(5)

21943

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 VI OF VII

J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
Telephone: (843) 720-5270
Fax: (843) 414-7039

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie White
South Carolina Environmental Law Project
430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Fax: (843) 527-0540
Attorneys for the Appellants

Bradley D. Churdar
South Carolina Department of Health & Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
Attorney for Respondent DHEC

Randolph R. Lowell
Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, SC 29202

Philip L. Lawrence
General Counsel
South Carolina State Ports Authority
P.O. Box 22287
Charleston, SC 29413-2287
Attorneys for Respondent SPA

Chad Nicholas Johnston
PO Box 8416
Columbia SC 29202

Michael Gary Corley
1312 Augusta Street
Greenville, SC 29605
864-232-5870
Attorney for Appellant

Tracey Colton Green
PO Box 8416
Columbia, SC 29202-8416
803-252-3300
Attorneys for the Respondent SPA

known as Building 322 located on Union Pier Terminal ("Union Pier"), the Port of Charleston, to convert it into a passenger terminal. The renovation project implements the SPA's decision to move its current passenger terminal from its location on the southern end of Union Pier at Building 325 approximately 1700 feet north to Building 322. This move out of Building 325 and into Building 322 is necessitated by new security requirements as discussed more fully below.

The SPA submitted a permit application to the Corps seeking authorization to add five piling clusters, with a combined total of 23 pilings, to the existing, 1,374 pilings that support Building 322. (*See* footprint of Building 322 at AR 109.) These additional pilings impact just 41 square feet of river bottom.[1] AR 95. The installation of these pilings was authorized by a Nationwide Permit.[2] In this instance the project satisfied the conditions of Nationwide Permit 3 ("NWP 3") which authorizes maintenance, described in part as "repair rehabilitation, or replacement of any previously authorized currently serviceable structure or fill ... provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recent modification." Reissuance of Nationwide Permits, 77 Fed. Reg. 10,270 (Feb. 21, 2012).

The general renovation of Building 322 includes the addition of a mezzanine to be accessed by ADA compliant elevators and escalators, renovation of the building's interior and exterior, the installation of canopies over designated pedestrian areas, and the addition of a loading canopy or platform on the existing wharf to transfer ship stores from the back of delivery trucks to the cruise ship. The Corps' permitting jurisdiction was invoked, under the Rivers and

---

1 41 square feet of impact is less than 1/1000th of an acre and less than the surface area of a 4' x 11' dining room table.

2 "Nationwide permits are a type of general permit and represent DA authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit." 33 C.F.R § 325.5 (2012). "The NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment." 77 Fed. Reg. 10,184 (2012).

Harbors Act, 33 U.S.C. § 403, only because the addition of elevators and escalators, necessary for compliance with the Americans with Disabilities Act ("ADA") to accommodate disabled passengers, required additional load bearing capacity. But for the need to install additional pilings, impacting less than 1/1000th of an acre of river bottom, the SPA could have accomplished the renovations without seeking a federal authorization. AR 121.

Plaintiffs oppose the renovation of Building 322 and the relocation of the passenger operations on the terminal and seek judicial review of the Corps' decision in accordance with 16 U.S.C. §§ 470 et seq., the National Historic Preservation Act ("NHPA"), 42 U.S.C. §§ 4321 et seq., the National Environmental Policy Act ("NEPA"), and 5 U.S.C. §§ 551 et seq., the Administrative Procedures Act ("APA").

Standard of Review

"A moving party is entitled to summary judgment if the evidence shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Nat'l City Bank of Indiana v. Turnbaugh, 463 F.3d 325, 329 (4th Cir. 2006); FRCP Rule 56. The Court must 'view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.' Pueschel v. Peters, 577 F.3d 558, 563 (4th Cir. 2009) (quoting Battle v. Seibels Bruce Ins. Co., 288 F.3d 596, 603 (4th Cir. 2002)).

Under the Administrative Procedures Act, "[a] court shall set aside agency findings, conclusions and actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977). In Motor Vehicle Mfrs. Ass'n. v. State Farm Mut.

Auto. Ins. Co., the U.S. Supreme Court articulated the scope of the "arbitrary and capricious" standard of review:

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made. . . . . In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. 29, 43 (1983) (internal citations omitted).

"Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid. . . . Especially in matters involving not just simple findings of fact but complex predictions based on special expertise, 'a reviewing court must generally be at its most deferential.'" Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009) (internal citations omitted). "Under the APA, the Corps' factual findings, such as field data, observations, and calculations, shall not be set aside unless 'arbitrary' or 'capricious.'" Precon Dev. Corp. v. U.S. Army Corps of Engineers, 658 F. Supp.2d 752, 763 (E.D. Va. 2009), *rev'd on other grounds*, 633 F.3d 278 (4th Cir. 2011). Importantly, "[d]eference [to the agency's decision] is due where the agency has examined the relevant data and provided an explanation of its decision that includes "a 'rational connection between the facts found and the choice made.'" Ohio Valley Envtl. Coal., 556 F.3d at 192 (*quoting* Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (*quoting* Burlington Truck Lines, Inc. v. U. S., 371 U.S. 156, 168 (1962))); *accord* Ohio River Valley Envtl. Coal, Inc. v. Kempthorne, 473 F.3d 94, 102–03 (4th Cir. 2006). "[A] court need not find that the agency's decision is the 'only reasonable one, or even that it is the result the

court would have reached had the question arisen in the first instance in judicial proceedings.'" Ouachita Riverkeeper, Inc. v. Bostick, No. 12-803, 2013 WL 1449710, at *5, (D.D.C. Apr. 10, 2013) (citing Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 422 (1983)).

Background

On January 23, 2012, the SPA submitted a permit application, entitled "Joint Federal and State Application Form for Activities Affecting Waters of the United States or Critical Areas of the State of South Carolina" to the Corps for "Union Pier Cruise Facility – Renovation of Building 322 Union Pier Terminal – State Pier 2." The application form was accompanied by supplemental information regarding the project. AR 37-45. The SPA noted in the project description that the Port of Charleston has an existing, active cruise passenger terminal located on Union Pier and identified as Building 325. In fact, cruise ships have been regularly calling on the Port of Charleston since 1967 and the cruise business in Charleston has grown steadily since 1973 with the dedication of Building 325 as the existing passenger terminal. AR 40. Notably, the existing passenger terminal at Building 325 is located only ± 1700 linear feet south of Building 322. AR 43.

An upgraded passenger terminal is needed because of current terminal security requirements enforced by U. S. Customs and Border Protections ("CBP"). The Cruise Terminal Design Standards promulgated by CBP describe one-stop processing of passengers which requires an estimated total area of 28,600 square feet. AR 776. In addition to the processing and inspection, space is required for rest-rooms, offices, and vertical circulation. It is estimated that 54,000 square feet is needed to move passengers more efficiently through a 2.5 hour embarkation process. AR 774. Building 325 has only 30,216 square feet. Building 322 has 108,480 square feet. AR 758.

The SPA entered into a Memorandum of Understanding with CBP in 2007 related to security improvements. AR 40, 843. In accordance with paragraph 28 of this Memorandum the SPA and the CBP agreed that they would "work collaboratively ... to identify requirements to improve and upgrade the facility to meet federal security standards." AR 846. Relocation of the existing terminal to Building 322, as opposed to attempts to retrofit or renovate Building 325, was selected as the preferred option. AR 40. In its analysis of feasible alternatives for the project, the Corps determined that "[m]odifying 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." AR 41. The SPA determined that the wetland impact associated with expansion of Building 325 would be "significant." AR 1.

There are public benefits attained by closing the existing passenger terminal at Building 325 and moving it to Building 322. These are detailed in a letter authored by Bill H. Stern, Chairman of the SPA. There Stern noted that relocation of the passenger terminal operations "would have profound positive impacts on Charleston. We would relocate all cargo operations away from the Union Pier property. That means relocating away from the historic district about 200 cargo ships annually, ending cargo rail traffic south of Charlotte Street, and eliminating about 1,800 related truck and car trips each week on downtown streets." In addition, relocating cruise operations would "unlock the entire southern portion of the property for public and other uses. Throughout our planning process, there was widespread community support for this idea."[3] AR 1009.

Of the planned renovations to Building 322, the only change that impacts navigable waters of the United States is the installation of five new pile clusters under Union Pier,

[3] The City of Charleston's waterfront park is located south of Building 325.

impacting 41 square feet of river bottom, to provide the necessary load bearing support for installation of elevators and escalators for ADA compliance. All new piles will be located within the existing footprint of Building 322 on Union Pier. Union Pier is 74 acres in area of which 43 acres are land and 20 acres are "constructed deck over water." AR 758.[4] The constructed wharf over the Cooper River to which Buildings 325 and 322 attach is approximately 2,470 linear feet. AR 758. The five pile clusters with a combined total of 23 pilings join the 1,374 existing pilings supporting Building 322 and the thousands of pilings[5] supporting the 20 acres of constructed deck over water referenced above.

On April 20, 2012, the Corps authorized "Building No. 322 Renovation" under "Department of the Army Nationwide Permit #3." AR 112. In its authorization the Corps noted that the "project involves impacts to not more than 0.01 [1/100th] acres of waters of the United States associated with the installation of additional pilings underneath an existing pile support structure." AR 112.

The Corps provided a memorandum reflecting the rationale for authorizing the installation of the five pile clusters. The Corps noted in its rationale that "[t]he area where Union Pier Terminal is located has been developed with commercial docks and wharves for more than 100 years." The Corps made reference to 12 federal permit authorizations issued over the past 50 years to the SPA authorizing port-related activities at Union Pier Terminal. "The footprint of the existing marine terminal is well established and the SCSPA has operated a passenger terminal at this location for more than 40 years." AR 120. SAC-72-10-07 was issued November

[4] An additional eleven acres are platted lots extending into the Cooper River. AR 758.
[5] "The existing marine terminal has 2,740 linear feet of continuous pile supported wharf and berth space." AR 124.

7, 1972 and authorized the extension of Union Pier northward 1,150 linear feet. This authorization was modified in 1974 to include the construction of Building 322. AR 120. SAC-72-10-07 included a condition that required the SPA to maintain the approved structures in "good working order." AR 121. In accordance with this condition the SPA is not required to seek authorization for any repair and replacement work performed on Union Pier and within the existing structures. The only reason additional federal authorization was required for the renovation of Building 322 was because of the proposed new pilings. Thus, the Corps concluded that "the scope of our evaluation is limited to the footprint of the new pilings." AR 120-121.

Plaintiffs' Claims for Relief

Plaintiffs allege that the Corps has mischaracterized the renovation of Building 322, and in particular the installation of five pile clusters under an existing pier and building, as "maintenance." Plaintiffs allege that the Corps' action in authorizing renovation of Building 322 under NW3 violates "legal conditions and requirements protecting nationally significant historic resources under the NHPA (National Historic Preservation Act) and NEPA (National Environmental Policy Act)." Entry Number 1. The significant historic resource referenced in the Complaint is the "Charleston National Historic Landmark District."

The Charleston Historic District ("Historic District") was nominated for listing in the National Register of Historic Places in 1966 with later actions taken to enlarge the boundary. The District consists of several hundred 18th and 19th century buildings with historical and architectural significance. "The district includes areas all located in peninsular Charleston south of a line drawn from the Ashley River through the center line of Bee, Morris, and Mary Streets and extending eastward to the Cooper River." Essentially, the District boundaries encompass everything south of Calhoun Street, along with certain properties extending north

from Calhoun to Morris Street. Union Pier Terminal is located adjacent to the eastern boundary of the District.[6] The Historic District (1966) and the existing passenger terminal at Building 325 (1974) have been neighbors for forty years.

Plaintiffs further claim that the Corps' review of the SPA's permit application should have included a NEPA analysis and the Corps failed to perform a NEPA analysis.

Plaintiffs characterize these alleged actions and omissions of the Corps as "procedural failures." Based on these allegations Plaintiffs claim that the Corps' authorization of renovations to Building 322 to convert it from a cargo facility to a passenger facility violates the APA, the NHPA, NEPA, and the Corps' regulations governing permitting.

Argument

1. The Corps' determination that the project proposed by the SPA qualified for permit coverage under NWP 3 is consistent with the Corps' permitting regulations and procedures.

In accordance with Section 404 of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., the Secretary of the Army is authorized to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment." The ability to regulate impacts to navigable waters through the use of general permits, and particularly Nationwide Permits, is critical to the function of the Corps' district offices. "The nationwide permits authorize approximately 40,000 reported activities per year, as well as approximately 30,000 activities that do not require reporting to USACE districts." AR 1151. As relates to NWP 3, the Corps determined that "[if]

[6] Index of Charleston, http://www.nationalregister.sc.gov/charleston (last visited Jul. 15, 2013).

this NWP is not available, substantial additional resources would be required for the Corps to evaluate these minor activities through the individual permit process, and for the public and Federal, Tribal, and state resource agencies to review and comment on the large number of public notices for these activities." Additionally, if NWP 3 were unavailable it would "reduce the Corps' ability to pursue the current level of review of other activities that have greater adverse effects on the aquatic environment, including activities that require individual permits ... ." AR 1113.

The Corps reissued NWP 3 effective March 19, 2012. Reissuance of Nationwide Permits, 77 Fed. Reg. at 10,184. NWP 3 authorizes the following activities pertinent to this dispute:

> 3. *Maintenance.* (a) The repair, rehabilitation, or replacement[7] of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.0 provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. **Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized.**"

Id. at 10,270 (emphasis added.)

In its review of the permit application the Corps noted that the previous permit authorizing the extension of Union Pier and the construction of Building 322, SAC-72-10-087, included terms and conditions that survived beyond the expiration date of the authorization requiring the permittee to maintain existing structures. Much of the renovation activities fell within the scope of that previously-permitted requirement. However, the installation of

---

[7] The SPA described the project as "renovation of Building 322." AR 105. "Renovation" and "rehabilitation" (the term used in NWP 3) share the same meaning – "to restore." The American Heritage Dictionary of the English Language.

additional pilings to support escalators and elevators amounted to "deviations in the structure's configuration" arising from requirements of other regulatory authority – 42 U.S.C. §§ 12101 et seq., the Americans with Disabilities Act. AR 106.

Clearly the permitted project is consistent with the activities authorized by NWP 3. Based on the project description and a plain reading of NWP 3 there is no factual basis to dispute the decision to authorize the project as maintenance as defined within NWP 3. Moreover, the Corps recognized that the permitted project was reflective of the essential purpose and use of the Port of Charleston – to facilitate the movement of cargo. "Renovations and modifications to the configuration of existing marine terminals are expected due to increases or decreases in the demand for different types of cargo over time and/or improvements in the logistics or technology that is used to handle marine cargo. In this case, the SCSPA is proposing to renovate an existing warehouse in order to improve the efficiency of the existing passenger terminal at Union Pier." AR 121.

In accordance with 33 C.F.R § 325.5, "[n]ationwide permits are a type of general permit and represent DA authorizations that have been issued by the regulations (33 C.F.R § 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit." 33 C.F.R. § 325.5(c)(2) (2012). Here, the conditions of authorization were met and, in accordance with the regulations, the Corps properly authorized the project under NWP 3.

2. The Corps had no regulatory obligation to consult under ACHP regulations upon concluding that renovations to Building 322 would have no effect on historic properties. Consequently the issuance of permit coverage to the SPA under NWP 3 was consistent with the requirements of the NHPA.

Appendix C of 33 C.F.R. § 325 sets forth the "Procedures for the Protection of Historic Properties." In accordance with Appendix C, Section 13 "[t]he criteria at paragraph 15 of this Appendix will be used for determining compliance with the nationwide permit condition ... regarding the effect on designated historic properties. When making this determination the district engineer may consult with the SHPO (State Historic Preservation Officer), the ACHP (Advisory Council on Historic Preservation) or other interested parties." 33 C.F.R. § 325, App. C.

The Corps' April 20, 2012, authorization to the SPA included a requirement that "the project must comply with the enclosed Nationwide Permit General Conditions . . . ." AR 181. General Condition 20 relates to historic properties. AR 1187. This condition is triggered "in cases where the district engineer determines that the activity may affect properties listed or eligible for listing in the National Register for Historic Places." AR 1187.

Appendix C, Section 15 defines "Effect and Adverse Effect" as follows:

> "An undertaking has an effect on a designated historic property when the undertaking may alter characteristics of the property that qualified the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered."

33 C.F.R. § 325, App. C.

Based on the requirements of Appendix C and the general condition developed in accordance with 33 CFR § 330.5, the Corps determines if there is a potential for effect on listed historic property before granting permit authorization under NWP 3. To aid the Corps in implementing this process, the ACHP promulgated 36 C.F.R. § 800 to define procedures applicable to federal agencies implementing their statutory responsibilities under Section 106 of

the Historic Preservation Act, 42 U.S.C. §§ 4321 et seq. 36 C.F.R. § 800.1(a) (2012). The pertinent part of the regulation requires as follows:

> (a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in Sec. 800.16(y)**8** and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.
> (1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

36 C.F.R. § 800.3.

The ACHP provided written guidance to the Corps regarding implementation of these regulations. In that guidance the ACHP described that Section 800.3(a)(1) "explains that if there is an undertaking, but if it is not a type of activity that has the potential to affect a historic property, then the agency is finished with its section 106 obligations. There is no consultation requirement for this decision." Sup 071.

The Corps is authorized to determine whether an undertaking has the potential to effect historic properties and if the agency official finds that there is no potential, the inquiry ends. This procedure was implemented by the Corps in determining whether to authorize the renovation of Building 322. *See* Vieux Carre Property Owners, Residents & Assocs., Inc., v. Brown, 875 F.2d 453 (5th Cir.). "[NWP 3] is subject to the section 330.5(b)(9) requirement that the district engineer give the advisory council an opportunity to comment **if he determines that historic properties may be adversely affected** by the repair, rehabilitation, or replacement." *Id.* at 464 (emphasis added).

---

8 33 C.F.R. § 800.16(y) defines "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; **and those requiring a Federal permit**, license or approval." (emphasis added)

The Corps determined that the installation of five piling clusters impacting 41 square feet of river bottom had no potential to effect historic properties because Union Pier and the associated buildings and wharfs were not listed on the National Register or eligible for listing as historic properties. Based on fifty years of dredging and port related construction activity the Corps concluded that the terminal site was heavily altered. "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." AR 125.

The Corps was aware of the Plaintiffs' concerns at the time it evaluated the SPA permit application. "Specifically, the plaintiffs express an interest in the preservation of historic properties that are located near the project site." AR 126. The Corp relied on the definition of "permit area" in 33 C.F.R. § 325, Appendix C.

> (1) The term "permit area" as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the "permit area":
> (i) Such activity would not occur but for the authorization of the work or structures within the waters of the United States;
> (ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and
> (iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

The Corps applied the three-pronged test and concluded that the "permit area for this type of project is limited to the footprint of the proposed activity. 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." AR 126. This conclusion is consistent with guidance that was issued by Corps Headquarters on April 25, 2005.

> "The limits of the permit area are constrained by the extent of Federal control and responsibility over a particular project (i.e., the undertaking). The district engineer remains responsible for making the final determination regarding the boundaries of the permit area. *Id.* The district engineer can, in unusual or complex projects, seek the view of the SHPO/THPO before making the final determination."

Michael B. White, U.S. Army Corps of Engineers, Directorate of Civil Works, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (2005).

Plaintiffs seek to expand the permit area based on the regulatory definition of area of potential effects:

> [T]he geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertakings.

36 C.F.R. § 800.16(d). Plaintiffs seek such expansion based on concerns that "cruise operations enabled thereby will increase congestion and traffic in the historic downtown and disrupt and degrade the historic assets and fabric of the protected historic district." Entry Number 1, paragraph 9.

The Corps of Engineers has no federal control over existing cruise operations, congestion and traffic in historic downtown Charleston. These are local issues subject to control and resolution by the City of Charleston and the State Department of Transportation, not the Corps of Engineers. As is acknowledged in the definition, the area of potential effects is influenced by the scale of the undertaking and here the undertaking and permit area is appropriately confined to 41 square feet. Plaintiffs seek to extend the permit area not only beyond the limits of the direct

impact of 41 square feet but also beyond the limits of Union Pier Terminal, a massive structure occupying 63 acres. Any extension of the permit area and undertaking beyond the area of direct impact is inconsistent with 33 C.F.R. § 325.

3. The finding of no potential to cause effect under the ACHP regulations was not arbitrary and capricious, and is supported by the factual record.

There is no factual dispute regarding the Corps' conclusions that Building 322 and the existing wharf are not eligible for listing on the National Register. AR 126. The dispute is whether the Corps should have determined there was potential to effect historic properties located within the Charleston Historic District. The Historic District and the passenger terminal have co-existed for forty years. Assuming, for the sake of argument, that the Corps had concluded under 36 C.F.R. § 800.3 there was a potential for effect on the Charleston Historic District based on the continuation of an existing use, then the Corps would consider 33 C.F.R. § 325, Appendix C, Section 15 – Criteria of Effect and Adverse Effect.

> (a) An undertaking has an effect on a designated historic property when the undertaking may alter characteristics of the property that qualified the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.
> (b) An undertaking is considered to have an adverse effect when the effect on a designated historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on designated historic properties include, but are not limited to:
> (1) **Physical destruction**, damage, or alteration of all or part of the property;
> (2) **Isolation** of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;
> (3) **Introduction** of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
> (4) Neglect of a property resulting in its deterioration or destruction; and
> (5) Transfer, lease, or sale of the property.
> (c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of this appendix:

> (1) When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;
> (2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings", or
> (3) When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.

33 C.F.R. § 325, App. C. (emphasis added).

The Charleston Historic District is listed on the National Register based on the number of structures within the District that are architecturally and historically significant. The renovation of Building 322 does not alter or impair the architectural significance of the structures within the District. The use proposed for Building 322 – a passenger terminal - will not alter or impair the architectural significance of the structures within the District. Moreover, passenger terminal operations in Building 322 only result in the continuation of a use in existence for the past forty years and will not have an adverse effect on historic property as defined in 33 CFR Part 325, Appendix C, particularly since the existing passenger terminal is in similar proximity to the boundaries of the District. Relocating the passenger terminal operations from one end of Union Pier to the other does not result in the introduction of a new activity or use adjacent to the Charleston Historic District. AR 140.

Plaintiffs submitted supplemental information for inclusion in the Administrative Record. This supplemental information demonstrates that residents within the Historic District have complained of pollution, noise, and traffic resulting from on-going operations at the existing passenger terminal on Union Pier Terminal. While these complaints may be considered as

"visual, audible, or atmospheric elements" as contemplated in 33 CFR § 325, Appendix C, Section 15(b)(3), these elements are not introduced by this project on Union Pier Terminal. If these elements are present, their introduction has been within the past four decades with the construction of the existing terminal and, generally, with all cargo-related activities at the Port of Charleston.

Even though it limited the permit area, the Corps recognized that Union Pier "is located adjacent to historic properties" and considered whether construction activities under Union Pier could impact properties in the Historic District, thus determining the area of potential effects.. AR 126. The Corps concluded that "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 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." AR 126

It defies logic for Plaintiffs to claim otherwise. The permitted project will have no adverse effect on structures in the Charleston Historic District as contemplated by Section 15 of Appendix C. Moreover, the permitted project does not result in the introduction of "visual, audible, or atmospheric elements" as contemplated by Section 15. The permitted project merely facilitates the continuation of an existing and long-term use.

Plaintiffs supplemented the Administrative Record with an exchange of correspondence between the ACHP and the Charleston District Corps that occurred in June of 2012, after the SPA received authorization from the Corps to install the pilings. The ACHP requested that the Corps provide information regarding the Corps' analysis of the permitted project. In addition, the ACHP formally objected to "the Corps' determination of effect." Sup 064. The Corps responded to the ACHP and provided the requested information. In addition, the Corps noted that the ACHP has published guidance for federal agencies making it clear that there is no consultation requirement following an agency determination of "no potential to cause effects." Sup 067. The Corps concluded its letter indicating disappointment that the ACHP lodged an objection without reviewing the Corps record of decision. Sup 068. There was no additional response from the ACHP.

4. *The Corps complied with NEPA in the development of NWP 3.*

Plaintiffs alleged that the Corps undertook no NEPA analysis prior to authorizing the installation of five pile clusters with 41 square feet of impact. Plaintiffs seek to have this Court declare that "[a]uthorizing the project without NEPA compliance was arbitrary and capricious and otherwise not in accordance with law." Entry Number 1 paragraph 58-64.

> Before issuing a nationwide permit, the Corps conducts a 'predictive environmental analysis' ... of the potential adverse environmental effect of the activity at issue, prepares an environmental impact statement as required by NEPA ... and conducts the impact analysis specified in Subparts C through F of the Environmental Protection Agency's Clean Water Act Section 404(B)(1) guidelines. ... After conducting the relevant analysis, the Corps publishes a proposal to issue (or reissue where relevant) the nationwide permit in the Federal Register. ... The Corps subsequently memorializes its analysis, including any response to public comments in the Federal Register as well as a decision document for each nationwide permit.

Ouachita Riverkeeper, Inc., 2013 WL 1449710, at *1.

The Administrative Record includes the Decision Document that provided the basis for development and reissuance of NWP 3 in March of 2012. AR 1104-1147. The Decision Document contains "a discussion of the environmental considerations necessary to comply with the National Environmental Policy Act . . . ." The Decision Document was developed based on the requirements of 33 C.F.R Section 330.5: "Documentation. The Chief of Engineers will prepare appropriate NEPA documents and, if applicable, section 404(b)(1) Guidelines compliance analyses for proposed NWPs." 33 C.F.R § 330.5(b)(3) (2012).

In the environmental assessment of the effect of NWP 3, embodied in the Decision Document, the Corps quantified the cumulative effects of utilization of NWP 3 and concluded that "the Corps estimates that this NWP will be used approximately 5,300 times per year on a national basis, resulting in impacts to approximately 325 acres of waters of the United States, including jurisdictional wetlands. ... Using the current trend, approximately 26,500 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 1,625 acres of waters of the United States, including jurisdictional wetlands." AR 1137-1138. The Corps concluded that "[t]he adverse effects of activities authorized by the NWP on general environmental concerns will be minor, since the NWP authorizes only maintenance activities." AR 1130. As relates specifically to historic properties, the Corps included general condition 20 in NWP 3. This condition is only triggered if the district engineer determines that the activity "may affect properties listed, or eligible for listing, in the National Register of Historic Places." AR 1131, 1187.

There can be no reasonable dispute as to whether the Corps complied with NEPA in March, 2012, with the reissuance of NWP 3. The Decision Document supporting NWP 3 reflects the Corps' compliance.

4. The District Engineer was not required to conduct a separate NEPA review of the SPA's request for authorization.

42 U.S.C. § 4332(c) of the National Environmental Policy Act requires that an Environmental Impact Statement ("EIS") be prepared for "major Federal actions significantly affecting the quality of the human environment . . . " A "Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (2012). An Environmental Assessment ("EA") is prepared to document the analysis supporting the conclusion that an EIS is not necessary. 40 C.F.R. § 1508.9.

> Under NEPA, an agency must include an environmental impact statement in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. ... 'Requiring an EIS for anything less would needlessly hinder the Government's ability to carry on its myriad programs and responsibilities in which it assists, informs, monitors, and reacts to activities of individuals, organizations and states, but in which the Government plays an insubstantial role.'

Sugarloaf Citizens Assoc. v. Fed. Energy Regulatory Comm'n, 959 F.2d. 508, 512. (4th Cir. 1992) (quoting Nat'l Assoc. for Advancement of Colored People v. Medical Center, Inc. 584 F.2d 619, 634 (3d Cir. 1978)) (internal citations omitted).

In accordance with the Corps' regulatory requirements, a decision on an individual permit application "will either require an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion." 33 C.F.R. § 325.2(a)(4). "A general nationwide permit, on the other hand, must undergo that extensive process at the time the permit is promulgated, rather than at the time an applicant seeks to discharge fill material under such a permit." Snoqualmie Valley Preservation Alliance v. U. S. Army Corps of Engineers, 683 F.3d 1155, 1158 (9th Cir. 2012) (citing 33 C.F.R. § 330.5(b)(3)). The Snoqualmie Valley

Preservation Alliance challenged the Corps' use of nationwide permits to authorize activities associated with a hydroelectric power plant and sought a declaration from the court that the activities required individual permits and NEPA review. The Court concluded that "this argument ignores the structure and purpose of the nationwide permit system. Each nationwide permit has to undergo the NEPA process when it is promulgated. This process ensures that any activity authorized under that nationwide permit will have 'minimal adverse environmental effects.'" Snoqualmie Valley Preservation Alliance, 683 F.3d at 1159.

Plaintiffs would ask this Court to find that the Corps was obligated to employ the procedural tools specified by NEPA to assess the potential environmental consequences of the installation of five pile clusters, impacting 41 square feet, under an existing wharf supported by thousands of piles. Such request invalidates the purpose of NWP 3, which is "to reduce the regulatory burden on applicants for activities that result in minimal individual and cumulative adverse effects on the aquatic environment." AR 1113. The Corps did the requisite inquiry when NWP 3 was proposed for issuance, assessed the environmental consequences of maintenance of existing structures or fill, and concluded that the cumulative environmental impact of maintenance projects was minimal. AR 1137. The SPA permit application qualified for coverage under NWP 3, consequently the underlying assessment by the Corps set forth in the Decision Document that supported reissuance of NWP 3 provides the hard look required by NEPA. The District Engineer has the discretion under 33 CFR §. 330.5 to suspend authorization of a particular project, to impose additional conditions on the authorization, or to require an individual permit. Here, however, the Corps determined that the activity could be authorized under NWP 3.

> "From the Corps' perspective, the SCSPA is renovating an existing structure and reconfiguring a portion of an existing marine terminal in order to address existing

> safety and security measures and to improve the efficiency of the existing cruise operation. Based on the available information, the scope of the proposed project is limited to the installation of the additional pilings underneath the existing pile support wharf and this activity can be authorized by Nationwide Permit #3."

AR 122.

"The hallmarks of a 'hard look" are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms." Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 185 (4th Cir. 2005). The ability to conduct a thorough and substantive analysis of potential environmental harms of 41 square feet of impact is limited by the minimal nature of such impact. The purpose of the "hard look" taken by the Corps during development and issuance of NWP 3 was to confirm that the environmental impact would be minimal.

Regardless, the Administrative Record reflects that the Corps took as hard a look as can be taken when considering only 41 square feet of impact. The site was assessed and determined to be "disturbed by previous construction activities on the project site during the 1970s. ...[T]he entire pile supported wharf and the support facilities that are located on top of this structure have been extensively modified by previous work ... at different times over the past 50 years." AR 125. The Corps also noted that "[t]he 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 thousands of piling that are already located underneath the existing pile supported structure." AR 125. These observations and analysis confirm the minimal level of impact associated with

this authorization and expand the initial NEPA analysis undertaken prior to reissuance of NWP 3 to be specific to the permitted project.

"Judicial review of NEPA compliance is limited in scope. . . . We ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not arbitrary or capricious." Kentucky Riverkeeper, Inc. v. Rowlette, 714 F.3d 402 (6th Cir. 2013) (internal citations omitted). Here the Corps complied with its regulations in the development of NWP 3. The EIS and Decision Document developed prior to reissuance of NWP 3 confirm that projects that meet the specifications to obtain authorization under NWP 3 have minimal environmental impacts. This is inherent in the nature of maintenance which is a limited activity undertaken on an existing structure or fill. It is illogical to require a NEPA review of a project that qualifies for a Nationwide Permit because it defeats the regulatory purpose and objective of developing a stream-lined regulatory process. And, the Corps' actions in authorizing the project under NWP 3 and determining that the project had minimal environmental impacts are supported by the information in the Administrative Record. In particular, the project area is an altered environment based on the amount of construction and disturbance that has occurred in and around Union Pier Terminal over the last fifty years. And the construction and pile installation techniques proposed by the SPA result in minimal disturbance to the surrounding aquatic area. Finally, the impacts of construction are limited to only 41 square feet, or 1/1,000th of an acre.

6. Plaintiffs have failed to demonstrate standing sufficient to create a case or controversy so as to invoke this Court's jurisdiction under Article III, Sec. 2 of the U. S. Constitution.

"Article III, Section 2 of the Constitution restricts the federal courts to deciding actual cases and controversies. Among '[t]he several doctrines that have grown up to elaborate that

requirement,' the one 'that requires a litigant to have standing to invoke the power of a federal court is perhaps the most important. The basic purpose of standing doctrine is to ensure that the plaintiff has a sufficient personal stake in the outcome of a dispute to render judicial resolution of it appropriate." Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 319 (4th Cir. 2002).

> In order to satisfy Article III's standing requirements, the plaintiff must show that: (1) he has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. The plaintiff bears the burden of establishing injury, traceability, and redressability, because it is the party seeking to invoke federal jurisdiction.
>
> In addition, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germaine to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members of the suit.

Id. at 320.

Plaintiffs lack standing to challenge the Corps' action in authorizing the installation of five cluster piles under an existing pile supported wharf to facilitate installation of elevators and escalators as part of the renovation of Building 322. Plaintiffs cannot demonstrate an injury-in-fact; a causal connection between the injury and the authorization that the Corps provided to the SPA; or that the alleged injury is redressed by a favorable decision from this Court. Plaintiffs claim that their members' well-being is harmed from continuing and expanded cruise operations in Charleston's historic downtown. Entry Number 1 paragraph 8. Plaintiffs' members are concerned regarding congestion and traffic in the historic downtown district and fear that the cruise operations will cause pollution and will diminish the use and enjoyment of the local natural environment and harm their health. Entry Number 1 paragraph 9. Plaintiffs' members have not suffered injury-in-fact from the Corps' authorization of permit coverage under NWP 3 because the injuries alleged pertain to existing cruise operations generally and not the permitted

activity to install five cluster piles. Moreover, such alleged injuries impact all citizens and visitors to Charleston and are not unique to Plaintiffs' members.

Even if the injuries alleged by Plaintiffs satisfy the injury-in-fact requirement such injuries are on-going, and are not fairly traceable to the authorization for installation of five pile clusters. Cruise operations at Union Pier Terminal have been in existence for at least four decades. Plaintiffs' members will continue to suffer the alleged injuries regardless of whether this permit authorization is implemented by the SPA.

Finally, Plaintiffs' injuries are not redressed by a favorable decision of this Court rejecting this permit authorization. The SPA will continue to utilize the existing passenger terminal at Building 325 and to provide berthing for cruise ships as it has done for the past forty years. The embarkation and debarkation of cruise passengers will be on-going regardless of whether the SPA is able to fulfill its plans of moving the terminal from Building 325 to Building 322.

Conclusion

Under the Administrative Procedures Act, "[a] court shall set aside agency findings, conclusions and actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *see also* Citizens to Preserve Overton Park, Inc., 401 U.S. at 413-414. Here, the Corps undertook an extensive assessment, under NEPA, to evaluate the environmental impact and effect of the reissuance of NWP 3. The Corps also assessed the environmental impact and effect of authorizing the SPA's permit application for installation of five pile clusters under Union Pier. The Corps implemented the requirements of its regulations and the ACHP's regulations and complied with Section 106 of the National Historic Preservation Act.

This Court should reject any notion that a maintenance project that qualifies for nationwide permit coverage and that impacts only 41 square feet of river bottom has the potential to effect the Charleston Historic District. This Court should reject any notion that such a project triggers the procedural requirements of NEPA. Plaintiffs are opponents of the cruise industry in Charleston, and not the permitted project. Plaintiffs have seized this opportunity to make their case against the cruise industry and, in addition to this action, have two other challenges filed against the SPA.[9]

The Corps' decision to authorize the installation of five pile clusters under Union Pier in order for the SPA to install elevators and escalators as part of the renovation of Building 322 is supported by the Administrative Record, is consistent with all applicable statutes, regulations, and procedures, was a proper exercise of permitting discretion, and is neither arbitrary nor capricious. Moreover, Plaintiffs lack standing to pursue this challenge. Wherefore the Defendant/Intervenor the SPA seeks an Order granting summary judgment in favor of Defendants.

---

[9] An action is pending before the S. C. Administrative Law Court challenging a permit authorizing the renovation of Building 322 issued by the S. C. Department of Health and Environmental Control, 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 v. SCDHEC and the SPA, Docket No. 13-ALJ-07-0056-CC. In addition, the S. C. Supreme Court, in its original jurisdiction, is considering the matter of Historic Ansonborough Neighborrhood Association, Charlestowne Neighborhood Association, the Coastal Conservation League and the Preservation Society of Charleston v. Carnival Corporation D/B/A Carnival Cruise Lines and the SPA, 2001-CP-10-41-39 (filed initially in the Charleston County, Court of Common Pleas.)

s/ *Mary D. Shahid*

Marvin D. Infinger, Fed ID No. 4589
Mary D. Shahid, Fed. ID No. 643
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
PHONE: 843.577.9440
FACSIMILE: 843.720.1777
minfinger@nexsenpruet.com
mshahid@nexsenpruet.com

July 15, 2013
Charleston, SC

Philip Lawrence, Fed ID No. 2614
General Counsel
S. C. State Ports Authority
P. O. Box 22287
Charleston, S. C. 29413
plawrence@scspa.com

Attorneys for Proposed Intervenor
South Carolina State Ports Authority

Exhibit D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

PRESERVATION SOCIETY OF CHARLESTON and SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS, JOHN M. McHUGH, in his Official Capacity as the Secretary of the U.S. Army, THOMAS P. BOSTICK, In His Official Capacity of Chief of Engineers U.S. Army Corps of Engineers, Defendants And SOUTH CAROLINA STATE PORTS AUTHORITY, Intervenor/Defendant.	C/A No. 2:12-cv-02942-RMG **INTERVENOR/DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

Intervenor/Defendant South Carolina State Ports Authority ("SPA") sets forth the following in reply to the Plaintiffs' Responses (Entry No. 66 and 67).

In support of their claims that the Corps failed to provide proper review to the SPA's request to install five piling clusters under Union Pier Terminal ("Union Pier"), Plaintiffs assert that the Corps inexplicably considered the passenger terminal at Building 325 and the warehouse at Building 322 as "interchangeable." Plaintiffs claim this is a departure from the Corps'

historical treatment of the two facilities. As a result of the Corps' handling of the SPA's permit application, and the use of Nationwide Permit 3 ("NWP 3") to authorize the activity requested, Plaintiffs claim that they have been denied participation in the permit process. Plaintiffs seek to have this Court require the SPA to submit, and the Corps to process, an individual 404 permit application.[1] *Plaintiffs' Response to the Corps' of Engineers' Motion* p. 1-2.

While Plaintiffs seek to characterize the Corps' handling of the SPA's permit request as a "waterfront shell game," the Corps engaged in deliberate and appropriate analysis in its disposition of the SPA's permit application. The Corps conducted a pre-application meeting with the SPA and the South Carolina Department of Environmental Control ("SCDHEC") on December 13, 2011, more than a month before the application was submitted. The purpose of this meeting was "to discuss whether a State and/or Federal permit will be required to install additional pilings underneath the existing pile supported concrete dock at Union Pier Terminal." AR 219. The Corps noted that "[t]he SCSPA plans to cut openings in the concrete slab inside Building 322 to provide temporary access during the installation of 5 clusters of pilings. Once the new pile caps are installed (at a slightly lower elevation than the existing concrete slab) these openings will be converted into concrete elevator or escalator pits. AR 218.

The Corps noted that Union Pier consists of "20 acres of pile supported concrete docks and wharves, 2,470 linear feet of berths .... and more than 600,000 square feet of warehouses, transit sheds, and port related buildings." AR 218. The permit drawings depict the pile-supported footprint of Building 322 and four "pile locations." AR 117. The footprint of Building 322 measures approximately 450 feet by 240 feet, or 108,000 square feet. AR 768.

[1] In fact the SPA submitted an Individual Permit Application to the Corps. AR 37-39. The Corps determined upon review of the permit application that the SPA was entitled to authorization under NWP 3. The Corps considered the "Joint Federal and State Application Form" to be a Pre-Construction Notification ("PCN") and authorized the project under NWP 3. AR 38, 112. A "pre-construction notification" is part of the submittal process for Nationwide Permit coverage. 77 Fed. Reg. 10271.

The combined footprints of the three proposed elevator pits are less than 300 square feet – and the combined footprint of the two escalator pits is approximately 400 square feet. The areas within the footprint of Building 322 that are impacted by this installation constitute less than 1% of the square footage of Building 322. AR 116-117. And, based on the dimensions of the pile clusters, the impacted area of the river bottom from pile installation is only 41 square feet.

Plaintiffs ask the Court to overlook the nominal activity undertaken by the SPA – the removal of sections of slab inside Building 322 measuring less than 1% of the area of the first floor of the building and the installation of 23 pilings, each sixteen inches in diameter, in groups of 3 and 4 piles, extending from the river bottom up to the openings in the slab. Instead, Plaintiffs insist that the Rivers and Harbors Act, 33 U.S.C.A. empowers the Corps to require a permit for construction activities undertaken inside and around an existing building which have no impact on the navigable capacity of waters of the United States. And Plaintiffs contend that the SPA cannot vary from the historical uses of the 26 buildings that have been constructed on Union Pier without obtaining authorization from the Corps, even though the movement of cargo, freight, crew, passengers, security personnel, SPA employees, shipping representatives, longshoremen, and stevedores in, out, and around these 26 buildings has no impact on the "navigable capacity" of the Charleston Harbor. 33 U.S.C.A. Sec. 402.

Despite their claims, Plaintiffs' objective is not to seek participation in the Corps' regulatory process. Plaintiffs were not denied participation and did participate – their contribution to the administrative record, documenting their opposition, exceeds, by hundreds of pages, the information that the SPA provided to the Corps. Their position was considered by the Corps as a "Major Issue": "The Ansonborough Neighborhood Association (Ansonborough), Charlestowne Neighborhood Association (Charlestowne), South Carolina Coastal Conservation

League (SCCCL) and Preservation Society of Charleston have filed a lawsuit against Carnival Cruise Lines that it is violating numerous laws that protect Charleston's historic assets and the existing cruise operations are incompatible with adjacent land uses." AR 218. "Specifically, the Plaintiffs have expressed an interest in the preservation of historic properties that are located near the project site." AR 126.

Plaintiffs' objective is to frustrate the efforts of the SPA to modernize its existing passenger facility. Plaintiffs have a long-history of protesting the SPA's cruise business, which has been a fixture at Union Pier for more than forty years. Plaintiffs have utilized every available forum – this Court, the South Carolina Supreme Court, in its original jurisdiction, and the South Carolina Administrative Law Court where Plaintiffs are challenging SCDHEC's decision to issue a permit to the SPA.[2]

Plaintiffs attempt to cloud this matter with hyperbole. But the issues presented are straightforward. The minimal nature of the activity, conducted within the footprint of an existing permitted pier, can be authorized under Nationwide Permit 3. The Corps should not be burdened with providing individual review and process to an activity as limited as the SPA's proposal. And the Corps has regulations that dictate its processes. The Corps' actions are consistent with regulatory requirements governing the permitting process. Plaintiffs have not challenged the legality of the regulations or claimed a violation of these regulations.

1. <u>The Corps is not required to permit specific maritime uses for each structure on Union Pier.</u>

---

[2] Plaintiffs want this Court to require the Corps to entertain an individual permit application, in the same fashion as SCDHEC, under the guise of allowing participation. In reality Plaintiffs merely seek additional opportunities to litigate, frustrate, and delay the SPA's plans. An individual permit application will trigger additional review by SCDHEC in the form of a water quality certification and a coastal zone consistency certification which can be challenged by initiating another contested case with the S. C. Administrative Law Court. Plaintiffs' request that the Corps require an individual permit application could delay the renovation of Building 322 for at least two years.

33 CFR Sec. 325.1 provides for application "processing procedures" applicable "to any Department of the Army (DA) permit." 33 CFR Sec. 325.1(d) specifies the requirements for the "content of application." "If the activity would include the construction of a filled area or pile or float-supported platform the project description must include the use of, and specific structures to be erected on, the fill or platform." 33 CFR Sec. 325.1 (d)(5). The commas set-off the phrase "and specific structures to be erected on." The requirement is to describe the use of "the fill or platform" and to include depictions of specific structures to be erected on the fill or platform. There is no requirement to describe the use of specific structures, but merely to include them. There simply is no other way to interpret this regulatory requirement. The punctuation used by the drafting agency indicates that the use of the proposed platform or fill is relevant for review of the application, but not the uses of any proposed structures. This is entirely consistent with the SPA's permitting history with Union Pier. The SPA's use of Union Pier has always been as "a commercial shipping facility." AR 125. As with the permits issued for the passenger terminal and the transit shed, the SPA depicted a building footprint occupying the area of pier expansion but the use of that building was not the subject of the Corps' review, just the use of the pier. *See,* also, 33 CFR Sec. 325.6(a): "DA permits may authorize both the work and the resulting use." Under the Rivers and Harbors Act, the authorized work was the obstruction, or pier installation, and the use was the operation of "commercial docks and wharves." AR 120.

2. The Corps' regulations require the district engineer to ascertain the scope of the permit analysis for purposes of NEPA.

> The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action. ... Typical factors to be considered in determining whether sufficient "control and responsibility exists

> include: ... (iii) The extent to which the entire project will be within Corps jurisdiction. ... (iv) The extent of cumulative Federal control and responsibility. ... Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." 33 CFR Sec. 325 App. B (7)(b)(2).

The Corps' establishment of the scope of analysis for the SPA's permit application is entirely consistent with the regulatory example provided in the Corps' regulations, 33 CFR Sec. 325 App. B (7)(b)(1).

> In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA documents (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.

The business of the SPA is State business, as the SPA is a creature of State law. The operations of the SPA are dictated by State law and policy and the SPA's governing board. Plaintiffs want this Court to conclude that the Corps has federal control over the cruise business and the operation of the passenger terminal in order to increase the project area from 41 square feet to the Charleston Historic District encompassing the majority of the Charleston peninsula. The Corps has no control over the vessels. The Corps has no control over the frequency and duration of visits made by cruise ships to the Port of Charleston. The Corps has no authority over the air and water emissions generated by cruise ships. The Corps cannot take any action to prevent the current cruise operations at Building 325. The Corps has no control or authority over the activities that Plaintiffs are concerned about. The limit of the Corps' authority over this particular SPA project is the proposed obstruction. Consequently, a NEPA analysis of the environmental and aesthetic impacts of the cruise business isn't justified.

3. The Corps' regulations require establishment of a permit area for implementation of the NHPA.

The Corps' establishment of the "permit area" for purposes of review of the effects of the SPA's permit application is also consistent with its regulations, specifically 33 CFR Sec. 325 App. C. In order for Plaintiffs to prevail in expanding the permit area to the Charleston Historic District, which extends over much of the Charleston peninsula, Plaintiffs must demonstrate adherence to the following three regulatory tests:

> (i) Such activity would not occur but for the authorization of the work or structures within the waters of the Unites States;
> (ii) Such activity must be integrally related to the work or structures to be authorized within waters of the Unites States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and
> (iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.
> 33 CFR Sec. 325 App. C (1)(g).

The activity outside of waters of the United States that Plaintiffs desire to have the Corps consider is the "influx of thousands of vehicles, concentrated crowds, pollution and impossible-to-ignore forms that overpower the scale and character of Charleston's historic downtown and damages the human environment." Entry Number 67, p. 11. Yet, as is evident from the Administrative Record, this activity is occurring now, and will continue, regardless of the disposition of this permit application. (*See* "Smoke from Charleston's cruise ships is a cause of a concern," "Cruise ships' visibility puts off potential home buyers," "Cruise, run traffic collide." AR Sup008, Sup015, Sup016. There is no basis for this Court to conclude that the SPA will cease cruise activities at Building 325 if this permit application fails. Consequently, Plaintiffs' efforts to enlarge the permit area to include the Charleston Historic District for purposes of review under the National Historic Preservation Act fail since Plaintiffs cannot meet the first prong of the three-part test. While the SPA considers the opportunity to move the cruise

terminal to Building 322 as desirable, particularly since it provides significant public opportunities for the use of the southern end of Union Pier, the SPA has never expressed any intent to close Building 325 if it were to be unsuccessful in implementing the plans for Building 322. In fact, the SPA has consistently stated the opposite.

> If the suit delays the Port's plans to move its passenger terminal north on Union Pier, the Port will need to renovate its existing terminal. And Union Pier will continue to be used entirely for maritime purposes with no public access. 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.
> AR 0025 (emphasis added).

Moreover, there is no basis for the Court to conclude that the Corps' authorization of the SPA's permit application will cause an increase in cruise ships. "As we have repeatedly stated, it will be a **one-berth, one-ship terminal**, accommodating ships consistent with those we've hosted in the past. We are fully committed to maintaining the cruise ship business as a scale that is compatible with Charleston." AR 16, emphasis added.

Plaintiffs have not challenged the legality of the Corps' regulations or the Corps' compliance with its regulatory requirements. The Corps adhered to its regulations in reviewing the permit application and in determining the scope of analysis under NEPA and the permit area under the NHPA.

> Because we are asked here to review the Corps' interpretation of its own regulations, our review is cabined to assessing the reasonableness of that interpretation. This kind of review is highly deferential, with the agency's interpretation "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (internal quotations omitted); *see also Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413–14, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945); *Kentuckians for the Commonwealth v. Rivenburgh,* 317 F.3d 425, 439 (4th Cir.2003) (noting that, when reviewing an agency's interpretation of its own regulation, "[t]he reviewing court does not have much leeway"). In applying this principle, also known as "*Auer* deference" or "*Seminole Rock* deference," we must first determine whether

> the regulation itself is unambiguous; if so, its plain language controls. *See Christensen v. Harris County,* 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *United States v. Deaton,* 332 F.3d 698, 709 (4th Cir. 2003). If ambiguous, however, *Auer/Seminole Rock* deference is applied. *See Christensen,* 529 U.S. at 588, 120 S.Ct. 1655; *Deaton,* 332 F.3d at 709.
>
> Ohio Valley Environmental Coalition v. Aracoma Coal Co.
> 556 F.3d 177, 193-194 (4th Cir. 2009.)

Here the Corps' regulatory requirements are clear and unambiguous. The Corps' regulations include specific examples and guidance for NEPA and NHPA compliance. The Corps did not deviate from its regulations. There is no basis for finding that the Corps' actions were arbitrary and capricious when it adhered to its unambiguous regulatory requirements.

4. The authority cited by Plaintiffs supports the Defendants' positions and affirmance of the Corps' permitting action.

Plaintiffs cite the final disposition of Vieux Carre Property Owners Residents and Associations, Inc. v. Brown, 40 F. 3d 112 (5th Cir. 1994) as authority for support of Plaintiffs' claims. The dispute in that case arose when the Corps authorized an aquarium and riverfront project on the Bienville Street Wharf in New Orleans, adjacent to the French Quarter, under NWP 3. The district court held, on remand, "that since the park spawned no effect on navigation the Corps need not activate the procedures demanded by the NHPA." The Fifth Circuit Court of Appeals disagreed with the district court's inconsequential treatment of the Corps' admission that "it did not evaluate the historic impact of either phase of the project." Id. at 116. This finding did not result in a reversal of the district court as the Court of Appeals determined that there was no meaningful relief, that could be afforded to the Plaintiff at this point in the protracted dispute between the parties.

Here, the Corps did not neglect its duties under the NHPA, but instead followed the requirements of the ACHP's regulations and documented its findings and conclusions regarding

whether the SPA's plans to install five piling clusters had a potential to effect historic properties. This is in contrast to the Corps' evaluation in Vieux Carre that no review under the NHPA was required.

The Court of Appeals in Vieux Carre affirmed the Corps' findings that the wharf retained its "maritime purposes as a general cargo wharf," which supported authorization of the project under NWP 3. Id. at 116. The Court further determined that the Corps' failure to consider traffic and congestion attributable to the construction of the aquarium and park project was proper because "any increased traffic and congestion would be relevant only to the extent it could be tied to the development of the park as the aquarium is beyond the jurisdiction of the Corps." Id. at 117, fn 8. These aspects of the Court's decision lend support to the Corps' actions relative to the SPA permit application. The Corps here, as in Vieux Carre, considered the function and purpose of the wharf structure instead of the function and purpose of the buildings on and connected to the wharf. The Corps here, as in Vieux Carre, did not consider generalized complaints of traffic and congestion to be within the scope of analysis, since these were matters outside of the realm of federal control.

Plaintiffs rely on Preserve our Island et al. v. the U. S. Army Corps of Engineers and Northwest Aggregates Co., 2009 WL 2511953 (W.D.Ky. 2009). There Defendant Northwest Aggregates obtained a permit to remove an old deteriorating dock and wooden pilings and replace it with a new dock with steel pilings. The Corps consulted with National Marine Fisheries Service ("NMFS") and United States Fish and Wildlife Service ("USFWS") for several years prior to issuance of the permit, to address potential impacts to endangered species and critical habitat including Orca Whales and Chinook critical habitat. The consultation was required under the Endangered Species Act. "An agency's decision whether to take a

discretionary action that may jeopardize endangered or threatened species is thus strictly governed by ESA-mandate inter-agency consultation procedures." Id. at 4. The Corps issued a Finding of no Significant Impact at the conclusion of an environmental assessment of the project.

Plaintiffs claimed the Corps violated NEPA and the ESA in disregarding the evidence gathered during the six year consultation process. Plaintiffs claimed such action on the part of the Corps was arbitrary and capricious. The district court for the Western District of Washington agreed with the Plaintiffs, finding the agency findings to be conclusory and without evidentiary support. The district court granted the Plaintiffs' motion for summary judgment on the basis that the Corps had not given the "hard look" required by NEPA.

There is no comparison between Preserve our Island and the Corps' authorization of the SPA's project. ESA consultation is mandatory. The ACHP regulations give the Corps discretion, vested in the District Engineer, to conclude that consultation is unnecessary upon a determination of no potential for effect.

Plaintiffs attempt to distinguish McGehee v. U. S. Army Corps of Engineers, 2011 WL 2009969 (W.D.Ky. 2011). In McGehee the Corps initially authorized certain aspects of a road extension project in Kentucky under NWP 14. The project was later redesigned to include two clear span bridges, eliminating the need for authorization under NWP 14. A federal permit was not required for the construction of the bridges, but permit coverage was issued under NWP 33 to authorize temporary impacts to waters of the United States resulting from bridge construction. The Plaintiff owned property that was listed in the National Register of Historic Places. The construction of the road would ultimately result in destruction of the Plaintiff's home. Consequently, Plaintiff's property had been acquired by way of condemnation.

The Corps determined in McGehee that the authorization of temporary impacts

associated with construction under NWP 33 "would have no potential to cause effects on historic properties." Page 4. The district court for the Western District of Kentucky concluded that "[h]ere, the temporary construction activity had no potential to affect a historic property. The Corps did not abuse its discretion by concluding that a temporary structure used solely to build a bridge did not affect the McGehee's home." The Court affirmed the Corps' narrow determination of the area of potential effects from the activity authorized under NWP 33.

In McGehee, the activity authorized under NWP 33 was part of a larger road extension project that resulted in condemnation of the Plaintiffs' historic farm. But the Corps' control over the project was limited to authorizations under NWP 14 and NWP 33, which did not amount to sufficient control to acquire the designation of major federal action or undertaking. Id. at 3. Once the scope of the Corps' involvement was narrowly defined, the Corps was justified in limiting the area of potential effects, and in concluding that there was no potential to effect historic properties.

Despite Plaintiffs' protestations, McGehee represents affirmance by the district court of an analysis similar to the analysis of the Charleston District Corps of Engineers. Here the Corps limited the project area and the area of potential effects based on the limited "scale and nature" of the federal undertaking. Id. at 4.

5. Plaintiffs' demonstration of standing fails because their alleged injuries cannot be redressed by a favorable ruling from this Court.

Plaintiffs submit two Declarations which are outside of the Administrative Record. These Declarations demonstrate that Plaintiffs' members allege injuries that are currently on-going as a result of the SPA's cruise terminal located in Building 325. *Declaration of Christina Dodd (Preservation Society)* p. 2. *Declaration of Tommie Robertson (South Carolina Coastal Conservation League)* p. 2-3. There is no information in the Administrative Record to support

the claims of Dodd and Robertson that their alleged injuries will increase as result of the permitted project. However, the record before the Corps and this Court contains significant support for a finding that the injuries alleged to be suffered by Plaintiffs will not increase as result of the outcome of this proceeding. Defendant SPA directs this Court's attention to the following:

- If the SPA is unsuccessful in this litigation, Union Pier will continue to be used exclusively for maritime purposes including cargo and cruise ships. AR 025.
- The SPA intends for the new passenger terminal to be a "one-berth" and "one ship" terminal, able to accommodate, annually, up to 104 ships about the size of those that have visited in the past. AR 035.
- Regardless of whether the terminal stays at Building 325 or moves to Building 322, Customs and Border Patrol "will look for passenger capacities which directly relate to described needs to be met under CTDS," Cruise Terminal Design Standards. AR 776.
- Cruise ships presently call at the Union Pier Terminal pursuant to the SPA's statutory obligation to promote maritime commerce. The SPA encourages cruise ship calls. The South Carolina General Assembly included the following mandate in the 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." AR 981
- The SPA recognizes the importance of ensuring that the marine terminal operations for cruise remain in scale with Charleston. The existing cruise market for vessel calls in Charleston can support about two ships per week, as demonstrated by cruise bookings of about 67 ships in 2010 and 94 in 2011. The new cruise ship terminal will be designed to

accommodate only one ship at a time, consistent with the size of ships that have called Charleston in the past and that fit our cruise market profile. AR 1004-1005.

Plaintiffs can provide this Court with no support, other than their own conclusory allegations, that approval of the SPA's permit application will cause the cruise business to increase at Union Pier Terminal. Cruise activity has steadily increased over the years as a result of the popularity of the destination and the service at the port, not because of the SPA's plans to upgrade the passenger terminal. AR 731.

Conclusion

Plaintiffs will not suffer an injury as a result of the installation of the five piling clusters and renovation of Building 322 to convert it from a warehouse to a passenger terminal. Plaintiffs' alleged injuries are on-going, as a consequence of the popularity of Charleston as a port-of-call for cruise vessels and passengers. The Administrative Record does not support Plaintiffs' conclusory allegations that their members' injuries will increase as a result of the plans to move the cruise operations from Building 325 to Building 322.

The Corps followed its permitting regulations in its review of the SPA's permit application, its determination of the appropriate scope of analysis and potential for effect. The scope of the Corps' review is limited by the Corps' authority and control over all aspects of the project. The Corps has no authority or control over the operations of the SPA and, in particular, the current cruise operations.

The Corps' decision is not arbitrary or capricious and is in accordance with the law as the Corps followed its regulations. Defendant SPA requests that this Court deny the Plaintiffs' Motion for Summary Judgment and grant Defendants' Motions for Summary Judgment.

/s/ Mary D. Shahid
Marvin D. Infinger, Fed ID No. 4589
Mary D. Shahid, Fed. ID No. 643
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
PHONE: 843.577.9440
FACSIMILE: 843.720.1777
minfinger@nexsenpruet.com
mshahid@nexsenpruet.com

And

Philip L. Lawrence, Fed ID No. 2614
General Counsel
S. C. State Ports Authority
P. O. Box 22287
Charleston, S. C. 29413
plawrence@scspa.com

Charleston, SC

August 5, 2013

Attorneys for Intervenor/Defendant
South Carolina State Ports Authority

Exhibit E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED
2013 SEP 18 P 3: 19

Preservation Society of Charleston and South Carolina Coastal Conservation League,	)	
Plaintiffs,	)	Civil Action No. 2:12-2942-RMG
vs.	)	
United States Army Corps of Engineers, et al.,	)	
Defendants,	)	**ORDER**
and	)	
South Carolina State Ports Authority,	)	
Intervenor-Defendant.	)	

Plaintiffs Preservation Society of Charleston ("Preservation Society") and South Carolina Coastal Conservation League ("Coastal Conservation") have challenged the action of the Defendant Army Corps of Engineers ("Army Corps") in authorizing an undertaking of the Intervenor-Defendant South Carolina Ports Authority ("Ports Authority") to convert a previously permitted transit shed situated on the Union Pier over the navigable waters of the United States into a modern state-of-the-art $35-million cruise ship passenger terminal. The Army Corps, in authorizing this undertaking, determined that it was unnecessary for the Ports Authority to first comply with the formal assessment and consultative requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, and the National Historic Preservation Act ("NHPA"),

16 U.S.C. § 470f, because the Army Corps found that "the proposed activity will result in minimal individual and cumulative adverse environmental effects," the undertaking qualified for treatment under Department of Army Nationwide Permit # 3 ("NWP # 3") as "maintenance," and the project was the type of activity that had "no potential to cause effects" on historic properties. Administrative Record [hereinafter AR] at 112-14, 119-30. The Army Corps determined the scope of its review would be limited to the footprints of five clusters of concrete pilings that under the proposal would come into direct physical contact with the navigable waters of the United States. AR 112, 120. Plaintiffs challenge these findings and determinations by the Army Corps, arguing that the proposed cruise ship passenger terminal was unlawfully authorized under the controlling statutory and regulatory provisions of NEPA and NHPA and the findings of minimal environmental and historic properties impact were arbitrary and capricious.

Legal Standards

Judicial review of agency action under NEPA and NHPA is conducted pursuant to the Administrative Procedures Act ("APA") which requires a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004); *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 586-87 (4th Cir. 2012); *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 601 (4th Cir. 2012). Further, "[i]nsofar as the agency's decision may be deemed unreasonable as a matter of law, it is likely to have been arbitrary and capricious." *Friends of Back Bay*, 681 F.3d at 587. An agency's construction of a statute or regulation which it is charged with administering is generally entitled to deference by the courts and should be overturned only if "plainly erroneous or inconsistent

with the regulation." *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 (4th Cir. 2009) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). While the standard of judicial review is a "narrow one" and "highly deferential," the inquiry must be "searching and careful," *Marsh v. Or. Natural Res.*, 490 U.S. 360, 378 (1989), and the courts have no obligation "to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute," *Seatrain Lines*, 411 U.S. at 746. Ultimately, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1983).[1]

Federal jurisdiction arises under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, which prohibits the erection of any structure in or over the navigable waters of the United States without the authorization of the Army Corps through the issuance of a permit. This includes a prohibition of the construction of any "wharf, pier, . . . or other structures" which are "in or over any navigable water of the United States" without authorization from the Army Corps. *Id.*; 33 C.F.R. § 320.2(b); 33 C.F.R. Pt. 325, App. B, para. 7b(2). The "navigable waters," and thus the Army Corps' jurisdiction, includes all waters riverward of the

[1] The Army Corps correctly notes that the Federal Rule of Civil Procedure Rule 56 standard for summary judgment (the movant must show that "there is no genuine dispute as to any material fact" and is entitled to judgment as a matter of law) is not applicable in a motion for summary judgment under the APA. (Dkt. No. 60 at 18-19). Since the court in an APA review does not resolve factual questions, the proper standard to dispose of a motion for summary judgment under the APA is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 879 (S.D.W.Va. 2009).

Ordinary High Water Line ("OHWL"). *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown* (*Vieux Carre I*), 875 F.2d 453, 456 (5th Cir. 1989) (holding a park erected on a wharf over the navigable waters "completely riverward of the OHWL" is "indisputably within the Corps' jurisdiction"); *United States v. S. Inv. Co.*, 876 F.2d 606, 609 (8th Cir. 1989) ("Under the RHA . . ., waters below the OHWL are declared waters of the United States and are subject to regulatory jurisdiction by the Corps."); 33 C.F.R. § 329.11(a)(1).[2] Review may also be required where the activity is landward from the OHWL (and thus outside the Corps' jurisdiction) when the level of federal control and responsibility are great, or where the project's environmental consequences flow essentially from the portion of the project within federal jurisdiction. 33 C.F.R. Pt. 325, App. B, para. 7b(2).

Once it has been determined that an activity requires a permit from the Army Corps under the Rivers and Harbors Act, the Army Corps must also comply with a host of other federal statutes including NEPA and NHPA. NEPA, which has been referred to as our "basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), requires that all "major federal actions significantly affecting the quality of the human environment" must undergo a review process that culminates in a "detailed statement" of the environmental impact of the proposed action, any adverse effects, and alternatives to the proposed action, 42 U.S.C. § 4332(C). These "major federal actions" may include "new and continuing activities, including projects . . . regulated by federal agencies" and "construction . . . activities located in defined geographic

[2] At oral argument, there was some discussion regarding the meaning of OHWL as compared to "Mean High Water Line." *See* 33 C.F.R. § 329.12. In any case, Defendants acknowledged at oral argument that the entire structure at issue, Building 322, is situated in the navigable waters of the United States.

areas." 40 C.F.R. § 1508.18(a),(b)(4). As the Chief Counsel of the Army Corps explained in a 2007 "legal guidance," "Section 10 of the Rivers and Harbors Act . . . authorizes the Corps to issue permits for the construction or modification of structures in navigable waters." Memorandum from Earl Stockdale, Chief Counsel, Department of the Army, to the Director of Civil Works, "Legal Guidance on the NEPA Scope of Analysis in Corps Permitting Actions" (July 9, 2007) http://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/eis/NEPA%20SOA%20Opinion.pdf [hereinafter "2007 Stockdale Memo"].

The NEPA process requires the permitting federal governmental agency to take a "hard look" at the environmental consequences of the proposed action, which includes the requirement that the agency "rigorously explore and objectively evaluate all reasonable alternatives." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); 40 C.F.R. § 1502.14(a). Agencies are also required under the NEPA process to broadly disseminate relevant environmental information to the public. *Robertson*, 490 U.S. at 350; 40 C.F.R. § 1506.6. This process "does not mandate particular substantive results," but "merely prohibits uninformed–rather than unwise–agency action." *N.C. Wildlife Fed'n*, 677 F.3d at 601 (quotations omitted). The congressional purposes in mandating these formal assessment and consultative processes are to focus "the agency's attention on the environmental consequences of a proposed project" and "ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die is otherwise cast." *Robertson*, 490 U.S. at 349.

When making an environmental assessment under NEPA, the Army Corps is mandated to consider both the direct and indirect effects, which may include such indirect effects as "growth

inducing effects" and "changes in the pattern of land use, population density or growth rate." 40 C.F.R. § 1508.8. These indirect effects may be ecological as well as "aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." *Id.* Additionally, the permitting agency must consider the context and intensity of the impact of the undertaking. The regulation sets forth ten "intensity factors," which include consideration of the "unique characteristics of the geographic area, such as proximity to historic or cultural resources," "the degree to which the effects on the quality of the human environment are likely to be highly controversial," and the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(a),(b)(3)-(5). The agency must also consider "the degree to which the action may adversely affect districts, sites, . . . structures, or objects listed in or eligible for listing in the National Register of Historic Places." *Id.* § 1508.27(b)(8). "Conclusory statements that the indirect and cumulative effects will be minimal or that such effects are inevitable are insufficient under NEPA." *N.C. Wildlife Fed'n*, 677 F.3d at 602.

NEPA does not, however, require every undertaking to undergo a full environmental impact statement ("EIS") and activities "which do not individually or cumulatively have a significant effect on the human environment" are entitled to a categorical exclusion from the NEPA process. 40 C.F.R. §§ 1501.4, 1508.4. Further, certain activities that have no more than minimal environmental impact may be eligible for a general permit under the Army Corps' nationwide permit program so long as the activity meets all of the terms and conditions of a specific nationwide permit. 33 C.F.R. § 330.1(c). Where an activity qualifies for a nationwide permit, the Army Corps may verify eligibility and not require the applicant to otherwise submit

to a full NEPA environmental assessment. For instance, NWP # 3 authorizes certain "maintenance" activities that involve the "repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure . . . provided that the structure . . . is not to be put to uses differing from those specified or contemplated in the original permit." AR 1104. NWP # 3 also authorizes "minor deviations" from the building's configuration where the changes are required to comply with regulatory standards or current construction codes. *Id.* Even where an activity may require the issuance of an individual permit, an agency may initially make a more abbreviated review, known as an environmental assessment ("EA"), if it is uncertain if the activity under review will have a potential for significant environmental impact. 40 C.F.R. § 1508.9. In the final analysis, "when it is a close call whether there will be a significant environmental impact from a proposed action" the "policy goals underlying NEPA are best served if agencies 'err in favor of preparation of an EIS when . . . there is a substantial possibility that the [proposed] activity may have a significant impact on the environment.'" *Friends of Back Bay*, 681 F.3d at 590 (quoting *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997)).

An essential first step in determining the proper level of review of any proposed activity under NEPA is establishing the proper "scope of analysis." The "scope of analysis" should include all activities that fall within federal jurisdiction, and thus require a federal permit, as well as those portions of a larger project outside federal jurisdiction where there is sufficient federal control and responsibility. 33 C.F.R. Pt. 325, App. B, para. 7b; 53 Fed. Reg. 3120, 3121-22 (Feb. 3, 1988). For an activity subject to Section 10 of the Rivers and Harbors Act, the "scope of analysis" should include "the specific activity requiring a [Department of Army] permit" lying within or over the navigable waters of the United States and upland activities subject to federal

control and responsibility. *Aracoma Coal Co.*, 556 F.3d at 194 (4th Cir. 2009); 33 C.F.R. § 320.2(b); 33 C.F.R. Pt. 325, App. B, para. 7b. Once the proper "scope of analysis" is determined, the Army Corps then evaluates the eligibility of the proposed activity for general or individual permit treatment. The Army Corps' determination of the proper "scope of analysis" is entitled to deference. *Wetlands Action Network v. U.S. Army Corps of Engr's*, 222 F.3d 1105, 1115 (9th Cir. 2000), abrogated on other grounds by *Wilderness v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

In addition to the mandates set forth under NEPA, an agency reviewing a permit application under the Rivers and Harbors Act must also comply with NHPA, which requires an assessment of the "effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. Indeed, even if a project is eligible for approval under a national permit program in regard to NEPA processes, review is still required under NHPA. AR 1187. The processes under NHPA, known commonly as "Section 106 review," include a requirement that the permitting agency "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment" regarding the proposed project. 16 U.S.C. § 470f.

Like NEPA, NHPA contains a provision limiting the necessity of the permitting agency to follow the formal assessment and consultation processes of the Act when the agency determines that the proposed project "is a type of activity that does not have the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a)(1). In examining potential effects on historic properties, the agency, utilizing the previously determined "scope of analysis," must consider both the direct and indirect effects on historic properties by the type of activity proposed, both

within and outside the permit area. *Id.* § 800.16(d); 33 C.F.R. Pt. 325, App. C, paras. 2a-b, 5f. An "adverse effect" can be found where the proposed project "may alter, directly or indirectly, any of the characteristics of a historic property," including action that "would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1). This may include "reasonably foreseeable effects" and the "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features. *Id.* § 800.5(a)(2)(v). As the Fourth Circuit observed in *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001), "[e]ven if no shovels or backhoes will touch [an] historic area, damage to historic areas can occur in less direct ways."

Factual Background

This litigation arises out of a challenge to the authorization granted by the Army Corps to the Ports Authority under Section 10 of the Rivers and Harbors Act to proceed with the Ports Authority's "Building No. 322 renovation" as a maintenance project under NWP # 3. AR 103, 112-14. Plaintiffs and the Army Corps characterize the proposed project in fundamentally different ways. The Army Corps acknowledges that the Ports Authority's application seeks authorization for renovating Building 322 and the installation of concrete pilings represents only a "part of [the] overall project." However, the Army Corps treats the application as merely one to install five clusters of concrete pilings into the navigable waters of the United States and evaluates the potential environmental and historic impact of the project as if the undertaking is limited to the installation of the new concrete pilings. AR 112. The Army Corps asserts that the installation of the pilings would have "minimal individual and cumulative adverse environmental effects" and constitutes maintenance activity eligible for processing under NWP # 3. *Id.* On the

other hand, Plaintiffs assert that the proposed activity involves a structure that is located over the navigable waters of the United States and the full scope of activities (i.e. the new passenger terminal rather than only the supporting concrete pilings) is subject to assessment and review pursuant to NEPA and NHPA. Plaintiffs argue that when the undertaking is properly evaluated in its entirety its potential adverse environmental and historic impact requires the preparation of an EIS and full consultation under NHPA. The Plaintiffs further argue that the proposed undertaking does not remotely satisfy the requirements for a maintenance project and is not eligible for authorization under NWP # 3.[3]

The proposed project would convert a previously permitted "transit shed" into a $35-million passenger terminal on the northern end of Union Pier, which is situated over the navigable waters of the United States along the Cooper River in downtown Charleston, South Carolina. AR 17, 42-43. The proposed project would require the placement of five clusters of concrete pilings directly into the navigable waters of the United States to provide support for escalators and elevators needed for the new terminal. The proposed pilings appear to have no independent utility other than to provide foundational support for the infrastructure associated with the proposed passenger terminal. The proposed new passenger terminal would have 108,480 square feet and the capacity "for homeporting a 3,450 passenger ship." AR 758, 765.

---

[3] Plaintiffs moved before the Court to supplement the record, which the Court granted. (Dkt. No. 50). All of the supplemented materials are post-decisional. The Court indicated in granting the motion that it was not then determining whether such documents were relevant or what weight the Court would give to the supplemented materials. (Dkt. No. 50 at 3). Having now reviewed the full administrative record and the supplemented materials, the Court has determined that these post-decisional documents are unnecessary for the Court to address the issues in this APA review. Consequently, the Court has given no weight or consideration to the supplemented materials.

The proposed new passenger terminal would more than triple the size of the existing 30,216-square-foot passenger terminal which sits at the southern end of Union Pier approximately a quarter of a mile from the proposed site. AR 758.

The proposed new passenger terminal would be situated "in the center of Charleston's historic waterfront" and "adjacent to some of the most cherished, historically important, and valued neighborhoods." AR 754. The proposed terminal would sit adjacent to the "tree canopied neighborhood of Ansonborough." AR 754. The Ansonborough neighborhood lies within the Charleston Historic District, which is listed on the National Register of Historic Places and is one of the largest and best preserved Revolutionary- and Colonial-era districts in the United States. AR 754, 755, 879. Thirty-three other National Historic Landmarks are located nearby. AR 51.

Plaintiffs and various neighborhood associations have vigorously voiced their concern that the placement of this proposed new and enlarged passenger terminal near these historic neighborhoods and National Landmark structures would adversely impact the quality of life and historic feel and integrity of these communities and structures. AR 52. The adverse impacts they note include traffic congestion, air and noise pollution, and impairment of Charleston's scenic beauty. *Id.* They argue that the adverse effects of the cruise ship industry significantly worsened with Charleston becoming the home port for the Carnival *Fantasy* in 2010, which they assert brought greatly increased numbers of passengers, automobiles, buses, and tractor trailers to the highly confined and dense historic waterfront area on embarkation and disembarkation days. AR 52, 878. They argue that the new passenger terminal would exacerbate this situation by bringing even greater numbers of passengers and cruise ships, now closer to historic residential

neighborhoods with the proposed move northward on Union Pier, and produce significant adverse impacts on the environment, Landmark neighborhoods and structures, and the overall quality of life in the peninsula city of Charleston.

The Ports Authority has acknowledged that a cruise ship terminal can "present special challenges" in "managing automobile and pedestrian traffic," "protecting the environment," and "preserving Charleston's unique character" and "there are still lingering questions about how well the cruise ship business will fit into the context of this diverse, world class city." AR 1003-04. Record evidence provided by the Ports Authority supports the claim of Plaintiffs that the number of cruise ships and passengers has increased in recent years, and the proposed new and larger passenger terminal would likely significantly increase the number and size of cruise ships visiting Charleston and the volume of cruise passengers in the historic Charleston waterfront. In the five-year period preceding the home porting of the *Fantasy* in 2010, Charleston hosted on average nearly forty-five cruise ships per year.[4] In 2010, the number of cruise ships visiting Charleston increased to sixty-nine. AR 731. This increase set off loud protests from neighborhood, preservation, and environmental groups and led the National Trust for Historic Preservation and the World Monuments Fund to place the Charleston Historic District on endangered watch lists. AR 50-54. By 2012, the number of cruise ships visiting Charleston had risen to eighty-four, an 86% increase over the 2005-2009 five year average. AR 46.

The Ports Authority has clearly indicated that it seeks to build a new passenger terminal capable of handling a single 3,450-passenger ship on average twice a week or 104 cruise ship

---

[4] Cruise ships visiting Charleston during this five-year period were as follows: 2005: 47, 2006: 50, 2007: 44, 2008: 49, 2009: 33. AR 731.

visits over a calendar year. AR 765, 1005, 1008. The Ports Authority asserts that the existing cruise ship market could accommodate this level of activity with an adequate passenger terminal. AR 1008. Even if the Ports Authority maintained its voluntary cap of 104 cruise ship visits per year, this would represent a 131% increase over the 2005-2009 five year average and a 24% increase from 2012.

In addition to the projected growth in the number of cruise ship visits, the Ports Authority data indicate a likely significant increase in the number of cruise passengers in the newly designed passenger terminal. The new terminal would be designed to accommodate and home port a 3,450-passenger ship. AR 765. Currently, the *Fantasy*, the only ship which uses Charleston as its home port, has a passenger capacity of 2,052 and the average passenger load per cruise ship for the year 2010 (the last year such information was provided in the record) was 1,612.[5] AR 735. Under the Ports Authority's plan for its new terminal, the "recommended design vessel size (post-Panamax)" would be a passenger capacity of 3,000 to 3,500 and estimates submitted by the Ports Authority to the Army Corps regarding projected traffic volumes with the new passenger terminal were based on an average 3,450-passenger vessel. AR 765, 779. Relying upon the Ports Authority's announced goal of 104 cruise ships per year and the estimate of 3,450 passengers per vessel, the annual passenger total would be 358,800, or more than triple the number of passengers in 2010. Further, to service such a volume of passengers, the Ports Authority has estimated that on an average embarkation and disembarkation day up to twenty tractor trailers, sixteen small trucks, thirty-two buses, ninety taxis, and 1600

[5] According to Ports Authority data, there were sixty-nine cruise ships visiting Charleston in 2010 with 111,240 total passengers. AR 735.

passenger vehicles would need access to the very confined area of the proposed new passenger terminal that lies immediately adjacent to the Charleston Historic District and the Ansonborough neighborhood. AR 779.

Plaintiffs have also asserted that the size and scale of the cruise ships, particularly the home port docking of the *Fantasy*, negatively impact the historic character of the Charleston Historic District. The *Fantasy* is 855 feet long and weighs 70,367 gross tons.[6] Under the Ports Authority's proposal, the "recommended design vessel size," which would be "post-Panamax," would be far larger, with a length of 950 to 1,100 feet and weight of 100,000 to 150,000 gross tons. AR 765.

The Ports Authority correctly notes that cruise ships have serviced Charleston since at least 1973, following the dedication of a 30,216-square-foot facility on the south end of Union Pier. AR 758, 1007. The Ports Authority applied for a permit from the Army Corps on March 1, 1971, "to construct a passenger facility at State Pier 2 . . . behind the south end of the existing dock." AR 465. In January 1972, the Ports Authority modified the application by submitting revised drawings of the proposed facility. AR 466. The Army Corps then issued a permit on February 18, 1972, to "construct a passenger facility on existing dock," including necessary dredging, and mandating that the "structure" authorized "shall be in accordance with the plans and drawings attached." AR 440. The permit required the Ports Authority to "maintain the structure authorized herein in good condition in accordance with the approved plans." AR 442.

The Ports Authority has continuously used the passenger terminal facility at the southern

[6] Carnival, http://www.carnival.com/cruise-ships/carnival-fantasy.aspx (last visited Sept. 17, 2013).

end of Union Pier for approximately forty years. The structure is known as Building 325. The increase in cruise ship visits and demands for greater port security have understandably caused the Ports Authority to seek some alternative to this rather modest and apparently antiquated passenger terminal. In fact, the Ports Authority is currently operating the existing passenger terminal under a Memorandum of Understanding with United States Customs and Border Protection that recognizes that Building 325 "has limited capacity to meet current passenger workloads resulting in less than optimal processing time." AR 846. The Ports Authority has agreed with Customs and Border Protection to "improve and upgrade the facility to meet federal security requirements." *Id.*

The Ports Authority proposes to move the passenger terminal northward approximately a quarter of a mile to another previously permitted structure known as Building 322. This structure has its own distinct permit history. The Ports Authority applied for a permit from the Army Corps on July 21, 1972, that included a request to authorize construction of a "dock extension with a transit shed 750 ft. by 400 ft." AR 550. The application included a drawing of a rectangular building in accord with the dimensions that was demarcated "transit shed." AR 569. The Army Corps issued a permit to the Ports Authority on November 7, 1972, authorizing the construction of the dock extension and transit shed. AR 524. In approving the Ports Authority application, the Army Corps District Engineer stated "<u>IT SHALL NOT BE LAWFUL TO DEVIATE FROM SUCH PLANS EITHER BEFORE OR AFTER COMPLETION OF THE WORK</u>." AR 564. Any modifications in the plans had to be submitted to the Army Corps for review and approval. *Id.* The permit issued by the Army Corps to the Ports Authority further provided that the Army Corps could revoke the permit and require the Ports Authority at its own

expense to "restore the waterway to its former condition." AR 527.

The Ports Authority subsequently requested approval of changes in its proposed project at Building 322 that included a modification of the configuration of the proposed transit shed. The proposed building was now 250 feet long by 400 feet wide. AR 120, 585. The Army Corps approved the requested changes on March 5, 1974. The Ports Authority submitted other proposed modifications for the project in 1978 that indicated only a portion of the proposed and approved transit shed had been constructed as of October 3, 1978. The submitted plans sought approval of the completion of the originally authorized work completing the transit shed and an additional area to be added to the structure at its northern end. AR 591. The Army Corps issued a new permit on November 3, 1978, approving the project "in accordance with the plans and drawings attached hereto which are incorporated in and made a part of the permit." AR 586. The permit further provided that the permit could be modified or revoked if the Secretary of the Army determined that the action was in the public interest and the Ports Authority had no right to damages or any property rights as a result of the issuance of the permit. AR 587.

Building 322, as ultimately permitted and constructed, is a large cavernous structure, over 108,000 square feet, with embedded railroad tracks and is large enough to accommodate railroad cars. AR 582, 758, 768, 1075. It sits on Union Pier over the navigable waters of the United States. The building has warehouse-type lights and is ventilated by electronically operated fans. AR 769. Like the permit issued for Building 325, the permit for Building 322 required the Ports Authority to maintain the structure in accordance with the approved plans. AR 587.

The Ports Authority now proposes "the conversion of an existing cargo handling building [Building 322] into a functional and attractive passenger terminal." AR 188. The new "world

class passenger terminal" would include a mezzanine serviced by escalators, elevators, passenger waiting areas and lounges, state-of-the-art security systems, cruise line offices, baggage handling areas, and much more. AR 17, 40, 165, 776, 982. As the Ports Authority has explained, Building 322, "as presently configured" with its vast open spaces, "provides a flexible platform to renovate into a workable cruise passenger terminal." AR 769. In order to support the proposed escalators and elevators to service the terminal's cruise passengers, the Ports Authority has indicated a need to add five additional concrete pile clusters under the existing Union Pier at Building 322. AR 105.

The Ports Authority submitted on January 23, 2012, a joint federal-state application for approval of a proposed project involving the "general renovation" of Building 322 into a modern passenger terminal and "relocating" the terminal from its present location on the southern end of Union Pier. AR 103-05. The Ports Authority indicated that the "continued growth of the cruise industry" in Charleston and the current security requirements made the need "for a new facility . . . critical." AR 105. The "improvements" to Building 322 under the Ports Authority's proposal included three elevators, two escalators, five concrete pile clusters to support the newly installed escalators and elevators, "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." *Id.* The Ports Authority asserted that it was "reasonably anticipated that the work planned will cause no adverse impacts to jurisdictional areas." AR 104.

Shortly after the Ports Authority submitted its application, various neighborhood groups and Plaintiffs wrote the Army Corps and other federal agencies on March 16, 2012, expressing concerns about a broad range of environmental and historic district impacts from the proposed

new passenger terminal, including traffic congestion, air pollution, noise pollution, and damage to the "scenic treasure . . . [of] the Holy City." AR 50-54. They asked to be consulted in any review the Army Corps conducted. AR 51. They also reminded the Army Corps of its duty under Section 106 of NHPA to "afford the Advisory Council on Historic Preservation and the general public a reasonable opportunity to comment." AR 53.

On April 20, 2012, less than three months after the Ports Authority filed its initial application for authorization for "Building No. 322 renovation," and only four days after the application was determined to be complete, the Army Corps authorized "the proposed project" under NWP # 3. AR 112-14. This authorized the Ports Authority to proceed with construction without the necessity of complying with the assessment and consultation provisions of NEPA, including a careful and independent assessment of the environmental impact, an objective evaluation of all reasonable alternatives, and the broad dissemination of information to the public to allow public comment on the proposal.

In reaching its determination, the Army Corps found that the existing "structure" (which included Building 322) as well as the concrete pilings were "located in navigable waters of the United States" and that "authorization pursuant to Section 10 of the Rivers and Harbors Act is required." AR 120. However, despite its finding that Building 322 was located in the navigable waters of the United States, and thus subject to federal jurisdiction, and the proposed passenger terminal involved a significant construction activity, the scope of analysis for NEPA review was "limited to the footprint of the new pilings." *Id.* Using this very confined scope of analysis of the activity under review, the Army Corps concluded that the "activity will result in minimal individual and cumulative adverse environmental effects." AR 112. The Army Corps further

concluded that the project satisfied the requirements for NWP # 3, finding that the activities involved "repair, rehabilitation, or replacement" of a previously authorized structure, there was no change in use since a passenger terminal had been present on Union Pier for the past forty years, and any changes were "minor deviations" to comply with new federal regulations regarding terminal safety. AR 121-22.

Additionally, the Army Corps determined that the Ports Authority was not required to provide Section 106 review under NHPA because the project was the type of activity that had no potential to cause adverse effects on historic landmarks. AR 125-26. In reaching this conclusion, the Army Corps again considered the scope of the project to be limited to the additional pilings that directly came into contact with the navigable waters and found that these additional pilings had "no potential to cause effects to historic properties in or outside of the 'permit area'" AR 126. As a consequence of this decision, the Army Corps did not "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment" regarding the proposed project. 16 U.S.C. § 470f.

Discussion

Before the Army Corps could evaluate the proposed activity under NEPA and NHPA, it had to determine the "scope of analysis" that is subject to federal review. The Ports Authority's application clearly set forth its intention to convert Building 322, an existing structure previously permitted as a transit shed, into a passenger terminal. AR 103-06. The Ports Authority asserted that the only activity that would affect United States waters involved the installation of five concrete pile clusters and that the renovation of Building 322 constituted "landside improvements." AR 105. The Army Corps, in determining the "scope of analysis," found that

both the existing structure and the new pilings "are located in the navigable waters of the United States" and for that reason the activity required authorization under Section 10 of the Rivers and Harbors Act. AR 120. However, the Corps, without further elaboration, stated that "our evaluation is limited to the footprint of the new pilings." *Id.*

The Army Corps' determination to limit the "scope of analysis" to the impact of the five concrete pile clusters, rather than the new passenger terminal, dramatically and improperly constricted the assessment of the potential environmental and historic landmark impacts of the proposed activity. The concrete pilings comprise no more than 0.01 acres and have, standing alone, no discernible adverse environmental or landmark impact. On the other hand, the proposed new passenger terminal would be 108,000 square feet and potentially would bring an estimated 350,000 cruise passengers to the area immediately adjacent to the landmark Charleston Historic District, more than tripling the number of cruise passengers visiting Charleston in 2010. Plaintiffs assert that the new and substantially enlarged cruise passenger terminal would result in worsening of problems with air and noise pollution, traffic congestion, and a loss of the aesthetics and historic authenticity of the landmark Charleston Historic District. AR 50-54. Since the Army Corps limited the "scope of analysis" to the concrete pilings, its review did not evaluate or consider the potential adverse impacts of the proposed new passenger terminal.

The "scope of analysis" issue was hotly litigated several decades ago, with the issue primarily arising where a portion of a proposed project lay within federal jurisdictional waters or wetlands and the remainder of the project was landward outside of federal jurisdiction. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005). Following several significant appellate court decisions, the Army Corps adopted new regulations, found at Title 33 of the Code

of Federal Regulations, Part 325, Appendix B, to sort out when an entire project would fall within the "scope of analysis" and thus be subject to federal review. The regulations provide that the "scope of analysis" should include all portions of a proposed activity requiring a Rivers and Harbors Act permit and that portion of the project outside of federal jurisdiction in which there is "sufficient control and responsibility to warrant federal review." 33 C.F.R. Pt. 325, App. B, para. 7b(1). In official comments issued by the Army Corps explaining its final action in adopting the regulations, the agency explained that the "scope of analysis" would "normally . . . cover the regulated activity," which includes all "activities . . . subject to Section 10 of the Rivers and Harbors Act." 53 Fed. Reg. at 3121. The Corps further explained that the agency had the obligation to "address all aspects of the activity within its jurisdiction." *Id.*

Federal jurisdiction under the Rivers and Harbors Act extends to all structures which are located riverward from the OHWL. 33 U.S.C. § 403; *Vieux Carre I*, 875 F.2d at 455 (stating the OHWL is "the Corps' benchmark for determining its jurisdiction under the RHA"); 33 C.F.R. § 329.11(a)(1). Federal jurisdiction includes structures directly in contact with the navigable waters, such as piers, as well as wharves and other structures constructed over the navigable waters of the United States. *Vieux Carre I*, 875 F.2d at 455, 463; 33 C.F.R. § 320.2(b) ("Section 10 of the Rivers and Harbors Act . . . prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over the navigable water of the United States . . . is unlawful unless the work has been . . . authorized by the Secretary of the Army.").

The Army Corps seeks to justify what amounted to essentially a non-review of the proposed passenger terminal on the basis that its jurisdiction is limited to the portion of the

project physically touching the navigable waters of the United States. Since only the five concrete pile clusters actually touch the navigable waters, the Corps contends that its review cannot extend to the significant construction activity involving a structure located on the wharf situated over the navigable waters of the United States. (Dkt. No. 64 at 8-9). This argument is plainly inconsistent with the Army Corps' own regulation under the Rivers and Harbors Act which provides for jurisdiction involving any "structure in *or over* any navigable water of the United States." 33 C.F.R. § 320.2(b) (emphasis added). Moreover, despite the Army Corps' contention to the contrary, a structure situated over the navigable waters *is* an obstruction and this is the reason that the Army Corps has historically permitted Building 322 and determined that the park situated on a wharf over the navigable waters was under the Army Corps' jurisdiction in *Vieux Carre*.

The Fifth Circuit exhaustively and consistently addressed the Army Corps' jurisdiction over structures located on a wharf over the navigable waters in three decisions referenced as *Vieux Carre I*, *II*, and *III*. In *Vieux Carre I*, the Army Corps reviewed an application for a proposed aquarium and park which were to be built near the historic French Quarter in New Orleans. The aquarium was landward from the OHWL and the proposed park was to be constructed on a wharf which was built over the navigable waters. No portion of the park touched the navigable waters of the United States. In concluding that the park was subject to federal jurisdiction and the aquarium was not, the Fifth Circuit held that since the park was "riverward of the OHWL," it was "therefore indisputably within the Corps' jurisdiction" and "within the navigable waters of the United States." 875 F.2d at 455-56, 464; *see also Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown* (*Vieux Carre II*), 948 F.2d 1436, 1439

(5th Cir. 1991) (stating the park required a federal permit "because it was to be built on the Wharf completely within the OHWL"); *Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown* (*Vieux Carre III*), 40 F.3d 112, 115 (5th Cir. 1994) (stating the provisions of the RHA were triggered by the proposed park because "some structures involved in the project were built on the Bienville Street Wharf").

During oral argument, the Court repeatedly asked defense counsel to explain why a park situated on a wharf in New Orleans would be within the Army Corps' jurisdiction while a major construction activity in a structure on a wharf in Charleston would not be. No reasonable distinction was articulated. Instead, Defendants argued that *Vieux Carre* recognized that the park was determined to be eligible for general permit treatment. While this is undoubtedly true, the Fifth Circuit determined that the entire park was subject to the Army Corps' jurisdiction under the Rivers and Harbors Act and only then analyzed the park for general permit eligibility. In this case, the Army Corps evaluated the adverse environmental and historic effects arising from only a small fraction of the project which lay in United States waters, the five concrete pile clusters, and never evaluated the full scope of the passenger terminal project. This was clearly in error.

Further, a review of the permitting history of Building 322 demonstrates that the Army Corps has consistently recognized and exercised its jurisdiction over the construction and modification of the structure. The Ports Authority applied for a permit in July 1972 to construct a "transit shed" at what is now Building 322. AR 550. The plans the Ports Authority submitted showed a rectangular building 750 feet long and 400 feet wide. AR 567, 569. The Army Corps approved the project on October 14, 1972, but specifically prohibited any deviation from the plans submitted and approved either during construction or thereafter. AR 564. The Ports Authority

later submitted a request to modify the previously approved plans for a transit shed, with the modified plans providing for a transit shed 250 feet long and 400 feet wide. AR 120, 585. The Army Corps approved these modifications on March 5, 1974. AR 580. The Ports Authority made an application for still additional modifications to the transit shed in 1978, indicating that only a portion of the previously approved structure had actually been constructed. AR 591. The Ports Authority requested authorization in the newly submitted plans to alter the configuration of the proposed transit shed by adding additional square footage at the northern portion of the structure. AR 591. The Army Corps authorized the alterations in a new permit issued on November 3, 1978, "in accord with the plans and drawings attached hereto which are incorporated and made part of this permit," with a single exception allowing "any modification or minor addition" required by the state of South Carolina as a precondition for issuing a state permit. AR 586, 588. Both the 1972 and 1978 permits vest in the Secretary of the Army the authority to revoke the permit authorizing the structure, with the 1972 permit explicitly providing for the right of the Secretary to require the restoration of the "waterway to its former condition." AR 527.[7]

The Army Corps contended at oral argument that the Rivers and Harbors Act was not a general zoning board regulation and the Army Corps had no interest in or jurisdiction over

[7] The Army Corps now contends that the Building 322 permits only authorized "pier construction." (Dkt. No. 64 at 13). The 1972 permit explicitly referred to the transit shed, and the approved plans for both the 1972 and 1978 permits clearly set forth the configuration and dimensions of the structure and designated it as a transit shed. AR 524, 564, 569, 586, 588, 591. These permits conditioned the authorization to proceed on the requirement that the Ports Authority construct and maintain the approved structures in accord with the plans. The Court finds the present Army Corps characterization of the 1972 and 1978 permits to be convenient revisionist history to justify its present non-review of the proposed passenger terminal and such characterization of those earlier permits as limited to pier construction is arbitrary, capricious, and unreasonable.

modifications of permitted buildings and had no concern regarding uses that a particular permitted structure might be put. The Army Corps certainly does not function as a zoning board but its jurisdiction extends to approval of "specific projects, such as construction . . . activities located in a defined geographic area" and "for construction and modification of structures in the navigable waters." 40 C.F.R. § 1508.18(b)(4); 2007 Stockdale Memo. Further, the Army Corps provides by way of regulation the requirement that any application for a Rivers and Harbors permit set forth "the location, purpose and need for the proposed activity." 33 C.F.R. § 325.1(d)(1). Thus, when the Ports Authority applied for a permit in 1972 for authorization to construct Building 322, it properly designated its purpose as a transit shed, and it also acted consistent with the Army Corps' regulations when it sought and obtained authority in 1974 and 1978 to modify the permit for Building 322. AR 550, 567, 569, 580, 582, 586, 588, 591; *see* 42 Fed. Reg. 37122, 37149 (July 19, 1977).

Under the Army Corps' regulations, the determination of the "scope of analysis" required for the proposed project before the Court should have been relatively straight forward because the Army Corps found that Building 322 was located in the navigable waters of the United States and thus subject to Section 10 of the Rivers and Harbors Act. AR 120. This avoided the necessity of evaluating the level of federal control and responsibility to determine whether a portion of the project outside of federal jurisdiction was subject to federal review, which is the most common source of conflict in "scope of analysis" disputes. Since the Army Corps found that Building 322 was located in the navigable waters of the United States and subject to Section 10 of the Rivers and Harbors Act, and the agency was mandated to "address all . . . activity within its jurisdiction," the entire passenger terminal conversion project, and not just the concrete pilings, should have

been included in the "scope of analysis." 53 Fed. Reg. at 3121.

Defendants further suggest that the federal interest under the Rivers and Harbors Act in a structure located on a wharf situated over the navigable waters is not particularly great, thereby justifying exclusion from federal review. *Vieux Carre I* makes it clear, however, that even the placement of a structure such as a park located on a wharf is subject to federal jurisdiction and review. 875 F.2d at 455, 464. Further, regardless of the level of federal interest in certain activities within the agency's jurisdiction, this "does not diminish the Corps' jurisdiction, the scope of its analysis, or its obligation to consider the environmental effects under NEPA of its permit action." *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005). Moreover, the Courts should not allow a "convenient" and "invalid" limitation on the Army Corps' "scope of analysis" to serve to "excuse a most inadequate consideration of the environmental consequences of the action for which it had responsibility." *Ark. Nature Alliance, Inc. v. U.S. Army Corps of Eng'rs*, 266 F. Supp. 2d 876, 891-92 (E.D. Ark. 2003).

Finally, the Ports Authority challenges that Plaintiffs lack Article III standing to bring this action. "Article III, Section 2 of the Constitution restricts the federal courts to deciding actual cases and controversies. Among [t]he several doctrines that have grown up to elaborate that requirement, the one that requires a litigant to have standing to invoke the power of a federal court is perhaps the most important." *Friends of Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 319 (4th Cir. 2002) (internal quotations omitted). "To demonstrate standing in the context of the [APA], not only must a plaintiff show that he has suffered an injury in fact that is fairly traceable to the defendant's conduct and that a court can provide relief to redress the injury, but also he must show that the injury in fact is within the zone of interests protected by the statute." *Pye v.*

United States, 269 F.3d 459, 466-67 (4th Cir. 2001). "In addition, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit." *Friends of Ferrell Parkway*, 282 F.3d at 320 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

The Ports Authority argues that Plaintiffs lack standing because they cannot demonstrate (1) an injury in fact, (2) a causal connection between their injury and the challenged action, or (3) that the alleged injury will be redressed by a favorable decision of this Court. (Dkt. No. 57-1 at 25). The Ports Authority's standing argument, however, suffers from the same defect as its argument under NEPA and NHPA. Specifically, the Ports Authority's standing argument depends on the Court adopting an artificially narrow view of this controversy. The Ports Authority insists the Court limit its standing analysis to the installation of the five concrete pile clusters and ignore the renovation of Building 322 into a state-of-the-art cruise ship terminal. As above, the Court cannot ignore this reality. When this case is viewed within the framework of a proper "scope of analysis," it is clear that Plaintiffs have a "sufficient personal stake" in the outcome of this dispute to satisfy Article III. *Friends of Ferrell Parkway*, 282 F.3d at 319. Plaintiffs' members include residents of the Ansonborough neighborhood which abuts the north side of Union Pier where Building 322 is located and where the alleged detrimental effects of the proposed new cruise ship terminal—including increased traffic congestion and airborne pollution from cruise ships—are expected to be felt. The Court's finding that the Army Corps' authorization granted to the Ports

Authority is invalid could potentially redress these harms and lead to an appropriate assessment under NEPA and NHPA. *See Pye*, 269 F.3d at 467-68 ("adjacent landowners often have standing to challenge the government's failure to follow statutorily prescribed procedures"); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992) (organization of citizens has standing to challenge agency's failure to comply with NHPA). In sum, when the proper scope of review is applied, it is clear that Plaintiffs have standing under Article III to bring this action.

Conclusion

The Army Corps had the affirmative duty to assess "all aspects of the activity within its jurisdiction," which required the Army Corps to include in its "scope of analysis" all activities subject to Section 10 of the Rivers and Harbors Act. 33 Fed. Reg. at 3121. The Army Corps specifically found that "the existing structure" was "located in navigable waters" and required authorization under the Rivers and Harbors Act. AR 120. This finding was consistent with Army Corps regulations establishing its jurisdiction over structures "in or over navigable water," past permitting practice regarding Building 322, and case law holding that structures located over a pier in navigable waters were "indisputably within the Corps' jurisdiction." *Vieux Carre I*, 875 F.2d at 456; 33 C.F.R. § 320.2(b); AR 550, 564, 580, 582, 586, 588, 591.

Despite these findings and the Army Corps' well established legal duty to include all activities within its jurisdiction under the Rivers and Harbors Act in the "scope of analysis," the Army Corps, unreasonably and unlawfully, constricted the "scope of analysis" to an insignificant fraction of the project that lay within the agency's jurisdiction. By omitting more than 99% of the project within its jurisdiction from the "scope of analysis," the Army Corps effectively denied the meaningful review mandated by NEPA and NHPA. Even using the highly deferential standard of

review under the APA, the Court finds that the Army Corps' limitation of the "scope of analysis" to five concrete pile clusters was arbitrary, capricious, unreasonable, and contrary to law.

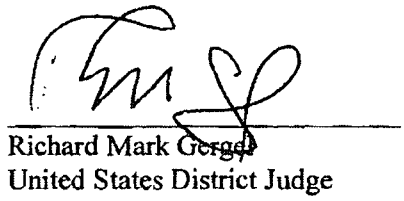
The Court is compelled under these circumstances to find that the authorization by the Army Corps for the Ports Authority to proceed by letter dated April 20, 2012, is unlawful and void. Since the duty to conduct the necessary review and make the appropriate findings based upon the administrative record rests by law with the Army Corps, remand is obviously necessary. The matter is therefore remanded to the Army Corps to place within its "scope of analysis" all activities within its jurisdiction (riverward of the OHWL), which the Court finds under this record must include, at a minimum, all activities concerning the Building 322 conversion project.[8] Once the Army Corps uses the proper "scope of analysis," the agency must undertake an appropriate NEPA and NHPA review, which should include such issues as (1) whether the passenger terminal project is entitled to a general permit or must undergo the individual permitting process; (2) whether, if an individual permit is required, the Corps must perform an EIS; and (3) whether the passenger terminal is the "type of activity that does not have the potential to cause effects on historic properties." 16 U.S.C. § 470f; 33 C.F.R. § 330.1; 36 C.F.R. § 800.3(a)(1); 40 C.F.R. §§ 1501.4, 1508.4, 1508.9. 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

[8] The Corps also contended at oral argument that the proposed passenger terminal was simply too "inchoate" for federal permit review. This is an odd argument since detailed renderings of the proposed structure are contained in the record and the proposed conversion project has been submitted and approved by the City of Charleston's Board of Architectural Review ("BAR"). Further, counsel for the Ports Authority acknowledged during oral argument that the proposed passenger terminal project is well beyond the concept stage and has been approved by the BAR.

analysis."

Therefore, the Court GRANTS Plaintiffs' motion for summary judgment, (Dkt. No. 58), DENIES Defendants' motions for summary judgment, (Dkt. Nos. 57, 60), and REMANDS this action to the agency for further action consistent with this order.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Judge

Charleston, South Carolina
September 18, 2013

Exhibit F

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 G

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 H

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

SWORN TO before me this

10th day of July, 2013.

(SEAL)

Notary Public for South Carolina
My Commission Expires:

My Commission Expires August 22, 2016

Exhibit 1

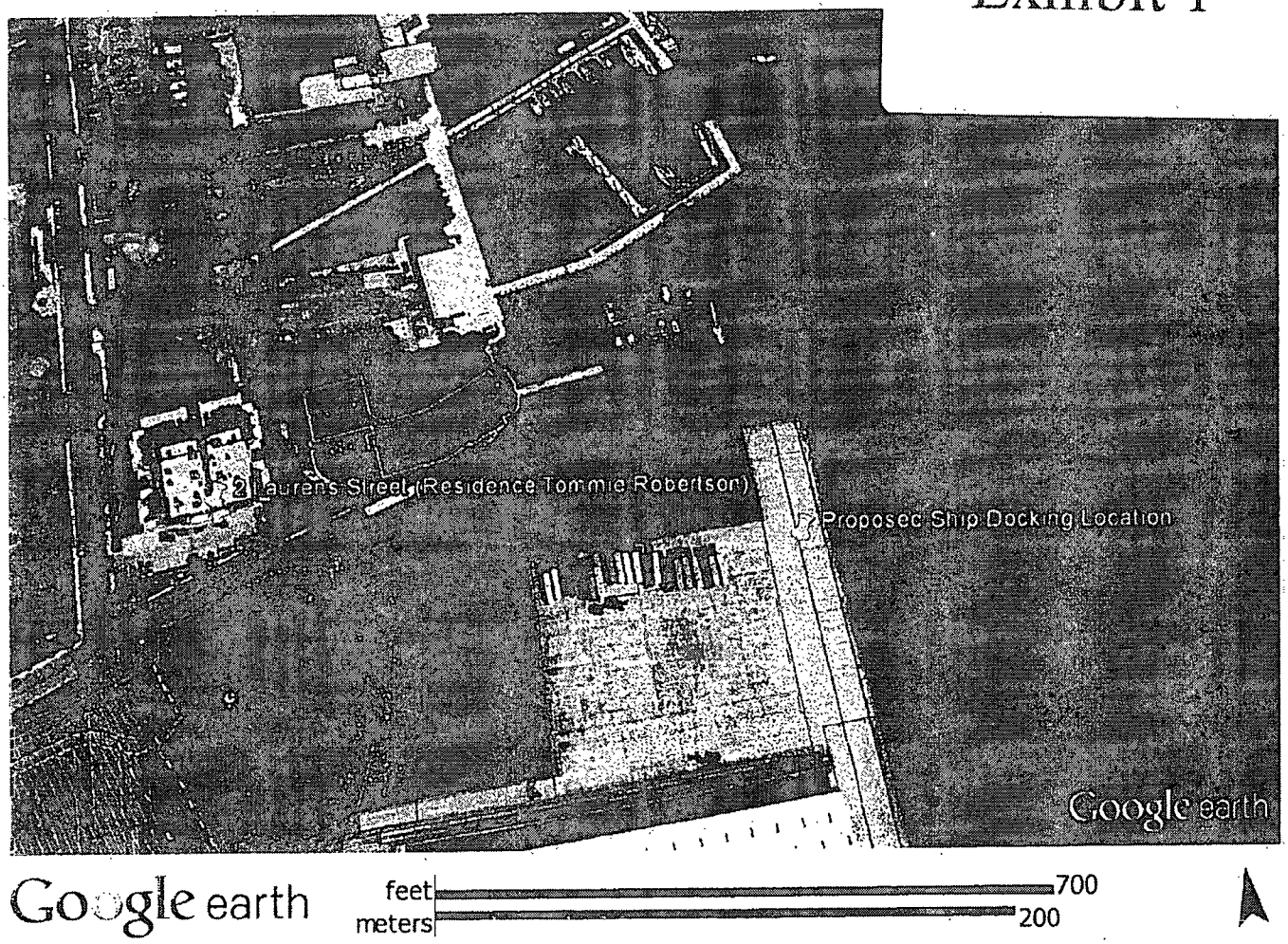

2 Lauren's Street (Residence Tommie Robertson)
Proposed Ship Docking Location
Google earth
Google earth
feet
meters
700
200

Exhibit I

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

Exhibit J

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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 KATHERINE ZIMMERMAN**

PERSONALLY APPEARED before me Katherine Zimmerman who being duly sworn deposes and says:

1. I live at 45 Sycamore Avenue, Unit 531, Charleston, South Carolina. I have lived at this address since 2006. I am over the age of twenty-one and have personal knowledge of the matters set forth in this declaration.

2. I was a Project Manager at the Coastal Conservation League ("CCL") starting in 2009. In 2013, I was promoted to Program Director. Prior to joining CCL, I worked at the National Oceanic and Atmospheric Administration's Coastal Services Center as a contractor on performance metrics and strategic planning. I also have several years of experience in environmental justice and water quality work, an M.S. in Environmental Studies, and a B.A. in English, Political Science, and Environmental Studies.

3. CCL is a nonprofit organization. Its mission is to protect the natural environment of the South Carolina coastal plain and to enhance health and the quality of life in our communities by working with individuals, businesses, and government to ensure balanced solutions.

4. Since I joined CCL, I have been deeply involved in community efforts to bring balance and reasonable limits to cruise operations in Charleston. My duties include: coordinating with local organizations such as neighborhood associations; researching and disseminating information to our members and the public at large regarding developments in cruise ship plans and operations; attending public hearings and forums to give feedback to the State Ports Authority ("SPA") in its planning efforts for its proposed new terminal; and coordinating with our legal counsel at the Southern Environmental Law Center ("SELC") to protect the legal rights of our members to environmental compliance and public participation in present and future cruise operations in Charleston.

5. The SPA has proposed a new cruise terminal in the heart of densely-populated and heavily visited downtown Charleston that will accommodate more and bigger cruise ships, and increase homeporting operations (including embarking/disembarking passengers and restocking of supplies at least twice a week). The new terminal includes nine acres of surface parking for cruise passengers, located on what is arguably the Southeast's most prime waterfront property. The new terminal includes a dock that is long enough to accommodate two Carnival *Fantasy*-sized cruise ships at once, and the port has purchased a passenger boarding ramp large enough to accommodate a 4,500-passenger ship.

6. CCL has been involved with community work on the issue of the cruise industry's environmental impacts in Charleston since 2009. CCL has approximately 5,000 members, as well as a list of almost 10,000 activists, approximately 1,400 of whom have requested regular

updates on the issue of cruise regulation and reasonable limits. Hundreds of our members and supporters have written letters to the editor, comments to the City of Charleston, and comments to the S.C. Department of Health and Environmental Control's ("DHEC") Office of Ocean and Coastal Resource Management ("OCRM") regarding existing cruise operations and SPA's planned new terminal. Hundreds of members of our organization and members of the public have also attended public meetings and hearings to express their concerns regarding the impacts that cruise operations have on air and water quality in Charleston, and the significant adverse impacts that a new cruise terminal located in the heart of downtown historic Charleston would have on the surrounding historic resources, neighborhoods, and environment. The location of the new terminal was not fully and publicly vetted, and alternatives to reduce environmental impacts were not considered. The cruise industry and the port are reaping the benefits, while the taxpayers (particularly in the City of Charleston), local businesses, land-based tourists, and environment are bearing the costs. We have repeatedly recommended a limit on the number and size of cruise visits, the use of shore-side power, access to pollution discharge logs, and an alternative site analysis – all of which could reduce impacts and injury to our members – but the city, port, and Carnival refuse, despite Carnival doing these things in other cruise port cities.

7. CCL has covered the issue of increased cruise operations and their effects on Charleston in many of its recent newsletters. We have focused on the topics of pollution, lawsuit and issue updates, and the economics of the cruise industry. In 2010, our Board chair submitted an op-ed explaining why Charleston deserves reasonable standards on cruises, which is predominantly based on business equity, because every other industry in Charleston is heavily regulated and limited, as are downtown homeowners. CCL's Executive Director, Dana Beach, addressed inaccuracies presented by the head of the Harbor Pilots on environmental regulation of cruise

ships. He also submitted a letter to the editor of the Natural Resources Defense Council's *OnEarth* magazine, praising the magazine for coverage of air pollution from cruise ships and explaining the problems experienced by us in Charleston. I wrote an op-ed on the reluctance of the SPA to respond to our FOIA requests and its attempts to charge large sums of money for very limited information. Mr. Beach has submitted several op-eds over the years, explaining our concerns with pollution from cruise ships and what we suggest for mitigation.

8. CCL has also sought to protect the legal rights of it and its members through the courts: in addition to this case, CCL has been involved in two other lawsuits addressing the impacts of cruise operations on the environment, historical resources, human health, and livability in Charleston. In June 2011, the CCL joined the Historic Ansonborough Neighborhood Association, the Charlestowne Neighborhood Association, and the Preservation Society of Charleston as plaintiffs in a lawsuit against Carnival Cruise Lines to enforce zoning, environmental, and nuisance laws limiting activities in downtown Charleston that depreciate value and degrade the environment and human well-being and health. In July of 2012, CCL and the Preservation Society of Charleston filed a lawsuit in federal district court challenging the Army Corps of Engineers' decision to approve the cruise terminal project under a nationwide permit without public review. The federal judge found that the Corps had unlawfully constricted its scope of analysis when deciding to approve the project under a nationwide permit. The court declared the Corps' authorization of the new terminal project void, and the Corps must now consider the entire cruise terminal project when determining whether an individual permit is required and what level of public review is necessary.

9. One of the primary environmental concerns associated with cruise operations are impacts on water quality. Unfortunately, cruise regulations at both the international and national levels

are not rigorous. Raw sewage, macerated garbage, and untreated graywater can be discharged once the ship is beyond three miles of shore, and "treated" wastewater can be discharged closer to shore ("treated" simply means the ship has a basic Marine Sanitation Device on board, but not necessarily that it is working, and the EPA found in Alaska that "treated" pollutants from Marine Sanitation Devices are more polluting than what flows into land-based treatment systems). The impacts of cruise ships on water quality have been well-documented. In 2008, the EPA released its *Cruise Ship Discharge Assessment Report*, which details the types and amounts of pollutants discharged by cruise ships, discusses issues with current technologies for treating wastewater, and compares the benefits of alternative wastewater treatment technologies. The EPA report is available in its entirety at http://water.epa.gov/polwaste/vwd/upload/2009_01_28_oceans_cruise_ships_0812cruiseshipdischargeassess.pdf. The Congressional Research Service ("CRS") also prepared a report in 2008 entitled *Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues* that summarizes the numerous waste streams generated by cruise ships, what risk they pose to human health, and why cruise ships pose a greater concern relative to other seagoing vessels for some of those waste streams. Finally, a 2009 report prepared by Ross A. Klein, Ph.D, for the non-profit group Friends of the Earth entitled *Getting a Grip on Cruise Ship Pollution* builds off of the 2008 EPA report and details the current issues associated with each form of cruise ship pollution and steps that could be taken to reduce impacts in the future. True and correct excerpts of the CRS and Dr. Klein reports are attached hereto as Exhibits A and B, respectively. Dr. Klein also gave oral testimony in 2012 before the Senate Committee on Commerce, Science, and Transportation regarding oversight of the cruise industry where he discussed the water pollution generated by cruise ships and opportunities for waste reduction. That testimony is included in

the record at DHEC-SPA 001632-45. Discharges of pollutants from cruise ships in area waters, legal or otherwise, present recognized threats to water quality that CCL seeks to protect on behalf of and in concert with its members.

10. Air quality impacts resulting from cruise operations are significant. In 2010, EPA promulgated new regulations to reduce emissions from the largest marine diesel engines, including those used in cruise ships. The regulation governing a phasing in of cleaner ship fuel will require a fuel sulfur standard of 0.1 percent (1,000 parts per million) by the year 2015, which the EPA expects to reduce particulate matter and sulfur oxide emissions by more than 85 percent from today's levels. However, our calculations show that when the Carnival *Fantasy* is idling in port for one day, even if it were burning the cleanest required fuel, it still emits the sulfur dioxide equivalent of more than 34,000 idling trucks. CCL commissioned a study by Dr. James Corbett showing that shore-side power would significantly reduce emissions of not only sulfur dioxide, but also of other major pollutants. A true and correct copy of that study is attached hereto as Exhibit C. Both the CRS report and Dr. Klein's report referenced above (Exhibits A and B) also discuss cruise ships' impacts on air quality and opportunities to reduce impacts. Notably, air pollution is not limited to the cruise ships themselves. Air pollution is also caused by the cars and trucks that take persons, supplies, and waste to and from the cruise homebasing operation. Traffic backups caused by this cruise traffic also result in increased air pollution in the downtown area near Union Pier Terminal. CCL seeks to reduce all air pollution from and caused by cruise operations on behalf of itself and its members.

11. SPA has occasionally stated that ships will continue to call at Union Pier Terminal regardless of whether the new cruise terminal is built. Specifically, SPA says that if the new terminal is not constructed, cargo ships will call at levels of the past, when BMW conducted its

Roll-on/Roll-off ("Ro-Ro") operation at Union Pier, even though BMW moved to Columbus Street Terminal in 2011. SPA has contended that a new cruise terminal would significantly reduce air pollution compared to a current baseline, which it has implied involves hundreds of very large Ro-Ro ships calling at UPT every year. I recently reviewed the online archives of the Charleston *Post and Courier,* which publishes information provided by SPA on ship calls at Union Pier and other terminals. I also went to the Charleston County Public Library and reviewed all the 2012 editions of the *Post and Courier* Business and Money sections on microfilm in order to cross-check my result. I found that, in 2012, there was mention of 28 cruise ship calls and only 3 cargo calls at Union Pier Terminal. The Post and Courier library stated that SPA's provision of information is incomplete, as is obvious by the low number of cruise visits reported (the actual 2012 number was 90). However, the figures available suggest that the ratio of cargo ships to cruise ships is 1:9, and multiplying the reported figure by the figure needed to provide the number of cruise ship calls would yield a figure of at most 12 cargo ship calls – most of which are not large Ro-Ro ships, if any. That low number is confirmed by my personal observations. My office is almost adjacent to and within visual eyesight of Union Pier Terminal. It appears to me that the number of cargo calls there in 2012 and 2013 was significantly less than 100, and that the only cargo vessel making routine calls is a relatively small vessel loading steel wire. Thus, current cargo emissions are already far below what they were even five years ago at Union Pier, and emissions would be lowered even further if cruise ship activity were to transfer to a different viable location.

12. All of these issues should have been considered by DHEC as part of its review including the 401 water quality certification process. *See* S.C. Code Ann. Regs. 61-101(F) (when reviewing applications for 401 water quality certification, the agency must consider "whether

there are feasible alternatives to the activity" and "all potential water quality impacts of the project, both direct and indirect"). However, DHEC did not engage in these issues in any detail and failed to consider the serious environmental impacts of cruise operations, as well as practical alternatives that could significantly reduce these impacts and protect Charleston's environmental and historical resources.

Katherine S. Zimmerman

Katherine S. Zimmerman

SWORN TO before me this

21st day of January, 2014.

_____ (SEAL)
Notary Public for South Carolina
My Commission Expires: Jan. 20, 2019

Exhibit A

Order Code RL32450

CRS Report for Congress

Cruise Ship Pollution: Background, Laws and Regulations, and Key Issues

Updated February 6, 2008

Claudia Copeland
Specialist in Resources and Environmental Policy
Resources, Science, and Industry Division

Prepared for Members and Committees of Congress

Congressional Research Service

R.002608

cruise ship discharges and waste management approaches. As part of that effort, in 2000 EPA issued a background document with preliminary information and recommendations for further assessment through data collection and public information hearings.[8] Subsequently, in December 2007, the agency released a draft cruise ship discharge assessment report as part of its response to the petition. This report summarized findings of recent data collection activities (especially from cruise ships operating in Alaskan waters). EPA expects to issue a completed report by the end of 2008, and at that time will identify a range of options and alternatives to address cruise ship waste streams.[9]

This report presents information on issues related to cruise ship pollution. It begins by describing the several types of waste streams and contaminants that cruise ships may generate and release. It identifies the complex body of international and domestic laws that address pollution from cruise ships, as there is no single law in this area. Some wastes are covered by international standards, some are subject to U.S. law, and for some there are gaps in law, regulation, or possibly both. The report then describes federal and state legislative activity concerning cruise ships in Alaskan waters and recent activities in a few other states. Cruise ship companies have taken a number of steps to prevent illegal waste discharges and have adopted waste management plans and practices to improve their environmental operations. Environmental critics acknowledge these initiatives, even as they have petitioned the federal government to strengthen existing regulation of cruise ship wastes. Environmental groups endorsed companion bills in the 109th Congress (the Clean Cruise Ship Act, S. 793/H.R. 1636) that would have required stricter standards to control wastewater discharges from cruise ships. Congress did not act on either bill.

Cruise Ship Waste Streams

Cruise ships generate a number of waste streams that can result in discharges to the marine environment, including sewage, graywater, hazardous wastes, oily bilge water, ballast water, and solid waste. They also emit air pollutants to the air and water. These wastes, if not properly treated and disposed of, can be a significant source of pathogens, nutrients, and toxic substances with the potential to threaten human health and damage aquatic life. It is important, however, to keep these discharges in some perspective, because cruise ships represent a small — although highly visible — portion of the entire international shipping industry, and the waste streams described here are not unique to cruise ships. However, particular types of wastes, such as sewage, graywater, and solid waste, may be of greater concern for cruise ships relative to other seagoing vessels, because of the large numbers of passengers and crew that cruise ships carry and the large volumes of wastes that they produce. Further, because cruise ships tend to concentrate their activities in specific

---

[8] EPA White Paper.

[9] U.S. Environmental Protection Agency, Office of Water, "Draft Cruise Ship Discharge Assessment Report," EPA842-R-07-005, December 2007. Hereafter, EPA Draft Discharge Assessment Report. See: U.S. Environmental Protection Agency, "Draft Cruise Ship Discharge Assessment Report, Notice of availability and request for public comments," *Federal Register*, vol. 72, no. 244, Dec. 20, 2007, p. 72353.

coastal areas and visit the same ports repeatedly (especially Florida, California, New York, Galveston, Seattle, and the waters of Alaska), their cumulative impact on a local scale could be significant, as can impacts of individual large-volume releases (either accidental or intentional).

Blackwater is sewage, wastewater from toilets and medical facilities, which can contain harmful bacteria, pathogens, diseases, viruses, intestinal parasites, and harmful nutrients. Discharges of untreated or inadequately treated sewage can cause bacterial and viral contamination of fisheries and shellfish beds, producing risks to public health. Nutrients in sewage, such as nitrogen and phosphorous, promote excessive algal growth, which consumes oxygen in the water and can lead to fish kills and destruction of other aquatic life. A large cruise ship (3,000 passengers and crew) generates an estimated 15,000 to 30,000 gallons per day of blackwater waste.[10]

Graywater is wastewater from the sinks, showers, galleys, laundry, and cleaning activities aboard a ship. It can contain a variety of pollutant substances, including fecal coliform bacteria, detergents, oil and grease, metals, organics, petroleum hydrocarbons, nutrients, food waste, and medical and dental waste. Sampling done by EPA and the state of Alaska found that untreated graywater from cruise ships can contain pollutants at variable strengths and that it can contain levels of fecal coliform bacteria several times greater than is typically found in untreated domestic wastewater.[11] Graywater has potential to cause adverse environmental effects because of concentrations of nutrients and other oxygen-demanding materials, in particular. Graywater is typically the largest source of liquid waste generated by cruise ships (90%-95% of the total). Estimates of graywater range from 30 to 85 gallons per day per person, or 90,000 to 255,000 gallons per day for a 3,000-person cruise ship.[12]

Solid waste generated on a ship includes glass, paper, cardboard, aluminum and steel cans, and plastics. It can be either non-hazardous or hazardous in nature. Solid waste that enters the ocean may become marine debris, and it can then pose a threat to marine organisms, humans, coastal communities, and industries that utilize marine waters. Cruise ships typically manage solid waste by a combination of source reduction, waste minimization, and recycling. However, as much as 75% of solid waste is incinerated on board, and the ash typically is discharged at sea, although some is landed ashore for disposal or recycling. Marine mammals, fish, sea turtles, and birds can be injured or killed from entanglement with plastics and other solid waste that may be released or disposed off of cruise ships. On average, each cruise ship passenger generates at least two pounds of non-hazardous solid waste per day and disposes of two bottles and two cans.[13] With large cruise ships carrying several thousand passengers, the amount of waste generated in a day can be massive. For a

---

[10] The Ocean Conservancy, "Cruise Control, A Report on How Cruise Ships Affect the Marine Environment," May 2002, p. 13. Hereafter, "Cruise Control."

[11] EPA Draft Discharge Assessment Report, pp. 3-5 - 3-6.

[12] Cruise Control, p. 15.

[13] The Center for Environmental Leadership in Business, "A Shifting Tide, Environmental Challenges and Cruise Industry Responses," p. 14. Hereafter, "Shifting Tide."

large cruise ship, about 8 tons of solid waste are generated during a one-week cruise.[14] It has been estimated that 24% of the solid waste generated by vessels worldwide (by weight) comes from cruise ships.[15] Most cruise ship garbage is treated on board (incinerated, pulped, or ground up) for discharge overboard. When garbage must be off-loaded (for example, because glass and aluminum cannot be incinerated), cruise ships can put a strain on port reception facilities, which are rarely adequate to the task of serving a large passenger vessel (especially at non-North American ports).[16]

Cruise ships produce **hazardous wastes** from a number of on-board activities and processes, including photo processing, dry-cleaning, and equipment cleaning. Types of waste include discarded and expired chemicals, medical waste, batteries, fluorescent lights, and spent paints and thinners, among others. These materials contain a wide range of substances such as hydrocarbons, chlorinated hydrocarbons, heavy metals, paint waste, solvents, fluorescent and mercury vapor light bulbs, various types of batteries, and unused or outdated pharmaceuticals. Although the quantities of hazardous waste generated on cruise ships are small, their toxicity to sensitive marine organisms can be significant. Without careful management, these wastes can find their way into graywater, bilge water, or the solid waste stream.

On a ship, oil often leaks from engine and machinery spaces or from engine maintenance activities and mixes with water in the bilge, the lowest part of the hull of the ship. Oil, gasoline, and byproducts from the biological breakdown of petroleum products can harm fish and wildlife and pose threats to human health if ingested. Oil in even minute concentrations can kill fish or have various sub-lethal chronic effects. **Bilge water** also may contain solid wastes and pollutants containing high amounts of oxygen-demanding material, oil and other chemicals. A typical large cruise ship will generate an average of 8 metric tons of oily bilge water for each 24 hours of operation.[17] To maintain ship stability and eliminate potentially hazardous conditions from oil vapors in these areas, the bilge spaces need to be flushed and periodically pumped dry. However, before a bilge can be cleared out and the water discharged, the oil that has been accumulated needs to be extracted from the bilge water, after which the extracted oil can be reused, incinerated, and/or off-loaded in port. If a separator, which is normally used to extract the oil, is faulty or is deliberately bypassed, untreated oily bilge water could be discharged directly into

---

[14] Bluewater Network, "Cruising for Trouble: Stemming the Tide of Cruise Ship Pollution," March 2000, p. 5. Hereafter, "Cruising for Trouble." A report prepared for an industry group estimated that a 3,000-person cruise ship generates 1.1 million gallons of graywater during a seven-day cruise. Don K. Kim, "Cruise Ship Waste Dispersion Analysis Report on the Analysis of Graywater Discharge," presented to the International Council of Cruise Lines, September 14, 2000.

[15] National Research Council, Committee on Shipboard Wastes, *Clean Ships, Clean Ports, Clean Oceans: Controlling Garbage and Plastic Wastes at Sea* (National Academy Press, 1995), Table 2-3, pp. 38-39.

[16] Ibid., p. 126.

[17] "Shifting Tide," p. 16.

the ocean, where it can damage marine life. A number of cruise lines have been charged with environmental violations related to this issue in recent years.

Cruise ships, large tankers, and bulk cargo carriers use a tremendous amount of **ballast water** to stabilize the vessel during transport. Ballast water is often taken on in the coastal waters in one region after ships discharge wastewater or unload cargo, and discharged at the next port of call, wherever more cargo is loaded, which reduces the need for compensating ballast. Thus, it is essential to the proper functioning of ships (especially cargo ships), because the water that is taken in compensates for changes in the ship's weight as cargo is loaded or unloaded, and as fuel and supplies are consumed. However, ballast water discharge typically contains a variety of biological materials, including plants, animals, viruses, and bacteria. These materials often include non-native, nuisance, exotic species that can cause extensive ecological and economic damage to aquatic ecosystems. Ballast water discharges are believed to be the leading source of invasive species in U.S. marine waters, thus posing public health and environmental risks, as well as significant economic cost to industries such as water and power utilities, commercial and recreational fisheries, agriculture, and tourism.[18] Studies suggest that the economic cost just from introduction of pest mollusks (zebra mussels, the Asian clam, and others) to U.S. aquatic ecosystems is more than $6 billion per year.[19] These problems are not limited to cruise ships, but there is little cruise-industry specific data on the issue, and further study is needed to determine cruise ships' role in the overall problem of introduction of non-native species by vessels.

Air pollution from cruise ships is generated by diesel engines that burn high sulfur content fuel, producing sulfur dioxide, nitrogen oxide and particulate matter, in addition to carbon monoxide, carbon dioxide, and hydrocarbons. Diesel exhaust has been classified by EPA as a likely human carcinogen. EPA recognizes that these emissions from marine diesel engines contribute to ozone and carbon monoxide nonattainment (i.e., failure to meet air quality standards), as well as adverse health effects associated with ambient concentrations of particulate matter and visibility, haze, acid deposition, and eutrophication and nitrophication of water.[20] EPA estimates that large marine diesel engines accounted for about 1.6% of mobile source nitrogen oxide emissions and 2.8% of mobile source particulate emissions in the United States in 2000. Contributions of marine diesel engines can be higher on a port-specific basis.

One source of environmental pressures on maritime vessels recently has come from states and localities, as they assess the contribution of commercial marine vessels to regional air quality problems when ships are docked in port. For instance,

---

[18] Statement of Catherine Hazelwood, The Ocean Conservancy, "Ballast Water Management: New International Standards and NISA Reauthorization," Hearing, House Transportation and Infrastructure Subcommittee on Water Resources and Environment, 108th Cong., 2nd sess., March 25, 2004.

[19] David Pimentel, Lori Lach, Rodolfo Zuniga, and Doug Morrison, "Environmental and Economic Costs Associated with Non-indigenous Species in the United States," presented at AAAS Conference, Anaheim, CA, January 24, 1999.

[20] 68 *Federal Register* 9751, 9753, February 28, 2003.

large marine diesel engines are believed to contribute 7% of mobile source nitrogen oxide emissions in Baton Rouge/New Orleans. Ships can also have a significant impact in areas without large commercial ports: they contribute about 37% of total area nitrogen oxide emissions in the Santa Barbara area, and that percentage is expected to increase to 61% by the year 2015.[21] Again, there is little cruise-industry specific data on this issue. They comprise only a small fraction of the world shipping fleet, but cruise ship emissions may exert significant impacts on a local scale in specific coastal areas that are visited repeatedly. Shipboard incinerators also burn large volumes of garbage, plastics, and other waste, producing ash that must be disposed of. Incinerators may release toxic emissions as well.

Applicable Laws and Regulations

The several waste streams generated by cruise ships are governed by a number of international protocols and U.S. domestic laws, regulations and standards, which are described in this section, but there is no single law or regulation. Moreover, there are overlaps in some areas of coverage, gaps in other areas, and differences in geographic jurisdiction, based on applicable terms and definitions.

International Legal Regime

The International Maritime Organization (IMO), a body of the United Nations, sets international maritime vessel safety and marine pollution standards. It consists of representatives from 152 major maritime nations, including the United States. The IMO implements the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978, known as MARPOL 73/78. Cruise ships flagged under countries that are signatories to MARPOL are subject to its requirements, regardless of where they sail, and member nations are responsible for vessels registered under their respective nationalities.[22] Six Annexes of the Convention cover the various sources of pollution from ships and provide an overarching framework for international objectives, but they are not sufficient alone to protect the marine environment from waste discharges, without ratification and implementation by sovereign states.

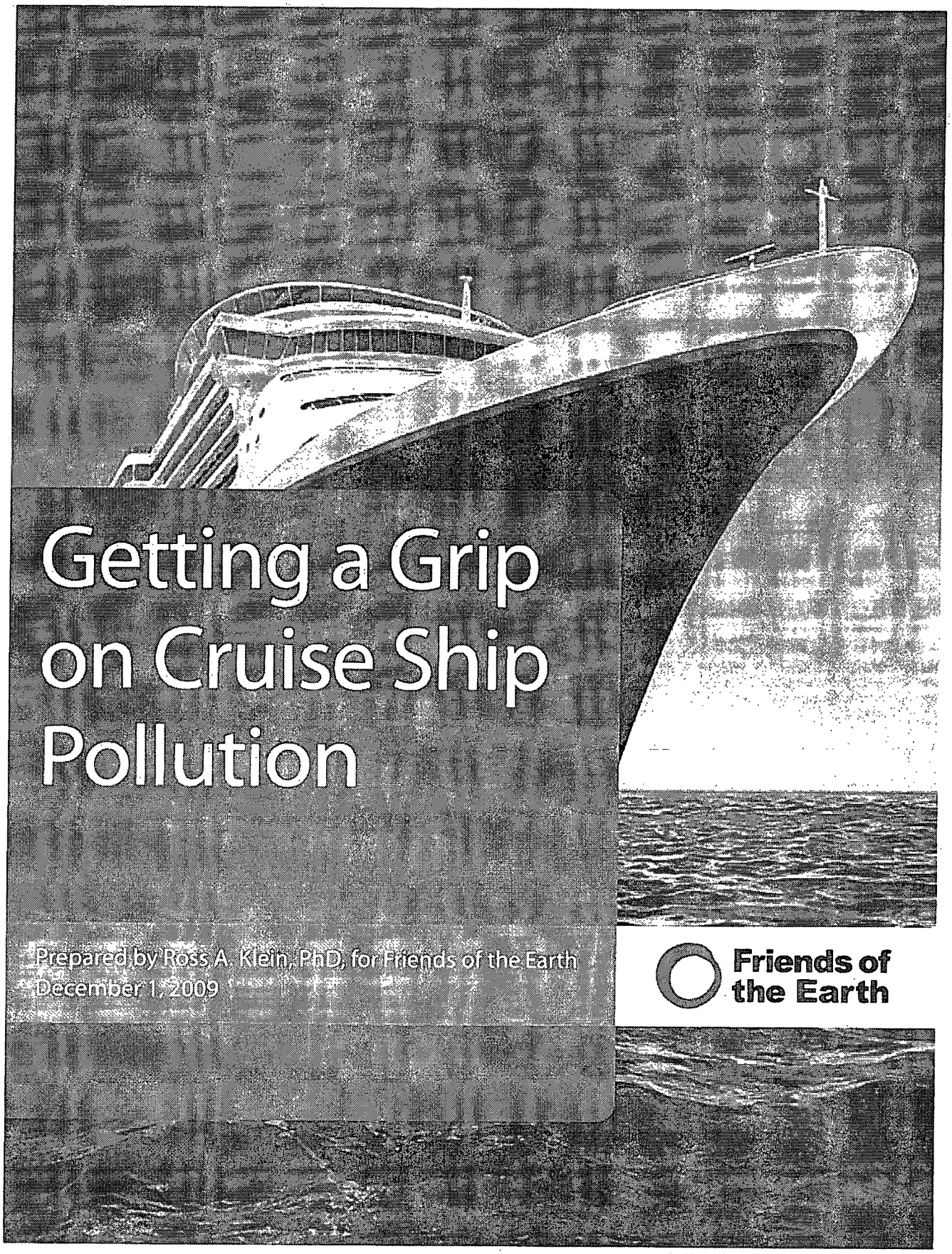
- Annex I deals with regulations for the prevention of pollution by oil.
- Annex II details the discharge criteria and measures for the control of pollution by noxious liquid substances carried in bulk.
- Annex III contains general requirements for issuing standards on packing, marking, labeling, and notifications for preventing pollution by harmful substances.
- Annex IV contains requirements to control pollution of the sea by sewage.

---

[21] Ibid., pp. 9751, 9756.

[22] The majority of cruise ships are foreign-flagged, primarily in Liberia and Panama. Both of these countries have ratified all six of the MARPOL annexes. For information, see [http://www.imo.org/].

Exhibit B



Getting a Grip on Cruise Ship Pollution

Prepared by Ross A. Klein, PhD, for Friends of the Earth

December 1, 2009

Friends of the Earth

II. THE CRUISE SHIP POLLUTION PROBLEM

A cruise ship is not the most environmentally friendly form of transportation. On average, a cruise ship discharges three times more carbon emissions than aircraft, trains, and passenger ferries:

"Carnival, which comprises 11 cruise lines, said in its annual environmental report that its ships, on average, release 712 kg of CO2 per kilometer ... This means that 401g of CO2 is emitted per passenger per kilometer, even when the boat is entirely full. This is 36 times greater than the carbon footprint of a Eurostar passenger and more than three times that of someone traveling on a standard Boeing 747 or a passenger ferry."[7]

But the problem is greater than just CO2. A moderate-sized cruise ship on a one week voyage with 2,200 passengers and 800 crewmembers is estimated to generate up to 210,000 gallons of human sewage (this would fill approximately ten backyard swimming pools), one million gallons (the equivalent of 40 more swimming pools) of gray water (water from sinks, baths, showers, laundry, and galleys), eight tons of garbage (the weight of a school bus), more than 130 gallons of hazardous waste, and 25,000 gallons of oily bilge water.[8]

The cruise industry frequently claims that its pollution is only a small part of the problem given the proportionately larger number of other ocean-going vessels and that these vessels, too, produce waste. While this may be true for waste streams such as oily bilge water and emissions from burning fuel, it is not the case with other pollution. With its large number of passengers and crew, wastes such as sewage, gray water, solid waste, and air emissions from incinerators are substantially greater on cruise ships than on other ships – a U.S. Congressional Research Service report estimates that 24 percent of the solid waste generated by vessels worldwide (by weight) comes from cruise ships.[9] In addition, because cruise ship operations tend to concentrate in the same geographic locations and along the same sea routes, their cumulative impact on local areas can be significant. Add to this the potential for, and reality of, accidental discharges and the environmental impacts of cruise ships are a serious concern.

A. CRUISE SHIP WASTE STREAMS IDENTIFIED

1. Cruise Ship Water Pollution

a. BLACK WATER

Black water, otherwise known as human sewage, is the waste from cruise ship toilets and medical facilities. A cruise ship produces more than eight gallons of sewage per day per person.[10] The cumulative amount per day for a ship such as Royal Caribbean's *Explorer of the Seas*[11] is more than 40,000 gallons; almost 300,000 gallons on a one week cruise. These wastes contain harmful bacteria, pathogens, disease, viruses, intestinal parasites and harmful nutrients. If not adequately treated they can cause bacterial and viral contamination of fisheries and shellfish beds.[12] In addition, nutrients in sewage, such as nitrogen and phosphorous, promote algal growth. Algae consume oxygen in the water that can be detrimental or lethal to fish and other aquatic life.[13]

Sewage from cruise ships is a critical problem, compounded by the fact that it is excluded from the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting requirements and ignored beyond three nautical miles from shore. The Clean Water Act's provision for sewage discharges from vessels sets treatment standards

that are inadequate, and now outdated, and does not require permits or reporting. Further, the discharge of sewage from vessels in coastal waters beyond three miles is not regulated.

Sewage Treatment:

i. Marine Sanitation Devices. Sewage from a cruise ship traditionally has been treated by a Type II marine sanitation device (MSD). Under Section 312 of the U.S. Clean Water Act, commercial and recreational vessels (including cruise ships) with installed toilets are required to have an MSD. Type II MSDs are the most common type of wastewater treatment systems on cruise ships and consist of flow-through devices that break up and chemically or biologically disinfect waste before discharge. Within three nautical miles of shore vessels must treat sewage with an approved Type II MSD prior to discharge. Beyond three nautical miles, discharge of raw sewage is allowed. The U.S. Environmental Protection Agency's (EPA) regulations governing MSDs have not been updated since they were instituted in 1976.

Type II MSDs are supposed to produce effluent containing no more than 200 fecal coliform for 100 milliliters and no more 150 milligrams per liter of suspended solids. [14] Whether MSDs achieve that standard was called into question in 2000 when the state of Alaska found that 79 of 80 samples from cruise ships were out of compliance with the standard. According to the Juneau port commander for the Coast Guard, the results were so extreme that it might be necessary to consider possible design flaws and capacity issues with the Coast Guard-approved treatment systems. [15] As seen in a 2008 report from the U.S. EPA, the problems identified in 2000 with MSDs continue today (see Appendix 1). [16]

ii. Advanced Wastewater Treatment Systems (AWTS). The cruise industry in recent years has adopted the use of AWTS (an advanced form of Type II Marine Sanitation Device) on many ships – most often ships visiting Alaska's Inside Passage where such systems are required for continuous discharge in state waters. A ship with an AWTS avoids the need to travel outside Alaska state waters to discharge treated sewage. Installation of AWTS for ships visiting other waters with less stringent or no regulations has been at a much slower pace. For example, Carnival Corporation (which includes Carnival Cruise Lines, Holland America Lines, and Princess Cruises) had AWTS installed on slightly less than one half of its fleet at the end of 2008. But Carnival Cruise Lines, which sends only one ship to Alaska per season, has installed an AWTS on only one of its twenty-three ships. [17] The corporation's spokesperson says they try to make sure AWTS are included on ships that go to Alaska and to other sensitive areas.

AWTS are a vast improvement over MSDs — yielding what the industry refers to as drinking-water quality effluent. However this terminology must be treated with skepticism. Such water cannot be recycled for onboard human consumption nor can it be used in the laundry because sheets and towels apparently turn gray. [18] Both the EPA and Alaska have found that even the best systems still had difficulty with a number of constituents (see Appendix 2 and Table 1 below). A key problem is the AWTS do not adequately address nutrient loading, which means they pose similar problems as MSDs with regard to nitrogen and phosphorous. In addition, tests in Alaska have shown levels of copper, nickel, zinc, and ammonia that are higher than the state's water quality standards. [19] As seen in Appendix 2, AWTS also exceed permitted concentrations of chlorine and tetrachlorethylene. As a result, 12 of 20 (60%) ships permitted to discharge in Alaska waters [20] violated discharge limits in 2008, logging 45 violations involving 7 pollutants (see Table 1). [21] These include ammonia, biological oxygen demand, chlorine, copper, fecal coliform, pH, and zinc. [22] 2009 was even worse, with 13 of 18 (72%) ships permitted to discharge in Alaskan waters violating Alaska discharge limits during the season, racking up 66 violations involving 9 pollutants (see Table 1). Each violation is liable for a fine of up to $100,000. It is noteworthy that nearly 30 percent of ships discharging in Alaska were able to meet the water quality standards.

Royal Caribbean stated in 2003 that, "two of the three prototype systems on our ships today have proven unsatisfactory and we will replace them with even newer prototypes."[23] Moreover, given that these systems are not regularly tested, except by Alaska, and that they are prone to breakdown and require constant maintenance and care, there is a need to be cautious with regard to where the effluent from an AWTS can be released. The need for caution is further supported by a 2007 study by the Washington State Division of Environmental Health that found, "AWTS can effectively remove bacteria but may not eliminate viruses that cause illnesses."[24] The report recommends no discharges should occur within 0.5 nautical miles of bivariate shellfish beds that are recreationally harvested or commercially approved for harvest, and that cruise ships should withhold discharge when a system upset occurs.

Even with their limitations, AWTS are a marked improvement over Type II MSDs. In order to protect all U.S. waters from the harms associated with sewage, meaningful and reliable standards that support AWTS should be instituted within the entire U.S. Exclusive Economic Zone (EEZ). In addition, increased monitoring and reporting standards for treated sewage discharges are necessary to ensure reliability in operation of treatment systems.

Table 1: Alaska 2008 and 2009 Wastewater Notice of Violation Summary*

Pollutant	Number of Violations 2008	Number of Violations 2009
Ammonia	21	31
Copper	8	8
Zinc	7	11
Biological Oxygen Demand	4	4
Fecal Coliform	2	6
pH	2	3
Chlorine	1	1
Nickel	-	1
Total Suspended Solids	-	1
Total	45	66

*Companies and ships cited in 2008 (number of violations in parentheses) include Princess Cruises: *Coral Princess* (3), *Dawn Princess* (1), *Diamond Princess* (7), *Golden Princess* (2), *Island Princess* (4), *Sapphire Princess* (6), *Star Princess* (7), *Sun Princess* (1); Holland America Line: *Westerdam* (10); Norwegian Cruise Line: *Norwegian Pearl* (1); Regent Seven Seas: *Seven Seas Mariner* (1); Silversea Cruises: *Silver Shadow* (2). Companies and ships cited in 2009 (number of violations in parentheses) include Princess Cruises: *Coral Princess* (1), *Diamond Princess* (6), *Golden Princess* (8), *Island Princess* (10), *Pacific Princess* (3), *Sapphire Princess* (21), *Sea Princess* (6); Holland America Line: *Ryndam* (2), *Statendam* (1), *Volendam* (3); Norwegian Cruise Line: *Norwegian Pearl* (2); Royal Caribbean Int'l: *Serenade of the Seas* (1); Silversea Cruises: *Silver Shadow* (2).

b. SEWAGE SLUDGE.

Most Type II MSDs and AWTS filter solids from sewage as part of treatment. This yields on average 4,000 gallons of sewage sludge per day;[25] cumulatively, it adds up quickly. It is estimated that 4.2 million gallons of sewage sludge are produced every year by ships as they pass through Washington State waters on their way to Alaska[26] – this is small compared to what cruise ships generate outside Washington state waters. In some cases (about one in sixteen ships with an AWTS), sewage sludge is dewatered and then incinerated. In other cases sludge is dumped at sea. Most jurisdictions permit sludge to be dumped within three miles of shore; in California a ship must be beyond three miles from shore and in Wash-

ington beyond twelve miles.[27] In either case, these sludges have a high oxygen demand and are detrimental to sea life. Sewage sludge poses the same problem as sewage, but in a more concentrated form.

A report issued in August 2003 by the California Environmental Protection Agency and the California state Water Resources Control Board said "it found 'particularly troubling' the discharging of sludge 12 miles out to sea."[28] This concern is in stark contrast to regulations elsewhere that define sewage sludge as treated sewage and permit its discharge within three miles of the U.S. shoreline. The need for minimum regulations applicable to the entire U.S. coastline is obvious.

One option is to require sewage sludge to be dewatered and incinerated onboard, however incineration creates an air quality problem and the ash must be disposed of somewhere. Dumping the ash overboard raises new problems. Another option is to require sewage sludge to be held onboard and offloaded for treatment in port. Washington State has in recent years explored the commercial use and value of sewage sludge as a fertilizer, but no clear plans have yet been made.[29] Clearly, a workable solution to the huge volume of sludge being dumped into the waters of the U.S. – 28,000 gallons per week on an average-sized cruise ship – must be identified and implemented.

c. GRAY WATER.

Gray water is wastewater from sinks, showers, galleys, laundry, and cleaning activities aboard a ship. It is the largest source of liquid waste from a cruise ship: as much as 90 gallons per day per person; nearly half a million gallons per day for a ship such as *Explorer of the Seas.*[30] Like sewage, gray water can contain a variety of pollutants. These include fecal coliform bacteria, detergents, oil and grease, metals, organics petroleum hydrocarbons, nutrients, food waste and medical and dental waste.[31] The greatest threat posed by gray water is from nutrients and other oxygen-demanding materials. The cruise industry characterizes gray water as innocuous, at worst. A 2008 report from the EPA disagrees (see Appendix 3). It states:

"Sampling done by EPA and the state of Alaska found that untreated graywater from cruise ships can contain pollutants at variable strengths and that it can contain levels of fecal coliform bacteria several times greater than is typically found in untreated domestic wastewater. Graywater has potential to cause adverse environmental effects because of concentrations of nutrients and other oxygen-demanding materials, in particular."[32]

As recently as the 1980s ships were designed with pipes that directly discharged gray water overboard no matter where the ship was. Today gray water is more commonly collected in a holding tank and discharged, through a screen that filters out plastics, when a ship is one mile from shore. Some vessels with AWTS mix gray water with sewage and they are treated together. This is not always possible. Gray water lacks sufficient nutrients for a bioreactor system to properly function so ships using this design release their gray water with limited or no treatment.

Except for the Great Lakes, Maine, and Alaska, gray water was until recently largely unregulated. However, effective February 6, 2009, pursuant to a CWA National Pollutant Discharge Elimination System (NPDES) Vessels General Permit issued by U.S. EPA (VGP), cruise ships must meet treatment standards for gray water as well as 25 other types of incidental vessel discharges – from ballast water to deck runoff. Operational limits in the permit prohibit the discharge of untreated gray water within one nautical mile (nm) of shore. Gray water discharges are only allowed within one nm if they meet specific effluent limits and can not be discharged in waters of marine sanctuaries, units of the National Park System, units of the National Wildlife Refuge System, National Wilderness areas, and national wild and scenic rivers system components. Discharges of untreated gray water are allowed between one nm and three nm of shore if the vessel is traveling at a speed of

six knots or more.. [33] Beyond 3nm there are no restrictions.

The VGP is a positive step. However, there is room for improvement because the VGP only regulates gray water out to three nautical miles. As illustrated in Appendix 3, untreated gray water falls woefully short of National Recommended Water Quality Standards and the Title XIV Standard for Continuous Discharge in Alaska Waters, in particular for fecal coliform, chlorine, biological oxygen demand, suspended solids, ammonia, copper, nickel, zinc, and tretrachloroethylene. This suggests the need for upgrading and regular testing of systems treating gray water, and for extending the area in which gray water discharges are prohibited. As well, it is necessary to perform system inspection and monitoring more frequently than required in the NPDES VGP, which only requires annual inspection and evaluation by the U.S. Coast Guard or the ship's classification society.

d. SOLID WASTE.

A cruise ship produces a large volume of non-hazardous solid waste. This includes huge volumes of plastic, paper, wood, cardboard, food waste, cans, glass, and the variety of other wastes disposed of by passengers. It was estimated in the 1990s that each passenger accounted for 3.5 kilograms of solid waste per day. [34] With better attention to waste reduction this volume in recent years has been cut nearly in half. But the amount is still significant, more than eight tons in a week from a moderate sized cruise ship. Twenty-four percent of the solid waste produced by vessels worldwide comes from cruise ships. [35] Glass and aluminum are increasingly held onboard and landed ashore for recycling when the itinerary includes a port with reception facilities.

Food and other waste not easily incinerated is ground or macerated and discharged into the sea. These "... food waste can contribute to increases in biological oxygen demand, chemical oxygen demand, and total organic carbon, diminish water and sediment quality, adversely effect marine biota, increase turbidity, and elevate nutrient levels." [36] They may be detrimental to fish digestion and health and cause nutrient pollution. [37] An additional problem with discharging food waste at sea is the inadvertent discharge of plastics. Under MARPOL, [38] throwing plastic into the ocean is strictly prohibited everywhere. [39] Plastic poses an immediate risk to sea life that might ingest or get caught in it. It poses a longer term risk as it degrades over time, breaking down into smaller and smaller pieces, but retaining its original molecular composition. The result is a great amount of fine plastic sand that resembles food to many creatures. Unfortunately, the plastic cannot be digested, so sea birds or fish can eventually starve to death with a stomach full of plastic. [40]

Solid waste and some plastics are incinerated on board, with the incinerator ash being dumped into the ocean. Incinerator ash and the resulting air emissions can contain furans and dioxins, both found to be carcinogenic, [41] as well as heavy metal and other toxic residues. For this reason Annex V of MARPOL recommends, but does not require, that ash from incineration of certain plastics not be discharged into the sea. [42] At the very least, incinerator ash should be tested before each overboard discharge. This would include analysis and accounting of the contaminants typically found in cruise ship incinerator ash to determine whether it should be categorized as solid waste or hazardous waste.[43]

Under MARPOL [44] and U.S. law, [45] no garbage can be discharged within three miles of shore. Between three and twelve miles garbage can be discharged if ground-up and capable of passing through a one-inch screen. If not ground-up and capable of passing through a screen, most food waste and other garbage can be discharged at sea when a ship is more than twelve miles from shore.

Although cruise ships have reduced their volume of solid waste, the total amount is still significant. Royal Caribbean's

stated commitment in 2003 to not dump any trash overboard is admirable and should set a standard for all cruise ships operating from U.S. ports and in U.S. waters. If it is achievable by Royal Caribbean, then there is no reason why it is not practical for all cruise lines. This should be incorporated in legislation in order to ensure cruise ships can be held accountable for any unnecessary dumping of solid waste in the waters of the U.S.

e. HAZARDOUS WASTE.

A ship produces a wide range of hazardous waste. These include photo processing chemicals, dry cleaning waste, used paint, solvents, heavy metals, expired chemicals and pharmaceuticals, waste from the print shop, hydrocarbons and chlorinated hydrocarbons, used fluorescent and mercury vapor light bulbs, and batteries. [46] Although the volume produced by a ship may be relatively small (less than 1,000 liters in a typical week), the toxicity of these wastes makes them a serious concern. Hazardous wastes must be carefully managed in order to avoid contamination of other waste streams (e.g., gray water, solid waste, bilge water, etc).

Cruise industry compliance with hazardous waste laws in the U.S. must be seen in the context of confusion over what regulations apply. The Resource Conservation and Recovery Act (RCRA) is the primary federal law governing hazardous waste and its disposal, but it is not entirely clear what elements apply to cruise ships. [47] RCRA rules that cover small quantity generators (those that generate more than 100 kilograms but less than 1,000 kilograms of hazardous waste per month) are less stringent than those for large quantity generators (generating more than 1,000 kilograms per month) and it is unclear whether cruise ships are classified as large or small generators of hazardous waste. Further, it is unclear whether these limits are applied for each ship individually, or whether they apply to a company's full complement of ships and are taken together. At the same time, some cruise companies say they generate less than 100 kilograms per month and therefore should be classified in a third RCRA category, as conditionally exempt small generators, a category that allows for less rigorous requirements for notification and recordkeeping. [48] This confusion leads to inconsistencies in practice and, some would argue, to less stringent record keeping than should be required (especially of cruise ships with regular trans-boundary itineraries that allow disposal in other countries).

Rather than permit each individual cruise ship to be classified as an independent producer of hazardous waste, which means reporting and record-keeping requirements are relatively lax, each cruise corporation should be considered as a generator of hazardous waste, responsible for hazardous waste from its entire fleet. This would ensure that maximal control is maintained over the handling of wastes that would have potentially disastrous effects if released into the marine environment. Present loopholes that can be exploited by cruise lines must be closed.

f. OILY BILGE WATER.

A typical large cruise ship will generate an average of eight metric tons of oily bilge water for each twenty-four hours of operation; [49] according to Royal Caribbean's 1998 Environmental Report its ships produce an average 25,000 gallons of oily bilge water on a one week voyage. This water collects in the bottom of a vessel's hull from condensation, water lubricated shaft seals, propulsion system cooling and other engine room sources. It contains fuel, oil, wastewater from engines and other machinery, and may also include solid wastes such as rags, metal shavings, paint, glass, and cleaning agents.

The risks posed to fish and marine organisms by oil and other elements in bilge water are great. In even minute concentrations oil can kill fish or have numerous sub-lethal effects such as changes in heart and respiratory rates, enlarged livers,

reduced growth, fin erosion, and various biochemical and cellular changes. [50] Research also finds that by-products from the biological breakdown of petroleum products can harm fish and wildlife and pose threats to human health if these fish and wildlife are ingested.

Oily bilge water in U.S. waters is regulated by the Clean Water Act. The Act prohibits the discharge of oil or hazardous substances, in such quantities as may be harmful within 200 miles of the coast. In addition, Coast Guard regulations specifically prohibit discharges within 12 nautical miles of shore unless it has been passed through a fifteen parts per million (ppm) oily water separator and does not cause a visible sheen. [51] The NPDES VGP reinforces the 15 ppm standard and it requires large vessels (over 400 gross tons) to discharge oily bilge beyond 1 nautical mile from shore if the vessel is underway and the discharge is technologically feasible and safe. Beyond 12 nautical miles, oil or oily mixtures can be discharged while a vessel is proceeding en route so long as the undiluted oil content is less than 100 ppm. [52] The oil extracted by the separator can be reused, incinerated, and/or offloaded in port. [53] Vessels are required to document the disposal of oil, oily bilge water or oily residues in an Oil Record Book. [54]

To address the deleterious effect of oil to marine life, even in minute quantities, the discharge of oily bilge water should be prohibited in sensitive areas and in coastal zones out to 12 nautical miles. Additionally, consistent minimum water quality standards for oily bilge should be set across all waters under U.S. control either at the Coast Guard's current level of 15ppm or as low as 5 ppm. The reduction to 5 ppm is achievable. [55]

g. BALLAST WATER.

Cruise ships like other ocean-going vessels use a tremendous amount of ballast water to stabilize the vessel during transport. [56] This water is often taken on in one location after a ship discharges wastewater or unloads cargo and then discharged at the next port of call.

"[Ballast water] ... typically contains a variety of biological materials, including plants, animals, viruses and bacteria. These materials often include non-native, nuisance, exotic species that can cause extensive ecological and economic damage [and] ... [pose] public health and environmental risks, as well as significant economic cost to industries such as water and power utilities, commercial and recreational fisheries, agriculture, and tourism." [57]

The problem is not limited to cruise ships – it is a problem posed by all ships traversing the world's oceans.

Although open ocean exchange requirements for ballast water exist under MARPOL, there are no regulations applying to ballast water quality. In the U.S., ballast water was erroneously exempted from permit requirements under a Clean Water Act regulation until that regulation was successfully challenged by a number of environmental groups. A 1999 petition to EPA ended with a successful court ruling in December 2008 vacating the regulation and the issuance of the NPDES VGP, which took effect February 6, 2009. The VGP, among other things, sets standards for ballast water discharges within 3 miles of the shoreline, but does not apply to invasive species. Ballast water remains unregulated beyond the three-mile limit.

In California, prior to the national lawsuit against EPA, four environmental groups (Bluewater Network, [58] Environmental Law Foundation, Surfrider Foundation, and San Diego Baykeeper) filed suit in a California state court to force cruise ships to follow a California ballast water law passed in 2000, a law which two-thirds of cruise ships were ignoring. [59] All cruise ships visiting California complied after the lawsuit was heard by a state court. In 2006, California passed SB 497, which

took a further step to protect state waters from invasive species in ballast water. The legislation requires ships to treat ballast water before dumping it in ports or coastal waters. The treatment standards are to be phased in, starting in 2009. By 2020, no discharge of organisms larger than 50 microns - about the size of a grain of sand - would be allowed. [60]

There is great value in having national legislation that regulates the quality of ballast water and ensures waters in the U.S. EEZ are protected from further encroachment by the invasive species often found in ballast water. Technology has advanced to the point where ballast water can be treated to a reasonable point that avoids deleterious environmental effects. This technology should be required on ships entering U.S. waters. California's SB 497 provides a useful template.

2. Cruise Ship Air Pollution

a. AIR EMISSIONS.

There are two sources of air emissions from cruise ships: incinerators and engines. Each presents its own set of issues.

Incinerators.

Cruise ships incinerate and burn a variety of wastes, including hazardous wastes, oil, oily sludge, sewage sludge, medical and bio-hazardous waste, outdated pharmaceuticals, and other solid wastes such as plastics, paper, metal, glass, and food. [61] A cruise ship may burn 1 to 2.5 tons per day of oily sludge in these incinerators and boilers. [62] The emissions from onboard incineration and its ash can include furans and dioxins, both found to be carcinogenic, as well as nitrogen oxide, sulfur oxide, carbon monoxide, carbon dioxide, particulate matter, hydrogen chloride, toxic and heavy metals such as lead, cadmium and mercury, and hydrocarbons. [63]

In contrast to incinerator use on land, which is likely to be strictly monitored and regulated, incinerators at sea operate with few limits. MARPOL Annex VI bans incineration of certain particularly harmful substances, including contaminated packaging materials and polychlorinated biphenyls (PCBs). [64] There are no national standards limiting emissions from ship incineration.

The State of California has established that air emissions from incineration, generated between 27 and 102 miles off the coast, could negatively impact the air quality of the state. [65] The state initially introduced legislation in 2003 to prohibit ships from using onboard waste incinerators while within 20 miles of the coast, but subsequently passed legislation applicable only to waters over which the state had jurisdiction. The final California law prohibits incinerator use when a ship is within three miles of the coast.

Clear parameters are needed for operational requirements for onboard incinerators, much like on land. In addition, it is wise to do as California has done and ban the use of incinerators within a specific distance from the coast. Any such law must take into account the potential for onshore winds and ocean currents to move incinerator pollutants on-shore.

Engine Emissions.

Air emissions from ship engines are an obvious source of pollution because many ships burn bottom-of-the-barrel bun-

ker fuel – typically what remains of the crude oil after gasoline and distillate fuel oils are extracted through refining. [66] An estimated 60,000 people die worldwide each year as a result of under-regulated shipping air emissions and that number is estimated to grow by 40 percent by 2012 due to increases in global shipping traffic. [67] According to the U.S. EPA, ocean-going ships that used Category 3 marine engines and operated in the U.S. Exclusive Economic Zone (EEZ) in 2007 emitted 870,000 tons of nitrogen oxide, a key contributor to smog. [68] Conventionally a cruise ship's daily emissions are likened to the impact of 12,000 automobiles. [69] A study published in 2007 raises an even greater alarm. It found that bunker fuel on average has almost 2,000 times the sulfur content of highway diesel fuel used by buses, trucks, and cars and that one ship can make as much smog-producing pollution as 350,000 cars. [70] This figure can vary widely depending on the fuel being burned. A number of ships began using gas turbine engines in the late 1990s and early 2000s, well before the spike in fuel costs in 2007. These gas turbines are considerably better than conventional cruise ship engines in terms of sulfur and nitrous oxide emissions.

Current international standards set maximum sulfur content for ocean going vessel fuel at 4.5 percent, making it easy for cruise lines to say they meet or exceed international regulations since bunker fuel averages 3 percent sulfur content. [71] Significantly, lower sulfur fuels such as on-road diesel currently have sulfur contents as low as 0.0015 percent. New international standards that will go into effect in 2020 will significantly reduce particulate matter, sulfur, and oxides of nitrogen pollution from vessels. [72]

Cruise lines have been resistant to adopting use of fuels below 3 percent because of their higher cost. [73] Governments struggling with air pollution problems, however, are beginning to take action to curtail air pollution from these ships. As one example, the United States and Canada have a proposal pending before the International Maritime Organization (IMO) that would create a protective Emission Control Area (ECA) along the majority of North American coasts, extending to the fuel use in all ships within 200 nautical miles of shore. [74] This ECA would require much cleaner bunker fuel use if approved by the IMO in March 2010 -- 1.0 percent by 2012 and 0.1 percent by 2015 -- saving thousands of lives in the process. [75]

Another way in which air emissions can be curtailed is by imposing reduced speed limits as cruise ships approach ports. In March 2009, the Port of San Diego moved forward with a vessel speed reduction program. [76] Cruise and cargo ships will be asked to voluntarily reduce their speed when entering and leaving San Diego Bay in an effort to reduce air pollution. The voluntary speed limit will be 15 knots for cruise ships when traveling in an area that extends 20 nautical miles out to sea from Point Loma; cargo ships are expected to reduce speed to 12 knots. According to port officials, studies have shown a significant reduction in air emissions from ship engines when speeds are reduced – particularly significant reductions in emissions of oxides of nitrogen, oxides of sulfur, diesel particulate matter and carbon dioxide. [77] Similar programs have been enacted by the ports of Los Angeles and Long Beach, which report the program saved more than 100 tons of nitrogen oxide from going into the air in the first three months of implementation. [78]

An additional way to grapple with the problem of air emissions from engines is cold ironing, the option for ships to turn off all engines while in port and to plug into shore-side power. Cold-ironing was first introduced in 2001 in a partnership between the port of Juneau and Princess Cruises and is slowly propagating to other locations, including the ports of Vancouver, Los Angeles, Long Beach, and Seattle. The west coast of the U.S. is setting an example for the rest of the country and the practice of cold ironing should be encouraged, if not required, along all coasts of the U.S.

While the industry argues that it meets or exceeds international limits, it must be recognized that these regulations are minimal and fall far short of those already in place in California where ships are required to use marine gas oil, or marine

diesel oil with a sulfur content of no more than 0.5 percent by weight in all diesel engines within 24 nautical miles of the coast beginning in July of this year (sulfur content of marine gas oil drops to 0.1 percent sulfur in 2012). According to the California Air Resources Board, the use of low sulfur fuel in auxiliary engines used in port could save 3,600 lives in coastal communities over the first six years through reduced respiratory illnesses and heart disease, including a potential 80% drop in cancer risk associated with ship pollutants.[79] The results are even more impressive if auxiliary engines are shut down and shore-side power is used instead.

3. Cruise Ship Observers

Alaska has demonstrated the feasibility and the value of onboard observers aboard cruise ships. Observers ensure onboard practices and systems conform to legal requirements. Observers ensure that effluent can be regularly tested, and they confirm that onboard systems are operational. Presently, as long as a ship has a sewage treatment system approved by the U.S. Coast Guard, it is assumed the system operates up to performance standards and effluent is discharged based on that assumption. As already mentioned, this is not the case with MSDs. As well, even if a cruise ship has an AWTS, there is no guarantee the system will be operational and used at all times while in U.S. waters. The existence of a system is one thing; confirming its use and that it is performing to required standards is another. Use of independent onboard observers is the most effective means for gaining confirmation.

Onboard observers are important also to ensure that oily water separators are properly maintained, that the system is not being tricked such that meters inaccurately measure oil content, and that proper records are kept. As was seen in the cruise industry's violations in the 1990s, there was economic advantage to violating requirements, and while these practices are presumed to have ceased, an onboard observer is the most effective method for ensuring they do not reappear. Onboard observers are perhaps more important now given that all cruise lines are off probation from their environmental violations in the 1990s and are thus under considerably less scrutiny than was the case two or three years ago.

One other lesson learned from Alaska is onboard observers must be given clear authority in legislation for their monitoring activities. Placing obstacles to observer access to onboard systems and log books, and to the ability to test effluent, must be clearly made illegal with stiff punishment. The value and efficacy of the observers depend on their ability to do their job without limits and without concern for their safety and security.

Exhibit C

Final Memorandum

Clearing the Air:
Would Shoreside Power Reduce Air Pollution Emissions from Cruise Ships calling on the Port of Charleston, SC?

Prepared by:

James J. Corbett, PhD, PE
Bryan Comer
Energy and Environmental Research Associates, LLC
2 Babcock Farms Lane
Pittsford, NY 14534

Prepared for:

Southern Environmental Law Center
43 Broad St., Suite 300
Charleston, SC 29401

September 9, 2013

Abstract

Cruise ships can contribute to local and regional air pollution by using their on-board engines to generate power for the vessel while docked in port. One alternative to using on-board engines is shore power. Shore power allows marine vessels, including cruise ships, to plug into the electric grid to power lights, air conditioning, refrigeration, and other ancillary equipment while at berth in port. This memo compares estimated emissions from cruise vessels while docked at the Port of Charleston, SC when using on-board engines as opposed to shore power for the following pollutants: carbon monoxide (CO), nitrogen oxides (NO_x), particulate matter (PM), sulfur dioxide (SO_2), and carbon dioxide (CO_2). We find that the use of shore power would greatly reduce air pollution from these ships. Specifically, in 2013 shore power would reduce CO by 92%, NO_x by 98%, PM_{10} up to 59%, $PM_{2.5}$ up to 66%, SO_2 up to 73%, and CO_2 by 26%. Emissions reductions would be expected to be even greater in 2019 after the local power company reduces its use of coal for electricity generation. Reducing air pollution by switching to shore power could provide health benefits for the near-port community.

1. Introduction

Air emissions from commercial marine vessels, including cruise ships, can have deleterious effects on air quality and negatively impact communities near ports. While docked in port, cruise ships generate the electricity they need by either operating on-board engines or accessing electricity by plugging into shoreside power connections at the dock, if available. Marine engines combusting petroleum fuels emit air pollutants that may lead to, or exacerbate, health problems like asthma, bronchitis, and lung cancer. Engine combustion produces harmful byproducts including carbon monoxide (CO), nitrogen oxides (NO_x), particulate matter (PM), and sulfur dioxide (SO_2) in addition to greenhouse gases like carbon dioxide (CO_2). Shoreside electrical connections can substitute for on-board generation of power while the ship is docked. Electricity supplied to the ship would come from the local utility's power generation portfolio, which might include renewable and non-renewable sources. Shore power can avoid idling of marine engines, reduce on-board fuel consumption, and eliminate engine-combustion emissions while the vessel is docked. Many cruise lines have begun to use shore power to reduce emissions.

Carnival, the world's largest cruise firm, operates 100 ships under 10 brands like Princess Cruises and Holland America. One of these ships is the Carnival Fantasy. The Carnival Fantasy is 855 feet long and holds over 2000 passengers.[1] The electricity demand of a cruise ship is considerable, in many cases several times that of a container vessel. Carnival Corporation states in its 2008 environmental management report that shore power installations at ports "allow ships that have been configured [to accept shore power] to use shore power provided by land-based power plants. This allows those Carnival ships to shut down their engines and avoid air emissions while moored in these ports. These land-based power plants use environmental technologies not yet available to ships that enable them to produce power with less environmental impact and take advantage of sustainable resources, such as hydroelectric power."[2] In their 2009 Corporate Sustainability Summary (updated 2011), the company states that "Carnival has taken the lead in the cruise industry in developing shore power for cruise ships in Juneau, Alaska; Seattle, Washington; and Vancouver, British Columbia. Carnival is engaged in planning shore power in several other United States and European ports and participates in a working group that is establishing international standards for shore power."[3]

---

[1] http://www.carnival.com/cruise-ships/carnival-fantasy.aspx

[2] *Environmental Management Report: Fiscal Year 2008.* Carnival Corporation & PLC. See p. 19 at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NzkyMHxDaGlsZElEPS0xfFR5cGU9Mw==&t=1

[3] *Corporate Sustainability Summary 2009: Updated 29 April 2011*. Carnival Corporation & PLC. See p. 37 at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTE1NjV8Q2hpbGRlRD0tMXxUeXBlPTM=&t=1

However, in some cases, there is resistance to installing shore power. For instance, in the "Frequently Asked Questions" section of the South Carolina State Ports Authority's (SCSPA) website detailing upgrades to the Union Pier Cruise Terminal at the Port of Charleston, the SCSPA states the following in direct response to a question about the potential for air quality benefits from shore power:

> "On March 26, the IMO designated a 230-mile area around the U.S. coast as an Emission Control Area (ECA), dramatically reducing ship-related emissions and eliminating the need to consider shore power. The EPA estimates this move reduces sulfur content in fuel by 98% – cuts particulate matter by 85%, and NOx by 80%. The new standards go into effect in 2011, with implementations in 2012 and 2015."[4]

This explanation is misleading and partly incorrect. Sulfur and PM emissions from ships calling on the port will decrease under new international maritime pollution standards, especially in 2015, due to increasingly stringent fuel sulfur limits. However, NO_x emissions will most assuredly not be reduced by 80%. New NO_x emissions standards only apply to marine engines installed on vessels built on or after January 1, 2011 (Tier II standards) or January 1, 2016 (Tier III standards). Tier II standards achieve 20% NO_x reductions compared to Tier I standards.[5] Tier III standards achieve 80% NO_x reductions compared to Tier I standards and apply to ships operating in ECAs.[6] Therefore, a cruise ship that calls on the port after 2011 could potentially have 20% lower NO_x emissions if it were newly built; 80% reductions could only be realized after 2016, provided the vessel was constructed on or after January 1, 2016. Moreover, it is necessary to compare emissions that would arise from electricity generation for shore power to emissions from the ship while at berth in order to determine if environmental (and human health) benefits are likely to occur. Without quantifying the emission reductions offered by shore power, claiming that shore power is unnecessary and would not produce environmental benefits is misguided.

This project evaluates whether using shore power at the Union Pier Cruise Terminal at the Port of Charleston, S.C., could reduce air pollution emissions from the Carnival Fantasy. Specifically, we estimate and compare emissions from shore power to emissions from the Carnival Fantasy (i.e. "vessel power") while moored in port. Emissions are estimated for CO, NO_x, $PM_{2.5}$, PM_{10}, SO_2, and CO_2 assuming that the electricity used for shore power would be supplied by South Carolina Electric and Gas (SCE&G) and vessel power would be provided by the Carnival Fantasy's on-board engines. Annual in-port emissions associated with hotelling of the Carnival Fantasy are estimated for 2013 and 2015. Shore power and vessel power assumptions for each scenario are explained below.

2013 Scenario:

i. Shore power
   a. Electricity is supplied by SCE&G assuming they use the same fuel mix as they did in 2011 (48% coal; 28% natural gas; 19% nuclear; 3% hydro; 2% biomass)[7]
ii. Vessel power
   a. Electricity is generated by on-board engines assuming 1% sulfur (S) fuel (maximum allowable S content in ECAs in 2013)
   b. Electricity is generated by on-board engines assuming 0.5% S fuel[8]

---

[4] *Frequently Asked Questions*. SCSPA. http://www.scspa.com/UnionPierPlan/faq.html#a8

[5] Tier I standards apply to marine engines installed on vessels constructed on or after January 1, 2000.

[6] See p. 4 of the EPA fact sheet on the North American Emissions Control Area for a concise summary of the impacts of new marine vessel fuel sulfur and NO_x standards: http://www.epa.gov/otaq/regs/nonroad/marine/ci/420f10015.pdf

[7] *2012 Environmental Sustainability Report*. SCANA. 2012. See p. 4 at http://www.scana.com/NR/rdonlyres/A8A5F326-5E16-4DD6-B6DC-F3EA6172ADFC/0/ESR_2012.pdf

2015 Scenario

i. Shore power
   a. Electricity is supplied by SCE&G assuming they use the fuel mix as they did in 2011 (48% coal; 28% natural gas; 19% nuclear; 3% hydro; 2% biomass)
ii. Vessel power
   a. Electricity is generated by on-board engines assuming 0.1% S fuel (2015 ECA compliant)

Emissions are also estimated for a future scenario: the "2019 Scenario." This scenario assumes that SCE&G's energy portfolio shifts away from coal and toward more natural gas and nuclear. We also evaluate how emissions would change if a larger cruise ship were to call on the port. Shore power and vessel power assumptions for the 2019 scenario are explained below.

2019 Scenario

i. Shore power
   a. Electricity is supplied by SCE&G assuming they produce one-third of their energy using coal, one-third using natural gas, and one-third using nuclear (or other non-emitting sources)[9]
ii. Vessel power
   a. Electricity is generated by on-board engines from a 2000 passenger cruise ship (like the Carnival Fantasy) operating on 0.1% S fuel
   b. Electricity is generated by on-board engines from a 3500 passenger cruise ship (like the Carnival Dream) operating on 0.1% S fuel

2. Methodology

This section briefly describes the methodology used to calculate vessel power and shore power emissions for the 2013 and 2015 Scenarios as well as the 2019 Scenario.

2.1 2013 and 2015 Scenarios

2.1.1 Carnival Fantasy Emissions

Emissions from the Carnival Fantasy were estimated by applying methodologies similar to those used by the California Air Resources Board (CARB)[10] and the US Environmental Protection Agency (EPA).[11] In general, to estimate annual cruise ship emissions one needs to know the total installed power of the on-board engines, the proportion of that installed power used for auxiliary power while at berth (i.e., the hotelling load factor), the annual number of port calls, and the average time at berth; these inputs are found in Table 1. Once the total amount of energy (kWh) used by the cruise ship each year is determined, one can estimate total annual air emissions for each pollutant by applying the emissions factors (g/kWh) found in Table 2.

---

[8] While the ECA requires marine fuels to contain at most 1% S, we believe that the sulfur content of fuel used in cruise ships calling on the Port of Charleston is probably closer to 0.5%. Using a lower S assumption for marine fuels yields a more conservative estimate of vessel emissions for SO_2 and PM.

[9] A recent SCE&G press release suggests that by the end of 2018, the generation mix will be closer to one-third coal, one-third natural gas, and one-third nuclear. See: http://www.sceg.com/en/news-room/current-news/sceg-accelerates-plans-to-retire-canadys-station.htm

[10] *Emissions Estimation Methodology for Ocean-Going Vessels*. CARB. 2011. http://www.arb.ca.gov/regact/2011/ogv11/ogv11appd.pdf

[11] *Proposal to Designate an Emissions Control Area for Nitrogen Oxides, Sulfur Oxides and Particulate Matter: Technical Support Document*. US EPA. 2009. http://www.epa.gov/nonroad/marine/ci/420r09007.pdf

Our assumptions can be compared with those used in other reports estimating cruise ship emissions. We believe that a memorandum by Trinity Consultants titled *Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal* has underestimated air pollution emissions from cruise ships calling on Port of Charleston by nearly 75% as a direct result of incorrect assumptions. The Trinity memo correctly assumes that the hotelling load factor is 16% (the same assumption we make in Table 1). However, they incorrectly apply this load factor to what they call "hotelling power" (which they assume is 11,000 kW) instead of total installed power. Thus, they assume that cruise ships calling on the port use 1,760 kW while at berth. We estimate that the Carnival Fantasy uses 6,758 kW at berth (42,240 kW installed power * 0.16). Therefore, we believe that the Trinity Consultants memorandum underestimates air pollution emissions from cruise ships during hotelling by almost 75%. As an example, Trinity Consultants claims that 64 cruise ship calls, spending an average of 10 hours at berth, yielded 1.29 metric tons (1.43 short tons) of CO in 2010; we estimate this activity would result in 4.76 metric tons of CO.

To verify that our assumptions would yield realistic results, we used our assumptions to calculate emissions from cruise ships calling on the Union Pier Terminal in 2011 and compared those results to the 2011 South Carolina Ports emissions inventory conducted by Moffat & Nichol.[12] Assuming the same number of port calls and average time at berth (88 calls; 12.3 hrs/call), our results closely match those of Moffat & Nichol for CO and NO_x. For CO, we estimate that 2011 cruise activity would generate 8.87 tons compared to 8.85 tons in the Moffat & Nichol report; for NO_x we estimate 112 tons compared to 108 tons.[13] Moffat & Nichol estimate higher PM and SO_2 emissions than what we would, but this appears to reflect their assumption that cruise vessels in 2011 were operating on residual oil (RO) instead of marine diesel oil (MDO). To comply with ECA fuel sulfur limits, cruise ships would have to operate on lower sulfur fuel beginning in July 2010, requiring a shift to MDO or some other distillate fuel, so we question the accuracy of PM and SO_2 emissions from cruise vessels in the Moffat & Nichol report. Nevertheless, because our results track well with the South Carolina Ports emissions inventory for CO and NO_x, we believe that our estimates for annual emissions from the Carnival Fantasy will be reasonable.

Table 1. Assumptions for Carnival Fantasy vessel characteristics and activity.

Description	Value	Units
Installed power[14]	42,240	kW
Hotelling load factor[15]	0.16	hotelling power/installed power
Hotelling power	6,758	kW
Port calls per year[16]	68	port calls/yr
Hours per call[17]	10	hr
Hours per year	680	hr/yr
Annual power consumption at berth	4,595,712	kWh

[12] *South Carolina Ports 2011 Air Emissions Inventory Update.* Moffatt & Nichol. 2013. http://www.pledgeforgrowth.com/documents/2011_Air_Emissions_Inventory_Update.pdf

[13] See on-terminal hotel emissions for Union Pier in Table 7-2 on p. 52 of *South Carolina Ports 2011 Air Emissions Inventory Update.* Moffatt & Nichol. 2013. http://www.pledgeforgrowth.com/documents/2011_Air_Emissions_Inventory_Update.pdf.

[14] http://www.cruiseships.xtreemhost.com/Ships%20A%20to%20C/Carnival%20Fantasy.htm

[15] Table II-5 on p. D-14 of *Emissions Estimation Methodology for Ocean-Going Vessels.* CARB. 2011. http://www.arb.ca.gov/regact/2011/ogv11/ogv11appd.pdf

[16] Table 2-1 on p. 27 of *South Carolina Ports 2011 Air Emissions Inventory Update.* Moffatt & Nichol. 2013. http://www.pledgeforgrowth.com/documents/2011_Air_Emissions_Inventory_Update.pdf.

[17] ibid.

Table 2. Emissions factors (g/kWh) used to calculate Carnival Fantasy emissions.

	2013 (1% S fuel)[18]	2013 (0.5% S fuel)[19]	2015 (0.1% S fuel)[20]
CO	1.10	1.10	1.10
NO_x	13.9	13.9	13.9
PM_{10}	0.49	0.38	0.25
$PM_{2.5}$	0.45	0.35	0.23
SO_2	4.24	2.12	0.42
CO_2	690	690	690

2.1.2 SCE&G Emissions

Net energy generation data for SCE&G power plants from the US Energy Information Administration (EIA), coupled with annual facility-wide emissions data obtained from the South Carolina Department of Health and Environmental Control (SCDHEC), were used to calculate emissions factors for CO, NO_x, PM_{10}, $PM_{2.5}$, SO_2, and CO_2 for 2011 (the most recent year for which quality-assured emissions data are available) as shown in Table 3. These emissions factors were used in combination with the Carnival Fantasy activity assumptions above (Table 1) to determine what the annual emissions would be if shore power were used (i.e., we multiply annual power consumption at berth by the emissions factors in Table 3). It should be noted that at the end of 2012 SCE&G retired one of three coal-fired generating units at the Canadys station; the other two coal-fired units will be retired by the end of 2013.[21] Therefore, in 2013 and 2015 (when the 0.1% S limit for marine fuels takes effect) there will likely be decreases in the emissions rates of some pollutants, especially SO_2 and PM, from the SCE&G portfolio. Using SCE&G's 2011 generation mix helps ensure that the emissions reduction benefits of shore power are not overestimated.

[18] Source for CO, NO_x, PM_{10}, $PM_{2.5}$, and SO_2 is Table 2-10 on p. 35 of *South Carolina Ports 2011 Air Emissions Inventory Update*. Moffatt & Nichol. 2013. http://www.pledgeforgrowth.com/documents/2011_Air_Emissions_Inventory_Update.pdf. Source for CO_2 is Table II-08 on p. D-16 of *Emissions Estimation Methodology for Ocean-Going Vessels*. CARB. 2011. http://www.arb.ca.gov/regact/2011/ogv11/ogv11appd.pdf

[19] Source for CO, NO_x, PM_{10}, $PM_{2.5}$, and CO_2 is Table II-08 on p. D-16 of *Emissions Estimation Methodology for Ocean-Going Vessels*. CARB. 2011. SO_2 was calculated using equation 2-3 on p. 2-10 of *Proposal to Designate an Emissions Control Area for Nitrogen Oxides, Sulfur Oxides and Particulate Matter: Technical Support Document*. US EPA. 2009. http://www.epa.gov/nonroad/marine/ci/420r09007.pdf

[20] ibid.

[21] *SCE&G Accelerates Plans to Retire Coal-fired Canadys Station*. SCE&G. 2013. http://www.sceg.com/en/news-room/current-news/sceg-accelerates-plans-to-retire-canadys-station.htm

Table 3. Data used to calculate emissions factors for shore power from SCE&G for 2013 and 2015 Scenarios

Facility Name	Net Generation (MWh)	CO (MT)	NO_x (MT)	PM_{10} (MT)	$PM_{2.5}$ (MT)	SO_2 (MT)	CO_2 (MT)
Canadys Steam	1,558,389	883.33	2,409.91	2,070.54	1,639.68	14,180.75	1,386,546
Coit GT	870	0.28	4.92	0.05	0.05	0.12	1,045
Cope Station	2,459,909	94.96	956.24	536.26	425.90	1,428.92	2,038,986
Hagood	55,604	38.95	37.02	1.40	1.40	0.68	38,287
Hardeeville	11	0.01	0.38	0.00	0.00	0.00	64
Jasper County Generating Facility	5,549,564	34.69	138.48	113.09	113.09	10.31	1,955,072
McMeekin	1,204,643	152.41	1,638.15	525.12	515.25	6,548.88	1,033,022
Parr	51,659	0.55	7.72	0.09	0.09	0.18	1,717
Urquhart	2,186,990	547.99	753.73	589.02	421.50	4,279.52	1,163,511
Wateree	3,973,744	383.58	1,970.64	1,156.82	707.04	3,523.06	3,874,183
Williams	2,742,673	239.59	1,400.17	505.95	301.76	550.60	2,429,011
Neal Shoals (Hydro)	11,169	0.00	0.00	0.00	0.00	0.00	0.00
Stevens Creek (Hydro)	53,984	0.00	0.00	0.00	0.00	0.00	0.00
Saluda (Hydro)	41,426	0.00	0.00	0.00	0.00	0.00	0.00
Fairfield Pumped Storage (Hydro)	(229,744)	0.00	0.00	0.00	0.00	0.00	0.00
V C Summer (Nuclear)	7,426,232	0.00	0.00	0.00	0.00	0.00	0.00
Total	27,087,123	2,376	9,317	5,498	4,125	30,523	13,921,444
Emissions factor (g/kWh)[a]		**0.088**	**0.344**	**0.152**	**0.203**	**1.13**	**514**

[a] To calculate emissions factor for each pollutant in grams per kilowatt hour (g/kWh), multiply the total emissions of each pollutant by 10^6 to convert from metric tons (MT) to grams (g); then, multiply net generation by 10^3 to convert from megawatt hours (MWh) to kilowatt hours (kWh); finally, divide total emissions (g) by total net generation (kWh).

R.002633

2.2 2019 Scenario

2.2.1 Cruise Ship Emissions – Bigger Ships in 2019?

The Carnival Fantasy is the oldest ship in the Carnival fleet and entered into service in 1990.[22] The Carnival Fantasy holds a little more than 2000 passengers; whereas, newer ships like the Carnival Dream can hold over 3,500.[23] The relocation and upgrades of the cruise terminal at the Port of Charleston's Union Pier may permit larger cruise ships to call on the port. A larger ship with larger engines may yield more in-port emissions during hotelling. For the 2019 Scenario, we compare shore power emissions to Carnival Fantasy emissions as well as a larger cruise ship: the Carnival Dream. Operating characteristics and assumed annual activity for the Carnival Fantasy are the same as they were in the 2013 and 2015 Scenarios; operating characteristics and assumed annual activity (i.e., port calls per year and hours per call) for the Carnival Dream are found in Table 4. This analysis leaves unchanged the time-in-port and number-of-port-call inputs applied to the Carnival Fantasy, essentially assuming the larger vessel would not require more dockside time. This affords easier comparison with vessel emission characteristics and may provide a conservative (low) estimate for a larger vessel's dockside emissions. Emissions factors used to calculate emissions from the Carnival Fantasy and the Carnival Dream are shown in Table 5.

Table 4. Assumptions for Carnival Dream vessel characteristics and activity.

Description	Value	Units
Installed power[24]	63,335	kW
Hotelling load factor[25]	0.16	hotelling power/installed power
Hotelling power	10,134	kW
Port calls per year[26]	68	port calls/yr
Hours per call[27]	10	hr
Hours per year	680	hr/yr
Annual power consumption at berth	6,890,848	kWh

[22] *Carnival Fantasy Cruise Ship.* Fritscher, L. USA Today. http://traveltips.usatoday.com/carnival-fantasy-cruise-ship-17589.html

[23] ibid.

[24] *Carnival Dream Fact Sheet.* Note: 84,833 hp = 63,335 kW. http://carnival-news.com/2013/01/17/fact-sheet-carnival-dream-2/

[25] Table II-5 on p. D-14 of *Emissions Estimation Methodology for Ocean-Going Vessels.* CARB. 2011. http://www.arb.ca.gov/regact/2011/ogv11/ogv11appd.pdf

[26] We assume that the Carnival Dream would call on the port as often as the Carnival Fantasy does.

[27] We assume that the Carnival Dream would spend the same average time hotelling as the Carnival Fantasy.

Table 5. Emissions factors (g/kWh) used to calculate Carnival Fantasy and Carnival Dream emissions.

	0.1% S fuel[28]
CO	1.10
NO_x	13.9
PM_{10}	0.25
$PM_{2.5}$	0.23
SO_2	0.42
CO_2	690

2.2.2 SCE&G Emissions – Cleaner Energy Portfolio in 2019

SCE&G is planning to shift their electricity generation portfolio away from coal and toward natural gas and nuclear by the end of 2018. In 2011, SCE&G's generation mix was mainly coal (48%), followed by natural gas (28%), and nuclear (19%); the rest was hydro (3%) or biomass combustion (2%).[29] A recent SCE&G press release suggests that by the end of 2018, the generation mix will be closer to one-third coal, one-third natural gas, and one-third nuclear.[30] In fact, SCE&G retired one coal-fired unit at their Canadys plant at the end of 2012; they plan on retiring the other two by the end of 2013.[31] Three additional coal-fired units will be retired by the end of 2018 (Urquhart Unit 3 and McMeekin Units 1 and 2).[32] These six coal-fired generating units are the oldest[33] and most polluting in the SCE&G portfolio. Our analysis reveals that in 2011 the Canadys and McMeekin plants were responsible for 68% of SO_2 emissions and 52% of $PM_{2.5}$ emissions while representing only 10% of SCE&G electricity generation. Shifting away from coal will considerably reduce emissions from the SCE&G electricity generation portfolio, particularly for SO_2 and PM.

In order to estimate emissions factors for shore power in 2019, we assumed that the one-third of total electricity generated from coal was produced by the Wateree power plant. After the coal-fired units at Canadys, McMeekin, and Urquhart close, the Wateree plant will be the "dirtiest" remaining coal-fired power plant. For example, in 2011 the Canadys plant produced approximately 9,000 g of SO_2 per MWh, followed by McMeekin (~5,400 g/MWh) and Urquhart (~2,000 g/MWh); Wateree produced almost 900 g/MWh of SO_2. While it is unlikely that Wateree will handle all of the coal electricity generation duties in 2019, other SCE&G coal-fired power plants produce fewer emissions per MWh. Thus, we have selected Wateree to ensure that we do not underestimate shore power emissions, particularly for SO_2 and PM. For the one-third of electricity generated by natural gas, we assumed that this electricity was generated by the Jasper plant. This plant produced 20% of

[28] Source for CO, NO_x, PM_{10}, $PM_{2.5}$, and CO_2 is Table II-08 on p. D-16 of *Emissions Estimation Methodology for Ocean-Going Vessels*. CARB. 2011. SO_2 was calculated using equation 2-3 on p. 2-10 of *Proposal to Designate an Emissions Control Area for Nitrogen Oxides, Sulfur Oxides and Particulate Matter: Technical Support Document*. US EPA. 2009. http://www.epa.gov/nonroad/marine/ci/420r09007.pdf

[29] *2012 Environmental Sustainability Report*. SCANA. 2012. See p. 4 at http://www.scana.com/NR/rdonlyres/A8A5F326-5E16-4DD6-B6DC-F3EA6172ADFC/0/ESR_2012.pdf

[30] *SCE&G Accelerates Plans to Retire Coal-fired Canadys Station*. SCE&G. 2013. http://www.sceg.com/en/news-room/current-news/sceg-accelerates-plans-to-retire-canadys-station.htm

[31] ibid.

[32] *SCE&G Announces Plans to Retire a Portion of its Coal-fired Generation*. SCE&G. 2012. http://www.sceg.com/en/news-room/current-news/sceg-announces-plans-to-retire-a-portion-of-its-coal-fired-generation.htm

[33] *2012 Environmental Sustainability Report*. SCANA. 2012. See p. 6 at http://www.scana.com/NR/rdonlyres/A8A5F326-5E16-4DD6-B6DC-F3EA6172ADFC/0/ESR_2012.pdf

total electricity in 2011 (the most of any natural gas plant by far); we think it is reasonable to assume that this plant will generate most of the natural gas electricity in 2019. The rest of the electricity will be produced by non-emitting[34] technologies (mostly nuclear). Given these assumptions, the emissions factors for electricity produced by SCE&G in the 2019 Scenario are presented in Table 6.

Table 6. Shore power emissions factors for 2019 Scenario.

Pollutant	Emissions Factor (g/kWh)
CO	0.034
NO_x	0.174
PM_{10}	0.104
$PM_{2.5}$	0.066
SO_2	0.300
CO_2	442

3. Results

3.1 2013 and 2015 Scenarios

Our estimates for emissions generated by the Carnival Fantasy while at berth (hotelling) compared with shore power, assuming 68 port calls per year and an average of 10 hours per call, are found in Table 7.

Table 7. Potential annual emissions (metric tons) generated by the Carnival Fantasy while at berth using shore power compared with on-board engines operating on 1%, 0.5%, and 0.1% sulfur fuel, respectively.

	Shore Power	2013 (1% S fuel)	2013 (0.5% S fuel)	2015 (0.1% S fuel)
CO	0.40	5.06	5.06	5.06
NO_x	1.58	63.9	63.9	63.9
PM_{10}	0.93	2.25	1.75	1.15
$PM_{2.5}$	0.70	2.07	1.61	1.06
SO_2	5.18	19.5	9.75	1.95
CO_2	2,362	3,171	3,171	3,171

Results indicate that:

1. Shore power would reduce CO emissions by 92% in 2013 and in 2015 (Figure 1a)
2. Shore power would reduce NO_x emissions by nearly 98% in 2013 and in 2015 (Figure 1b)
3. Shore power would reduce PM_{10} emissions 46%-59% in 2013 and 19% in 2015 (Figure 1c)
4. Shore power would reduce $PM_{2.5}$ emissions by 56%-66% in 2013 and 34% in 2015 (Figure 1d)
5. Shore power would reduce SO_2 emissions by 47%-73% in 2013; however SO_2 emissions from shore power would be greater than vessel power in 2015 (Figure 2a).
6. Shore power would reduce CO_2 emissions by 26% in 2013 and in 2015 (Figure 2b)

[34] Non-emitting at the point of electricity generation; like most electricity generating technologies (e.g., coal and natural gas), there are emissions associated with resource extraction and transportation.

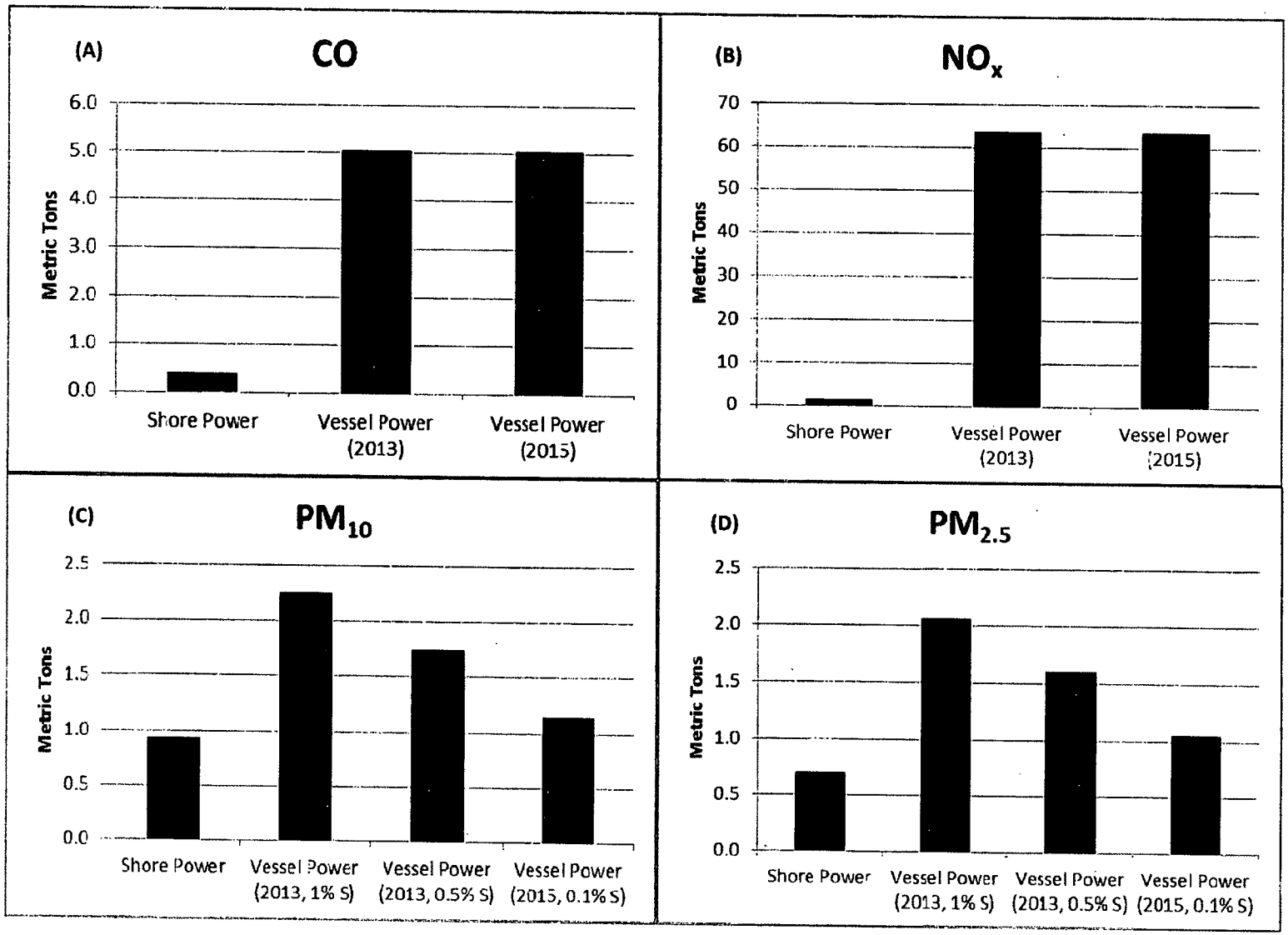


Figure 1. Shore power reduces CO, NO_x, PM_{10}, and $PM_{2.5}$ emissions in 2013 and 2015.

R.002637

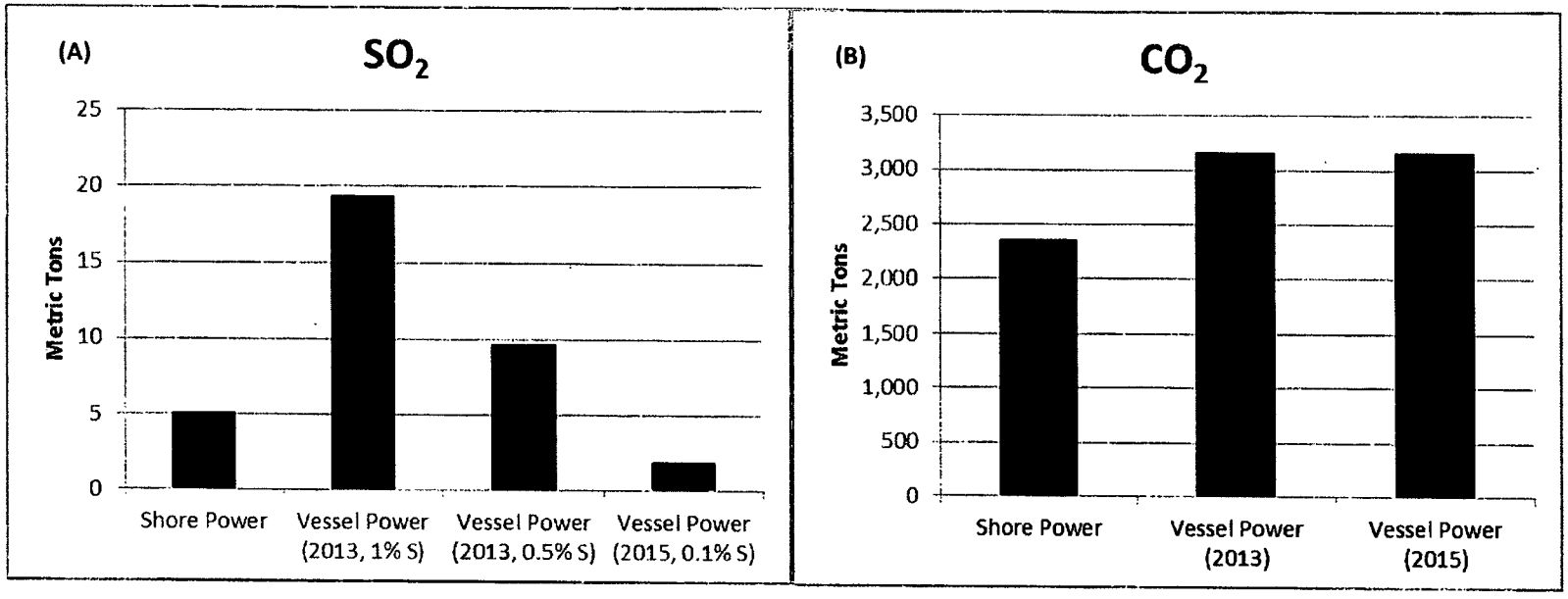


Figure 2. Shore power reduces SO_2 in 2013 but not 2015, and shore power reduces CO_2 emissions in 2013 and 2015.

R.002638

3.2 2019 Scenario

In 2019 SCE&G's energy portfolio will produce fewer air emissions per MWh due to a shift away from coal toward natural gas and nuclear. Shore power could be especially beneficial if larger ships begin calling on the port in the future. Our estimates for emissions generated by a 2000 passenger cruise ship (Carnival Fantasy) and a 3500 passenger cruise ship (Carnival Dream) while at berth (hotelling) compared with shore power, assuming 68 port calls per year and an average of 10 hours per call, are found in Table 8.

Table 8. Potential annual emissions (metric tons) generated by a 2000 passenger cruise ship (Carnival Fantasy) and a 3500 passenger cruise ship (Carnival Dream) while at berth using shore power compared with using on-board engines operating on 0.1% sulfur fuel.

	2000 Passenger		3500 Passenger	
	Shore Power	Vessel Power	Shore Power	Vessel Power
CO	0.16	5.06	0.24	7.58
NO_x	0.80	68.3	1.20	95.8
PM_{10}	0.48	1.15	0.72	1.72
$PM_{2.5}$	0.30	1.06	0.46	1.58
SO_2	1.36	1.95	2.04	2.92
CO_2	2,033	3,171	3,049	4,755

Results indicate that:

1. Larger cruise ships would produce more emissions of all pollutants (Figure 3 and Figure 4)
2. Shore power would reduce CO emissions by 97% in 2019 (Figure 3a)
3. Shore power would reduce NO_x emissions by nearly 99% in 2019 (Figure 3b)
4. Shore power would reduce PM_{10} emissions by 58% in 2019 (Figure 3c)
5. Shore power would reduce $PM_{2.5}$ emissions by 71% in 2019 (Figure 3d)
6. Shore power would reduce SO_2 emissions by 30% in 2019 (Figure 4a)
7. Shore power would reduce CO_2 emissions by 36% in 2019 (Figure 4b)

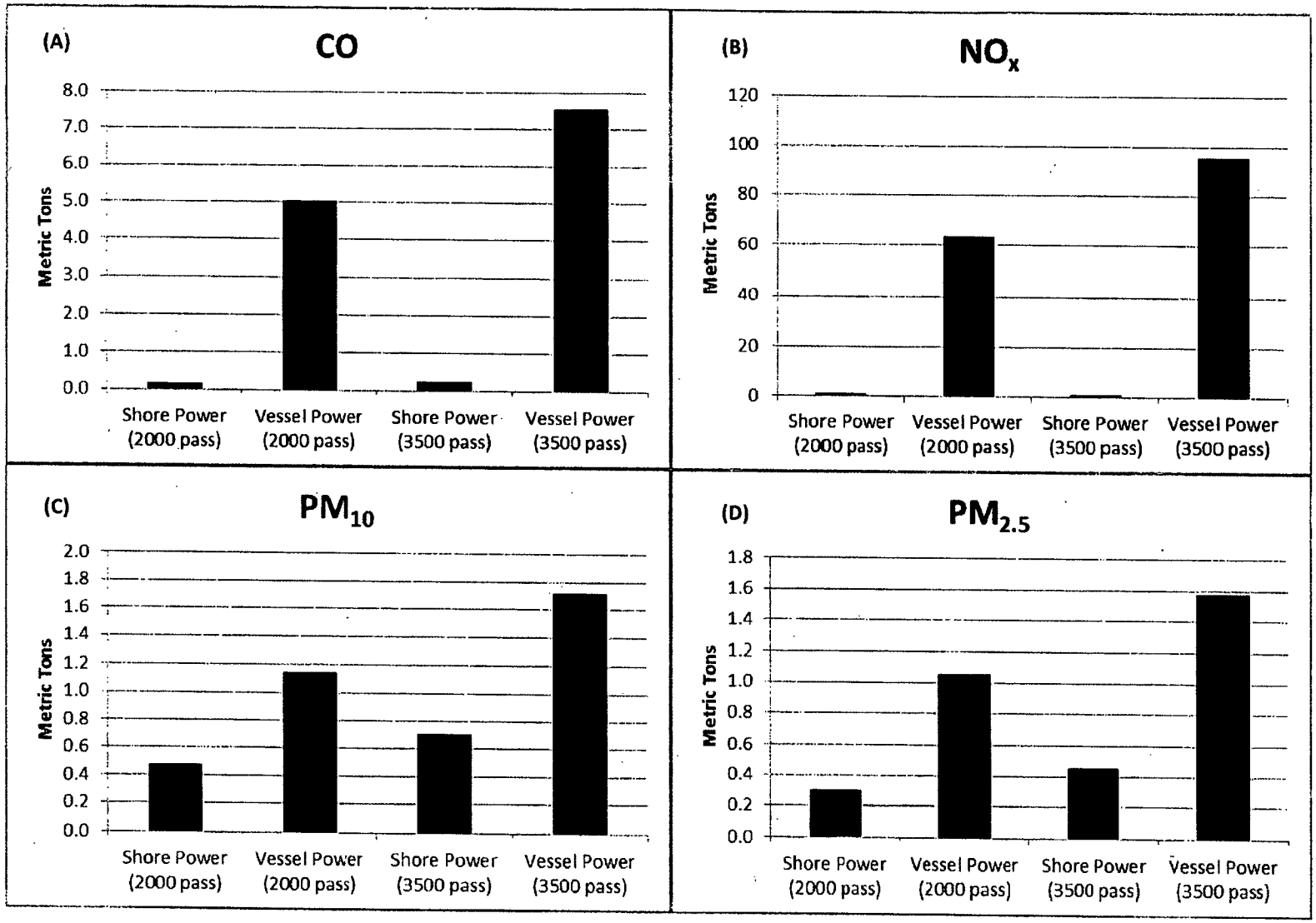


Figure 3. Shore power reduces CO, NO_x, PM_{10}, and $PM_{2.5}$ emissions in 2019; larger cruise ships would be expected to produce more emissions.

R.002640

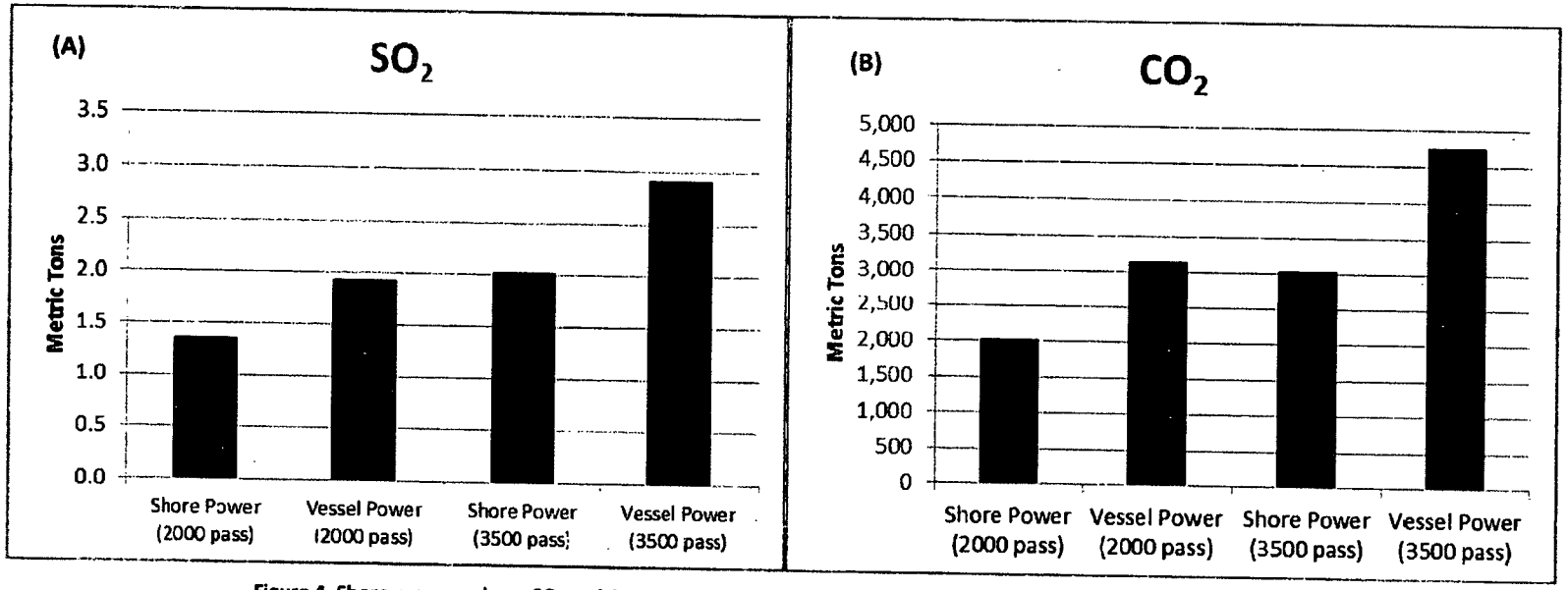


Figure 4. Shore power reduces SO_2 and CO_2 in 2019; larger cruise ships would be expected to produce more emissions

R.002641

Exhibit K

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

PRESERVATION SOCIETY OF CHARLESTON, et al.,	)	
Plaintiffs,	)	C/A No. 2:12-cv-02942-RMG
UNITED STATES ARMY CORPS OF ENGINEERS, et al.,	)	
Defendants.	)	
and	)	
South Carolina Ports Authority,	)	
Intervenor-Defendant	)	

DECLARATION OF EVAN THOMPSON

I, EVAN THOMPSON, declare as follows:

1. I live at 118 East Bay Street, Charleston, South Carolina. I have lived at this address since June 1, 2011. I am over the age of twenty-one and have personal knowledge of the matters set forth in this declaration.

2. I am the Executive Director of the Preservation Society of Charleston ("the Society"). I have held this position since June 2010. Prior to joining the Society, I was the Executive Director of Historic Beaufort Foundation for five years where I led historic restoration and preservation of buildings, as well as advocacy, educational and research efforts to develop knowledge of and protection for a wide variety of historic resources. In April 2010, the South Carolina House of Representatives passed a house resolution recognizing and honoring

my preservation efforts. I also hold a J.D. from The University of Texas School of Law and a B.A. in History from the University of Richmond.

3. The purpose of the Society is to cultivate and encourage interest in the preservation of buildings, sites and structures of historical or aesthetic significance and to take whatever steps may be necessary and feasible to prevent the destruction or defacement of any such building, site or structure. Such purposes are solely eleemosynary and not for profit.

4. As the Executive Director of the Society, my duties include various education and advocacy efforts to protect the material and cultural heritage of Charleston. The Society is the oldest community based historic preservation organization in America and is well known in Charleston due to the hundreds of Carolopolis Award markers and historic plaques it has placed at historic sites and properties, the easements it holds protecting historic properties, and various tours, lectures, membership meetings, and other programs for the public that it provides each year. The Society counts over 1,000 households among its active members. In addition, the Society collaborates with neighborhood associations in Charleston, other local nonprofits, national organizations, is an active Local Partner of the National Trust for Historic Preservation, and collaborates with regional, national and international organizations in organizing special tours, forums and workshops around the region. In short, the Society acts as a physical and virtual clearing house and meeting place for thousands of people, and a dozen or more organizations, concerned with preservation of historic resources in Charleston and beyond.

5. The Society has been engaged with the issue of the cruise industry's impacts and potential impacts to Charleston's historic properties and neighborhoods since 2003. In 2010, we became aware of the State Ports Authority ("SPA")'s plans to construct a new cruise

terminal, and its refusal to place any enforceable limits on the size of cruise ships based or visiting in Charleston, the number of cruise visits allowed weekly or annually, or to consider any mitigation measures, such as shore-side power or an alternate site for the new terminal located further from Charleston's historic downtown district.

6. Charleston is arguably the best preserved historic city in the United States. It is the oldest city in South Carolina, founded in 1670, and as a key port town in the Southeast, it played a critical role in the following years of colonial development, the Civil War, and Reconstruction. Its motto, *Aedes mores juraque curat* ("She guards her buildings, customs, and laws"), reflects the serious commitment the city has made to caretaking its historic properties and traditions. Charleston now serves as a cultural hub of the Southeast, where vibrant and diverse arts, foods and handicrafts flourish in a charming setting with a deep connection to the region's history. Charleston also serves as a living museum of African American history, where physical remnants of slavery coexist with active Gullah communities and artistic development, shared through events such as the MOJA arts festival. Other well-managed, large-scale events, such as the Southeastern Wildlife Exposition and the Spoleto Festival USA draw hundreds of thousands of tourists each year who enjoy Charleston's quiet streets and impeccably preserved antebellum homes, churches and public buildings. It is the Society's position that tourism is important to Charleston's continued preservation and economic success, but it must be managed with enforcable limits and reasonable regulations in order to maintain Charleston's viability first as a livable city for its citizens and secondarily as a tourist destination.

7. As preservationists, we understand that Charleston is diverse, complex and inextricably linked to its maritime past. Yet the scale of Charleston's small peninsula and streets is not

expandable. The balance between the residential qualities of our neighborhoods, privately maintained and publicly enjoyed, and the tourist industry has required limitations on the scale and placement of hotels, the numbers of carriages, tour buses and pedicabs on our streets, and even the size of walking tours. When tourist transportation, such as cruise ships, is physically bigger than anything that tourists come to see, tourism is out of balance. Cruise tourism is a new form and scale of tourism unprecedented in Charleston's maritime history, and it should be managed to the fullest extent possible. Cruise tourism disproportionately contributes to congestion, aesthetic blight, pollution, noise and a diminution of the essential character of Charleston that led to its federal designation as a National Historic Landmark, and risks creating an environment in which the quality of the tourist experience will be diminished and a market in which historic neighborhoods, particularly those near the cruise terminal and those that are subject to the most intensive tourism, will no longer have appeal as a place to live and invest. Historic preservation is the voluntary investment of millions of dollars every year in the maintenance of historic structures, which creates hundreds of jobs for tradesmen and professionals from all walks of like. Tourism on its own does not and cannot provide the capital required for this investment in maintaining Charleston's neighborhoods and historic structures.

8. In April 2010 our concern was publicized in a front-page article in the Charleston City Paper, *Uncharted Waters,* Robert Gurley, a member of the Society's staff, noted that "Once the city loses its ambiance and its sense of special place, it's impossible to ever get it back," and pointed out that cities like Key West, Florida and St. Thomas, U.S. Virgin Islands, which are established cruise destinations, rank far below Charleston as destination cities as reported by the National Geographic Society. According to the National Geographic Society, Key

West's character was "robbed" by the cruise industry, and St. Thomas suffers from "massive over-visitation by massive cruise ships with poor waste management" and intense development and government that refuses to embrace sustainable tourism.

9. On July 27, 2010, the Society's board of directors adopted a position statement entitled "Cruise Ship Tourism in Charleston and Related Port Issues," attached as Exhibit A. This position statement called for "reasonable, written and enforcable regulations" to be put in place to "ensure that negative tourism impacts are managed and that the integrity and character of our city is not diminished." This included a call for a reconsideration of the final location of a new cruise terminal.

10. On September 14, 2010, I published an opinion piece in the Charleston Post and Courier entitled "Charleston can't manage tourism on 'cruise control,'" in which I articulated opposition to City Council's adoption of a "Resolution in Support of the South Carolina State Ports Authority's Plans for the Passenger Cruise Business and Redevelopment of Union Pier." I stated that the Society's position was that "specific steps be taken to protect the quality of life of the residents of the City of Charleston from the significant economic, social and cultural impacts caused by increased cruise ship traffic at the Port of Charleston." I emphasized that Charleston should focus on high-quality tourism centered on drawing tourists to Charleston-based hotels, restaurants and shops over development of a cruise terminal that was designed to take tourists out of Charleston. I also argued that the City of Charleston should do everything possible to impose reasonable, enforceable written standards setting appropriate limits and guidelines for cruise ship tourism. This is attached as Exhibit B.

11. In January 2011, the Society nominated Charleston to the National Trust for Historic

Preservation ("NTHP")'s "11 Most Endangered List." In making this recommendation, we expressed our belief that "the rapid growth of the cruise tourism industry at the Port of Charleston is introducing a new and unprecedented form and scale of tourism in the city. It is dramatically tipping the delicate balance that ahs been achieved through nearly three decades of shrewd and careful nationally-recognized tourism management in the city's historic neighborhoods."

12. In June 2011, the Society joined the Historic Ansonborough Neighborhood Association, the Charlestowne Neighborhood Association and the Coastal Conservation League as plaintiffs in a lawsuit against Carnival Cruise Lines to enforce existing zoning laws limiting activities in Charleston that would depreciate its historic value (i.e. structures that are too tall, block street views, have unpermitted signs, and emit pollution and noise).

13. Also in June 2011, the NTHP assigned Charleston "watch status" as part of its 2011 list of "America's 11 Most Endangered Historic Places." In its press release, NTHP stated that "The Watch Status means that a specific threat to a historic site appears to be growing, but can be avoided or controlled through collaboration and innovation. In the case of Charleston, expanding cruise ship tourism could jeopardize the historic character of the city, historic downtown Charleston and its surrounding neighborhoods. The Watch Status designation is accompanied by an offer from the National Trust to assist with finding a balanced solution that benefits the community and its rich cultural heritage." Addition of Charleston to the NTHP's watch list due to increased cruise operations was reported widely nationally and locally, from National Public Radio to the Charleston Post and Courier.

14. On July 14, 2011 I published an opinion piece in the Charleston Post and Courier describing in detail the concerns the preservation community has with the way that cruise

operations are expanding in Charleston. The article is attached as Exhibit C and describes that balance in scale is critical to maintaining Charleston's unique and valuable historic resources without depleting them and losing the very experience that makes the city one of the most sought-after destinations in the world.

15. In October 2011, World Monuments Fund ("WMF") listed Charleston on its 2012 Watch List of 67 threatened heritage sites worldwide. WMF president Bonnie Burnham pointed out that the list is a "call to action" and that "it is hoped that inclusion of Charleston on the 2012 Watch will support implementation of a balanced and sustainable plan that will enable both tourism – including by cruise ship – and the Historic District to thrive." This designation was also reported widely, nationally and locally.

16. On February 8, 2012, the Historic Charleston Foundation released a report studying the impacts that the cruise ship industry is having on Charleston. On February 9, the Post and Courier published an editorial reviewing the study's findings, including concerns about the size of the ships, which tower over the city's skyline, and the economic shift decreasing business of local, downtown merchants. The article stated that to date, "the mayor and City Council have followed the SPA's lead on the cruise ship issue. It is time for them to recognize that critics of the industry have legitimate concerns, which they, as elected officials, need to address."

17. In addition to the concern expressed by the Society and other organizations about the impacts of the cruise industry on Charleston, cruise operations are widely recognized around the world by preservation experts as threatening the local character and historically valuable physical and cultural resources of the cities where they locate. Venice, Italy; Key West, Florida; Malta; fjord communities in Norway; Falmouth, Jamaica are all among communities

that have struggled with cruise operations that have overtaken their waterfronts and homogenized the tours, restaurants and experiences available to tourists and residents of the cities.

18. In sum, the effect of the activities and publications mentioned in Paragraphs 4-17 is that the public concern and discourse over cruise operations in Charleston and their impacts on historic resources has raised it to one of the main issues under debate in Charleston over the past two years. Virtually anyone living in Charleston would be aware of the great controversy concerning the impact of cruise ship operations on downtown Charleston's historic structures and fabric.

19. In May 2012, in response to a public notice from the South Carolina Department of Health and Environmental Conservation's Office of Ocean and Coastal Resource Management, I submitted comments on behalf of the Society. The comments explained the intense impacts that the proposed cruise terminal would have on the surrounding historic neighborhoods and property. Those comments are attached as Exhibit D.

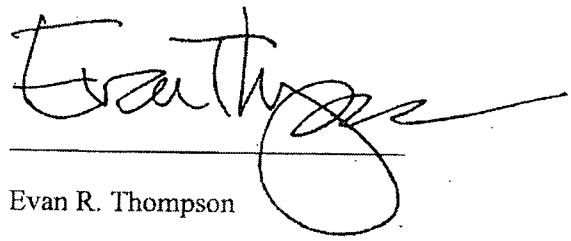
20. If the United States Army Corps of Engineers ("the Corps") had publicly noticed its permitting decision authorizing the construction of SPA's planned new cruise terminal, the Society would have participated fully in any public hearings, meetings, or public comment processes. The Society is ideally situated to provide institutional knowledge, historic documents and photos, and a preservation perspective as a consulting party in a Union Pier Terminal Section 106 process. Specifically, a fair and comprehensive Section 106 review would consider alternative terminal locations, off-site parking, a smaller terminal, multi-use terminal plans, shoreside power, binding cruise ship size limits, and scheduling coordination with major Charleston events.

21. The Corps' failure to undertake a public process of consultation and evaluation concerning the proposed cruise terminal's impacts on federally protected historic structures injured the Society and its members by impairing their statutorily-protected rights to participate in that public process and advocate for measures that would decrease cruise impacts on protected historic structures and neighborhoods, including structures near Union Pier upon which the Society holds conservation easements. Ongoing and increased cruise ship operations injure the Society and its members by injecting large amounts of traffic and inserting very large nonhistoric forms into the most protected and valued part of historic downtown Charleston. The ships tower over the historic skyline and block historically accessible views toward Charleston Harbor. Individual permitting review of the terminal proposal, with full National Historic Preservation Act ("NHPA") and National Environmental Policy Act ("NEPA") review would remedy the Plaintiffs' injury because the public procedures and evaluations would elicit measures to mitigate the impacts of the project on the human environment including Charleston's historic structures and integrity, or to avoid them altogether.

22. The NHPA Section 106 process, along with a full individual permit review and an Environmental Assessment and/or Environmental Impact Statement produced pursuant to the NEPA, could be easily implemented now, while the project is still in the planning stages; however, it would be very difficult to engage in a genuine public discourse evaluating and improving a project that is already under construction. If the SPA is allowed to install the pilings and retaining walls beneath the wharf, and therefore commence the complete overhaul of Building 322, the Society's (and that of the public at large) right to participate in a fair review of this project will be irremediably harmed.

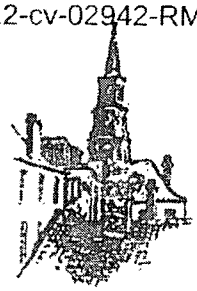
Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 19, 2013, in Charleston, S.C.



Evan R. Thompson

Exhibit A



PRESERVATION SOCIETY of CHARLESTON

1920 - 2010

CRUISE SHIP TOURISM IN CHARLESTON AND RELATED PORT ISSUES

July 27, 2010

It is the position of the Preservation Society of Charleston that specific steps should be taken to protect the quality of life of the residents of the City of Charleston from the significant economic, social and cultural impacts caused by increased cruise ship traffic at the Port of Charleston. Reasonable, written and enforceable regulations should be put in place to ensure that negative tourism impacts are managed and that the integrity and character of our city is not diminished. We believe that five considerations are utmost in charting an appropriate course:

1. The **quality of life** of the citizens of the city should be the primary factor in weighing any decisions that are made about the cruise ship industry and the Union Pier property. Tourism and the local economy flourishes when the citizens of the city are pleased with how it is managed.

2. **Maximum transparency** and public input is essential for ensuring that future plans for the cruise ship industry and Union Pier property consider potential negative impacts before future contracts are signed. Written commitments, timely public release of relevant documents and the use of impartial data (economic impact, traffic, etc.) should be the basis of decision making.

3. **Reasonable regulations** are the responsibility of the City of Charleston to ensure that the cruise ship industry is managed in the same way that all other tourist-related industries (pedicabs, walking tours, carriage tours) have been regulated. While imperfect, tourism management regulations are an essential tool for minimizing negative social and cultural impacts.

4. **Appropriate redevelopment** of the Union Pier property should be integrated into the existing fabric of the City of Charleston in order to enhance the sense of place that distinguishes our historic district with appropriately scaled new construction, compatible uses, quality materials, and the protection and preservation of existing historic resources. This should include a reconsideration of the present accommodations overlay as it relates to the property and the final location of a new terminal.

5. **Stabilization and restoration of the Bennett Rice Mill façade** should not be contingent on any future cruise ship contract or Union Pier redevelopment plan. It is urgent that the at-risk physical condition of this historic facade, owned by the State Ports Authority, be addressed so that this unique piece of industrial architecture can stand as a testament to our collective commitment to the historic legacy of our city. The SPA should consider placing a historic preservation easement on the façade.

In support of these objectives we present to the City of Charleston, the State Ports Authority and to the general public the attached set of "Recommendations for Sustainable Cruise Ship Tourism" that we have prepared for consideration and debate. We believe that these recommendations provide a basis for appropriate action by the City of Charleston and the State Ports Authority to manage cruise ship tourism so that we can protect the quality of life and historic resources of our world-renowned historic city and still derive an economic benefit from the cruise ship industry.

147 KING STREET • POST OFFICE BOX 521 • CHARLESTON SOUTH CAROLINA 29402
(843) 722-4630 www.preservationsociety.org FAX (843) 723-4381

Exhibit B

The Post and Courier

Charleston can't manage tourism on 'cruise control'

BY EVAN R. THOMPSON
Tuesday, September 14, 2010

Charleston City Council will vote tonight on a proposed "Resolution in Support of the South Carolina State Ports Authority's Plans for the Passenger Cruise Business and Redevelopment of Union Pier." It resolves to pledge the city's support for redevelopment of Union Pier and an enhanced cruise business managed by the SPA.

We, too, support the appropriate redevelopment of Union Pier and we are actively working to assist the SPA's efforts to stabilize and restore the historic Bennett Rice Mill facade that sits on the Union Pier property.

We do not believe, however, that the city should pass a resolution absolving itself of direct responsibility for the appropriate management of this (or any) industry that seeks to operate in the city. An unrestricted cruise passenger business of the type that is operating in Charleston, with ships carrying 3,500 passengers regularly berthing on our waterfront, is not a part of the rich maritime tradition of the city. It is a new form and scale of tourism that should be regulated in the same manner that all other tourism-related industries are managed.

It is the position of the Preservation Society of Charleston that specific steps be taken to protect the quality of life of the residents of the City of Charleston from the significant economic, social and cultural impacts caused by increased cruise ship traffic at the Port of Charleston. The proposed city council resolution resolves that the passenger cruise industry should be managed under the terms of a letter written by SPA President Jim Newsome on June 25, 2010.

Newsome's letter states that "it would not be appropriate for the Ports Authority to formally limit our ability to fulfill our mission and service our customers." It adds that "if there is a material change in the amount of cruises" that the SPA "will consult with the City and our neighbors to discuss accommodating these changes."

We are told that a one-berth facility will limit the scope and scale of the cruise business. Yet a one-berth facility could service up to 365 cruise ships per year. Let's be plain: Carnival is just getting its feet wet in the Cooper River, and unless city council adopts reasonable limitations on the number of cruise ships coming to Charleston, we could see double or triple the current level of 104 cruise ships per year.

Charleston has been a national leader in tourism management and historic preservation

zoning. There are limits placed on the number of carriage tours on our streets, the size of walking tour groups on our sidewalks, the square footage of building footprints on our city blocks and the number of rooms in hotels in our historic downtown, all toward the legitimate and meritorious end of supporting the quality of life and historic character of our city.

Why, then, are there to be no city regulations on the number of times a red, white and blue fin will compete with church steeples on our skyline, bringing hundreds of cars and thousands of people onto our streets each week? Let's not place too much emphasis on a $37 million economic impact based on a data model (IMPLAN) that is criticized by economists for being able to produce whatever numbers one wants, and that does not factor in the costs or displacement effects caused by said tourism. Rather, imagine the economic impact of a cruise passenger spending five nights in a downtown hotel, rather than five nights on a cruise ship. Imagine the economic impact of five days of breakfast, lunch and dinner in our city's restaurants, rather than fifteen meals on a cruise ship.

We must recognize that high-quality tourism in Charleston hotels, in Charleston restaurants, in Charleston stores, in Charleston historic sites and at Charleston cultural events should be our number one priority, rather than funneling people through our city streets to set sail for the Bahamas.

We look forward to the redevelopment of Union Pier and stabilization of the Bennett Rice Mill facade. We stand ready to assist with meaningful design recommendations for the new terminal. However, we believe that the proposed resolution before city council amounts to an abdication by the City of Charleston of its responsibility for imposing reasonable, written standards setting appropriate limits and guidelines under which cruise ship tourism should operate downtown.

The business of tourism management cannot be conducted on "cruise control." It's the job of the City of Charleston, and it's what our citizens expect and deserve.

Evan R. Thompson is executive director of the Preservation Society of Charleston.

Copyright © 1995 - 2011 Evening Post Publishing Co..

Exhibit C

Historic preservation requires balanced cruise controls

Y EVAN R. THOMPSON

Historic preservation is the voluntary investment of millions of dollars of private capital nd thousands of hours of sweat equity by property wners and tenants into historic buildings every year, rom the Battery o Byrnes Downs; rom the Westside Windermere. It is so the proverbial olden-egg-laying oose.

Thompson

In addition to creating hundreds of obs for tradesmen and professionals all kinds, it generates millions of ollars in economic benefits to the harleston region as well as sales, ccommodations, hospitality and roperty tax revenue. Preservation ustains a globally significant built vironment that draws millions of urists to our streets every year. Yet e scale of Charleston's small pensula and streets is not expandable. hile some see downtown as a limitless piggy bank of tourist dollars and hotel rooms, there is a tipping point where downtown Charleston will cease to be a viable and sustainable residential place.

The balance that has been achieved between the residential qualities of our neighborhoods, privately maintained but publicly enjoyed, and the tourist industry that brings so many jobs to Charleston has required limitations on the scale and placement of hotels, the numbers of carriages, tour buses and pedicabs on our streets, and even the size of walking tours.

This balance of scale in tourism is no different than efforts by our Board of Architectural Review to balance the scale of new buildings. None of this has been achieved voluntarily or by accident. It is deliberate, and governed by local ordinances. When the tourist transportation is physically bigger than anything that tourists come to see, that is not balance.

The Preservation Society of Charleston is proud of Charleston's maritime history. It built this city. But that should not give cruise ships a free pass from the thoughtful, locally enforced regulatory framework that is essential to protecting our city's neighborhoods.

Recent spin to the contrary, the issue is not cargo ships, which have co-existed with our city at Union Pier for decades. This is about the conversion of a cargo port to a tourist port, with cruise ships carrying thousands of passengers visiting nearly 100 times per year — a new and unprecedented development in Charleston's maritime history.

Would a big-box store be appropriate on King Street just because we have a history of retail downtown? Mass tourism is an opportunity fraught with overt and hidden costs, some of which are long term, all of which should be addressed responsibly at the outset. That means now, not later when it is someone else's problem.

Despite organized rallies and polarizing posters, the applicability of existing local ordinances to the conversion of a cargo port to a tourist port is key to managing our city's assets and opportunities to the fair advantage of all. The Society is involved in a lawsuit because the application of those ordinances to cruise ships making their permanent home in Charleston is in dispute.

The lawsuit does not seek to run cruise ships out of Charleston Harbor. It does seek to clarify the applicability of existing regulations as necessary to chart a course for how Charleston can manage cruise tourism now and in the future. No one will be thrown out of work if cruise ship visits are limited to 104 per year by local ordinance. Charleston is proof that tourism thrives when it is conducted within reasonable boundaries. Protecting our residential neighborhoods with something more than a handshake should not incite the venomous reaction that it has.

A concerted effort has also been made to confuse the public about the issue of tourism regulations and the redevelopment of Union Pier. They are separate issues. The Preservation Society has repeatedly stated its support for the Union Pier redevelopment plan and has made constructive suggestions for the design of the new terminal. Yet a recent publication circulated by Union Pier's owner, the State Ports Authority, presents Charleston with a take-it-or-leave-it choice: to have regulations on the future size of the cruise tourist industry or to make Union Pier the most remarkable new neighborhood on the Atlantic seaboard.

Why can't we choose both? Must we sacrifice one for the other?

As preservationists we understand that Charleston is diverse, complex and inextricably linked to its maritime past. We do not involve ourselves in this issue because we seek to be frivolous nags. We are involved because we love our city. We seek to protect a city that anchors our region and is worthy of the world. Cruise tourism is welcome as part of our local tourism management framework.

We have seen enough of what has happened in the past to know that while tourism management is not always easy or popular in the short term, it is worth doing in the end. Charleston deserves nothing less.

Evan R. Thompson is executive director of the Preservation Society of Charleston.

2:12-cv-02942-RMG Date Filed 04/10/13 Entry Number 107-7 Page 17 of 20

R.002659

Exhibit D

PRESERVATION SOCIETY of CHARLESTON

— FOUNDED 1920 —

Board of Directors
2012-2013

Caroline M. Ragsdale
President

Kristopher B. King
1st Vice President

Anne T. Pope
2nd Vice President

J. Elizabeth Bradham
Treasurer

Samia Hanafi Nettles
Recording Secretary

J. Rutledge Young III
Immediate Past President

Lane F. Becken
J. Anderson Berly III
Debbie Bordeau
Elizabeth Kirkland Cahill
Beau Clowney
Glen Gardner
Rebecca G. Herres
Glenn F. Keyes
Bill Marshall
James R. McNab
Irish Ryan Neville
Felix C. Pelzer, Jr.
Louester A.S. Robinson
Elizabeth Garrett Ryan

Advisors
Lynn S. Hanlin
T. Hunter McEaddy
Daniel Ravenel
Helga Vogel
Jane O. Waring

Director Emeritus
Norman Haft
Jane Lucas Thornhill

May 4, 2012

Mr. Steven Brooks, Project Manager
SCDHEC Office of Ocean & Coastal Resource Management
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

RE: **P/N # OCRM-12-054-B**

Dear Mr. Brooks:

The Preservation Society of Charleston respectfully submits this letter to urge denial of the State Ports Authority's above referenced critical area permit application. The issuance of this permit will irreversibly harm the Charleston Historic District. The permit would enable the conversion of a small cargo port into a modern hub of unregulated, high-volume international mass tourism with all of its associated traffic, noise and pollution immediately adjacent to the Charleston Historic District, a Geographic Area of Particular Concern.

The Society was founded in 1920, and is qualified to address the impacts of the proposed new use for Union Pier on the Charleston Historic District, a National Historic Landmark. We also own façade easements on numerous structures on East Bay Street and in Ansonborough neighborhood, adjacent to Union Pier, and write as an organization with a real property interest in the impacts of this project.

As defined in Chapter IV of the Coastal Management Program, the highest priority must be given to the identified primary value of a GAPC. 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." 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"
- "a flavor of an earlier America"

The aesthetic presence of a modern warehouse servicing massive 2,000+ passenger cruise ships docking at Union Pier every five days, looming over the historic district, with thousands of cars traveling through the historic district's streets, carrying passengers to and from the passenger terminal, does not embody the values enumerated above. The scale of the ships themselves are incompatible with the height, scale and mass of Charleston's buildings and

147 KING STREET • POST OFFICE BOX 521 • CHARLESTON SOUTH CAROLINA 29402
(843) 722-4630 www.preservationsociety.org FAX (843) 723-4381

are enormous when compared to the historic scale of shipping on Charleston's waterfront. Indeed, the presence of these ships is felt all over the district, dominating vistas from bridges leading to and from Charleston on the opposite side of the peninsula over the Ashley River, with noise and pollution impacts occurring in historic peninsular neighborhoods distant from the terminal itself. This is a radically different impact from the much smaller scale, noiseless and otherwise unobtrusive cargo ships, which no longer service Union Pier, and which never required street closures and sandwich board signs to announce their presence, nor generated traffic volumes of thousands of cars.

Decreasing property values in historic neighborhoods adjacent to the pier area are a major risk, diminishing the long-term investment in historic neighborhoods that are essential to our local preservation economy. The recent foreclosure of a major condominium development next to Union Pier and subsequent failure of an auction to produce reasonable resale values could be an early indication that the development of Union Pier as a cruise terminal will undermine the value of redeveloping and preserving adjacent areas.

In summary:

B(6) – **The development will negatively affect irreplaceable historic sites of South Carolina's Coastal Zone.**

B(10) – **The proposed use will negatively affect the value and enjoyment of adjacent owners.**

C(1) – **The long-range, cumulative effects of the project will undermine other possible development and the general character of the area.**

C(3) – **The negative impacts on the Charleston Historic District and associated National Historic Landmarks, a Geographic Area of Particular Concern, will be extensive and irreversible.**

We enclose a copy of our *Cruise Tourism Special Report* which highlights past statements by Charleston's mayor about the value and opportunity of redeveloping Union Pier as a residential and commercial area in keeping with the historic district. We support that vision, and urge denial of this permit. There are more appropriate locations for this use in areas further up the Cooper River where impacts on GAPCs will be negligible.

Sincerely,

Evan R. Thompson
Executive Director

Exhibit L

The Cruise Industry in Charleston:

A Clear Perspective

Prepared for

Historic Charleston Foundation

Prepared by

Miley & Associates Inc

Columbia, SC

April 2012

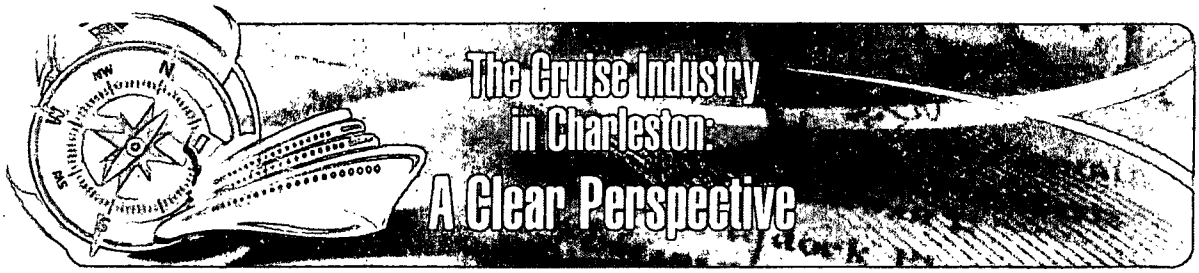


Table of Contents

1. Introduction 2

2. Economic Analysis of the Cruise Industry 7

- 2.1 Economic Impact of the Cruise Industry: An Overview of Existing Research 7
- 2.2 Analysis of the Crotts and Hefner Report 13
- 2.3 The Cruise Industry in Relation to Overall Charleston Tourism 28
- 2.4 The Cruise Industry: A Global Supply Chain Model 29
- 2.5 Potential Revenues Generated by the Cruise Industry for the SPA 35
- 2.6 What are the Risks Presented by the Cruise Industry for Charleston? 37

3. Summary and Recommendations 39

Endnotes 44

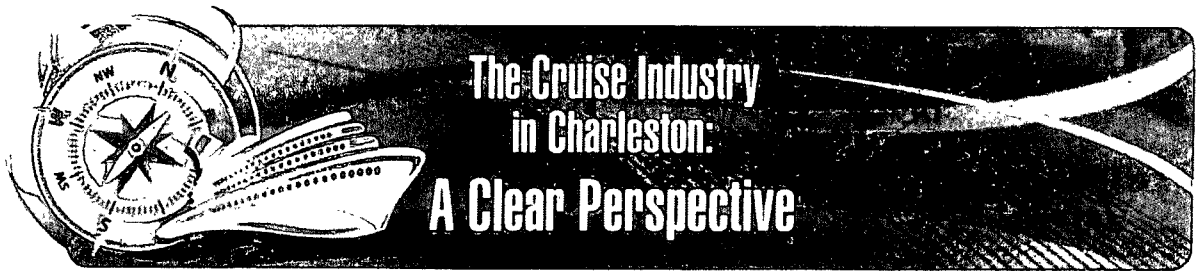
Bibliography 45

Appendices 46

1. Cruise Ship Schedule and Profile 46
2. Questions and Answers from the SPA 53
3. Demographic and Housing Analysis 58
4. Legal and Related Issues 70

Miley & Associates 84

General Limiting Conditions 85



Introduction

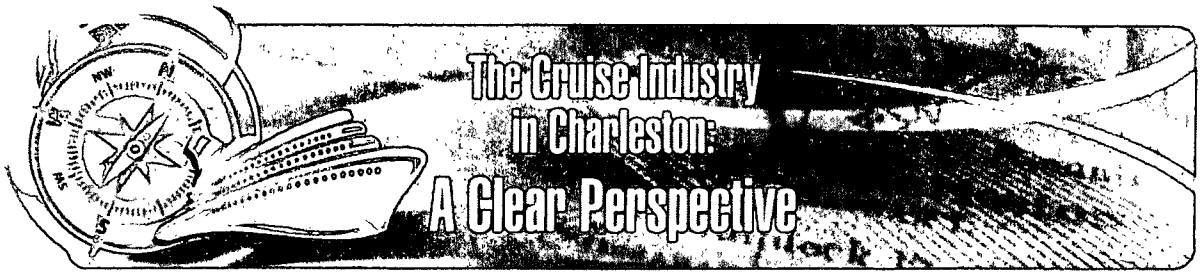
In the fall of 2011, Historic Charleston Foundation (HCF) commissioned Miley & Associates, Inc. (M&A) to conduct an impartial analysis of the impact of the cruise industry on the City of Charleston. HCF directed M&A to provide an assessment of the positive and negative, short-term and long-term impacts that the cruise industry has, or may have, on Charleston's economy and quality of life as they relate to the historical, architectural and cultural character of the City. Funding for this report was made possible in part through a contribution from the National Trust for Historic Preservation.

This is the first comprehensive study of how the cruise industry affects businesses, government, residents, and tourism in the Charleston region. It covers many facets of the cruise industry in detail, including the industry's economic impacts on the community, and their sophisticated business and operating model. The report confirms the complexity of the cruise industry and how it generates profits, as well as how its focus on meeting customer needs and profit goals can be a concern for communities that are either home ports or Ports of Call. Charleston is both.

This report is intended to provide analysis and perspective on the cruise industry's impacts on the City so that community leaders can establish policies to address the cruise industry's presence in the historic district. The goal of the report is to increase the Charleston stakeholders' understanding of the relationship a community can expect to have with the cruise industry. However, it should be noted that while other groups and studies have focused on the benefits to the Charleston region from the cruise industry, this study also considers the cost to the City of Charleston from the cruise industry. This report provides Historic Charleston Foundation with findings related to the cruise industry, economic impacts, opportunity costs and quality of life issues which are an inherent part of accepting the cruise industry into Charleston's cultural fabric. Included are examples, case studies, analysis of third party data, expert interviews and observations of solutions both deployed and avoided by other similar communities.[1]

However, as we point out several times in this report, the truth about the industry's impacts – good or bad – on the City of Charleston can only be determined with a comprehensive analysis based on extensive, real data collected from Charleston's residents and businesses.

Currently, the Gibbes Museum of Art is featuring "The Art of Alfred Hutty: Woodstock to Charleston", showcasing landscapes and the human condition paintings based on life in Charleston. Hutty and his fellow artists formed the founda-

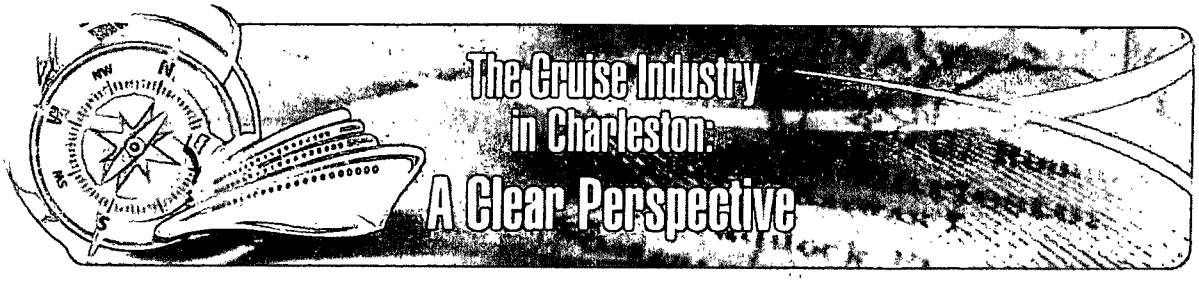


Introduction
(continued)

tion of what is referred to as the Charleston Renaissance (1920 – 1945). This time period began a movement that captured the imagination of tourists. From those humble beginnings, tourism in Charleston has slowly grown over the years to produce what it is now, a renowned destination for travelers around the world who appreciate culture, artistry, and a history supported by a community that appreciates old world charm and values (for a brief overview of the demographic profile of Charleston, see Appendix 3). Tourism is a critically important component of the Charleston area economy, and historic preservation plays a major role in its success as an international destination. Based on the latest data from the Charleston Area Convention and Visitors Bureau, there were more than 4.2 million visitors to Charleston in 2010 spending more than $3 billion.

Central to the issue of cruise ships in Charleston is the volume of the cruise industry (number and size of cruise ships) and the proposed development of the Union Pier Passenger Terminal to be built by the South Carolina State Ports Authority (SPA). The SPA has proposed renovating an older building on SPA property at a cost of $35 million. The SPA's proposed new terminal is supported by many in the Charleston area. SPA and its supporters have focused attention on the assertion that the cruise industry and the new passenger terminal provide (and will provide) a tremendous boost to the City's economy. The SPA has commissioned at least two studies supporting these economic impacts, and two of the more recent ones are discussed in this report.[2]

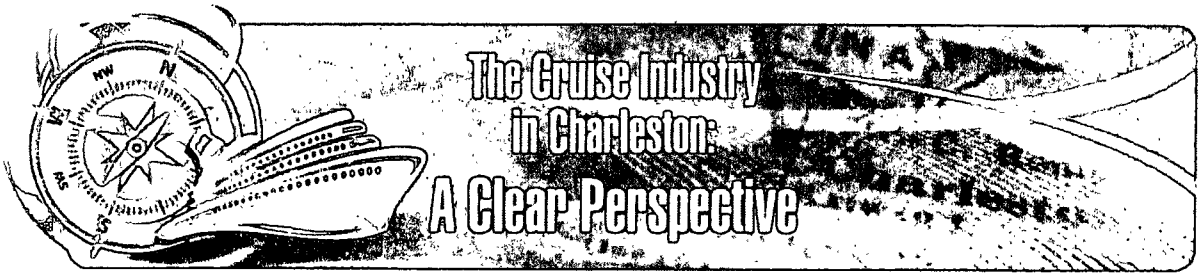
Concerns about the cruise industry are multi-pronged. Some think that the cruise industry is hurting the historic character and charm of Charleston that has made the City one of the most attractive places to visit in the country. Others believe that it has not hurt the City yet, but could hurt the City if the volume of the industry is allowed to grow unchecked. This issue is frequently referred to as "killing the goose that lays the golden egg." Charleston has a well-known legacy of thoughtful and comprehensive tourism regulation that has protected the character and livability of the City thus far, and many in the community would like to see the cruise industry regulated in the same manner.



Introduction
(continued)

In addition, some stakeholders believe that the new terminal is in the wrong place and creates additional traffic congestion in an area of the City that is already congested. They think that there are other options for its location and that, given its location in the middle of the historic district; Union Pier is not the optimal choice.

It is critically important to acknowledge that all stakeholders involved in the cruise discussion have different perspectives on the benefits and costs of the cruise industry in Charleston.



Introduction
(continued)

While not exhaustive, the following list highlights the primary groups of stakeholders in the cruise industry's future in Charleston:

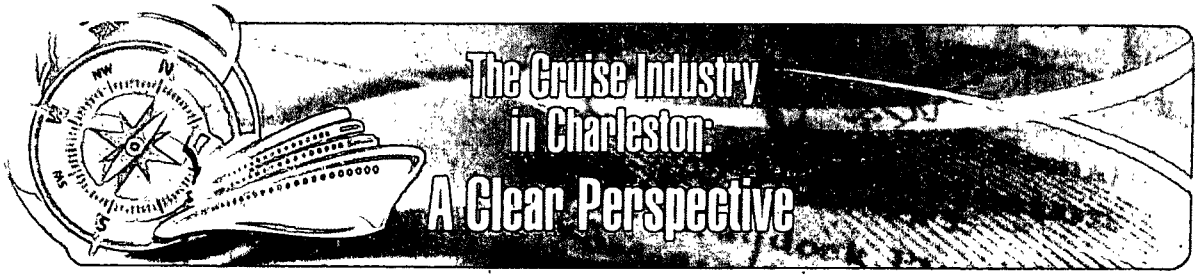
- The City of Charleston government
- The taxpayers in the City of Charleston
- Historic preservationists
- The City residents who live and work near the Union Pier
- The businesses that sell and serve the cruise passengers
- Longshoremen
- Other visitors to Charleston who are impacted by the traffic congestion
- The SPA and its employees
- The Carnival Cruise Line
- The other cruise operators that call on Charleston
- The residents and businesses located in surrounding areas such as Mt. Pleasant, North Charleston, Summerville, and the rest of Charleston County outside the peninsula
- The hotel industry on and off the peninsula
- The Charleston Area Convention and Visitors Bureau
- The local governments of the surrounding areas such as Mt. Pleasant, North Charleston, Charleston, Berkeley and Dorchester County governments, and Summerville
- Chambers of Commerce
- Companies and users of other services such as container shipping at the Charleston port
- Environmentalists concerned with water and air pollution

Within each group of stakeholders there may not be complete consensus. For example, some in the hotel industry see the cruise passenger business as a positive – filling empty rooms in the off-season. However, some see the cruise industry passengers as potentially displacing other visitors.

To date, no such cost benefit analysis has been conducted. The analysis and discussion that has occurred has completely ignored the fact that whatever benefits may accrue to one or more groups or to certain jurisdictions may not be shared with all the groups, *and* that some of the groups that may bear some or all of the costs may not receive any of the benefits that might be generated.

This non-alignment of benefits and costs can be seen in the relatively minor economic impacts to the City of Charleston from the industry. For example, it is estimated in this report that the SPA will collect as much as $9 million in parking and head tax fees in a typical year from the cruise industry. However, none of these revenues goes to the City of Charleston, yet all of the services to meet the needs of the passengers once they are off the ship fall on the City of Charleston or other local governments. The SPA released a study purporting to show that the cruise industry has made a large impact on local hotel occupancy. However, it is estimated that the vast majority of these impacts is on hotels outside the City of Charleston.

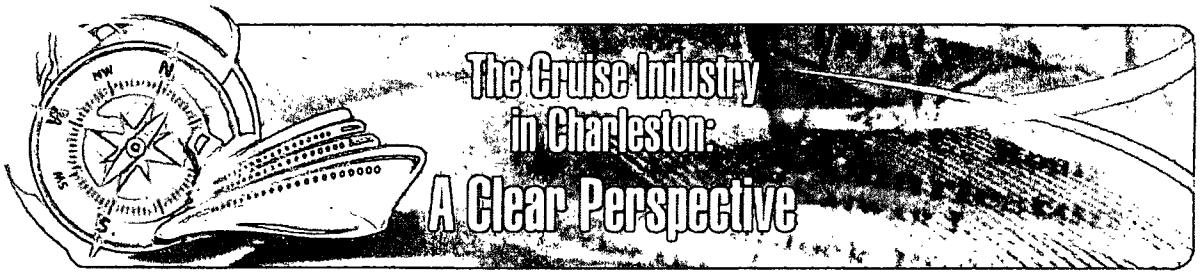
There are many reasons to support the cruise industry. For one, the cruise business generates revenues and profits for the agency. The cruise business helps diversify the SPA's operations and may help offset declines in revenue over the last few years.



Introduction
(continued)

The SPA is a well-respected, well-run port operator and has served the Charleston area, the state of South Carolina, the many exporters and importers in the region exceptionally well for many years. As in other cruise ports, the SPA is one of the largest and most vocal supporters of the cruise industry in Charleston. This report should not be interpreted as a negative report on the SPA or the cruise industry.

The purpose of this report is to help clarify the key issues that concern the City of Charleston and its residents. This report focuses on the most visible reasons that the SPA and others support the cruise industry ---the claims by the SPA and others that the cruise industry generates major positive impacts on the Charleston economy. In addition, this report addresses the issue of whether the cruise industry could grow so large that it could harm the overall tourism industry in the City. And finally, this report provides recommendations for the City of Charleston and its leaders to consider in future cruise industry negotiations.



2. Economic Impact of the Cruise Industry

2.1 Economic Impact of the Cruise Industry: An Overview of Existing Research

Ocean economics has been a part of Charleston history from the City's beginning. The Port of Charleston was and is one of the key drivers of the region's success. The economics of the Port for most of the region's history has centered on general cargo, containers, and break-bulk goods. As markets have changed, the Port has needed to adapt, most recently with large manufacturers such as BMW®, new and larger ships soon expected to pass through the expanded Panama Canal, and cruise ships.

Although ships have been calling on Charleston's port since the 17th century, the cruise industry is relatively new to the Charleston region. It is clear that any vessel that can hold upwards of 4,100passengers would generate a fair amount of excitement in terms of the potential economic impact (dollars spent locally) those visitors might be expected to bring to a local economy.[3] However, estimating the impacts has proven more difficult than some reports may imply.

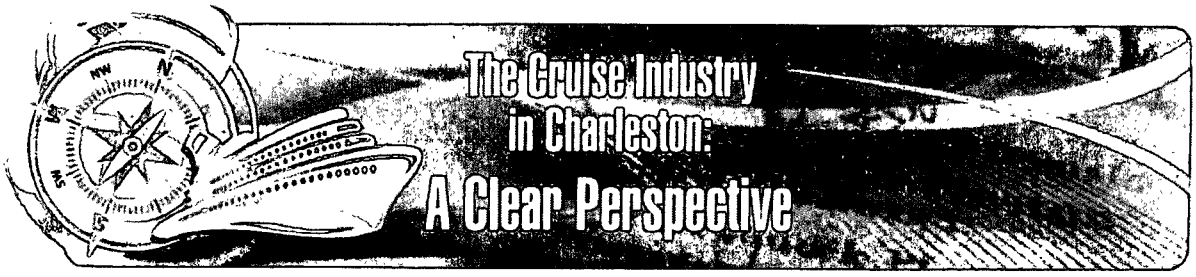
The following section provides an overview of the various approaches and results of economic impact studies of the cruise industry in an attempt to help the Charleston community better understand the difficulty in estimating the economic impacts of the industry. We reviewed more than 100 sources, which included research documents, scholarly articles, books, presentations, and government and industry reports related to the economic impact of the cruise industry on different geographies around the globe. We narrowed that volume of literature to 15 published economic impact reports that we believe represent the current state of the industry and its economic effects on local communities. These reports, while focused on economic impacts, also provide valuable insight into the opportunity costs inherent in the cruise industry.[4]

We found the impacts vary considerably. This is explained by a number of variables including community involvement, negotiating skills of the local community, the community's dependence on the tourism industry, whether a community is the origination point or a Port of Call, location of country, and customer preferences. Complicating the comparison analysis is the variety of impacts, project scopes, and methods used.

The Port of Charleston was and is one of the key drivers of the region's success. The economics of the Port for most of the region's history has centered on general cargo, containers, and break-bulk goods. As markets have changed, the Port has needed to adapt...

Impact Method and Variances

A number of methodologies were used to calculate economic impact. Of the reports reviewed, one study applied IMPLAN (Minnesota IMPLAN Group, 2004), four studies referenced RIMS II (U.S. Department of Commerce, 1997), and one took a computable general equilibrium (CGE) approach, while the balance of reports used no economic model to calculate impacts and instead relied on tax receipts or other types of revenue estimates.



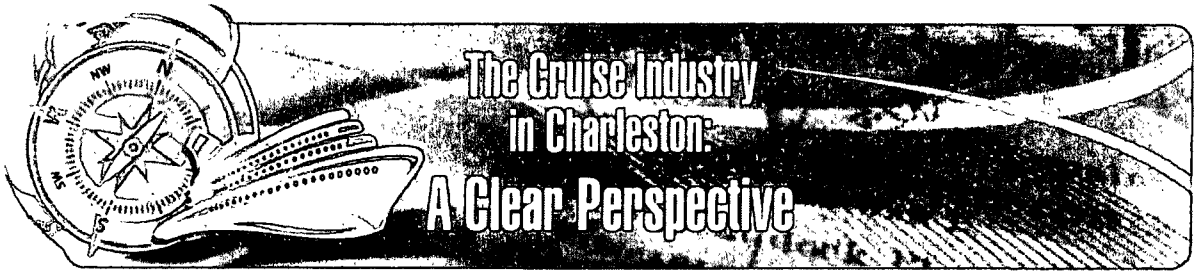
2. Economic Impact of the Cruise Industry
(continued)

The economic benefits received by ports and their associated communities are only a small fraction of the income derived by the cruise industry for the use of ports and the amenities supported by the local communities (Klein, 2009).[5] Therefore, passenger spending recorded in these studies is peripheral (secondary) spending by cruise customers. An example from a Belize report states: "Although stay over tourists (non-cruise) comprise only a fraction of the total visitors to Belize, they contributed 82.5% of the total tourism revenue in 2005." (Center on Ecotourism and Sustainable Development (CESD), 2006).

In the studies analyzed, daily passenger spending ranged from $32 per passenger in the Key West study (Thomas J. Murray & Associates, Inc., 2005) to $180 per passenger in the Seattle study (John C. Martin Associates, LLC, 2004). See Table 1. The Charleston study (Crotts & Hefner, 2010) estimated $66 per passenger per day. The average of all the studies analyzed was $61.[6] Analysis of the impacts is grouped in four general categories: method, cruise spending, origination versus Port of Call estimates, and employment. We also included a brief analysis of taxes imposed since it can be either a direct revenue source or a secondary source derived in part from passenger spending.

Impact: Method

The range of methodologies utilized for the various studies that were analyzed created the significant variance in cruise spending numbers from study to study. Of the 15 studies evaluated, seven studies – about half – did not survey cruise passengers or crew customer spending. Of the eight that did, only two studies reported statistically significant spending data.[7] Both the Belize and Costa Rica (Center on Ecotourism and Sustainable Development (CESD), 2007) reports completed a statistical sampling analysis on intercept surveys to ensure that data collected was statistically accurate. That ensured one group of visitors was not inadvertently left out or disproportionally represented in the study. The Costa Rica study notes, "Both the statistical sampling as well as the methodology used in surveys with crew and passengers make it possible to derive a close approximation of the average expenditures of visitors in Costa Rican ports, which in turn allows for a calculation of cash flow per category of visitor expenditure." Two of the reports completed by industry representatives provide a range of economic spending



2. Economic Impact of the Cruise Industry
(continued)

TABLE 1 Impact Assumptions

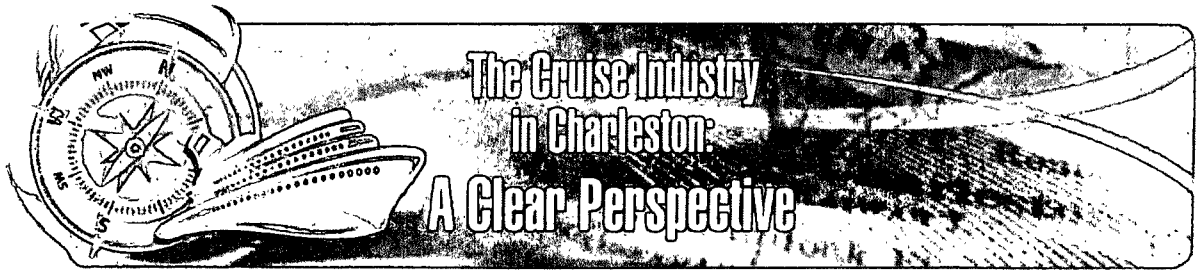
Impact/Study > Location	Year	Study Cruise Visitors	Spending/ Passenger ($)	Customer Survey	Jobs	Community Donations (K)	Model Results Reported	Average Crew Spending	Origination Data	Port of Call Data	Statistical Significance
Charleston	2010	111,240	$66.31	Yes	407	$50	IMPLAN	$70.23	Yes	Yes	No
Costa Rica	2007	–	$74.84	Yes	1:10	–	–	$39.80	–	–	Yes
Belize	2006	–	$44.00	Yes	1:10	–	–	–	Yes	Yes	Yes
Maui	2005	240,800	$101.00	No	–	$750	–	$64.00	No	No	–
Key West	2004	884,735	$32.10	Yes	955	–	RIMS II	$65.80	No	Yes	No
N. America	2004	–	$95.50	No	315,830	–	RIMS II	$38.91	No	No	–
Halifax	2004	170,000	–	No	–	–	–	–	No	No	–
Carribbean	2004	–	–	No	–	–	CGE	–	No	No	–
Canada	2003	–	$55.71	No	–	–	–	–	No	No	–
Seattle	2003	345,000	$180,000	Yes	1072	–	RIMS II	$120.00	No	No	–
Victoria	2003	250,000	$88.00	Yes	–	–	–	–	No	No	No
Portland, ME	2002	205,374	$117.00	No	372	–	–	$38.00	No	No	–
Carribbean	2001	–	$103.83	No	–	–	–	$72.06	No	No	–
Juneau	2000	595,959	$125.00	Yes	750	–	–	$20.00	No	No	No
Anchorage	1999	274,290	$100.00	Yes	2040	$364	RIMS II	–	No	No	No

impacts. The North American study, completed by Business Research & Economic Advisors (BREA), lists a range of passenger spending, depending on location. Daily spending ranges from $29 to $231 (Business Research & Economic Advisors, 2004). A second report completed by PricewaterhouseCoopers of the Caribbean, does not report passenger spending other than in aggregated form. It is not clear in the report what dollars were included in final spending totals. (PricewaterhouseCoopers, 2001)

Impact: Visitor Spending

For studies that used a survey, either statistically tested or not, spending is limited to what is commonly purchased on shore. These items include retail goods, lodging, meals, tours, and miscellaneous expenditures. Those not using a survey method, measured spending using, in some cases, cruise industry-derived data. Two examples of this are reports created by the McDowell Group. They state: "Spending estimates for cruise passengers and crew are based largely on the McDowell Group's study of Cruise Industry Impacts on Local Governments in Southeast Alaska (1997), along with 1999 gross sales data, sales tax data, cruise line reports of on-board tour sales, and cruise traffic data for each community. In addition, the McDowell Group recently conducted proprietary research that assisted in making these estimates." (McDowell Group, 2000). It appears from these remarks that sales on board the ship were also included in the customer spending data. Therefore, these figures would include monies that return to the cruise line rather to the local economy.

This method does not give an accurate accounting of what dollars are, in fact, spent locally. From a cruise perspective, the industry has a captive audience to sell to. Spending on a ship is substantial and can includes bar sales, casino gambling,



retail sales in ship-board stores, shore excursions, spa services, photography, art auctions, bingo, extra-tariff restaurants, phone and internet services, and food and drink not covered in the main meal package (Klein, 2003). Including these data in visitor spending overstates the actual impact into the local community. This is an important revenue source for the cruise lines as ships become larger and more vertically integrated. Future ships will include underwater restaurants, cabins, and conference rooms, all for an extra price.[8] But these dollars are not part of a local economic impact.

Other accounting inconsistencies are demonstrated in a Seattle impact study (John C. Martin Associates, LLC, 2004). This study has the highest passenger spending because it includes the total cost of the airline ticket as part of local expenditures. At a minimum, half of the ticket needs to be excluded, since those monies are typically allocated to the departure city.

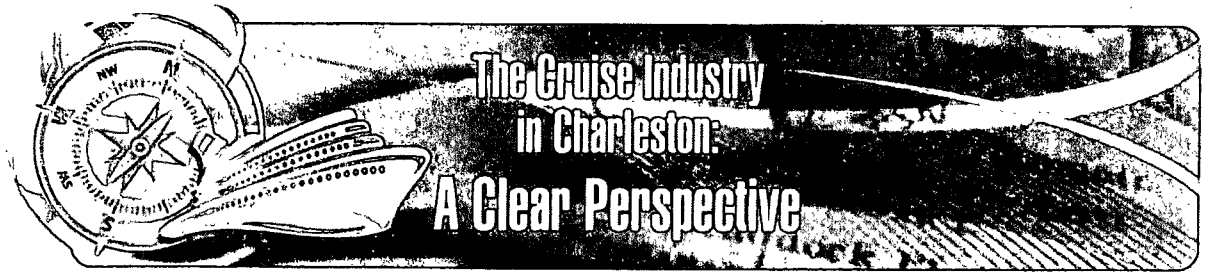
Impact: Origination vs. Port of Call

Cruise passenger spending is significantly affected by the location and timing of the cruise and whether the cruise port is a home (origination) port or Port of Call. Origination refers to the location where the cruise begins and ends. Port of call is a stop on the cruise itinerary. Two studies addressed this issue specifically. The Charleston study estimated Port of Call visitor spending at $43 while origination visitor spending was $66 (Crotts & Hefner, 2010). A Maine study estimated just the opposite, with Port of Call passengers spending $117 locally, and average home port spending $28 to $99 locally (City of Portland Department of Ports & Transportation, 2002). Note the significant variation between the two studies, and the large variance in the Maine study data.

The Key West study may give us clues to why this is. It notes spending is greatly dependent on timing of the cruise. As stated by Murray & Associates, "the fact that it is the first Port of Call, and passengers are saving money for later port calls where there is more extensive duty-free shopping, more attractive tours, etc. One observation can be made from the schedules noted above; that is, Key West is an early-morning Port of Call typically, and perhaps passengers just embarking on a cruise ship vacation do not desire early morning activities having spent their first night of the cruise on board a luxury passenger vessel" (Thomas J. Murray & Associates, Inc., 2005). Other factors affecting spending include departure and arrival times, time of year, and mode of transportation to the cruise vessel and cruise package. Spending is likely affected by the type of cruise passenger being targeted in the local market. If the market consists of customers who can drive less than a half day from home to the origination point, board, then disembark at the end of the cruise and drive home without having to stay overnight in a hotel, then local spending will be greatly reduced.

Impact: Employment

Interestingly, only five of the 15 reports provide specific, detailed employment analysis. Part of the reason for this is that many of the reports did not use an economic impact tool, such as IMPLAN, to assist in creating a detailed calculation. Another reason is that many of the reports are related to Caribbean countries, where some economic data required to make the calculation may not be available. However, many of the studies do provide aggregated estimated employment, but are not clear as to the scope, geography or time frame of that employment. Many also evaluate employment impacts from



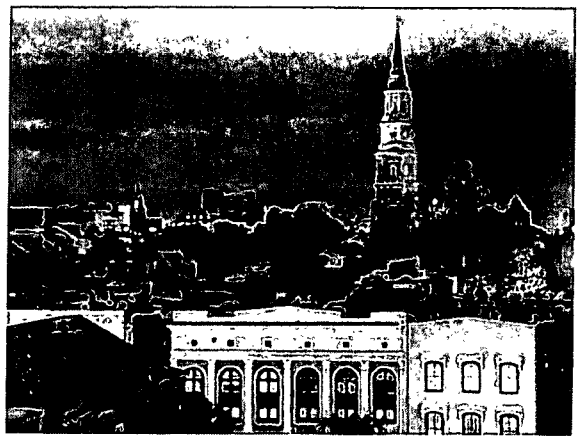
2. Economic Impact of the Cruise Industry
(continued)

a social science perspective. The Belize reports stated, "In terms of employment, in 2004, it was estimated that only 10 percent of jobs in the tourism industry were a result of cruise tourism, while 90% were in the stay over tourism sector."

Unfortunately, employment gains made from tourism spending are offset by a number of study observations that indicate increased stress on the workforce because of part-time low-wage work. A report by the European Union evaluating the Caribbean states, "The majority of jobs are low-level with low wages but higher than wages in other sectors such as agriculture. Among Caribbean countries the perception of tourism varies – in mature destinations it tends to be negative" (Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements, 2007).

In the Charleston study, employment is calculated based on dollars spent. As we have noted, there is significant variation in the calculation of spending. Of the 407 direct, indirect, and induced jobs, approximately 30 percent of the employment is cruise ship employment and not related to the local economy. Another 35 percent are retail-related positions – likely either part-time, seasonal or both – as a result of the nature of cruise industry. The balance of positions is either professional services or wholesale and trade. IMPLAN calculations indicate the wage rate is close to or at minimum wage.[9]

The exceptions to low-paying jobs are union jobs needed at the dock. At first glance this would appear to be a significant impact. However, it only takes a few hours of work to dock a boat, including tying up both bow and stern. This likely is incorporated into the daily work of

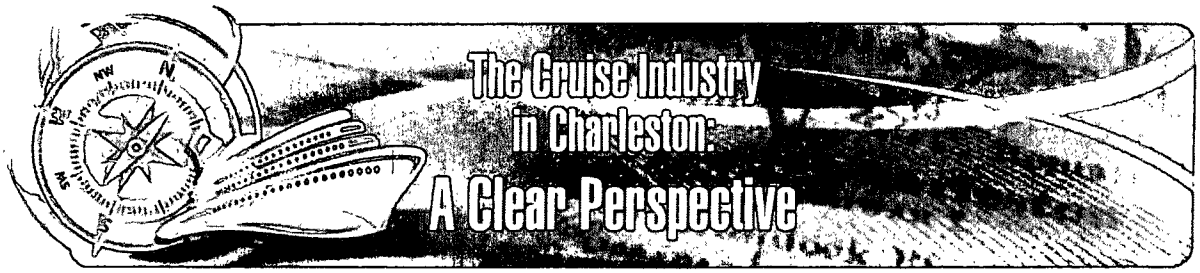


current union workers. Other potential union work is loading and unloading the ships. The union contracts were not available to us for this research – either number of workers or rate of pay.[10] Other third party data suggests this work is mainly handled by cruise staff, again limiting the economic impact to the local community.

Temporary and low-wage jobs are the main types of workers hired by the cruise industry. Unfortunately, there are very few high-paying jobs and few or no growth opportunities for employment based on cruise passenger spending. The lack of better paying job opportunities is one of the key policy concerns stated in more than one report reviewed.

ImpactTax: Industry and Visitor Spending (Secondary)

Industry-imposed tax is a primary source of income when applied as a head tax, docking fees, etc., and is an overall part of the economic impact. Some reports addressed tax as an economic impact and others did not. The industry's US flagships, a cruise company's primary assets, generate significantly more tax than non-US ships. US flagships, like hotels, "contrib-



ute to the community or participate in ways that most foreign-flagships do not. Hotels regularly engage in community activities and charities, and must undergo environmental impact studies and pay infrastructure impact mitigation fees. Foreign-flagships do none of these" (Maui Mayor's Cruise Ship Task Force, 2005).

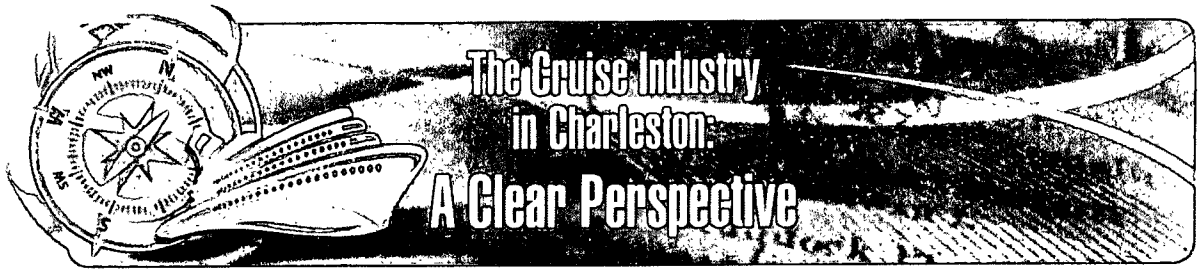
Comparing cruise ship impacts with land-based operations may give a community a false sense of security, since it is like comparing apples to oranges. Cruise passenger spending is "shallow," providing in most cases only secondary tax revenue sources, not primary. As the Maui Mayor's task force writes, "Cruise lines make their major infrastructural investments in assets that are mobile, i.e. ships, whereas the major infrastructural investments made by hotel operations are land based tourist accommodations and amenities, i.e. largely immobile assets. This gives cruise line businesses the appearance of being more easily transferred to other locales than the land-based accommodation businesses. Hotels continue to generate jobs and revenue for the County and the State even if they are sold or converted for time-share or condominium uses."[11]

The secondary source of tax income is generated from local spending by cruise tourists. Tax, however, varies greatly, depending on state and country of origin. Tax collected, or not collected, by local government affects the final community economic impact. Some communities have found the tax collected from cruise spending to be a real life-saver as other industries contract, such as natural resource extraction and fishing. In southeast Alaska, "Tourism also contributed to the tax base of municipalities through sales taxes, bed taxes, and docking fees. In 2000, Haines Borough voters approved a bed tax and a sales tax on commercial tours, which they hoped would generate revenue to offset losses in other industries" (USDA, 2005).

Unfortunately, the result of this tax was that the cruise industry left Maui. According to the USDA study, "This tax was repealed by voters in 2003 in an effort to entice cruise ships back to the community". Although taxes remains an economic revenue source, the power of some communities to levy a tax may be limited, depending on the community's overall dependence on cruise tourism.

Summary – Overview of Impact Studies

There is significant interest around the country in the economic impacts of the cruise industry as evidenced by the number of studies we encountered. For some communities and countries focused on tourism, the cruise industry is a vital part of the economy. For others it is less so. All of the reports we analyzed suggested some kind of positive economic impact to the community. What they did not agree upon was the level of that impact, who most benefited from the industry, related opportunity costs and potential damage to a way of life resulting in the continued challenge of trying to balance the tourism industry to the benefit of all.



2.2 Analysis of Crotts and Hefner (C &H) February 2010 report "An estimate of the economic contributions of the SC State Ports Authority's 2010 cruise ship activity to the region's economy"

Introduction of Crotts and Hefner Review

A major concern of this research is to provide a better understanding of the economic impact of the cruise industry on the City of Charleston, the tri county area and the state of South Carolina. In order to reach a consensus about its value and impact it is extremely important for all parties to accept the estimates utilized when discussing the industry. The de facto data regarding the economic benefits of the cruise industry is the February 2010 report ***"An estimate of the economic contributions of the SC State Ports Authority's 2010 cruise ship activity to the region's economy"*** prepared by John Crotts and Frank Hefner, two professors in the School of Business at the College of Charleston. As noted by the title of the report, the data are ***ESTIMATES*** – not actual documented numbers. In fact, the report does not identify a single new employee who has been hired as a result of cruise ships visiting Charleston. Since the overall tourism business had declined dramatically in 2008 it is highly likely that firms already had capacity to accommodate new business without any new hires.

This is especially the case given that cruise ships were in port only about 69 days in 2010.

It is important to understand the nature of economic impact studies and the Crotts and Hefner study in particular. By conducting interviews with passengers on two Port of Call visits and one origination cruise in November 2009, the authors developed the spending patterns that were inputs for an analytical model IMPLAN (Impact Analysis for Planning). This model was used to generate estimates of direct and indirect impacts in terms of dollars and employment. In other words, using interviews with passengers for only three ships in one late fall month, the authors extrapolated values for all the other 16 Port of Call ships and 53 Carnival Fantasy cruises throughout the year. The estimated expenditures are listed in Table 2. For example the first row of the table indicates that 11,303 Port of Call visitors spent an average of $11.64 on tours while 76,334 Carnival Fantasy passengers spent only $2.45. The data in Table 2 are based on interviews and are representative of expenditures in other studies. The data in Tables 3 and 4 are the estimates of the number of **NEW** employees who would be hired to accommodate the increased spending generated by the visiting passengers. For example, the authors estimate that new expenditures on tours (scenic) of about $318,000 spread out on 69 days would result in the tour companies hiring 117 new full employees at a salary of $48,880. Basically, they are saying that $318,000 in new spending will result in $5,758,013 in salaries for new workers – not existing labor.

We find this conclusion by Crotts and Hefner to be an overestimate.

2. Economic Impact of the Cruise Industry
(continued)

TABLE 2 Breakdown of spending patterns used by Crotts and Hefner

Spending	POC	Passengers	Per Person	Origination	Passengers	Per Person
Tours	$131,531	11303	$11.64	$187,283.00	76334	$2.45
Retail	$207,112	11303	$18.32	$1,736,165.00	76334	$22.74
Food	$53,005	11303	$4.69	$415,059.00	76334	$5.44
Eating & Bev	$38,772	11303	$3.43	$118,637.00	76334	$1.55
Hotel	$0	11303	$0.00	$1,143,945.00	76334	$14.99
Auto	$0	11303	$0.00	$253,085.00	76334	$3.32
Taxis/ bus	$5,889	11303	$0.52	$101,234.00	76334	$1.33
Other	$52,514	11303	$4.65	$96,172.00	76334	$1.26

TABLE 3 Distribution of employment used by Crotts and Hefner

Distribution on Employment for 2010 Cruise Ship Impact Top Ten Sectors

Description	Employment	Labor Income	Output
Scenic and sightseeing transportation and support activities for transportation	117.8	$5,758,032	$8,106,397
Retail Stores - General merchandise	66.0	$1,809,645	$4,070,791
Wholesale trade businesses	39.8	$2,718,610	$7,231,954
Food services and drinking places	33.0	$630,225	$1,814,988
Retail Stores - Food and beverage	18.6	$564,210	$1,334,351
Real estate establishments	14.1	$259,537	$1,557,289
Hotels and motels, including casino hotels	12.2	$395,980	$1,162,344
Employment services	6.4	$171,915	$239,047
Retail Stores - Miscellaneous	5.8	$112,497	$217,004
Offices of physicians, dentists, and other health practitioners	4.8	$359,130	$594,588
Total of full-time jobs in the tri-counties across 440 economic sectors	407	$16,193,200	$37,024,340

Total State and Local Tax Impact (Tri County)

$3,483,113

2. Economic Impact of the Cruise Industry
(continued)

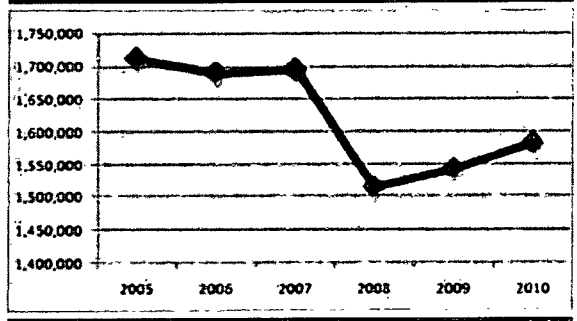
The economic impact estimates from this analysis have been widely cited. Unfortunately they have also been assumed to accurately represent the economic impact of the cruise industry on Charleston. For example the estimates were cited in the concurrent resolution by the South Carolina Senate and House (S 0968) in June, 2011. The joint resolution states:

> Whereas, the cruise business generated $37 million for South Carolina's economy in 2010 and projected to generate 407 jobs in the Tri –county region, paying a total of $16,193,200 in labor income ;and Whereas, a 2010 survey of more than 1,500 embarking passengers showed that nearly one-third of Charleston's cruise passengers are South Carolina residents, more than one –third stayed more than one night in one of more than fifty different hotels across the area, one half ate in one of more than one hundred different restaurants and nearly forty percent shopping in resident –oriented retail stores, locally owned shops and tourist-oriented stores throughout the area;
>
> Whereas, South Carolina's cruise passengers are predominately couples traveling without children and these families have a median annual household income of between $100,000 and $149,999;
>
> Whereas, when a cruise ship embarks from Charleston, more than two hundred local residents are working directly in support of the operation including check in agents, parking attendants, longshoremen, and stevedores, security personnel and others;

TABLE 4 Estimated salaries generated from Crotts and Hefner data

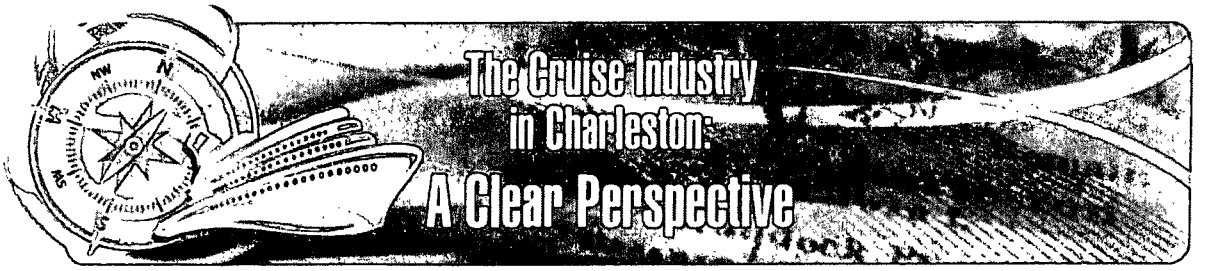
Sector	Emp	Labor Income	Salary
Scenic	117.8	$5,758,031	$48,880
Retail - general	66	$1,809,645	$27,419
Wholesale	39.8	$2,718,610	$68,307
Food	33	$630,225	$19,098
Retail - Food & Bev	18.6	$564,210	$30,334
Real Estate	14.1	$259,537	$18,407
Hotel	12.2	$395,980	$32,457
Employment Serv	6.4	$171,915	$26,862
Retail Stores -Mis	5.8	$112,497	$19,396
Health	4.8	$359,130	$74,819
Total	**407**	**$16,193,200**	**$39,787**

TABLE 5 Charleston Attraction Attendance



3% increase from 2009 to 2010

It was not within the scope of our study to conduct another survey that could have validated the estimates. Furthermore, it is fair to assume that the authors would have preferred to have conducted the set of interviews with a more rigorous research design than the three ships they selected. Such a design would have assured the sample was stratified by season, hours in port, type of ship for the Port of Call visits (i.e. luxury or gaming), and day of the week. For such an important study it is unfortunate that more funds and time were not provided. Nevertheless,



the authors used the data they collected and input these numbers into the model.

The conclusions cited by the General Assembly raise several concerns such as:

- On the day of departure for the Carnival Fantasy there are probably 200 people working in support of the ship. Since there are only about 70 departures a year that equates to 14 weeks of work – these are part time jobs with no benefits.

- Most of these 200 part time jobs are likely to be hourly workers many earning a minimum wage.

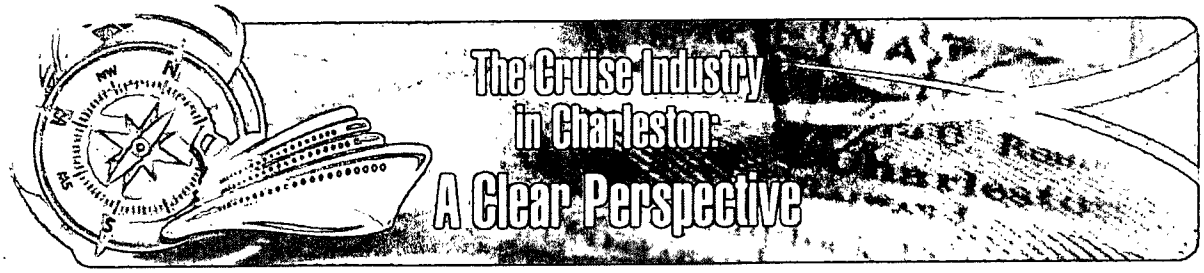
- It is hard to justify that these 200 part time jobs on the 70 days of departure could be scaled to 407 full time jobs with a salary of $39,786-or the $16,193,200 in labor income cited in the resolution.

- The estimate that a third of the passengers are from South Carolina suggests that their expenditures have no net economic benefit to the state. (Eating in a restaurant in Charleston rather than Columbia has no benefit). In fact, these South Carolina families are a net loss of tourist dollars for the State. (They are spending their money on the ship or in the Bahamas.)

- Port of call visits must employ far fewer workers because there is no luggage handling, ticket sales or parking.

- Many of the hotels that cater to the cruise passengers are in North Charleston and Mount Pleasant.

- We do not know whether the off ship excursions are contracted on the Port of Call ship. If a carriage ride is contracted with the cruise line a large proportion of the reported expenditure never reaches the local provider.



2. Economic Impact of the Cruise Industry
(continued)

Overview of Method

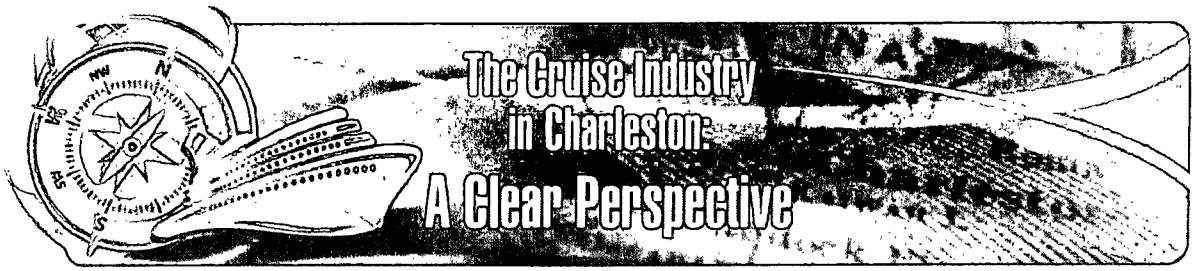
As noted above, it is reasonable to assume that the authors were greatly constrained by the resources and the deadlines required by the South Carolina State Ports Authority. Consequently, it is unfortunate that a more extensive set of interviews was not available or that any in-depth case studies were available. As a result, the authors were forced to use a limited set of interviews obtained from three ships and to assume that these results were similar for all the other ships during the year. Of necessity, this forced a bias to the sample. For example, ships in November 2009 were in port over the Thanksgiving holiday then they were likely to be more families and people who are willing to pay a higher price for a holiday cruise. Data from its own website indicates that fares on the Carnival Fantasy vary significantly throughout the year – with some off season fares as low as $200 for a five day trip.

Another important factor for the Port of Call cruises is the time in port. In some cases, the ship is in port for only eight to twelve hours and the time passengers have to leave the ship is only a portion of the time the ship is docked. This limited time only allows for a brief tour of the southern part of the peninsula and some shopping at the Market. Many of the Port of Call passengers don't have time for a dinner meal – and they have already paid for their meals on the ship. Our analysis indicates that a variety of ships use Charleston as a Port of Call throughout the year. Obviously the sample responses could vary considerably based on the specific ships and the length of stay.

The authors also made some assumptions about the direct and indirect impact of the industry. It would have been useful to conduct an interview with companies providing the services and to validate that, indeed, they are hiring new employees to meet the demand. For example, as seen in Table 4, they estimated that the cruise industry has generated 39.8 new full time employees in the wholesale sector each earning $68,000 for a net new payroll of $2,718,610. We suggest that this may be a substantial overestimate of the employment impacts. For example, cruise tourist spending in Charleston is spread out over an entire year, and over many industries, across numerous competitors. The result is that employment impact is not directly proportional to spending. An example demonstrates this effect. The average hotel has an employee at the front desk whether it is 50 percent or 100 percent full. Even if the tourism dollar doubles from a POC visit for this vendor, the employment would most likely stay the same. The technical reason is "economies of scale". In more common terms, it is due to the well-developed Charleston tourism economy.

The authors also made some assumptions about the direct and indirect impact of the industry. It would have been useful to conduct an interview with companies providing the services and to validate that, indeed, they are hiring new employees to meet the demand.

Carnival Corporation is a huge, vertically integrated business. It must arrange for supplies to be there on the day of departure. Research



from other ports suggests that Carnival and other cruise companies purchase a small portion of their supplies from local vendors. With the assistance of its sponsor, the SPA, it would have been easy to validate their estimates or to report on some firms benefiting from the business. It would have been interesting to learn how the employees are occupied when the ship is not in port. ***We strongly recommend that such a follow up study regarding the supply chain be conducted.***

Issues that would justify a more extensive study

It is important for all stakeholders to reach some level of consensus about the economic impact of the cruise industry on the Charleston economy. Since the people living on the peninsula bear the brunt of the negative impacts (costs) they deserve to understand the positive factors (benefits). Consequently it is important to reach a consensus about the validity of the numbers. The following section addresses some specific questions regarding the Crotts and Hefner study that is the current de facto estimate of these benefits.

Does the study adequately address the costs associated with the cruise industry?

- The report does not factor at all the costs associated with the cruise industry in its analysis.
- It also does not describe how the economic impact will be distributed throughout Berkeley, Charleston, and Dorchester Counties. There is no discussion of the statistical techniques. The report simply says:

  The study area is the Tri-county local economy consisting of Berkeley, Charleston, and Dorchester Counties. Through various statistical techniques, IMPLAN localizes the impacts of spending to the study area.

Does the study accurately align benefits (and costs) along geographical and governmental jurisdictional boundaries, i.e., are the benefits and cost borne by the same groups/ populations/government jurisdictions?

- The report only discusses benefits which are estimated to be $8,159,071 per year ($5,552,496 by passengers and $2,606,575 by crew members).
- It does not discuss how the benefits would be distributed. It can be assumed that most of the jobs are located in the shops and restaurants within a walking distance of the terminal. This includes average purchases of $70 by crew members at local grocery stores, pharmacies and other shops.
- The C & H report suggests that the crew members do not make expenditures on food and beverages.
- The Port of Call visitors are estimated to spend a total of $43 per visit versus $66 for passengers originating in Charleston.
- C & H estimate that the average originating passenger will spend about $15 on hotel rooms. This level of spending on hotel rooms appears low and is inconsistent with regional room rates and is an

additional reason to question the results of the study. It is not clear about where the hotel jobs might be located. However, all of the hotel stays are generated by passengers on the Carnival Fantasy and most of them arrive by automobile via I-26. Therefore, it is likely that many of the hotel stays will be at the numerous inexpensive hotels situated near the interchanges north of the City – not in the historic district. (See map A-3 in Appendix 1 of hotels offering free park and/or shuttle service).

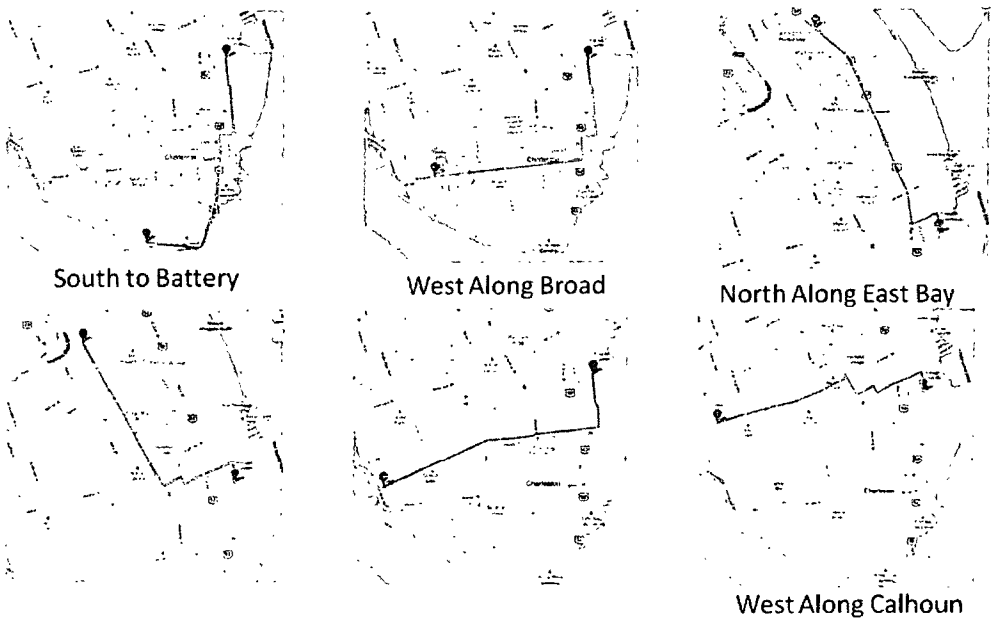
- Recent reports also indicate that there are no benefits to local farmers and it is very unlikely that the 2004 estimates for purchase of supplies by the cruise ships are still valid. They specifically estimated these figures to be $70 per Port of Call passenger and $137 for the Carnival Fantasy passengers.

- Evidence from Alaska and elsewhere detailed in this report suggests that over time Carnival will establish vertical supply chains in which the supplies are provisioned though their established networks.

The C&H impacts in perspective with the rest of the Charleston economy and the entire tourism industry in the region.

- The cruise industry is very different from other forms of tourism in Charleston. The differences relate to the nature of Port of Call (POC) visitors and the much

FIGURE 1 30-Minute Walking Distances from Cruise Dock



2. Economic Impact of the Cruise Industry
(continued)

larger number of passengers who travel to Charleston to embark one of the 70 Carnival Fantasy cruises.

- Based on an analysis of the 2011 and 2012 POC visits, the 21 ships in 2011 and the 14 scheduled in 2012 are timed to provide just a few hours in the City which thereby limits the passengers' ability to spend money and indicates that there is no impact on restaurants for dinner. The ships may be in port for an extended stay but the passengers have a smaller window of time to leave the ship.

FIGURE 2 Carnival-POC Passenger Comparison

- ■ **78% of cruise ships are Carnival**
- □ **22% of cruise ships are Port of Call**

- Only three ships in 2011 spent the night in Charleston and none are scheduled for an overnight stay in 2012. The average time in port in 2012 is scheduled to be just under 10 hours – See Table 6. This is the entire time the ship is docked and the passengers have a smaller window of time to leave the ship.

- Some of these ships are rather small, therefore the number of visitors is modest. These visitors have no impact on parking or hotels.

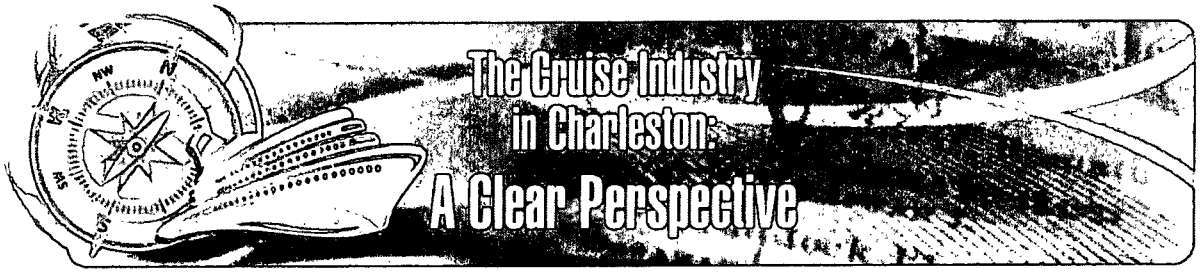
- Crew members from these ships may purchase items from local grocery stores and pharmacies, but these low wages employees are unlikely to spend much money in bars and restaurants.

- The origination passengers on the Carnival Fantasy are what are often considered "The consummate shopper – look for best cruise value; have taken an average of five cruises; know the cruise lines and ships; have an average age of 55 years".[12]

- For these passengers Charleston represents a port for embarking and disembarking on a five day, relatively low-cost (less than $100 / day) cruise for entertainment.

- Many of them are repeat customers and may have little interest in Charleston – just cruises.

- The Carnival Fantasy leaves at 4:00 PM and returns at 8:00 AM. The 4:00 PM departure allows for passengers to drive for approximately six hours during the day of departure. The 8:00 AM arrival allows for passengers to leave immediately for their journey home. They have most likely woken up very early that day to pack, be processed through security, and be ready to depart the ship. In addition, for those that have parked on SPA property, they must move their cars from the cruise lots to allow for the arrival of new passengers.



2. Economic Impact of the Cruise Industry
(continued)

TABLE 6 Port of Call Activity 2012

Date	Day of Week	VESSEL AND SHIP LINE	ARRIVES/SAILS	ACTIVITY	Overlap	Same Week Sun - Sat	More than 2 per week Not Fantasy	Length of stay /hrs	Over Night	Dinner 1900hrs +	Capacity/passenger
10/25/2012	Thurs	Aida Aura Aida Cruises	0700 hrs /1600 hrs	Port of call				9	No	n	1,300
10/5/2012	Fri	Aida Luna Aida Cruises	0900 hrs / 1700 hrs	Port of call				8	No	n	2,100
1/27/2012	Mon	Artania Phoenix Reisen Cruises	1300 hrs/ 1900 hrs	Port of Call				6	No	y	1,200
11/19/2012	Mon	Columbus 2 Hapag-Lloyd Cruises	0800 hrs /2000 hrs	Port of call				12	No	y	698
5/6/2012	Sun	Crystal Serenity Crystal Cruises	0800 hrs / 1700hrs	Port of Call				9	No	n	1,080
11/2/2012	Fri	Crystal Symphony Crystal Cruises	0800 hrs /1800 hrs	Port of call		Yes		10	No	n	922
11/5/2012	Mon	Emerald Princess / Princess Cruises	0900 hrs /1800 hrs	Port of call		Yes	Yes	9	No	n	3,080
4/29/2012	Sun	Maasdam Holland America Line	0800 hrs /1600 hrs	Port of call				8	No	n	1,258
4/6/2012	Fri	Navigator Regent Seven Seas Cruises	0800 hrs /2000 hrs	Port of call				12	No	y	490
9/21/2012	Fri	Navigator Regent Seven Seas Cruises	0900 hrs / 1800 hrs	Port of call				9	No	n	490
11/6/2012	Tues	Navigator Regent Seven Seas Cruises	0900 hrs 1800 hrs	Port of call		Yes	Yes	9	No	n	490
11/7/2012	Wed	Norwegian Dawn Norwegian Cruise Line	0800 hrs /1800 hrs	Port of call		Yes	Yes	10	No	n	2,224
2/2/2012	Thurs	Oceana P & O Cruises	0800 hrs/1700hrs	Port of Call				9	No	n	2,016
10/30/2012	Tues	Seabourn Sojourn Seabourn Cruises	0800 hrs /2300 hrs	Port of call		Yes		17	No	y	450
	Total Number of POC's = 14						Average Stay =	9.8	Number =	4	

2. Economic Impact of the Cruise Industry
(continued)

- Given this schedule and the low fare nature of these cruises it is possible many of these passengers have no impact on the Charleston economy.

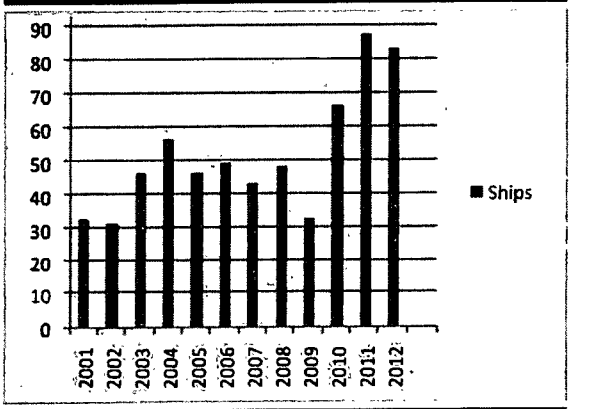
- The 4:00 PM (non –rush hour) departure time allows for considerable leeway in terms of arrival time. The 8:00 AM arrival time would suggest that considerable outbound highway traffic on I-26 would occur after 9:00 AM.

- Without a detailed passenger survey it is not possible to accurately estimate the size of their expenditures, however, the $66 per person figure proposed by C & H is a reasonable guess. It should be noted that this figure is much less than the traditional tourist who spends a night in a hotel and enjoys a dinner in a local restaurant in the historic district.

- The C&H study includes a graph of cruise ship visits that shows 67 ships in 2010 – the number of total ships increased to 88 in 2011, but is scheduled to decline in 2012 to 84 with only 14 Port of Call visits.

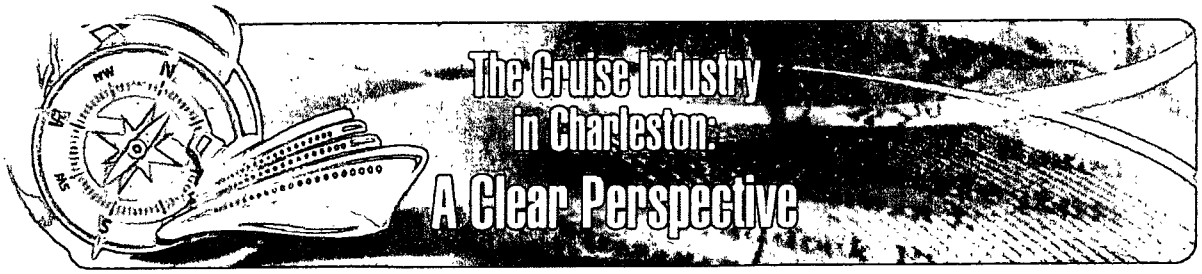
- The decline could be an indication that 2011 was a peak and the proposed limit of 104 cruise visits a year may never be an issue.

TABLE 7 Charleston Cruise Ships



- There is no reason to assume that another line would also use Charleston as a home port. Carnival is part of a huge multinational conglomerate and would not compete with itself.

- Carnival has a record of abandoning cities such as Mobile and Norfolk after they have built new terminal facilities.



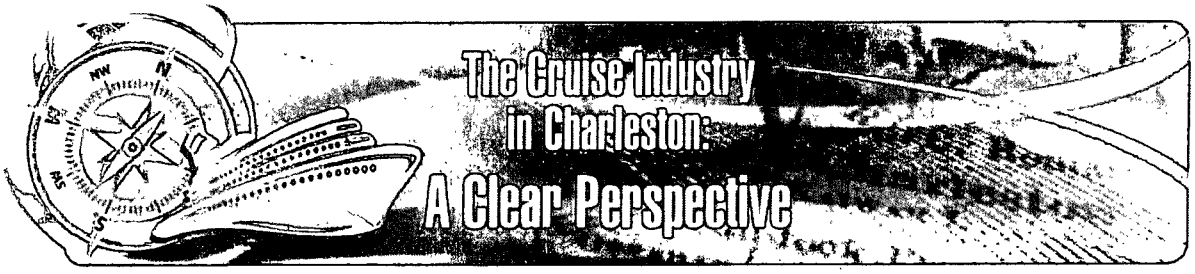
Compare the C&H projections and assumptions to actual data for the Charleston area (if more detailed, current data are available).

The C & H report included the following table:

TABLE 8 2010 Passenger Data

	Port of Call	Origination	Total
Number vessels	16	53	69
Passengers	17,000	94,240	111,240
% who visited Charleston	66.49%	100%	
% local residents	0%	19.0% (Calculated from 2004 estimates)	
Sub Total Passengers	11,303	76,334	105,543
Average per person local expenditure	$43.42	$66.31	
Total Direct (Passengers)	$490,789	$5,061,707	$5,552,496

- The scope of this project did not allow for the generation of any new survey data; therefore our analysis is based on a thorough review of numerous studies of the cruise ship industry and interviews with experts in the industry.[13]
- As noted, the C&H report only deals with the estimation of economic benefits. It is based on a November 2009 survey of an unknown number of passengers and crew from only two Port of Call ships and one origination cruise.
- Using this data and a 2004 report on cruise ship expenditures, the authors made several assumptions to interpolate a number of economic impacts on employment and expenditures within traditional impact analysis. This is a very limited sample of ships and includes only those that arrived in the November 2009.
- The authors also rely heavily on the estimates of local spending by cruise ship companies from an undocumented 2004 study.
- We have no knowledge of who conducted this study, how it was conducted, whether it pertained to Charleston, or, most importantly, whether the data are valid for 2011.
- Based on a limited sample of responses from a few passengers and crew members and an undocumented estimate of cruise ship expenditures, the authors made the following basic assumptions that deserve further research.



2. Economic Impact of the Cruise Industry
(continued)

1. "66.49% will leave the ship" –

   This is probably a reasonable estimate for Port of Call visitors.

2. 100% of the origination passengers will "Visit Charleston"

   Given the times of departure and arrival, the logistics of parking and the desire to return home it is doubtful that Carnival passengers "leave the ship" to spend money in the City. While they may sleep in a hotel or dine in a restaurant the night before departure they are unlikely to visit the market and other areas after they arrive. Figure 3 was taken at the Market on January 31, 2012 at 10:30 AM in the market after the Fantasy had arrived two hours earlier. There was no evidence of added shopping by arriving passengers.

3. According to the C&H study: "Currently 16 Port of Calls and 53 origination cruises have been booked at the SCSPA for 2010. Based upon the survey results, C&H estimate that of the passengers on ships that will make Charleston a Port of Call, 66.5% will leave the ship and visit the City which will amount to 11,303 additional tourists. Of these visitors, one-half will debark on escorted motor coach tours from the ship to tour the region's attractions while the other one-half will visit the City independently."

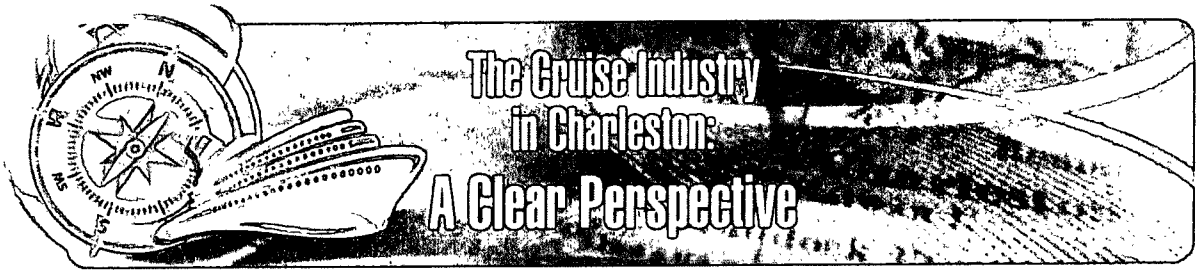
   Crotts and Hefner estimate that in 2010 an additional 11,303 additional tourists were added by the 16 Port of Calls. They estimate that 50% of these (5,651) will take a motor coach tour. A February 12, 2012 press release from the South Carolina Ports Authority

FIGURE 3 M&A, Inc., photo taken on January 31 2012, at 10:30 AM

> *"...it is doubtful that Carnival passengers "leave the ship" to spend money in the City While they may sleep in a hotel or dine in a restaurant the night before departure they are unlikely to visit the market and other areas after they arrive."*

Public Relations Manager, "Charleston Welcomes First Cruise Port of Call of 2012," provides a specific account of the activities by passengers from the first Port of Call in 2012. The release states:

The 1,944 passengers on board the Oceana are visiting Charleston prior to making the trans-Atlantic crossing to Ponto Delgado, located in the Azores off the coast of Portugal. While in Charleston today, 35 percent



2. Economic Impact of the Cruise Industry
(continued)

of the passengers are participating in organized excursions to Lowcountry plantations and museums along with tours of the City.

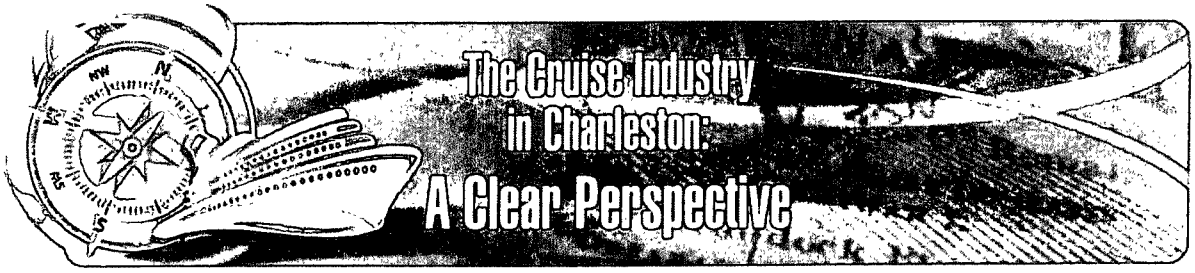
This means that 680 passengers are participating in a pre-arranged tour. While some of these excursions will involve a motor coach tour to a plantation, many of these will be carriage rides, walking tours, etc. It is important to put these numbers into perspective. In 2012, 14 Port of Call visits are scheduled for Charleston. At full capacity there will a potential of 17,794 passengers. Using the 35% participation rate there will be a potential of about 6,229 of these visitors participating in a variety of organized on-shore tours. All of these visits will occur on just 14 days. Three of the 14 visits will be by the Regent Seven Seas Navigator with a maximum capacity of 490 passengers. These visits will generate a total of about 171 additional tours on each of those three days.

This analysis suggests that Port of Call visits have a positive impact on tourism related activities in Charleston. However, these impacts will be confined to only 14 days in 2012 and are spread among a number of competing activities. Given the limited number of days and the range of firms involved, it is difficult to believe that the tour companies would have hired 117 new full time employees at a salary of $48,880 each, as Crotts and Hefner have estimated. It is much more likely that tourist oriented firms had existing capacity to absorb the increase in business on the Port of Call days.

4. According to the C&H study -"407 jobs paying a total of $16,193,200 in labor income. These jobs will average $39,786 in annual wage earnings"

This analysis suggests that Port of Call visits have a positive impact on tourism related activities in Charleston. However, these impacts will be confined to only 14 days in 2012 and are spread among a number of competing activities. Given the limited number of days and the range of firms involved, it is difficult to believe that the tour companies would have hired 117 new full time employees at a salary of $48,880 each, as Crotts and Hefner have estimated.

- *We question both the 407 total new jobs and the estimate of $40,000 per year salary.*
- *Using the table included in the C&H report we calculated the salaries for the different occupations. For example, C&H's estimate that the 39.8 employees in the wholesale sector earning $68,000 a year seem unrealistic.*
- *Furthermore, many of these questionable numbers are based on the assumption that the Carnival line is purchasing goods from a local supplier.*



Estimates of the spending per passenger

The numbers of $43.42 for Port of Call and $66.31 for originating passengers seem reasonable but are based on a limited sample.

5. **"Both groups of survey respondents were predominately couples (73.5%) traveling without children (86.4%) with median annual household income between $100,000 - $124,999. 44.3% were first time visitors to Charleston" –**

   We question that the demographics of the two groups are similar. Since we don't have any information about the two POC cruise ships surveyed, we cannot determine the similarities or differences between the Carnival cruise market and the POC visitors. We don't know whether the demographics are different in other seasons. For example, are there more children during the summer?

6. "How likely will you visit Charleston again within the next five (5) years," approximately four in five (79%) indicated they would likely do so. Similarly when asked "How likely will you recommend to your friends and relatives to visit Charleston," a high 90.4% indicated they would likely to do so."

   While a large percentage of the POC visitors are likely to obtain a positive view of Charleston, it does not directly translate to additional visits and it cannot be determined whether the visit was a deciding factor. The image of Charleston is reinforced by many other forms of publicity.

7. The C&H study estimates that 100% of the non-local Carnival passengers will spend $66.31 per person in Charleston (see Table 8).

   We doubt that each of the non-local passengers will be in Charleston long enough to spend $66. We believe that many of the Carnival customers drive to Charleston in time for the 4:00 PM departure drive home as soon as they debark at 8:00 AM. Therefore, the $5,061,707 figure for total direct expenditures seems inflated.

Summary – Review of Crotts & Hefner study

We conclude that the economic impacts estimated in the Crotts & Hefner study are substantially overstated. We draw this conclusion from the analysis in this section of the report --the highlights are as follows:

- C&H base their analysis on interviews with passengers for only three ships in one late fall month and then the authors extrapolated these values for all the other 16 Port of Call ships and 53 Carnival Fantasy cruises throughout the year.

- Using this data and a 2004 report on cruise ship expenditures, the authors made several assumptions to interpolate a number of economic impacts on employment and expenditures within traditional impact analysis. This is a very limited sample of ships and includes only those that arrived in November 2009.

- The authors also rely heavily on the estimates of local spending by cruise ship companies from an undocumented 2004 study.

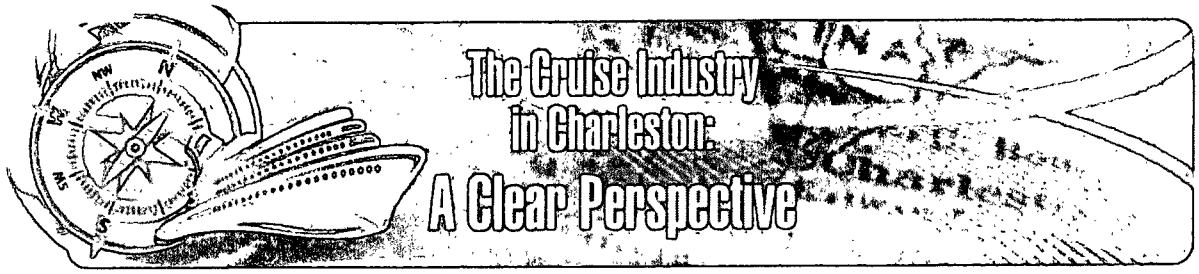
- Together with the analysis of the supply chain model utilized by the cruise industry, the C&H estimates of local spending by the cruise industry are overstated.

If the City really wants to know the impacts of the industry, the City will need to generate detailed, direct survey data from vendors and visitors over an extended time period.

2.3 The Cruise Industry in Relation to Overall Charleston Tourism

While a great deal has been made of the projected $37 million impact of the cruise industry on Charleston, this level of spending—even if it could be verified–is relatively minor in the overall tourism industry in Charleston. Dr. Bing Pan estimates that the total number of tourists in Charleston was over 4.2 million in 2010.[14] The 150,000 or so cruise passengers represent about 3% of the total visitors. Dr. Pan also estimates that these 4.2 million visitors spent $3.03 billion in the area. That level of spending helps put the estimated $37 million spent by the cruise industry in better perspective. Based on Crotts and Hefner's estimates, the cruise industry represents about 1.2% of the tourism industry in the Charleston area.

Dr. Pan estimates that the average visitor spends $718 per visit. The average expenditure estimated by Crotts and Hefner was $66 per person for an embarking passenger. Based on our analysis, this estimate overstates the level of spending. However, even at this level, the spending by the cruise passenger is roughly 1/10th the level of spending by the average visitor to Charleston according to Dr. Bing Pan's estimated levels of spending.



2.4 Cruise Industry: A Global Supply Chain Model

The vice president of supply chain at any global cruise line starts the day thinking about the 10,000 to 20,000 meals – depending on the size of the ship – to be served at each one of the company's ships that day.[15] To put this in perspective, it is like coordinating 50 meals at every full-service restaurant in Charleston County each day.[16] This would be overwhelming to most businesses, but it is just another day in the cruise business.[17]

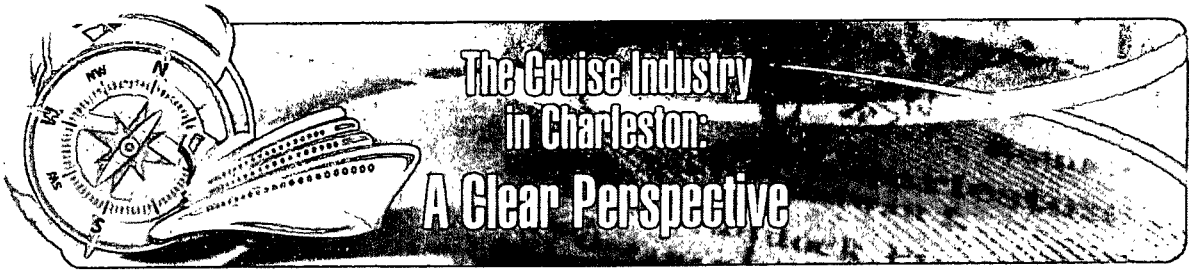
Each ship is typically considered a profit center and it requires a significant amount of logistical planning, teamwork, and information and forecasting technology to supply it through the day (let alone the entire cruise) until it arrives at its next Port of Call. The cruise industry's sophisticated supply chain is capable of delivering a variety of goods and services to all corners of the world in an efficient, cost-effective manner.

Charleston is the home port to a Carnival Cruise Lines ship. How does the Charleston port fit into the logistical supply chain of the cruise line? Very little is published about supply chain logistics of the cruise industry. One reason for this is that the logistics process is a critical part of the cruise business model and profit-making process. Therefore, to know the proprietary details of a company's supply chain is to know how the company makes a profit and how it competes. However, we are able to glean from third-party sources the basics of cruise line supply chain management and how the Charleston port fits into this process. Our analysis looks at strategy, supply chain logistics, and competition among ports of these very sophisticated and well-managed organizations. strategy, supply chain logistics, and competition among ports of these very sophisticated and well-managed organizations.

The vice president of supply chain at any global cruise line starts the day thinking about the 10,000 to 20,000 meals – depending on the size of the ship – to be served at each one of the company's ships that day. To put this in perspective, it is like coordinating 50 meals at every full-service restaurant in Charleston County each day. This would be overwhelming to most businesses, but it is just another day in the cruise business.

Cruise: International Strategy of Vertical Integration

To understand the needs of the cruise industry supply chain we need to understand the basic structure of the cruise industry. The industry follows what is characterized as Maritime Law or Transnational Law. In other words, the ship makes its own law, since it is not ruled by any governmental body, until a vessel sails into "state" waters. This allows the industry to vertically integrate, enabling companies to create small profit centers. These profit centers carry over onto land-based operations in the form of tours, hotels, restaurants, and shopping centers. The industry is largely foreign-owned and pays little or no U.S. tax. (Klein R. A., 2003) Because

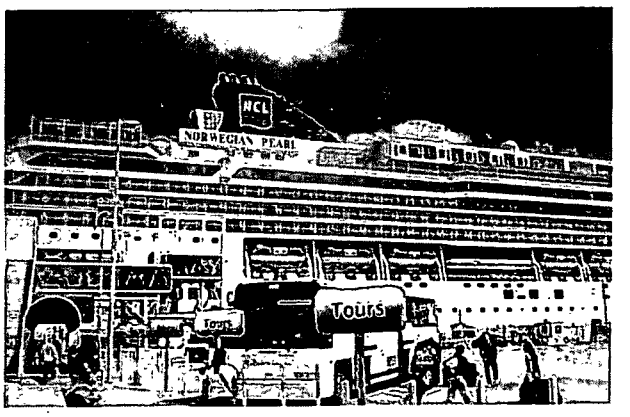


2. Economic Impact of the Cruise Industry
(continued)

they are primarily foreign ships, one of the few laws they do need to follow is called Cabotage Laws,[18] which reserve to U.S.-flag vessels the right to move passengers and cargo between U.S. ports.

The cruise industry hires J1 Visa[19] workers to work both on the ships and at their land-based facilities at below minimum wage rate for the cruise season. The implication is that direct, indirect, and induced impacts to the local community are significantly impacted downward, with profits flowing to the cruise lines based on ownership interests. It is best to consider the cruise lines like little cities, which supply themselves with all the goods and services they need to meet their customers' needs. To meet those needs, the industry focuses on controlling as many inputs as possible to ensure a favorable outcome both for customers and profit-making.

Cruise lines are typically thought of as a form of deep-sea passenger transportation to or from foreign ports,[20] but a significant portion of cruise revenue is made on shore-side excursions, and cruise lines actually own many such operations. Klein states that Holland American Line reported its per capita income increased by 73 percent due to shore excursions operations. As a result of vertical integration, the cruise industry is constantly shaving profits from local tour-and service-providing vendors, which can create a problem for the local economies that the ships visit. This integration process has spilled over into strategic partners such as travel agents, who will decrease commissions on cruise packages, especially as the industry brings more bookings in-house (Funk, 2011). This is a result of cruise lines' focus on four areas: (a) a greater variety of cruise ships, (b) a variety of potential itineraries, (c) choices regarding cruise durations, and (d) a plethora of activities onboard the vessel and in the areas visited as well (Vaggelas & Lagoudis, 2010). The design of the supply chain must meet the needs of each of these focus areas in a variety of geographies (Travel Talk-Middle East, 2011).



Supply Chain: Vertical Integration

The industry term "terminalisation" was coined to describe the way cruise lines integrate the vessel with the shore-based operations. They come together and become the focal point of the supply chain. The Vaggelas report states that land-based operations, sometimes islands owned or managed by the cruise line, provide value-added items such as duty-free shops, entertainment, accommodations, and restaurants (Dowling, 2006). Many of these are touted as tourist villages (Center on Ecotourism and Sustainable Development (CESD), 2006).

Even land-based tours are integrated into the cruise industry as these shore excursions are often sold by the cruise ship or travel agencies. They are convenient for passengers, 50 to 80 percent of whom buy an excursion in each port, and provide solid revenue to the cruise line. This

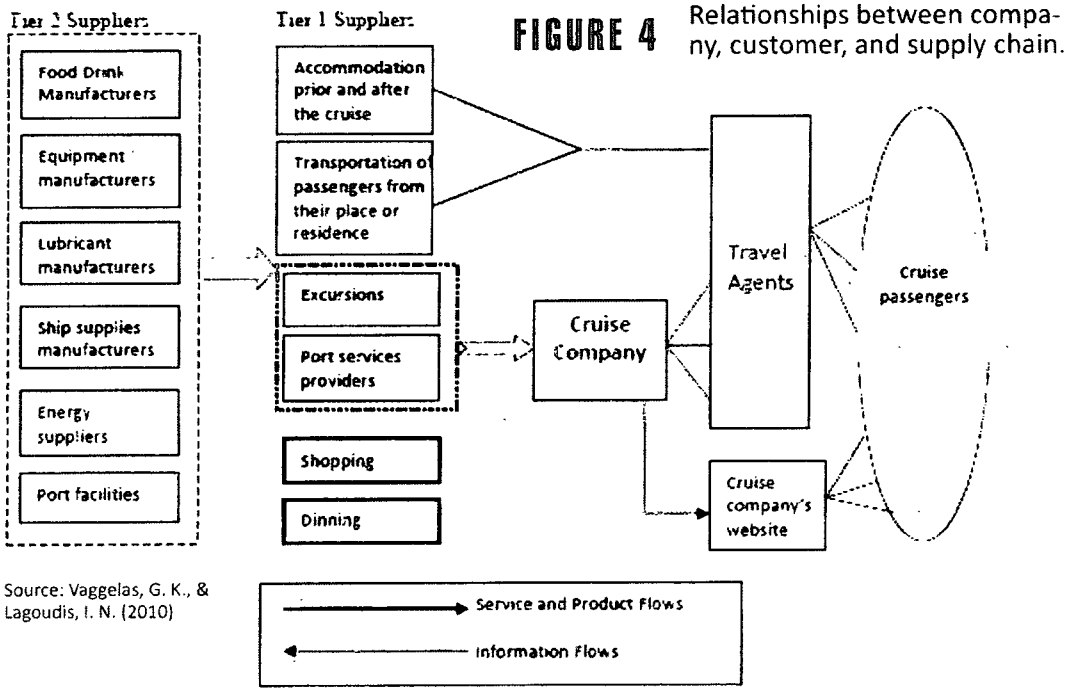
again underscores the inconsistencies and variations in the data on local economic impacts from the cruise industry. It also demonstrates that if the City really wants to know the impacts of the industry, the City will need to generate detailed data collection in the City.

As little as one-half to one-third of the shore excursion price is paid to the person providing the excursion. It would appear that these may be small vendors, but in many cases they are large providers hired by the industry. "North American-based cruise lines generally use one of three companies to run their shore excursion programme: International Voyager Media, On-Board Media or the PPI Group. The concessionaires arrange the excursions, hire port lecturers and handle shore excursion sales" (Klein R. A., Turning Water into Money: The Economics of the Cruise Industry, 2006).

The supply chain thus incorporates more than just suppliers – it also provides services to customers. The supply chain is simple yet complex since it requires the company to coordinate both supplies and passengers, which need to arrive at a predetermined point at the same time. Below is a schematic redrawn by Vaggelas, which shows the relationships between company, customer, and supply chain.

Note in this schematic the Tier 2 suppliers are actually manufacturers. This is not a misprint. Based on the quantities needed, typically suppliers are large, integrated manufacturing operations with global reach. Tier 1 suppliers actually interface with the customer. These suppliers therefore are strategic in nature.

FIGURE 4 Relationships between company, customer, and supply chain.



Source: Vaggelas, G. K., & Lagoudis, I. N. (2010)

2. Economic Impact of the Cruise Industry
(continued)

Vaggelas has further broken down the above diagram, describing how the supply chain impacts service delivery and profit. The two basic criteria are risk and profit maximization:

TABLE 9 Profit Impact vs. Supply Risk Factors

Profit Impact	Low Supply Risk	High Supply Risk
High	**Leverage items** 3 *Ship's Electronic Equipment (3)* 3 *Machinery Equipment (6)* 3 *Hotel Consumables (4)* 3 *Ship repairs (6)* 3 *Lubricants (3)* 3 *Internet and Information Technologies (1)*	**Strategic items** 3 *Coach Services (1)* 3 *Tourist Agencies (1)* 3 *Insurance Services (1)* 3 *Classification Societies (1)*
Low	**Non-critical items** 3 *Cabin Stores (4)* 3 *Food Beverage (5)* 3 *Fuel Supplies (3)* 3 *Tools (4)*	**Bottleneck items** 3 *Pilot Services (7)* 3 *Towage Services (7)* 3 *Port Services (7)* 3 *Financial Services (3)*

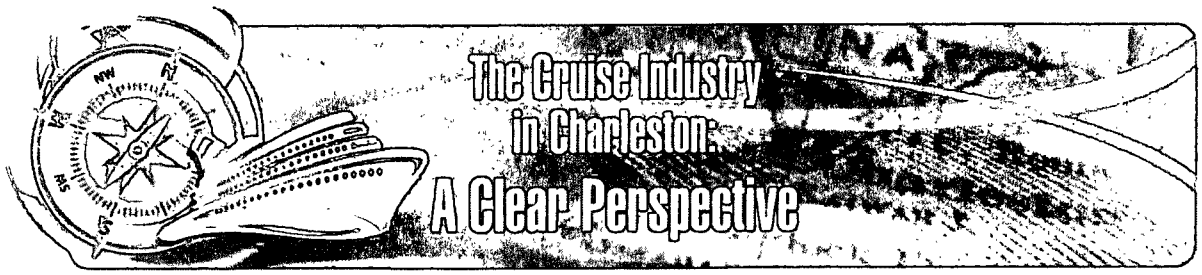
Source: Vaggelas, G. K., & Lagoudis, I. N. (2010)

The company focuses on long-term relationships with suppliers that provide high-risk and high-profit impact. With low-risk and low-profit impact, the industry focuses on cost.

Charleston, being a home port but a relatively small player – especially with Miami a few hours away – may compete in a few areas, such as ship repair services (leverage items) or tourist agencies (strategic).[21] It is unlikely that Charleston as a home port is able to compete effectively with low-profit (non-critical) margin items such as and food or beverage, with the exception of fresh food (milk, for example). The industry looks for opportunities to reduce costs through economy of scale purchases. Low risk/low profit items fit this scenario.

One reason for this is the sheer volume of supplies needed. These items are typically sourced from regional players who are able to mass large quantities of supplies and move them to any location on a moment's notice, if necessary. Agility® Logistics is an example of a company that deals with the types of problems major logistics partners are required to solve.[22]

Finally, cruise lines' logistics include looking for ways to grow by leveraging geography and economies of scale. One way to accomplish both



of these goals is through mergers and acquisitions. Klein explains, "As just seen, reducing costs is as effective a means of improving the economic bottom line as is generating income. This has been a key force driving consolidation in the industry. There are clear benefits from economies of scale. Both Carnival and Royal Caribbean projected savings of $100 (US $'s) million a year from the synergies achieved by their merger with P&O Princess. Carnival's experience indicates that actual savings are exceeding expectations. There are a number of other ways that the industry has been effective in turning water into money." The industry aggressively continues to use all available management tools to minimize costs and maximize profits.

Logistics, Competition, and Ports

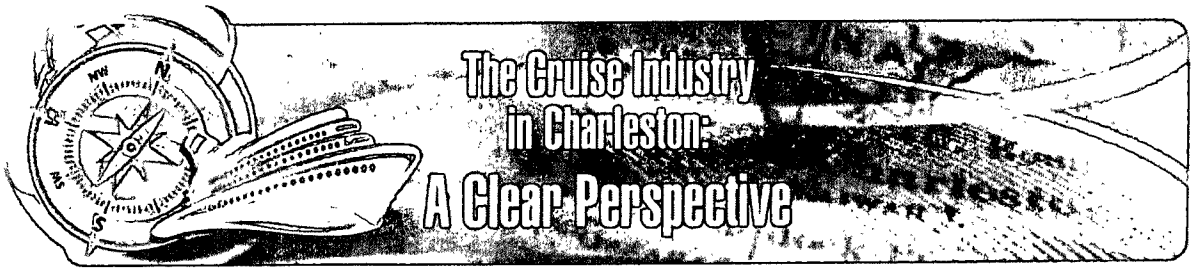
A business model that revolves around meeting the needs of the customer through superior service and logistical support provides the cruise industry with unique business flexibility. Like airlines, cruise lines are constantly evaluating their customers' likes and dislikes and making adjustments to accommodate those needs. The cruise industry is uniquely positioned, however, to exploit the ability to move freely and not invest directly in land-based operations as other modes of transportation (trains, coach buses, and airplanes) do. This ability to move and take their "city" and supply chain with them is what fuels port-to-port competition.

Competition among ports

The competition among ports to lure the cruise industry is well documented. Ports spend millions of dollars building facilities for cruise ships, and then compete for more cruise ships by lowering port use fees. That benefits an industry with a high level of flexibility (Klein R., 2005). Klein goes on to point out that there are substantial risks in making these public investments, since the cruise line can (and does on a regular basis) choose one port over another as a result of a better offer, lower offer, or no-fee offer. Notwithstanding, in the background that offer is only accepted if it can be coupled with a better overall supply chain value that increases profit potential.

The Charleston port has already been caught in the web of one-upmanship, even though numerous examples demonstrate this mistake by others – most notably and recently in Mobile, AL--resulting in a passenger terminal now sitting empty. The press release announcement from Carnival is worth a closer look because it focuses on the fact that the supply chain (cost) is telling Carnival Cruise Lines to leave.

> *Unfortunately, we have not been able to achieve favorable financial results with this program. Although we have consistently filled the ship, it has been at lower relative pricing to the rest of our fleet. We have made every effort to drive higher demand and pricing through our sales and marketing initiatives and the deployment of a newer class of ship in 2009. However, we have not been successful in achieving a sustainable level of acceptable pricing.*
>
> *Additionally, the itineraries from Mobile require much higher relative fuel costs to operate and those fuel costs will become even more unfavorable with the implementation of the new ECA requirements starting in 2012.*[23]



2. Economic Impact of the Cruise Industry
(continued)

Note that the ships are full, but that the sum total of the supply chain (in this case they use fuel as the excuse) does not add up to an acceptable return on investment. Result: the ships have left Mobile completely. It is easy to point to this as a single case, but the scenario has happened time and again and could happen in Charleston at some point.[24] This is not to say that the cruise industry in particular hires bad or unethical managers. It does not. On the contrary, as an industry cruise lines are beholden to a business model that allows the corporation to be successful by leveraging maritime laws, tax advantages, supply chain, market position, and port-to-port competition to its advantage (TravelAge West, 2010).

Unlike Boeing, MUSC, Blackbaud, Bosch, or even the Port of Charleston itself, the cruise industry takes its investment--the supply chain (including passengers, goods and services, infrastructure employment, and all other aspects of their business)--with it every time a cruise ship departs the port.

The natural reaction is to point out that Charleston is different, and it is by many objective measures. The latest positive news is that Charleston has the third best hotel in America![25] However, the City does not determine the success of the cruise industry. It is how well the supply chain (people and supplies) of the cruise industry fits both the Charleston location and industry profit expectations. The bottom line is that as soon as the cruise line supply chain identifies a better alternative, the cruise operator has an obligation to take advantage of it. The result looks like Mobile, San Diego, Vancouver, Norfolk, Nanaimo and other ports where cruise lines have suddenly left. It appears that it is best for the community to steer clear of cruise port competition and instead capitalize on its characteristics – attributes that are difficult to duplicate, guiding the cruise lines supply chain to the community's front port door and ensuring that the industry benefits the local economy as much as possible.

Rethinking Supply Chain Tourism

Each community needs to decide on the level of cruise tourism it wants to support. The cruise industry operates a business model that incorporates a supply chain focused on maximizing cruise industry profit by leveraging supply chain flexibility to place the "profit center" in the highest return on investment geography while maximizing tax advantages, foreign labor, and competition among ports armed with public dollars.

The business model the Charleston region is now forced to address is quite different from past economic development projects and requires a different approach for the local community to prosper. Unlike Boeing, MUSC, Blackbaud, Bosch, or even the Port of Charleston itself, the cruise industry takes its investment--the supply chain (including passengers, goods and services, infrastructure employment, and all other aspects of their business)--with it every time a cruise ship departs the port. Due to the volatile nature of the industry and its ability to transfer operations relatively easily, the cruise business does not invest in the ports for the long term.

2.5 Potential Revenues Generated by the Cruise Industry for the SPA

The SPA receives revenues from the cruise industry for services it provides. Based on information from the SPA, it is estimated here that the SPA receives about $10 million a year in fees and revenues from the cruise industry.

The SPA provided the following information when asked about the various fees they charge:[26]

Attached below is a summary of the types of SCSPA fees associated with a cruise vessel call in Charleston, some of which are specific to cruise ships and some of which apply to all vessels. As they may be under contract, this is not exactly what they pay, but I would say that it is illustrative and indicative.

PORT OF CHARLESTON TARIFF

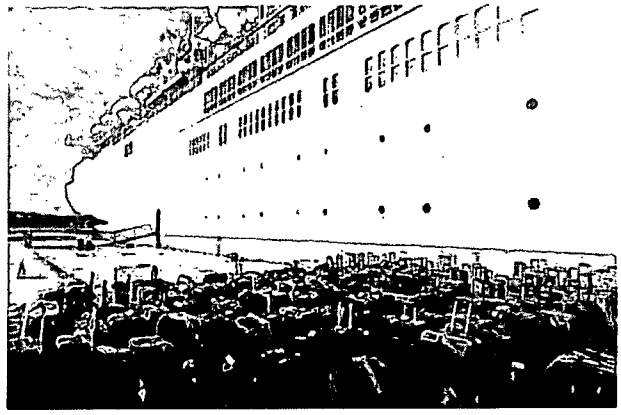
Passenger fees:
Passenger Fee - $20.00 - per person

- *Port of Call (1 way fee)*
- *embark (1 way fee)*
- *debark (1 way fee)*

Passenger Fee – minimum - per call – if vessel does not load/unload passengers -- $1055.00

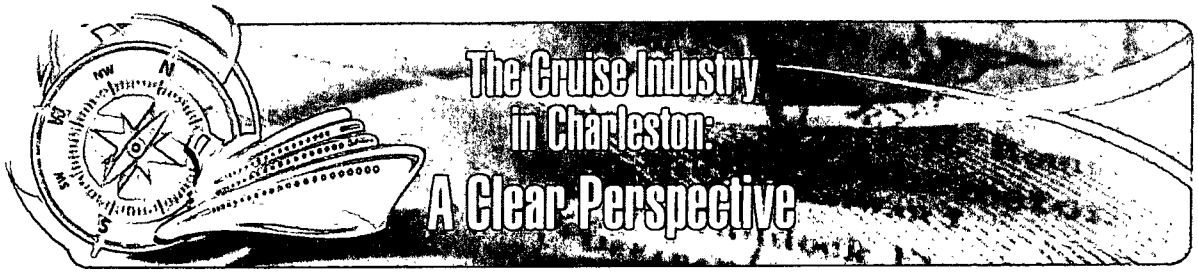
Vehicle storage fees are used for embarkation vessels:

Vehicle storage fees – vehicles up to 20 feet in length - $15.00 per day
Vehicle storage fees – oversized vehicles (RV's, campers) - $35.00 per day
Vehicle storage fees – valid handicap permit and ID – complimentary
Fee is multiplied by number of days of cruise – i.e., 5-day cruise = $75.00 fee per vehicle/standard size



General vessel related charges, some of which apply to cruise ships:

Fresh water supplies - per net ton - $5.85
Fresh water supplies – minimum fee - per call - $185.00
Berth/dockage fees - per linear foot of ship – per 24-hour period or fractional day - $9.15
Security Fee/Ship - per linear foot of ship – per call - $2.90
Security Fee/Passenger - per person – per call - $5.00
Harbor Master Fee - per vessel call - $127.00



2. Economic Impact of the Cruise Industry
(continued)

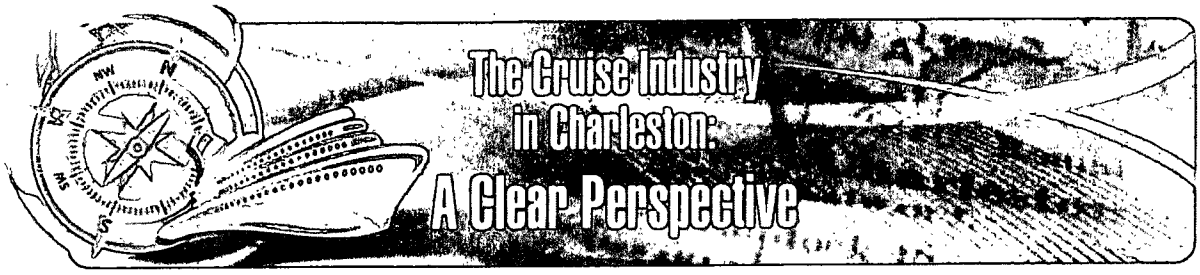
TABLE 10 Typical Cruise Ship Fees

Typical Carnival Cruise Ship	
Passenger Fees	$80,000
Parking Fees	$37,500
Fresh Water	$185
Berth Docking	$9,150
Security	$2,900
Security Passenger	$10,000
Harbor Master	$127
Fees Per Ship	$139,862
Annual Fees	$9,790,340
Typical POC Cruise Ship	
Passenger Fees	$20,000
Parking Fees	$18,750
Fresh Water	$185
Berth Docking	$9,150
Security	$2,900
Security Passenger	$5,000
Harbor Master	$127
Fees Per Ship	$56,112
Annual Fees	$785,568
Carnival Ships	**$9,790,340**
POC Ships	**$785,568**
Total Annual SPA Fees	**$10,575,908**

Based on this schedule of fees and the estimated volume of cruise ships in 2012, it is estimated that the SPA receives approximately $10.5 million in fees (See **Table 10**).

This estimate is based on the following assumptions:

1. 14 POC Ships with an average of 1,000 passengers = 14,000 passengers
2. 70 Carnival Ships with an average of 2,000 passengers = 140,000 passengers
3. Average stay for POC ships = 1 day
4. Average length of Carnival ships = 5 days
5. Average length of ship = 1,000 ft.
6. Average number of parked cars for 5 days = 500 cars



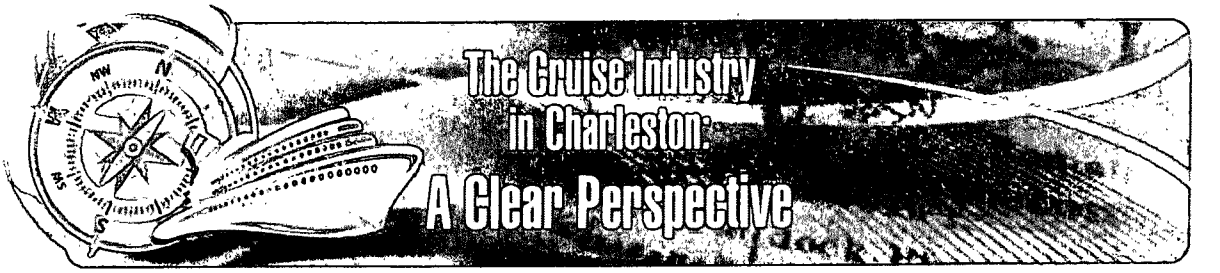
2.6 What Are the Risks Presented by the Cruise Industry for Charleston?

While there has been a great deal of attention paid to the potential positive economic impacts of the cruise industry on the City, there has been little discussion about the costs and risks associated with it. There are many costs associated with serving the visitors and passengers on cruise ships as there are with any visitors to the City. Estimating the costs of these services is beyond the scope of this analysis. However, it is strongly recommended that the City undertake such an analysis. This is especially important given that the City receives no revenues directly from the cruise ships or the SPA but is responsible for providing City services to the visitor.

The issue of balance is becoming more and more important. The capacity of the City to maintain its historic character and charm is a matter of balance between many competing stakeholders. One indicator of this balance is the number of visitors per year relative to the number of residents in the City. Based on population data from the US Census and visitor data from the Charleston Area Convention and Visitors Bureau, the number of visitors to residents has increased in recent years. In 2000, it is estimated that the ratio was 26:1 (2.5 million visitors to 96,650 residents). In 2010, it is estimated that this ratio has increased to 35:1 (4.2 million visitors to 120,083 residents), which reflects an increase of 35%. While the ratio of a perfect balance is not known, the Charleston area should monitor this balance carefully to avoid the possibility of reaching an unhealthy balance.

Perhaps the greatest risk of the cruise industry is that it becomes a negative influence on the historic "charm" of Charleston. As stated earlier, the average visitor staying in Charleston spends a longer time and more money than the typical cruise ship visitor or passenger. The major concern is that if the cruise business becomes too large, it could choke off and displace other visitors to Charleston. If the reputation/perception of Charleston is damaged in the national and international tourism market (even if the reality is different), the overall tourism industry in Charleston could suffer. It is unclear what the level of cruise activity would need to be to reach that "tipping" point. However, it is clear that the reputation of Charleston today in the industry is as high as it has ever been. Recent ratings by Conde Nast and other national and international tourism experts cite Charleston as one of the best places to visit in the country. The qualities and infrastructure that have produced this wonderful place did not happen by accident or overnight. Charleston has developed an extensive system of ordinances and regulations in the historic district that serve to protect the character and livability of the downtown area. However, the City's reputation could be harmed by the perception that is has been overrun by the cruise industry.

The issue of balance is becoming more and more important. The capacity of the City to maintain its historic character and charm is a matter of balance between many competing stakeholders.



2. Economic Impact of the Cruise Industry
(continued)

Charleston was recently placed on The National Trust for Historic Preservation on its 2011 endangered "watch list."[27] As the Trust stated:

> In the case of Charleston, expanding cruise ship tourism could jeopardize the historic character of the City, historic downtown Charleston and its surrounding neighborhoods. The Watch Status designation is accompanied by an offer from the National Trust to assist with finding a balanced solution that benefits the community and its rich cultural heritage.

The Trust added that:

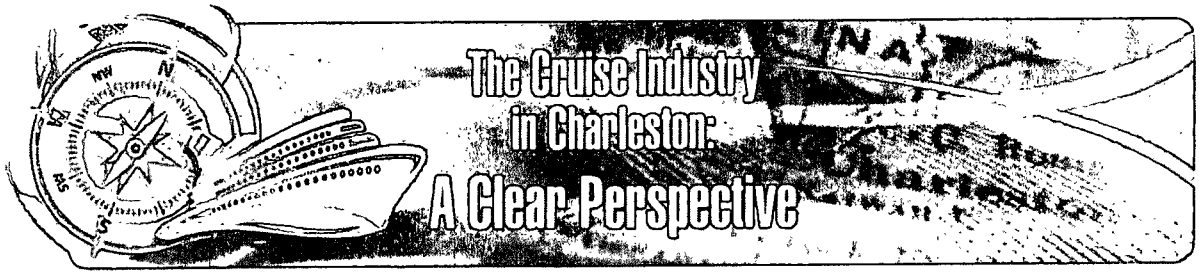
> While there are many proposals at play in the Charleston cruise tourism issue, including relocation of the cruise docking pier, the National Trust believes that defining enforceable limits on the size, number and frequency of cruise ships visiting the downtown piers is central to a positive resolution.

There is also the risk of the cruise lines leaving Charleston as quickly as they have come. Mobile, Alabama; San Diego, California; and Norfolk, Virginia are three recent cases of communities that spent millions of dollars to lure the cruise industry and built expensive new terminals – only to see the cruise companies leave their ports – leaving the communities holding the bag (and the bill) for the new multi-million dollar facilities.[28] There is certainly no reason to expect Carnival to do that in Charleston, but it did happen to two of Charleston's southern neighbors and there is no guarantee that it will not happen to Charleston.

Historic Charleston Foundation Mission:

"To preserve and protect the historical, architectural and cultural character of Charleston and its historic environs, and to educate the public about Charleston's history and the benefits that are derived from preservation."

Historic Charleston Foundation



3. Summary and Recommendations

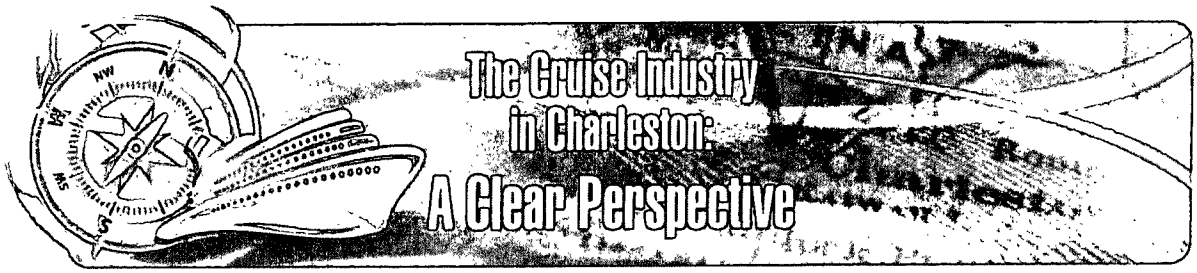
This is the first comprehensive study of how the cruise industry affects businesses, government, residents, and tourism in the Charleston region. It covers many facets of the cruise industry in detail, including the industry's economic impacts on the community, and their sophisticated business and operating model. The report confirms the complexity of the cruise industry and how it generates profits, as well as how its focus on meeting customer needs and profit goals can be a concern for communities that are either home ports or Ports of Call. Charleston is both.

This independent assessment reviewed more than 100 documents, focusing on a representative sample of literature about the cruise industry, how it operates and who it affects locally, nationally, and internationally. The goal of the report is to increase the Charleston stakeholders' understanding of the relationship a community can expect to have with the cruise industry.

The report begins with a detailed economic analysis and evaluation of the cruise industry's economic impact as recorded in a variety of cities, both national and international. This analysis includes sources from industry; industry experts; private consultants; universities; and local, state, and federal reports on the impacts of the cruise industry. It focuses on method of analyses, customer spending, and employment. We found a variety of methods that analysts used to calculate economic impacts. Estimates vary so widely that they create doubts as to the accuracy of reported cruise impacts (if, in fact, there are significant impacts at all) relative to the local-stay overnight tourism most communities depend upon. This wide variation also creates confusion for those interested in understanding the potential positive and negative impacts of the industry. After sorting through the variety of methods, some which clearly guess at spending, we focus on a concise presentation of spending impacts, allowing the reader to better understand the complex relationship between cruise customers and related community impacts. In this spending mix, the money seems to flow mostly to the cruise lines rather than to the businesses in the area. The bottom line is that the industry actually competes with the local community for the tourist dollar rather than stimulating the local economy.

Employment based on cruise tourist spending is an important issue, especially during a down economy or an economy that depends on the cruise industry. Our research indicates that employment is largely controlled by the industry, and that related land-based jobs (other than cruise industry employment) may actually be hard to find, and in some cases may negatively affect the local employment mix.

Employment based on cruise tourist spending is an important issue, especially during a down economy or an economy that depends on the cruise industry. Our research indicates that employment is largely controlled by the industry, and that related land-based jobs (other than cruise industry employment) may actually be hard to find, and in some cases may negatively affect the local employment mix.



3. Summary and Recommendations
(continued)

We would like to believe that the cruise industry has the best interests of its partner communities in mind, and it might. But the business model is designed to maximize profits through extensive use of vertical integration and supply chain management, which typically come into conflict with a community's desire to capture tourism dollars, maintain its core tourist attractions, and provide services to locals who are vested in the region.

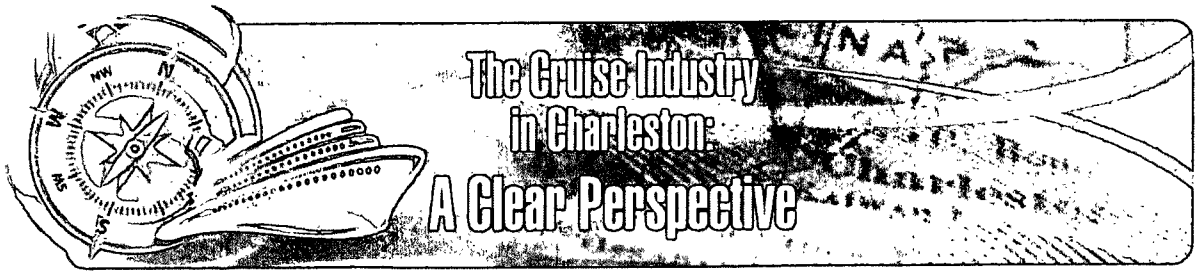
The report blends what is learned about cruise economic impacts with a focused and detailed analysis of a study Crotts and Hefner completed, which ties the cruise industry to economic gains in the Charleston region. Our analysis of this study provides significantly more information about how the cruise tourist dollars flow into a community, and to what extent. It evaluates method, geography, and spending calculations. It also identifies gaps in the study, resulting in a new picture of cruise customer spending. Unfortunately, our analysis of the Crotts study was unable to identify even one new full-time job outside the industry, contradicting even the most basic analysis.

We include discussions and analysis of sampling bias, insufficient data, and confusion about whether the impact monies flow to the cruise line or into the community. Our report does not develop its own economic impact analysis, as that is a separate process and requires primary data collection. Instead, it identifies clear issues with current research that creates reasonable doubt as to the role that economic benefits from the cruise industry play within the Charleston economy.

Within the research scope of this study, we dissect industry patterns, allowing us to analyze impact from a different perspective: by observing the industry's goals and interactions with its suppliers. We would like to believe that the cruise industry has the best interests of its partner communities in mind, and it might. But the business model is designed to maximize profits through extensive use of vertical integration and supply chain management, which typically come into conflict with a community's desire to capture tourism dollars, maintain its core tourist attractions, and provide services to locals who are vested in the region.

Vertical integration also generates unique vendor relationships, which form the foundation of the cruise industry's supply chain. We uncover how the industry is able to provide large volumes of supplies to support the tens of thousands of customers it interacts with each day. The industry's supply chain is reviewed in detail, including the national and international nature of its suppliers, the depth and flexibility of its vendors, and the efficiency of a system required to bring suppliers and customers together to form a cruise. From this process we infer that little is left over for suppliers in the local community, further reducing the benefits to local businesses.

It is clear that some ports gain from the cruise industry. However, it is also clear that these gains are in many cases reduced, and in some cases eliminated, by competition among communities (sometimes using public funds to attract the cruise industry).



3. Summary and Recommendations
(continued)

Based on this analysis, it is recommended that Historic Charleston Foundation undertake the necessary actions that are consistent with its mission to encourage the City to consider the following recommendations:

1. The City should create a separate citizens monitoring board/commission to oversee and provide advice to the City Council on issues related to the cruise industry. This monitoring board should be comprised of individuals representing the wide variety of stakeholders identified in this report.

   It is of utmost importance that the City, the SPA, and other stakeholders cooperate in a transparent, unified manner. All stakeholders need to work together. As a major stakeholder in the process, the City should become more involved with the negotiations with the cruise industry and the SPA. This study has clearly demonstrated the issue of non-alignment of costs and benefits associated with the cruise industry. Whatever positive economic impacts are generated by the cruise industry in Charleston, the vast majority are not felt by the downtown residents.

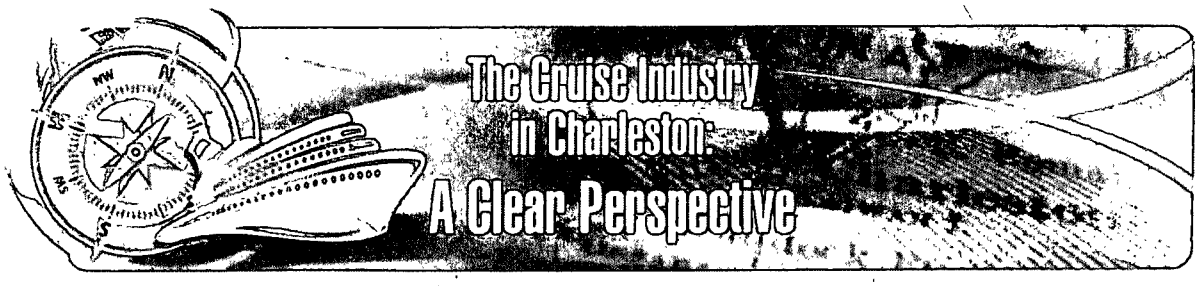
   There are a large number of stakeholders affected by the City's actions related to the cruise industry, and all of their voices need to be heard and incorporated in the City's actions. Since many of the downtown residents, neighborhood organizations, and preservation organizations feel the pressure from the cruise industry, they need to be given more oversight and monitoring so that they can feel like true stakeholders in the decisions being made by the City and SPA.

It is of utmost importance that the City, the SPA, and other stakeholders cooperate in a transparent, unified manner. All stakeholders need to work together. As a major stakeholder in the process, the City should become more involved with the negotiations with the cruise industry and the SPA. This study has clearly demonstrated the issue of non-alignment of costs and benefits associated with the cruise industry.

2. To protect the "goose that lays the golden eggs," the City should ensure that the cruise industry is managed and controlled like virtually all other attractions and activities governed by the City to the best of its ability.

   Perhaps the importance of managing the City's cruise tourism relative to other demands is best stated by Tim Keane, the Director of the Department of Planning, Preservation and Sustainability for the City of Charleston: "Charleston is a special place unlike anywhere in the United States and with the spring comes a tremendous amount of visitors. These visitors are very important to the City's economic growth, but are secondary to the residents of downtown Charleston".[29]

   Every aspect of tourism is carefully regulated by the City already and has ensured its success in presenting an authentic, high



quality historic environment. Perception is everything and all the negative press, such as being placed on the Watch List by the National Trust and The World Monuments Fund can erode the City's top position as an international destination.

3. The City should undertake an extensive service level study to determine the resources it allocates to managing the costs of the cruise industry.

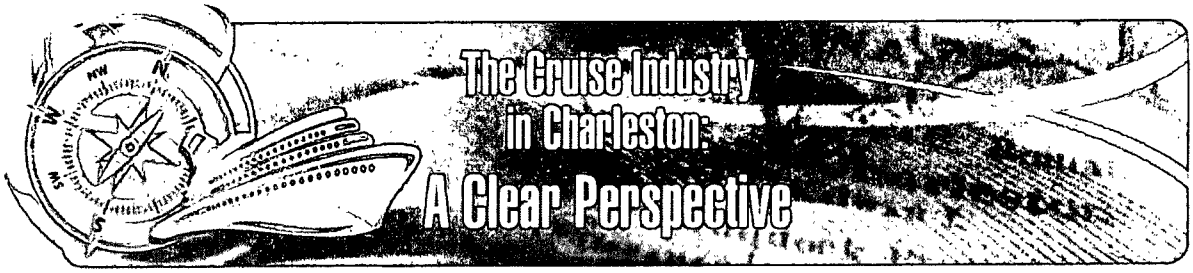
   The City is responsible for providing various services to its residents and visitors. To date, no detailed analysis has been done to determine what, if any, services are required by the cruise visitors. However, much discussion has been made of the "benefits" of the cruise visitors. It is recommended that for the City to be comprehensive in overseeing the industry, it should consider both the costs and benefits of the industry. Therefore, these costs should be evaluated by the City.

4. The City should negotiate with the SPA and cruise industry to impose a reasonable passenger fee to help offset costs that the City may incur serving the cruise industry. These funds could be used in the event of additional costs incurred by the City related to the cruise industry. In addition, the City could use some of these funds to create an "Infrastructure Fund" to offset the cost of infrastructure improvements that will be required for the redevelopment of the southern portion of Union Pier and the special initiatives presented in the Union Pier Concept Plan. Such improvements could benefit the cruise industry as well as other sectors of the local economy.

As stated earlier, there is a distinct non-alignment of benefits and costs associated with the cruise industry and the City of Charleston. A source of revenue to help the City pay for any costs associated with the industry would ensure that the residents of Charleston are not burdened with costs they do not generate.

Other uses of these funds could help offset costs for additional waterfront development planned by the City and the SPA. *The South Carolina State Ports Authority Concept Plan for Union Pier Waterfront*, September 2010, prepared by Cooper, Robertson & Partners, outlines several special initiatives that generated much excitement throughout the community.

Every aspect of tourism is carefully regulated by the City already and has ensured its success in presenting an authentic, high quality historic environment. Perception is everything and all the negative press, such as being placed on the Watch List by the National Trust and The World Monuments Fund can erode the City's top position as an international destination.



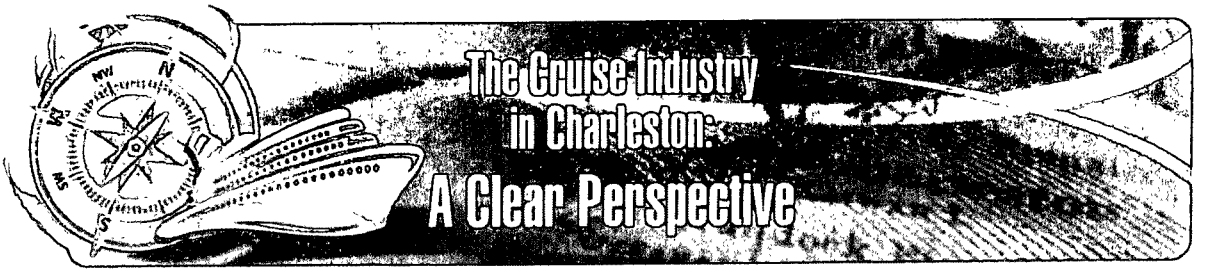
The four special initiatives of the Concept Plan are:

- Restoration of the historic public landing in front of the Customs House
- Restoration of the natural shoreline
- Restoration of Bennett's Rice Mill and creation of Rice Mill Park
- Creation of a pavilion for the history of the waterfront in a new Union Pier Park

All four of these special initiatives would have far-reaching positive impacts for the redevelopment of Union Pier for the City and its residents. It would be logical for the SPA to help fund some of the infrastructure improvements for this significant waterfront parcel to ensure that the private redevelopment is of the highest quality. This would be another way that local residents and businesses could perceive a more significant positive impact from cruise operations in Charleston.

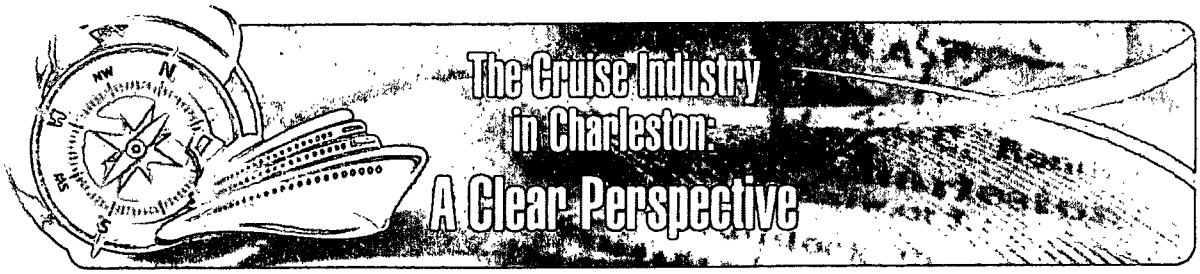
5. The stakeholders should sponsor a new economic impact study conducted by an impartial organization with real-time data. This study should obtain information that is representative of the entire spectrum of passengers throughout the year. It should also include an in-depth analysis of firms that may have hired new employees to meet the additional demand from visits by the cruise ships. Of particular interest would be a thorough understanding of the supply chain network.

   This recommendation is justified only if the City and the stakeholders really want to know exactly who benefits and how much they benefit from the cruise industry. While small sample surveys and speculative studies have been relied upon in the past to quantify the industry's impacts, the truth about the industry's impacts – good or bad – on the City of Charleston can only be determined with a comprehensive analysis based on extensive, real data collected from Charleston's residents, businesses and cruise passengers.



Endnotes

1. Experts included staff at the Charleston Area Convention and Visitors Bureau, Joseph W. Geldhof, Esquire, Juneau, Alaska, Ross A. Klein, Ph. D and others.
2. Crotts and Hefner, February 2010 report "An estimate of the economic contributions of the SC State Ports Authority's 2010 cruise ship activity to the region's economy", and The Impact of Cruise Ship Embarkations and Debarkations on Hotel Demand in Metro Charleston's Major Hotel Markets, January 1, 2009 - October 1, 2011, John C. Crotts Consulting, November 2011
3. Royal Caribbean to roll out new generation cruise ships." Travel Talk-Middle East 1 Apr. 2011. General OneFile. Web. 19 Sep. 2011.
4. The criteria used to narrow the number of reports reviewed included size of sample included in the report, completeness of the report, author of study, and whether the report addressed jobs creation, spending, geography and included only those studies that included a discussion of the research method used. Many reports were only partial analyses, were not sourced, and/or only covered one aspect of the industry.
5. CITY & FINANCE: Carnival makes a $1.3bn profit." Travel Trade Gazette UK & Ireland 24 Sept. 2010: 18. General OneFile. Web. 19 Sep. 2011
6. Dollars are not adjusted for inflation
7. "statistically significant" unlikely to have occurred by chance
8. "CARNIVAL CRUISE REPORT: Blue sea thinking or the future?" Travel Trade Gazette UK & Ireland 1 Apr. 2011: 6. General OneFile. Web. 19 Sep. 2011.
9. IMPLAN employee compensation is: wage and salary payments as well as benefits, including: health and life insurance, retirement payments and any other non-cash compensation.
10. See Appendix 2 Questions to SPA
11. http://articles.latimes.com/2011/jan/14/business/la-fi-1014-mexicocruise-ships-20110114
12. Cruise Ship Tourism, Edited by, Ross K. Dowling, Edith Cowan University, School of Marketing, Tourism and Leisure, Australia,
13. Experts included staff at the Charleston Area Convention and Visitors Bureau, Joseph W. Geldhof, Esquire, Juneau, Alaska, Ross A. Klein, Ph. D and others.
14. 2020 Economic Impact of Tourism on the Charleston Economy, Bing Pan, Ph.D., School of Business, College of Charleston, April 12, 2011, http://prezi.com/eit7xkf6u4_j/2010-impact-of-tourismon-the-charleston-economy
15. "Our supply chain process is a very streamlined process as we have to supply our ships worldwide producing 10,000 to 20,000 meals a day per ship, depending on the ship's size." "Unraveling the supply chain purchasing conundrum." International Cruise & Ferry Review Autumn-Winter 2010. General OneFile. Web. 10 Oct. 2011.
16. Total full service restaurants 406 (BLS-Charleston County 2010 2nd Qtr) TIMES 20,000 meals.
17. www.cruiseandferryreview.com (ArticleID=2695828&Issue=79655)
18. CABOTAGE LAW: Laws limiting a foreign company's right to transport passengers between two points in a country. Under the US Passenger Services Act, for example, only a US registered cruise ship can take passengers on an Alaska cruise from Seattle without stopping in BC. A ship not registered in the US must stop at a BC port in order to comply with US cabotage laws. Canada's cabotage laws similarly prohibit a foreign flagged vessel from operating BC-only cruises.
19. http://j1visa.state.gov/programs/summer-work-travel/
20. http://www.census.gov/epcd/naics02/def/NDEF483.HTM
21. Funk states "selling just three shore excursions and third-party travel insurance (the "fries") increased our earnings by a whopping 81%."
22. http://www.agilitylogistics.com/en/gil/pages/YS_Industry_Solution_Cruise_Line_Logistics.aspx
23. http://blog.al.com/live/2011/03/carnival_cruise_lines_cutting.html
24. Carnival has reduced the number of stops to Charleston for 2012
25. http://www.postandcourier.com/news/2012/jan/31/charlestons-wentworth-mansion-named-no-3-hotel-ame/
26. Based on data and information received via email from Byron Miller, SC SPA on 11.18.11.
27. http://www.preservationnation.org/travel-and-sites/sites/southern-region/watch-status-charleston -html
28. See http://blog.al.com/live/2011/03/carnival_jumping_ship_from_mob.html; http://www.wvec.com/news/local/RoyalCaribbean-Cruise-Line-is-saying-good-bye-to-Norfolk-95194539. html; http://www.sdnews.com/view/full_story/9625087/articleWill-economy%E2%80%99s-choppy-seas--calm-for-cruise-shipindustry
29. "DiscoverCharleston.com, Balancing Charleston's Growth, Brandeis J. Price, http://www.discovercharleston.com/realestate/



Bibliography

Business Research & Economic Advisors. (2004). *The Contribution of the North American Cruise Industry to the U.S Economy in 2004*. Exton: Cruise Lines International Association.

Center on Ecotourism and Sustainable Development (CESD). (2007, January). *Cruise Tourism Impacts in Costa Rica & Honduras: Policy Recommendations for Decision Makers*. Washington, DC, USA.

Center on Ecotourism and Sustainable Development (CESD). (2006, November). *Cruise Tourism in Belize: Perceptions of Economic, Social & Environmental Impact*. Washington, DC, USA.

City of Portland Department of Ports & Transportation. (2002). *Economic Impact of the International Passenger Industry on the Portland, Maine Region*. Portland: City of Portland.

Crotts, J., & Hefner, F. (2010). *An estimate of the economic contributions of the SC State Ports Authority's 2010 cruise ship activity to the region's economy*. Charleston: South Carolina State Ports Authority.

Dowling, R. K. (2006). *Cruise Ship Tourism*. Cambridge: CAB International.

John C. Martin Associates, LLC. (2004). *THE ECONOMIC IMPACTS OF THE 2003 CRUISE SEASON AT THE PORT OF SEATTLE*. Lancaster: John C. Martin Associates, LLC.

Klein, R. A. (2003). *Cruising -Out of Control: The Cruise Industry, The Environment, Workers, and the Maritimes*. Nova Scotia: Canadian Centre for Policy Alternatives.

Klein, R.A. (2009). *Cruising Without a Bruising*. Nova Scotia: Canadian Centre for Policy Alternatives.

Klein, R. A. (2006). *Turning Water into Money: The Economics of the Cruise Industry*. St John's: Memorial University of Newfoundland, School of Social Work.

Klein, R.A. (2005). *Playing Off the Ports: BC and the Cruise Tourism Industry*. Vancouver: Canadian Centre for Policy Alternatives.

Maui Mayor's Cruise Ship Task Force. (2005). *MAYOR'S CRUISE SHIP TASK FORCE ISLAND OF MAUI*. Retrieved September 2011, from http://www.cruiseresearch.org: http://www.cruiseresearch.org/Maui%20Task%20Force.pdf

McDowell Group. (2000). *The Economic Impacts of the Cruise Industry in Southeast Alaska. Southeast Conference* (p. 41). Juneau: McDowell Group.

Minnesota IMPLAN Group. (2004). *IMPLAN Professional Version 3.0 Social Accounting & Impact Analysis Software*. Stillwater: Minnesota IMPLAN Group, Inc.

Pricewaterhouse Coopers. (2001). *Cruise Industry's Economic Impact on the Caribbean*. Pembroke Pines: Business Research & Economic Advisors (BREA).

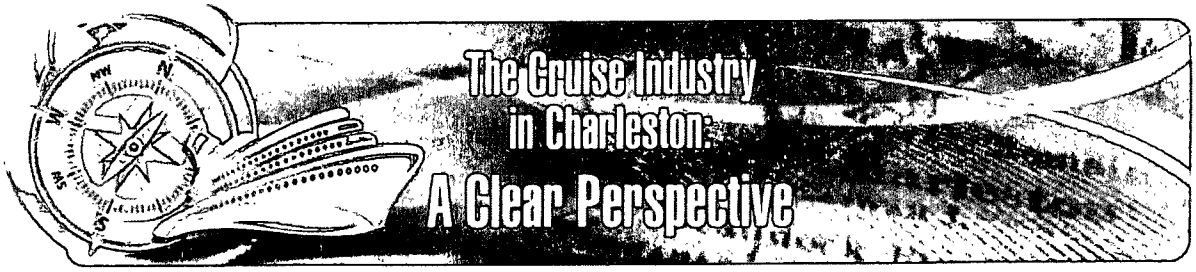
Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements. (2007, March). Caribbean Region: Tourism. Bridegetown, Barbados.

Thomas J. Murray & Associates, Inc. (2005). *THE IMPACTS OF THE CRUISE SHIP INDUSTRY ON THE QUALITY OF LIFE IN KEY WEST*. Gloucester Point: City of Key West Naval Properties Local Redevelopment Authority.

U.S. Department of Commerce. (1997, March). *Regional Input-Output Modeling System (RIMS II)*. Retrieved September 2011, from BEA.Gov: www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf

USDA. (2005, July). Tourism and Its Effects on Southeast Alaska Communities and Resources: Case Studies From Haines, Craig, and Hoonah, Alaska. *Research Paper PNW-RP-566*.

Vaggelas, G. K., & Lagoudis, I. N. (2010). Analysing the Supply Chain Strategy of the Cruise Industry: The case of a small Cruise Company. *International Association of Maritime Economists Conference Lisboa*. Portugal: www.porteconomics.eu.



Appendix 1

Analysis of 2011 and 2012 Cruise Schedules

This Appendix provides additional data on the cruise industry activity in Charleston. Of particular note is that the number of Port of Call ships visiting Charleston has declined in recent years. Data compiled by the SC State Ports Authority indicate that between 2001 and 2009, there was an average of about 43 cruise ships visiting Charleston per year (all Port of Call ships). Since the Carnival Fantasy began operation in 2010 the total number of ships visiting Charleston has increased to about 80 ships per year. According to SC SPA, there are four fewer ships scheduled for 2012 than in 2011. The Fantasy which uses Charleston as its home port represents about 70 of those visits each year. Analysis of 2012 schedule indicates that the number of Port of Call visits will be reduced from 21 to 14 ships. Therefore, the number of Port of Call ships has dramatically declined from about 43 per year prior to the Fantasy to about 14 scheduled for 2012.

1. Basic Facts

2011 Total - 90 Cruises: 21 POCs and 69 Carnival Fantasy (77% of total ships)
2012 Total - 84 Cruises: 14 POCs and 70 Carnival Fantasy (84% of total ships)

- Between 2011 and 2012 the number of total cruise ships using Charleston will decline from 90 to 84 or 6.6 %
- The Carnival Fantasy that leaves at 4:00 PM and returns at 8:00 AM every five days
- The number of total cruise ships using Charleston as a Port of Call will decline from 21 to 14, or 33%
- Of the POC ships, nine are small (less than 1,100 passengers)
- The largest is the Crown Princess with a capacity of 3,080 passengers.
- In 2011 only three ships will dock overnight
- In 2012 none will
- In 2011 only eight ships will be docked to allow for dinner
- In 2012 only four ships will be docked to allow for dinner
- Parking is considered by the passengers to be well organized and relatively efficient and friendly
- Based on the Mobile, AL experience there are likely to be more than 150 hotel stays per ship.

It may be safely assumed that Carnival Corporation will not use Charleston for the home port for more than one ship. Carnival Corporation is a huge corporation with revenues of $14.5 billion in 2010 and 49.2% of the total world market. It is comprised of eleven individual cruise line brands. Executive control of each brand is by geographical location, with Carnival Corporation controlling operations in North America, Carnival UK controlling operations in the United Kingdom and Costa Cruises Group controlling operations in the rest of Europe. P&O Cruises Australia is operated by Carnival UK as a sister company of P&O Cruises.
http://en.wikipedia.org/wiki/Carnival_Corporation_%26_plc

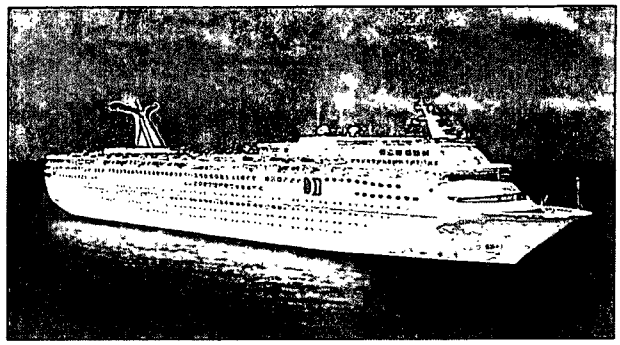
- AIDA Cruises, Germany
- Carnival Cruise Lines, United States
- Costa Cruises, Italy
- Cunard Line, United Kingdom
- Holland America Line, United States
- Ibero Cruises, Spain
- P&O Cruises, United Kingdom
- P&O Cruises Australia, Australia
- Princess Cruises, United States
- Seabourn Cruise Line, United States

2. Impact of Carnival Fantasy 2011 69 cruises; 2012 70 Cruises

Charleston is the home port for the Carnival Fantasy. It is the only cruise ship that uses Charleston for embarking or disembarking. The Fantasy operates five day cruises from Charleston through the Bahamas.

The typical itinerary is:

Day 1 Charleston, South Carolina -- 04:00 PM [Before Dinner]
Day 2 Fun Day At Sea -- --
Day 3 Freeport, Bahamas 08:00 AM 06:00 PM
Day 4 Nassau, Bahamas 07:00 AM 07:00 PM
Day 5 Fun Day At Sea -- --
Day 6 Charleston, South Carolina 08:00 AM – [Early morning]



These are low cost cruises for fares as low as $200

The ship has a crew of 920 and a capacity for up to 2,056 passengers

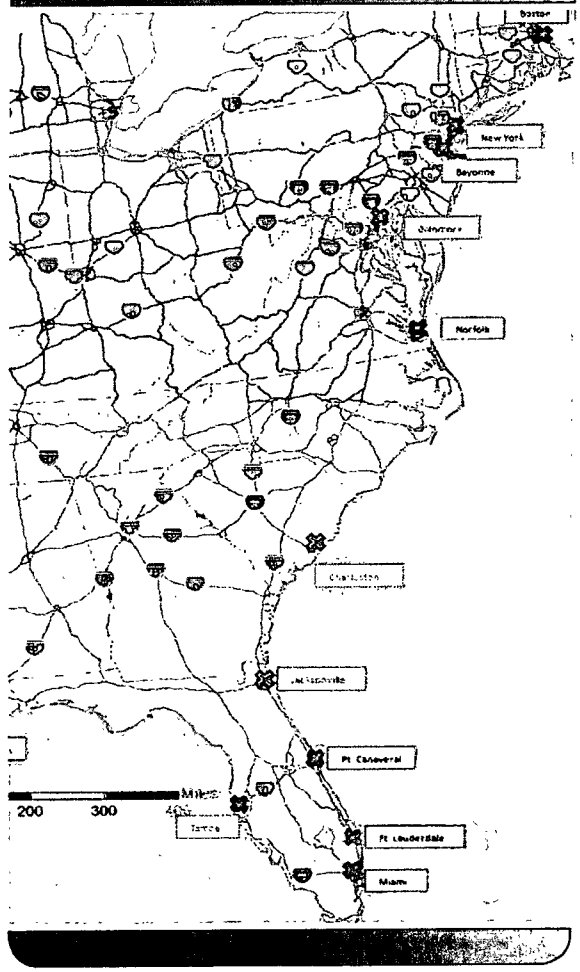
Analysis: This ship represents about 75% of the cruise traffic in Charleston and is the only ship that requires parking. The cruises leave at 4:00 PM and return at 8:00 AM. The 4:00 PM departure allows for passengers to drive for approximately six hours during the day of departure. The 8:00 AM arrival allows for passengers to leave immediately for their journey home. Given this schedule and the low fare nature of these cruises it is possible many of these passengers have no impact on the Charleston economy. The only impacts are parking for five days and increased traffic. The 4:00 PM (non –rush hour) department time allows for considerable leeway in terms of arrival time. The 8:00 AM arrival time would suggest that considerable outbound highway traffic on I-26 would occur after 9:00 AM.

Appendix 1
(continued)

Geographic situation of Charleston as a Cruise Ship Port

The decision by a cruise line to visit Charleston as a Port of Call or as a home port is governed by several geographic factors. It may be assumed that Carnival Corporation's decision to use Charleston as the home port for the Fantasy was based on business factors including the fees for use of the port facilities and the relative location of the City to attach customers. Carnival decided that the best type of product to market from Charleston was an inexpensive five day cruise with Ports of Call in the Bahamas. This product is priced at about $600 (with off season discounts at $200). The ship leaves at 4:00 PM and arrives at 8:00 AM. With this price structure and schedule it is possible for passengers to drive to and from their homes without an overnight stay. The map of competing cruise ship ports (Figure A-1) illustrates the competitive position of Charleston to attract passengers from South Carolina, Georgia, North Carolina, Tennessee and Virginia. In fact, just as the Grand Strand is a favorite beach destination for visitors from Ohio, Kentucky, Indiana, Illinois and Michigan, Charleston is favorably situated to serve cruise passengers from those states.

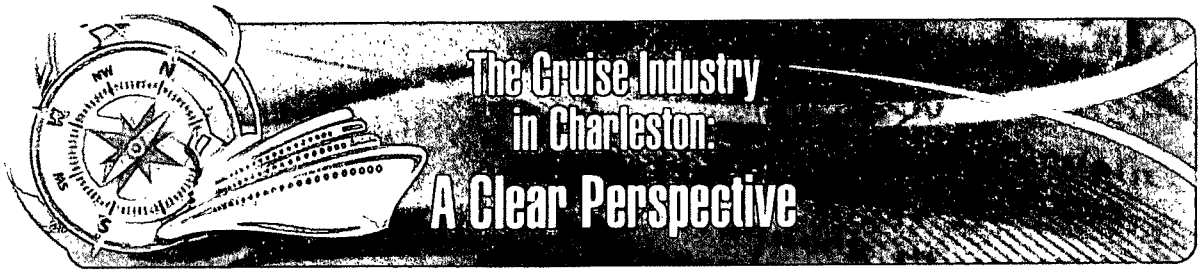
FIGURE A-1 Map of east coast ship ports



It should be noted that Baltimore is the closest year round alternative cruise port north of Charleston. Carnival has greatly reduced the cruises by the Carnival Glory from Norfolk. In fact it will only operate seven cruises in May and October of 2012. This further strengthens Charleston's competitive position.

While Charleston has an excellent competitive position with respect to attaching passengers seeking an inexpensive cruise, it is not well situated with respect to expansion of Ports of Call. Basically, the Bahamas represent the only destination within the desired short cruise duration. While Bermuda is an alternative it is much better reached by departing from Baltimore or further north. Similarly for cruises to the Caribbean, it is better to drive to Florida and depart from one of its five ports.

Therefore it appears that Carnival has made a good business decision to operate the Fantasy from Charleston and there would be little chance of expanding its role as a home port.



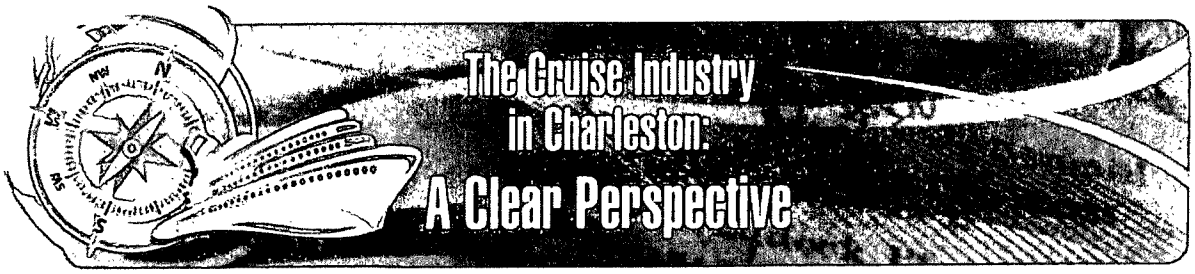
3. Analysis of Port of Call visits

2011 21 Visits – Three Overnight
2012 14 Visits – No Overnight

In 2011, 21 cruises made by 15 different ships will use Charleston as a Port of Call. These stays were generally between 8:00 AM and 4:00 PM. Therefore, they are not generally in port for the dinner period. It may be assumed that these passengers disembark and visit areas within a 30 minute walk of the dock. This would easily extend to The Market, Battery, and King Street. They may take carriage rides, shop in the market and have lunch off the ship. In total these amount for a total of 298.5 hours or 12.5 days. Only three ships will spend more than 24 hours in port and dock over night. The longest stay of 77.5 hours is by the World Residen Sea which is a residential ship with 165 apartments. It may be assumed that the residents of this ship have an extremely positive influence on the City. They are likely to dine in restaurants and may take tours. Only eight ships were at the dock during the dinner period.

Several ships that have visited Charleston in 2011 and will visit in 2012 are considered luxury cruise ships. These include the Queen Victoria Cunard and the World Residen Sea which is actually a floating residence with 165 apartments. Two ships from the Crystal line have been awarded the "Best Large-Ship Cruise Line" for fifteen years by *Conde Nast Traveler.* The Seabourn Sojourn is all-suite, mid-size ultra luxury cruise ship, with suites ranging in size from 225 to 1,682 square feet.

<u>Other ships are considered small (less than 1,100 passengers)</u>
Columbus Hapag-Lloyd Cruises: 420 passengers
Columbus 2 Hapag-Lloyd Cruises Capacity 698 passengers
Crystal Symphony Crystal Cruises: Capacity: 922 passengers
Navigator Regent Seven Seas: Capacity: 490 passengers
Oceania Regatta Oceania Cruises 824 passengers
Princess Danae Classic International: Capacity Total Beds 707
Seabourn Sojourn Seabourn Cruises Capacity assengers 450
The World Residen Sea Capacity 165 Residences
Crystal Serenity Crystal Cruises Capacity: 1,080 passengers



Appendix 1
(continued)

Congested Times

Disregarding the trips made by the Carnival Fantasy with its five day turn around, there were four weeks with two or more Port of Call visits in 2011 and 2012.

2011
4/17 – 4/23 – 2 POC visits + 2 Fantasy
9/25 – 10/1 – 2 POC + 2 Fantasy
10/16 – 10/22 – 4 POC + 2 Fantasy
10/31 – 11/5 – 2 POC + 1 Fantasy

2012
10/21 – 10/27 – 1 POC + 2 Fantasy
10/28 – 11/3 – 2 POC + 1 Fantasy
11/4 – 11/10 – 3 POCs + 1 Fantasy

TABLE A-1 History of Volume 2001-2012

Ships	Year
33	2001
32	2002
47	2003
57	2004
47	2005
50	2006
44	2007
49	2008
33	2009
67	2010
88	2011
84	2012

FIGURE A-2 Cruise Ship Activity

Cruising through the Numbers

The State Ports Authority has agreed to a voluntary 104 ships per year limit, with no more than one ship in port at a time. Cruise opponents agree but want these voluntary limits to be enforceable. Here's the data on recent cruise activity:

YEAR	NUMBER OF CRUISE SHIPS
2003	47
2004	57
2005	47
2006	50
2007	44
2008	49
2009	33
2010	67
2011	88
2012	84 currently scheduled

SOURCE: Byron Miller, South Carolina State Ports Authority

2011 Cruise Activity

Ship Embarkations: 68 total by Carnival Fantasy*

Port-of-calls (20 total by 14 ships)

- *Aida Aura* & *Aida Luna* (Aida Cruises)*
- *Arcadia* (P&O Cruises)*
- *Columbus* (Hapag-Lloyd Cruises)
- *Crown Princess* (Princess Cruise Lines)*
- *Crystal Symphony* (Crystal Cruises)
- *Navigator* (Regent Seven Seas)
- *Oceania Marina* (Oceania Cruises)
- *Oceania Regatta* (Oceania Cruises)
- *Oriana* (P&O Cruises)*
- *Princess Danae* (Classic International Cruises)
- *Seaborne Sojourn* (Seaborne Cruise Line)*
- *The World* (ResidenSea)
- *Veendam* (Holland America)*

*Note: cruise lines owned by Carnival Corporation

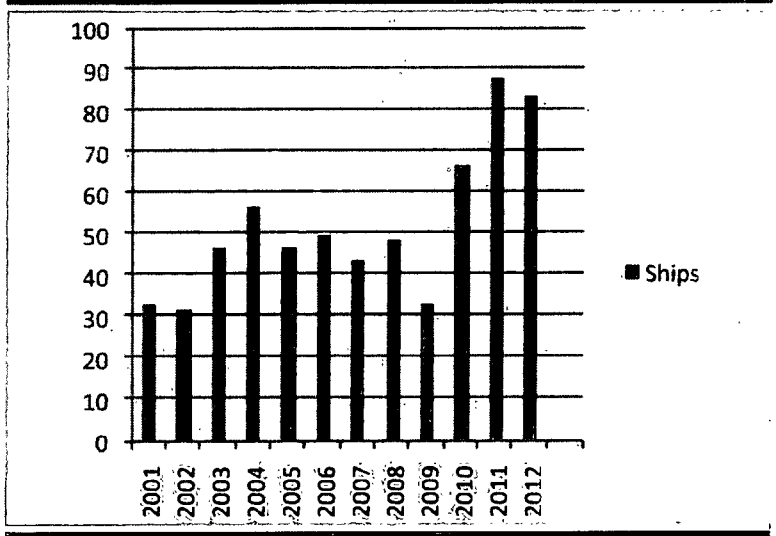
Source: CharlestonMag.com, January 2012

Geographic analysis of the Charleston as a Port of Call

Cruise ships that visit Charleston as a Port of Call generally originate in the Northeast and include the City as part of visit to major ports on the way to the Bahamas or the Caribbean. This is a limited market and may not see much growth in the future.

Appendix 1
(continued)

TABLE A-2 Charleston Cruise Ships



Analysis of Parking

Our initial assumption is that the vast majority of the passengers drive to Charleston and park at the facilities that have been established at the terminal. It may be assumed that fewer than 1,000 vehicles park at the facility. The parking fee is $15.00 per day - for standard vehicles up to 20 feet in length and $35.00 per day - for oversized vehicles over 20 feet in length (RV's, campers and busses)

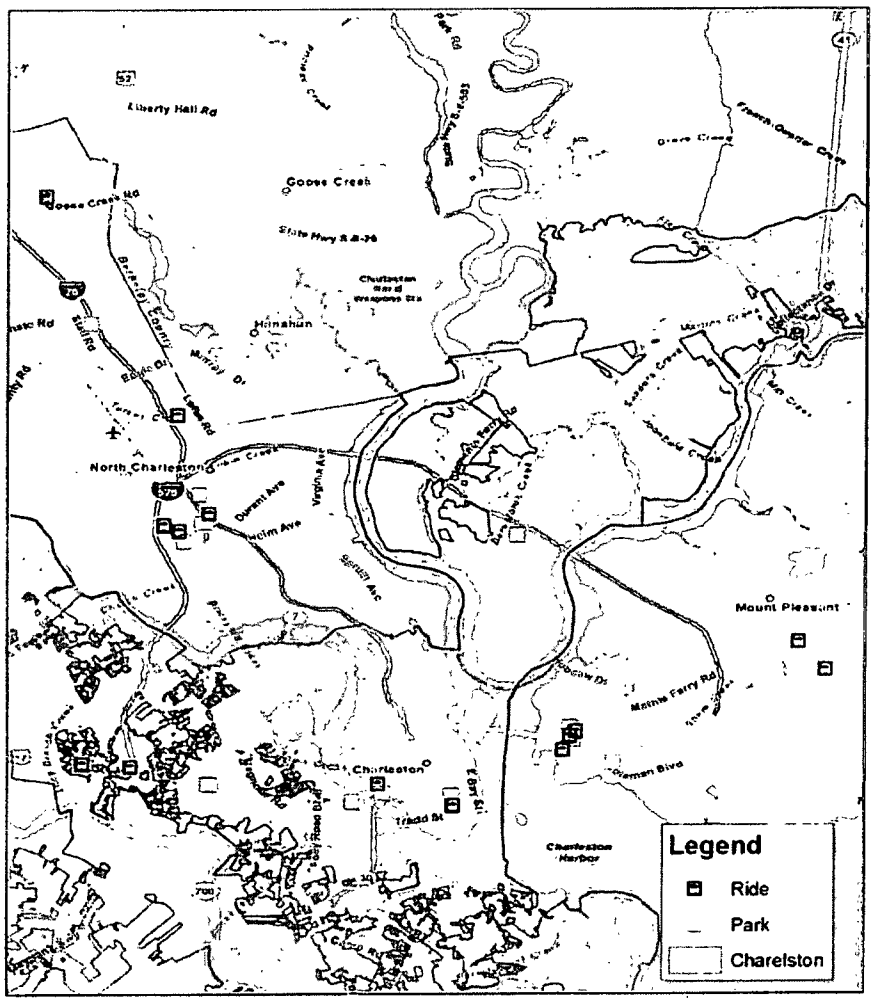
The following is an quote from the Carnival website regarding their parking procedures:

A complimentary shuttle service operates between the vehicle storage areas and the Passenger Terminal. The areas are just a few minutes from the Passenger Terminal, but the shuttle provides a comfortable way for passengers to arrive at the check-in locations. Handicap accessible shuttles are also available. Vehicle storage is available on port property, in a controlled access area available to cruise passengers - not the general public. The site is secured and patrolled by the Port Police during the cruise. The driver will receive a color-coded claim ticket that will help identify the storage area on the return date. Port Police will be stationed along the travel route to direct guests to the appropriate parking areas; shuttle bus service is provided between the parking area and the Cruise Ship Terminal. Indoor and outdoor parking areas. Luggage and vehicles will be accepted at the Union Pier Terminal starting at 12:00 noon, and continue to 3:30 p.m. —. All passengers and luggage must go to the Union Pier collection site first. Due to Port and U.S. Coast Guard security regulations, no check-through luggage will be accepted at the Cruise Ship Passenger Terminal. Secured parking on Port Property, patrolled by Port Police; limited access, available only to cruise ship passengers. www.port-of-charleston.com.

FIGURE A-3 Hotels and/or Transportation

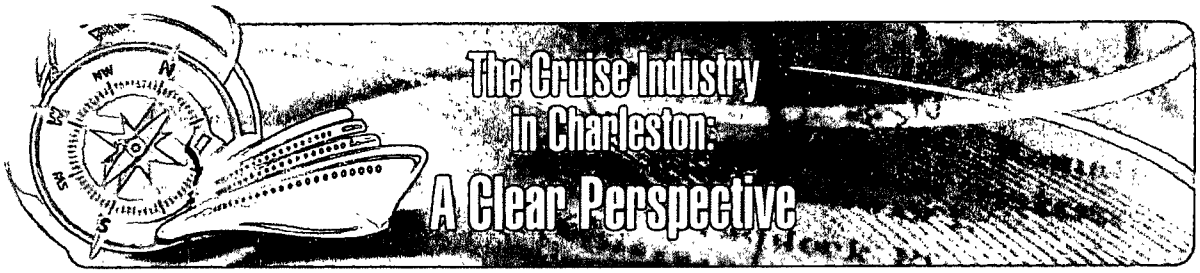
(31 Offer Free Parking - 13 Also Provide Free Transportation)

Draft: Not for distribution,Miley and Associates, 11/18/2011



Miley & Associates

Source: thttp://www.charlestoncvb.com/visitors/special_offers/packages/stay/



Appendix 2

Questions and Answers from the SPA

This Appendix includes an email from Miley & Associates, Inc. to the SC State Ports Authority dated October 25, 2011 asking the SC SPA for information about the SPA's cruise business. The second item in the Appendix is the response from the SPA dated November 18, 2011.

October 25, 2011

Hello Byron:

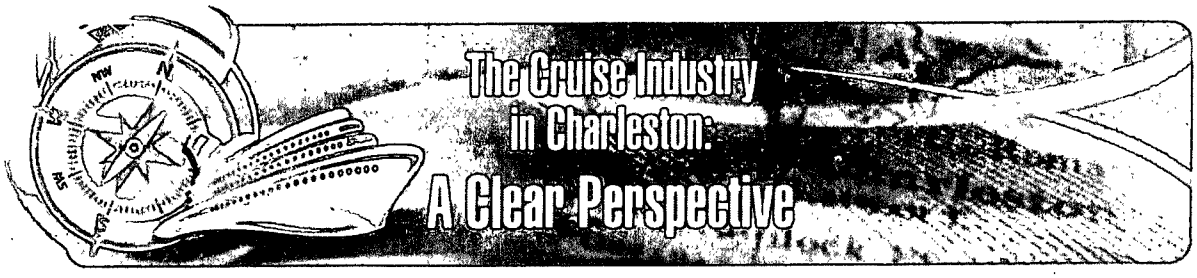
I appreciate your offer to help us with our work for the Historic Charleston Foundation. We are making substantial progress. However, we are still collecting data and we hope the SPA can help. Would you be able to provide us with the following?

First, do you have a recent annual report you can send me. We are interested in the overall volume of the SPA, the number of ships, the volume of containers, the number of SC companies using the SPA, etc. Also, any additional information you think might be helpful for us to have that will help us demonstrate the statewide impact of the SPA.

In addition, we have the following questions/data requests:

1. SPA financing the new Union Pier terminal

    a. Will the funding for the new terminal be provided by the SPA via revenue bonds, GO bonds, reserve funds through operating, excess bonds funds from a previous issue?
    b. Will there be a guarantee by any cruise line to underwrite the financing either through traditional underwriting or via a guaranteed number of passengers or ships?
    c. Is the terminal renovation contingent on a contract with one or more cruise line?
    d. Is the renovation of the terminal a requirement by a cruise line to embark and disembark passengers in Charleston?
    e. Will any cruise line make direct payments to finance the new terminal?
    f. Will any cruise line have any ownership in the new terminal or will they have any lease arrangements with the SPA for the use of the terminal or other facilities?
    g. If the cruise line volume declines, who will be required to pay the debt service on the outstanding bonds used to finance the new terminal?
    h. Are the bonds used to finance the new terminal full faith and credit bonds of the State of South Carolina?



Appendix 2
(continued)

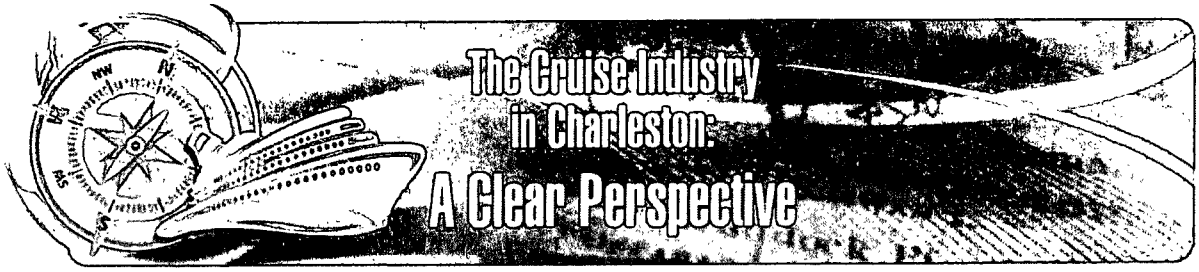
2. Does the SPA collect/charge any of the cruise lines a head tax per passenger and if so, what are those fees?
   a. Are there other fees that SPA charges the cruise lines such as wharfage fees, pilot fees, charges for potable water, fuel, etc.?
   b. If the SPA does not charge any fees now, does it have plans to do so in the future?
   c. If the SPA charges any fees, does it share any of these fees with any other entity such as the City, County, and State?

3. What are the fees per vehicle that SPA charges for parking at the current terminal and what will the fees be with the new terminal?
   a. What are the total parking fees generated per year for the last 3 years from terminal (cruise line related) parking?
   b. Does the SPA own the parking facility?
   c. Does any cruise line own or rent the parking facility?
   d. Are parking fees charged by the SPA or the cruise line(s)?
   e. If the cruise line charges the parking fees, are the fees included in the price of the cruise ticket or in addition to the cruise ticket?
   f. Does the SPA pay any commission or other type of payment to the cruise lines as a percentage of the income generated by the parking fees, taxi services, etc.?
   g. If there is additional infrastructure needed, such as traffic lights, traffic turns and waiting lanes, will the SPA or City be required to pay for them?

4. We have several questions regarding employment:

   a. Who will employ the individuals handling baggage for passengers? Will these be employees of the cruise lines, a local government employee or independent contractors? Will the same employees or contractors handling baggage during the parking and transfer operations also be responsible for loading baggage aboard the vessels?

   b. Do you anticipate utilization of other employees or contractors to provide goods or services to cruise vessels calling on Charleston, e.g., delivery of groceries, refuse collection and line-handling activities? If so, what other direct employment activities do you anticipate related to cruise operations in Charleston?



d. How many are employed on an FTE annual basis and what is the average hourly wage and how many hours per year is the average worker working on cruise line activities? If they are not employed by SPA, are the contractual employees of SPA? If they are contract employees, what is the average wage and how many hours per year do they work on cruise related activities?

b. Are the tie up/un-tie workers employees of the SPA, contract employees of the SPA or employed/hired by the cruise lines? How many are employed on an FTE annual basis and what is the average hourly wage and how many hours per year is the average worker working on cruise line activities? If they are contract employees, what is the average wage and how many hours per year do they work on cruise related activities?

c. Are there any employees directly employed by the SPA working at the cruise terminal currently and if so, how many, and what is the average wage? Are they employed full time (annual) for cruise line activities?

d. What has been the number of employees (on an FTE basis) directly employed by the SPA from 2000 -2011? How many contract employees during this time?

e. How many longshoremen are currently working for SPA and/or the cruise line related to cruise industry? What is the average wage paid to them?

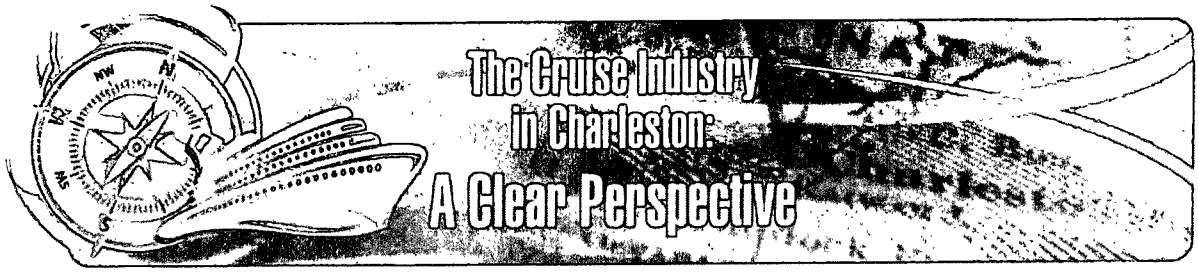
As you can imagine, everyone is very interested in the results of our analysis. The information you can provide will help us demonstrate the important role that the SPA plays in the economy of Charleston and the State.

Time is of the essence and we would appreciate anything you can do to facilitate our requests.

Do you think you could provide this information to us within the next two weeks?

We appreciate your help.

Please call or email if you have any questions.



Appendix 2
(continued)

These questions were presented to Byron Miller of the SPA and the SPA responses (provided to M&A on 11.18.11) are provided in **BOLD** text.

1. SPA financing the new Union Pier terminal

   a. Will the funding for the new terminal be provided by the SPA via revenue bonds, GO bonds, reserve funds through operating, excess bonds funds from a previous issue?

      Funding for the new terminal is a 100% responsibility of the Ports Authority, and it is already secured. The cruise terminal was included in a revenue-bond issuance in December 2010. These bonds and the interest on them are a responsibility of the Ports Authority – not the City, the state or their taxpayers.

   b. Will there be a guarantee by any cruise line to underwrite the financing either through traditional underwriting or via a guaranteed number of passengers or ships?

      See (a.) above.

   c. Is the terminal renovation contingent on a contract with one or more cruise line?

      See (a.) above.

   d. Is the renovation of the terminal a requirement by a cruise line to embark and disembark passengers in Charleston?

      We have an urgent need to provide better facilities, meeting the security requirements and commercial expectations. We initially considered renovating the existing cruise terminal facility, but were encouraged to study the entire Union Pier site. The resulting plan will result in the relocation of cargo operations – including 200 cargo ships a year, rail and truck traffic – off Union Pier.

   e. Will any cruise line make direct payments to finance the new terminal?

      See (a.) above.

   f. Will any cruise line have any ownership in the new terminal or will they have any lease arrangements with the SPA for the use of the terminal or other facilities?

      See (a.) above.

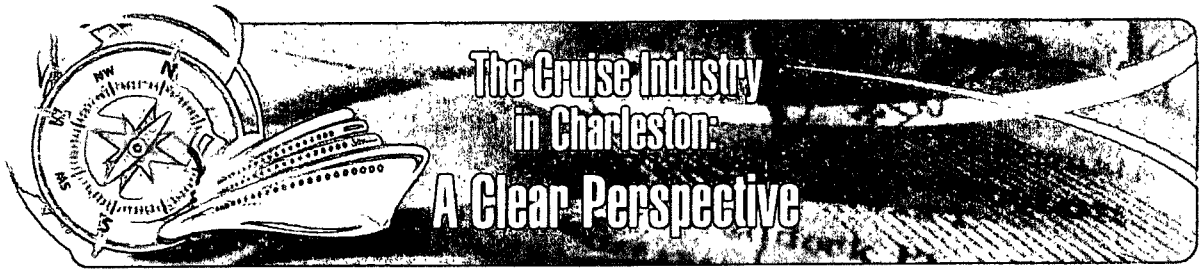
   g. If the cruise line volume declines, who will be required to pay the debt service on the outstanding bonds used to finance the new terminal?

      See (a.) above.

   h. Are the bonds used to finance the new terminal full faith and credit bonds of the State of South Carolina?

      See (a.) above.

2. Does the SPA collect/charge any of the cruise lines a head tax per passenger and if so, what are those fees?
   a. Are there other fees that SPA charges the cruise lines such as wharfage fees, pilot fees, charges for potable water, fuel, etc.?
   b. If the SPA does not charge any fees now, does it have plans to do so in the future?
   c. If the SPA charges any fees, does it share any of these fees with any other entity such as the City, County, and State?
   d. Does the SPA provide any financial incentives (such as reduced fees) to the cruise lines based on thresholds met by the cruise lines, such as number of ships or number of passengers?
   e. What additional fees, charges or taxes, if any, does the SPA envision collecting with regard to cruise vessels or their passengers and how does the SPA intend to allocate those revenues?



Appendix 2
(continued)

The Ports Authority's contracts with its customers are marine terminal service and non-tariff agreements. These are obviously sensitive competitive data, which are protected and exempt from disclosure under S.C. law. However, all of the tariff charges associated with the cruise business can be found in section 34-405 of our terminal tariff:
http://www.scspa.com/Resources/tariff/8_Charleston_Tariff.pdf

Attached below is a summary of the types of SCSPA fees associated with a cruise vessel call in Charleston, some of which are specific to cruise ships and some of which apply to all vessels. As they may be under contract, this is not exactly what they pay, but I would say that it is illustrative and indicative.

PORT OF CHARLESTON TARIFF

Passenger fees:
Passenger Fee - $20.00 - per person

- Port of Call (1 way fee)
- embark (1 way fee)
- debark (1 way fee)

Passenger Fee – minimum - per call – if vessel does not load/unload passengers -- $1055.00

Vehicle storage fees are used for embarkation vessels:
Vehicle storage fees – vehicles up to 20 feet in length - $15.00 per day
Vehicle storage fees – oversized vehicles (RV's, campers) - $35.00 per day
Vehicle storage fees – valid handicap permit and ID – complimentary
Fee is multiplied by number of days of cruise – i.e., 5-day cruise = $75.00 fee per vehicle/standard size

General vessel related charges, some of which apply to cruise ships:
Fresh water supplies - per net ton - $5.85
Fresh water supplies – minimum fee - per call - $185.00
Berth/dockage fees - per linear foot of ship – per 24-hour period or fractional day - $9.15
Security Fee/Ship - per linear foot of ship – per call - $2.90
Security Fee/Passenger - per person – per call - $5.00
Harbor Master Fee - per vessel call - $127.00

Appendix 3

Demographic and Housing Analysis

As part of this research we conducted a detailed analysis of the population and housing characteristics for sixteen census tracts that comprise the peninsula of the City of Charleston (Figure C-1). The data were compiled from the 2010 Census of Population and Housing. Since there were a considerable number of changes in the numbering and alignment of census tracts between the 2000 and 2010 decennial censuses we utilized the comparison developed by the *New York Times*. http://projects.nytimes.com/census/2010/map

2010 Census Tracts

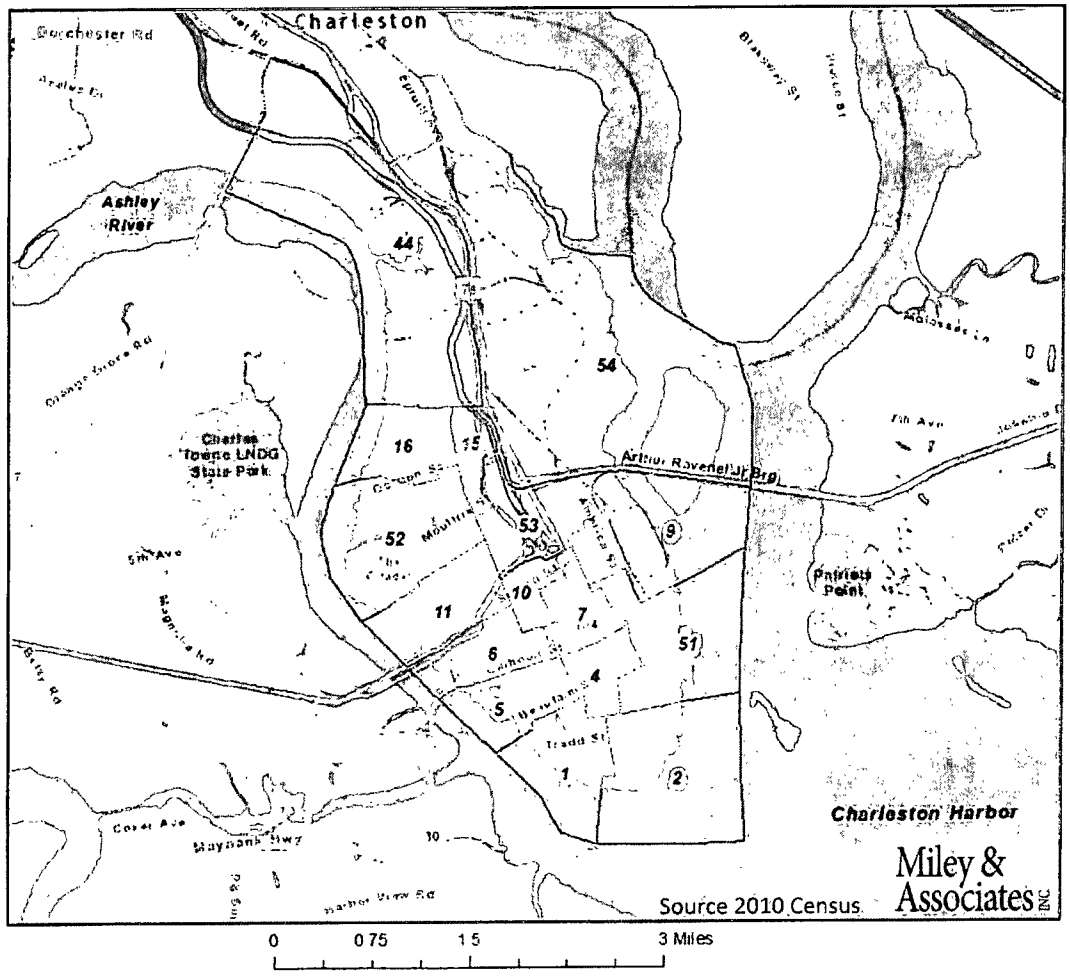


FIGURE C-1 2010 Census Tracts for Peninsula

Appendix 3
(continued)

The 2010 Census data indicate that the total population of the peninsula declined by 464 people from 37,050 in 2000 to 36,586. The map of population change (Figure C-2) demonstrates that there was a considerable loss of population along the east side of the peninsula. The loss of 256 people occurred in the census tract 9 near the construction of the Ravenel Bridge. Population gains occurred in the center of the peninsula, north of Calhoun Street.

2010 Census Tract Population Change

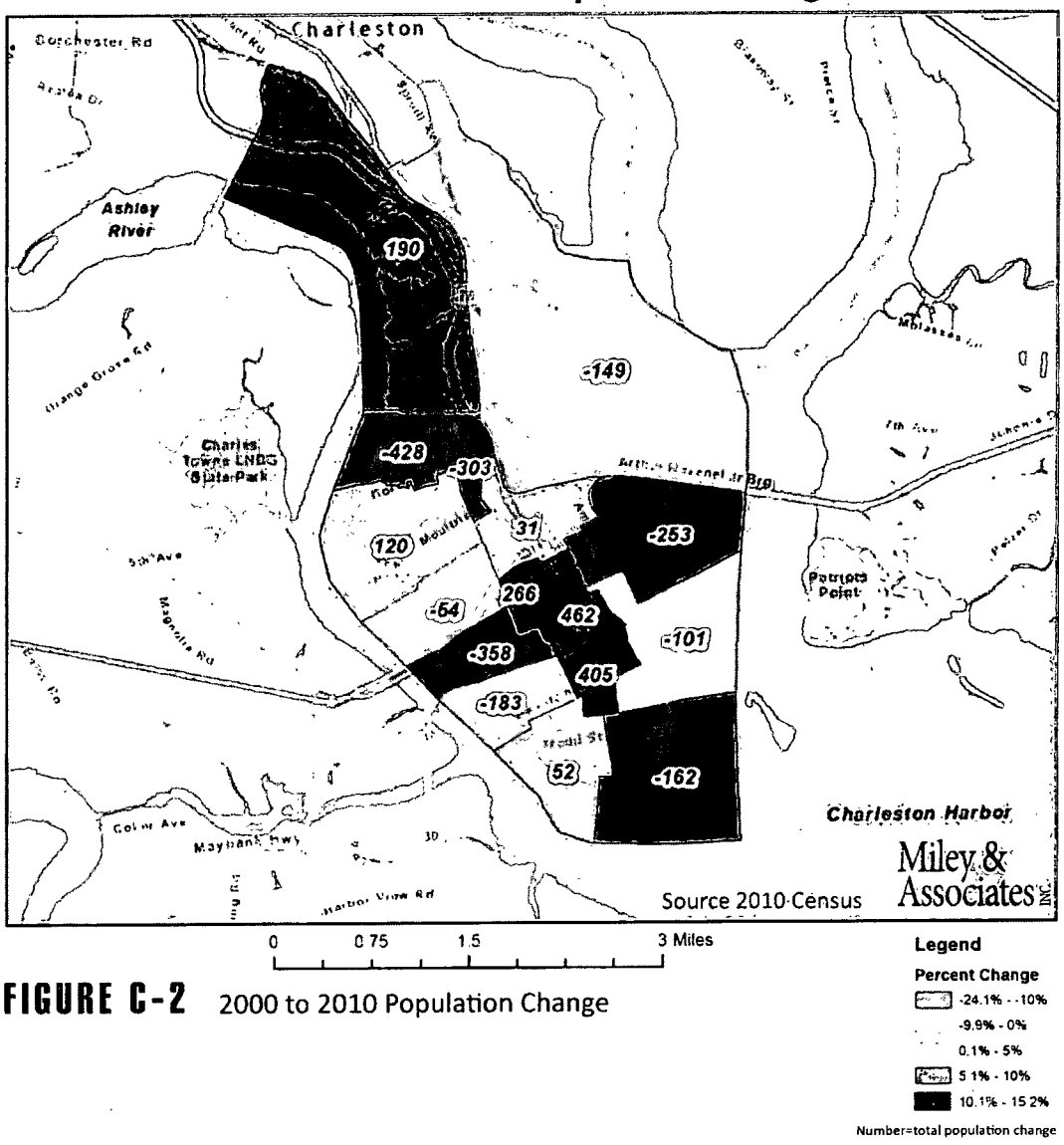


FIGURE C-2 2000 to 2010 Population Change

During this period the percentage of white population increased from 45.2 % to 57.6% while the black population declined from 51.8 % to 38.9 %. Together these two groups represented 97% of the population in 2000 and 96.5 % in 2010. The map of racial distribution (Figure C-3) illustrates an almost uniform decrease in the proportion of white population from the Battery northward. In the northern census tracts, with the exception of those near The Citadel and the Ashley River, the white population is 30% or less.

2010 Per Cent White Population

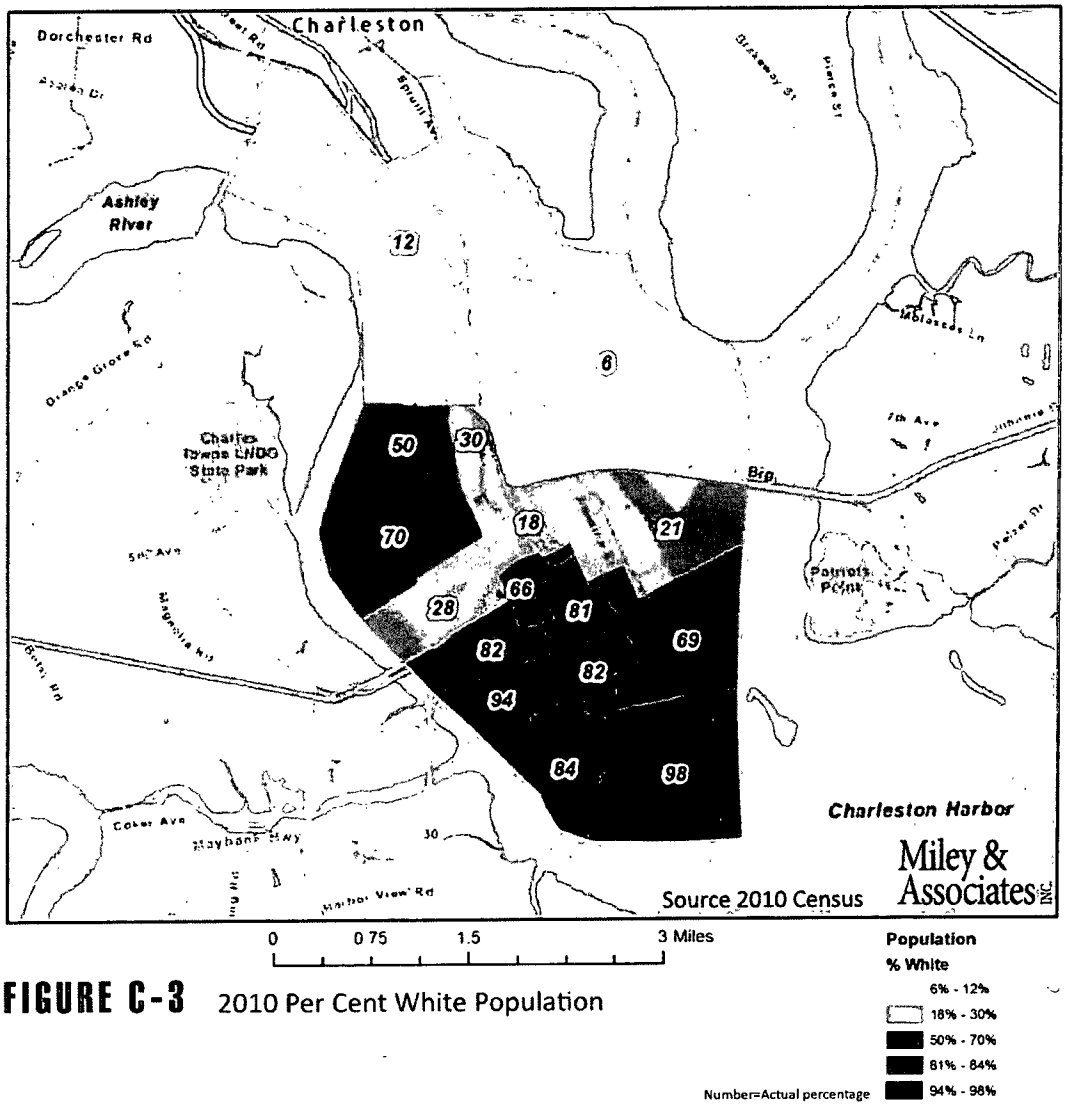


FIGURE C-3 2010 Per Cent White Population

Appendix 3
(continued)

During the same period the number of housing units declined by 53 from 18,002 in 2000 to 17,949 in 2010. In 2000 13.5 percent of the housing units were vacant. This increased to 15.5% in 2010. The map of occupied housing units (Figure 4) clearly indicates that decline in housing units near the new bridge and the Battery. In fact, Census Tract 2 that coincides with the Battery witnessed a 57.7% increase in the vacancy rate and a 7.7 % decline in occupied housing units since 2000 (Figure C-4). These data are clear evidence of the rate of absentee ownership south of Broad Street.

2010 Per Cent Change in Occupied Housing Units

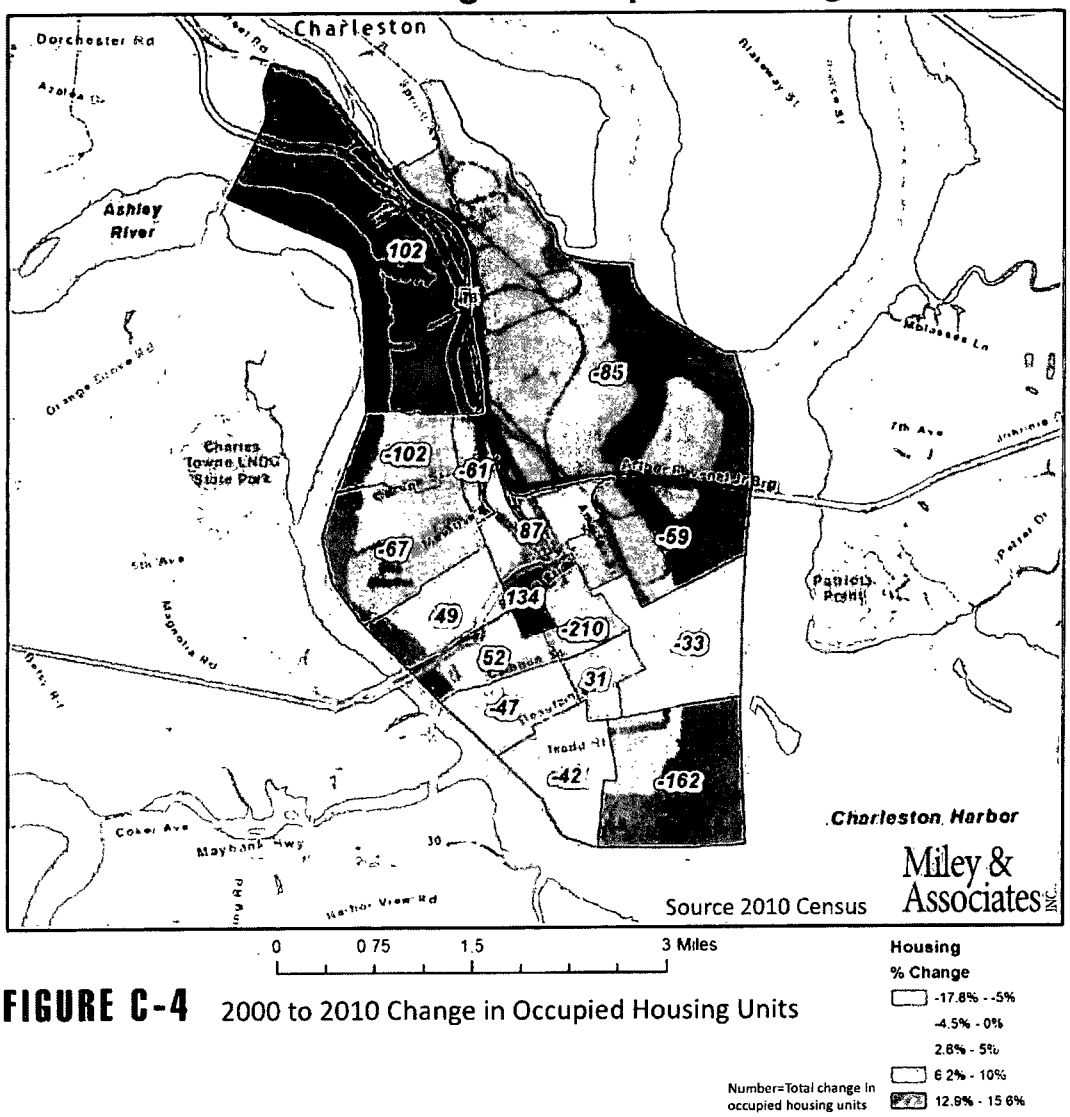


FIGURE C-4 2000 to 2010 Change in Occupied Housing Units

Appendix 3
(continued)

The following maps and tables represent an overview of the changing demographic and housing characteristics of the census tracts on the peninsula of Charleston. They were generated from the interactive mapping system for the 2010 census data that has been created by the *New York Times* (http://projects.nytimes.com/census/2010/map) and GIS data analysis from the Census data.

Tract 1

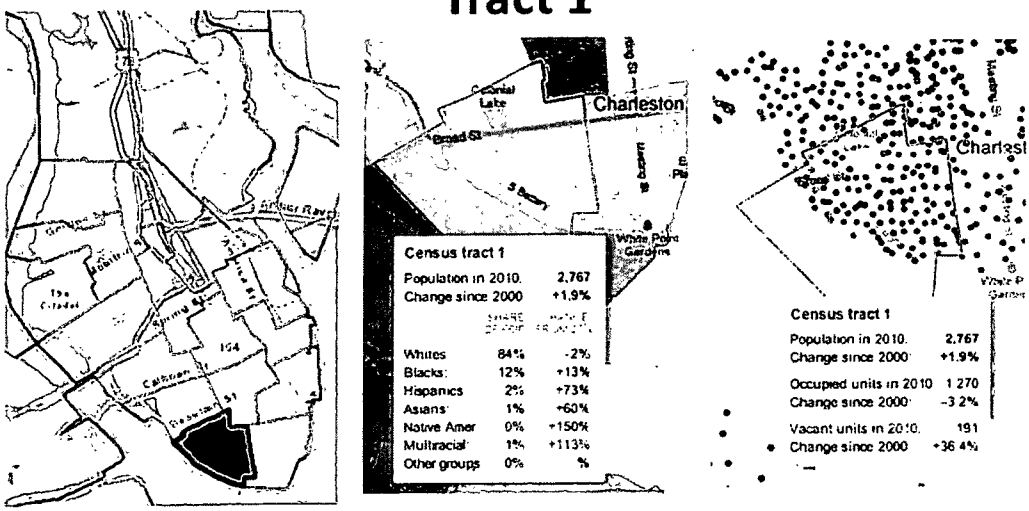


FIGURE C-5 Census Tract 1 Demographic and Housing Characteristics

Tract 2

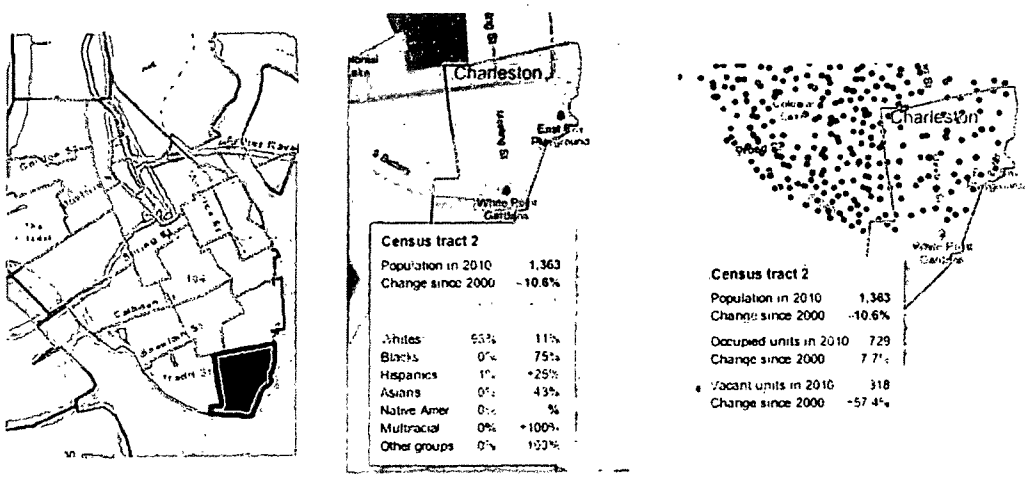
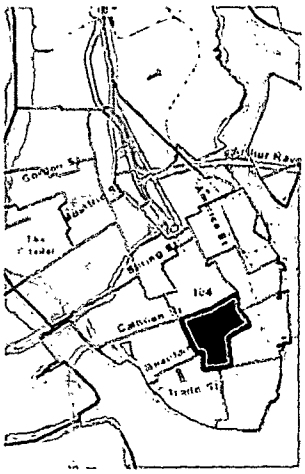
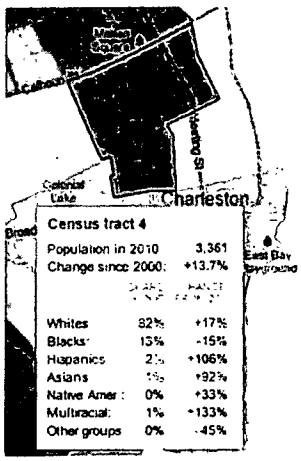


FIGURE C-6 Census Tract 2 Demographic and Housing Characteristics

Tract 4





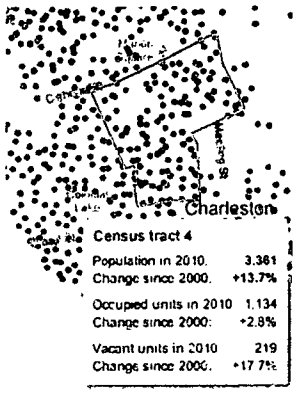
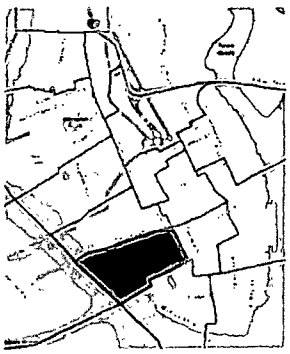
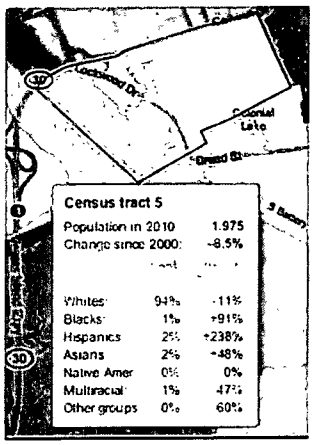


FIGURE C-7 Census Tract 4 Demographic and Housing Characteristics

Tract 5





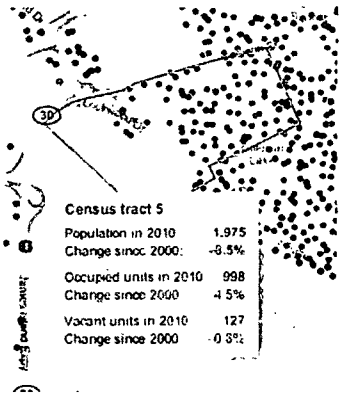


FIGURE C-8 Census Tract 5 Demographic and Housing Characteristics

Tract 6

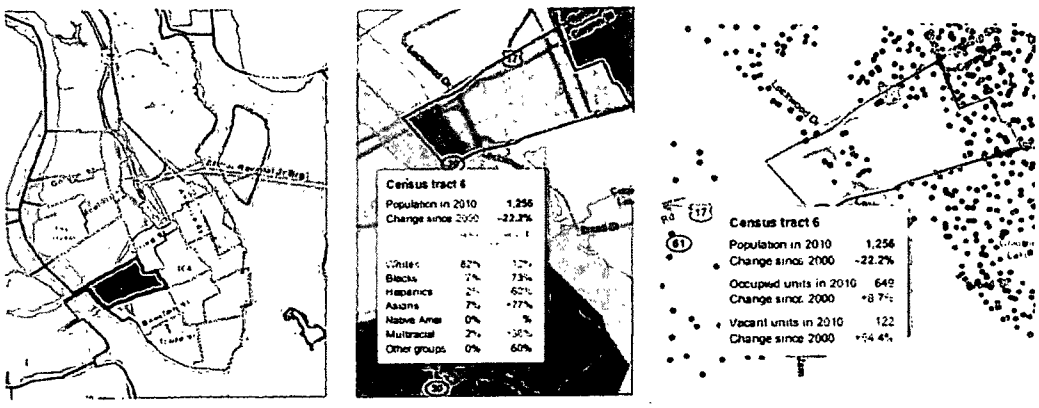


FIGURE C-9 Census Tract 6 Demographic and Housing Characteristics

Tract 7

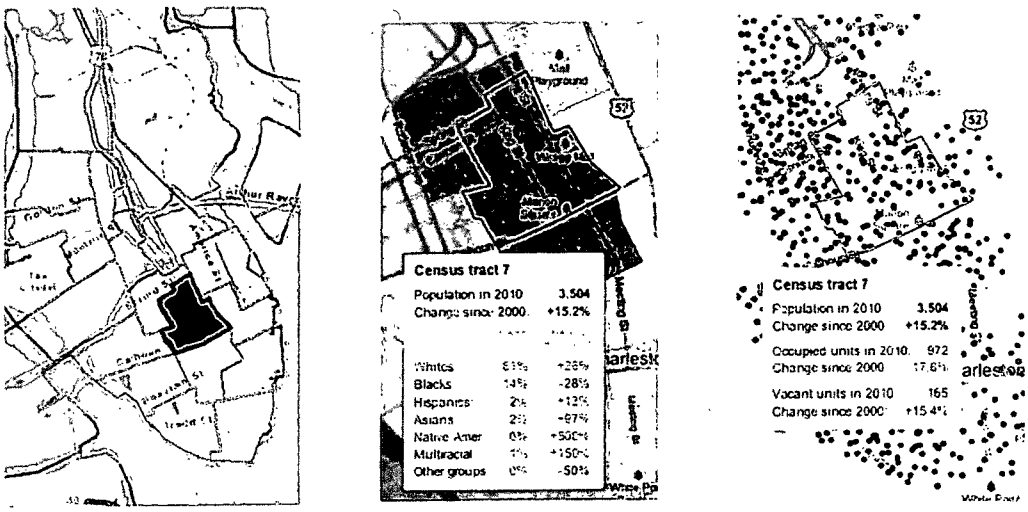


FIGURE C-10 Census Tract 7 Demographic and Housing Characteristics

Tract 11

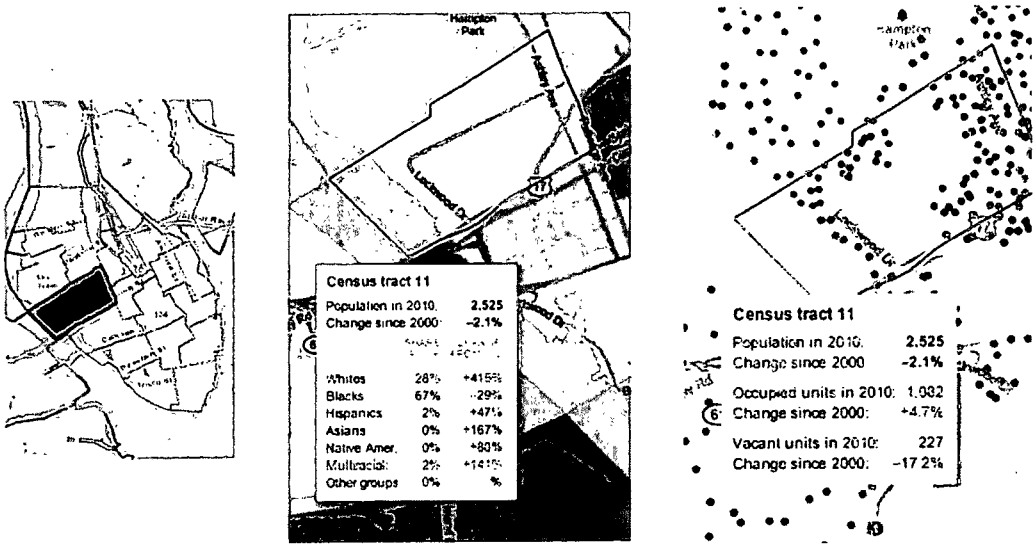


FIGURE C-13 Census Tract 11 Demographic and Housing Characteristics

Tract 15

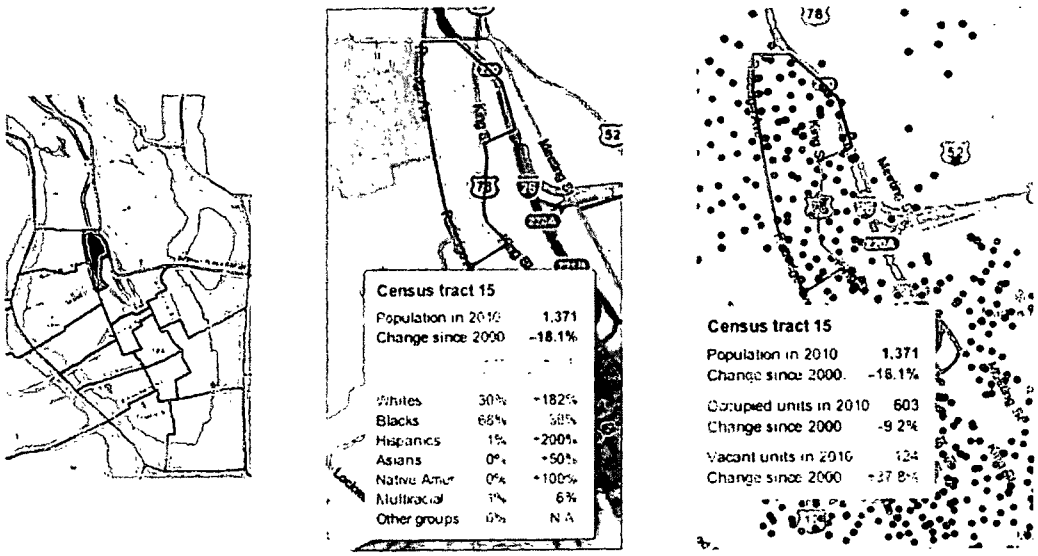


FIGURE C-14 Census Tract 15 Demographic and Housing Characteristics

Tract 16

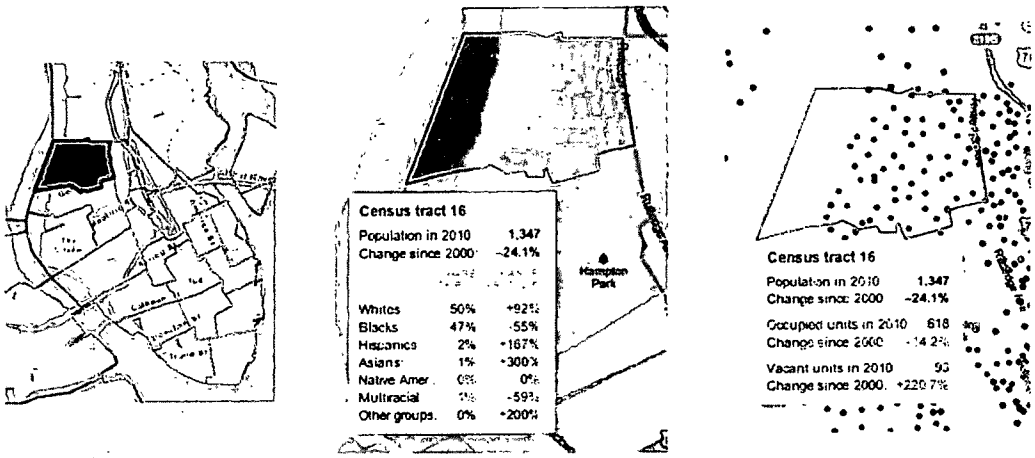


FIGURE C-15 Census Tract 16 Demographic and Housing Characteristics

Tract 44

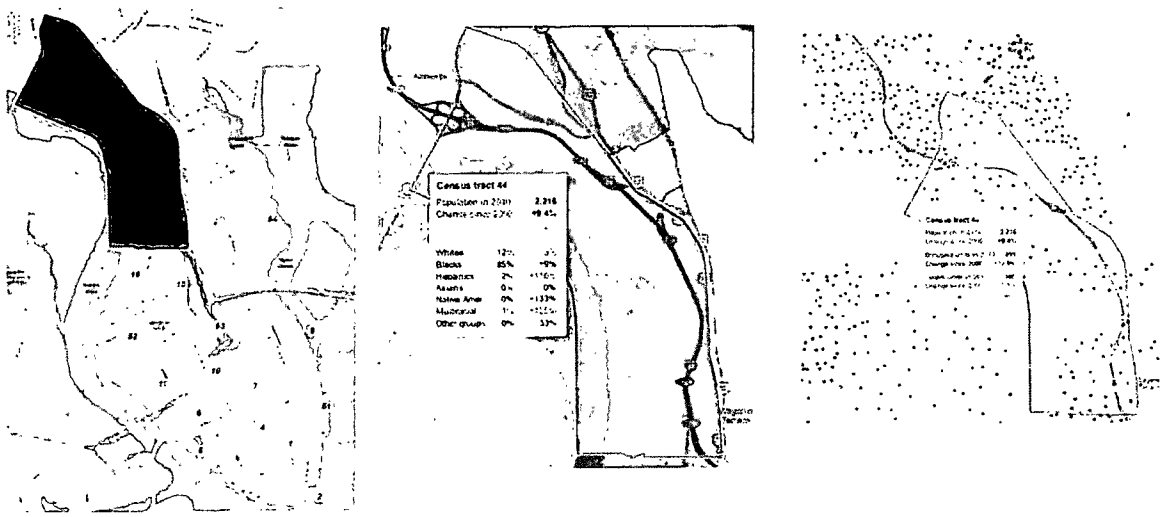


FIGURE C-16 Census Tract 44 Demographic and Housing Characteristics

Tract 51

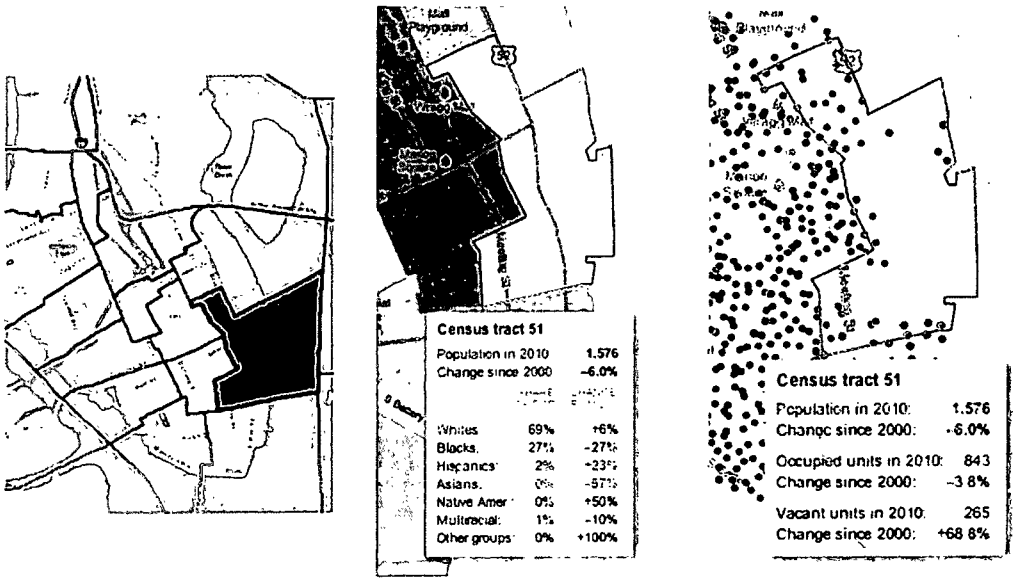


FIGURE C-17 Census Tract 51 Demographic and Housing Characteristics

Tract 52

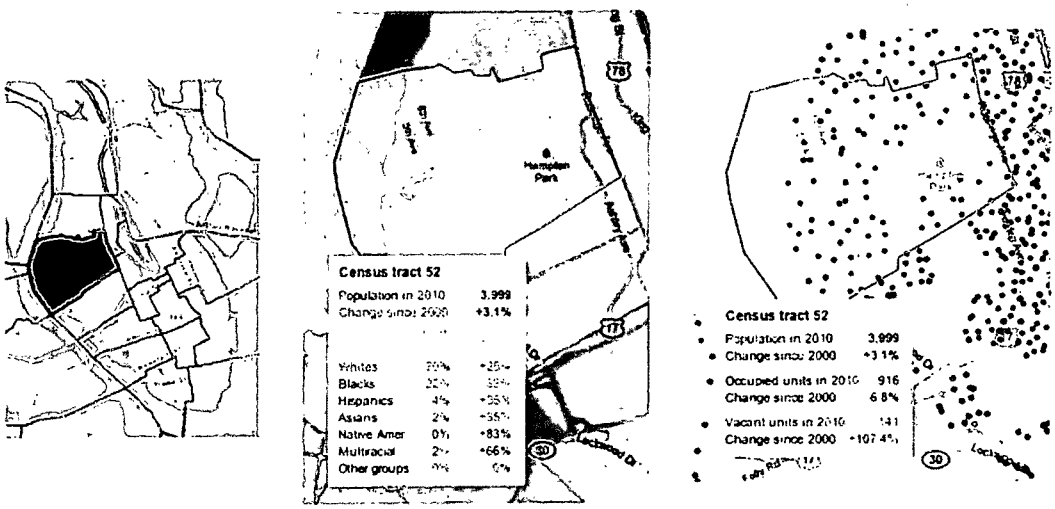


FIGURE C-18 Census Tract 52 Demographic and Housing Characteristics

Tract 53

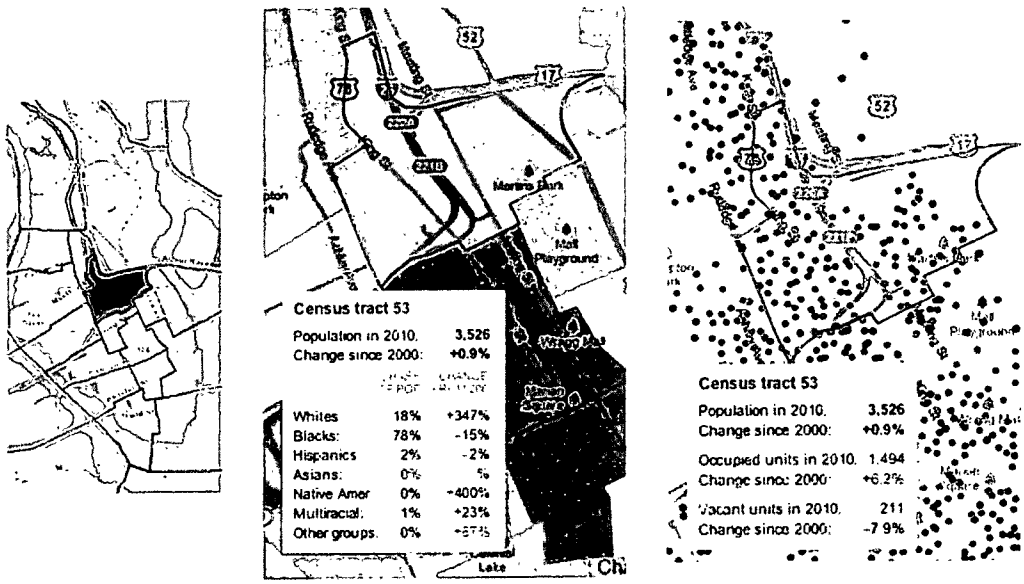


FIGURE C-19 Census Tract 53 Demographic and Housing Characteristics

Tract 54

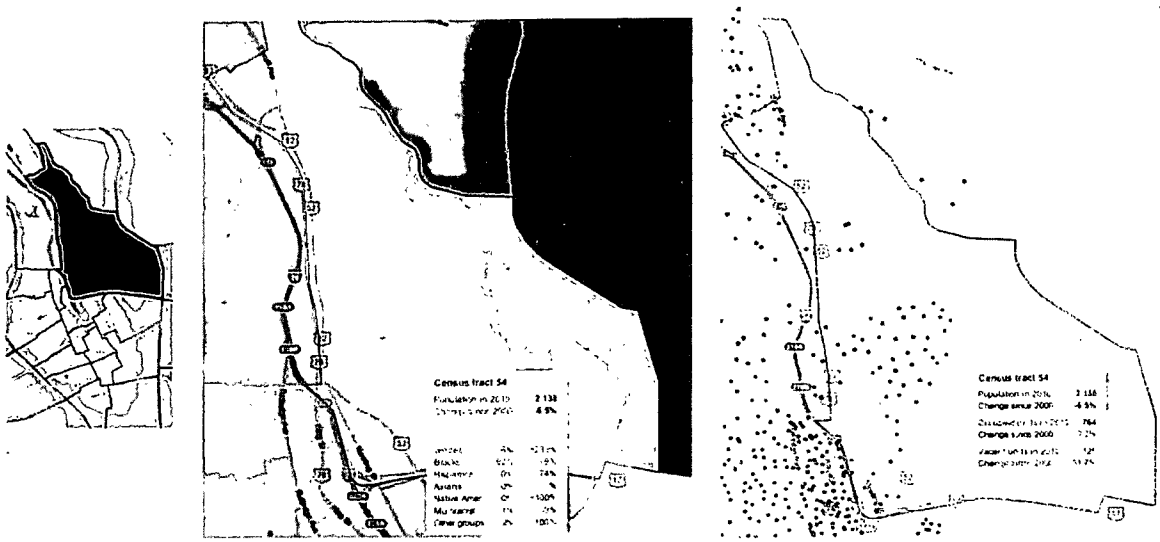


FIGURE C-20 Census Tract 54 Demographic and Housing Characteristics

Tract 55

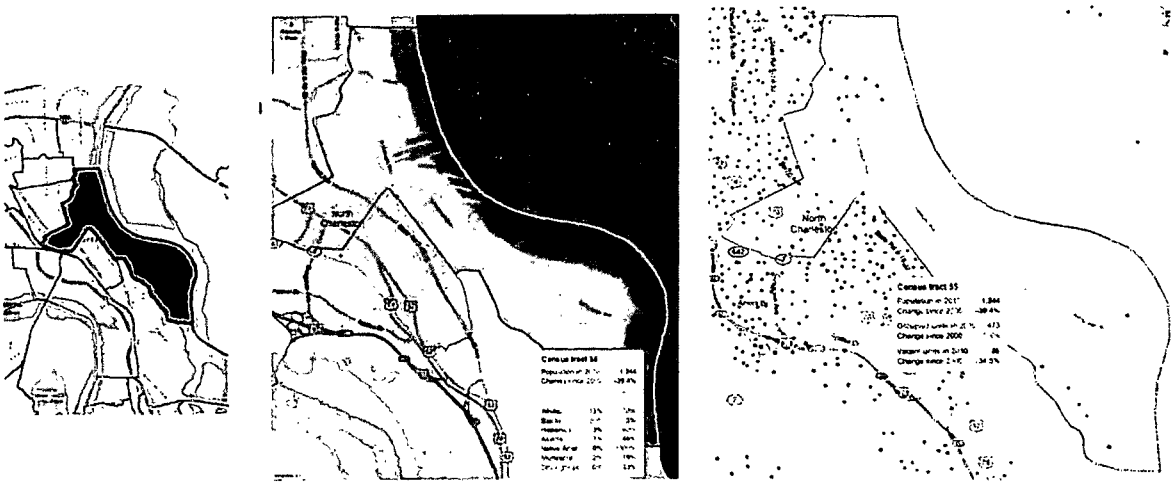
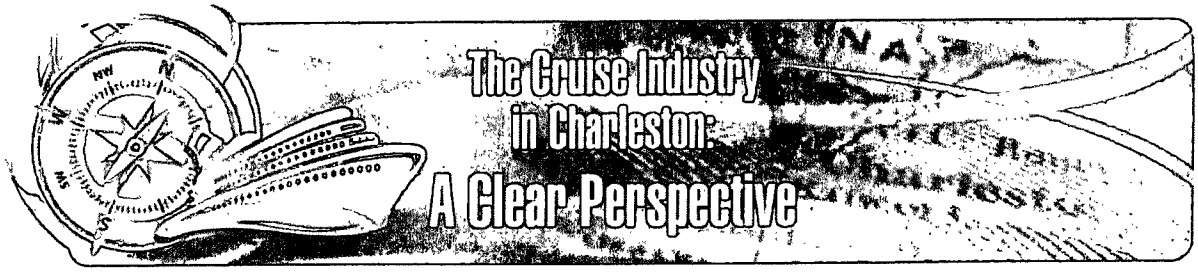


FIGURE C-21 Census Tract 55 Demographic and Housing Characteristics



Appendix 4

Legal and Related Issues

Review of Legal and Related Issues relating to the operation of cruise ships in Charleston

Summary

While the purpose of this report is to "conduct an independent and objective study to evaluate the economic impacts of cruise terminal operations," it is impossible to ignore the issues surrounding the regulation of the cruise ship industry in the City of Charleston. As noted in a recent issue of *Charleston Magazine*.

> Most of Carnival's cruise patrons have no idea that the convoluted maze they 've just driven through is symbolic of the complex issues the local cruise question has raised. Most are probably clueless that outside the chain-link and barbed –wire fence that surrounds Charleston's Union pier, there's a heated controversy afloat, with billboards sparring, a lawsuit pending and letters to the editor flying

There appear to be three primary issues:

1. Charleston's being placed by The National Trust for Historic Preservation on its 2011 endangered "watch list." As the Trust stated:

In the case of Charleston, expanding cruise ship tourism could jeopardize the historic character of the City, historic downtown Charleston and its surrounding neighborhoods. The Watch Status designation is accompanied by an offer from the National Trust to assist with finding a balanced solution that benefits the community and its rich cultural heritage.

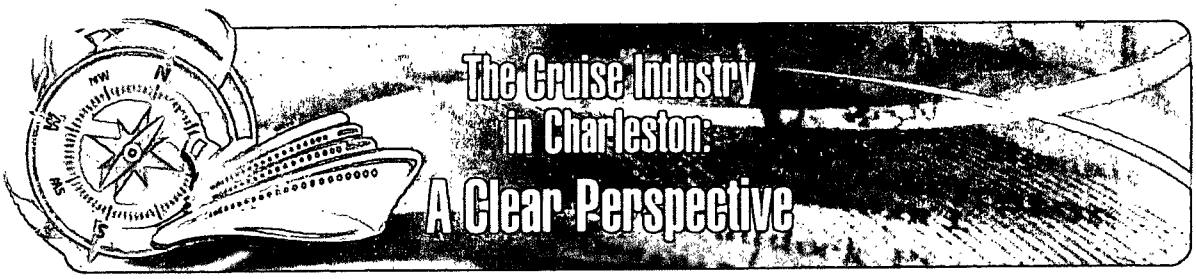
2. A June 13, 2011 law suit brought by the Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, Coastal Conservation League, and Preservation Society of Charleston filed suit against Carnival Corporation, D/B/A Carnival Cruise Lines. This lawsuit charges that Carnival Corporation is guilty of the following:

- Unlawful Use Within Light Industrial Zone District
- Violation of the Accommodations Zoning Ordinance
- Violation of the Old City Height District Ordinance
- Violations of View Corridor Provision
- Violation of Sign Ordinance
- Noise Ordinance
- Private Nuisance
- Public Nuisance

On August 22, 2011 this lawsuit was challenged by the Carnival Corporation, the City of Charleston and the South Carolina Ports Authority.

The petitioners filed a petition for original jurisdiction requesting "the SC Supreme Court to exercise its original jurisdiction with respect to the attached lawsuit recently commenced in the Court of Common Pleas for the Ninth Judicial Circuit by respondents." As it states:

> Due to the time sensitive nature of this dispute and the enormous, potential adverse commercial and economic impact at stake, Petitioners respectively request the Court to conduct an expedited review of matters contained herein in furtherance of the public interest.



Appendix 4
(continued)

On January 17, 2012 The South Carolina Supreme Court agreed to hear complaints brought by local residents, preservationists and an environmental group over Charleston's expanded cruise industry

3. City Council Ordinances that have not incorporated suggestions from local nonprofit citizens groups

On September 14 2011 the Charleston City Council approved by an 8-3 vote an ordinance that supports the cruise industry and stipulates that it would require a public hearing process if the States Ports Authority wants to accept more than 104 cruise ships a year. According to the *Post and Courier*:

> But critics said the mayor's ordinance, which outlines a public hearing process should the State Ports Authority want to accept more than 104 cruise ships a year, doesn't go far enough. The Historic Charleston Foundation drafted one with more binding limits, but council members never put it up for a vote. Seventeen residents, mostly preservation and neighborhood leaders, urged council to defer the mayor's ordinance or also pass the foundation's proposal -- or something like it.

Report on Issues

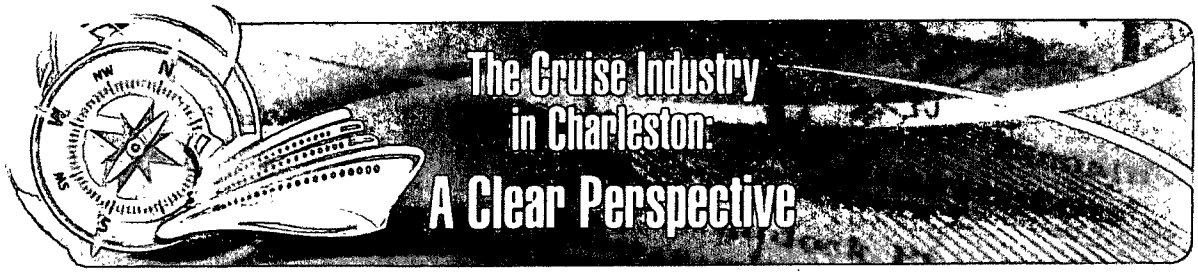
The following material has been assembled to provide a statement of facts regarding these issues.

1. Quality of life issues

1.1 The National Trust for Historic Preservation placed Charleston on its 2011 endangered "watch list."
http://www.preservationnation.org/travel-and-sites/sites/southern-region/watch-status-charleston-1.html

In 2011 The National Trust for Historic Preservation stated:

> For the first time in its history, the list of America's 11 Most Endangered Places has been supplemented with a site placed on "Watch Status": the City of Charleston. The Watch Status means that a specific threat to a historic site appears to be growing, but can be avoided or controlled through collaboration and innovation. In the case of Charleston, expanding cruise ship tourism could jeopardize the historic character of the City, historic downtown Charleston and its surrounding neighborhoods. The Watch Status designation is accompanied by an offer from the National Trust to assist with finding a balanced solution that benefits the community and its rich cultural heritage.
>
> Along with the new passenger terminal will come the demolition of older warehouses in the same area and the dedication of much of the Union Pier property to redevelopment, including restoration of natural waterfront and establishment of public green spaces and private commercial and residential units. Rail operations in the area will cease. The City's Board of Architectural Review has given conceptual approval to the terminal design.
>
> While there are many proposals at play in the Charleston cruise tourism issue, including relocation of the cruise docking pier, the National Trust believes that defining enforceable limits on the size, number and frequency of cruise ships visiting the downtown piers is central to a positive resolution. The National Trust wants to play a construc-



tive role in addressing this issue by offering its assistance in three ways:

- **Helping sponsor a Tourism Impact Study for Charleston.** The study would provide a deeper understanding of the economic, social and cultural impacts that current tourism and the increased levels of cruise traffic will create on the historic peninsula of Charleston. The study should be commissioned by parties with an interest in the issue, including the City, preservation organizations and the State Ports Authority. The National Trust's participation can provide assurance that the study responsibly reflects the concerns of all parties. In addition, the National Trust plans to support such a study with a grant to help defray costs.

- **Funding an Enforcement Authority Legal Review.** The National Trust can bring its significant legal resources to better understand the issue of authority in setting enforceable limits on cruise tourism. Precedents from other coastal communities, role and scope of potential City ordinances and state regulation and oversight are all considerations in the complex process of setting cruise limits. Parties engaged in this issue will ultimately need to understand what legal basis exists for management of cruise tourism levels. The National Trust can play a useful role in helping clarify the options available.

- **Launching a Community Forum on Cruise Tourism.** The National Trust plans to tap into its social networking and online presence to encourage continued discussion of the cruise tourism issue, both within the Charleston community and interested public audiences.

The National Trust believes that a positive, solution-oriented approach to the issues surrounding the City of Charleston is the only viable solution.

1.2 *Charleston Magazine* January 2012

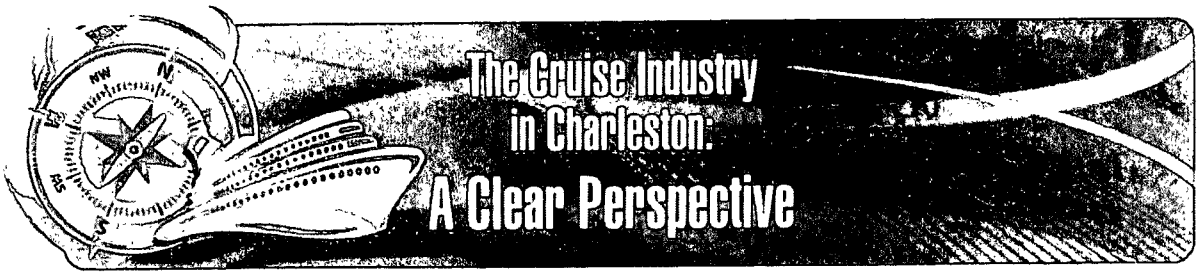
The January 2012 issue of *Charleston Magazine* included the following list of concerns:

EPA Clean Water Act and International Maritime Organizations (IMO) International Convention for the Prevention and Pollution from Ships MARPOL set environmental standards for water/ air emissions for cruise ships.

The Cruise Lines international Associations (CLIA) adopted cruise specific standards that meet or exceed the federal and international regulations, these are voluntary, i.e. no agency enforcement.

The EPA requires gray water, sewage, and ground up garbage to be discharged further than three miles from land. Cruise ships that embark from Charleston have voluntarily agreed to discharge gray water when the ship is more than 12 miles from shore according to the SPA.

The industry has a history of regulatory non-compliance. One example: in 2001 and 2003 Carnival paid settlements fees of $18 million and $200,000 respectively for improper oil bilge discharge and ballast water issues See cruisejunkie.com for additional infractions.



Other ports and states, such as Alaska, unsatisfied with CLIA's "trust Us" voluntary regulations, have passed more stringent laws, including mandating in –port use of shore power to reduce air pollution.

In March 2010, the IMO adopted new North American Emission Control Area (ECA) standards effective 2015, which are expected to reduce sulfur and particulate matter emissions by 85%.

1.3 Shore side Plug in power

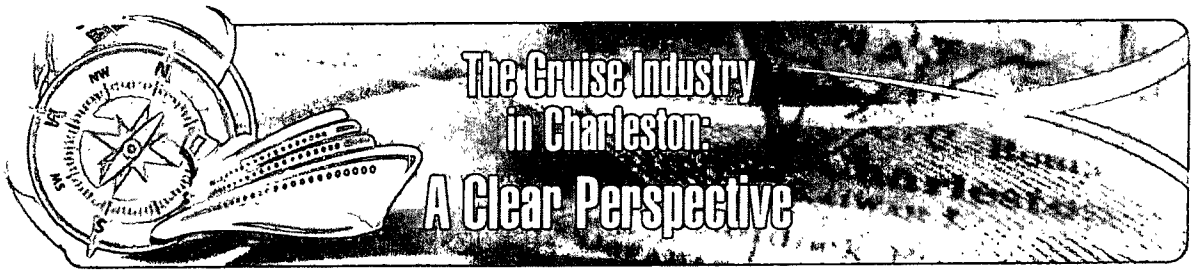
http://www.postandcourier.com/news/2011/jun/10/more-cruises-more-health-risks/

Three local physicians, Dr. Frederick E. Reed Jr., Dr. Thomas B. Harper III and Dr. William H. Lee presented shore side plug in power as a possible solution to some of the air quality issues. In a June 10, 2011 article in the *Post and Courier* they wrote:

> Our economy cannot afford shutting shipping down, but we can concentrate on mitigating big offenders such as cruise ships because their impact is closest to neighborhoods like Ansonborough, Mazyck-Wraggborough and the East Side. Downtown residents already report pervasive black soot on porches and exteriors.
>
> Shoreside or "plug-in" power should be our first line of defense against cruise ship air pollution.
>
> Carnival has already committed to shoreside power in a number of places. Just recently, New York City Mayor Bloomberg announced that Brooklyn's cruise terminal will be the first port on the East Coast to have shoreside power. The neighborhood residents immediately adjacent to the New York cruise terminal are plagued by high rates of asthma.
>
> According to the relevant environmental impact study for Brooklyn's consideration of shoreside power, a "large cruise ship burning diesel fuel emits more than 1,600 tons of air pollutants annually" and switching to shoreside power "would eliminate nearly 1,500 tons of carbon dioxide, 95 tons of nitrous oxide and 6 1/2 tons of diesel particulate matter annually.
>
> Now the New York Ports Authority is working with the EPA and Carnival to share the cost of installing the power source. Carnival will invest in retrofitting its visiting ships to allow plug-in.
>
> This measure has already been in force in San Francisco, Juneau, Seattle, Vancouver, Los Angeles and San Diego. Los Angeles even goes a step further, powering its shoreside facilities with solar panels.

In addition to plug-in power, Charleston should also require cruise lines to burn low-sulfur fuel. Carnival proudly asserts that its ships burned low-sulfur fuel in California before it was required by law. Carnival also boasts it "uses low-sulfur fuel in Glacier Bay National Park (Alaska) and Venice (Italy), though not required by law."

With other cities taking simple, common-sense steps to safeguard human health, Charleston should not be left behind. Whether the new terminal goes to Columbus Street, stays at Union Pier or even moves to Patriots Point, health protective measures are an essential part of City governance.



Appendix 4
(continued)

2. The Law Suit

On June 13, 2011 Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, Coastal Conservation League, And Preservation Society Of Charleston filed suit against Carnival Corporation, D/B/A Carnival Cruise Lines.

According the official document (Case No. 11-CP – 10 -4139) in Court of Common Pleas, State of South Carolina, County of Charleston

"In this Complaint, Plaintiffs allege that Defendant Carnival Cruise Lines ("Carnival") is violating numerous laws that protect Charleston's historic assets and environment from uncontrolled and incompatible cruise industry operations, and that Defendant's enterprise and its impacts are comprise an injurious nuisance. At base, Defendant Carnival is conducting an intensive cruise accommodations business in downtown historic Charleston as if the enterprise were beyond the reach of laws that other businesses and citizens must, and do, obey. Defendant is discharging pollutants from its vessel the Carnival Fantasy into Charleston Harbor without permits required by South Carolina pollution control law. Further, defendant is conducting Charleston's single largest accommodations business in an area where accommodations and deepwater transportation are not allowed. The crowds, pollution, and traffic associated with these unlawful operations create a nuisance for Charleston citizens. This lawsuit aims to protect Charleston's neighborhoods, families and the environment by having Defendant Carnival play by the longstanding rules and norms that have made - and make - Charleston a wonderful place to work, live, and visit. Relief sought includes a declaration that Defendant is not above local laws as well as injunctive relief to obtain compliance with those laws and to abate the nuisance caused by Defendant's operations."

The plaintiffs have claimed that Carnival Corporation is guilty of the following:

- Unlawful Use Within Light Industrial Zone District
- Violation of the Accommodations Zoning Ordinance
- Violation of the Old City Height District Ordinance
- Violations of View Corridor Provision
- Violation of Sign Ordinance
- Noise Ordinance
- Private Nuisance
- Public Nuisance

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment as follows:

A. Issue a declaratory judgment in Plaintiffs' favor adjudicating the illegality and unreasonableness of Defendant's use of Union Pier Terminal and surrounding areas and attached structures for cruise operations as set forth above.
B. Enjoin further violations of the law by Defendant Carnival;
C. Abate cruise operations that constitute a nuisance;
D. Award Plaintiffs such other and further relief as the Court may deem just and proper.

Counter suit

After the suit was filed, the City and the State Ports Authority intervened on the side of Carnival. They asked the Supreme Court to take immediate jurisdiction saying the lawsuit threat-

ens the maritime commerce making it a matter of statewide public interest.

August 22, 2011 Carnival Corporation, South Carolina Ports Authority and City of Charleston v 2011 Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, Coastal Conservation League, and Preservation Society of Charleston.

According to the official document (Executed Petition for Original Jurisdiction, the State of South Carolina in the Supreme Court). http://www.scspa.com/EXECUTED%20PETITION%20FOR%20ORIGINAL%20JURISDICTION%20.pdf

The petitioners filed a petition for original jurisdiction requesting "the SC Supreme Court to exercise its original jurisdiction with respect to the attached lawsuit recently commenced in the Court of Common Pleas for the Ninth Judicial Circuit by respondents."

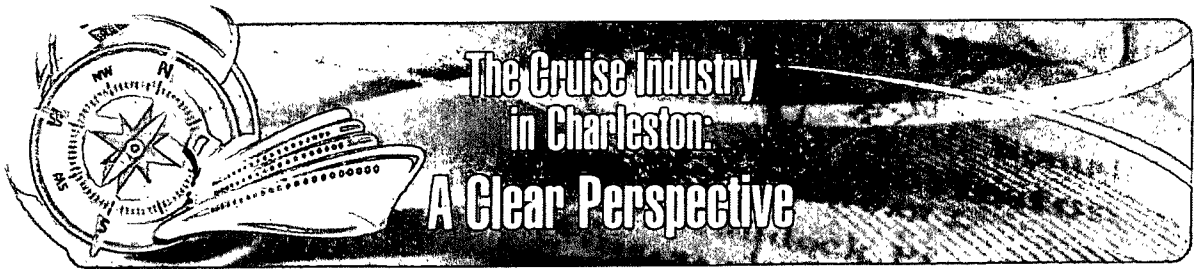
> In the Common Pleas action over which this Court's original jurisdiction is sought, Respondents seek a declaration that calls by cruise vessel at Charleston are illegal and unreasonable and should be enjoined. Although the legal challenges in this action are directed toward passenger cruise calls, most of the legal challenges apply to all cargo operation at SCSPA port terminals on the Charleston peninsula and at least two of the legal challenges implicate every cargo vessel which calls at any SCSPA port terminal in the State. Due to the time sensitive nature of this dispute and the enormous, potential adverse commercial and economic impact at stake, Petitioners respectively request the Court to conduct an expedited review of matters contained herein in furtherance of the public interest.

Since about May 2010 the Carnival Fantasy has made approximately eighty cruises from Charleston, taking roughly 185,000 passengers on cruises to Bermuda and various points in the Caribbean.

To finance the improvements to Union Pier, SCSPA bonds have been issued and sold with proceeds generating approximately $35,000,000. A key component of the Union Pier improvement is the continuation of long term and predictable commercial, ocean – going cruise vessels, calls at Union Pier and the income stream produced thereby. Toward this end, SCSPA and Carnival Cruise lines had made process toward a long-term contract under which Carnival would regularly call at Union Pier during the contract term. Carnival has, however, expressed strong reluctance about proceeding with an agreement in the face of litigation challenging the right of cruise vessels to use Union Pier. Without Carnival's long-term contractual commitment, the Union Pier improvement plan will not be viable.

The concurrent resolution notes that , among other benefits, Carnival's cruise calls pumped $37,000,000 into South Carolina's economy in 2010 alone, are projected to generate 407 jobs in the tri-county region and have resulted in the payment of $26,193,200 in labor income.

Although the majority of the attached Complaint consists of lengthily narrative indicting the cruise ship industry in general, the gist of



it is that Carnival vessels cannot legally call at Union pier because those vessels (a) violate the Charleston City Zoning Ordinances; (b) discharge into the South Carolina waters incidental to their operation without the benefit of permit issued by the SC DHEC and (c) constitute a nuisance.

In sum, Respondents purport to represent the historic peninsula City at large (Coastal Conservation League and Preservation Society of Charleston) including the neighborhoods south of Broad Street and nearby Ansonborough which between them contain over three thousand residents. Given the type of injury claimed and the number of residents supposedly represented the Respondents clearly lack standing to assert a nuisance claim. Only a public authority may do so. Indeed, the public authorities most interested in pursuing public nuisance charges, the City of Charleston and the State, have unanimously resolved that the vessel calls decidedly are not a nuisance but rather a great benefit to the public good of the City and State, supra.

On January 17, 2012 The South Carolina Supreme Court agreed to hear complaints brought by local residents, preservationists and an environmental group over Charleston's expanded cruise industry.

3. Proposals offered by nonprofit organizations that were not incorporated into the City's Ordinance passed on September 14, 2011

3.1 Coastal Conservation League Proposal
http://coastalconservationleague.org/projects/cruise-ships-in-charleston/Jan 31, 2012

- A cap of 104 ships annually. The SPA asserts that this is the maximum number of ships the cruise market will support. This number should be codified.

- A ship size limit of 3,500 passengers. The SPA states that no ship larger than this will call on Charleston. We have asked for a binding agreement confirming this commitment.

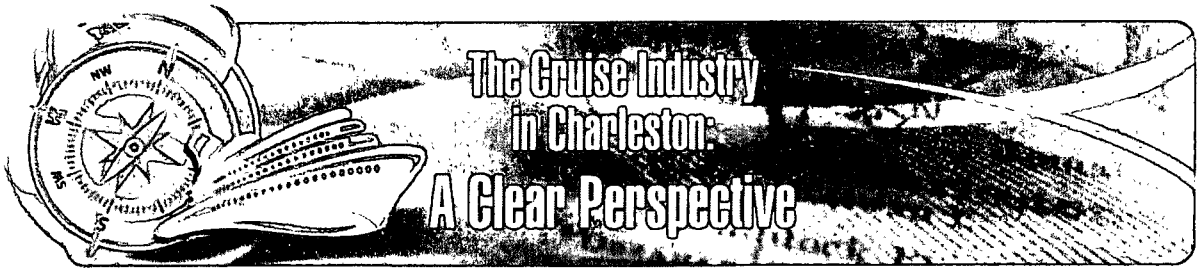
- An enforceable agreement between the City and the cruise lines stating that no waste will be discharged closer than twelve miles from land. The cruise industry's trade association has made this promise verbally. It should be written and verifiable.

- Shore side power at the new terminal. Other major cruise destinations around the country include electric plug-ins, allowing ships to turn off their engines. Charleston should have the same.

- Shuttle service and offsite parking combined with a parking garage, to eliminate the need to devote 9 acres of prime waterfront property to a surface parking lot.

- Enforcement of the City's noise ordinance.

- A fee to offset the costs to the City of managing cruise visits. Currently, the City of Charleston receives no income whatsoever from visiting ships.



Appendix 4
(continued)

3.2 Historic Ansonborough Neighborhood Association (HANA) proposal

1) Amend the City ordinances that govern tourism businesses to include the cruise industry within the regulation of the Tourism Commission;

2) Execute an agreement between the State Ports Authority (SPA) and the City limiting the number of embarkations/disembarkation to two ships per week, each ship with a maximum of 3,500 passengers;

3) Update the 1996 City Master Plan and traffic plan for peninsular Charleston to reflect not only the increased traffic generated by the cruise ship industry, the new hotel and residential buildings and the proposed re-alignment of certain streets, but also the already approved redevelopment of Ansonborough Field.

3.2 Preservation Society of Charleston
http://www.preservationsociety.org/issues/2012-01-20-statement-cruisesuit.pdf
The Society also outlined a list of Ten Recommendations for Sustainable Cruise Ship Tourism, which included:

- Limiting the number of cruise ships and passengers on a daily and annual basis.
- Reaffirming SPA commitment to abide by local zoning ordinances.
- Establishing a remote parking facility.
- Directing pedestrians away from Ansonborough.
- Banning "late departure" offerings by cruise lines.
- Creating a Marine Passenger Fund.

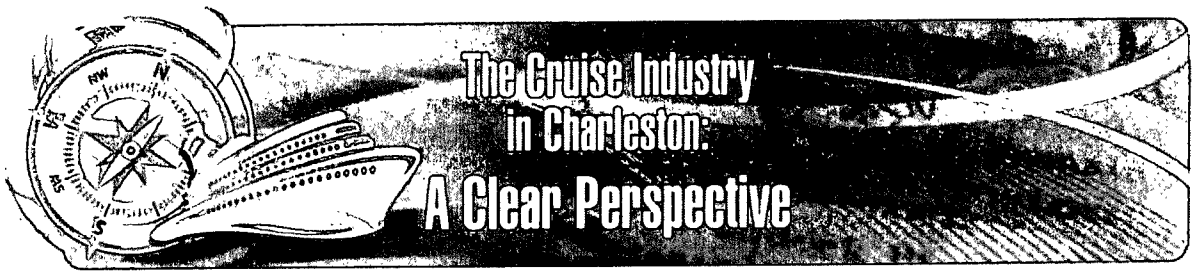
Objectives:

1. The quality of life of the citizens of the City should be the primary factor in weighing any decisions that are made about the cruise ship industry and the Union Pier property Tourism and the local economy flourishes when the citizens of the City are pleased with how it is managed.

2. Maximum transparency and public input are essential for ensuring that future plans for the cruise ship industry and the Union Pier property consider potential negative impacts before future contracts are signed. Written commitment, timely public release of relevant documents and the use of impartial data (economic impact, traffic, etc.) should be the basis of decision making.

3. Reasonable regulations are the responsibility of the City of Charleston to ensure that the cruise ship industry is managed in the same way that all other tourist – related industries (pedicabs, walking tours, carriage tours) have been regulated. While imperfect, tourism management regulations are an essential tool for minimizing negative social and cultural impacts.

4. Appropriate redevelopment of the Union Pier property should be integrated into the existing fabric of the City of Charleston in order to enhance the sense of place that distinguishes our historic district with appropriately scaled new construction, compatible uses, quality



materials and the protection and preservation of existing historic resources. This should include a reconsideration of the present accommodation overlay as it related to the property and the final location of a new terminal.

5. Stabilization and restoration of the Bennett Rice Mill Façade should not be contingent on any future cruise ship contract or Union Pier redevelopment plan. It is urgent that the at risk physical condition of this historic façade owned by the State Ports Authority be addressed so that this unique piece of industrial architecture can stand as a testament to our collective commitment to the historic legacy of our City. The SPA should consider placing a historic preservation easement on the façade.

Gurley at City Council

The Preservation Society of Charleston believes that the proposed amendment to the City's Tourism Management Ordinance to address cruise tourism is an important first step toward a workable regulatory framework. It codifies a process that provides valuable public input into future City council resolutions regarding the future growth of the cruise tourism industry. While not perfect, we feel that the proposed ordinance can be strengthened with the inclusion of specific criteria against which requests for increases in the scale or frequency of cruise tourism can be measured, so that the community can expect an objective and holistic analysis. Additionally, the Tourism Commission should be given the authority to negotiate an annual cruise visit calendar that avoids overlap of cruise visits with major community events.

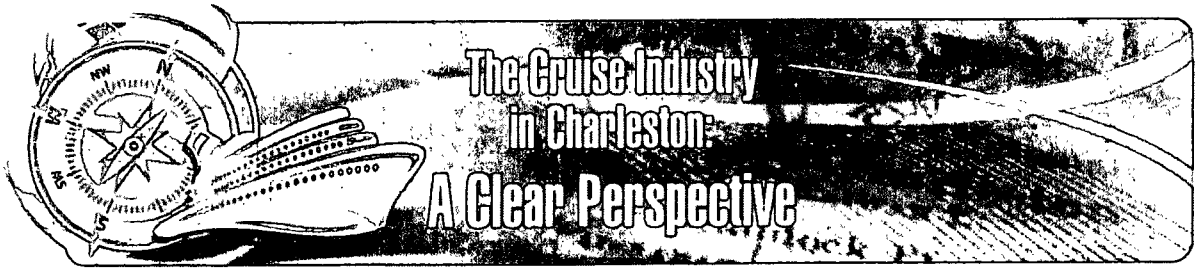
In order to balance concerns expressed by our organization and others in the community, we also believe that opportunities exist to amend the City's Zoning Ordinance to provide enforceable mechanisms to protect against unchecked future cruise tourism growth and to deal directly with challenges presented by traffic congestion and excessive surface parking at Union Pier.

In order to balance concerns expressed by our organization and others in the community, we also believe that opportunities exist to amend the City's Zoning Ordinance to provide enforceable mechanisms to protect against unchecked future cruise tourism growth and to deal directly with challenges presented by traffic congestion and excessive surface parking at Union Pier.

3.3. Review of the Historic Charleston Foundation Actions

http://www.historiccharleston.org/preservation/issues.html?id=126

Over the past two years the Historic Charleston Foundation has established ad hoc committees, conducted its own assessments, conducted public forums and commissioned independent studies to reach a reasonable consensus regarding a balanced approach for managing the cruise industry in Charleston. Over this period it has offered several statements regarding its perspective on the industry and proposed specific recommendations pertaining to the regulation of the industry.



Appendix 4
(continued)

Facts & Findings

a. **HCF's position on Cruise Ships and Union Pier should be consistent with its mission:**
   To preserve and protect the historical, architectural and cultural character of Charleston and its historic environs, and to educate the public about Charleston's history and the benefits that are derived from preservation.

b. **HCF strongly supports the SPA and its core work.** It also recognizes that the Port is a vital economic engine for the entire state. Concern for the impacts of the cruise ship industry does not indicate a broader concern with other aspects of the SPA. We need to emphasize that these are two very distinct issues.

c. **Downtown residents, especially those living on the east side of the Peninsula and below Calhoun, feel the greatest impact.** This is in-part because Washington and Concord Streets make up a very important north-south corridor, and the existing terminal is near Harris-Teeter, a primary grocery store for downtown residents.

d. **The SPA's statement, "no more than two ships per week,"** was derived from a 52-week average, i.e. no more than 104 ships per year. As the cruising "high season" occurs mostly in the fall and spring, the approximately 90 ships scheduled for 2011 will mean a greater concentration of ships than the community was led to believe during those months of the year. The 2011 cruise ship activity and its impacts must be measured and monitored - objectively and creatively - so that the impacts - good and bad - can be determined.

e. **In the winter of 2011, SPA moved its BMW operations** from Union Pier to the Columbus Street terminal; this allowed for the removal of the freight train south of Columbus Street and its requisite street closings. Also, the queuing, luggage drop-off, and parking for the embark/debark cruise passengers will be more efficiently handled on SPA property. This has been the first step towards mitigating some of the impacts of the cruise ships.

f. **The Union Pier Concept Plan** includes some great ideas for extending the urban fabric to the water's edge and increasing public access. It does not provide details about future land use and development options, short or long term. There is little discussion of how it will advance the overall quality of life and economic development of the site itself and the surrounding community. Since this is public land, there is great opportunity for a more detailed vision, especially for the non-maritime areas. Current market conditions indicate that realistic nonmaritime redevelopment options for Union Pier may take many years. This contributes to the uncertainty of how and when the Concept Plan will be implemented.

g. **HCF's strength in negotiating with the City and the SPA** will come from using the tools it has successfully used in the past to address large scale developments, including Charleston Place Hotel. These include participation in the regulatory review process, community outreach, and dialogue.

h. **The City has a responsibility to manage the cruise ship sector**, as it manages all businesses and other sectors of the tourism

industry. There does not currently appear to be any regulations of the cruise sector. Cruise ship operators should operate under rules and regulations just as all other tourism businesses.

Based on these findings, HCF's action plan includes three key components:

- The City should establish, if called for, regulations and ordinances that balance the economic interests of the cruise industry with citizens' quality of life. The City, in cooperation with SPA, should require all cruise lines calling on Charleston to comply with these regulations and ordinances.

- HCF will hire a qualified consultant, at its own expense, to independently monitor and analyze cruise visits in 2010 and 2011 to assess their environmental, economic and quality of life impacts. It will use findings from this independent study to develop its advocacy positions regarding the cruise industry.

- HCF will provide the resources to support a transparent, community-driven planning process to create a vision for the optimal redevelopment of the Union Pier property and cruise terminal. HCF will provide the financial resources to have an acclaimed team of experts study the property and publicly present their findings and recommendations in a public forum to be held in early spring 2011.

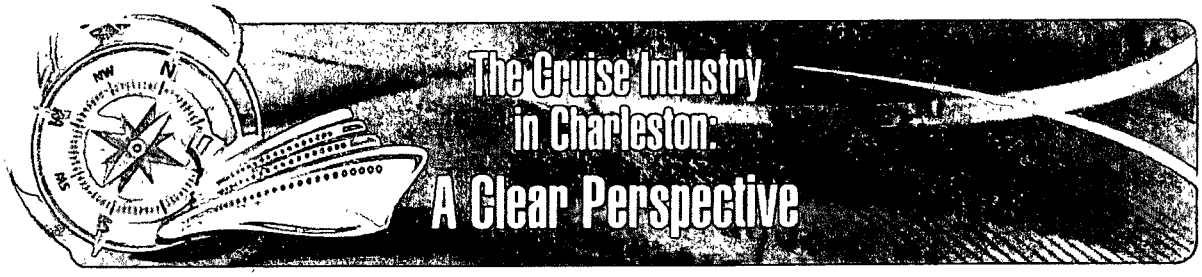
Proposed Plan of Action
Objective: The Foundation's objective is to identify a pro-active, solutions-based process for building upon the opportunities Union Pier's development affords and resolving potentially adverse impacts created by the cruise ship industry. HCF aims to lead the community in a collaborative manner that strengthens relationships among all partners, specifically the City and its elected officials, the SPA and its board, and community residents and businesses. The following proposed three-pronged approach aims to address the legal, land-use, and quality of life issues by providing objective information and a compelling vision of opportunity.

1. Cruise Industry. The City must manage the cruise industry in a manner that is consistent with the City's ongoing efforts to appropriately balance the demands of tourism and commerce against the protection of history, culture, the environment and other factors contributing to the quality of life.

To that end, HCF will advocate that the City and its Council consider all means at its disposal, including, if necessary, enforceable ordinances that would sufficiently account for scale, capacity, frequency of visits, traffic and other considerations.

This will require study, review and amendments to the tourism management ordinance and guidelines. We propose that once appropriate regulations are developed, the City, working with the SPA, require that all the cruise lines calling on Charleston comply with such regulations.

2. Monitoring Impact. HCF will hire a consultant to independently monitor, document, and analyze the 2010 and 2011 cruise visits to objectively assess the legal, land-use, and quality of life impacts—both positive and negative. This would include a survey of residents, visitors,



historic sites and businesses (including hotels and restaurants) followed by a measurement of agreed-upon key indicators. The findings from this study will help the City adopt and/or modify the local regulations. The City and other community organizations should use this information to advocate for an appropriate regulatory framework before the SPA negotiates new cruise contracts.

3. Building the Vision. HCF supports a transparent, community-driven planning process to determine the optimal redevelopment plan for the entire Union Pier property including the Cruise Ship Terminal.

To stimulate our community's best thinking, HCF sponsored an acclaimed team of experts to visit and study the Union Pier property, then to publicly present their findings and recommendations in a public forum held in May 2011.

HCF would continue the process after the forum to help establish an overall redevelopment Vision for Union Pier.

The trustees adopted, unanimously, the following resolution and proposed plan of action to:

1) Encourage the City to regulate the impacts of the cruise industry in a manner consistent with the City's ongoing efforts to appropriately balance the demands of tourism and commerce with the protection of history, culture, the environment, and other factors contributing to the quality of life.

2) Lead a study of impacts to independently monitor, document, and analyze cruise visits and objectively assess the environmental, economic, and quality of life impacts.

3) Host a transparent, community-driven forum in which the Foundation sponsors a team of experts to visit and study the Union Pier property and offer their findings publicly.

March 2011 the trustees adopted the following resolutions:

1) To call upon the City to require the State Ports Authority (SPA) to move development plans through and abide by the decisions of the Board of Architectural Review (BAR) and the Board of Zoning Appeals (BZA) and that the City and/or any other relevant governing entity implement immediate, reasonable written and enforceable regulations on the cruise industry.

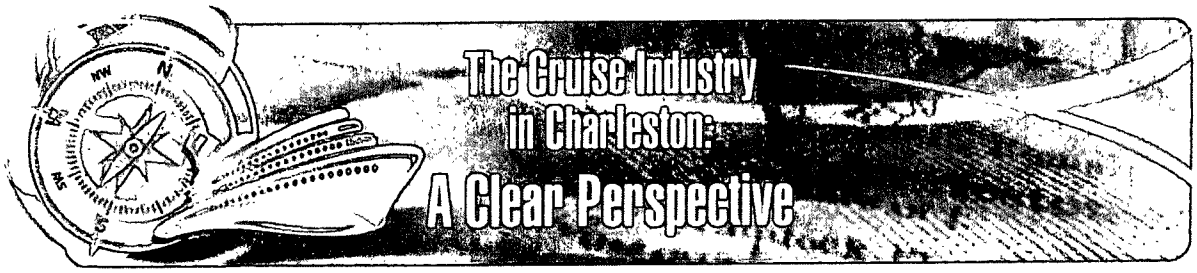
2) To call upon the SPA and the State of South Carolina to present an overview of the analyses of alternatives regarding the cruise ship terminal.

The Foundation was most pleased when the SPA agreed, in June, to submit the Union Pier development plans to the BAR.

April 13, 2011 the HCF Trustees Approved Two Resolutions for Union Pier and Regulation of the Cruise Industry

The first resolution ratified the Board's support for two actions:

- That the City take all necessary actions to ensure that any construction or renovation of the proposed cruise terminal building, and additional related or



subsequent development on State Ports Authority (SPA) owned property within either the Old and Historic District or the Old City District, be required to move through and abide by the decisions of the Board of Architectural Review (BAR) and the Board of Zoning Appeals (BZA).

- That the City and/or any other relevant governing entity implement immediate, reasonable written and enforceable regulations of the cruise industry. Such regulations must be reviewed and modified from time to time by City Council and/or that governing entity with the input of the community.

The second resolution calls upon the SPA and the State of South Carolina to present an overview of the analyses of three alternatives regarding the cruise ship terminal: (a) cruise operations as they exist today, (b) sale of the southern portion of Union Pier for private development and the redevelopment of the cruise terminal at the north end (i.e., the current SPA proposed scenario), and (c) the complete sale of the entire Union Pier property. The overview should be completed and made available to the public prior to a commitment to any specific action.

August 14 , 2011

While the City's authority to regulate is not unlimited, the Foundation's comprehensive legal assessment shows that local governments may regulate landside impacts created by maritime activities, as long as they reasonably balance relevant state and federal interests. We have determined that under existing laws, the City has broad land-use authorities and may impose reasonable zoning requirements that protect legitimate local interests and simultaneously allow the port to function pursuant to its statutory authorities and voluntary commitments.

We have developed this approach to serve as a framework that protects the most critical interests of the Ports Authority and of the City's residents and businesses. This ordinance will allow our community to move forward and to start the truly exciting work of redeveloping Union Pier, an achievement that our historic City and its citizens deserve.

Our proposed ordinance:

- Imposes reasonable and enforceable requirements on cruise passenger terminals, only in the heart of the City's historic districts, and it creates a Cruise Overlay Zone.

- Binds the Ports Authority's voluntary commitments, by allowing a single-berth cruise passenger terminal downtown, which could accommodate:

  - one cruise ship at a time;

  - cruise ships of up to 3,500 passengers; and

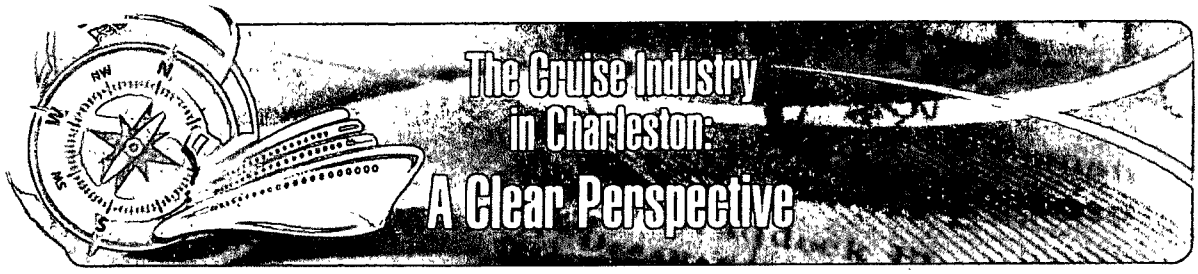
  - as many as 104 cruise ship visits/year

Ensures

- Cruise passenger impacts can be avoided on days when other significant City events are planned;

Appendix 4
(continued)

- Vehicle arrivals and departures are scheduled to avoid congestion and rush hour traffic;
- Surface parking for cruise-related uses in the Cruise Overlay Zone is limited in favor of structured parking; and
- All vehicular and passenger processing occurs onsite; and all off-site traffic impacts are mitigated, pursuant to a traffic study prepared by the terminal operator, based on the City's adopted level-of-service standards.



Miley & Associates

Miley & Associates is one of the Southeast's leading economic and financial consulting firms. The firm specializes in economic impact analyses, fiscal impact analyses, feasibility reports, impact fee studies and benefit/cost modeling. Our clients include national and prominent local real estate developers, school districts, local governments, regional development agencies, and other private sector development firms. Miley & Associates partners appear regularly before decision-makers at all levels of government and understand the values, needs and desires of the clients they represent. With offices located in Columbia, South Carolina, the firm is well positioned to provide clients with hands-on service for projects throughout the entire Southeast region.

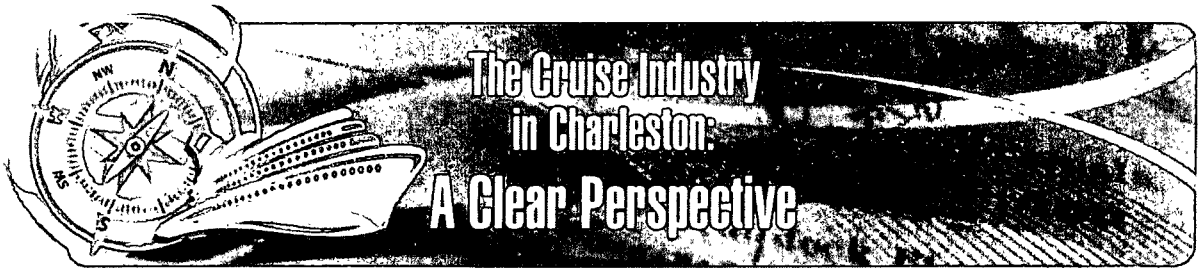
Miley & Associates appreciates that every research project is unique and deserves a custom solution. Public policy decisions are not made overnight, and we excel at providing advice and counsel along the way. We represent our clients. Our business plan is simple: we focus on exceeding our client's expectations and building long-term relationships.

Miley & Associates, Inc. was founded in 1993 by Harry W. Miley, Jr. Ph. D. The Company is an economic and financial consulting firm providing a range of analytical services to public and private sector clients. Miley & Associates conducts fiscal and economic impact analyses of proposed new developments and has extensive experience in assisting clients with their economic development and community revitalization projects.

Dr. Miley served as Chairman of the South Carolina Board of Economic Advisors (BEA) under two Governors. The BEA is responsible for estimating the State's revenues for the Governor and the General Assembly to use in formulating the State's annual budget. Dr. Miley was originally appointed as Chairman by Governor Carroll Campbell and continued to serve as Chairman for Governor David Beasley.

Dr. Miley was the Senior Executive Assistant for Economic Development to Governor Campbell from 1987 to 1989. Dr. Miley served as principal advisor to Governor Carroll Campbell on the state's policies for economic development, employment and training, work force and adult illiteracy, technical education and transportation issues.

Prior to joining the Governor's Office, Dr. Miley was on the faculty of the Moore School of Business at the University of South Carolina and Associate Director of the Division of Research at the School.



General Limiting Conditions

This economic analysis is not a budget or forecasting document and is not intended to depict a definitive course of action. Moreover, economic impact analysis is not designed as a space or facility-planning document. Many assumptions underlying economic impact analyses are based on policy decisions which, if modified, would affect the overall results.

This study is based on estimates, assumptions and other information developed by Miley & Associates, Inc. from its independent research effort, consultations with the client and its representatives, and primary and secondary sources. We have utilized sources that are deemed to be reliable but cannot guarantee their accuracy. Moreover, estimates and analysis are based on trends and assumptions and, therefore, there will usually be differences between projected and actual results because events and circumstances frequently do not occur as expected, and those differences may be material. No responsibility is assumed for inaccuracies in reporting by the client, the client's agent and representatives or any other data source used in preparing this study.

This report is based on information that was current as of April 2012 and Miley & Associates, Inc. has not undertaken any update of its research effort since that date. We have no obligation, unless subsequently engaged, to update this report or revise this analysis as presented due to events or conditions occurring after the date of this report.

Possession of this study does not carry with it the right of publication thereof or to use the name of "Miley & Associates, Inc." in any manner without first obtaining the prior written consent of Miley & Associates, Inc. No abstracting, excerpting or summarization of this study may be made without first obtaining the prior written consent of Miley & Associates, Inc. This report is not to be used in conjunction with any public or private offering of securities or other similar purpose. This study may not be used for purposes other than that for which it is prepared or for which prior written consent has first been obtained from Miley & Associates, Inc.

This study is qualified in its entirety by, and should be considered in light of, these limitations, conditions and considerations.

Exhibit M

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 MARTY MORGANELLO**

PERSONALLY APPEARED before me Marty Morganello who being duly sworn deposes and says:

I am a resident and citizen of Charleston, South Carolina. I reside at 1620 Oak Island Drive, Charleston, South Carolina 29412.

I am also a member and the President of the Charleston Chapter of the Surfrider Foundation ("Surfrider").

Currently, cruise ships are able to dump raw sewage merely 3 miles off the coast and into our waterways. Further, within one mile of the coast, cruise ships are permitted to dump gray water, which consists of the water used by cruise ship passengers to wash their hands, take showers, clean dishes and more. The dumping of this waste directly into our waterways not only pollutes the waterways themselves, but also exposes members of the public like myself who use and enjoy those waterways to risks of disease and infection.

As a member of Surfrider, and as a Charleston resident who uses and enjoys the city and its surrounding waterways, I am 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.

I regularly swim and kayak in our state's waterways. I enjoy the aesthetic and recreational value that they add to my life on a daily basis. However, 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. The potential for raw sewage and pollution to wash onshore or otherwise come into contact with me while I am using the waterways is a real threat with increased cruise operations and without any legally binding regulations in place. My use and enjoyment of the waterways surrounding my home if cruise ship operations at Union Pier are expanded will decrease because I fear how SPA's proposed project will exacerbate the dumping of contaminants into these waterways.

Marty Morganello

SWORN TO before me this

19th day of July, 2013.

Kathy V. DuPree (SEAL)

Notary Public for South Carolina

My Commission Expires:

KATHY V. DUPREE NOTARY PUBLIC SOUTH CAROLINA My Comm. Exp. 01-21-2015

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 & Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

The South Carolina Ports Authority (Ports Authority) respectfully submits this Reply to the Cruise Opponents' January 21, 2014 Response (Response) to its December 27, 2013 Motion for Partial Summary Judgment[2] (Motion). The Ports Authority is entitled to judgment as a matter

[1] The Ports Authority will not identify or rebut every misstatement of the Cruise Opponents in its Response. 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 contested herein.

For example, the Cruise Opponents make the wholly unsupported statement that an "examination of the facts shows that DHEC did not purport to consider or issue an individual [401 Certification] in issuing the [Permit]," Resp. at 4, ignoring the law and this Court's ruling that that **the critical area permit serves as the 401 Certification**. Cruise Opponents cite no evidence in support of this contention. However, the issue presented to the Court does not relate to the underlying facts surrounding the 401 Certification itself, but rather whether Cruise Opponents can challenge the 401 Certification component of the Permit at all.

[2] The Response purports to include a "Cross Motion for Summary Judgment," although the filing contains no motion, no argument for a motion, and seeks no relief such as would be

of law that the 401 Certification issued by DHEC, in accordance with South Carolina law, as a component of the critical area permit and coastal zone consistency determination (CZCD) issued December 18, 2012 (Permit No. OCRM-12-054-B) (Permit), is valid and binding, and the Cruise Opponents cannot now challenge it in this proceeding. The Cruise Opponents offer no reason or rationale to alter this legal conclusion.

REGULATORY AND FACTUAL CONTEXT

This is a *de novo* contested case proceeding brought by the 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 (Project).

On January 27, 2012, the Ports Authority submitted a Joint Federal and State Application Form for Activities Affecting Waters of the United States or Critical Areas of South Carolina to the Corps and to OCRM for a permit to engage in activities affecting the waters of the United States and critical areas of South Carolina. This application states as follows in pertinent part:

> *Authorities:* ... 33 USC 1341 .... These laws require permits for activities in, or affecting, navigable waters of the United States.... 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 ... to apply for both the Federal and/or State permit(s).[3]

---

requested in a motion. Instead the filing is just a response and only seeks denial of the Ports Authority's motion.

[3] This application was part of the dual-track permitting process of seeking a 401 Certification for an individual permit or a Nationwide Permit from the Corps for the insignificant activity of adding five pile clusters. The individual 401 Certification without conditions (for water quality) issued for the Project in December 2012 reinforces the decision DHEC made with regards to the general 401 Certification for NWP 3 (without conditions) issued in April 2012. As this Court remarked in the January 9, 2014 conference, just because the Cruise Opponents did not think of this "belt and suspenders" approach to permitting does not mean that the Ports Authority and DHEC did not. Transc. at 38:1-3, Jan. 9, 2014 (speaking on the individual 401

The application sought approval for the installation of five pile clusters to be driven into the marl to support the construction of three elevators and two escalators in Building 322. These five pile clusters are to be installed within the existing footprint of the already developed marine terminal and directly underneath the existing footprint of Building 322. The pile clusters will provide further support for Building 322 within its existing footprint as authorized under original UPT permits issued in the 1970s by the S.C. Budget and Control Board. *See* Ex. A, B&CB Permit No. 71-26.

The proposed installation of pilings in a navigable water of the United States is a proposed activity subject to Section 10 of the Rivers and Harbors Act (RHA), which 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. §§ 401 *et seq.* In turn, any applicant for a federal permit or license involving the construction or operation of facilities that may result in a discharge into navigable waters must comply with Section 401 of the Clean Water Act. *See* 33 U.S.C.A. § 1341; S.C. Code Ann. Regs. 61-101. Thus, before issuing a final permit to the Ports Authority authorizing the Cruise Terminal renovations, the Corps must either obtain a 401 Certification or a waiver from the State of South Carolina through DHEC.[4]

In this case, because the Project involves driving pilings in a navigable water of the United States, an proposed activity within the Corps' jurisdiction, a 401 Certification is required from the State of South Carolina (through DHEC) to be issued, denied, or waived within one

---

Certification after the Cruise Opponents counsel complained that they were cognizant of only one 401 Certification, the Court stated that "[m]aybe it didn't come up for you, but [it] came up for them.").

[4] The Cruise Opponents ignore the waiver option under federal and state law for complying with Section 401. Notwithstanding the Cruise Opponents claim that it is "undisputed" that a 401 Certification *must* be issued, a project can nevertheless move forward under the waiver option for compliance with Section 401 of the Clean Water Act.

year after receiving the request for certification. In compliance with these requirements, the Project received all of the necessary permits and certifications from DHEC. An application was submitted in January 2012 for the Project, and the Permit was issued on December 18, 2012. This DHEC action, which occurred within one year of the request, serves as the critical area permit, coastal zone consistency determination, and 401 Certification for the Project. Ex. B, OCRM-12-054-B; *see* Order Denying Pet'rs' Mot. to Vacate, filed Dec. 20, 2013, at 6.

I. THE PROJECT RECEIVED A VALID AND BINDING 401 WATER QUALITY CERTIFICATION FROM DHEC IN COMPLIANCE WITH SOUTH CAROLINA AND FEDERAL LAW.

The Project has received all necessary permits and licenses required by state law, including the state requirement under Section 401 of the Clean Water Act. As the Court is aware, in addition to the federal RHA permit, because the Project occurs in a "critical area" of the coastal zone in South Carolina, South Carolina law requires a critical area permit from DHEC, *see* S.C. Code Ann. § 48-39-130(A), as well as a CZCD, *see* S.C. Code Ann. § 48-39-80. DHEC issued the Permit within one year of the request, and that Permit serves as the 401 Certification, the critical area permit, and the CZCD for the Project. Ex. B, Permit; *see* Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6.

The Cruise Opponents continue to misunderstand the law surrounding the 401 Certification program generally, as well as its application to the Project specifically, in its Response. Indeed, the vast majority of the Response is devoted to re-arguing the motion to vacate. However, as this Court determined:

> Under state law, the critical area permit serves as the 401 Certification and the 401 Certification serves as the CZC Certification.... [W]ater 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.

Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6. Thus, as a matter of law, the Permit is a 401 Certification for the Project. The re-argument against this holding is untimely and barred because the Cruise Opponents failed to file a motion for reconsideration. The issue presented to the Court through the instant Motion is whether the Cruise Opponents have the ability to even raise the issue of the 401 Certification component in this proceeding since they failed to make any challenge to the 401 Certification to the DHEC Board (and thus failed to exhaust their administrative remedy) or to this Court in the Request for Contested Case or Prehearing Statement (thus waiving and abandoning the issue altogether). For purposes of this contested case, as South Carolina law plainly and clearly reflects, the Permit is a 401 Certification for the Project.[5]

II. THE CRUISE OPPONENTS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES TO CHALLENGE THE 401 CERTIFICATION, AS THEY FAILED TO RAISE THIS ISSUE OR CHALLENGE THAT COMPONENT OF THE PERMIT TO THE DHEC BOARD.

The Cruise Opponents never challenged the 401 Certification component of the Permit at the DHEC Board or to this Court prior to filing their Motion to Vacate. The Cruise Opponents' failure to raise either the 401 Certification component of the Permit or compliance with

[5] Pursuant to South Carolina law, the Project's critical area permit serves as its 401 Certification. S.C. Code Ann. Regs. 30-2(H), 61-101.A.8. Further, "the [CZCD] determination shall be issued as a component of, and concurrently with, the [401] certification" in accordance with the requirements of a CZCD under the CMP, and "the [401] certification will serve also as the [CZCD]." S.C. Code Ann. Regs. 61-101.A.7.

Regulation 61-101 to the DHEC Board bars it from raising that issue in this proceeding as a matter of law.

In the context of a challenge to a DHEC decision, the statutory prerequisite for seeking a contested case review before the ALC is to first seek review by the DHEC Board.[6] *See* S.C. Code Ann. § 44-1-60; *Wise v. S.C. Dep't of Health & Envtl. Control,* No. 10-ALJ-07-0851 (Feb. 23, 2011) (McLeod, J.) ("A failure to timely file and participate in the DHEC Board review process forecloses a contested case action at the ALC."); *MRI at Belfair, Inc. v. S.C. Dep't of Health & Envtl. Control,* No. 07-ALJ-07-0298-CC (July 25, 2007) (Anderson, J.) ("I find a clear legislative intent that a party may seek contested case review before the ALC **only after a party first seeks review by the Board.**") (emphasis added).

The Cruise Opponents do not contest the fact that they failed to challenge the 401 Certification component of the Permit to the DHEC Board in this matter, by which, as a matter of law, they have failed to preserve the issue for challenge in this Court. Instead, the Cruise Opponents seek to excuse their failure to follow the law, claiming that they did not seek DHEC Board review of the 401 Certification because, at the time DHEC issued the Permit, the Cruise Opponents "understood" that the Water Quality Certification (401) was authorized through the

[6] As evidenced by Cruise Opponents "comments" regarding *de novo* review in their Response, they continue to struggle with understanding the *de novo* review this Court conducts in a contested case matter. As this Court knows, under a *de novo* review standard this Court may issue an order within the same discretionary bounds and authority as the original agency for any matter for which the Court's jurisdiction is properly invoked. Thus, in this case, assuming the Court properly has jurisdiction (*e.g.*, standing exists) the Court has contested case, *de novo* authority over the CZCD and critical area permitting criteria. The Court may deny, grant, or condition these two licenses for the Project as the evidence warrants. This is because the Cruise Opponents filed a Board request for review and contested case request to challenge the critical area permit and CZCD. However, the 401 Certification was not challenged by the Cruise Opponents in the state process. As a result, the Court lacks jurisdiction over the 401 Certification component of the Permit.

NWP 3. Resp. at 7. However, this position is inconsistent with the law and the Cruise Opponents' prior positions.

As discussed, the law unambiguously provides that the 401 Certification has been issued for the Project. The Cruise Opponents were on notice of the law and what it provides. *Ex parte Wessinger*, 235 S.C. 239, 245, 111 S.E.2d 13, 16 (1959) (rejecting argument that failure of resolution of condemnation to reference right of appeal should excuse failure to timely file appeal, stating that "[n]ot only was appellant charged with knowledge of the law ... but he was represented by counsel at the hearing....").[7] Nonetheless, they did not challenge the 401 Certification aspect of the Permit, a failure they now attempt to excuse on the basis of their belief that there was no 401 Certification for them to challenge. This circular argument is not consistent with the governing law and regulations. It is, however, consistent with their apparent strategy in this case to challenge the case only at the federal level. Specifically, the Cruise Opponents acknowledge that they elected to challenge only "SPA's NWP 3 coverage granted by the Corps," and not the "DHEC staff decision to issue certification for NWP #3." Resp. at 7.

In other words, the Cruise Opponents admit that, at least at the outset, they made an affirmative decision to challenge the authorization for the Project only at the federal level. Their failure to challenge the water quality certification aspect of the Permit is entirely consistent with this apparent strategy. The problem is that their failure is not consistent with the law and regulations applicable to the Permit or with the requirement that issues must be presented to administrative agencies and are waived if they are not. Their failure also is not consistent with their own arguments because if the NWP 3 was improperly applied to the Project, the only

[7] Cruise Opponents' legal counsel (SELC and SCELP) routinely oppose permits and projects and have challenged innumerable critical area permits, 401 Certifications, and CZCDs in the past.

alternative is that, under their own theory, the Permit must serve as the 401 Certification. Therefore, under their own legal claims and assertions, Cruise Opponents were on notice of the Permit serving as the 401 Certification because that was consistent not only with the law but also with their own legal claim against the NWP 3.[8]

It is undisputed that the Cruise Opponents failed to challenge or mention the 401 Certification as part of the Request for Board Review. *See* Cruise Opponents' Requests For Review. Therefore, as Cruise Opponents have undeniably and admittedly failed to challenge the 401 Certification before the DHEC Board, they are now barred from challenging the 401 Certification before this court. *See MRI at Belfair,* No. 07-ALJ-07-0298-CC ("I find a clear legislative intent that a party may seek contested case review before the ALC only after a party first seeks review by the Board."); *see also League of Women Voters of Georgetown v. S.C. Dep't of Health & Envtl. Control*, No. 07-ALJ-07-0529-CC (Dec. 15, 2008) (Anderson, J.) (failure to properly and timely request DHEC Board review deprives ALC of jurisdiction to hear case); *S.C. Conservation League v. S.C. Dep't of Health & Envtl. Control*, No. 07-ALJ-07-0107-CC (Sept. 4, 2007) (Geathers, J.) (same); *Wilson v. S.C. Dep't of Health & Envtl. Control*, No. 06-ALJ-07-0799-CC (Mar. 21, 2007) (McLeod, J.) (lack of review by DHEC Board eliminates ALC jurisdiction). As the Cruise Opponents' did not raise a challenge to the 401 Certification

[8] Based on their response, the Cruise Opponents made a strategic decision not to raise the 401 Certification issue before DHEC at any stage despite notice and knowledge that the law dictates that the 401 Certification be issued for the Project as part of the Permit. Having made a strategic decision to proceed as they did, the Cruise Opponents are bound to the consequences of that strategy.

below, and DHEC Board jurisdiction was not triggered, this Court lacks jurisdiction over the 401 Certification component of the Permit.[9]

III. THE CRUISE OPPONENTS HAVE WAIVED ANY CHALLENGE RELATED TO THE 401 CERTIFICATION FOR THE PROJECT.

A party waives or abandons a right when they: (1) had actual or constructive knowledge of its rights, or knew all the material facts upon which the right depended; and (2) expressly or implicitly failed to assert such right. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 387, 387-88 (1992). Waiver may therefore be express or implied from circumstances indicating a party's intent to waive a known right. *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Here, the Cruise Opponents failed to make any claim or challenge to any 401 Certification component of the Permit to this Court, and thus have waived and abandoned any challenge to the Project's 401 Certification.

In challenging the Permit before DHEC and this Court, Cruise Opponents never articulated any challenge to DHEC's issuance of the 401 Certification. They did not challenge the 401 Certification before DHEC staff or the DHEC Board. The Cruise Opponents likewise have not challenged the 401 Certification subsequent to the proceedings conducted by DHEC. The Cruise Opponents' Request for Contested Case and Prehearing Statement are devoid of any mention of or citation to the 401 Certification component of the Permit or South Carolina

---

[9] The League and its counsel have affirmative acknowledged that a proper challenge at the DHEC Board level is a condition precedent and prerequisite to this Court having jurisdiction.

> The Court: Do you agree that complying with [S.C. Code Ann. 44-1-60(E)] is a prerequisite to being able to later file a contested case before this Court?
>
> Mr. Holman: Under the statute, yes, sir.

Ex. D, Hr'g Tr. at 64:8-12, Docket No. 07-ALJ-07-0107-CC (July 2, 2007).

Regulation 61-101.[10] *See* Cruise Opponents' Requests for Board Review and Requests for Contested Case. In fact, Cruise Opponents do not contest the fact that, at no time prior to filing their Motion to Vacate in this case, have they ever articulated the 401 Certification component of the Permit as a basis for their challenge to the Permit. That constitutes a waiver of their opportunity to challenge the 401 Certification. *Jordan v. State Highway Dep't*, 188 S.C. 83, 198 S.E. 174, 179 (1938) ("The failure to assert at the proper time a legal right constitutes a waiver or abandonment of the same."); *see also Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 546, 725 S.E.2d 698, 701 (2012) (citing *Hurst v. Sumter County,* 189 S.C. 376, 1 S.E.2d 238 (1939) (noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived)); *Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) (holding that in order to be timely, an objection usually must be made at the earliest possible opportunity).

The Cruise Opponents attempt to excuse their failure to challenge DHEC's issuance of the 401 Certification by noting that the Permit itself states that it is a "Critical Area Permit & Coastal Zone Consistency Certification" and does not expressly reference the 401 Certification. However, because the regulations expressly provide that the Permit constitutes the 401 Certification, the labelling of the Permit is not determinative, especially when the legal effect of the Permit is spelled out in the law. *See* Order Denying Mot. to Vacate, filed Dec. 20, 2013, at 6; S.C. Code Ann. Regs. 61-101.A.8 (DHEC "will not issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone."); S.C. Code Ann. Regs. 30-2.H ("The direct permit will serve as the 401 water

[10] However, having been charged with knowledge of the law and the fact that the critical area permit serves as the 401 Certification, they had notice that the individual 401 Certification was issued for the Project.

quality certification for an associated Federal permit."). Moreover, in addressing the water quality aspects of the Project, the Permit review document states that the "[p]roposed port development or expansion and operation must meet existing ... water quality standards, as regulated by the [EPA] and [DHEC.]" Ex. C, DHEC Tech. Summ. at 4. And in the Permit, DHEC required that "all authorized work shall be conducted in a manner that minimizes any adverse impact on ... water quality." Ex. B, Permit at 4. DHEC also imposed the following General Condition:

> ***[A]ll 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.

Ex. B, Permit at 4 (emphasis added). Finally, and maybe most importantly, the language of the Permit states that it is issued pursuant to S.C. Code Ann. Regs. 30-1 through 30-18, which includes Regulation 30-2.H stating that **the critical area permit serves as the 401 Certification**. In short, the Cruise Opponents had actual or constructive knowledge that the Permit would serve as the 401 Certification for the Project, especially if they were successful in their federal challenge to the NWP 3 coverage authorized by the Corps.

As discussed above, the Cruise Opponents' admitted decision to challenge only the NWP 3 coverage authorized by the Corps and not the DHEC water quality certification issued for NWP 3 is consistent with their failure to challenge the water quality certification before DHEC at any stage of the application process for the Project. That is to say, the circumstances of this case demonstrate that the Cruise Opponents intended to undermine the Project by not challenging the water quality certification at any stage before DHEC and attacking the Permit through challenging the federal NWP 3 coverage issued by the Corps. That is a strategic decision

that the Cruise Opponents were entitled to make. However, it does not provide them with a blanket exclusion from the requirement of first presenting a challenge to the appropriate agency and identifying that challenge as an issue in their initial filings with this Court. The Cruise Opponents' undisputed failure to challenge that aspect of the Permit therefore constitutes an abandonment and waiver of that issue.

Cruise Opponents attempt to excuse their failure to challenge the 401 Certification by arguing that the public notices issued for the Project, as well as the Permit itself, did not provide *adequate* notice to them that a 401 Certification was at issue. Resp. at 4. However, an asserted ignorance of law does not excuse the Cruise Opponents' failure to challenge the 401 Certification. *E.g., S.C. Wildlife & Marine Res. Dep't v. Kunkle*, 287 S.C. 177, 179, 336 S.E.2d 468, 469 (1985) ("[I]it is a well-settled maxim that ignorance of the law is no excuse."); *see Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 584, 674 S.E.2d 181, 184 (Ct. App. 2009) (holding that, in rejecting a claim for estoppel, the appellants were "presumed to know the law"); *see also Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005) ("Ignorance of the statute of limitations is not an excuse for late filing [of a post-conviction relief petition], even when the Petitioner claims he did not learn of the statute because he was incarcerated in another state."). Moreover, in this instance, Petitioners must be charged with knowledge of the regulatory framework. *Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 166, 714 S.E.2d 869, 875 (2011) ("All individuals are presumed to know the law, including the nature and extent of a government official's authority, and they are charged with the knowledge that an ordinance may be changed only through compliance with proper procedures."); *Am. Legion Post*, 381 S.C. at 583, 674 S.E.2d at 183 ("Nothing presented [the appellants[from learning of the governing statutes, as we find is required for due diligence."). Given the stakes that they identify in their

various federal and state pleadings, the Cruise Opponents knew or should have known of the 401 Certification provisions and understood how the process works and should have acted diligently. They proceeded on a single track, ignoring the dual-track nature of the Ports Authority's permitting process.

The Cruise Opponents also attempt to excuse their failure to challenge the 401 Certification in this case by noting that the permit in *South Carolina Coastal Conservation League v. South Carolina DHEC*, No. 07-ALJ-070107-CC (March 9, 2007) expressly indicated a "Water Quality Certification" on its face. However, the Cruise Opponents' analogy to this prior license is without merit. Notably, the terms and conditions of the 2006 license referenced by the Cruise Opponents were issued specific to the 401 Certification evaluation (as well as specific conditions pursuant to the CZCD and the critical area permitting criteria). However, in the instant matter, DHEC determined that no special conditions for the 401 Certification (or the CZCD) were warranted, and thus the "special conditions" were imposed under the review for the critical area permitting component of the Permit. As DHEC had previously determined that no additional terms or conditions were necessary for the NWP 3, and the same activity for the same Project was at issue, DHEC acted rationally and consistently in not imposing special conditions on the Project based on the review of the individual permitting for the 401 Certification and CZCD. Because the Permit served as the 401 Certification as a matter of law, the governing provision of which is cited in the Permit, and no specific provisions were included based on 401 Certification review, there was no need to add superfluous verbiage

In short, the Cruise Opponents' express failure to challenge the 401 Certification before DHEC and as part of this contested case even though they knew of the need to present a challenge to that certification, as well as their failure to even acknowledge the law providing that

the critical area permit serves as the 401 Certification, Cruise Opponents have waived their right to challenge the 401 Certification in this court. The Cruise Opponents' failure to contest the 401 Certification throughout these proceedings is consistent and deliberate, and constitutes a waiver of any opportunity to make any future challenge to the 401 Certification in these proceedings.

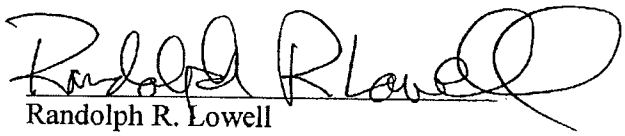
CONCLUSION

The Ports Authority is entitled to judgment as a matter of law with respect to the 401 Certification for the Project as the Cruise Opponents failed to challenge the 401 Certification for the Project at any stage or time. As a result, the Cruise Opponents cannot challenge and have waived and abandoned the right to challenge or litigate the individual 401 Certification for the Project as part of the Permit.[11] The Court should grant the Motion and hold that the 401 Certification is issued for the Project as a matter of law and such decision is final and not subject to challenge in the pending contested case matter.

[SIGNATURE PAGE FOLLOWS]

[11] Whatever factual dispute the Cruise Opponents may or may not have with the DHEC administrative record or underlying documents is irrelevant. They make several claims in the Response about what the documents do or do not say, often without citation or support, but that makes no difference for a determination about whether the Cruise Opponents timely filed or preserved a challenge to the 401 Certification issued as part of the Permit. Indeed, this line of argument obfuscates the Cruise Opponents undisputed failure to take issue with the 401 Certification, which is the only issue before the Court on this Motion.

Respectfully submitted,



Randolph R. Lowell
Tracey C. Green
Chad N. Johnston
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

February 5, 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,	)	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.	)	

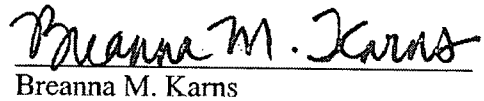
This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of **South Carolina Ports Authority's Reply in Support of Motion For Partial Summary Judgment** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
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

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401



Breanna M. Karns

Columbia, South Carolina
This 5th day of February 2014.

EXHIBIT A

STATE OF SOUTH CAROLINA)
) PERMIT
SOUTH CAROLINA STATE BUDGET)
AND CONTROL BOARD)

TO: S. C. State Ports Authority

WHEREAS, the State of South Carolina has title to the Submerged Lands, (the area below the usual low water mark), the Tidelands, (the area between the usual high water mark and the usual low water mark), and the waters of the State. The State of South Carolina holds the Tidelands, Submerged Lands and Waters in trust for and subject to the public purposes and rights of navigation, commerce, fishing, bathing, recreation or enjoyment, other public and useful purposes, and such other rights as are incident to public waters at common law, free from obstructions and interference by private persons; and

WHEREAS, the South Carolina State Budget and Control Board has determined that it is necessary in the interest of the State to require a permit for any construction or excavation below the usual high water mark.

NOW, THEREFORE, IT IS ORDERED:

1. That this permit authorizes you to proceed with the project in accordance with your application for a permit from the Corps of Engineers dated 12 March 1971. This permit grants you the right to proceed in accordance with the plans and specifications shown on the said application. P/N 71-26.

2. That this permit is issued subject to the issuance of a permit by the Corps of Engineers.

3. That the construction shall be modified or removed upon proper demand made by the State.

And it is so ordered this 1st day of May, 1971.

Furman E. McEachern, Jr.
Director, General Services Division
South Carolina State Budget and Control Board

COE00454

EXHIBIT B

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

DEC 20 2012

DHEC - OCRM
CHARLESTON OFFICE

RECEIVED

DEC 19 2012

TRIDENT CONSTRUCTION CO., LLC

MEMORANDUM

TO: **All interested parties**

FROM: **STEVEN BROOKS**

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

DATE: **DECEMBER 18, 2012**

This is to inform you that the above referenced permit was issued and validated on 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."

I Scanned & e-mailed to everyone. No one claimed this. Call 572-7600 to discuss.
Thanks
Bobbie

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 or otherwise sent to the applicant, permittee, licensee and affected persons who have requested in writing to be notified, 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 or otherwise sent to persons entitled to receive notice. 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.

January 7, 2011

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

JAN 03 2013

DHEC - OCRM
CHARLESTON OFFICE

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

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
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

DHEC-SCPA 000093

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
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

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 CONDITIONS(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.

SEE SPECIAL CONDITION(S)

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.

Barbara L Melvin
(PERMITTEE(S)
SC State Ports Authority

1/2/13
(DATE)

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

12/18/12
(DATE)

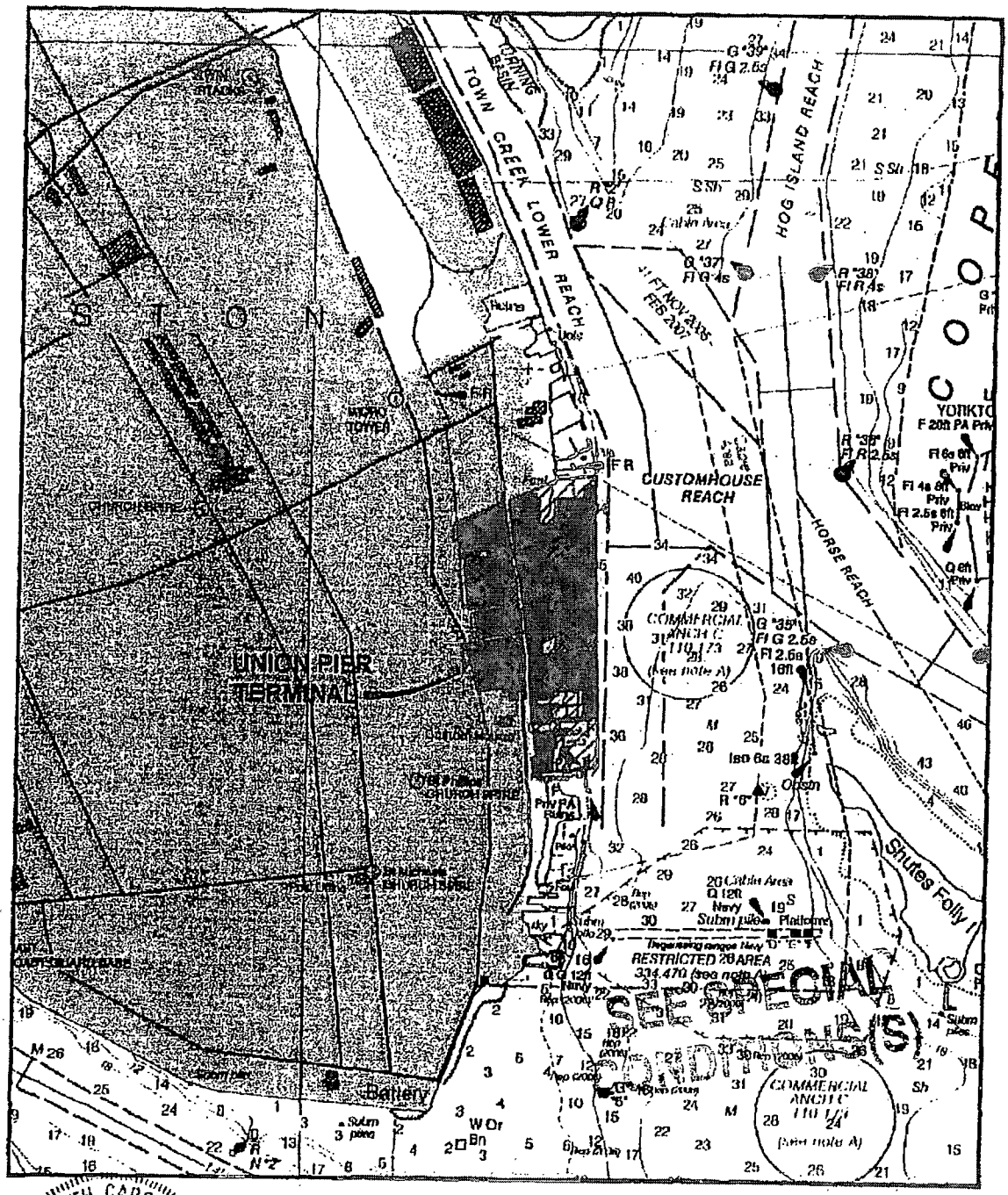
RECEIVED
JAN 03 2013
DHEC-OCRM
CHARLESTON OFFICE

DHEC-SCPA 000097

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

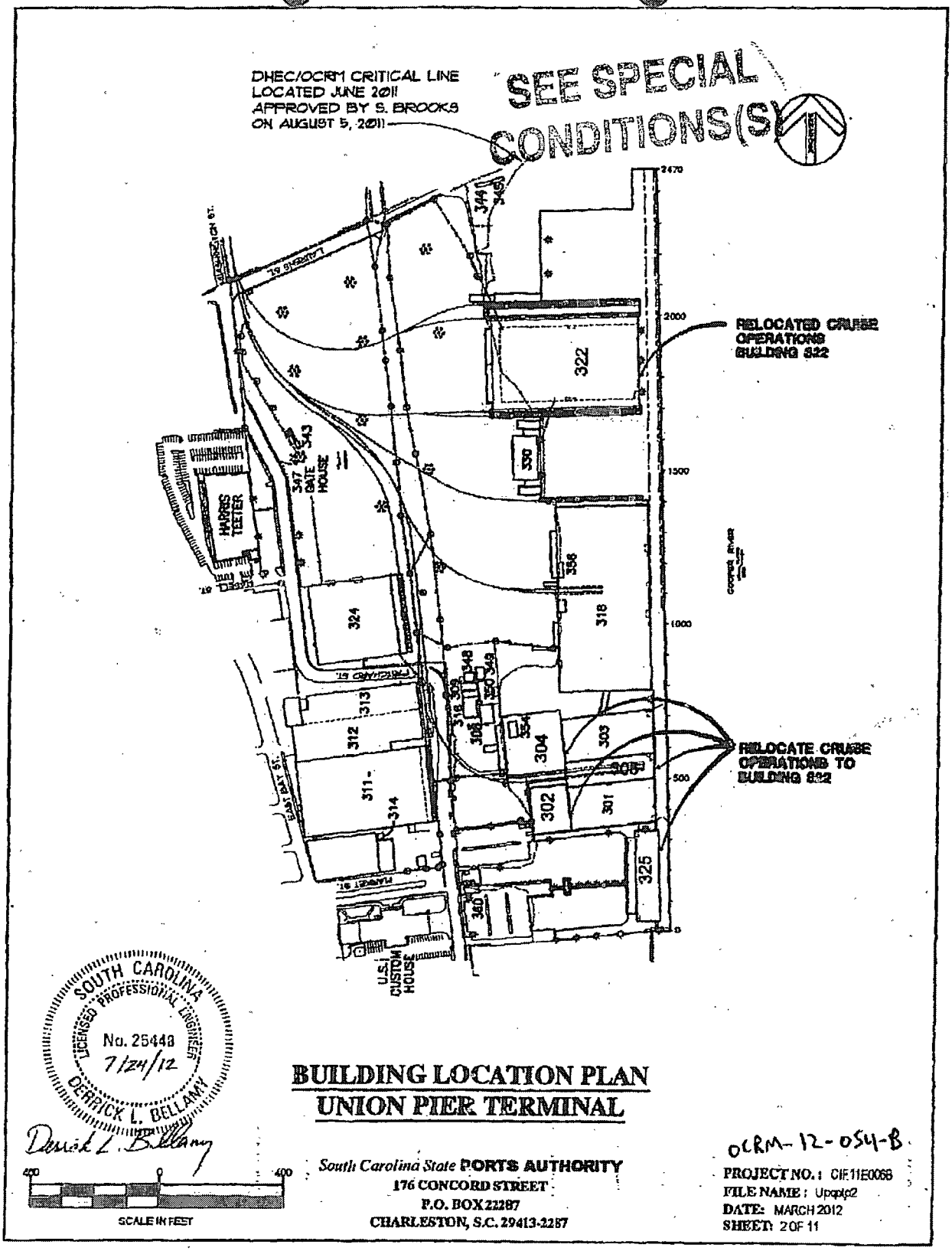
Derrick L. Bellamy

LOCATION

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

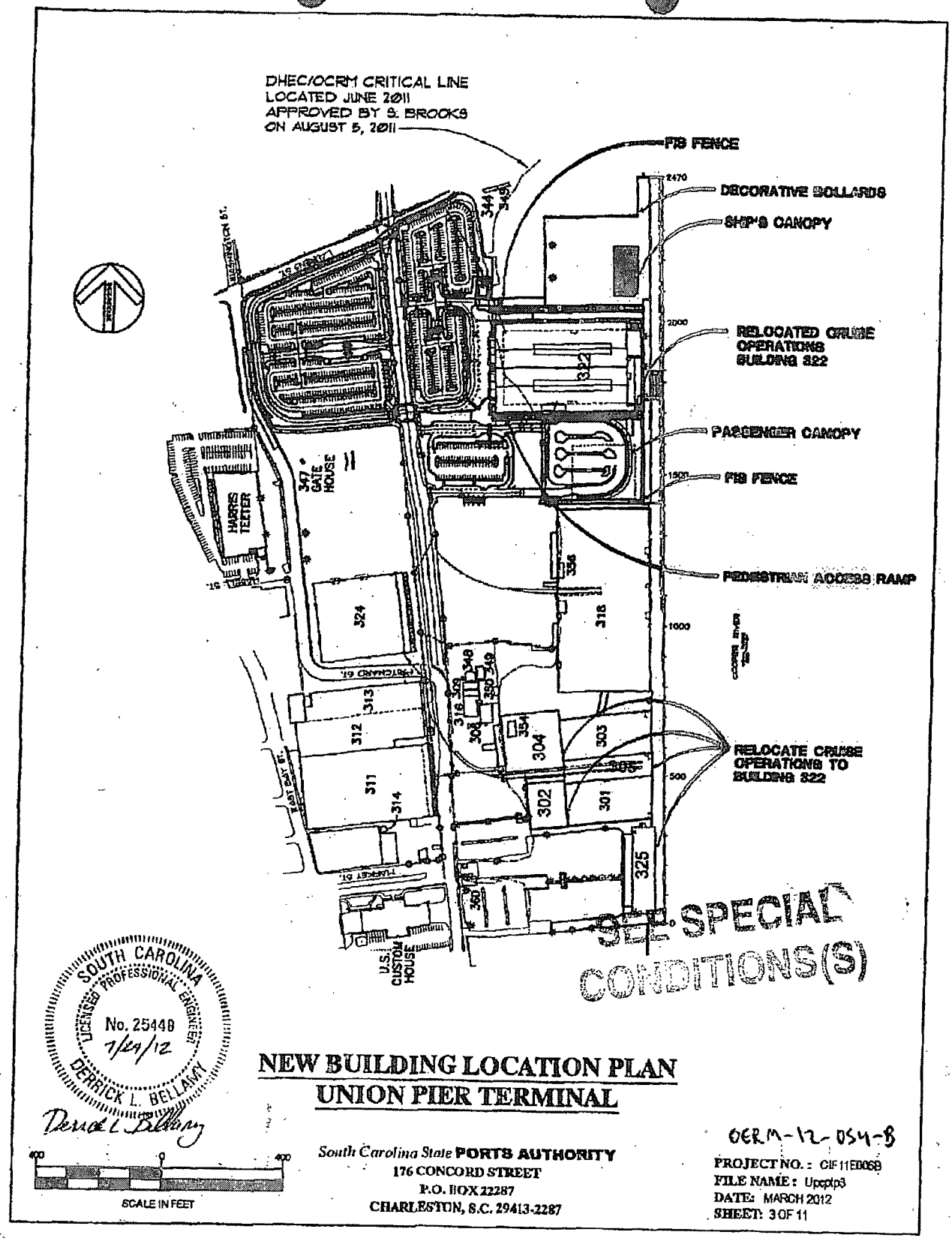
OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upcptp1
DATE: JULY 2012
SHEET: 1 OF 11



BUILDING LOCATION PLAN
UNION PIER TERMINAL

DHEC-SCPA 000100



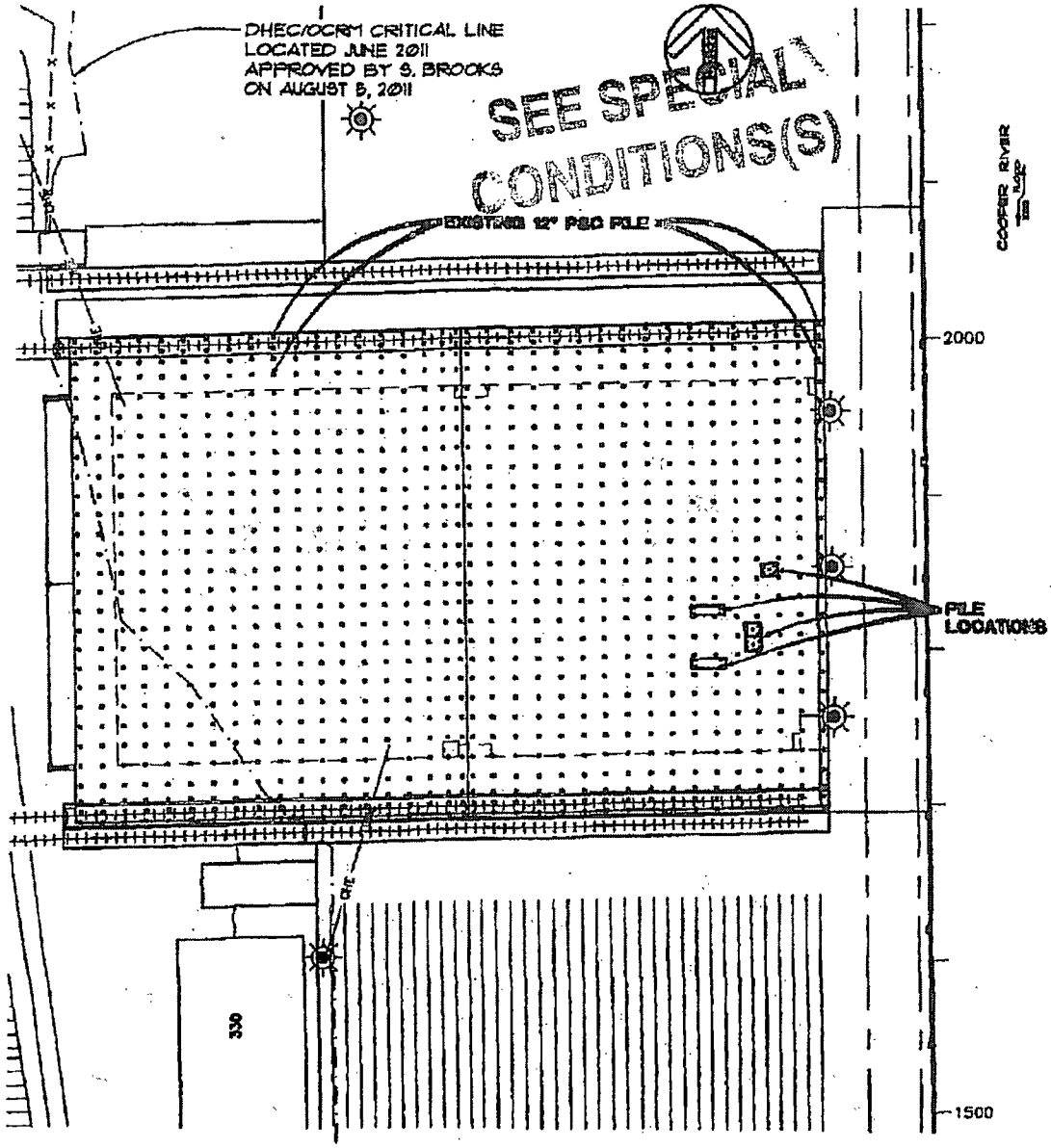
NEW BUILDING LOCATION PLAN
UNION PIER TERMINAL

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: Upcptp3
DATE: MARCH 2012
SHEET: 3 OF 11

DHEC-SCPA 000101



LEGEND

B
D
B
ELEVATORS

A
ESCALATOR
A

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

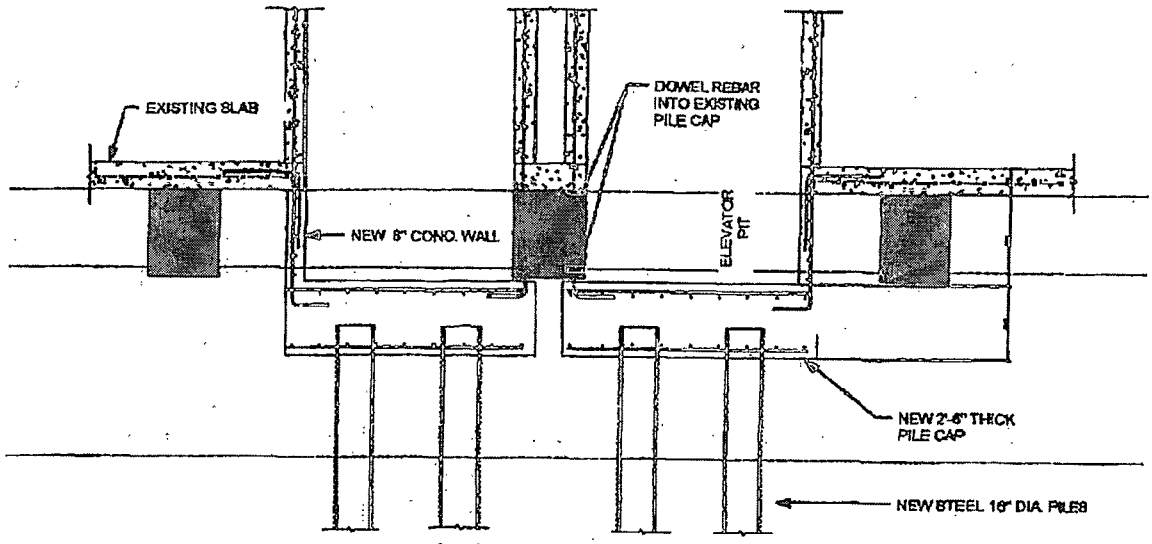
100 0 100
SCALE IN FEET

MODIFICATIONS (BUILDING 322)

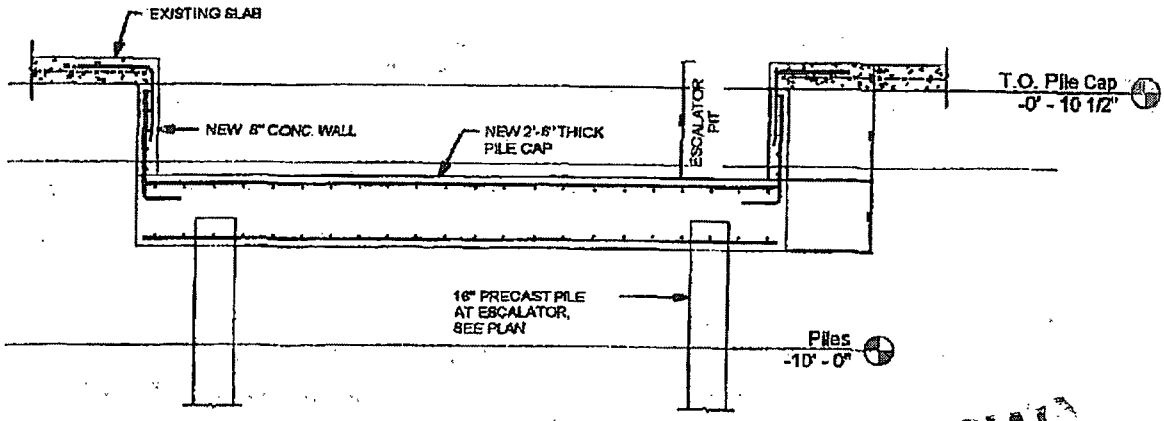
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcplp4
DATE: JULY 2012
SHEET: 4 OF 11

DHEC-SCPA 000102



A SECTION
ELEVATOR



B SECTION
ESCALATOR

SEE SPECIAL CONDITIONS(S)

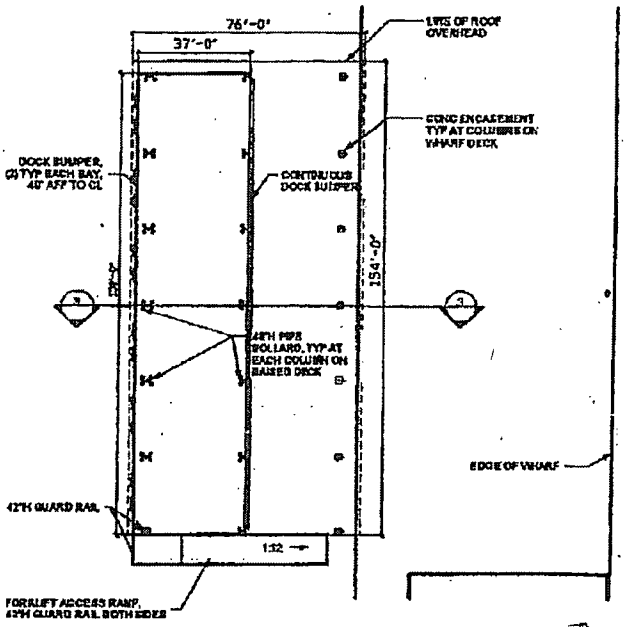
SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25440 7/24/12 DERRICK L. BELLAMY

David L. Bellamy

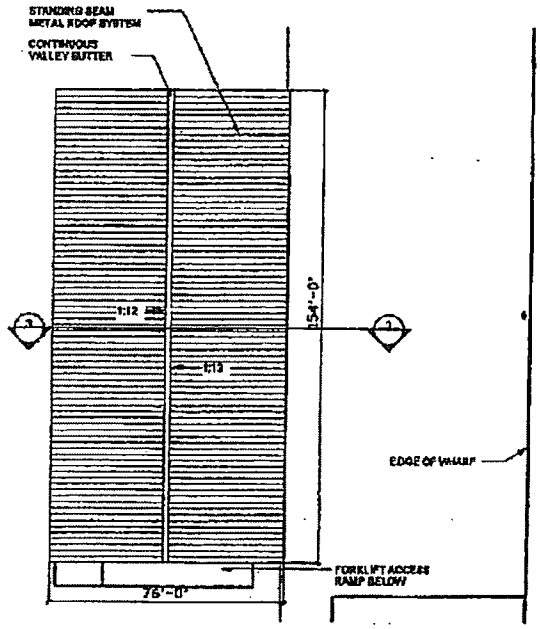
MODIFICATIONS (CROSS SECTION)

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

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp5
DATE: JULY 2012
SHEET: 5 OF 11

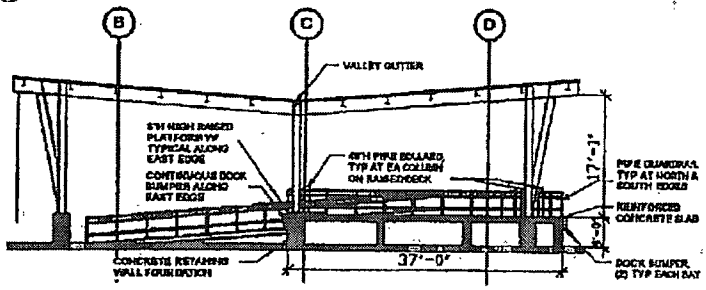


1 STORES CANOPY FLOOR PLAN



2 STORES CANOPY ROOF PLAN

SEE SPECIAL CONDITIONS(S)



3 STORES CANOPY E-W SECTION

SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 25443
7/24/12
DERRICK L. BELLAMY

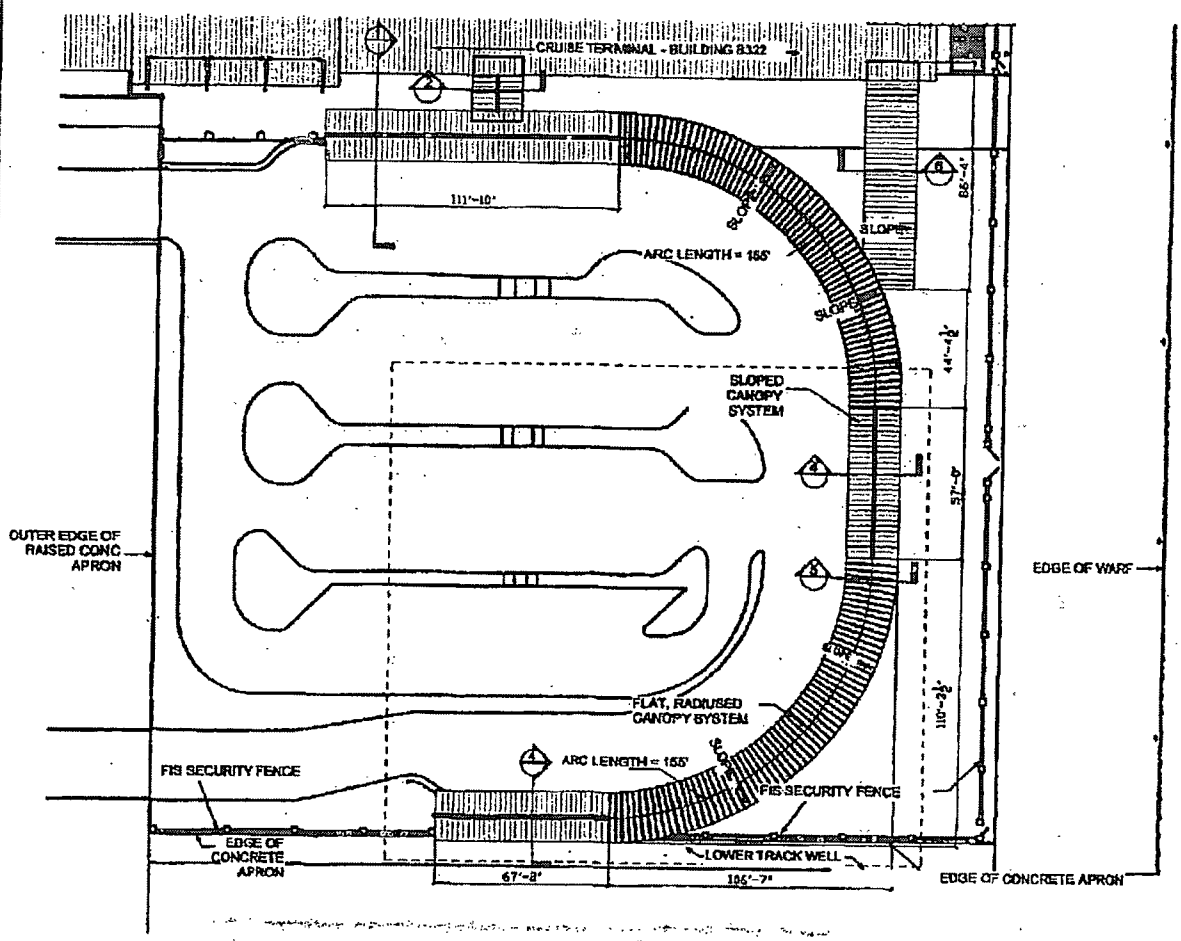
MODIFICATIONS
NORTH APRON

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

OCRM-12-054-B
PROJECT NO.: CIF11E0068
FILE NAME: Upgdg6
DATE: JULY 2012
SHEET: 6 OF 11

DHEC-SCPA 000104

SEE SPECIAL CONDITIONS(S)



PAX CANOPY PLAN

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

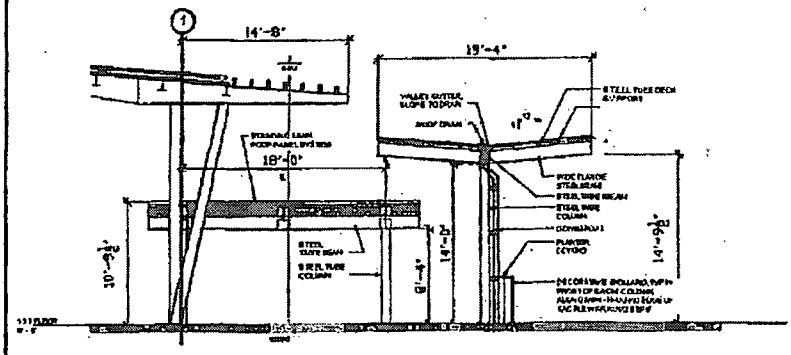
Derrick L. Bellamy

MODIFICATIONS
SOUTH APRON

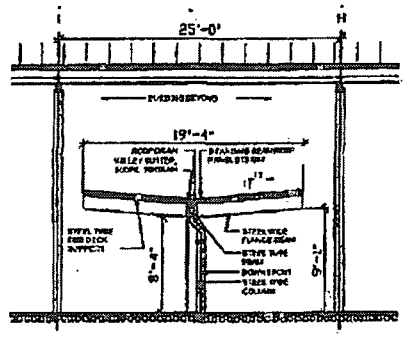
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

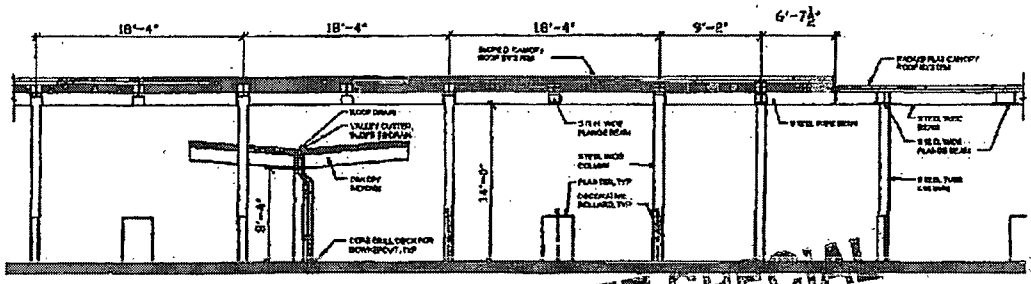
PROJECT NO.: CIF11E006B
FILE NAME: Upcplp7
DATE: JULY 2012
SHEET: 7 OF 11



SECTION - PAX DROP OFF ZONE CANOPY

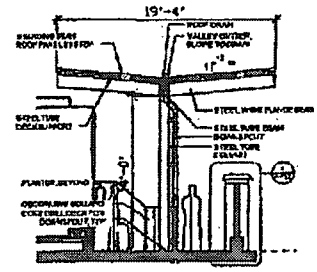


SECTION - PAX DROP OFF ZONE CANOPY @ BLDG INTERSECTION

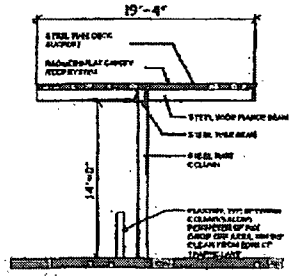


SECTION - PAX ACCESS CANOPY

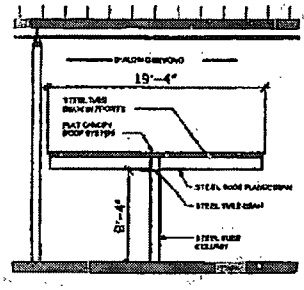
SEE SPECIAL CONDITIONS(S)



SECTION - SOUTH PAX ACCESS CANOPY



SECTION - FLAT PAX ACCESS CANOPY



SECTION - FLAT POV BAG CANOPY

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

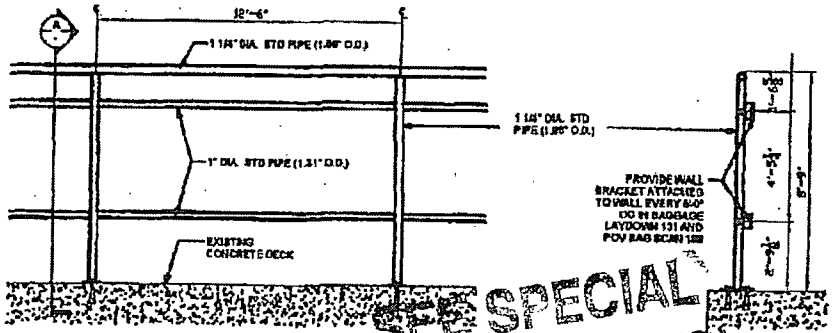
Derrick L. Bellamy

MODIFICATION
SOUTH APRON - DETAILS

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

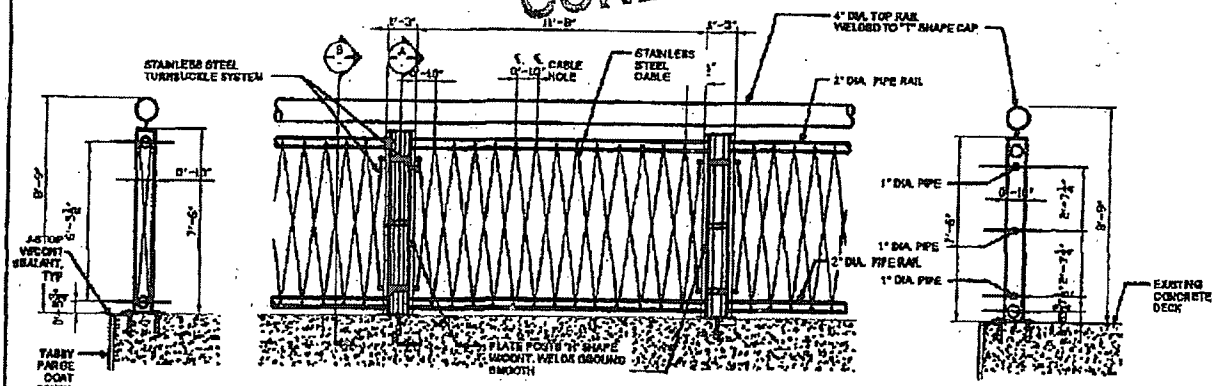
OCRM- 12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp8
DATE: JULY 2012
SHEET: 8 OF 11

DHEC-SCPA 000106



SEE SPECIAL CONDITIONS(S)

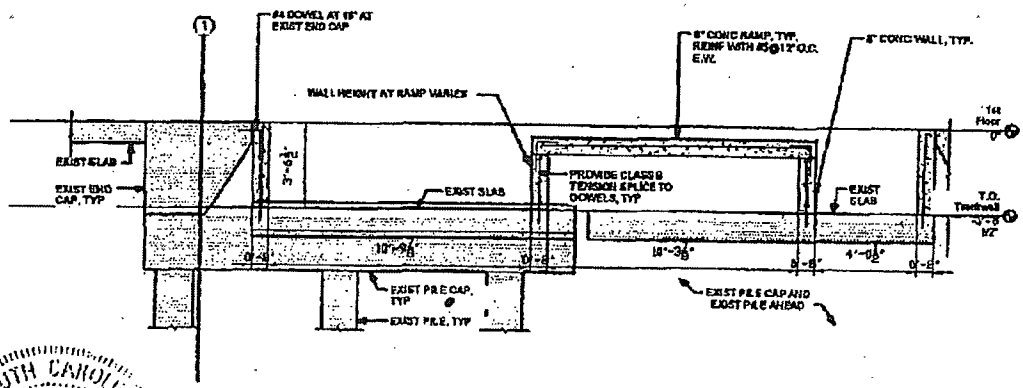
SECTION "A"



SECTION "B"

ELEVATION @ POSTS

SECTION "A"



SOUTH CAROLINA PROFESSIONAL ENGINEER No. 25448 7/24/12

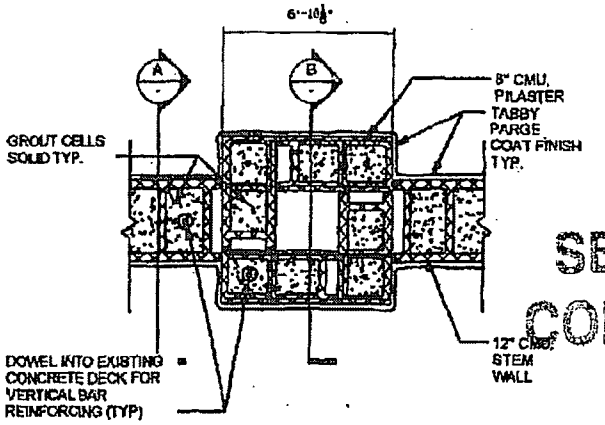
Derrick L. Bellamy

MODIFICATIONS
PEDESTRIAN ACCESS RAMP DETAIL

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

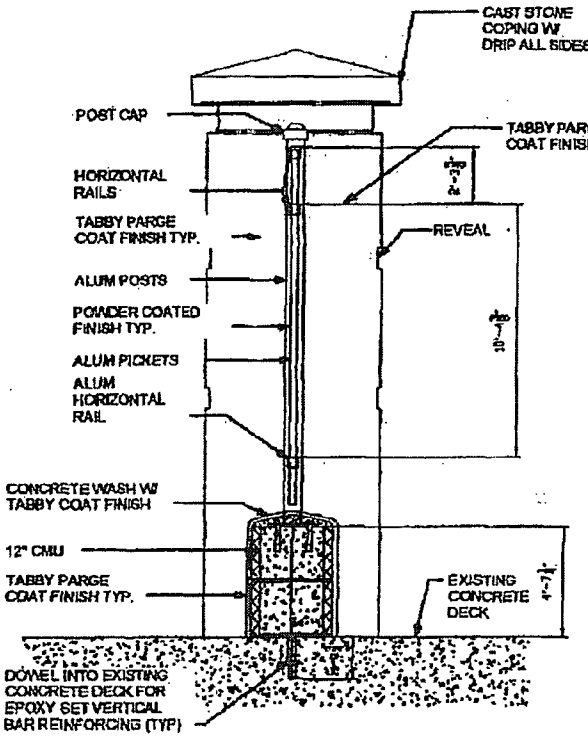
OCRM-12-054-B
PROJECT NO.: GIF11E006B
FILE NAME: Upcptp9
DATE: JULY 2012
SHEET: 9 OF 11

DHEC-SCPA 000107

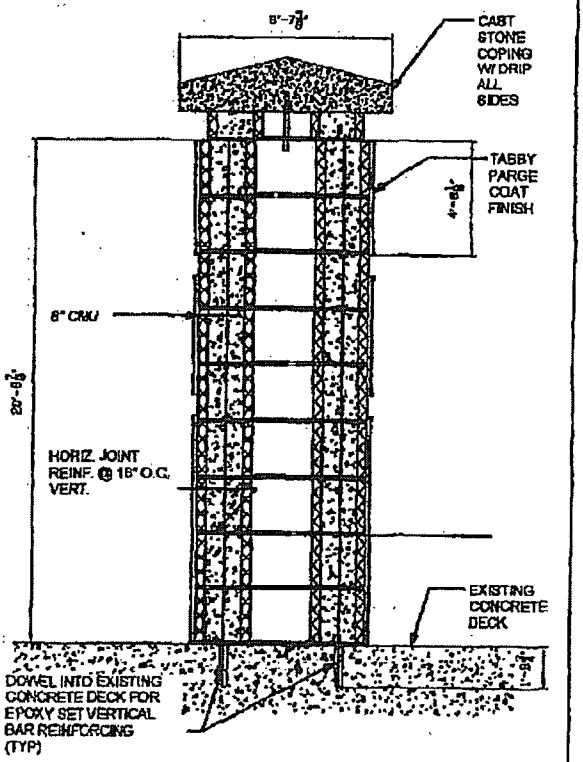


SEE SPECIAL CONDITIONS(S)

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

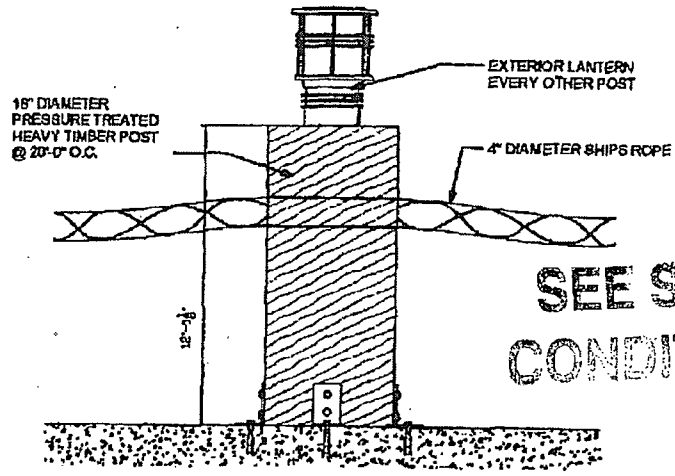
Derrick L. Bellamy

MODIFICATIONS
SECURITY FENCE DETAILS

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

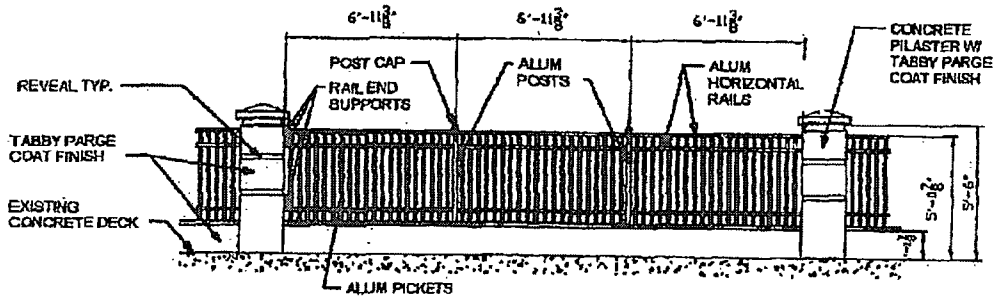
OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp10
DATE: JULY 2012
SHEET: 10 OF 11

DHEC-SCPA 000108

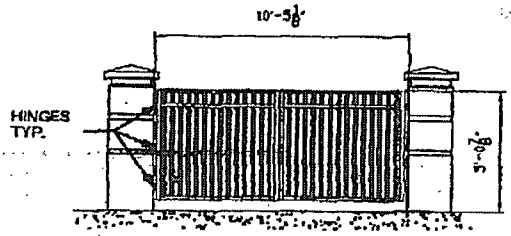


SEE SPECIAL CONDITIONS(S)

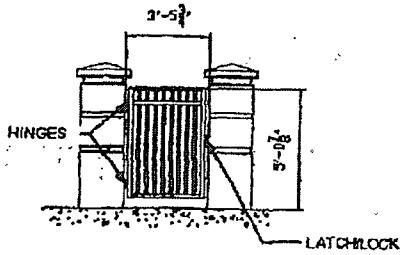
NORTH APRON DECORATIVE BOLLARDS



ELEVATION @ FIS SECURITY FENCE



ELEVATION @ ACCESS GATE



ELEVATION @ PED GATE

SOUTH CAROLINA
No. 25448
7/24/12
PROFESSIONAL ENGINEER

David 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: 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.

SEE SPECIAL CONDITIONS(5)

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)

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)**

SCPA 000455

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.

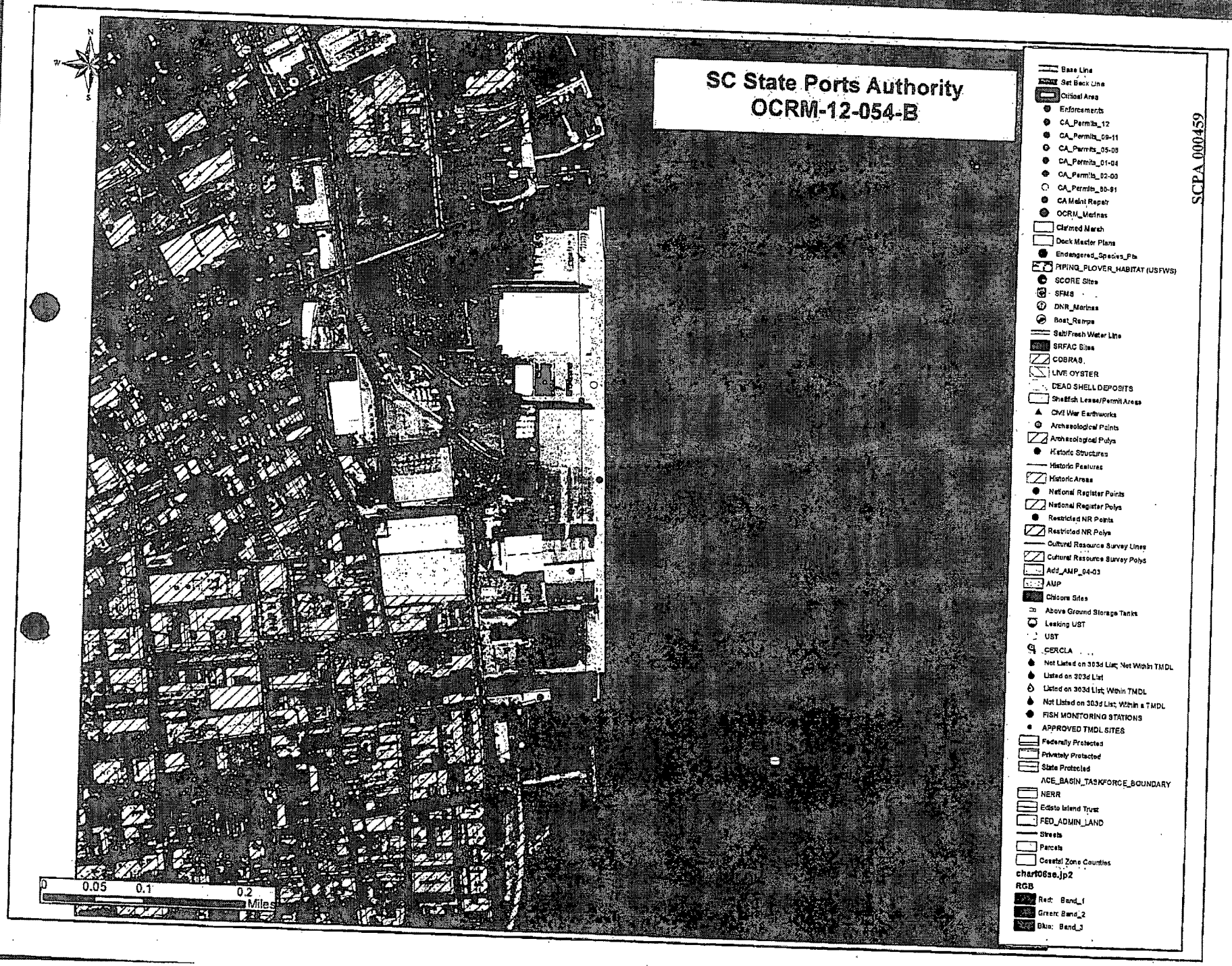
6. Provided that an as-built survey of the modified terminal facility must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the new terminal facility, and must 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

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.

X. **Attachments Required:**

GIS Review (See Section IV.C. above)
Site Photographs



SCPA 000459

R.002804

EXHIBIT D

Transcript of the Testimony of

SC COASTAL CONSERVATION LEAGUE VS. SC DHEC ET AL.

Date: July 2, 2007

CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index

1230 Richland Street
Columbia, SC 29201
Phone: (803) 252-3445 / (800) 822-0896
Fax: 803-799-5668
Email: contact@creelreporting.com

Page 1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 07-ALJ-21-0107-CC, 07-ALJ-21-0108-CC

South Carolina Coastal Conservation League,

Petitioner,

v.

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

Respondents.

MOTION HEARING
****

Monday, July 2, 2007
10:06 a.m. - 11:57 p.m.

The hearing before the Honorable John D. Geathers, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 2nd day of July, 2007 before Karen L. Yearwood-Cole, Court Reporter and Notary Public in and for the State of South Carolina.

Page 2

APPEARANCES:

J. Blanding Holman, Esquire
Geoff Gisler, Esquire
Southern Environmental Law Center
200 West Franklin Street, Suite 330
Chapel Hill, North Carolina 27516
and
W. Jefferson Leath, Jr., Esquire
Leath, Bouch & Crawford, L.L.P.
134 Meeting Street, 5th Floor
Charleston, South Carolina 29402
Attorneys for Petitioner

Van Whitehead, Esquire
Sara P. Hazenore, Esquire
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405
Attorney for Respondent, South Carolina Department of Health and Environmental Control
Deborah Brooks Durden, Esquire
South Carolina Department of Transportation
955 Park Street, Suite 302
Columbia, South Carolina 29202
Attorney for the Respondent, South Carolina Department of Transportation

Randolph R. Lowell, Esquire
Mitchell M. Willoughby, Esquire
Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, South Carolina 29201

and

Philip L. Lawrence, Esquire
South Carolina State Ports Authority
Post Office 22287
Charleston, South Carolina 29413
Attorneys for the Respondent, South Carolina Ports Authority

Page 3

INDEX

PAGE

MOTION:
MR. LOWELL 8
MR. WHITEHEAD 36
MR. HOLMAN 43
MR. HOLMAN 65
MR. LOWELL 73
MR. HOLMAN 83
Certificate 85

EXHIBITS

(No exhibits introduced)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

Page 4

THE COURT: This morning, we're here to deal with a motions hearing in the matter of South Carolina Coastal Conservation League v. South Carolina Department of Health & Environmental Control and the South Carolina Ports Authority, docket 07-ALJ-21-0107. There's also an additional matter, docket 07-ALJ-21-0108 involving all of the previous aforementioned parties with the exception of the Department of Transportation. I thought that Ms. Durden would be here now and that we could go ahead and dispense with both of these motion hearings at the same time and consolidate them since the issue is the same in both. I don't see any need to have separate argument. Does that make sense?

MR. LOWELL: Your Honor, I think it makes sense in the legal issues. There are some factual distinctions and there actually is one procedural distinction between the two. I mean, I agree, and I suspect that Mr. Holman will probably agree that it doesn't make sense to go through because both my motion and his response are fairly cut and paste on the essential legal issues.

THE COURT: Well, the time frames are the same,

Page 61

1 list? Did you see a newspaper advertisement?
2 MR. HOLMAN: Your Honor, I don't recall exactly.
3 Usually it happens, we are on mailing lists.
4 Sometimes people will see a notice in the
5 newspaper. They'll learn of it in various
6 ways. I don't recall. Was there one public
7 hearing or multiple public hearings?
8 MR. LOWELL: On this permit, there's ... I know
9 there was one.
10 MR. HOLMAN: Yeah, I don't recall particularly, Your
11 Honor.
12 THE COURT: Are you aware of what the Department's
13 uniform system of public notice is as described
14 as required in 44-1-60(b)? You referenced that
15 section.
16 MR. HOLMAN: I am in terms of the certification
17 requirements, Rule 61-101(g), and that one says
18 that if you submit a comment, you will get
19 mailed notice.
20 THE COURT: Do you believe that filing within the 15
21 day time period is a prerequisite to being able
22 to later file a contested case before the ALC,
23 if you're not satisfied with the ...
24 MR. HOLMAN: It's an interesting ...
25 THE COURT: ... results?

Page 62

1 MR. HOLMAN: It's an interesting question of what
2 happens if no petition is filed for review
3 within the 15 day period, and I think the
4 answer is under the statute, that, a contested
5 case hearing challenging the final Agency
6 decision through the mechanism of 44-1-60 is
7 not available, but if that's the case, then the
8 mechanism of the Constitution would be
9 available, and it would not be an exhausted
10 problem. In other words, if for some reason
11 there was some failure of this administrative
12 review process to provide a hearing to someone,
13 does that mean they get no hearing whatsoever
14 ever? I think the answer would be,
15 constitutionally would be no.
16 THE COURT: Certainly if the Department had some
17 conspiracy that it wanted to keep you in the
18 dark about it and someone, and circumvent the
19 process under the scenario that you described,
20 but the procedures are in place and one doesn't
21 avail one's self of the process, then you can't
22 make an Article 1, Section 22 argument, can
23 you?
24 MR. HOLMAN: Correct.
25 THE COURT: Okay.

Page 63

1 MR. HOLMAN: And we're not alleging a mass
2 conspiracy here.
3 THE COURT: No. I'm just ... that was just for a
4 point of illustration. I'm just saying you
5 can't have it both ways. You can't say well,
6 I'm not going to avail myself of this process,
7 this statutory mechanism that is in place, but
8 I'm going to sit on my hands or put my head in
9 the sand and then I'm going to make an Article
10 1, Section 22 argument that I'm entitled to due
11 process.
12 MR. HOLMAN: Yes, Your Honor. I agree with that
13 except to say that there are certain procedures
14 that, even though they exist, may be in
15 themselves constitutionally affirmed. So,
16 there's a nest of questions of whether or not
17 there's an ...
18 THE COURT: Well, I mean, that's a Constitutional
19 challenge of the procedural process in and of
20 itself.
21 MR. HOLMAN: Well, it could be a mass applied
22 challenge.
23 THE COURT: Yeah, yeah.
24 MR. HOLMAN: For example, for example, if the Agency
25 makes you think one thing and then does

Page 64

1 something else.
2 THE COURT: Well, that's what I was alluding to.
3 MR. HOLMAN: Okay.
4 THE COURT: Yes.
5 MR. HOLMAN: And I would say in this case there's
6 not a conspiracy so much as some ball dropping
7 that happened.
8 THE COURT: But again to my question. Do you agree
9 that complying with subpart E is a prerequisite
10 to being able to later file a contested case
11 before this Court?
12 MR. HOLMAN: Under the statute, yes, sir.
13 THE COURT: Okay. So, in essence, the Court's
14 jurisdiction is not an exhaustion problem. Of
15 course, jurisdiction is tied to subpart E. In
16 essence, you can't make the argument that well,
17 that's internal workings of the Department.
18 We're just going to see what happens, and wait
19 until the process works itself out.
20 MR. HOLMAN: Absolutely.
21 THE COURT: And then when it does, I don't like the
22 results, so now I'm going to go and attempt to
23 challenge it before the ALC
24 MR. HOLMAN: Right. There's not going to be
25 sandbagging. What I do think is important to

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.	)	Docket No. 13-ALJ-07-0056-CC
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

PORTS AUTHORITY'S REPLY IN SUPPORT OF GRANTING SUMMARY JUDGMENT 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 for Summary Judgment for Lack of Standing (Motion).[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 addressed 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.[2] *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).

Cruise Opponents take issue with this basic tenet of standing jurisprudence, yet again disputing their burden of proving standing at this stage of the litigation. Instead, Cruise Opponents rely on the Court's denial of the motion to dismiss and the same bare-bone factual assertions and conclusory statements previously submitted. *See* Resp. at 17-28. Interestingly, the Cruise Opponents previously argued for a lesser standard of review at the motion to dismiss stage and wanted to wait until summary judgment to examine standing. Cruise Opponents' Resp. to MTD, filed July 22, 2013, at 34 ("[I]t is 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)...."). However, this Court acknowledged that the Cruise Opponents must meet a higher threshold of standing at this stage of the litigation and on summary judgment than the standard applied in considering a

---

Additionally, the Ports Authority does not intend this reply to simply be a restatement of its Motion and apologizes to the Court for its length. 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.

[2] The Cruise Opponents make a half-hearted effort at claiming the Ports Authority is precluded from arguing standing because of the Federal District Court order. As this is a mere conclusory statement and none of the case citations actually support the claim, nor have the Cruise Opponents asserted how this issue was "actually litigated" for purposes of collateral estoppel, this argument should be summarily dismissed.

motion to dismiss. *See, e.g.*, Ex. 1, Sept. 6, 2013 Hrg. Trans. at 18-19 ("All right. Well, that takes me back to *Lujan*. To where it says, quote, that you can consider standing at the completing stage and the summary judgement [sic] stage and at the trial stage and in each one of those stages, the burdens and analysis of the court shifts."); Ex. 2, Jan. 9, 2014 Hrg. Trans. at 21-22 ("At each level of trial, you have a further evaluation of standing ... [a]t the Motion to Dismiss Stage, it was allegations. At the Summary Judgment Motion, it is genuine issue of material fact ... [t]he bar raises for one party and lowers for the others.").

Now that the time has come, Cruise Opponents offer nothing more than the prior allegations and averments responsive to the motion to dismiss.[3] However, the law requires a substantive and probing inquiry into standing at this stage different from the "free pass" advocated by Cruise Opponents. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court concluded that while "general factual allegations may suffice" to withstand a motion to dismiss for lack of standing, "[i]n response to a summary judgment motion

[3] 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. The Cruise Opponents rely heavily on *United States v. Students Challenging Regulatory Agency 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*]."); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 904 n.16 (Del. 1994) (holding that reliance on *SCRAP* (and *Duke Energy*) "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).

... the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" demonstrating "perceptible harm" causally connected to the challenged conduct and capable of judicial relief. *Lujan*, 504 U.S. at 560-61, 566. The initial burden of the movant may be met by merely "pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004).

Once the initial burden has been met, the non-movant "cannot simply rest on mere allegations or denials contained in the pleadings." *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). Instead, the non-movant must come forward and disclose by affidavit or other proof the "specific facts" it intends to rely on demonstrating the existence of a genuine issue of material fact for trial. *See Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); *Sides*, 362 S.C. at 255, 607 S.E.2d at 364; *see also 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) ("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).

Moreover, a non-movant's reliance on conclusory and speculative allegations or subjective belief is not sufficient to survive a summary judgment motion. *See Shupe*, 315 S.C. at 516-17, 445 S.E.2d at 655; *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. Consequently, Cruise Opponents carry the full burden of satisfying all of the elements of standing at this stage. This they cannot do. By the Cruise Opponents' own admission, the alleged injuries are not caused by

the infrastructure constructed and owned by the Ports Authority but the actions of third parties not before the Court. Furthermore, despite Cruise Opponents' attempt to evade the issue, 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 should this permit be denied. Rather, the *status quo* of unlimited cargo and cruise operations—along with everything that goes with those operations—will resume at current or increased levels.

BACKGROUND AND FACTS

The Ports Authority incorporates by reference the Statement of Facts section contained in Ports Authority's Motion. Cruise Opponents, however, in the "Factual Background" section of their Response have cobbled together a version of events replete with unsupported, misleading, and at times curious attempts to repackage existing facts on the record as new and scandalous revelations.

Much of the Response, and almost all of the background section, consists of combinations of half-truths and quotations taken out of context. However, a cursory review of the cited exhibits reveals they do not support the representations made to the Court.[4] *See Apsley v. Boeing Corp.*, Civil Action No. 05-1368-MLB, 2007 WL 3231526 (D. Kan. Oct. 30, 2007) (unpublished) (cautioning plaintiffs' counsel over making "statements that, upon inspection of

[4] The Ports Authority will not attempt to correct each and every factual inaccuracy in the Response (of which there are many); however, the following will debunk the major themes that characterize their "press release litigation" style. The Response employs rhetoric and unsubstantiated allegations that is more appropriate for press release material or public relations campaigns than legal filings, relying more on innuendo and hyperbole that has no validity and cannot withstand scrutiny in a legal proceeding.

the cited exhibits, were half-truths, misleading, incomplete, or blatantly unsupported by the cited exhibit").[5]

(1) The ad hominem attacks are unwarranted and unsupported.

The Cruise Opponents' unsupported *ad hominem* attack on the integrity of the Ports Authority and its counsel is beneath the dignity of this Court and the duties and obligations of officers of the Court. *See* Rule 3.1 (Meritorious Claims and Contentions) and 3.3 (Candor Toward the Tribunal), S.C. Rules of Prof. Conduct, Rule 407, SCACR; Rule 11, SCRCP; Rule 72, RPALC. Supported by little more than hyperbole and bluster, Cruise Opponents unleash a slew of baseless allegations, including:

> In applying for a Critical Area Permit .... [the Ports Authority's] attorney's wrote that the project should be considered mere maintenance.... Even a cursory review of [the Ports Authority's] plan and studies show this statement to state permitting officials to be ***materially false and misleading***.... Indeed, the statement appears to have been ***part of a scheme to mislead regulators*** into thinking the project was 'maintenance' when [the Ports Authority] and its agents understood that it was anything but."

Resp. at 8-9 (emphasis added).[6] As part of this "scheme", Cruise Opponents allege, "[the Ports Authority] coached its contractors" to participate in a "legal fiction" and engaged in a "lack of

---

[5] In fact, in a recent opinion of the Supreme Court, Justice Kittredge, writing for the majority, admonished a party for misrepresenting the contents of the record in an effort to portray its position in a more positive light; one that ultimately did not withstand that Court looking behind the party's representations. *See City of Myrtle Beach v. Tourism Expenditure Review Committee*, Op. No. 27356 (S.C. Sup. Ct. filed Feb. 5, 2014) (Shearouse Ad. Sh. No. 5 at 24).

[6] Notably, the Cruise Opponents are trying to litigate the "change of use" issue in its Response, but the truth is that the regulators agree with the Ports Authority that the Project is NOT a change in use. Indeed, even the Federal District Court left open the possibility that the Project could qualify for a NWP #3 for "maintenance." Specifically, the Federal Order held that the U.S. Army Corps of Engineers may still determine that the Project is eligible for general, NWP approval on remand, upon re-evaluation of the Project under the Court's mandated scope of analysis. Federal Order, Sept. 18, 2013, at 29. Further, the Federal Court expressly held that its decision should not be interpreted as reaching a conclusion as to the level of permit review

candor with regulators." *Id.* at 9, 10. However, "even a cursory review" of the truncated building modification language with which Cruise Opponents take issue demonstrates that they have cherry-picked statements out of place, out of time, and out of context to intentionally and maliciously disparage the Ports Authority and its counsel. In requesting additional information, OCRM requested that the Ports Authority provide "[d]etailed plans and an updated project description for any modifications made to building 322" explaining that "[t]his structure is located over the critical area and any modifications to the building or change in use will require authorization from the Department." Ex. 3, Ltr. of Brooks to Bellamy, SCPA 000074. The full passage from counsel's letter in response states as follows:

> Detailed plans and an updated project description for modifications to Building 322 are in preparation and will be provided to you upon completion. All work performed to renovate Building 322 is interior within the existing four walls and dimensions of the building. "The northern end of Union Pier offers an opportunity to **retrofit an existing cargo warehouse** and is the most economically efficient and environmentally sustainable solution for a new cruise terminal ... ." *Newsome letter para 5 p.2 (emphasis added.)*

---

required. *See* Federal Order at 29-30 ("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); *see also* Federal Order at 23 (holding that it "is undoubtedly true" that construction activity on a wharf like that at issue in this case, while subject to the Corps' jurisdiction, "is eligible for general [*i.e.*, NWP] permit treatment").

It is common sense that renovating a warehouse to be used as a cruise terminal changes the use from storage to passenger transport. The issue is not a change in use of the building, but a change in use of the pier and wharf, which is where the work takes place. If one renovates and places a bed in the room over the garage, the use of the particular room may change from a playroom to a guestroom, but the house is still a house—its use hasn't changed. As a part of this Project, neither the use or function of UPT changes from that which it was originally permitted.

Ex. 4, Ltr. of Shahid to Brooks, SCPA 009650. The import of the question posed by OCRM clearly was whether the building footprint would change, since it is located over the critical area, and it is that point that the letter addressed.[7]

Further, it is notable that the regulatory agencies are not complaining. They understand perfectly well the scope of the Project and what it entails. Cruise Opponents—to their chagrin—are not regulators, and their ignorance of the process should not be imputed to the regulatory agencies.

(2) Many of the Cruise Opponents' representations fail to withstand even cursory scrutiny.

While much of the Response is contradicted by facts and evidence, several examples will suffice to demonstrate the liberties taken by the Cruise Opponents. First, the Cruise Opponents allege that the Ports Authority intentionally misled state regulators as to its ownership of UPT by not expressly mentioning that Concord Street is owned by the State of South Carolina. *See* Resp. at 10-11 (citing SCPA 005257). Even a superficial reading of the documents demonstrates this allegation to be incorrect. The "Affidavit of Ownership or Control" submitted by the Ports Authority to DHEC gave the affiant the option of attaching a deed to the affidavit for purposes of describing the parameters of the property. Ex. 5, Aff. of Ownership or Control, SCPA 005257-78. Although Cruise Opponents failed to provide the Court with the entire document, these deeds

[7] Moreover, it defies belief that the Cruise Opponents now take issue with *exterior* changes to Building 322 that are meant to conform the building to match the historic character of Charleston per the Board of Architectural Review suggestions—which is the solution reached to one of Cruise Opponents' chief complaints through Ports Authority-consultation on this Project. *See* Ex. 6, E-Mail of Pres. Soc'y of Charleston, Aug. 9, 2011, Cruise Opponents 003184-85 (informing membership of the various structural changes that should be made to the proposed cruise passenger terminal to better reflect Charleston's character); Ex. 7, E-Mail of S.C. State Ports Authority, Apr. 12, 2012, SCPA 002698-99 (press release noting final and unanimous approval by the Charleston Board of Architectural Review for the proposed cruise passenger terminal).

satisfy the fundamental purpose of the representation by establishing ownership over the actual critical area, identifying Concord Street as a boundary line with respect to certain tracts of real property owned by the Ports Authority. *Id.* Moreover, as depicted in maps submitted by the Ports Authority to DHEC, Concord Street is clearly delineated and distinct from the UPT footprint. *Id.* at SCPA 005258.

Additionally, the Cruise Opponents state the following:

> SPA's counsel stated to DHEC that there were no possible potential impacts on, or interaction with, historic assets from the proposed project, even though it would be constructed next to a National Historic Landmark District. But SPA has also claimed that the new terminal would 'fit within the historic, aesthetic, and community context,' SPA 007021, a recognition that such a large facility and operation will necessarily interact with and affect the fabric and scale of what is widely recognized as the most intact Colonial city in the nation.

While no citation is provided for the Ports Authority's counsel comments, the documents produced in discovery and the public statements demonstrate that there is no adverse impact on the historic properties in Charleston as the UPT itself is not located in the historic district. Separately, the Ports Authority voluntarily submitted its design to the Board of Architectural Review (BAR) for consideration[8] to ensure that its design and appearance are consistent with and would "fit within the historic, aesthetic, and community context." Ex. 8, E-mail of Byron Miller, Aug. 11, 2011, SCPA 005388-90 (forwarding article from the Charleston Post & Courier discussing voluntary submission of the proposed cruise terminal to the Charleston Board of Architectural Review); Ex. 9, SCPA 007020-23. The inconsistency between criticizing the aesthetics of the cruise terminal's exterior while complaining about the Ports Authority's plan for

[8] As one would expect, the Cruise Opponents fought the Project at the BAR. *See, e.g.*, Ex. 10, E-mail of Katie Zimmerman, Oct. 6, 2011, Cruise Opponents 010017 (encouraging members to "attend [the Charleston Board of Architectural Review] meeting and comment on [member] concerns about the design.").

the proposed construction to fit within the general aesthetic of the area is explainable only by an unbridled disdain for the mere existence of the cruise terminal itself.

Cruise Opponents also assert that the Ports Authority dismissed concerns about cruise ship discharges. Resp. at 15 (citing SCPA 009301, 006644). What the e-mail cited by Cruise Opponents actually reveals, however, is that Carnival Cruise Lines *exceeds* legal requirements governing the discharge of waste products by voluntarily committing to discharge all waste not less than 12 miles from shore. Ex. 11, E-mail of Adame to Newsome, SCPA 009301 (stating "I have verified again with ... Carnival. Voluntarily, both of them do not discharge **anything** inside 12 miles to include ground up food waste.") (emphasis in original). Moreover, the Cruise Opponents completely ignore the regulatory scheme governing certain discharges through the applicable Vessel General Permit—for which DHEC issued a 401 Certification without conditions and which the Cruise Opponents did not challenge. *See, e.g.*, Ex. 12, March, 28, 2013 NPDES Vessel General Permit Summary. Further, the Ports Authority and DHEC entered into a Memorandum of Understanding on November 5, 2012 that establishes a "no discharge" requirement for all commercial passenger vessels (*i.e.*, cruise vessels). Ex. 13, Ports Authority-DHEC MOU dated November 5, 2012.[9]

---

[9] Pursuant to the MOU, the Ports Authority has implemented a tariff provision that states as follows:

> No sewage shall be discharged within the waters of the harbors and seaports of South Carolina by commercial passenger vessels (cruise vessels) calling at South Carolina Ports Authority facilities. Commercial passenger vessels (cruise vessels) calling at South Carolina Ports Authority facilities must at all times be in compliance with federal and international laws, regulations, and standards governing the storage, processing, and discharge of sewage. Failure to comply with the requirements of this rule may result in a non-compliant commercial passenger vessel being barred from future port calls to South Carolina Ports Authority

(3) Shore-side power is not the sole option or cure-all the Cruise Opponents portray.

The League became enamored with shore-side power in the mid-2000s when it was *en vogue* on the West Coast. *See* Ex. 14, Laura D. Gates, Charleston Post & Courier, *Conservation League Backs Responsible Port Expansion*, Jun. 23, 2008 (advocating the use of shore-power and lauding West Coast mitigation efforts). In response to the Ports Authority's position on shore-side power, Dana Beach of the League stated: "[The Ports Authority's] response, that they will install 'other more modern technologies that provide equal or greater benefits,' is nonsensical, because no other technology can eliminate this source of toxic emissions, in this case just a few hundred yards from homes and businesses, as well as the densest concentration of tourists in the state." Ex. 15, Jan. 19, 2014 E-mail of Beach. However, despite having no scientific or technical expertise, Cruise Opponents' advocacy for shore-side power is without any serious consideration, analysis, or even a rudimentary understanding of shore-side power and the appropriate considerations.

Generally speaking, shore-side power is designed to reduce nitrogen oxides (NOx) and particulate matter (PM). *See, e.g.*, Ex. 16, Cal. Air Resources Bd., *Regulatory Advisory: Ships At-Berth Regulation* (Dec. 2013) ("The At-Berth Regulation is intended to reduce emissions of diesel particulate matter (PM) and oxides of nitrogen (NOx) from auxiliary engines on ocean-going vessels while at-berth at California ports."). NOx is a concern on the West Coast because it is a precursor to the formation of ozone, which is a serious and significant issue on the West Coast. Therefore, it makes sense that West Coast ports or ports located in areas that classified as

---

> facilities. Any discharge in violation of this requirement must be reported immediately to the South Carolina Ports Authority. Reported violations may result in enforcement actions by appropriate Federal or State authorities.

Id. at § 2.1.

"nonattainment" or close thereto for ozone would choose to look at shore-side power as an alternative.

In contrast, a constituent of concern in South Carolina is sulfur dioxide (SO2), the standard for which the U.S. Environmental Protection Agency recently lowered. 77 Fed. Reg. 20218 (April 3, 2012). The Cruise Opponents state, and Katie Zimmerman of the League testifies in her affidavit, that "the use of shore-side power would significantly decrease emissions of sulfur dioxide...." Resp. Ex. J, Zimmerman Aff. ¶10. Tommie Robertson testified that she was "extremely concerned about what sulfur dioxide emissions must be doing" to her body. Resp. Ex. H, Robertson Aff. However, as even the League's own commissioned report states, shore-side power will **increase** sulfur dioxide (SO2). Resp. Ex. J, Zimmerman Aff. Ex. C (Corbett Rpt.). According to Corbett, shore-side power is expected to emit 5.18 tons of sulfur dioxide while diesel emissions using 0.1% sulfur fuel in 2015 (per law) only emit 1.95 tons. Corbett Rpt. at 9, tbl. 7. Thus, the Cruise Opponents vehemently support the use of a technology for which their consultant's report shows that, under their own assumptions, sulfur dioxide emissions in 2015 are increased by approximately 260% through the use of shore-side power.

In an attempt to evade this issue, Cruise Opponents claim that "SPA's own internal documents showed that SSP could be less costly than fuel upgrades and that SPA should consider SSP next to 'residential populations' since 'proximity matters when it comes to diesel emissions.' SCPA 008671." Resp. at 13. But the cited document consists of a survey sent by the Ports Authority to other ports that utilize shore-side power and a quote from a Port of Seattle representative responding to the inquiry. In fact, a closer look at the document reveals that the Ports Authority's shore-side power position is justified. Seattle notes that less than half of cruise ship calls utilize shore-side power. Further, Seattle notes that its power is mostly hydroelectric,

resulting in a lower power cost. Nonetheless, at the time of the survey, Seattle had "one project identified ... for shorepower" but that "issues with power availability and costs of uplands work make that project unlikely in the near term." Ex. 17, E-mail Exchange between Joe Bryant and Chamberlain, Feb.-Mar. 2010, SCPA 008670-72.

Further, Cruise Opponents claim that "[e]ven though SPA's contractor submitted drawings showing how shore power could be installed at the new terminal, SCPA 007337, and estimated the cost to be $5.3 million, SCPA 007369, SPA continued to claim publicly that SSP was infeasible and that it would not reduce air pollution beyond the reductions caused by use of less-dirty marine fuel as required under a federal Emissions Control Area ("ECA")." Resp. at 13-14.[10] The drawing illustrates that shore-side power was thoroughly evaluated and considered for the Project. Moreover, the preliminary estimate of $5.3 million for cost[11] was exclusive of the cost to retrofit a cruise ship—which adds approximately $1.5 million to the budget. Thus, under these assumptions, shore-side power would add approximately $6.8 million to a $35 million project.[12]

---

[10] Cruise Opponents previously claimed that the Ports Authority never really evaluated shore-side power. *See* Ex. 18, E-mail of Carrie Agnew, Oct. 9, 2012, Cruise Opponents 001481 (informing members of reasons why the OCRM permit should be denied, to include, *inter alia*, "[t]he SPA's lack of willingness to require—let alone consider or provide onshore power...."); *see also* Resp. at 13 (stating without supporting citation that the "SPA publically ridiculed the option of using shore side power...."). Now, having had that disproved, they have shifted to another line of attack.

[11] That prior estimate is low. The necessary infrastructure to accommodate shore-side power, including transmission lines, substations, easements, and similar facilities ensure that number will only increase.

[12] Consider that a cruise ship may be berthed for 10 hours, and would only be able to utilize shore-side power for approximately eight of those hours because of the connection and disconnection time. For a maximum of 104 vessel calls per year, at eight hours per call or use, there are approximately 832 hours per year (less than 10% of annual hours) of shore-side power use coupled with 208 hours of running engines. That is a significant cost for decreasing a few tons of NOx and PM and increasing emissions from SO2.

But an evaluation of shore-side power has many components, as noted by the issues the Port of Seattle raised as well as other ports authorities and consultants with whom the Ports Authority discussed and evaluated this option. For the Ports Authority, the analysis is conducted by looking at viable technologies from an emission reduction and cost-effectiveness standpoint. Thus, while Dana Beach and the Cruise Opponents cannot fathom any other technology, the maritime industry has been looking at other alternatives and solutions. These include exhaust gas scrubbers, selective catalytic reduction devices, and other technologies that could be installed and provide emissions reductions all the time as opposed to part-time emission reductions from shore-side power. Indeed, the U.S. Environmental Protection Agency, U.S. Coast Guard, and Carnival Cruise Lines are exploring and testing different technologies that should meet or exceed the applicable standards. Ex. 19, U.S. Envtl. Protection Agency, U.S. Coast Guard, and Carnival Cruise Lines Ltr. Agreement, dated Aug. 8, 2013.

The bottom-line is that it under the circumstances is not cost-effective for the Ports Authority to spend money on shore-side power for the emissions reductions under the circumstances.[13] In fact, the support for a potential legislative appropriation illustrates this point. Resp. at 14 (citing to a news report for a legislative proposal to fund shore-side power). This proposal for shore-side power reinforces what the Ports Authority has said all along—shore-side power is not a good investment from a purely business standpoint because the cost-per-ton for reduction is simply not justified. However, even with an appropriation for shore-side power or other technology, the analysis must include consideration of the prioritization of what pollutant is

[13] These circumstances include fuel availability, fuel prices, available technologies, changing regulatory standards, ship connections, target pollutant of concern for reduction, capital expenditure, etc. The Cruise Opponents and their consultant did not consider a single one of these enumerated factors.

of greatest concern, what the total costs are, what infrastructure is required, and how effective the technology will be at reducing emissions.

The point here is that the Cruise Opponents are actually advocating for a technology that increases the very emissions of which their members claim to be afraid. And they have no desire to educate themselves, as evidenced by Dana Beach's "my way is the only way consequences be damned" e-mail. The Cruise Opponents started with the assumption that shore-side power will solve all ills,[14] but the citizens of Charleston and the State deserve better, and they deserve a reasoned analysis, which Cruise Opponents have not done.

(4) CST relocation has been evaluated and rejected.

Cruise Opponents also criticize the characterization by the Ports Authority of Cruise Opponents' favored northern CST option as "impractical," stating:

> [The Ports Authority's] spin campaign also sought to suppress consideration of [the Ports Authority's] large [CST] for cruise operations. [The Ports Authority's] guidelines for moderators of a community meeting directed that moderators, if asked why [sic] terminal wasn't being moved to CST, simply respond that it would be 'impractical' ... Yet earlier [the Ports Authority] had completed drawings showing how a cruise terminal could be located at the south end of CST.

Resp. at 14 (citing SCPA 006907, 008297). Cruise Opponents mistake "impractical" for "impossible." Detailed capital cost estimates performed by the Ports Authority revealed locating a cruise terminal at CST would cost millions of dollars more vis-à-vis the UPT option. Ex. 20,

[14] Indeed, the Cruise Opponents, and in particular Charleston Communities for Cruise Control (C4), has announced that it will begin "an educational campaign" on "shore power at the new cruise terminal." Ex. 21; C4 Press Release, Feb. 3, 2014. Of course, the irony of C4 engaging in a campaign to "educate" anyone in light of the prior misstatements made to this Court and the public by not just the Cruise Opponents but by the C4 Executive Director Carrie Agnew, who offered demonstrably false sworn testimony, is not lost on the Ports Authority nor should it be lost on the Court.

SCPA 010732 (estimating a cruise terminal cost at CST to be between $40,126,875.00 and $43,976,875.00 versus an UPT cruise terminal cost estimate of $37,829,005.00).

Moreover, sound business judgment weighs heavily against the CST option. For example, re-locating cruise to CST[15] would result in a significant portion of the CST footprint being dedicated to cruise operations after the Ports Authority performed a multimillion dollar capital improvement project to meet burgeoning cargo demand as CST and transform it into a premier cargo facility. *See* Ex. 22, SCPA 010742. Having terminals separately dedicated to cargo and cruise also reduces the complexity of devising a necessary security apparatus for each use. *See* SCPA 010734. Further, it makes better business sense to locate an aesthetically pleasing cruise terminal and cruise passengers at UPT in proximity to the historic downtown area and its major attractions, as opposed to employing UPT for cargo operations and retaining its industrial landscape. *Id.*

Cruise Opponents have publicly called for the cruise terminal to be relocated to the northern end of CST to, among other things, protect downtown residents from air pollution, noise, and traffic. *See* Ex. 23, E-mail of J. Randolph Pelzer, Feb. 11, 2011, Cruise Opponents 002556-57 (proposal to re-locate cruise terminal to northern end of CST). However, according to the Cruise Opponents' own consultant, this moves what they claim to be a public health hazard out of a predominantly white neighborhood into a predominantly black neighborhood. Census Tract 51 includes the UPT where cruise operations currently exist and has a 2010 census population of 69% white and 27% black. Census Tract 9 includes the CST where some Cruise Opponents propose to relocate cruise operations and has a 2010 census population of 21% white

[15] The overall plan of renovating and dedicating UPT to cruise operations and public use also involved moving BMW to CST.

and 75% black.[16] A summary of the UPT and CST census tracts reveals the following profiles. Ex. 24.

2010 Census	UPT Census Tract 51	CST Census Tract 9
Population % -- White	69%	21%
Population % -- Black	27%	75%
Mean Household Income	$69,750	$35,776
Population % With Household Income > $150,000	12.9%	0.6%

Thus, the Cruise Opponents propose moving what they have alleged to be a major public health hazard out of a wealthier socio-economic neighborhood and into a poorer, majority-minority neighborhood.

By comparison, the Ports Authority thoroughly evaluated CST using sound business judgment, and after a best-interests consideration of economic and business factors important to the State as well as its citizens (across all socio-economic classes), determined that the CST is better utilized as a cargo terminal and UPT is better utilized as a cruise terminal.[17] *See* Ex. 25 SCPA 010722-46 (revealing the detailed analysis performed by the Ports Authority prior to concluding that the cruise terminal at UPT option was superior to the CST option). This business judgment is left to the sound discretion of the Ports Authority, who has been charged by the General Assembly with making such determinations. *See* S.C. Code Ann. §§ 54-3-110

[16] Miley issued two reports, one in March and one in April. The difference was that in the "revised" April report Miley omitted the census data on Tract 9 for CST. *Compare* Ex. 26, Miley & Associates, Inc., *The Cruise Industry in Charleston: A Clear Perspective* 69-77 (March 2012) *with* Ex. 27, Miley & Associates, Inc., *The Cruise Industry in Charleston: A Clear Perspective* 62-69 (April 2012), Cruise Opponents 002192-99.

[17] Here again, the Cruise Opponents initially claimed that no analysis was undertaken. *See* Ex. 28, E-mail of Katie Zimmerman, May 12, 2011, Cruise Opponents 002634-36 (forwarding an article from the Post & Courier wherein Randy Pelzer and Carrie Agnew chastise for not studying the CST option). But now that claim will shift to an analysis that was allegedly deficient merely because the result was not what the Cruise Opponents wanted.

("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.").

(5) The Permit was the product of extensive public participation.

The Cruise Opponents decry the public participation because they failed to control it, failed to control the opinions of fellow citizens, and failed to achieve the end-goal of ending cruise at UPT. This is evident in the Cruise Opponents' complaining that they did not "FEEL" involved. Resp. at 11. But public participation was a key component of the Ports Authority's approach, involving over 100 public meetings and a substantial number of personal phone calls and e-mail communications, including communications with the Cruise Opponents. *See, e.g.*, Ex. 29, E-mail of Miller (with Community Outreach Timeline attached), Dec. 12, 2011, SCPA 005688-95; Ex. 30, E-mail of Miller, Dec. 6, 2011, SCPA 010654-55.

Persisting in their bid to paint the Ports Authority as a "bully" and unresponsive to the concerns of local citizens, Cruise Opponents state:

> When citizens question [the Ports Authority's] plan and raised objections to the damage being done by cruise operations, [the Ports Authority] assured Carnival that the state agency was 'putting the hammer down' on citizens.

Resp. at 11 (citing SCPA 004606). A bit of context, however, reveals Cruise Opponents' assertion is inapposite to what was actually taking place in Charleston. When Mr. Byron Miller stated "*[w]e* are putting the hammer down," the "we" was in reference to a major press

conference held by Charleston Mayor Joe Riley, flanked by a large number of city officials, business leaders, and concerned citizens, wherein the Mayor sternly rebuked Cruise Opponents' use of the courts as a means to terminate the popular UPT redevelopment plan by judicial fiat. Ex. 31, E-mail of Miller, Jun. 14, 2011, SCPA 004606-08 (stating that "I wanted to share ... the video from yesterday's press conference. We are putting the hammer down.").[18] Far from the Ports Authority putting the "hammer down" on "citizens," what is apparent from the press conference is the attempt by the citizens of Charleston and their elected officials to put the "hammer down" on Cruise Opponents, and in particular, the South Carolina Coastal Conservation League, who the Mayor specifically chastised for going after the cruise lines merely for the purpose of putting another "trophy" on its mantle.[19] *Id.*

Trying to create their own public buzz, the Cruise Opponents created an anti-cruise conference. Entitled "Harboring Tourism" and featuring the Cruise Opponents' own Dana Beach, Blan Holman, Harry Miley, Gil Baldwin, Randy Pelzer, Evan Thompson, and Carrie Agnew serving as panelists, it was attended by a graduate student gathering research for a master's thesis on the issue of cruise in Charleston. Ex. 32, Lauren Perez Hoogkamer, *Assessing and Managing Cruise Ship Tourism In Historic Port Cities: Case Study Charleston, South Carolina*, Submitted in partial fulfillment of the requirement for the degrees Master of Science in Historic Preservation, Master of Science in Urban Planning, Columbia Univ. at 119 (May 2013). Her "key observations" from the conference were:

---

[18] The video of the press conference held by Mayor Riley can be found at http://vimeo.com/25058586. A transcript is attached as Ex. 33.

[19] Indeed, this is the same mayor that the Cruise Opponents mounted opposition against in an attempt to unseat. *See* Ex. 34, E-mail of J. Randolph Pelzer, May 25, 2011, Cruise Opponents 002929 (insinuating that Mayor Riley's reelection may be undercut if he did not support Cruise Opponents, stating "existing cruise activity is being rejected ... like a body rejecting a virus.... Former supporters of Mayor Riley have been abandoning him in droves over the [cruise] issue."). Of course, Mayor Riley was re-elected with over 67% of the vote.

- The **lack of diversity and resident representation present**.
- The **constant denigration of cruise passengers, who were considered cheap and uncultured**, despite the call to focus on the real issues of assessment and management.
- The **simultaneous denigration of the cruise industry and port and city staff** while calling for collaboration.
- **Allusions to perceived political corruption at city and state levels**; the lack of early communication with the State Historic Preservation Officer (SHPO). The South Carolina SHPO reported not being asked to weigh in on the overall situation, although Charleston preservationists reported issuing an[ ] invitation to the conference.
- The lack of transparency and willingness to negotiate at both city and state levels.
- The **lack of hard data**.

Id. at 120-21 (emphasis added). The graduate student also interviewed 21 individuals in "man on the street" interviews. Of those, 16 were "pro cruise," 2 were "anti-cruise," and 3 were ambiguous. *Id.* In other words, when Cruise Opponents did not get their way in the wider public process, they created their own mutual admiration society and hosted their own conference.

The Cruise Opponents participated in the extensive public process. Their real complaint is the citizens, elected officials, Ports Authority, and regulatory agencies were not buying what the Cruise Opponents were selling, and they failed to control the discussion and have their way. But at the end of the day, the public had the opportunity to and did meaningfully participate.

ARGUMENT

In order for Cruise Opponents to properly invoke the jurisdiction of this Court, a justiciable controversy must be present. *Byrd v. Irmo High School,* 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character." *Sloan v. Greenville County.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003) (citing; *e.g.*, *Waters v. S.C. Land Res. Conservation Comm'n.*, 321 S.C.

219, 227, 467 S.E.2d 913, 917–18 (1996)). Cruise Opponents' satisfaction of the standing requirements is a prerequisite to this Court's exercise of its jurisdiction. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998) (reasoning that lack of standing fails to invoke jurisdiction because "South Carolina courts, like the federal courts, require a justiciable case or controversy ***before*** any decision on the merits can be reached") (emphasis added); *see also Solomon v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0367-CC (April 30, 2002) (Matthews, J.); *Thomas v. S.C. Dep't of Health and Envtl. Control*, Docket No. 01-ALJ-07-0163-CC (Jun. 28, 2001) (Stevens, J.).

I. THE SOUTH CAROLINA SUPREME COURT HAS FOUND THAT THE CRUISE OPPONENTS LACK STANDING TO PURSUE A CLAIM BASED ON THEIR FAILURE TO ALLEGE SUFFICIENT INJURY-IN-FACT.

In its recent opinion evaluating the standing of many of the Cruise Opponent-organizations to bring an action challenging the continued viability of the cruise industry at UPT, the Supreme Court of South Carolina clearly and decisively rejected the allegations of injury-in-fact advanced by Cruise Opponents as insufficient to satisfy their heavy burden of proving standing. *See* Ex. 35, *Carnival Corp. v. Historic Ansonborough*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014). Based on the Supreme Court's sound analysis, as well as the Cruise Opponents' failure to demonstrate the additional prongs of standing,[20] the Cruise Opponents are bound to the holding and finding of the lack of injury-in-fact and this Court should grant the Ports Authority's motion for summary judgment on that ground.

[20] *See, infra*, Sections III and IV, discussing Cruise Opponents' failure to show their alleged injuries are traceable to the permitted activity or are likely to be redressed by a decision of this Court.

The Supreme Court's opinion gives this Court a clear blueprint for analyzing the assertions of injury-in-fact in this contested case.[21] The action dismissed on standing grounds by the Supreme Court was filed by many of the same Cruise Opponents and sought an order permanently enjoining cruise operations at UPT. The allegations of harm advanced by Cruise Opponents in the "pleadings" of this contested case (*i.e.*, the request for contested case and prehearing statement), as reinforced in the affidavits submitted, are identical to the allegations the Supreme Court found to be insufficient for Cruise Opponents to maintain their declaratory judgment. The allegations included, verbatim in most circumstances, 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. *See* Motion, Ex. 73, First Am. Compl.

By way of example, in the Supreme Court case, Cruise Opponents alleged, *inter alia*, that "[t]he influx of thousands of passengers, crew, and support personnel (and associated traffic) ... cause major traffic congestion downtown and the closure of public roads," *Id.* at 5, ¶10(B), and that "[t]he vessels emit noise pollution, including broadcast announcements and music, and the burning of diesel fuel emits visible particulate soot from ship funnels—all adjacent to the Old and Historic District" ¶10(C). Meanwhile, in their contested case request to this Court, Cruise Opponents allege nearly identically that they "will demonstrate that cruise ship operations

[21] This Court previously indicated: "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, Dec. 2, 2013, at 15 n.7. However, on January 22, 2014, the South Carolina Supreme Court resolved this question against these Cruise Opponents on the very same grounds asserted in this case.

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...." Request for Contested Case at 12; *see also* Resp. Ex. F-M (alleging same). The attached comparison of claims demonstrates this point in greater detail, providing the Court an assessment of the injuries alleged in the Supreme Court action vis-à-vis the allegations advanced by those same Cruise Opponents in this contested case.[22] *See* Ex. 36, Comparison of Allegations.

The Supreme Court's opinion matter-of-factly discards all of Cruise Opponents' allegations, characterizing the lot as generalized grievances suffered by the public as a whole and lacking the personal and particularized required set forth in the *Lujan/Sea Pines* test.[23] The opinion systematically addresses each of Cruise Opponents' allegations and finds that, ***even if***

---

[22] The claims dismissed by the Supreme Court include:

- "Cruise ships such as the Defendant's *Fantasy* also emit visible particulate soot and other pollutants, including nitrogen and sulfur oxides, which are harmful to human health when inhaled and are deposited into the surrounding waters and land."
- "The influx of thousands of passengers, crew, and support personnel (and associated traffic) ... cause major traffic congestion downtown and the closure of public roads."
- "Home-porting cruise operations at an industrial scale could jeopardize the integrity, setting, and context that led to National Register designation and place maintenance of National Register status at risk."
- "Cruise operations downtown and ineffective management of them cause, among other things, traffic congestion, pollution emissions, road closures, large crowds, loud noises, and obstructed views that are incompatible with the area's historic setting, scale, and residential character and impact health and the environment."

Carnival Corp., Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014).

[23] The Supreme Court's opinion tracks the skepticism the Justices displayed during the oral argument of the case, as portrayed in the Ports Authority's Motion. Ex. 68, Hrg. Transc. The Justices repeatedly questioned Cruise Opponents' counsel regarding the sufficiency of their allegations of injury-in-fact to meet the heavy burden of proving standing. *Id.* at 21-22 (stating "those are not the sort of things that result in particularized damage" and instead amount to "individuals of the association [alleging] generalized damages that are the product of living in an urban environment").

the allegations are true, they fail to allege a personal harm that is independent of that suffered by the public generally. Specifically, the Supreme Court held:

> Lacking from these allegations is any claim that Plaintiffs themselves or their members have suffered a particularized harm. All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the City of Charleston and therefore, Plaintiffs fail to establish the first element of standing.

Ex. 35, *Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014). As the Court notes, the Cruise Opponents' members are in no different position than every single individual that lives, works, drives, visits, or plays in Charleston.

Suffering from the same defect here, the Cruise Opponents' failure to articulate a personalized injury is similarly fatal in this contested case.[24] Because the allegations of injury-in-fact mirror the allegations found to be inadequate by the Supreme Court, so to have Cruise Opponents failed to satisfy the initial prong of the test for standing, and this Court is bound by that determinative finding.[25] Notably, the Cruise Opponents cannot satisfy this injury component of standing regardless of whether there is any dispute about the underlying facts, such as shore-

---

[24] As discussed below, not only do Cruise Opponents fail to allege a concrete and particularized injury distinguishable from the harm suffered by the general public, their allegations also fail to show how their allegations are not conjectural or hypothetical, given that they are tied—if they are to be believed—to current conditions with existing cruise operations as opposed to any actual or imminent injury deriving from the permitted conduct.

[25] Notably, the Supreme Court found that the allegations of the individual members of Cruise Opponents were insufficient to confer standing, which in turn meant the plaintiff organizations lacked standing. While noting that Cruise Opponents must satisfy the additional hurdle of demonstrating associational standing to bring the claims on behalf of its members, the Supreme Court did not even reach this analysis in its opinion, finding the failure of Cruise Opponents' members to demonstrate injury-in-fact to be dispositive. *See Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014).

side power, alternative locations, and air and water emissions and discharges. The inability, even taking the claims as true, to distinguish these claims from those common to general public renders any dispute about them irrelevant and immaterial. Quite simply, complaining about urban living does not constitute adequate grounds for standing, as the Supreme Court held.

II. THE INJURIES ALLEGED BY THE CRUISE OPPONENTS ARE INSUFFICIENT TO CONFER STANDING.

A. The injuries alleged are general grievances applicable to the general public and are not concrete and particularized to the Cruise Opponents or their members and complain of cruise operations generally.

The Cruise Opponents have failed to identify an injury-in-fact that results from the permitted activity. Instead, the Cruise Opponents complain of cruise operations—everything but the permitted activity of driving pilings. Even looking at the broader picture of the terminal, the injuries complained of are third-party injuries—which is why Cruise Opponents' counsel said they did not sue the Ports Authority in their civil suit. Motion Ex. 75, Donna Tunney, "Southern Environmental Law Center's Blan Holman" *Travel Weekly* (Aug. 29, 2011), at http://www.travelweekly.com/print.aspx?id=232209.

Each of the assertions and claims are generalized grievances rather than the personal and immediate prejudice of a concrete and particularized injury required of individuals claiming standing. The Cruise Opponents fail to advance any claim that is neither "of general interest common to all members of the public," *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at, 291 (citing *Baird*; *Citizens of Lee County*), nor part and parcel of Cruise Opponents decision to live in the urban environment that is the Charleston peninsula. *See Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014) (rejecting these same claims on the grounds that they were generalized grievances).

Far from a concrete injury-in-fact, none of the harms described by the Cruise Opponents are either personal or particularized, but instead describe a natural by-product of living in the congested urban environment of the Charleston peninsula *today* and one common to everyone, not organizational membership. These harms fail to derive from the permitted conduct and fail to articulate a 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).

Indeed, judgment for the Ports Authority is mandated by the South Carolina Supreme Court's recent opinion. The Supreme Court summarized the appropriate standard that this Court must apply.

> In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way. While arising from the different context of a challenge to government action, in *Lujan* the United States Supreme Court distinguished generalized injuries from those injuries sufficiently particularized as to create standing, writing: "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not" possess standing. *Lujan,* 504 U.S. at 573–74, 112 S.Ct. 2130.

Carnival Corp., Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014) (internal citations omitted). Not a single allegation or complaint from the Cruise Opponents in their request for contested case, prehearing statement, or affidavits asserts anything that would not apply equally to every citizen, every visitor, and every person occupying space on the Charleston peninsula, and would not apply just to cruise operations, but could also apply to the Spoleto Festival, commercial and industrial manufacturing plants on the river, the BMW operations at Columbus Street Terminal, and the Boeing operations in North Charleston. Breathing ambient air

and occasional traffic is a consequence of living in an urban environment. The Supreme Court has already dismissed the Cruise Opponents' claims as general grievances—this Court must do the same. *See infra* n.22 and Ex. 36, Comparison of Allegations.

B. The proffered affidavits fail to establish any of the elements of standing.

The Cruise Opponents re-submitted five affidavits of individual organization members and one new affidavit in an attempt to shore up their standing arguments. However, the affidavits are merely supplemental legal briefing, full of conclusory statements, legal conclusions, opinion, and speculation.[26] Most of the content of the affidavits is inadmissible and cannot be considered by this Court. Only one of the affidavits (Zimmerman) states that it is based on the affiants' personal knowledge or even upon "information and belief." *See* Rule 56(e), SCRCP (requiring affidavits to be "made on personal knowledge" and "set forth ***facts*** ... admissible in evidence."), rendering the other five affidavits improper and therefore unavailable for this Court's consideration. Nevertheless, the affidavits merely set forth issues the affiants allegedly have experienced in the past or are presently experiencing due to the existence of the cruise industry in Charleston in a transparent attempt to manufacture sufficient questions of fact to survive a motion for summary judgment and continue the litigation strategy of delay and harassment through a continuation of this suit. *See Germann v. New York Life Ins. Co.*, 286 S.C. 34, 39, 331

[26] 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 that "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). Contrary to this fundamental requirement for affidavits, Cruise Opponents offer wholesale testimony and opinion in their affidavits as to the merits of their claims without so much as an attempt to qualify the affiants to offer the expert opinion testimony. And, in fact, not a single affiant is qualified to offer expert opinion or testimony and all rely on hearsay statements. The affidavits are inadmissible, improper, and lack credibility.

S.E.2d 385, 388 (1985) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment."); *see also Dawkins v. Fields*, 354 S.C. 58, 64-66, 580 S.E.2d 433, 436-37 (2003) (affirming trial court's decision to properly refuse to consider legal arguments and conclusions found in affidavit, even though affiant was expert)).

i. Affidavits of Dodd, Lane, Robertson, Gates, and Morganello

The individual affidavits provide no evidentiary basis or valid testimony. Aside from the gross infirmities set forth above, they largely are based on (1) feelings, (2) future speculation and conjecture, or (3) a regurgitation of someone else's work product. None of these are facts within personal knowledge. Moreover, the allegations in these affidavits are common to all members of the public, and one could change the name and the allegations could be attributable to anyone. Everyone has been delayed in traffic in downtown Charleston at some point.

The long and short of it is that these affidavits were drafted with the sole goal of trying to manufacture standing. These claims rely not on personal knowledge or personal injury, but are based on inadmissible hearsay and seek to make an unsupportable opinion enough to satisfy the heavy burden of making factually sufficient and supported claims and allegations to continue to pursue a crusade against cruise. Relying on inadmissible evidence and "because someone told me" is not a factual basis for an affidavit, much less a basis for standing. Accordingly, these affidavits and testimony are inadmissible and cannot be considered, and even if considered fall far short of creating standing.

ii. Affidavit of Katie Zimmerman

Following the "press release litigation" strategy of unsupported public relations wrapped in the guise of a legal filing, the Cruise Opponents submit an additional affidavit of the League's

Program Director Katie Zimmerman. However, Zimmerman's affidavit quickly reveals itself to be more of the same, opining on issues beyond the scope of her personal knowledge and competency and drawing self-serving conclusions and half-truths[27] to prolong this litigation.

Further, while Zimmerman's affidavit provides a good background of the League's efforts impose its vision of the Charleston peninsula on the rest of its inhabitants, it does nothing to satisfy Cruise Opponents' burden of demonstrating standing. In discussing the issue of water quality, Zimmerman describes and attaches several reports that, in addition to clearly being hearsay and beyond the scope of Zimmerman's personal knowledge[28] and background,[29] purport

---

[27] For instance, Zimmerman states that "[t]he SPA has proposed a new cruise terminal in the heart of densely-populated and heavily visited downtown Charleston...." If the Court did not know better, it might think the Ports Authority was proposing to build the new cruise terminal on a vacant park in the middle of the City as opposed to a renovated warehouse on existing Ports Authority property on an existing operating marine terminal that has served cruise operations continuously since 1973 and has accommodated passenger vessel calls for at least 100 years. *See* Motion, Ex. 16, Lehman Aff. ¶6; Ex. 12, Newsome Aff. ¶7.

[28] As an example, Zimmerman states that "DHEC did not engage in [a water quality analysis] in any detail and failed to consider the serious environmental impacts of cruise operations, as well as practical alternatives that could significantly reduce these impacts and protect Charleston's environmental and historical resources." Zimmerman Aff. at ¶12. Clearly, this paragraph is aimed at correcting Cruise Opponents' failure to challenge the 401 Certification component for the Project as a part of the issued critical area permit. *See* Order Denying Motion to Vacate, Dec. 20, 2013; Ports Authority Mot. for Partial Summ. Judg. (401). However, even beyond that motivation, this sort of blanket speculation regarding DHEC's actions is wholly conclusory, purports to make a legal conclusion for the Court, and is far beyond the scope of Zimmerman's personal knowledge, who was not privy to DHEC's considerations with respect to this Permit. Indeed, this type of assertion of ignorance is a hallmark of the League and Cruise Opponents, who seek to build arguments based on lack of knowledge.

[29] Later, Zimmerman reports that "our calculations show that when the Carnival Fantasy is idling in port for one day, even if it were burning the cleanest required fuel, it still emits the sulfur dioxide equivalent of more than 34,000 idling trucks." Zimmerman Aff. at ¶10. Conveniently, Zimmerman fails to tell the Court who is responsible for doing "our calculations" (not to mention their qualifications), on what the calculation is based, or what and whose data was used to substantiate such a clearly conclusory and self-serving statement. Zimmerman is clearly unqualified to make the calculation, but the claim of 34,000 trucks is good public relations, so the Cruise Opponents have spouted that claim elsewhere, but it has no place in this proceeding and is unsupportable hearsay.

to describe issues involving the water quality and the cruise industry as a whole. Zimmerman Aff. at ¶9. Of course, these are generic reports that offer no discussion or connection with any cruise industry in Charleston. In fact, Zimmerman ignores the 2013 Vessel General Permit and the Ports Authority's tariff provision that bans discharges by cruise vessels. Thus, the affidavit is incomplete and fails to address Charleston issues. Therefore, the reports attached to her affidavit are irrelevant to this contested case and immaterial to the personal and particularized requirement of injury which Cruise Opponents are required to demonstrate.

Zimmerman attempts to refute the affidavit of the Ports Authority's own Vice-President and Director of cruise operations at UPT, Peter Lehman, through her decidedly unscientific computation of the number cargo ships that called on UPT in 2012—derived from her estimation of cargo ships she could see from her office and a check of news articles posted in the *Post and Courier*. A non-scientific survey of a handful of news reports is what serves as "scientific research" for Zimmerman and the League. Indeed, Cruise Opponents claim this is "fact-checking" and assert Zimmerman "found" something, despite even Zimmerman saying the news reports were incomplete. Resp. at 25. Again, while reading a newspaper may be research for the League and Cruise Opponents and is part of the "press release litigation" style, it hardly constitutes admissible evidence and is unworthy of this Court's consideration. And notwithstanding the obvious unreliability of Zimmerman's estimation, the line of reasoning and penultimate statement that "[t]hus, current cargo emissions are already far below what they were even five years ago at Union Pier, and emissions would be lowered even further if cruise ship activity were to transfer to a different viable location," ¶11, clearly misses the point of Lehman's affidavit and demonstrates a lack of fundamental understanding of business and strategic planning. The Ports Authority has never pointed to 2012 as the baseline level of cargo operations

at UPT; as pointed out by Zimmerman, the Ports Authority had already begun to relocate most of the existing cargo operations, including BMW Ro-Ro operations, to other terminal facilities as part of the overall UPT renovation plan. Instead, should the federal and state permits for the Project be denied, the Ports Authority will continue to maintain cruise operations at UPT, *see* Lehman Aff. at ¶¶9-11, and cargo operations will be brought back to UPT and conducted at their operational capacity.

Everything in Zimmerman's affidavit is created for the purpose of satisfying standing, but cannot withstand even cursory review. It relies wholesale on hearsay and inadmissible evidence. Zimmerman is unqualified to discuss water or air pollution, and there is hardly a sentence that is within Zimmerman's personal knowledge. The Zimmerman affidavit is facially deficient and inadmissible and serves no useful purpose and cannot be considered by the Court.

III. THE INJURIES ALLEGED BY CRUISE OPPONENTS ARE NOT TRACEABLE TO THE PORTS AUTHORITY'S PERMIT.

To the extent that Cruise Opponents' generalized 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. Notwithstanding a finding of injury, a claim will still fail the *Lujan/Sea Pines* test 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. *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 as a cruise facility and is wholly divorced from the injuries alleged by Cruise Opponents.[30] The Response offers no substantive rebuttal to this fact.

A. The Cruise Opponents admit the injuries are caused by a third-party not before the Court.

In the case before the South Carolina Supreme Court, filed by several of these same Cruise Opponents, the Plaintiffs did not sue the Ports Authority, despite alleging the same injuries to person and property asserted here. Instead, ***Cruise Opponents averred through pleadings that the injuries were solely the result of the Carnival Cruise Lines***. Now, conveniently, Cruise Opponents attest to this Court that the injuries are the result of the permitted activity of the Ports Authority.

Indeed, the Cruise Opponents offer no rejoinder to their admission that they have no evidence tracing their injuries to the Project,[31] and have acknowledged and admitted that the Ports Authority is not the direct cause of any injury. *See, e.g.*, Motion Ex. 45, Katie Zimmerman E-Mail, Nov. 26, 2012, Cruise Opponents 009334 ("[W]e weren't able to narrow [the soot samples] down to cruise ships...."); Motion Ex. 74, Ltr. of Pat Jones, dated April 16, 2012, DHEC-SCPA 00721-22 ("***Blan Holman of the [SELC]*** (and acting for the plaintiffs in a lawsuit against Carnival) attended the May 2011 Historic Ansonborough Neighborhood Association (HANA) meeting and ***when asked if his organization had any proof or evidence linking***

[30] 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.

[31] Diesel emissions emanate from trucks, cars, cargo ships, container ships, cruise ships, tug boats, locomotives, and any other number of sources. The Cruise Opponents cannot and have not shown any semblance of reason or rationale that shows that the percentage of emissions attributable to the cruise operations is the cause of the Cruise Opponents' members' fears and concerns. They also have retained consultants, who have failed to offer any opinion on traceability or causation. They have named medical doctors as witnesses, who have failed to offer any opinion on health effects or traceability or causation. They lack even a mere scintilla of evidence to substantiate their claims.

Carnival ships to water or air-pollution, answered 'no.'") (emphasis added); Motion Ex. 75, Donna Tunney, "Southern Environmental Law Center's Blan Holman" *Travel Weekly* (Aug. 29, 2011), at http://www.travelweekly.com/print.aspx?id=232209 (quoting Blan Holman as stating that the Ports Authority was not sued because "The Carnival operation is the one directly causing the injuries to the plaintiffs. They are the cause...."). There is no evidence, just mere conjecture and speculation, and nothing in the Response changes this.[32]

A. The Cruise Opponents' failure to address the Bailey case is instructive.

Cruise Opponents fail to distinguish the standing analysis in *Bailey v. South Carolina Department of Health & Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). Notably, 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, 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*, Docket No. 07-ALJ-07-0583-CC (July 23, 2008) (Geathers, J.). This is the exact same argument

[32] In fact, Cruise Opponents fail to address, ***at all***, the Ports Authority's argument that the alleged injuries, if they exist at all, are attributable to third parties not before the Court. In doing so, Cruise Opponents ignore instructive case law from the United States Supreme Court and Fourth Circuit Court of Appeals holding that, where the causal link between a governmental action and the alleged injuries is caused by an independent third party, causation is lacking and there exists no standing. *See infra* § III (citing *Simon, Allen, Florida Audubon Society*, and *Doe v. Obama*). Moreover, because Cruise Opponents failed to address this argument, the Court may view it as conceded and may therefore grant summary judgment on that ground alone. *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.").

Cruise Opponents make in this contested case. The Court in *Bailey* did not accept the petitioner's arguments, 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.*

The Cruise Opponents offer a single sentence in opposition to the application of Bailey: "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." Resp. at 33. However, 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 (emphasis added); *see also Bailey*, 07-ALJ-07-0583-CC ("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 critical point that highlights the similarities between *Bailey* and this permit challenge: 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* Motion Ex. 16, Lehman Aff. ¶¶9-11. Under the precedent of *Bailey*, Cruise Opponents' contention that denying the Permit will redress alleged harms arising from expanded cruise operations is fatally undercut and Cruise Opponents have failed to satisfy their burden in proving traceability to the Ports Authority's actions.

B. The reliance on *Duke Energy* is misplaced.

Similarly, Cruise Opponents' continued[33] 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). 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.[34] Nevertheless, the United States Supreme Court departed from the *Duke Power* standing analysis in *Lujan*, applying a much stricter standard for causation and redressability.[35] The South Carolina

---

[33] The Ports Authority addressed Cruise Opponents' misguided reliance upon the *Duke Power* case at length in its briefing on the Motion to Dismiss and incorporates those arguments in full herein. In short, *Duke Power* is no longer good law on standing, and the facts are clearly distinguishable from those in this case.

[34] Here, the 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.").

[35] 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

Supreme Court's adoption of *Lujan* is binding on this Court. Thus, Cruise Opponents must comply with the "irreducible constitutional minimum of standing" set forth in *Lujan*. This they cannot do. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

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 grant summary judgment against the 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. The Cruise Opponents offer no substantive response, instead making an unsupportable claim that if they are "successful in challenging the new pilings, the terminal will likely not be built." Resp. at 31. However, Cruise Opponents' alleged injury is not the installation of the new pilings, but the supposed injuries from traffic congestion from tourists' vehicles and air emissions from the cruise ships.[36] The existing terminal will continue to operate, resulting in the same alleged injuries as today.[37] *See*

'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").

[36] 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.

[37] The Cruise Opponents claim that no work can be performed at the existing terminal without a permit, but offer no support or citation for that position. Despite Cruise Opponents' claim that the Ports Authority has offered no evidence to the contrary, the Ports Authority has

Motion Ex. 16, Lehman Aff. at ¶¶9-11. While the Ports Authority has proffered sworn testimony and evidence to support this inevitable fact, the Cruise Opponents offer no rejoinder other than a single unsubstantiated and conclusory statement that "if the new cruise terminal is not built, SPA's existing terminal will be out of compliance with the law and operating unlawfully." Resp. at 32. They cite no law that will be violated, and earlier in the Response admit that no law is being violated today because compliance with the ADA relates only to new construction. Resp. at 10. Here again, the Cruise Opponents make unsupportable and conclusory claims for the sole purpose of trying to say whatever they think this Court needs to hear to continue litigation of this case.

V. 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*

---

provided a copy of the original Budget & Control Permit for construction and operation of the cruise terminal, and the statute cited by the Ports Authority specifically provides for grandfathering of existing uses and the continuation of such uses without further permitting, which has been interpreted to mean subsequent construction contemplated in the original permit. *See* S.C. Code Ann. § 48-39-130(C); *S.C. State Ports Auth. v. S.C. Coastal Council*, 270 S.C. 320, 322-23, 242 S.E.2d 225 (1978); 1989 S.C. Op. Att'y Gen. 254, No. 89-94 (Sept. 20, 1989).

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.* In fact, in oral argument before the Supreme Court, Cruise Opponents' counsel admitted the organizations had no injury to person or property, as none of the organizations were adjacent or neighboring property owners, and instead sought to represent the rights of the organization members, some of whom they contended were property owners. *See* Motion, Ex. 68, Hrg. Trans. at 24:18-25, 25:1-10 (Nov. 19, 2013) Instead, the Cruise Opponents—all organizations—seek to establish standing through its alleged 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 organizations 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 grant the Ports Authority summary judgment in this case on those grounds. *See, e.g., Kissi, Ziino, and In re Paoli,* cited *supra*, n.32.

The affidavits make allegations about 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 their own personal property value may be reduced. However, in light of the proposed capital improvement plan, many people, including members of these organizations, will likely 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* Motion Ex. 16, Lehman Aff. Ex. B. 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 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, will likely be better off, 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.[38]

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.[39] *See Citizens for Lee Cnty., Inc. v. Lee Cnty.*, 308 S.C. 23, 29, 416 S.E.2d 641,

---

[38] 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." Motion Ex. 25, Ltr. of Theodore D. Stoney, Jr., DHEC-SCPA 001085-87.

[39] 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. 37, Ltr. of S.D. Thomas, M.D. to DHEC, DHEC-SCPA 000731-32.

645 (1992) ("Moreover, such imminent prejudice 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."); *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 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. *See* Ex. 35, *Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014). (dismissing Cruise Opponents exact claims on the grounds that there was no injury-in-fact).

VI. THE CRUISE OPPONENTS FAIL TO ESTABLISH STATUTORY STANDING OR THE EXISTENCE OF A PUBLIC IMPORTANCE EXCEPTION.

The Court should note at the outset that Cruise Opponents have not previously argued that their standing to bring this contested case derived solely from a statute, and they do so for the first time in their Response. *See* Resp. at 39. Neither have Cruise Opponents argued that the public interest exception should be applied by the Court to remedy their inability to meet the stringent *Lujan/Sea Pines* constitutional test for standing.[40] Accordingly, Cruise Opponents are

[40] Cruise Opponents contend they "properly made these arguments in briefing on SPA's misguided motion to dismiss on standing, and those arguments are incorporated herein in their entirety as if set forth in full." **Cruise Opponents do not offer a citation to these arguments, however, because this representation is false.** Cruise Opponents did not even reference statutory standing or the public interest exception in their previous briefing on the Ports Authority's Motion to Dismiss, and there is nothing to incorporate. In their response to the

procedurally barred from arguing that they have standing to bring this contested case based on a statute or the public interest exception. *See Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 546, 725 S.E.2d 698, 701 (2012) (citing *Hurst v. Sumter County,* 189 S.C. 376, 1 S.E.2d 238 (1939) (noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived)); *see also Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) (holding that in order to be timely, an objection usually must be made at the earliest possible opportunity); *Georgetown County League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 360, 713 S.E.2d 287, 293 (2011) (holding that justiciability issues, including a party's standing, are subject to rules of preservation) (citing *S.C. Dep't of Transp. v. Horry County*, 391 S.C. 76, 705 S.E.2d 21 (2011)).

A. Statutory Standing

Aside from the fact that Cruise Opponents have waived the opportunity to argue statutory standing in response to this Motion, Cruise Opponents essentially concede the concept's inapplicability to this contested case, putting forward a half-hearted and conclusory assertion of the concept's applicability with no supporting analysis or case law. However, the Court clearly held that

> [i]f 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.

Motion to Dismiss, Cruise Opponents set forth and delve directly into the three-pronged *Lujan/Sea Pines* test for standing, which should be viewed as a direct concession that neither statutory standing or the public interest exception apply to Cruise Opponents' challenge. Indeed, the only time Cruise Opponents have addressed the alternatives to constitutional standing was in footnote 1 of Cruise Opponents' supplemental brief on standing, where they list statutory standing and the public interest exception as alternatives, but do not even argue that they apply in this case.

Order, Dec. 2, 2013, at 12 n.6. Despite the Court's admonition, Cruise Opponents' "argument" that statutory standing is conferred by S.C. Code Ann. § 44-1-60 is confined largely to cutting and pasting the Court's Order setting forth the applicable areas of consideration. *Compare* Resp. at 3, *with* Order, Dec. 2, 2013, at 11. Rather than propose meritorious difference, Cruise Opponents instead suggest, and again without support, a hybrid approach should apply which, if it is properly understood by the Ports Authority, would involve a Court determining whether injury-in-fact is present, but then discarding that additional constitutional requirements of causation and redressability.[41] *See* Resp. at 3-4. However, as the Court clearly recognized in its Order, this hybrid approach makes no sense, as "a statute can confer standing even though it does not exist via the constitutional test." Order, Dec. 2, 2013, at 10; *see also Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012) ("The traditional concepts of constitutional standing [Lujan test] are inapplicable when standing is conferred by statute.").

Notwithstanding the Cruise Opponents' failure to articulate an argument in support of statutory standing, in South Carolina a person qualifies for "affected person" status when they demonstrate all three required parts of the traditional *Lujan* test for standing. In form and practice, the concepts of statutory and traditional constitutional standing in this setting are one and the same. Under our State's statutes, regulations and established case law, the requirements for standing as an "affected person" pursuant to statute and regulation are synonymous with the

[41] This is part and parcel of Cruise Opponents' strategy to convince the Court to ignore their obligation to fulfill the second and third prongs of constitutional standing, *see, e.g.*, Cruise Opponents Suppl. Br. at 12 (wherein they attempt to create a "special redressability standard" out of whole cloth that would do away with the requirement altogether in favor or focusing on injury-in-fact), in favor of a lower bar requiring only injury-in-fact. Cruise Opponents continue to advance this theory in an effort to compensate for and mask the clear inadequacies of the allegations and advanced, as well as the clear and uncontroverted testimony and documentation submitted by the Ports Authority.

"constitutional standing" requirements identified in *Lujan*.[42] *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007) (concluding that a person "adversely affected" by a permitting decision pursuant to former S.C. Code Ann. § 48-39-150 must satisfy the requirements of "constitutional standing" set forth *Lujan*); *O'Sullivan v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0491-CC (Jan. 18, 2002) (Geathers, J.) ("The requirement that a person bringing a contested case be 'adversely affected' by the agency's decision is essentially synonymous with traditional standing requirements.").

Section 44-1-60 of the South Carolina Code provides that an "applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing...." However, as the Court noted in its December 2 Order, the application of the term "affected" does not, without more,[43] confer standing on the person. To the contrary, pursuant to S.C. Code Ann. Regs. 30-6.A, "[a] [DHEC] decision involving the issuance, denial, suspension, or revocation of a permit or certification may be appealed by ***an affected person with standing*** pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39." (emphasis added); *see also* S.C. Code Ann. § 48-39-150(D) (The Coastal Zone Management Act providing that "a person adversely affected by the granting of the permit has the right of direct appeal from the decision of the administrative law

[42] DHEC similarly has averred that an "affected person" means a person meeting the elements of the *Lujan* standing test as adopted by our Supreme Court in *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). *See* Motion Ex. 67, *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 07-ALJ-21-0107-CC, -0108-CC, Hrg. Trans. at 37 (July 2, 2007) ("[G]enerally the Department's view would be that unless otherwise defined by statute or regulations [the meaning of affected person] would be the equivalent of judicial standing....").

[43] Curiously, Cruise Opponents initially agree with the Court's analysis, but then go on to propose the unsupported hybrid approach described above. *See* Resp. at 3-4 ("**The Community Groups agree**, but would respectfully submit that the statutory term "affected person" turns more on the injury element than causation and redressability....") (emphasis added).

judge pursuant to Section 1-23-610. An applicant having a permit denied may challenge the validity of any or all reasons given for denial.").

This Court has recognized the distinction between an "affected" person and the additional inquiry into whether a legitimate case or controversy exists in innumerable contested cases. *See, e.g., City of Denmark v. S.C. Dep't of Health & Envtl. Control*, Docket No. 06-ALJ-07-0926-CC (Aug. 8, 2007) (Matthews, J.) (dismissing case for lack of standing) (internal citations omitted) ("South Carolina Courts routinely hold that a party must not only be an affected person to obtain a contested case hearing, but must also have standing.... Initially, the [petitioner] must satisfy the general standing requirements required for all litigants."); *Sanders v. S.C. Dep't of Health & Envtl. Control*, Docket No. 00-ALJ-07-0357-CC (March 20, 2001) (Anderson, J.) (dismissing case for lack of standing) ("A fundamental prerequisite to institute an action is the requirement that the Plaintiff have standing."); *see also Bryant v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0350-CC (Jan. 10, 2002) (Stephens, J.) ("Not everyone is entitled to a contested case hearing; rather, only a 'proper party' may obtain such a hearing.... A person is not entitled as of right to be admitted as a party without first having 'standing.'").

In *O'Sullivan*, this Court concisely distilled the concept of standing in the context of a permit challenge under the same statutory and regulatory regime:

> "A party may appeal an administrative decision if he has standing to sue." 6 Jacob A. Stein et al., *Administrative Law* § 50.01, at 50-3 (Supp. 2000). Accordingly, a person may not challenge OCRM's decision to issue a permit unless that person is "adversely affected" by the granting of the permit and thus has standing to bring the challenge. S.C. Code Ann. § 48-39-150(D) (Supp. 2000); 23A S.C. Code Ann. Regs. 30-6 (Supp. 2000). In analyzing questions of standing, the South Carolina Supreme Court has adopted the three-prong test enunciated by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001).

O'Sullivan, Docket No. 01-ALJ-07-0491-CC (dismissing case for lack of standing).[44]

In sum, and as implicitly conceded by Cruise Opponents, the statutes and regulations applicable to the Permit in this contested case do not provide a mechanism for statutory standing separate and apart from the full, three-part traditional constitutional standing test set forth in *Lujan/Sea Pines*. Having failed to satisfy the "***stringent*** standing test" articulated in *Lujan*, Cruise Opponents cannot now create, and then hide behind, their own convenient definition of standing. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (emphasis added).

B. Public Importance Exception

Moreover, notwithstanding Cruise Opponents' failure to argue that their challenge is of such importance to the public that standing should be conferred to them on the basis of a public importance exception, the exception is inapplicable to the issues presented by Cruise Opponents and the Supreme Court considered and rejected the public importance exception on the same allegations presented here. Under longstanding case law, courts of this State have recognized a "public importance" exception to the general standing requirements. *See ATC*, 380 S.C. at 198, 669 S.E.2d at 341; *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007); *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). The public importance exception to standing is used by South Carolina courts to confer standing on a plaintiff who otherwise does not meet the *Lujan/Sea Pines* test where "an issue is of such public

[44] *See also Upstate Forever v. S.C. Dep't of Health and Envtl. Control*, Docket No. 10-ALJ-07-0919-CC (July 14, 2011) (Anderson, J.) (employing the *Lujan* test to determine whether petitioners had standing to challenge a DHEC decision); *Murphy v. S.C. Dep't of Health and Envtl. Control*, Docket No. 11-ALJ-07-0406-CC (Feb. 9, 2010) (Anderson, J.) (citing to S.C. Code Ann. Regs. 61-9.124.19(a) containing language analogous to S.C. Code Ann. Regs. 30-6.A and applying the *Lujan* test to determine whether petitioners had standing); 2 *State Envtl. L.* § 14:7 (2013) (equating the constitutional standing test in *Lujan* to the requirement that an administrative petitioner must be an "affected," adversely affected," or an "aggrieved party").

importance as to require its resolution for future guidance." *Davis*, 372 S.C. at 500, 642 S.E.2nd at 741. Where a court determines a case presents issues of important public interests standing may be conferred "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." *Davis,* 372 S.C. at 500, 642 S.E.2d at 741 (citations omitted).

However, public importance standing is not haphazardly recognized, but instead requires a "cautious balancing of the competing interests presented." *See ATC*, 380 S.C. at 198, 669 S.E.2d at 341. Here, no issues of public importance exist that would warrant the Court conferring standing on Cruise Opponents under this exception. To be sure, Cruise Opponents have attempted to turn this and other pending cases into a referendum on the cruise industry in Charleston. However, the desire of a vocal handful of citizens to impose their vision and will of a future cruise-free Charleston contrary to the general sentiment and the will of the general public and their elected officials does not render the issue of public importance. Indeed, the Supreme Court has already considered and rejected the applicability of the public importance exception to standing in this case to cure Cruise Opponents' lack of standing. *Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014).

Cruise Opponents' argument that the exception should apply in this contested case consists of a single conclusory sentence that says, essentially: the Ports Authority proposes to build a large, expensive cruise terminal in Charleston, so the exception applies. Resp. at 39. Courts, including this one, have time and again rejected such conclusory arguments as insufficient to meet a burden of good faith persuasion. *See, e.g.*, *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory

arguments may be treated as abandoned); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (stating a one sentence argument is too conclusory to present to the Court); *see also Gould v. S.C. Employment Benefit Auth.*, Docket No. 13-ALJ-30-0289-AP (Jan. 9, 2014) (Anderson, J.) (holding a conclusory argument abandoned); *Randolph v. S.C. Dep't of Health and Human Serv.*, Docket No. 13-ALJ-08-0034-AP (June 10, 2013) (Anderson, J.) (same).

Further, Cruise Opponents completely ignore the key component of the public importance exception analysis: whether resolution of the dispute is needed for future guidance. *Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014) ("Whether the exception applies in a particular case turns on whether resolution of the dispute is needed for future guidance.") (citing *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2nd 337, 341 (2008)). Instead, Cruise Opponents argued that the Supreme Court's decision to grant the petition to hear the case in its original jurisdiction, under the Court's "public interest" standard, should, *a fortiori*, dictate that the public *importance* exception to standing also applies. However, the Supreme Court also rejected this analysis, finding that the standard for granting original jurisdiction under Rule 245, SCACR is not synonymous with the standard for judging the public importance exception to standing. *Carnival Corp.*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014).

Moreover, because the Court is restricted in its review to the consideration of whether OCRM's permit was lawfully issued in this case, *see* Order, Dec. 2, 2013, at 15, there exists no issue for which resolution is needed for future guidance. *See ATC*, 380 S.C. at 199, 669 S.E.2d at 341 ("For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.").

Therefore, even if Cruise Opponents had contended that the public importance exception applied to the Court's analysis of their standing to bring this challenge action, which they did not and are now procedurally barred from doing, the exception is inapplicable to the facts of this case.

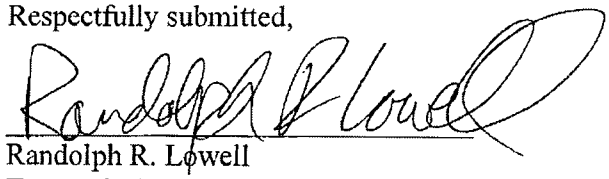
CONCLUSION

Cruise Opponents have failed to meet their burden of proving standing to challenge the DHEC 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.

Moreover, the South Carolina Supreme Court has unequivocally determined that the Cruise Opponents lack standing for failing to sufficiently allege injury-in-fact. Indeed, it is a waste of hundreds of thousands of dollars' worth of time and resources for this matter to continue when the Supreme Court—in a decision to which this Court is bound to follow—unanimously held that the same allegations found in this case were insufficient to confer standing.

The Court should grant the Motion for Summary Judgment and find the Cruise Opponents lack standing.

Respectfully submitted,



Randolph R. Lowell
Tracey C. Green
Chad N. Johnston
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

February 5, 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,	)	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.	)	

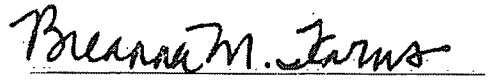
This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of **South Carolina Ports Authority's Reply in Support of Motion For Summary Judgment For Lack of Standing** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
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

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401



Breanna Karns

Columbia, South Carolina
This 5th day of February 2014.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	Docket No. 13-ALJ-07-0056-CC
v.	)	**MOTION TO FILE SURREPLY**
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

1. The Reply in Support of Summary Judgment filed by the S.C. State Ports Authority ("SPA") on February 5, 2014, contains a significant, entirely new argument to which the Petitioner Community Groups hereby request leave to respond.

2. SPA contends that the Petitioners in this case and this Court are "bound to the holding" in a recent order of the South Carolina Supreme Court dismissing a nuisance and municipal ordinance enforcement suit against Carnival Cruise Lines for lack of standing. Since SPA has made that argument for the first time in a reply brief, fair and due process require that the Community Groups be allowed leave to respond. *See, e.g., Eng'g & Mfg. Servs. v. Ashoton*, 387 F. App'x 575, 583 (10th Cir. 2010) (holding that court abused its discretion in not allowing a surreply brief to address new arguments presented in movant's reply brief); *Baloch v. Norton*, 517 F. Supp. 2d 345, 349 (D.D.C. 2007), *aff'd sub nom. Baloch v. Kempthorne*, 550 F.3d 1191 (D.C. Cir. 2008) ("If the movant raises arguments for the first

time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply.").

3. The proposed surreply, attached as Exhibit 2 to this motion, shows that the Supreme Court's order does not bind this Court in resolving the current motion for summary judgment. The Supreme Court was ruling on a motion to dismiss for failure to state nuisance and ordinance claims. SPA's motion, as noted, is one for summary judgment, and contends there is no factual dispute that this Court lacks jurisdiction over this administrative proceeding case. The elements of estoppel are not present.

4. Pursuant to SCALCR 19 & 68 and SCRCP 11(a), counsel for Community Groups have consulted with counsel for SPA prior to filing this motion. SPA's position, relayed by electronic mail, can be found as Exhibit 1 to this motion. SPA consents to the filing of a surreply on the Supreme Court's order under a number of conditions.

Respectfully submitted,

J. Blanding Holman IV by gmf
J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

Amy Armstrong by gmf
Amy Armstrong
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Counsel for Petitioners

February 11, 2014
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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 **CERTIFICATE OF SERVICE**

I hereby certify that I have on this 11th day of February 2014, served a copy of the foregoing Motion to File Surreply upon all parties and counsel of record in the above-captioned case, via United States Mail, postage pre-paid, addressed as follows:

Randolph R. Lowell
Chad N. Johnston
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202-8416

Bradley D. Churdar
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Attorneys for Respondent South Carolina State Ports Authority

J. Blanding Holman, IV
J. Blanding Holman IV

Exhibit 1

Subject: FW: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

From: Randy Lowell [RLowell@Willoughbyhoefer.com]
Sent: Monday, February 10, 2014 11:38 AM
To: Blan Holman
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green; Andrew DAntoni
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Mr. Holman:

The Ports Authority consents to a limited surreply on the following conditions.

1. The surreply is ***strictly limited to the legal argument made in Sections I and II.A of the Ports Authority's reply relying upon the Supreme Court's opinion***. The Ports Authority does not consent to and objects to any argument regarding facts, affidavit submittals, or any other portion of or argument made in the reply.
2. The surreply is filed no later than Wednesday, February 19. The Ports Authority will file a response to the surreply no later than Wednesday March 5. This provides 14 days for each side.

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.

From: Blan Holman [mailto:bholman@selcsc.org]
Sent: Monday, February 10, 2014 9:47 AM
To: Randy Lowell
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Jefferson Leath; Jesse WHite; Philip L. Lawrence
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Randy -

Please advise if SPA consents to our seeking leave to file a surreply to respond to the argument contained in SPA's reply in support of motion for summary judgment concerning the S.C. Supreme Court's decision in the Carnival case.

Thank you.

Blan

Blan Holman
Southern Environmental Law Center
43 Broad St. - Suite 300
Charleston, SC 29401

p. 843 720 5270
www.southernenvironment.org

From: Randy Lowell [RLowell@Willoughbyhoefer.com]
Sent: Wednesday, February 05, 2014 6:26 PM
To: Harvin Fair
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Denise Crawford; Blan Holman; Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green; Kelly Rainsford; Andrew DAntoni
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Ms. Fair:

Attached please find Word versions of the two replies filed with the ALC in the above-referenced matter.

Thank you.

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.

From: Harvin Fair [mailto:hfair@scalc.net]
Sent: Wednesday, February 05, 2014 3:17 PM
To: Randy Lowell
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Denise Crawford; J. Blanding Holman IV (bholman@selcsc.org); Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green
Subject: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Randy,
Please send a copy of the South Carolina Ports Authority's Reply in Support of Motion for Summary Judgment to Chambers in Word format.
Thank you,

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

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate https://cn.arx.com/?options=7&bselected=MTU2

Exhibit 2

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	**(PROPOSED) SURREPLY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
v.	)	
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

The Reply in Support of Summary Judgment filed by the S.C. State Ports Authority ("SPA") argues that the parties to the present action and this Court are "bound" by a recent South Carolina Supreme Court holding dismissing a nuisance and ordinance enforcement lawsuit brought by several organizations against Carnival Cruise Lines. SPA Reply 21. This is a new argument not made in SPA's opening Motion for Summary Judgment. As discussed below, SPA's position is unsound.

The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe,* 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (S.C. Ct. App. 1984). "The party asserting collateral estoppel 'must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.'" *Carrigg v. Cannon,*

347 S.C. 75, 80, 552 S.E.2d 767, 770 (S.C. Ct. App. 2001) (quoting *Beall,* 281 S.C. at 371, 315 S.E.2d at 191). SPA's collateral estoppel argument fails here because the Carnival decision concerns a different kind of case, in a different posture, resolved on different facts.

Unlike this contested case – which will determine if the S.C. Department of Health and Environmental Control ("DHEC") authorized SPA's new cruise terminal in compliance with applicable law – the case before the Supreme Court involved common law nuisance claims and claims to enforce municipal ordinances: claims over which the ALC has no jurisdiction, and that are typically lodged in Circuit Court. *See* Order, *Carnival Corp. et al. v. Historic Ansonborough Neighborhood Ass'n*, Op. 27355 at 3-4 (S.C. Orig. Jan. 22, 2014) (summarizing complaint and procedural history) (attached hereto as Exhibit 3). Moreover, the actual issue faced by the Supreme Court was whether the nuisance and ordinances claims should be dismissed for "failure to state facts sufficient to constitute a cause of action" pursuant to SCRCP 12(b)(6). Order, *Carnival Corp. et al. v. Historic Ansonborough Neighborhood Ass'n* at 5.

Accordingly, the Court based its rulings "solely on the allegations set forth in the complaint" in the Carnival matter, *id.,* and its decision turned on whether the complaint set forth the elements needed to state nuisance and ordinance violations against Carnival. Examining those elements as to nuisance, the Court noted that a private party bringing a public nuisance claim must allege he or she suffered a "special injury to his real or personal property." *Id.* at 8 (citations omitted). Because the plaintiffs' complaint failed to "set forth any injury they have suffered that is different from the injury suffered by the public generally," the Court found that "special injury" had not been alleged. *Id.*

Turning to the ordinance enforcement claims, the Court noted that state statute provides a cause of action only for a "specially damaged, adjacent or neighboring property owner." *Id.*

(citing S.C. Code (2004) § 6-29-950). The Carnival plaintiffs failed to allege "any injury distinct from that suffered by the public generally," according to the Court, and "[a]dditionally" made "no allegations that they own adjacent or neighboring property." *Id.* at 9.

In the present case, there is no requirement that affected parties be property owners, much less "specially injured" or "specially damaged" ones, to challenge unlawful DHEC approvals. They need only be "affected persons." S.C. Code Ann. § 44-1-60(G). Moreover, while the harm alleged in the Carnival case was attributed to operation of the Carnival *Fantasy* – a single ship with only 2,500 passengers aboard – the Community Groups in the current matter contend that construction of SPA's cruise terminal as unlawfully approved and permitted by DHEC will injure them by allowing SPA's cruise operation to continue when it otherwise could not and to expand. The Community Groups further contend that if the law were followed, the impacts from cruise operations in downtown Charleston – where they live, work and recreate – would decrease.

The Community Groups thus present the kind of injury that has supported affected party standing in South Carolina administrative proceedings for years. *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007); *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988). This Court therefore correctly determined that the Community Groups have alleged standing, and denied SPA's motion to dismiss contending otherwise. The Court's ruling is law of the case, and the Supreme Court's decision on different causes of action seeking different relief does not alter it.[1] Even if the Supreme Court's findings

[1] *See Citizens for Prot. of N. Kohala Coastline v. Cnty. of Hawai'i*, 91 Haw. 94, 102, 979 P.2d 1120, 1128 (1999) ("The issue of whether Citizens had standing to pursue an action for declaratory relief under HRS § 632-1 was not before the trial court in the agency appeal; rather, as mentioned, the court was faced only with the issue of whether Citizens had standing to appeal an agency's denial of a contested case hearing and grant of an SMA permit under HRS § 91-

concerning the Carnival plaintiffs' particularized injury could be extracted from the special pleading requirements for nuisance and ordinance claims, the Court's findings were not a "necessary" basis for its decision. As noted above, the Court independently held that the complaint should be dismissed because special injury and damages were absent, and estoppel is defeated by those alternative grounds.[2]

A final factor that defeats estoppel is procedural posture. The Supreme Court was ruling on motions to dismiss for failure to state a claim. This Court, by contrast, is presented with an SPA summary judgment motion on standing. As the Community Groups have noted, SPA's present motion parrots the summary judgment motion it filed in a parallel federal court matter, and the federal court's ruling is on all fours and estops SPA. Even if this could be put aside, *this* tribunal's treatment of SPA's motion will differ markedly from the Supreme Court's resolution of a motion to dismiss nuisance and ordinances claims for failure to state a claim. Not only does SPA espouse a different standing theory here – contending that standing is jurisdictional*ish* – but the Court has different facts before it concerning standing.

As the nonmoving party, the Community Groups can survive summary judgment by producing minimal evidence showing an issue of fact regarding standing. *See Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). They have met that burden in a number of ways, including an exhaustive factual recitation, supported by SPA's own

---

14."); *Walsh v. Town of Stonington Water Pollution Control Auth.*, No. 520132, 1998 WL 46492, at *1 (Conn. Super. Ct. Jan. 28, 1998), *aff'd*, 250 Conn. 443, 736 A.2d 811 (1999) ("An objection to a permit renewal and a claim for damages in a common law nuisance action are not identical issues and therefore the nuisance action is not barred by collateral estoppel."); *Miller v. City of Bainbridge Island*, 111 Wash. App. 152, 167, 43 P.3d 1250, 1257 (2002) (property owner who defended tenant in nuisance action not barred from contesting subsequent permit denial).

[2] *See C.B. Marchant Co., Inc. v. E. Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985) (cited in *TecSec, Inc. v. Int'l Bus. Machines Corp.*, 731 F.3d 1336, 1343 (Fed. Cir. 2013)); *In re Dunes Hotel Assocs.*, 212 B.R. 110, 127 (Bankr. D.S.C. 1997) (citing *Beall*, 281 S.C. at 371, 315 S.E.2d at 191).

documents, which shows that permitting SPA's new terminal will increase injury to downtown residents by enabling SPA's cruise operation – and its concentrated impacts – to continue and expand. Further, the Court has multiple sworn affidavits from affiants who live and work in the area most directly impacted by cruise operations, and have experienced firsthand the impacts described in their affidavits. SPA itself admits that the affidavits "set forth issues the affiants allegedly have experienced in the past or are presently experiencing due to the existence of the cruise industry in Charleston," Reply at 27 . Under SCRCP 11(c), an affiant must know "the facts stated to be true of his own knowledge," and these affidavits – reciting evidence upon which affiants have personal knowledge and are competent to testify – are rationally based on the perception of the witness, are helpful to the determination of a fact in issue, and do not require special knowledge. These facts alone defeat the claimed estoppel effect of the Supreme Court's nuisance decision.

CONCLUSION

The S.C. State Ports Authority's Motion for Summary Judgment should be denied.

Respectfully submitted,

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

Amy Armstrong
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

Counsel for Petitioners

February 11, 2014
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	Docket No. 13-ALJ-07-0056-CC
v.	)	**CERTIFICATE OF SERVICE**
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

I hereby certify that I have on this _____ day of February 2014, served a copy of the foregoing Surreply in Opposition to Motion for Summary Judgment upon all parties and counsel of record in the above-captioned case, via United States Mail, postage pre-paid, addressed as follows:

Randolph R. Lowell
Chad N. Johnston
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202-8416

Bradley D. Churdar
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Attorneys for Respondent South Carolina State Ports Authority

_____
J. Blanding Holman IV

Exhibit 3

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

v.

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

Appellate Case No. 2011-197486

ORIGINAL JURISDICTION

Opinion No. 27355
Heard November 19, 2013 – Filed January 22, 2014

JUDGMENT FOR PETITIONERS

Marvin D. Infinger, of Nexsen Pruet, LLC, and Philip L. Lawrence, of South Carolina Ports Authority, both of Charleston, for Petitioner South Carolina State Ports Authority.

Gordon D. Schreck and David M. Collins, of Womble, Carlyle, Sandridge, & Rice, PLLC, of Charleston, for Petitioner Carnival Corporation.

Corporation Counsel Charlton De Saussure, Jr., Assistant Corporation Counsel Susan J. Herdina, and Assistant

Corporation Counsel Frances I. Cantwell, all of Charleston, for Petitioner City of Charleston.

J. Blanding Holman, IV, of the Southern Environmental Law Center, of Charleston, for Respondents Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, and Coastal Conservation League.

Timothy C. Dargan, of Brown & Varnado, LLC, of Mt. Pleasant, for Respondent Historic Ansonborough Neighborhood Association.

John A. Massalon, of Wills Massalon & Allen, LLC, of Charleston, for Respondent Preservation Society of Charleston.

John C. Moylan, III, of Wyche, P.A., of Columbia, and Associate General Counsel William J. Cook, of Washington, D.C., for Amicus Curiae National Trust for Historic Preservation.

JUSTICE HEARN: In this case brought in our original jurisdiction, several citizens groups filed suit against a cruise ship operator alleging nuisance and zoning claims and seeking an injunction. We hold these groups lack standing and dismiss.

FACTUAL/PROCEDURAL BACKGROUND

The plaintiffs in this case consist of four Charleston citizens' groups: the Historic Ansonborough Neighborhood Association (Ansonborough Association), the Charlestowne Neighborhood Association (Charlestowne Association), the Coastal Conservation League (League), and the Preservation Society of Charleston (Preservation Society) (collectively Plaintiffs). The Ansonborough Association is a nonprofit corporation composed of residents, property owners, and tenants of the Ansonborough neighborhood which is concerned with compliance with land use laws and threats to the quality of life in the area. Similarly, the Charlestowne Association is a nonprofit that seeks to protect the quality of life for residents of the Charlestowne neighborhood. Both the Ansonborough Association and the

Charlestowne Association are located in the Old and Historic District near the Union Pier Terminal (the Terminal) in Charleston. The League is a nonprofit corporation with a mission of conserving natural resources and protecting the quality of life in South Carolina. The Preservation Society is a nonprofit corporation headquartered in Charleston which seeks to protect the historic, architectural, and cultural character of Charleston.

Plaintiffs brought suit seeking an injunction against what they believe to be the unlawful use of the Terminal by the Carnival Corporation's cruise ship, the *Fantasy*. Plaintiffs' complaint named Carnival as the sole defendant, but the South Carolina State Ports Authority, which owns and operates the Terminal, and the City of Charleston were later permitted to intervene as defendants (collectively Defendants).

Plaintiffs' first amended complaint alleges the Terminal is used as the *Fantasy*'s home port where crew, passengers, and supplies load and unload for each voyage. The *Fantasy* is 855 feet long and more than 60 feet tall from the water line and can carry up to 2,056 passengers and 829 crewmembers. Since 2010, the Ports Authority has contracted with Carnival for the use of the Terminal as the *Fantasy*'s home port. The Terminal is within the City's Old and Historic District which is listed on the National Register of Historic Places maintained by the United States Department of the Interior.

Plaintiffs allege the *Fantasy*'s operations at the Terminal harm the Old and Historic District and them in a number of ways. They allege the *Fantasy* can be seen above the historic buildings of Charleston and that it disrupts the historic skyline. The thousands of passengers and crew allegedly cause major traffic congestion in the area as well as the closure of public roads. The *Fantasy* allegedly emits noise pollution through music and broadcast announcements and air pollution through particulates produced by its diesel engines. Plaintiffs contend expanded cruise ship operations may jeopardize the Old and Historic District's listing on the National Register of Historic Places.

Plaintiffs' complaint seeks injunctive relief based on ten claims: seven based on City ordinances, a public nuisance claim, a private nuisance claim, and a claim based on the South Carolina Pollution Control Act. The ordinance claims assert the *Fantasy*'s use of the Terminal violates the City's zoning code because it is not a permissible use within the light industrial zone applicable to the Terminal, it is an accommodations use in an area not zoned for accommodations uses, it is a tour boat use in an area not within a tour boat overlay zone, the *Fantasy* exceeds the

applicable height ordinance, and the ship blocks views of the Cooper River in violation of the applicable view corridor provisions. The complaint also alleges Carnival violates the City's sign ordinance because the *Fantasy*'s smokestack is a sign and violates the City's noise ordinance because the *Fantasy* makes announcements over amplified sound systems.

Defendants initially filed motions to dismiss pursuant to Rule 12(b)(6), SCRCP, contending Plaintiffs' complaint fails to state a claim for relief because Plaintiffs lack standing, as a matter of law the ordinances do not apply to cruise ship operations at the Terminal, and to the extent the ordinances apply they are preempted by federal and state law. Before the circuit court could rule on the motions to dismiss, Defendants petitioned this Court to take the case in its original jurisdiction. The Court granted the petition, transferred the case to this Court, and appointed the Honorable Clifton B. Newman, Circuit Court Judge, as special referee to conduct a hearing and make recommendations on the motions to dismiss.

Following a hearing, Judge Newman issued a report recommending the Court grant the motions to dismiss as to all of the ordinance claims and the Pollution Control Act claim, but deny the motion as to the two nuisance claims. Generally, the report found that as a matter of law none of the ordinances apply to the *Fantasy*'s use of the Terminal, the Pollution Control Act does not govern the *Fantasy*'s discharges in South Carolina waters, and the complaint makes sufficient allegations to set forth both a private and a public nuisance cause of action. The report did not consider the issues of standing and preemption. Plaintiffs and Defendants filed exceptions to the report. After considering the report and the exceptions, this Court dismissed the noise ordinance, sign ordinance, and Pollution Control Act claims. This Court withheld ruling on the motions to dismiss on the five zoning and two nuisance claims and ordered the parties to brief the issues of standing, preemption, and whether the zoning ordinances apply to the *Fantasy*'s use of the Terminal.

ISSUES PRESENTED

I. Whether Plaintiffs possess standing to assert their claims?

II. Whether the zoning ordinances apply to the *Fantasy*'s use of the Terminal?

III. If the zoning ordinances are applicable to the *Fantasy*'s use of the Terminal, whether the zoning ordinances are preempted by federal or state law?

IV. Whether Plaintiffs' public nuisance claim should be dismissed for failing to

state facts sufficient to constitute a cause of action?

V. Whether Plaintiffs' private nuisance claim should be dismissed for failing to state facts sufficient to constitute a cause of action?

STANDARD OF REVIEW

Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its "failure to state facts sufficient to constitute a cause of action." In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id.*

LAW/ANALYSIS

Defendants move to dismiss Plaintiffs' complaint in its entirety on the ground Plaintiffs lack standing to bring any of the claims contained therein. We agree.

For a plaintiff to possess standing three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Id.*

Here, Defendants focus on the first, injury-in-fact element of standing, asserting Plaintiffs allege only generalized grievances suffered by the public as a whole and fail to allege any particularized harm. Reviewing Plaintiffs' complaint, we conclude Plaintiffs fail to allege a concrete, particularized harm to a legally protected interest and therefore hold Plaintiffs lack standing.

In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Id.* at 602, 550 S.E.2d at 292; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). While arising from the different context of a challenge to government action, in *Lujan* the United States Supreme Court distinguished generalized injuries from those injuries sufficiently particuarlized as to create standing, writing: "[A] plaintiff raising only a generally

available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not" possess standing. *Lujan*, 504 U.S. at 573–74.

Additionally, a plaintiff that is an association, such as Plaintiffs here, may possess standing by virtue of associational standing on behalf of its members. An organization has associational standing "if one or more of its members will suffer an individual injury by virtue of the contested act." *Sea Pines*, 345 S.C. at 600–01, 550 S.E.2d at 291. The three part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000), *see also Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (applying that test). Accordingly, to 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.

Here, Plaintiffs fail to allege a particularized injury either to themselves or their members. Rather, they assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing. Specifically, Plaintiffs' allegations of harm relevant to the remaining claims consist of the following:

- "The crowds, pollution, and traffic associated with these unlawful operations create a nuisance for Charleston citizens. This lawsuit aims to protect Charleston's neighborhoods, families and the environment by having Defendant Carnival play by the longstanding rules and norms that have made—and make—Charleston a wonderful place to work, live, and visit."

- "[T]he *Fantasy* visually disrupts the historic skyline."

- "The influx of thousands of passengers, crew, and support personnel (and associated traffic) . . . cause major traffic congestion downtown and the closure of public roads."

- "The vessels emit noise pollution, including broadcast announcements and music, and the burning of diesel fuel emits visible particulate soot from ship

funnels—all adjacent to the Old and Historic District."

- "Home-porting cruise operations at an industrial scale could jeopardize the integrity, setting, and context that led to National Register designation and place maintenance of National Register status at risk."

- "On *Fantasy* embarkation and debarkation days, portions of Concord and Washington Streets—which are public streets—are closed for cruise business. Because of those closures, displacement of traffic, and the concentration of cruise traffic in a limited area for a limited time, cruise embarkations and debarkations cause increased congestion along the east side of the downtown Peninsula."

- "Cruise ships such as the Defendant's *Fantasy* also emit visible particulate soot and other pollutants, including nitrogen and sulfur oxides, which are harmful to human health when inhaled and are deposited into the surrounding waters and land."

- "Defendant's actions including noncompliance with zoning and environmental laws have injured the above Plaintiff organizations and their members by among other things reducing their use and enjoyment of the local environment and Charleston's historic assets, including their homes, neighborhoods and protected structures."

- "Cruise operations downtown and ineffective management of them cause, among other things, traffic congestion, pollution emissions, road closures, large crowds, loud noises, and obstructed views that are incompatible with the area's historic setting, scale, and residential character and impact health and the environment."

Lacking from these allegations is any claim that Plaintiffs themselves or their members have suffered a particularized harm. All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the City of Charleston and therefore, Plaintiffs fail to establish the first element of standing.

While a public nuisance cause of action can be used to remedy harms

suffered by the public generally, typically only the State may assert this cause of action. *See Brown v. Hendricks*, 211 S.C. 395, 400, 45 S.E.2d 603, 605 (1947) (stating that generally "a private action does not lie to abate a public nuisance"). A private person may bring a private civil suit for a public nuisance only if he suffered a special injury to his real or personal property. *See Overcash v. S.C. Elec. & Gas. Co.*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005); *Brown*, 211 S.C. at 400, 45 S.E.2d at 605. A special injury is "individual or specific damage in addition to that suffered by the public," *Brown*, 211 S.C. at 400, 45 S.E.2d at 605, 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. As previously discussed, Plaintiffs fail to set forth any injury they or their members have suffered that is different from the injury suffered by the public generally. Therefore, the public nuisance cause of action does not provide Plaintiffs with the standing they otherwise lack.

Plaintiffs also assert that as to their zoning claims, Section 6-29-950 of the South Carolina Code (2004) provides standing. While that statute does provide a legally protected interest and thereby standing for neighbors of properties violating a local zoning ordinance, we conclude Plaintiffs' complaint fails to make factual allegations sufficient to establish the applicability of section 6-29-950 here.

Section 6-29-950 provides in part:

> In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county *or an adjacent or neighboring property owner who would be specially damaged by the violation* may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land.

(emphasis added). In short, under section 6-29-950 a specially damaged, adjacent or neighboring property owner can bring an action for an injunction based on an

alleged violation of a zoning ordinance.

Section 6-29-950's requirement that a private party seeking to enjoin a zoning violation must be specially damaged incorporates the particularized injury requirement of general standing doctrine as a requirement for the statute to apply. Again, even assuming the *Fantasy* violates the City's zoning ordinances as alleged by Plaintiffs' complaint, Plaintiffs have not alleged that as a result of the violations they suffer any injury distinct from that suffered by the public generally. Additionally, section 6-29-950 only permits "an adjacent or neighboring *property owner*" to bring suit. (emphasis added). Here, Plaintiffs have made no allegations that they own adjacent or neighboring property. They do allege that the League is a tenant in a nearby property and that the Preservation Society holds a conservation easement on a nearby property. However, those interests do not make the League or the Preservation Society a "property owner" as required by the statute to bring suit. *See Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 85, 644 S.E.2d 58, 60 (2007) (holding a tenant lacked standing under a town land management ordinance using identical "adjacent or neighboring property owner" language). Therefore, because Plaintiffs fail to allege that they are or will be specially damaged or that they are a neighboring or adjacent property owner, section 6-29-950 is inapplicable and does not provide Plaintiffs with standing to assert their zoning claims.

Finally, Plaintiffs assert the public importance exception should apply to remedy any lack of standing. South Carolina courts recognize an exception to the requirement that a plaintiff possess standing where "an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). Whether the exception applies in a particular case turns on whether resolution of the dispute is needed for future guidance. *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). While the need for future guidance generally dictates when the exception applies, the application of the exception in a particular case does not turn on a rigid formula but rather is determined by the competing policy concerns underlying the exception. *Id.* Those competing concerns are that:

> Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

In support of their argument that the public importance exception applies, Plaintiffs first rely on Defendants' petition for original jurisdiction and its numerous statements that this case deals with matters of "public interest." Plaintiffs contend that if the Court found the case was of sufficient public interest so as to grant the petition for original jurisdiction, *a fortiori* the case is also of sufficient public importance such that the public importance exception applies. While the Court may exercise original jurisdiction under Rule 245, SCACR, "[i]f the public interest is involved," the "public interest" standard of Rule 245 is not synonymous with the public importance necessary for the public importance exception to standing to apply. Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution, whereas the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived. Thus, because the two rules aim to answer different questions—whether the public interest requires expeditious resolution of a case versus whether the public interest requires resolution of a dispute for future guidance despite the lack of standing—the grant of the petition for original jurisdiction has no effect upon whether the public importance exception applies.

Fundamentally, the issues in this case are whether zoning ordinances are preempted by federal and state law, the applicability of zoning ordinances to a cruise ship, and tort liability for a public and a private nuisance cause of action. The case presents no issue of the constitutionality or legality of government action. Additionally, the claims asserted by Plaintiffs could be brought by other parties who can show the required injury. Therefore, we find the public importance exception inapplicable here.

In our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the "judicial power." S.C. Const. art. V, § 1. Accordingly, courts are limited to resolving cases and the powers inherent in that function. Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.

CONCLUSION

We hold Plaintiffs lack standing. Because standing is a fundamental prerequisite for instituting a legal action, we do not consider the remaining issues. Accordingly, we grant Defendants' motions to dismiss.

TOAL, C.J., PLEICONES, BEATTY, and KITTREDGE, JJ., concur.

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,	)	**SOUTH CAROLINA PORTS AUTHORITY'S RESPONSE IN OPPOSITION TO THE CRUISE OPPONENTS' MOTION TO FILE SURREPLY**
Petitioners,	)	
v.	)	Docket No. 13-ALJ-07-0056-CC
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

Respondent South Carolina State Ports Authority (Ports Authority) hereby submits this Response to Cruise Opponents' Motion for File Surreply and Proposed Surreply (attached to the motion), filed with the Court on February 11, 2014. As acknowledged in their Motion, the Ports Authority consented to Cruise Opponents' request to file a surreply; however it did so under the condition that Cruise Opponents limit their filing to the Ports Authority's legal discussion of the Supreme Court's recent opinion dismissing the identical claims of injury-in-fact asserted by many of these same Cruise Opponents in that companion case. *See* Reply Ex. 35, *Carnival Corp. v. Historic Ansonborough*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014). Unsurprisingly, the proposed Surreply exceeds the scope of a permissible surreply and instead is used by Cruise Opponents to try and rehabilitate their other arguments and affidavits submitted in response to the Ports Authority's Motion for Summary Judgment for Lack of Standing. Consequently, the Court should deny Cruise Opponents' Motion with respect to these additional

arguments. Moreover, should the Court grant Cruise Opponents' Motion, in whole or in part, the Rules of Procedure for the Administrative Law Court dictate that the Ports Authority, as the moving party for this Motion for Summary Judgment, be entitled to file a final response to any filing of Cruise Opponents.

ARGUMENT

I. THE PORTS AUTHORITY CONSENTS TO A SURREPLY LIMITED TO THE DISCRETE ISSUE OF RESPONDING TO ARGUMENTS MADE IN THE REPLY REGARDING THE SUPREME COURT'S RECENT OPINION.

Initially, it should be noted, as Cruise Opponents failed to inform the Court in either their Motion or proposed Surreply, the Supreme Court's opinion in the companion case was filed on January 22, 2014, subsequent to both the Ports Authority's Motion for Summary Judgment and Cruise Opponents' Response, which were filed December 27, 2013 and January 21, 2014, respectively. Thus, the Supreme Court's opinion was not available for analysis by either party, and Cruise Opponents' intimations that the Ports Authority failed to make an argument that was available to them in their motion in chief is simply incorrect. Motion at 1. However, an opinion of the highest court of this state, which this Court is bound to follow, analyzing the same issue, on the same facts, and with many of the same parties, is clearly relevant to the Court's analysis of the pending Motion for Summary Judgment for Lack of Standing. Accordingly, the Ports Authority's examination and comparison in its Reply of the Supreme Court's findings with respect to Cruise Opponents' allegations of injury-in-fact was not only appropriate for exploration, but necessary for this Court to reach a conforming holding.

Notwithstanding, the Ports Authority acknowledges that, given the timing of the issuance and disposition of the Supreme Court's opinion, Cruise Opponents may wish to respond. Consequently, as noted in Cruise Opponents' Motion, the Ports Authority consented to Cruise

Opponents' opportunity to file a surreply.[1] The Ports Authority consented under two express conditions: (1) that Cruise Opponents limit their surreply to the discrete legal argument made by the Ports Authority in Sections I and II.A of its Reply, relying on the Supreme Court's opinion;[2] and (2) that the surreply be filed no later than Wednesday, February 19,[3] and the Ports Authority's response to the surreply be filed no later than Wednesday, March 5.[4]

II. CRUISE OPPONENTS' PROPOSED SURREPLY GOES BEYOND THE SCOPE OF ADRESSING THE SUPREME COURT'S OPINION AND INSTEAD IMPROPERLY SEEKS TO BOLSTER AND REHABILITATE CRUISE OPPONENTS' RESPONSE.

Cruise Opponents purport to seek the ability to address the effect of the Supreme Court's repudiation of the allegations advanced in support of this and other frivolous challenges to the Union Pier Terminal Project; however, the submitted proposed surreply goes beyond this limited

---

[1] Under almost all circumstances, a surreply is inappropriate and finds no support under the Rules and case law. Rule 19, RPALC addresses motions procedure in this Court and provide only for a response and a reply. ("Any party may file a written response to the motion within ten (10) days of the filing of the motion ... Any party may file a written reply within five (5) days of the filing of a response."). In fact, prior to the amendments in 2013, Rule 19 did not even provide for a reply, and instead only expressly provided for a response. *See also Archdiocese of Milwaukee v. Underwriters at Lloyd's, London*, 955 F.Supp. 1066, 1070 (E.D. Wis. 1997) ("The rule does not provide for briefs in response to replies.... [A]t some point, briefing must end.") (denying leave to file a surreply); *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 [7.06, 7.07] "make no provision whatsoever for sur-replies").

[2] The Ports Authority did not consent, and expressly objected to any argument regarding facts, affidavit submittals, or any other portion of or argument made in the reply, which would clearly be beyond the scope of an acceptable surreply. Ex. 1, Email Exchange Between Holman and Lowell.

[3] Cruise Opponents acknowledged the Ports Authority's suggested timeline for filing, but declined to adhere, instead stating they "intend file [sic] our proposed surreply within the time given for replies..." notwithstanding the fact that the rules do not contemplate surreplies, much less a proper time period for their filing. *See* n.1, *supra*; Ex. 1, Email Exchange Between Holman and Lowell.

[4] The Ports Authority suggested this timeline to provide each side with fourteen (14) days to file their respective submissions, while accounting for the Ports Authority's counsel's request for protection. *See* Ports Authority Motion for Protection, filed February 11, 2014.

topic, impermissibly seeking to restore and rehabilitate some semblance of credibility of Cruise Opponents' arguments and the self-serving and conclusory affidavits submitted in support. Specifically, Cruise Opponents submit supplemental arguments in support of their Response on three separate occasions, each of which is improper, and the Court should reject Cruise Opponents' request regarding those contentions.

First, Cruise Opponents couch their proposed surreply as an argument against a position not advanced by the Ports Authority. In the opening section of the proposed surreply (second full paragraph), Cruise Opponents set out a standard[5] and proceed to argue against the Supreme Court opinion's collateral estoppel of their challenge to this permit. However, the Ports Authority did not argue in their Reply that Cruise Opponents are collaterally estopped from re-litigating the issue of their allegations of injury-in-fact. Rather, the Ports Authority clearly and methodically compared the allegations of injury asserted by Cruise Opponents in this action, compared to those same allegations advanced by Cruise Opponents before the Supreme Court. As argued in the Reply, the Supreme Court set out a clear blueprint for analyzing Cruise Opponents' allegations of injury-in-fact, which are identical to those advanced in support of this Permit challenge. Consequently, Cruise Opponents' thoughts on collateral estoppel are irrelevant, as that argument was not advanced by the Ports Authority, and the discussion contained in the Proposed Surreply should be rejected and not considered by the Court.

[5] It is ironic that Cruise Opponents now fully set forth an argument on collateral estoppel, including, for the first time, the standard required of a party asserting collateral estoppel. As pointed out by the Ports Authority in its Reply in Support of Summary Judgment, Cruise Opponents' half-hearted attempt to argue collateral estoppel with respect to the federal court action was the height of a conclusory argument. *See* Reply at 2, n.2. No doubt recognizing its inadequacy, Cruise Opponents attempt to revive (or, more aptly, make for the first time) their argument in this surreply, which is clearly beyond the scope of the Supreme Court opinion. *See* Proposed Surreply at 4 ("As [Cruise Opponents] have noted, SPA's present motion parrots the summary judgment motion it filed in a parallel federal court matter, and the federal court's ruling is on all fours and estops SPA.").

Second, and briefly, Cruise Opponents for the first time contend that this Court's Order denying the Ports Authority's Motion to Dismiss for Lack of Standing is the law of the case, and that the December 2, 2013 Order of Dismissal somehow finally decides the issue of standing in this case and bars the Ports Authority from raising standing now or going forward. Disregarding, for a moment, the absurdity of Cruise Opponents' misapprehension, this is the first time the argument has been made and is entirely inappropriate for a surreply. *Compare* Cruise Opponents' Response (failing to make a law of the case argument with respect to the Court's determination of standing at the motion to dismiss stage). However, as this Court clearly stated in its Order, the determination of standing was limited to accepting Cruise Opponents' pleadings at face value. *See* Dec. 2, 2013 Order at 10. Moreover, case law is clear that a party bringing a claim must maintain standing throughout the life of the proceeding. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (discussing the burden of proof required of a plaintiff at the various stages of litigation). Additionally, the standard applied by the court in evaluating a party's allegations of standing gets progressively more stringent the further into the litigation the case proceeds (as this Court has already recognized).[6] *Id.* Concomitantly, a finding of standing at the motion to dismiss stage has virtually no effect on the Court's consideration of the petitioner's standing at a subsequent stage of the litigation, and Cruise Opponents law of the case argument has no support and is wholly without merit.

---

[6] *See* Reply Ex. 1, Sept. 6, 2013 Hrg. Trans. at 18-19 ("All right. Well, that takes me back to *Lujan*. To where it says, quote, that you can consider standing at the completing stage and the summary judgement [sic] stage and at the trial stage and in each one of those stages, the burdens and analysis of the court shifts."); Reply Ex. 2, Jan. 9, 2014 Hrg. Trans. at 21-22 ("At each level of trial, you have a further evaluation of standing ... [a]t the Motion to Dismiss Stage, it was allegations. At the Summary Judgment Motion, it is genuine issue of material fact ... [t]he bar raises for one party and lowers for the others.").

Finally, Cruise Opponents inappropriately use the final paragraph of their Proposed Surreply to try and rehabilitate the deficient affidavits submitted in support of their allegations of injury-in-fact. The Supreme Court opinion laid bare the inadequacy and generalized nature of the allegations asserted by Cruise Opponents. Recognizing the deficiency, Cruise Opponents attempt to use a surreply to respond directly to well-aimed criticism of the Supreme Court and the Ports Authority in its Reply. This transparent attempt is beyond the scope of an appropriate surreply, and the Court should reject and not consider Cruise Opponents' proposed revisions to the submitted affidavits and attendant new argument.

III. SHOULD THE COURT GRANT CRUISE OPPONENTS LEAVE TO FILE A SURREPLY, THE PORTS AUTHORITY—AS THE PARTY WHO FILED THE PENDING MOTION FOR SUMMARY JUDGMENT—IS ENTITLED TO FILE A RESPONSE.

If the Court allows the Cruise Opponents to respond to the implications of the Supreme Court's opinion dismissing their claims for failure to allege an injury-in-fact despite exceeding the permissible scope of a surreply given their history in this case and the Ports Authority's limited consent, motion briefing protocol dictates that the Ports Authority, as the movant of the pending Motion, is entitled to file a return to the surreply as the final submission on the topic.

Further, Cruise Opponents and their counsel have previously acknowledged and argued to this Court that the proper procedure in this circumstance is to permit the moving party an opportunity to respond to any surreply filed. *See* Ex. 2, Motion to Strike Surreply, *Sierra Club v. Georgetown County and S.C. Dep't of Health and Envtl. Control*, Docket No. 12-ALC-07-0493-CC (arguing that "Rule 19[, RPALC] intentionally establishes a system that is customary under the law, where the moving party gets the last arguments on its motion. If DHEC is allowed a sur-reply, the Petitioners feel compelled to file a return addressing some of the contentions therein."). Accordingly, as the moving party under this motion for summary judgment, and using

the same logic employed by counsel for Cruise Opponents, the Ports Authority is afforded the opportunity to file a response to any Cruise Opponent-surreply filed and accepted by the Court.

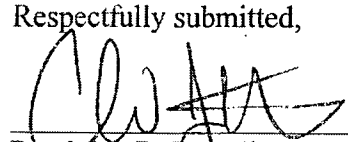
CONCLUSION

Cruise Opponents are not entitled to file a surreply out of right, and any submission must be appropriately limited to the single new issue raised in the Ports Authority's Reply. Due to the timing of publication of the Supreme Court's opinion in the companion action filed by Cruise Opponents, the Ports Authority could not have raised the opinion's effect on Cruise Opponents' standing in its original motion. Consequently, the Ports Authority consents to Cruise Opponents' motion for leave to address the opinion. However, Cruise Opponents should not be permitted the opportunity to attempt to rehabilitate and salvage arguments which they made or were available to them in drafting their Response, including the submitted affidavits. Accordingly, the Ports Authority respectfully requests that the Court limit any surreply in the manner discussed herein,[7] if the Court decides that further briefing is appropriate. Finally, the Ports Authority respectfully requests the opportunity to file a response to any allowed surreply, adhering to the traditional motions practice and procedure of permitting the movant the opportunity to file the "last word."

[SIGNATURE PAGE FOLLOWS]

[7] Attached as Exhibits 3 and 4 are redline and clean copies, respectively, of the proposed surreply with the impermissible arguments redlined and then deleted. The Ports Authority consents to the acceptance and consideration of the attached, revised surreply.

Respectfully submitted,



Randolph R. Lowell
Tracey C. Green
Chad N. Johnston
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

February 18, 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,	)	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 **Respondent South Carolina State Ports Authority's Response to Petitioners' Motion to File a Surreply** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

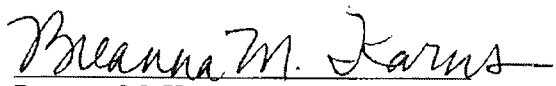
Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire

South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401



Breanna M. Karns

Columbia, South Carolina
This 18th day of February 2014.

Exhibit 1

From: Blan Holman [mailto:bholman@selcsc.org]
Sent: Monday, February 10, 2014 4:34 PM
To: Randy Lowell
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green; Andrew DAntoni
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Randy:

Thanks for your response. We intend file our proposed surreply within the time given for replies so don't think we will need the extended time. We are limiting our argument to the issue I indicated in my email.

We will indicate your position to the Court in seeking leave.

Thank you for your consideration,

Blan

Blan Holman
Southern Environmental Law Center
43 Broad St. - Suite 300
Charleston, SC 29401

p. 843 720 5270
www.southernenvironment.org

From: Randy Lowell [RLowell@Willoughbyhoefer.com]
Sent: Monday, February 10, 2014 11:38 AM
To: Blan Holman
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green; Andrew DAntoni
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Mr. Holman:

The Ports Authority consents to a limited surreply on the following conditions.

1. The surreply is ***strictly limited to the legal argument made in Sections I and II.A of the Ports Authority's reply relying upon the Supreme Court's opinion***. The Ports Authority does not consent to and objects to any argument regarding facts, affidavit submittals, or any other portion of or argument made in the reply.
2. The surreply is filed no later than Wednesday, February 19. The Ports Authority will file a response to the surreply no later than Wednesday March 5. This provides 14 days for each side.

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.

From: Blan Holman [mailto:bholman@selcsc.org]
Sent: Monday, February 10, 2014 9:47 AM
To: Randy Lowell
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Jefferson Leath; Jesse WHite; Philip L. Lawrence
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Randy -

Please advise if SPA consents to our seeking leave to file a surreply to respond to the argument contained in SPA's reply in support of motion for summary judgment concerning the S.C. Supreme Court's decision in the Carnival case.

Thank you.

Blan

Blan Holman
Southern Environmental Law Center
43 Broad St. - Suite 300
Charleston, SC 29401

p. 843 720 5270
www.southernenvironment.org

From: Randy Lowell [RLowell@Willoughbyhoefer.com]
Sent: Wednesday, February 05, 2014 6:26 PM
To: Harvin Fair
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Denise Crawford; Blan Holman; Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green; Kelly Rainsford; Andrew DAntoni
Subject: RE: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Ms. Fair:

Attached please find Word versions of the two replies filed with the ALC in the above-referenced matter.

Thank you.

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.

From: Harvin Fair [mailto:hfair@scalc.net]
Sent: Wednesday, February 05, 2014 3:17 PM
To: Randy Lowell
Cc: Amy Armstrong; Chad Johnston; Churdar, Bradley; Denise Crawford; J. Blanding Holman IV

(bholman@selcsc.org); Jefferson Leath; Jesse WHite; Philip L. Lawrence; Tracey Green
Subject: Preservation Society of Charleston, et al v. SC Ports Authority , 13-ALJ-07-0056-CC

Randy,
Please send a copy of the South Carolina Ports Authority's Reply in Support of Motion for Summary Judgment to Chambers in Word format.
Thank you,

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

Any views or opinions expressed in this email are those of the author and do not necessarily represent those of the SC Administrative Law Court. South Carolina Administrative Law Court Trusted Root Certificate https://cn.arx.com/?options=7&bselected=MTU2

Exhibit 2

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Sierra Club, South Carolina Coastal Conservation League and the League of Women Voters of Georgetown County,	)	Docket No. 12-ALC-07-0493-CC
Petitioners,	)	**MOTION TO STRIKE SUR-REPLY**
vs.	)	
Georgetown County and South Carolina Department of Health and Environmental Control,	)	
Respondents.	)	

TO: ADMINISTRATIVE LAW JUDGE PHILLIP LENSKI AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Petitioners hereby move the Court to strike the sur-reply filed by Respondent DHEC on July 12, 2013.

Administrative Law Court Rule 19 directly covers motions procedure, and recent amendments to Rule 19 make very clear that the sur-reply filed by DHEC is not allowed.[1] Prior to May 1, 2013, Rule 19 only provided for a motion response: "Any party may file a written response to the motion within ten (10) days." (2009). But then, as stated on the ALC website: "The 2013 amendments to the ALC Rules of Procedure became effective May 1, 2013. The amendments include . . . updated provisions for filing responses to motions." Specifically, Rule 19 was amended to allow a reply: "Any party may file a **written response** to the motion within ten (10) days of the filing of the motion . . . Any party may file a **written reply within five (5) days of the filing of a response.**" (2013) (emphasis added).

[1]Because ALC Rule 19 addresses motions procedure, any related provisions in the Rules of Civil Procedure are inapplicable under ALC Rule 68.

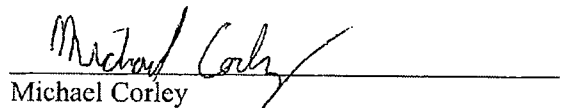
Clearly, the South Carolina judiciary very recently considered motions procedure in the ALC (which is to have simplified procedures) and determined that only a response and reply are allowed. The new Rule 19, which was in place and in effect at the time DHEC filed its sur-reply, makes no provision for additional briefing beyond the reply. The Petitioners submit that there could be no stronger, more immediate indication of judicial intent on this matter than the recent change to Rule 19. Through ALC Rule 19, the S.C. Supreme Court has made clear that motions briefing in the ALC ends with a reply. Further, Rule 19 intentionally establishes a system that is customary under the law, where the moving party gets the last arguments on its motion. If DHEC is allowed a sur-reply, the Petitioners feel compelled to file a return addressing some of the contentions therein.

To make matters here worse, DHEC has not even asked this court for permission to file its sur-reply. Certainly, if DHEC were allowed to break with the clear procedure provided in ALC Rule 19, it would have to be at this Court's discretion upon formal motion. Instead, counsel for DHEC emailed this Court asking for an *extension* for filing its sur-reply, stating that DHEC would normally have 10 days to make such filing. See Exhibit A. Even for the reply that is allowed under Rule 19, DHEC would have *only 5 days* to file. In all, 17 days passed between the Petitioners' reply and DHEC's purported sur-reply.

In addition to the terms of Rule 19, DHEC's failure to file a motion, and DHEC's delay in filing, a final factor weighing against acceptance of the sur-reply is its content. DHEC's sur-reply itself leads with the acknowledgment that "[t]he reasons summary judgment should be denied were *discussed in detail* in Respondent's previously-filed Memorandum in Response to Petitioners Motion for Summary Judgement." Sur-reply, p. 2 (emphasis added). And DHEC is

correct in this assessment – the sur-reply only seeks to bolster arguments previously presented in its response. Particularly, the sur-reply goes even further down the rabbit hole on an ancillary argument over the address of **a lawyer who has not even filed an appearance in this case.**[2] If DHEC believes that an affidavit relying on a year-old email from an unrelated FOIA matter is relevant to whether summary judgment or default judgment should be granted in this case, it was required to submit that affidavit with its response. The Petitioners' reply did not raise any issues beyond those in DHEC's response, and DHEC has no justification for submitting a sur-reply, even if one were permitted.

The Petitioners do not believe that DHEC can file a sur-reply under any circumstances. But surely DHEC cannot do so here, without first making a motion to the Court, and where its sur-reply only seeks to bolster issues already addressed in its response. In a case where failure to comply with the ALC's rules and deadlines is already front-and-center, the Petitioners' respectfully ask this Court to apply the plain, recently clarified terms of the ALC rules and strike DHEC's sur-reply.



Michael Corley
Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440

[2]ALC Rule 8(b) provides as follows: "After a case is assigned to an administrative law judge, an attorney . . . *must* file a notice of appearance with the presiding administrative law judge within ten days of being retained or authorized to represent the party." DHEC's sur-reply largely relates to its argument that using the address on Georgetown County's application was incorrect, and that Petitioner should have used the address of an attorney employed by the County who has not filed an appearance before this Court. DHEC made this exact same argument in its response.

Telephone (843) 527-0078

Attorneys for the Petitioners

Georgetown, South Carolina

June 17, 2013

Exhibit 3

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	**(PROPOSED) SURREPLY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
v.	)	
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

The Reply in Support of Summary Judgment filed by the S.C. State Ports Authority ("SPA") argues that the parties to the present action and this Court are "bound" by a recent South Carolina Supreme Court holding dismissing a nuisance and ordinance enforcement lawsuit brought by several organizations against Carnival Cruise Lines. SPA Reply 21. This is a new argument not made in SPA's opening Motion for Summary Judgment. As discussed below, SPA's position is unsound.

~~The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n. 1 (S.C. Ct. App. 1984). "The party asserting collateral estoppel 'must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment.'" *Carrigg v. Cannon,*~~

~~347 S.C. 75, 80, 552 S.E.2d 767, 770 (S.C. Ct. App. 2001) (quoting *Beall*, 281 S.C. at 371, 315 S.E.2d at 191). SPA's collateral estoppel argument fails here because the Carnival decision concerns a different kind of case, in a different posture, resolved on different facts.~~

Unlike this contested case – which will determine if the S.C. Department of Health and Environmental Control ("DHEC") authorized SPA's new cruise terminal in compliance with applicable law – the case before the Supreme Court involved common law nuisance claims and claims to enforce municipal ordinances: claims over which the ALC has no jurisdiction, and that are typically lodged in Circuit Court. *See* Order, *Carnival Corp. et al. v. Historic Ansonborough Neighborhood Ass'n*, Op. 27355 at 3-4 (S.C. Orig. Jan. 22, 2014) (summarizing complaint and procedural history) (attached hereto as Exhibit 3). Moreover, the actual issue faced by the Supreme Court was whether the nuisance and ordinances claims should be dismissed for "failure to state facts sufficient to constitute a cause of action" pursuant to SCRCP 12(b)(6). Order, *Carnival Corp. et al. v. Historic Ansonborough Neighborhood Ass'n* at 5.

Accordingly, the Court based its rulings "solely on the allegations set forth in the complaint" in the Carnival matter, *id.*, and its decision turned on whether the complaint set forth the elements needed to state nuisance and ordinance violations against Carnival. Examining those elements as to nuisance, the Court noted that a private party bringing a public nuisance claim must allege he or she suffered a "special injury to his real or personal property." *Id.* at 8 (citations omitted). Because the plaintiffs' complaint failed to "set forth any injury they have suffered that is different from the injury suffered by the public generally," the Court found that "special injury" had not been alleged. *Id.*

Turning to the ordinance enforcement claims, the Court noted that state statute provides a cause of action only for a "specially damaged, adjacent or neighboring property owner." *Id.*

(citing S.C. Code (2004) § 6-29-950). The Carnival plaintiffs failed to allege "any injury distinct from that suffered by the public generally," according to the Court, and "[a]dditionally" made "no allegations that they own adjacent or neighboring property." *Id.* at 9.

In the present case, there is no requirement that affected parties be property owners, much less "specially injured" or "specially damaged" ones, to challenge unlawful DHEC approvals. They need only be "affected persons." S.C. Code Ann. § 44-1-60(G). Moreover, while the harm alleged in the Carnival case was attributed to operation of the Carnival *Fantasy* – a single ship with only 2,500 passengers aboard – the Community Groups in the current matter contend that construction of SPA's cruise terminal as unlawfully approved and permitted by DHEC will injure them by allowing SPA's cruise operation to continue when it otherwise could not and to expand. The Community Groups further contend that if the law were followed, the impacts from cruise operations in downtown Charleston – where they live, work and recreate – would decrease.

The Community Groups thus present the kind of injury that has supported affected party standing in South Carolina administrative proceedings for years. *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007); *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988). This Court therefore correctly determined that the Community Groups have alleged standing, and denied SPA's motion to dismiss contending otherwise. ~~The Court's ruling is law of the case, and the Supreme Court's decision on different causes of action seeking different relief does not alter it.~~[+] Even if the Supreme Court's findings

---

[+] ~~*See Citizens for Prot. of N. Kohala Coastline v. Cnty. of Hawai'i*, 91 Haw. 94, 102, 979 P.2d 1120, 1128 (1999) ("The issue of whether Citizens had standing to pursue an action for declaratory relief under HRS § 632-1 was not before the trial court in the agency appeal; rather, as mentioned, the court was faced only with the issue of whether Citizens had standing to appeal an agency's denial of a contested case hearing and grant of an SMA permit under HRS § 91-~~

concerning the Carnival plaintiffs' particularized injury could be extracted from the special pleading requirements for nuisance and ordinance claims, the Court's findings were not a "necessary" basis for its decision. As noted above, the Court independently held that the complaint should be dismissed because special injury and damages were absent, and estoppel is defeated by those alternative grounds.[2]

A final factor that defeats estoppel is procedural posture. The Supreme Court was ruling on motions to dismiss for failure to state a claim. This Court, by contrast, is presented with an SPA summary judgment motion on standing. ~~As the Community Groups have noted, SPA's present motion parrots the summary judgment motion it filed in a parallel federal court matter, and the federal court's ruling is on all fours and estops SPA.~~ Even if this could be put aside, *this* tribunal's treatment of SPA's motion will differ markedly from the Supreme Court's resolution of a motion to dismiss nuisance and ordinances claims for failure to state a claim. Not only does SPA espouse a different standing theory here – contending that standing is jurisdictional*ish* – but the Court has different facts before it concerning standing.

~~As the nonmoving party, the Community Groups can survive summary judgment by producing minimal evidence showing an issue of fact regarding standing. *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). They have met that burden in a number of ways, including an exhaustive factual recitation, supported by SPA's own~~

~~14."); *Walsh v. Town of Stonington Water Pollution Control Auth.*, No. 520132, 1998 WL 46492, at *1 (Conn. Super. Ct. Jan. 28, 1998), *aff'd*, 250 Conn. 443, 736 A.2d 811 (1999) ("An objection to a permit renewal and a claim for damages in a common law nuisance action are not identical issues and therefore the nuisance action is not barred by collateral estoppel."); *Miller v. City of Bainbridge Island*, 111 Wash. App. 152, 167, 43 P.3d 1250, 1257 (2002) (property owner who defended tenant in nuisance action not barred from contesting subsequent permit denial).~~

[2] *See C.B. Marchant Co., Inc. v. E. Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985) (cited in *TecSec, Inc. v. Int'l Bus. Machines Corp.*, 731 F.3d 1336, 1343 (Fed. Cir. 2013)); *In re Dunes Hotel Assocs.*, 212 B.R. 110, 127 (Bankr. D.S.C. 1997) (citing *Beall*, 281 S.C. at 371, 315 S.E.2d at 191).

~~documents, which shows that permitting SPA's new terminal will increase injury to downtown residents by enabling SPA's cruise operation – and its concentrated impacts – to continue and expand. Further, the Court has multiple sworn affidavits from affiants who live and work in the area most directly impacted by cruise operations, and have experienced firsthand the impacts described in their affidavits. SPA itself admits that the affidavits "set forth issues the affiants allegedly have experienced in the past or are presently experiencing due to the existence of the cruise industry in Charleston," Reply at 27. Under SCRCP 11(c), an affiant must know "the facts stated to be true of his own knowledge," and these affidavits – reciting evidence upon which affiants have personal knowledge and are competent to testify – are rationally based on the perception of the witness, are helpful to the determination of a fact in issue, and do not require special knowledge. These facts alone defeat the claimed estoppel effect of the Supreme Court's nuisance decision.~~

CONCLUSION

The S.C. State Ports Authority's Motion for Summary Judgment should be denied.

Respectfully submitted,

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

Amy Armstrong
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

Counsel for Petitioners

February 11, 2014
Charleston, SC

Exhibit 4

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	**(PROPOSED) SURREPLY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
v.	)	
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

The Reply in Support of Summary Judgment filed by the S.C. State Ports Authority ("SPA") argues that the parties to the present action and this Court are "bound" by a recent South Carolina Supreme Court holding dismissing a nuisance and ordinance enforcement lawsuit brought by several organizations against Carnival Cruise Lines. SPA Reply 21. This is a new argument not made in SPA's opening Motion for Summary Judgment. As discussed below, SPA's position is unsound.

Unlike this contested case – which will determine if the S.C. Department of Health and Environmental Control ("DHEC") authorized SPA's new cruise terminal in compliance with applicable law – the case before the Supreme Court involved common law nuisance claims and claims to enforce municipal ordinances: claims over which the ALC has no jurisdiction, and that are typically lodged in Circuit Court. *See* Order, *Carnival Corp. et al. v. Historic Ansonborough Neighborhood Ass'n*, Op. 27355 at 3-4 (S.C. Orig. Jan. 22, 2014) (summarizing complaint and

procedural history) (attached hereto as Exhibit 3). Moreover, the actual issue faced by the Supreme Court was whether the nuisance and ordinances claims should be dismissed for "failure to state facts sufficient to constitute a cause of action" pursuant to SCRCP 12(b)(6). Order, *Carnival Corp. et al. v. Historic Ansonborough Neighborhood Ass'n* at 5.

Accordingly, the Court based its rulings "solely on the allegations set forth in the complaint" in the Carnival matter, *id.,* and its decision turned on whether the complaint set forth the elements needed to state nuisance and ordinance violations against Carnival. Examining those elements as to nuisance, the Court noted that a private party bringing a public nuisance claim must allege he or she suffered a "special injury to his real or personal property." *Id.* at 8 (citations omitted). Because the plaintiffs' complaint failed to "set forth any injury they have suffered that is different from the injury suffered by the public generally," the Court found that "special injury" had not been alleged. *Id.*

Turning to the ordinance enforcement claims, the Court noted that state statute provides a cause of action only for a "specially damaged, adjacent or neighboring property owner." *Id.* (citing S.C. Code (2004) § 6-29-950). The Carnival plaintiffs failed to allege "any injury distinct from that suffered by the public generally," according to the Court, and "[a]dditionally" made "no allegations that they own adjacent or neighboring property." *Id.* at 9.

In the present case, there is no requirement that affected parties be property owners, much less "specially injured" or "specially damaged" ones, to challenge unlawful DHEC approvals. They need only be "affected persons." S.C. Code Ann. § 44-1-60(G). Moreover, while the harm alleged in the Carnival case was attributed to operation of the Carnival *Fantasy* – a single ship with only 2,500 passengers aboard – the Community Groups in the current matter contend that construction of SPA's cruise terminal as unlawfully approved and permitted by DHEC will

injure them by allowing SPA's cruise operation to continue when it otherwise could not and to expand. The Community Groups further contend that if the law were followed, the impacts from cruise operations in downtown Charleston – where they live, work and recreate – would decrease.

The Community Groups thus present the kind of injury that has supported affected party standing in South Carolina administrative proceedings for years. *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007); *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988). This Court therefore correctly determined that the Community Groups have alleged standing, and denied SPA's motion to dismiss contending otherwise. Even if the Supreme Court's findings concerning the Carnival plaintiffs' particularized injury could be extracted from the special pleading requirements for nuisance and ordinance claims, the Court's findings were not a "necessary" basis for its decision. As noted above, the Court independently held that the complaint should be dismissed because special injury and damages were absent, and estoppel is defeated by those alternative grounds.[1]

A final factor that defeats estoppel is procedural posture. The Supreme Court was ruling on motions to dismiss for failure to state a claim. This Court, by contrast, is presented with an SPA summary judgment motion on standing. Even if this could be put aside, *this* tribunal's treatment of SPA's motion will differ markedly from the Supreme Court's resolution of a motion to dismiss nuisance and ordinances claims for failure to state a claim. Not only does SPA espouse a different standing theory here – contending that standing is jurisdictional*ish* – but the Court has different facts before it concerning standing.

---

[1] *See C.B. Marchant Co., Inc. v. E. Foods, Inc.*, 756 F.2d 317, 319 (4th Cir. 1985) (cited in *TecSec, Inc. v. Int'l Bus. Machines Corp.*, 731 F.3d 1336, 1343 (Fed. Cir. 2013)); *In re Dunes Hotel Assocs.*, 212 B.R. 110, 127 (Bankr. D.S.C. 1997) (citing *Beall*, 281 S.C. at 371, 315 S.E.2d at 191).

CONCLUSION

The S.C. State Ports Authority's Motion for Summary Judgment should be denied.

Respectfully submitted,

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

Amy Armstrong
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

Counsel for Petitioners

February 11, 2014
Charleston, SC

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.	)	**PETITIONER COMMUNITY GROUPS' REPLY IN SUPPORT OF MOTION MOTION TO FILE SURREPLY** Docket No. 13-ALJ-07-0056-CC

Pursuant to Rule 19, SCALCR, Petitioner Community Groups file this Reply in support of their Motion for Leave to File Surreply addressing arguments raised for the first time by Respondent S.C. State Ports Authority ("SPA") in its Reply in Support of Summary Judgment on standing.

The Community Groups sought leave to file a surreply because SPA injected a new matter – the S.C. Carolina Supreme Court's January 22, 2014 decision in a nuisance and ordinance case – in its reply in support of summary judgment. SPA does not dispute that it did this, and has "consented to Cruise Opponents' opportunity to file [*sic*] a surreply." SPA Opp. 3. SPA opposes portions of the proposed surreply, however, that it says go beyond "addressing the Supreme Court's opinion" and seek to "bolster" the Community Groups' response to SPA's motion for summary judgment. *Id.*

Needless to say, if fairness demands a response to a new issue launched on reply, it does not matter that such response would also serve to bolster the Community Groups' position on summary judgment. And since SPA contends that the Supreme Court's order goes to the merits of the present motion, it is hardly surprising that in responding to a new matter said to support SPA's motion, the Community Groups would make arguments that serve to oppose the motion.

Had SPA wanted to avoid that foreseeable result, it could have chosen to leave the Supreme Court's order out of its response. Instead, it injected a new issue and now wants to pick and choose the Community Groups' responses. SPA cannot have it both ways. SPA's opposition to the motion is baseless and the Court should allow the surreply to be filed without SPA's redlining.

1. Collateral Estoppel

SPA's central complaint is that the Community Groups mistakenly interpreted SPA's argument on the Supreme Court's order as concerning collateral estoppel. *See* Opp. 4. The Community Groups will confess to being confused by SPA's position – and understandably so. In introducing the Supreme Court's order, SPA stated that the parties are "bound" by the ruling on standing in the Carnival nuisance case, SPA Reply at 21. Now, in its opposition to surreply SPA repeats the word "bound," Opp. 2, and contends that "examination and comparison" of the Supreme Court's standing findings with standing allegations here is "*necessary* for this Court to reach a *conforming* result." *Id.* (emphases added).

Such language could be read to invoke preclusion; accordingly, the Community Groups responded with argument showing that elements of collateral estoppel are not present. This was a reasonable decision in light of what SPA filed, and SPA's disavowal now provides no reason to *edit* a properly drawn surreply. If anything, SPA's abandonment of the preclusion issue simply

allows the Court to avoid addressing the preclusive impact of the Supreme Court's opinion, and should support striking references in SPA's briefing to persons being "bound" by the "blueprint" of the Supreme Court's decision.

By the same token, SPA's clarification that it is *not* arguing collateral estoppel reinforces the reality that there is no real reason to consider the Supreme Court's resolution of a motion to dismiss claims sounding in nuisance and municipal ordinances. This Court has already resolved SPA's motion to dismiss on standing in this case, and a federal court has already rejected SPA's summary judgment motion relying on the same grounds SPA urges here.[1] *These* preclusive decisions – and SPA's failure to provide grounds for ignoring them – make the Supreme Court's decision in another case on different claims immaterial.

2. Community Groups Consent to a Limited Response

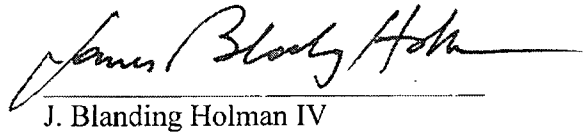
The Community Groups have no objection to a response to any *new* issues raised in the surreply, but do object to arguments that SPA could have made, or already did make, in SPA's reply in support of summary judgment. For example, should SPA change its mind and try to argue estoppel, it would *not* be entitled to set forth an affirmative argument for estoppel in what would effectively be a reply brief. Similarly, new attacks on the Conservation Groups' sworn affidavits would be inappropriate in a reply-like setting since SPA has already set forth its affirmative attack on the adequacy of affidavits in its reply supporting summary judgment. That is true even though SPA may have failed to attack certain aspects of self-evidently sufficient, sworn affidavits earlier; the filing of a surreply by Community Groups is not an opportunity for SPA to make arguments that it could have made earlier but failed to.

[1] SPA theorizes that the Community Groups have injected collateral estoppel to avoid waiving that issue with respect to the federal court order, SPA Opp. 4 n.5, but that issue is already preserved, Community Groups' Opp. to SJ at 16.

CONCLUSION

For the foregoing reasons, the Community Groups respectfully request that their Motion for Leave to File Surreply be allowed.

Respectfully submitted,



J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

Amy Armstrong
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

Counsel for Petitioners

February 26, 2014
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	Docket No. 13-ALJ-07-0056-CC
v.	)	**CERTIFICATE OF SERVICE**
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

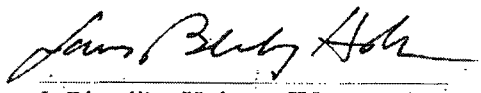
I hereby certify that I have on this 26th day of February 2014, served a copy of the foregoing Reply in Support of the Motion to File Surreply upon all parties and counsel of record in the above-captioned case, via United States Mail, postage pre-paid, addressed as follows:

Randolph R. Lowell
Chad N. Johnston
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202-8416

Bradley D. Churdar
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Attorneys for Respondent South Carolina State Ports Authority



J. Blanding Holman IV

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 RESPONSE TO CRUISE OPPONENTS' SURREPLY** Docket No. 13-ALJ-07-0056-CC

Respondent South Carolina State Ports Authority (Ports Authority) hereby submits this Response to Cruise Opponents' Proposed Surreply, filed as an attachment and in conjunction with the Motion to File Surreply, on February 11, 2014.[1] The Ports Authority submits the Supreme Court's analysis of the allegations of injury-in-fact in *Carnival Corp. v. Historic Ansonborough*, Op. No. 27355, 2014 WL 229894, (S.C. Sup. Ct. filed Jan. 22, 2014) (hereinafter Opinion), which are the same allegations advanced by many of the same organizations in this contested case, is instructive and binding in the Court's analysis of Cruise Opponents' standing.

[1] Based on the March 3, 2014 Order, this Response only addresses the arguments remaining in the "clean" version of the Proposed Surreply. *See* Ports Authority Response to Motion to File Surreply, Ex. 4 (accepting the deletion of the redline changes to Exhibit 3, as indicated by the Court).

ARGUMENT

I. THE SUPREME COURT PROVIDES THIS COURT WITH A CLEAR BLUEPRINT FOR EVALUATING THE SUFFICIENCY OF THE ALLEGATIONS OF INJURY-IN-FACT, WHICH IT FOUND TO BE INSUFFICIENT.

In the Opinion, the Supreme Court exposed the insufficiency of the allegations of injury-in-fact advanced in this litigation against the cruise industry in Charleston. Although Cruise Opponents' Surreply attempts to marginalize and distinguish the Supreme Court's analysis on the basis that the *causes of action* differ between the cases, the reality is that the *allegations* of injury-in-fact in this case, as well as the parties advancing them, are identical to those considered by the Supreme Court.[2] The Ports Authority's comparison of the claims of injury-in-fact advanced to the Supreme Court and those advanced in this contested case demonstrates that the claims are one and the same. The Cruise Opponents' argument that the *causes of action* differ between the two cases is a red herring which ignores the fact that the Supreme Court has methodically dismantled the *allegations*[3] made by Cruise Opponents, holding that those allegations are nothing more than generalized grievances shared by the public at large.

---

[2] The Surreply alleges the Supreme Court action was "resolved on different facts," *see* Surreply at 2, and that "[this] Court has different facts before it concerning standing [than did the Supreme Court]," *see* Surreply at 4; however, that is incorrect, and Cruise Opponents do not offer any example or explanation for their assertion. The alleged injuries advanced here are the same alleged injuries rejected by the Supreme Court. *Compare* Request for Contested Case, *with* Ports Authority Motion for Summ. Judg., Ex. 73, Cruise Opponents' First Am. Compl., *Carnival Corp. v. Historic Ansonborough*, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012).

[3] Moreover, to the extent properly alleged as a ground for revoking the Permit in the Request for Contested Case, *see* Request for Contested Case at 12, ¶24 ("Petitioners will demonstrate that cruise ship operations amount to a public and private nuisance ..."), Cruise Opponents now admit in the Surreply that this Court does not have jurisdiction over nuisance claims. *See* Surreply at 2 ("Unlike this contested case – which will determine if the S.C. Department of Health and Environmental Control ("DHEC") authorized SPA's new cruise terminal in compliance with applicable law – *the case before the Supreme Court involved common law nuisance claims* and claims to enforce municipal ordinances: claims *over which the ALC has no jurisdiction*, and that are typically lodged in Circuit Court.") (emphasis added).

Further, Cruise Opponents mischaracterize the Supreme Court's holding in suggesting that the Opinion was limited to considering whether Cruise Opponents had set forth facts and the required elements sufficient to constitute a cause of action. *See* Surreply at 2 ("[T]he [Supreme] Court based its rulings 'solely on the allegations set forth in the complaint' in the Carnival matter, *id.*, and its decision turned on whether the complaint set forth the elements needed to state nuisance and ordinance violations against Carnival."). Quite the opposite, although the issues of whether Cruise Opponents had alleged "facts sufficient" for both a public and private nuisance were presented to the Court, *see* Opinion at 5 (Issues Presented Nos. IV and V), the Supreme Court's opinion was expressly limited to the discrete issue of Cruise Opponents' inability to satisfy the injury-in-fact prong of the test for standing. *See* Opinion at 11 ("We hold Plaintiffs lack standing. Because standing is a fundamental prerequisite for instituting a legal action, we do not consider the remaining issues," *i.e.*, whether Cruise Opponents alleged "facts sufficient").

Moreover, Cruise Opponents' incorrectly suggest that the Supreme Court's injury-in-fact analysis is incapable of being applied to this case because the nuisance and ordinance causes of action required "special injury." *See* Surreply at 3 ("In the present case, there is no requirement that affected parties be property owners, much less 'specially injured' or 'specially damaged' ones, to challenge unlawful DHEC approvals. They need only be 'affected persons.'"). That argument ignores the clear parallel drawn by Supreme Court between a "special injury" requirement and concrete and particularized harm. In setting forth the level of proof required to allege a "special injury," the Opinion confirms that the test applied for a "special injury" is the

---

Thus, this allegation is abandoned, and the Court should enter judgment on Cruise Opponents' purported nuisance allegations.

same as that applied under the constitutional injury-in-fact evaluation of whether the plaintiff has suffered a concrete and particularized harm:

> 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.

Opinion at 8.[4] In effect, this is precisely the analysis suggested by the Ports Authority with respect to the conferral of standing on a petitioner by virtue of satisfying S.C. Code Ann. § 44-1-60's "affected person" status. *See* Motion for Summ. Judg. at 21, §2 (averring that in South Carolina, a person qualifies for "affected person" status when a party demonstrates standing under the traditional *Lujan/Sea Pines* test). The Opinion confirms this point: with respect to the injury-in-fact element of constitutional standing, all roads lead back to the *Lujan/Sea Pines* test. Therefore, because the test for "special injury" and "affected person" is the same—*i.e.*, the "particularized injury" requirement under *Lujan/Sea Pines*—the Supreme Court's evaluation and rejection of the *same allegations* of harm, advanced by many of the *same parties*, applies to the analysis of Cruise Opponents' standing in this case.

---

[4] In their efforts to distance themselves from the Supreme Court's holding on the failure of the allegations of harm to satisfy the particularized harm requirement, Cruise Opponents suggest, in essence, that the Supreme Court's analysis in that regard is *dicta* and not necessary to support its dismissal of Cruise Opponents' claims. *See* Surreply at 3-4 (stating that the Supreme Court's "findings were not a 'necessary' basis for its decision."). This unusual approach is almost 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. Unsurprisingly, Cruise Opponents cite no case law for this novel approach to rejecting dispositive holdings. Consequently, the Supreme Court's holding that Cruise Opponents have not alleged special injury—which it expressly equated to the particularized harm standard of *Lujan/Sea Pines*—is dispositive.

Finally, Cruise Opponents contend that, because the Supreme Court evaluated and rejected the allegations of injury-in-fact at the motion to dismiss stage, the procedural posture of that dismissal somehow prevents this Court from employing the Supreme Court's analysis here. *See* Surreply at 4. As expressly recognized by this Court, however, and discussed throughout the litigation, the standard and burden of Cruise Opponents to prove standing in this case changes as the litigation progresses, becoming progressively *more* difficult for Cruise Opponents to demonstrate. *See* Reply in Support of Motion for Summ. Judg. at 2, Exs. 1 and 2 (discussing the successively higher burden of proof for standing required of a plaintiff at each stage of the litigation).[5] Consequently, because the Supreme Court dismissed Cruise Opponents' claims at the motion to dismiss stage, where the Cruise Opponents' bar is at its lowest point to clear, the opinion and the Supreme Court's analysis may inform with more force this Court's analysis of the motion for summary judgment[6] and clearly shows the inadequacy[7] of the injury-in-fact

---

[5] *See* Reply Ex. 1, Sept. 6, 2013 Hrg. Trans. at 18-19 ("All right. Well, that takes me back to *Lujan*. To where it says, quote, that you can consider standing at the completing stage and the summary judgement [sic] stage and at the trial stage and in each one of those stages, the burdens and analysis of the court shifts."); Reply Ex. 2, Jan. 9, 2014 Hrg. Trans. at 21-22 ("At each level of trial, you have a further evaluation of standing ... [a]t the Motion to Dismiss Stage, it was allegations. At the Summary Judgment Motion, it is genuine issue of material fact ... [t]he bar raises for one party and lowers for the others.").

[6] As compared to the inverse situation where a more stringent summary judgment standard holding would be applied in the reverse to a pending motion to dismiss.

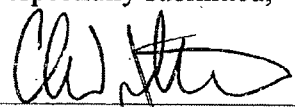
[7] The Ports Authority is not espousing a different standing theory in this case. *See* Surreply at 4 (suggesting, again without any citation or support, that the Ports Authority has made a "jurisdictional*ish*" argument with respect to standing). Quite to the contrary, the Ports Authority has consistently maintained throughout this litigation that Cruise Opponents must meet their heavy burden in satisfying the *Lujan/Sea Pines* test. The question of whether the Ports Authority's challenge to standing affects this Court's jurisdiction related to its argument that documents beyond the "pleadings" of the contested case could be considered by the Court in its deliberation of the motion to dismiss for lack of standing. In other words, the test for standing is always the same; the sliding scale relates to the rising burden of proof required of Cruise Opponents at varying stages of the litigation.

allegations that Cruise Opponents have advanced across their many fronts of litigation against the cruise industry.

CONCLUSION

Cruise Opponents' Surreply in no way demonstrates that the analysis of the Opinion should not be applied here. The underlying allegations made in this case essentially are the same as those rejected by the Supreme Court as failing to establish injury-in-fact. Accordingly, the Supreme Court's analysis provides the required framework for evaluating whether the allegations advanced in this contested case establish standing under the *Lujan/Sea Pines* test. As Cruise Opponents have utterly failed to meet their burden of proving injury-in-fact, causation, and redressability, the Court should grant the Motion for Summary Judgment for lack of standing at this stage of the litigation.

Respectfully submitted,



Randolph R. Lowell
Tracey C. Green
Chad N. Johnston
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

March 10, 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,	)	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 Response to Surreply** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

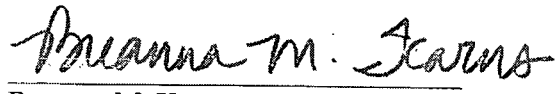
Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire
South Carolina Department of Health and Environmental Control

1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401



Breanna M. Karns

Columbia, South Carolina
This 10th day of March 2014.

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' MOTION FOR RECONSIDERATION**

TO: ADMINISTRATIVE LAW JUDGE RALPH K. ANDERSON, III, AND ALL PARTIES AND THEIR ATTORNEYS

PLEASE TAKE NOTICE that 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"), pursuant to ALC Rules 19 and 29(d) and SCRCP Rule 59(e), hereby move the Administrative Law Court for on order reconsidering its Order dated March 3, 2014, in which the Court ruled that discovery had ended on May 20, 2013, thereby denying the Community Groups' of the ability to conduct depositions.

"A party *may* wish to file such a motion [for reconsideration] when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

The Court Misunderstood and Failed to Fully Consider Petitioners' Arguments in Concluding that Good Cause Does Not Exist to Allow the Taking of Depositions

In deciding whether "good cause" is present, courts seek to ensure that "justice is promoted," and "strive for disposition of cases on their merits." Ricks v. Weinrauch, 293 S.C. 372, 375, 360 S.E.2d 535, 536 (S.C. Ct. App. 1987). Public policy generally supports disposition of cases "on their merits rather than on technicalities." Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) citing Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App.1986).

The Court's Order fails to ensure that justice is promoted and fails to strive for disposition of this case based on a full opportunity to present the merits. "Depositions are widely recognized as one of the 'most powerful and productive' devices used in discovery." In re Anonymous Member of S. Carolina Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (quoting A. Darby Dickerson, The Law and Ethics of Civil Depositions, 57 Md. L. Rev. 273, 277 (1998)). This Court's Order deprives the Community Groups of this essential discovery tool, undermining justice by hampering the ability to prepare for and present this complex issues involved in this case. The result is extreme prejudice to the Community Groups.

The Court's conclusion that there is no "good cause" to expand discovery fails to consider the express statements made by the State Ports Authority ("SPA"), the conduct of the parties up until December of 2013, the status of discovery at the time the discovery motion was filed, as well as the standard discovery practice in the ALC. These circumstances collectively go well beyond the "good cause" standard needed to expand discovery under ALC Rule 21.

The Court rejects the contention that all parties knew that discovery was ongoing beyond May 20, 2013, citing only to the fact that there was no scheduling order. The Court failed to consider the Community Groups' argument that, based on representations to this Court and the course of conduct of both Respondents, discovery had not, in fact, closed. The Community Groups identified several instances in which the State Ports Authority made such representations, which include email communications to the Court regarding discovery, as well as its own Prehearing Statement.

The Court issued an Order for Prehearing Statements on May 6, 2013. Notably, those Prehearing Statements were due on May 21, 2013, one day ***after*** discovery allegedly closed in this case. Yet the Court concludes that the Petitioners had "ample opportunity to conduct discovery," even though neither SPA nor DHEC had disclosed who they were calling as witnesses, what documents they intended to introduce or their defences that are outlined in the Prehearing Statement. In fact, SPA's Prehearing Statement stated that it "anticipate[d] discovery may take between six to nine months to complete" and that "an expanded number of depositions are appropriate for this matter." *See* Prehearing Statement of SPA.[1]

[1] In fact, this Court implicitly recognized that discovery would extend beyond Rule 21's 90-day period by way of its communication on May 31 that discovery was ongoing, observing that a hearing date it had proposed in November "provided over four months for discovery" and that it was "hopeful the parties could complete discovery within the time period."

The Community Groups cited SPA's Prehearing Statement, as well as its email communications with this Court, all indicating that SPA fully expected discovery to proceed outside the bounds of ALC Rule 21. It is evident from the Court's Order that it either 1) has been misled by SPA to believe that SPA has always asserted that discovery closed on May 20, or 2) misunderstood the fact that up until SPA's email dated December 18, 2013 (Exhibit E to Reply on Motion to Expand Discovery), SPA was operating under the premise that discovery would occur beyond the time limits of Rule 21, the same as Petitioners. The Petitioners direct the Court to communications between the parties, including attachments, establishing that the parties all understood discovery and depositions would occur outside of Rule 21. On June 10, 2013, weeks beyond the supposed May 20 discovery closure date, SPA's attorney emailed counsel for the Community Groups and DHEC proposing that the attorneys "*develop a scheduling order with deadlines for discovery*, dispositive motions, exchange of evidence, etc.," and suggesting that SPA would "*inform the Court that we are going to try and come up with a consent scheduling order* and ask that the Court let us know what week it will set the hearing for inclusion in that order." Exhibit A (emphasis added). Both Petitioners and DHEC agreed to proceed in this manner. Exhibit A. Shortly thereafter, SPA's attorney wrote to the Court, informing it that "*the parties are working on a proposed scheduling order with deadlines on discovery*, dispositive motions, exhibit exchange, and other deadlines as well as a proposed confidentiality order for discovery matters" and stating that that proposed orders would be submitted for the Court's consideration in the near term. Exhibit B.

In *not one* of these communications does SPA (or DHEC, for that matter) ever suggest that a modification or expansion under Rule 21 is being requested or even needed.[2] Moreover, *all* of

[2] The parties exchanged proposed consent orders, but neither was executed. Exhibit C.

these communications took place well past the May 20th deadline that SPA convinced this Court to retroactiavely deem as the controlling deadline.

SPA's representations to the Court and course of conduct in this case (prior to its reversal in December) are, in fact, consistent with the manner in which parties routinely practice before the ALC in environmental permitting casees. In fact, the rule cited by the Court appears to be honoured mostly in the breach. Petitioners pointed the Court to its decision in another case in which it orally denied a motion for continuance concluding that DHEC could take depositions four (4) days before the hearing. (Exhibit H to Reply to Motion to Expand Discovery). There was no scheduling order or motion by any party seeking to expand discovery beyond Rule 21. The failure to acknowledge the reality of common practice in the ALC justifies reconsideration.

In fact, the understanding that discovery in cases like this one extends beyond the 90-day period of Rule 21 is in keeping not only with how the attorneys in this case operated (until SPA's about-face on December 18, 2013), but also in keeping with how attorneys with a history of practice before the ALC – including the undersigned attorney – have operated. Prevailing practice is for discovery, and depositions in particular, to extend well past the ninety day period in ALC Rule 21. Leslie S. Riley, a long-standing practitioner before this Court, explains that she and other parties have consistently understood Rule 21 to be observed mainly in the breach since the timelines provided for under that rule do not provide for adequate preparation of cases such as this one. Exhibit D. Ms. Riley explains "that allowing for discovery is critical to properly prepare and present contested cases before the ALC." Exhibit D. Ms. Riley explains from a practitioners standpoint how parties conduct themselves in the ALC:

> In the nearly fifteen years that I have been practicing before the ALC, discovery has always exceed the ninety day period provided for under ALC Rule 21. In many instances,

> the parties have only exchanged Prehearing Statements and are in the initial phases of discovery, i.e., document production, within the ninety day period following the Notice of Assignment.
>
> These cases typically take up to a year or more to prepare for trial with discovery unless the issue is extremely narrow, and depositions in particular routinely occur very close to the trial date and certainly many months beyond the ninety period in ALC Rule 21. In fact, in my practice, the parties have not operated under ALC Rule 21, instead cooperating to enable full discovery of a case with the implicit recognition that depositions and document production will necessarily extend well beyond the ninety day period of ALC Rule 21. In my experience, **completing discovery within 90 days following the filing of the Notice of Assignment is a practical impossibility** . . .

Exhibit D (emphasis added).

The Court's order appears to misapprehend Petitioners' practical concerns. According to the Court, the Community Groups "have been afforded ample opportunity to conduct discovery" despite its conclusion that "discovery ended on or about May 20, 2013." If May 20 had been the deadline actually understood by all the parties, the Petitioners would have been required to complete discovery *before* Prehearing Statements were due, and *before* SPA had even begun responding to Petitioners April 26, 2013 requests for production. It would also have been extremely inefficient, if not practically impossible, to conduct productive depositions while documents were still pouring in by the 1,000s, since counsel cannot adequately prepare to take depositions until they have had an opportunity to review those documents. Needless to say, taking depositions by May 20 – before Petitioners had received ***any*** of SPA or DHEC's documents – would have been a futile waste of all parties' time.

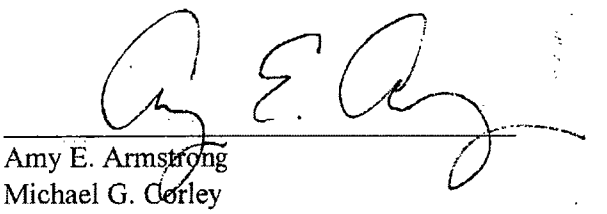
In summary, the Court's order should be reconsidered because it contradicts prevailing practice and the actions of the parties in this case. Moreover, it visits fundamental unfairness on the Petitioners and serves to punish them for having done nothing other than cooperate with SPA – a party that then changed course and sought to foreclose discovery that the parties indicated would

occur. While that outcome may serve SPA's purposes, it does not serve the purposes of justice or the ALC rules. *See* ALC Rule 10 (giving the ALC authority to take "reasonable measures" to ensure that the burdens of procedure "do not unfairly prevent the presentation of the facts.")

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court reconsider its Order of March 3, 2014, and grant Petitioners motion for expanded discovery and the relief sought therein or other such relief as the Court deems necessary.

Respectfully submitted,



Amy E. Armstrong
Michael G. Corley
Jessie A. White
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
Telephone (843) 527-0078

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street
Charleston, SC 29401
(843) 720-5270

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

Attorneys for the Petitioners

Georgetown, South Carolina

March 13, 2014

Re: FW: Proposed Orders in Preservation Society v. DHEC and SCPA

From: Amy Armstrong <amy@scelp.org>
To: Randy Lowell <rlowell@willoughbyhoefer.com>
Subject: Re: FW: Proposed Orders in Preservation Society v. DHEC and SCPA
Date: Wednesday, June 12, 2013 6:45 PM
Size: 17 KB

Yikes, sorry for my really slow reply! Yes, this is fine. Been consumed with a return to your SRMC amicus ;)

On Wed, Jun 12, 2013, at 11:51 AM, Randy Lowell wrote:

Are you okay with this plan?

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.

From: Bradley.Churdar [mailto:churdabd@dhec.sc.gov]
Sent: Monday, June 10, 2013 1:39 PM
To: Randy Lowell
Cc: Amy Armstrong; Chad Johnston; Lawrence, Philip
Subject: Re: Proposed Orders in Preservation Society v. DHEC and SCPA

Yes, that works for me. Thanks.

On Mon, Jun 10, 2013 at 1:37 PM, Randy Lowell <rlowell@willoughbyhoefer.com> wrote:
Brad and Amy:

I suggest we develop a scheduling order with deadlines for discovery, dispositive motions, exchange of evidence, etc. In assembling discovery responses, I believe the Ports Authority will need a protective order as well. We can draft initial proposed orders for consideration and circulation amongst counsel. And with your consent, I'll inform the Court that we are going to try and come up with a consent scheduling order and ask that the Court let us know what week it will set the hearing for inclusion in that order.

Does that plan work for everyone?

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.
(930 Richland Street)
Post Office Box 8416
Columbia, South Carolina 29202 (29201)
Telephone #: (803) 252-3300

Exhibit A

Facsimile #: (803) 256-8062
E-mail address: rlowell@willoughbyhoefer.com

Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential information and is intended only for the person or entity to which it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying or distribution or the taking of any action in reliance on the contents of this transmittal is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately by telephoning the sender at (803) 252-3300 and, also, please delete this transmittal from any computer or other data bank. Upon request, we will reimburse your reasonable costs of notifying us of a transmission error. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it was sent) without our express written consent.

--
Bradley D. Churdar
Chief Counsel
SCDHEC - Ocean & Coastal Resource Management
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(office) 843.953.0213
(fax) 843.953.0201

--
Amy E. Armstrong
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Phone: (843) 527-0078
FAX: (843) 527-0540
amy@scelp.org

Preservation Society of Charleston et al v. SCDHEC and SPA, 13-ALJ-07-0056-CC

From: Randy Lowell <rlowell@willoughbyhoefer.com>
To: Harvin Fair <hfair@scalc.net>
Cc: Amy Armstrong <amy@scelp.org>, michael@scelp.org, churdabd@dhec.sc.gov, Chad Johnston <cjohnston@willoughbyhoefer.com>, Lawrence, Philip <PLawrence@SCSPA.com>
Subject: Preservation Society of Charleston et al v. SCDHEC and SPA, 13-ALJ-07-0056-CC
Date: Friday, June 14, 2013 9:49 AM
Size: 10 KB

Dear Harvin:

On behalf of the parties in the above-referenced case, I wanted to let the Court know that the parties are working on a proposed scheduling order with deadlines on discovery, dispositive motions, exhibit exchange, and other deadlines as well as a proposed confidentiality order for discovery matters. We will submit either a joint consent order or competing orders for the Court's consideration in the near term.

Thank you.

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.
(930 Richland Street)
Post Office Box 8416
Columbia, South Carolina 29202 (29201)
Telephone #: (803) 252-3300
Facsimile #: (803) 256-8062
E-mail address: rlowell@willoughbyhoefer.com

Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential information and is intended only for the person or entity to which it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying or distribution or the taking of any action in reliance on the contents of this transmittal is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately by telephoning the sender at (803) 252-3300 and, also, please delete this transmittal from any computer or other data bank. Upon request, we will reimburse your reasonable costs of notifying us of a transmission error. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matt
advice may not be forwarded (other than within the taxpayer to which it was ser
consent.

Exhibit B

Proposed Orders

From: Randy R. Lowell <RLowell@Willoughbyhoefer.com>
To: amy@scelp.org
Cc: churdabd@dhec.sc.gov, PLawrence@SCSPA.com, Chad N. Johnston <CJohnston@Willoughbyhoefer.com>, Jefferson Leath <jl@leathbouchlaw.com>
Subject: Proposed Orders
Date: Wednesday, July 10, 2013 10:46 AM
Size: 90 KB

Amy:

Attached for your consideration are draft orders for scheduling and protection of discovery documents.

Please let me know your thoughts on these drafts at your earliest convenience.

Randy

Randolph R. Lowell, Esquire
Willoughby & Hoefer, P.A.
(930 Richland Street)
Post Office Box 8416
Columbia, South Carolina 29202 (29201)
Telephone #: (803) 252-3300
Facsimile #: (803) 256-8062
E-mail address: rlowell@willoughbyhoefer.com

Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential information and is intended only for the person or entity to which it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying or distribution or the taking of any action in reliance on the contents of this transmittal is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately by telephoning the sender at (803) 252-3300 and, also, please delete this transmittal from any computer or other data bank. Upon request, we will reimburse your reasonable costs of notifying us of a transmission error. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it was sent) without our express written consent.

2013-07-10 Consent Scheduling Order.docx 32 KB
2013-07-10 Consent Protective Order.docx 52 KB

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, 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

Preservation Society, et al. v. SPA & DHEC

From: Amy Armstrong <amy@scelp.org>
To: Randy Lowell <rlowell@willoughbyhoefer.com>
Cc: jl@leathbouchlaw.com, jessie@scelp.org, Bradley Churdar <CHURDABD@dhec.sc.gov>, Philip Lawrence <PLawrence@SCSPA.com>
Bcc: Blan Holman <bholman@selcsc.org>
Subject: Preservation Society, et al. v. SPA & DHEC
Date: Tuesday, August 13, 2013 4:52 PM
Size: 29 KB

Randy:

I have reviewed your proposed consent scheduling order and have made proposed edits, attached. As far as the protective order is concerned, the Petitioners cannot consent to a blanket protective order and cannot imagine what documents a state agency would have that are entitled to protection. If there are documents you believe are entitled to protection, we ask that you identify the author, the subject matter and the date of those documents, and counsel will review and consider whether we consent to protecting documents on a case-by-case basis.

You indicate in your responses to discovery requests that SPA will make available additional responsive documents at its Charleston office. I would like to set up a time for this review. We are available on August 16, 19-23, 28, 29 and 30th. Let me know which of these dates we can review SPA's production.

Finally, will you consent to a 5 day extension for our reply to your response to our motion to strike?

Thanks,
Amy

--
Amy E. Armstrong
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
Phone: (843) 527-0078
FAX: (843) 527-0540
amy@scelp.org

Consent Scheduling Order aea edits.docx
26 KB

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. We can't agree to completely eliminate the limitations placed on discovery under the ALC rules, but we are agreeable to expanding the number of depositions to 15 per side.

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. See above. Petitioners provided names of all persons that

have factual information related to the issues in this case and that list was significant because of the far-reaching impacts of SPA's operation of Union Pier terminal; however Petitioners do not intend to present all of those individuals as witnesses. Petitioners would agree to the taking of 30(b)(6) depositions of all the Petitioners. in addition to all of Petitioners' expert witnesses.

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. We will not agree to expanding 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 October 15 ~~August 2~~, **2013**.

6. Respondents shall designate their expert(s) no later than October 31~~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 December 31 ~~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 State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **AFFIDAVIT OF LESLIE S. RILEY**

PERSONALLY APPEARED before me Leslie S. Riley who being duly sworn deposes and says:

I am a citizen and resident of Charleston, South Carolina. I have been licensed to practice law in South Carolina since 1999. Upon graduation from the University of South Carolina School of Law, I began practicing law as a staff attorney for the South Carolina Department of Health and Environmental Control's ("DHEC") Office of Ocean and Coastal Resource Management ("OCRM"). In 2002 I became Chief Counsel for OCRM, a position I held for five years. As Chief Counsel I was responsible for handling a large portion of the litigation arising from the coastal permitting division. The vast majority of my practice involved administrative appeals of agency permitting or enforcement actions before the Administrative Law Court. I have handled

Exhibit D

hundreds of appeals before the Administrative Law Court related to environmental permit applications for a wide range of activities.

In January of 2007 I left the agency and joined McNair Law Firm as Special Counsel. My practice includes administrative, environmental and local government Law. During my seven years at McNair I have continued to appear regularly before the Administrative Law Court and am familiar with the ALC Rules as well as the ALC discovery and hearing process and procedure. Prehearing statements, which are dictated by an Order from the assigned ALJ, provide the parties with an opportunity to ascertain who will be witnesses, which exhibits are proposed, and the legal grounds for the claims or defenses. However, allowing for discovery is critical to properly prepare and present contested cases before the ALC.

In the nearly fifteen years that I have been practicing before the ALC, discovery has always exceed the ninety day period provided for under ALC Rule 21. In many instances, the parties have only exchanged Prehearing Statements and are in the initial phases of discovery, i.e., document production, within the ninety day period following the Notice of Assignment.

These cases typically take up to a year or more to prepare for trial with discovery unless the issue is extremely narrow, and depositions in particular routinely occur very close to the trial date and certainly many months beyond the ninety period in ALC Rule 21. In fact, in my practice, the parties have not operated under ALC Rule 21, instead cooperating to enable full discovery of a case with the implicit recognition that depositions and document production will necessarily extend well beyond the ninety day period of ALC Rule 21. In my experience, completing discovery within 90 days following the filing of the Notice of Assignment is a practical impossibility, particularly when the Prehearing Statement is the first indication of identified witnesses.

Further more the affiant sayeth not.

Leslie Stidham Riley

SWORN TO before me this

13th day of March, 2014.

(SEAL)

Notary Public for South Carolina

My Commission Expires: 10/31/2023

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' MOTION TO RECONSIDER AND FOR STAY**

TO: ADMINISTRATIVE LAW JUDGE RALPH K. ANDERSON, III, AND ALL PARTIES AND THEIR ATTORNEYS

PLEASE TAKE NOTICE that 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"), hereby move this Court: (1) for an order reconsidering the Order Granting Sanctions dated March 3, 2014 pursuant to SCALC Rules 29 and 68 and SCRCP Rules 52, 59 and 60; and (2) for an order staying the effect of its Order Granting Sanctions dated March 3, 2014 pursuant to SCALC Rule 29.E, SCRCP Rule 65, SCACR Rule 225, and S.C. Code Ann. §§ 1-23-380 and -600. The grounds for this motion are as follows:

INTRODUCTION

Following the DHEC staff decision granting a critical area permit and coastal zone consistency certification to SPA for the construction of a new cruise ship terminal at Union Pier, the Petitioners requested a final review conference of the DHEC Board. On January 10, 2013 the DHEC Board declined to conduct a final review conference. In response, on February 11, 2013, the Petitioners filed a request for contested case in the Administrative Law Court. In further response, and based upon the lack of evidentiary support and inadequate conclusory findings contained in the DHEC staff decision, the Petitioners filed a motion for remand to the full DHEC Board for review. By Order dated May 3, 2013, this Court denied the Petitioners' motion for remand. On July 1, 2013, SPA filed a motion for sanctions based on the motion for remand. The Petitioners' filed a response on July 26, 2013 and SPA filed a reply on August 6, 2013. This Court did not consider the Petitioners' sur-reply addressing the extent to which SPA's reply went beyond the scope of its original motion. On September 6, 2013, arguments were heard on the motion for sanctions, among other motions, and on March 3, 2014, this Court issued its Order Granting Sanctions against the Petitioners.

I. THE COURT FAILED TO CONSIDER SPA'S MOTION FOR SANCTIONS ACCORDING TO APPROPRIATE SOUTH CAROLINA CASE LAW

Under SCALC Rule 72, a presiding administrative law judge "may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require" upon determining that a case, appeal, motion or defense is "frivolous" or "solely for purposes of delay." SCALC Rule 72. In reaching a determination of frivolity, the ALJ may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act ("FCPSA"), and should also be guided by relevant case law and principles of equity. SCALC Rule 72, 2009 Revised Notes;

Southeastern Site Prep, LLC v. Atl. Coast Builders and Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (S.C. Ct.App. 2011). ("The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity.").

South Carolina courts have generally recognized that the bar is set high for a claim to rise to the level of "frivolous" and distinguish between claims which may ultimately be denied or deemed unpersuasive and those constituting frivolity. *Father v. S. Carolina Dep't of Soc. Servs.*, 353 S.C. 254, 259, 578 S.E.2d 11, 13 (2003) ("A party who makes a 'frivolous' claim or raises a 'frivolous' defense has committed a more egregious act than one who merely acts 'without substantial justification.'") (*citing Heath v. Aiken County*, 302 S.C. 178, 394 S.E.2d 709 (1990) ("A court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification")).

Here, this Court clearly disagreed with the Petitioners' legal position in seeking remand to the DHEC board. *See* Order Granting Sanctions, p. 4. However, a determination that an underlying legal argument was unpersuasive falls far short of the standard for imposing sanctions. *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (stating "it is axiomatic that asserting a *losing* legal position . . . is not of itself sanctionable conduct"). Further, the Court here has sanctioned a party for, at base, reading the statutory term "must" to mean "must." The motion for remand argued that the DHEC Board "must" hold a Final Review Conference within 60 days of one having been requested. *See* S.C. Code Ann. 44-1-60(F). The Petitioners contended that there exists a patent ambiguity in the statute with the foregoing sentence containing the mandatory language "must," followed by language describing what occurs "if" the DHEC Board does not conduct a final review conference, which does not necessarily mean that the Board's review is entirely discretionary. *Id.*

The statute does not explicitly state that the DHEC Board may hold a requested review conference "if it wants" or "in its discretion;" rather, it states that the DHEC Board "must" have a conference within 60 days if one is requested. *Id.* The statute goes on to state that, if the Board does not have a conference, the requesting party may then seek relief in the ALC. *Id.* The Court read this latter provision to make the review conference discretionary, but it also can be read to provide an avenue of redress in the wake of the Board's failure to take a non-discretionary action. Petitioners took that route, and then sought an order for the DHEC Board to do what the law easily can be read to require.

SPA disagreed with Petitioners interpretation of the law. So, ultimately, did this Court. Neither is a basis for sanctions. Indeed, a summary review of South Carolina cases in which sanctions were awarded demonstrates how far from the mark the case before this Court lands.

In *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006), Rutland sued his former counsel despite that lawyer having obtained a judgment in the Rutland's favor. Rutland filed three consecutive malpractice suits against counsel, each of which alleged the same claims, amounting to mere dissatisfaction with counsel and his firm, and each for a primary purpose other than securing the proper adjudication of civil proceedings. *Rutland v. Holler*, 371 S.C. 91, 98, 637 S.E.2d 316, 320. Accordingly, the Court determined that it was "***inconceivable*** that Rutland reasonably believed that his claims against Respondents were valid" and affirmed the imposition of sanctions against him. *Id.* (emphasis added).

In *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006), the South Carolina Supreme Court upheld sanctions against a party who should have realized that continuing to pursue an action to set aside a will and trusts on the ground of undue influence was improper after

receiving numerous affidavits directly refuting and demonstrating that the facts did not support her argument. 370 S.C. at 17, 633 S.E.2d at 728.

In *Ex parte Gregory*, 378 S.C. 430, 663 S.E.2d 46 (2008), the South Carolina Supreme Court affirmed sanctions based upon a party's failure to conduct a reasonable investigation prior to filing suit for conversion. The Court determined that the plaintiff had ample time to conduct a reasonable investigation and that had such investigation been conducted, the plaintiff would have known that there was no basis for an action in conversion. *Ex parte Gregory*, 378 S.C. at 438-39, 663 S.E.2d at 51. Instead, the plaintiff refused to contact the defendant and acted on the client's unverified statements in bringing the action. *Id.*[1] The Court's decision to uphold sanctions was influenced by the particularly egregious conduct of the party in that case, which the Court concluded rose to the level of "frivolous." *Id.* at 439, 51 (*citing Father v. S. Carolina Dep't of Soc. Servs., supra* (a party who makes a frivolous claim has committed a more egregious act than one who merely acts without substantial justification)).[2]

In *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011), the South Carolina Supreme Court determined that a second removal of the action to federal court was not based on good grounds, was interposed solely for delay, and therefore "constituted vexatious sanctionable conduct." In 2004, the appellants removed the state action for defamation and civil conspiracy, attempting to invoke the court's federal question jurisdiction based on an alleged immunity under federal law; however, the respondent's motion to remand,

[1] In particular, the Court found "it troubling that [the plaintiff] was willing to speak with a news reporter and make statements that he would have known to be false if he had conducted any type of meaningful investigation. Without a reasonable basis, [the plaintiff] relied on his client's statements that she did not know where the settlement money was to make inflammatory statements to the newspaper, *i.e.* accusing [the defendant] of commingling funds and of keeping the settlement money "in his pocket" and collecting all the interest on it." *Id.*

[2] The Court further stated: "Had [the plaintiff] spoken with [the defendant] and relayed [the client's] worries over the money, then the suit would have never been filed. Under the particular facts of this case, a simple phone call may have led to an explanation by [the defendant] as to why the money was being held. Such a discussion between the attorneys could have prevented the grievance and suit from being filed" at all. *Id.*

which asserted appellants could not defend their way into federal court, was granted and the case proceeded in state court. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. at 593, 713 S.E.2d at 625-26. In 2010, a few hours before trial, the appellants removed the case for a second time on the same grounds, which was similarly remanded, and faced sanctions from the state court judge and respondent pursuant to SCRCP Rule 11. *Id.* at 594-95, 626-27.

The Court upheld the imposition of sanctions finding that appellants "could not have formed a good faith belief that the second removal was appropriate" and stating "a filing ***that is so patently without merit*** that no reasonable attorney could have a good faith belief in its propriety" is clearly a violation of SCRCP Rule 11. *Id.* at 598-99, 628-29 (emphasis added).[3] The Court went on to "to state definitively that vexatious removal is sanctionable conduct, and parties will be held accountable for the unnecessary expense and delay caused by abuses of the right to removal." *Id.* However, the Court clarified that the appellants were being sanctioned in this case because their "***behavior goes far beyond*** simply exercising their right to remove a case to federal court" and reiterated that "[a] finding of vexatious removal should be ***rare***, but the case before us is an ***extreme*** one, and the coalescence of all the facts merit appropriate sanctions." *Id.* at 599-600, 629 (emphases added).

In each of the above cases, an award of sanctions followed some form of egregious conduct or was deemed appropriate due to the particularly extraordinary facts and circumstances of the case. Here, the Petitioners' conduct in filing the motion for remand does not come close to rising to that level and this Court erred by failing to consider SPA's motion for sanctions in accordance with principles of equity and the applicable South Carolina case law.

[3] The Court opined: "We will not approve attorneys engaging in semantic games with the courts and allow artful crafting of "new" grounds for removal when no evidence exists to support a subjective belief that the plaintiff was asserting a federal cause of action." *Id.* at 599, 629.

II. THE COURT MISAPPLIED THE PROPER STANDARD IN GRANTING SPA'S MOTION FOR SANCTIONS

As previously stated, SCALC Rule 72 directs an ALJ to look to principles of equity and relevant case law, as set forth above, as well as the FCPSA.

The original FCPSA created "a presumption that a person taking part in the initiation or continuation of proceedings acted with a proper purpose 'if he reasonably believes in the existence of facts upon which his claim is based' and . . . reasonably believes under the facts that his claim may be valid under existing or developing law." *Rutland v. Holler, supra*, 371 S.C. at 97-98, 637 S.E.2d at 319-20. Although the specific provisions of the FCPSA that required the party seeking to impose sanctions to prove the other party acted frivolously have been substantially altered,[4] the revised FCPSA prescribes a "reasonable attorney" standard to determine whether sanctions are warranted. *Southeastern Site Prep v. Atl. Coast Builders, supra*, 394 S.C. at 105, 713 S.E.2d at 654.

While the exact meaning of a "reasonable attorney" standard is generally elusive, its application under the revised FCPSA calls for an objective assessment of whether or not a reasonable attorney, who is presented with the same facts and circumstances, would believe the claim or filing to possess some good faith basis in law and therefore not be raised or made merely for purposes of delay or harassment. S.C. Code Ann. § 15-36-10(A)(4). However, rather than objectively evaluate the Petitioners' motion for remand, this Court applied a different and improper standard in reviewing the sanctions motion.

Among other things, this Court summarily dismissed sworn testimony of attorneys attesting to their good faith belief in the reasonableness and basis in law of the Petitioners' motion.

[4] The FCPSA was amended effective July 1, 2005.

The Court deemed these "unpersuasive" based, apparently, upon one of the affidavits being "submitted by a member of a law firm representing the Petitioners and the other by an attorney who has no demonstrable practice [sic] experience in the administrative law arena[.]" Order Granting Sanctions, pp. 5-6. In so doing, the Court went beyond the "reasonable attorney" standard to require a showing of a good faith basis by a lawyer practicing before the ALC and unconnected with any of the firms representing the party. There is no basis for rejecting affidavits on those grounds.

Moreover, this Court placed inappropriate emphasis on the fact that one of the attorneys for the Petitioners has had extensive experience in the administrative law arena and has previously stated in reference to a different case and under different circumstances that the DHEC Board has the option of conducting a final review conference after request is made. Order Granting Sanctions, p. 5. This, too, was improper. For even if Petitioners' counsel had offered a different view of the law underlying the motion at issue at a different time, such divergence is not itself grounds for sanction. Nor does the adoption of one reading of the law by practitioners and courts make it sanctionable for a lawyer to espouse a different view. If that were the case, the attorneys arguing *Brown v. Board of Education* and companion cases could have been sanctioned for failing to abide by *Plessey v. Ferguson*. *See Hunter v. Earthgrains, supra*, 281 F.3d at 153-54 (4th Cir. 2002) (overturning sanctions order, noting that "[c]reative claims... may merit dismissal, but not punishment." (internal quotations and citations omitted)). Here, the argument was not even "creative" – Petitioners merely contended that the word "must" established a mandatory duty.

As noted earlier, the Court found that despite use of the term "must," other provisions of the law lead to the conclusion that the mandatory command to the DHEC Board means that if it holds a board review conference, it merely "must" do so within 60 days. Ultimately, the Court

simply disagreed with a plausible reading of the statute offered by Petitioners, and found that prevailing practice concerning the statute made Petitioners' dissenting view a basis for imposing sanctions. It is worth pointing out, in that regard, that neither the Court nor SPA has cited to a single decision in which the Petitioners' reading of the law was argued and rejected. Put differently, the Petitioners' reading of "must" to mean "must" concerned an undecided question, yet the Court concluded that sanctions were warranted because – while the question had never been directly litigated – Petitioners should have known better than to read a plain statutory command to mean what it most naturally is read to mean.[5]

The totality of the facts point to something other than the presence of sanctionable conduct by the Petitioners. Rather, they point to a departure from prevailing standards to issue a punitive decision based on considerations not contemplated under the FCPSA "reasonable attorney" standard. If this Court's decision stands it has the potential to significantly disrupt the existing legal precedent and open the flood gates for sanctions motions that are lacking in the egregious conduct typically associated with imposition of such awards by our courts. Accordingly, the Petitioners respectfully request that this Court reconsider the motion for sanctions using the proper standard.

III. THE EFFECT OF THE ORDER GRANTING SANCTIONS SHOULD BE STAYED

The Petitioners move this Court to stay the effectiveness of its decision until all appeal opportunities have been exhausted or concluded. *See* S.C. Constitution, Art. I § 22; S.C. Code

[5] In addition, it is important to emphasize that the notion that Petitioners' motion for remand was a "delay tactic" is utterly baseless. The Petitioners filed the motion on the heels of their request for a contested case hearing – well before prehearing statements or any formal progression of the case – and with the specific intent of acting timely to secure proper evaluation of the permit at issue. Petitioners did not seek to stay this case while the motion for remand was briefed and resolved, an d this Court has espoused a view that even dispositive motions are not a basis for delaying this matter.

Ann. §§ 1-23-380 and -600; Rule SCALC Rule 29.E; SCRCP Rule 65; SCACR Rule 225. This motion for stay is based on the arguments set forth above, largely that the Court strayed from relevant law and misapplied the standard for awarding sanctions, which are not appropriate in this instance, as well as those described below.

While the decision to impose sanctions rests in the sound discretion of the court, the sanction must be "reasonable, and the court should not go beyond the necessities of the situation" in deciding to make such an imposition. *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004); *see also Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997) (finding trial court abused discretion by imposing sanctions that were unduly harsh under the circumstances). Here, the imposition of sanctions against the Petitioners constitutes a serious expense that will not only cause harm to them and this case but also to future parties in the administrative arena who may be discouraged from participation entirely. This Court already denied the Petitioners' motion for remand, and to now grant sanctions against the Petitioners is an unreasonably severe punishment that goes beyond the necessities of the circumstances in this case.

As explained above, this Court's decision to grant sanctions is unprecedented. Moreover, on January 9, 2014 at the status conference in this case, this Court explicitly acknowledged that the motion for sanctions presented novel issues for its determination.[6] Implicit in the recognition that such motions in the ALC are a rarity, and given the seriousness of its Order, the Petitioners

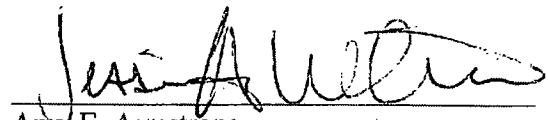
[6] In fact, a cursory search of ALJ decisions dealing with SCALC Rule 72 produced only two entries aside from the matter currently before this Court. First, in the order of *Effel Louis v. S.C. Dep't of Employment and Workforce and Palmetto GBA, LLC*, No. 11-ALJ-22-0292-AP, dated October 14, 2011, this Court referenced SCALC Rule 72 in a footnote stating "if anyone should be sanctioned under the ALC rules in this case, it should be Appellant, who has filed six motions, most of which are devoid of merit." Order, p. 3, FN 1. Second, in the Final Order and Decision of *Oconee County Assessor v. Douglas Chirillo, et al.*, No. 09-ALJ-17-0079-CC, dated November 23, 2010, Judge McLeod concluded that: the conduct of the party at issue did not amount to "frivolous" or bad faith; the facts and circumstances of the case were unique and the law was open to interpretation; and the matter was merely "a classic adversarial confrontation with each side trying to gain the advantage." Order, p. 14.

urge this Court proceed with caution before exacting the harsh penalty of sanctions for the filing of a motion in good faith. Accordingly, the Petitioners respectfully request that this Court stay the effectiveness of its Order Granting Sanctions.

CONCLUSION

Based upon the foregoing, Petitioners request that this Court reconsider its decision to grant sanctions by Order dated March 3, 2014 and move this Court for an order to stay the effect of its decision pending resolution of this matter on appeal.

Respectfully submitted,



Amy E. Armstrong
Michael G. Corley
Jessie A. White
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

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

(843) 937-8811

Attorneys for the Petitioners

Georgetown, South Carolina

March 13, 2014

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

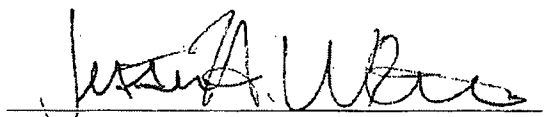
Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, 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 the Petitioners' Motion for Reconsideration and the Petitioners' Motion to Reconsider and For Stay on Respondents SC State Ports Authority and SCDHEC by placing copies of same in the U.S. Mail addressed to:

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

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Bradley Churdar, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405



Jessie A. White

Georgetown, South Carolina

March 13, 2014

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 RESPONSE TO CRUISE OPPONENTS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO EXPAND DISCOVERY** Docket No. 13-ALJ-07-0056-CC

The South Carolina State Ports Authority (Ports Authority) opposes the Motion for Reconsideration of the Court's Order Denying the Motion to Expand Discovery, filed on March 13, 2014.[1]

The Court has been fully apprised of the facts and circumstances surrounding Cruise Opponents' understanding that discovery is closed and not extended. The Court properly considered and rejected Cruise Opponents' motion to reopen discovery, finding good cause does not exist to save Cruise Opponents from their own dilatoriness. Cruise Opponents now advance new grounds and mischaracterize documents in asserting that the Court deprived them of a right to continued discovery. Looking beyond the accusatory rhetoric, Cruise Opponents seek to advance an argument they failed to make in their motion to reopen discovery. The motion should be denied because Cruise Opponents are not entitled to relief under Rule 29(D), RPALC.

[1] This Response is filed according to the Court's March 14, 2014 electronic mail request of an accelerated briefing schedule.

ARGUMENT

I. The Cruise Opponents Impermissibly and Improperly Present New Evidence on the Reconsideration that was Available During the Original Briefing.

a. The Cruise Opponents raised two grounds for reopening discovery in their threadbare motion, neither of which involved party discussions for a consent scheduling order.

Cruise Opponents' December 23, 2013 motion to reopen discovery was cursory and bare bones. A total of two substantive pages, the motion was expressly based on two limited grounds:[2] "First, both Respondent South Carolina State Ports Authority's [sic] ("SPA") and the Petitioners have filed motions that could have been dispositive of this case[; and] Second, the production of documents component of discovery in this case has been extensive and protracted, resulting in part from SPA's delayed responses." Motion to Reopen at 1-2. In its March 3 Order denying the motion, the Court succinctly addressed both of the arguments raised by Cruise Opponents and properly exercised its discretion in determining good cause does not exist to reopen discovery at this late stage of these proceedings.

Cruise Opponents now argue new grounds in their motion to reopen, alleging that the Ports Authority has "misled" the Court,[3] and that the parties' course of conduct should relieve Cruise Opponents from the applicability of express Rules. However, an issue may not be raised for the first time in a motion to reconsider. *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citing *Commercial Credit Loans, Inc. v. Riddle,* 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999). Initially, Cruise Opponents had a full and fair opportunity to move for expanded discovery under Rule 21, RPALC, within the 90-day period prescribed under the Rule. They did not. Moreover, if Cruise Opponents believed that the parties' course of

---

[2] "The basis for this motion is two-fold." Motion to Reopen at 1.

[3] In their desperation, the Cruise Opponents have now taken to repeatedly disparaging the Ports Authority and its counsel through baseless accusations. *See* Cruise Opponents Resp. to Mot. for Summ. Judg. For Lack of Standing at 8-9.

conduct provided good cause to expand discovery, they could have either so-moved on that ground in the months immediately following the close of discovery, or articulated this new argument in the filed motion to reopen. Again, they did not. Nine months after discovery closed, Cruise Opponents offered a threadbare motion, making the strategic decision not to fully flesh out the arguments they believed supported their motion.[4]

Now, Cruise Opponents mischaracterize the conduct and discussions of the parties in an effort to spread the responsibility of *their* mistake on *all* of the parties. *See* Motion for Reconsideration at 4 ("Petitioners direct the Court to communications between the parties, including attachments, establishing that the parties all understood discovery and depositions would occur outside of Rule 21."). In support, Cruise Opponents offer, for the first time, multiple emails and attachments which were readily available to them prior to filing the motion to reopen discovery. *See* Motion for Reconsideration, Exhibits A-C. Because they were not presented in the motion to reopen, Cruise Opponents' arguments and supporting exhibits are unpreserved for this Court's consideration in the context of this motion for reconsideration. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.") (citing *Natural Resources Defense Council v. U.S. E.P.A.,* 705 F. Supp. 698, 701 (D.D.C.1989), *vacated on other grounds,* 707 F. Supp. 3 (D.D.C. 1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner,* 594 F. Supp. 1091, 1118 (N.D. Ind.1984) ("Issues which could have been presented to

[4] It should be noted that, even after the Court expressly put Cruise Opponents on notice—during the January 9, 2014 status conference—that it was skeptical of the merits of the motion to dismiss but nevertheless permitted Cruise Opponents to file a substantive reply, they did not provide or proffer the exhibits attached to the motion for reconsideration. Instead, Cruise Opponents use this motion for reconsideration to unnecessarily consume court and party resources in an attempt to bolster and reargue a motion that was inadequate in the first instance.

the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived.")).

Although the parties *did* discuss the development of a comprehensive scheduling order that would have included a proposed agreement on discovery, no agreement was ever reached and, as this Court is aware, no scheduling order was ever presented. Having failed to reach a meeting of the minds, months passed away without further comment or effort on the abandoned idea.

Cruise Opponents present these preliminary discussions as a *fait accompli*, arguing, in effect, that their existence should take the place of the Court's entering an order.[5] If these discussions had the preclusive effect argued by Cruise Opponents (which they do not), it was a condition precedent that the argument—and all supporting documentation—be presented to the Court in the motion to reopen before it could be considered, as a motion for reconsideration is not the proper place to enunciate new arguments that could have been made but were not. *AK&W, Inc. v. S.C. Dep't of Revenue*, Docket No. 01-ALJ-17-0528-CC (May 17, 2002, J. Geathers) (denying motion for reconsideration); *BECA Social Club v. S.C. Dep't of Revenue*, Docket No. 04-ALJ-17-0014-CC (May 24, 2004, J. Geathers) (same); *see also* John D. Geathers, *Motions for reconsideration before the ALJD*, S.C. Lawyer (Nov. 2002) (providing generally

[5] In fact, contrary to Cruise Opponents' assertion that "*not one* of these communications does SPA (or DHEC, for that matter) ever suggest that a modification or expansion under Rule 21 is being requested or even needed," *see* Motion for Reconsideration at 4, the proposed consent scheduling order circulated between the parties states at the outset and as a condition of the scheduling order that "the limitations on discovery set forth in Rule 21, RPALC are hereby modified accordingly." *See* Motion for Reconsideration, Exhibit C. Moreover, Cruise Opponents' redline comments in response to the scheduling order draft explicitly acknowledge their understanding of the limitations Rule 21, RPALC puts on discovery. *Id.*, (Armstrong Redline to Proposed Consent Scheduling Order at 1) ("[Cruise Opponents can't agree to completely eliminate *the limitations placed on discovery under the ALC rules*, but we are agreeable to expanding the number of depositions to 15 per side.") (emphasis added). Cruise Opponents simply chose not to employ the protections set out in the Rules to expand discovery and now blame everyone but themselves.

that neither a motion for reconsideration nor a motion to alter or amend a judgment may be used to relitigate an issue or to offer new arguments that could have been raised).

b. Even if considered, the proposed scheduling order exchanged between parties establishes nothing.

Cruise Opponents now contend that the Ports Authority's good faith efforts at developing a scheduling order to present to the Court, an effort that was derailed by Cruise Opponents' own unwillingness to consent to reasonable terms, should be employed to relieve Cruise Opponents from their failure to follow the law. However, "it is a fundamental principle of law that everyone is charged with or deemed to have knowledge of the law." *See Gregory v. Gregory*, 292 S.C. 587, 589-90, 358 S.E.2d 144, 146 (Ct. App. 1987) ("The legal axiom that ignorance of the law is no excuse has long been the law of this nation and state.") (citing 31A C.J.S. *Evidence* Section 132(1) (1980); *Benn v. Camel City Coach Co.*, 162 S.C. 44, 160 S.E. 135 (1931)). Moreover, the parties' discussions regarding the possibility of presenting a consent scheduling order to the Court do not relieve Cruise Opponents from following the law, and in the absence of a Court-sanctioned alternative, the Rules are employed with full force and effect.

As an excuse for their own misapprehension, Cruise Opponents argue that "the parties all understood" that discovery and depositions would occur outside of Rule 21.[6] Notwithstanding Cruise Opponents' (mis)understanding, the exhibits do not support this universal supposition, and they do not show that the Ports Authority considered discovery ongoing beyond May 20. Instead, the draft consent scheduling orders clearly show that the need for an order was understood—pursuant to Rule 21, RPALC—in order for the parties to continue discovery. *See*

[6] Cruise Opponents go so far as to tell the Court what its understanding of the status of discovery was as well. *See* Motion for Reconsideration at 3, n.1 ("In fact, this Court recognized that discovery would extend beyond Rule 21's 90-day period by way of its communication on May 31 that discovery was ongoing...."). Of course, the Court expressly refuted this contention in its Order. *See* Order at 2, n.1.

n.5, *supra*. Rather than supporting Cruise Opponents' misapprehension, the circulation of the proposed orders demonstrates that all of the parties understood discovery was closed and required an order.[7] Having failed to demonstrate good cause in its motion or reply to reopen discovery, Cruise Opponents fall back on this newly presented argument, but in doing so, discourage cooperation and open communications between counsel.

II. The Cruise Opponents' Motion for Reconsideration is Without Any Basis in Law or Fact.

Briefly with respect to the merits of the motion for reconsideration, Cruise Opponents fail to distinguish how the Court's Order fails to apprehend or address the two discrete issues raised in the motion to reopen. *See* Motion to Reopen at 1 (describing the two grounds for the motion as being the dispositive motions filed by the Ports Authority and the Ports Authority's delay in responding to Cruise Opponents' discovery requests). In fact, the original two grounds for the motion to reopen are not discussed, *at all*, in the motion for reconsideration. Consequently, Cruise Opponents have failed to meet their burden and they are not entitled to relief under Rule 29(D), RPALC.

Notwithstanding Cruise Opponents' failure to challenge the Court's holdings, the Order's analysis of the circumstances surrounding discovery in this case was spot on. Both parties availed themselves of the available motions practice. The fact that the Ports Authority has diligently continued its review and supplementation of documents in response to Cruise Opponents' only timely filed discovery is not indicative of discovery remaining open or any "understanding" of the parties that compliance with the Rules was unnecessary. Indeed, it is

[7] Cruise Opponents' rejection of the terms of the proposed scheduling order, *see* Motion for Reconsideration, (Armstrong Redline to Proposed Consent Scheduling Order) (specifically rejecting a proposal for interrogatories, which would have allowed for a narrowing of the issues and made for more productive depositions), shows that they were more interested in prolonging the litigation rather than conducting legitimate discovery.

neither the Ports Authority's nor the Court's responsibility to protect the interests of Cruise Opponents; if Cruise Opponents wanted additional discovery, they should have sought to expand or reopen in a diligent and timely manner. Similarly, the issue before the Court is not a question of preventing further discovery in this case, as the tools and mechanisms were in place to do so, but Cruise Opponents failed to act diligently and prudently.[8]

Finally, as this Court is aware, while the motion to reopen was pending, Cruise Opponents noticed depositions despite knowing discovery was closed and despite this Court's indication of its intention with respect to the motion. Cruise Opponents' actions, undertaken as if they had not filed a motion to reopen, further confirms that this Court reached the correct conclusion in its Order that good cause does not exist to reopen discovery. Administrative contested case hearings can be conducted with little or no discovery and without depositions and are routinely done so. If the Cruise Opponents must rely on the testimony of Ports Authority witnesses to make a claim and cannot develop a good faith case on their own, then this case should be summarily dismissed.

III. The Riley Affidavit is of no value.

Finally, Cruise Opponents argue that violating the Court's discovery rule is the norm and that the ALC rules are "observed mainly in the breach." Motion for Reconsideration at 5. In support of their disdain for the ALC Rules, Cruise Opponents offer the affidavit of a lawyer currently employed as Special Counsel by McNair Law Firm, P.A., Leslie S. Riley. However, Ms. Riley's affidavit is of no import or guidance to the Court, and it does not address or excuse

[8] Cruise Opponents' contention that this Court somehow "deprived" them of a guaranteed right, "undermining justice by hampering the ability to prepare for and present this [sic] complex issues involved in this case" is untenable. Aside from ignoring the clear language of Rule 21, RPALC, this argument misapprehends the fact that the Court did not "deprive" Cruise Opponents of discovery—their own lack of diligence and failure to act promptly is the sole cause of their problems.

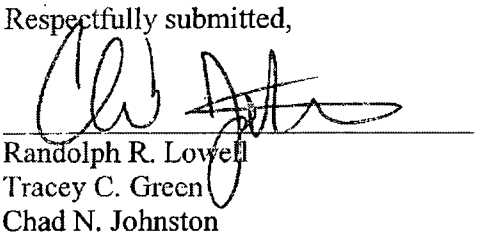
Cruise Opponents' failure to comply with the Rules. Additionally, while the affidavit may be indicative of Ms. Riley's experience and practice in the ALC, (stating that in her practice, "the parties have not operated under ALC Rule 21...."), most practitioners abide by and follow the rules, either completing discovery within the time period allowed or seeking an order expanding discovery under Rule 21, RPALC. *See* Randolph R. Lowell, *The Contested Case Before the ALC*, in South Carolina Administrative Practice and Procedure 183 (S.C. Bar 3rd ed. 2013) ("**Unless specifically expanded** or further limited by order by the presiding ALJ, upon notice and good cause shown, those **limitations are enforced**. ALJs routinely authorize broad discovery, however, particularly in complex cases.") (emphasis added). Thus, Ms. Riley's testimony offers nothing of value for this Court to consider.

CONCLUSION

Cruise Opponents seek to advance new grounds and arguments in support of their deficient motion to reopen discovery. However, because the documents supporting the newly advanced theory were readily available to Cruise Opponents prior to the filing of their motion, the argument's inclusion in the motion for reconsideration is improper, unpreserved, and should be summarily dismissed by the Court. Even if the Court were inclined to consider this new argument, it is insufficient to establish good cause to reopen discovery, and the documents submitted in support demonstrate only that the parties engaged in a good faith attempt to agree to terms on a scheduling order and that Cruise Opponents fully comprehended the necessity of such an order to prolong discovery beyond the period allowed by the Rules. Finally, the submission of an affidavit purporting to condone Cruise Opponents' failure to abide by the Rules is not persuasive and does not excuse Cruise Opponents' negligence in protecting their rights. The Court's Order addressed and rejected the only two arguments advanced in the motion to reopen

discovery and nothing in the motion for reconsideration constitutes a reasonable ground to revisit the Court's decision that good cause does not exist. Cruise Opponents' motion should be denied.

Respectfully submitted,



Randolph R. Lowell
Tracey C. Green
Chad N. Johnston
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

March 19, 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,	)	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 Ports Authority's Response to Petitioners' Motion for Reconsideration** 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
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

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Breanna M. Karns

Breanna M. Karns

Columbia, South Carolina
This 19th day of March 2014.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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 **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**

INTRODUCTION

The S.C. State Ports Authority's ("SPA") self-described Response to the "Cruise Opponents Motion for Reconsideration"[1] does nothing to remedy errors in the underlying order refusing Petitioners' request concerning discovery and depositions. At base, all parties and the Court understood that discovery was not closing on May 20, 2013, and SPA specifically communicated with the parties and this Court to that effect before changing course in December by announcing that discovery had supposedly ended six months earlier.

In response to SPA's sudden change in position, the Petitioner Community Groups filed a motion to clarify that discovery had *not* in fact closed and seeking affirmative Court approval for

[1] SPA has a practice of *re-captioning* pleadings filed by other parties, referencing the Petitioners' "Motion to Expand Discovery" as a "Motion to Re-Open Discovery." SPA Resp. to Mot. 2. Presumably the Court dockets pleadings as they are titled by the parties filing them.

depositions that had been contemplated as essential in this case. *See* Petitioners' Reply on Motion to Expand, 4-5. The Court denied the motion. It concluded that discovery had not extended past May 20, 2013 due to the operation of SCRALC Rule 21. Moreover, the Court determined that the actions and communications of the parties inconsistent with the deadline imposed by SCRALC Rule 21 did not constitute good cause for allowing discovery to proceed.

Petitioners then filed a motion for reconsideration contending that the Court misapprehended what actually transpired among the parties over the course of this case with regard to discovery as well as the actual practice before the ALC concerning Rule 21.

ARGUMENT

SPA's response to the motion for reconsideration focuses on trying to exclude evidence attached to the Petitioners' motion, including proposed scheduling orders that had been circulated among the parties. SPA contends that the Court cannot consider the scheduling order communications that document SPA's bait-and-switch strategy in this case because they concern a "new" issue not addressed in the original briefing. SPA Resp. 2. In truth, SPA itself directed the Court to "the history of discovery production in this case" in opposing the Petitioners' request for additional time in which to conduct discovery, SPA "Response to Motion to Re-Open Discovery" 2, and Petitioners agree that this history is relevant, having discussed it in the opening motion and in their reply, where they responded at length to correct SPA's self-serving mischaracterizations.

SPA has interjected these matters once more in its latest filing, scolding the Petitioners for having noticed depositions "despite knowing discovery was closed." SPA Resp. to Mot. Reconsider 2. But Petitioners contended that discovery was still open when they filed those notices. Moreover, SPA itself issued a subpoena seeking documents supposedly relevant to this

case from a Charleston real estate firm (Disher, Hamrick & Myers) as late as August 19, 2013. *See* Subpoena signed by R. Lowell (Willoughby & Hoefer) (attached as Exhibit A). Since SPA has contended that "document subpoenas are discovery" in attempting to chastise Petitioners for serving such subpoenas after May 20, Email from T. Green (Willoughby & Hoefer) to A. Armstrong (March 14, 2014) (attached as Exhibit B), it follows that SPA propounded discovery after the May deadline it sought to impose in December.

This is by now a familiar SPA litigation strategy: scold Petitioners in the strongest terms for actions similar to actions SPA itself took but has obscured from the Court. Indeed, the Court will recall that SPA told it (on page four of its response to Petitioners' motion to expand discovery) that "no additional discovery requests were served after the May 20 deadline." That statement is inconsistent with SPA's having propounded what it calls "discovery" on August 19, 2013. The Petitioners raised the actions and the communications of the parties in the briefing on their motion concerning discovery, and are entitled to submit further evidence relevant to that issue given the Court's apparent misapprehension of Petitioners' position and what actually transpired.[2] Those actions show that discovery was not treated as closed as of May 20, 2013, and that the Petitioners' discovery motion should have been granted.

This reality is underscored by the Riley affidavit. *See* Petitioners' Motion for Reconsideration, Ex. D. SPA does not seek to have this sworn affidavit excluded; instead it just proclaims that the affidavit "has no value" without articulating why the sworn testimony of an experienced practitioner concerning Rule 21 would *not* have value. The Riley affidavit is directly relevant to the Court's declaration that Rule 21 automatically operated to close off

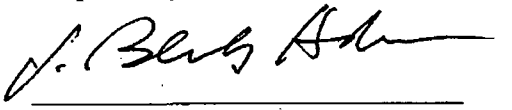
[2] Accordingly, the various cases cited by SPA are beside the point, as they concern instances where a party sought to raise entirely new issues not raised in the underlying briefing or broached by a Court's initial decision. Here, the actions of the parties and the Court concerning discovery were briefed and considered.

additional discovery even where the parties and the Court understood that additional discovery would be required and would be occurring. The best SPA counsel can do to counter the Riley affidavit is cite to an article by . . . SPA counsel. That article is not attached as an exhibit; is not sworn; admits that ALC's "routinely authorize broad discovery" in complex cases like this one; and is explicitly at odds with the actions of the article's author in this case, since he signed the subpoena after the supposed May 20 deadline.

CONCLUSION

The motion for reconsideration should be granted. Good cause was shown for requested discovery relief, since none of the parties understood or acted as if discovery closed on May 20, 2013 until SPA announced that view in December, 2013. Good cause has been shown and continues to be shown as SPA continues to produce thousands of pages of documents. As of March 21, SPA's rolling production brings its total production to nearly 30,000 pages, much of it coming in 2014. *See* Chart, Exhibit C. Petitioners' request that the Order denying to expand discovery and precluding depositions should be reconsidered and the requested discovery allowed within a reasonable time from the date of an order granting that relief.

Respectfully submitted,



J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

Amy Armstrong
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

Counsel for Petitioners

March 21, 2014
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, 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,	)	Docket No. 13-ALJ-07-0056-CC
v.	)	**CERTIFICATE OF SERVICE**
South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,	)	
Respondents.	)	

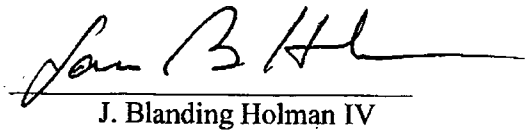
I hereby certify that I have on this 21st day of March, 2014, served a copy of the foregoing Reply In Support of Motion for Reconsideration upon all parties and counsel of record in the above-captioned case, via United States Mail, postage pre-paid, addressed as follows:

Randolph R. Lowell
Chad N. Johnston
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202-8416

Bradley D. Churdar
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Attorneys for Respondent South Carolina State Ports Authority



J. Blanding Holman IV

Exhibit A

ALC Form #110a

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Soc'y of Charleston, et al. Petitioner vs. S.C. Dep't of Health and Envtl. Control and S.C. State Ports Authority Respondent	)	SUBPOENA Case No. 13 -ALJ- 07 -0056- CC

To: H. Brown Hamrick
Registered Agent, Disher, Hamrick & Myers Residential, Inc.
Name of witness being served

30 Broad Street
Address of witness

Charleston, S.C. 29401
City, State, zip

YOU ARE COMMANDED TO (check all applicable):

____ Appear and testify in the above-captioned case at the place, date and time shown below; and/or

X Produce the following items, at the place, date and time shown below: _____

See attached Exhibit A. Place: Willoughby & Hoefer, P.A., 930 Richland St., Columbia, S.C. 29201

Date/Time: 08/28/2013, 5:00 PM

Date and Location of Hearing:	Party Requesting Subpoena:
Date	Name
Location	Address
Time of appearance	Telephone

I CERTIFY THAT THIS SUBPOENA IS ISSUED IN COMPLIANCE WITH ALC RULE 22(A).

ISSUING ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER:

Randolph R. Lowell, Esq., 930 Richland St., Columbia, S.C. 29201, 803-252-3300

ISSUING ATTORNEY'S SIGNATURE AND TITLE (INDICATE WHETHER ATTORNEY FOR PETITIONER, RESPONDENT OR OTHER):

Randolph R. Lowell ____ Petitioner X Respondent ____ Other (specify) _____

S.C. Bar #: 16145 Date of issue: August 19, 2013

Reply Reply All Forward

RE: Letter Re: Discovery

Tracey Green [TGreen@Willoughbyhoefer.com]

To: Amy Armstrong [amy@scelp.org]

Cc: Blan Holman; jl@leathbouchlaw.com; churdabd@dhec.sc.gov; Chad Johnston [CJohnston@Willoughbyhoefer.com]; Randy Lowell [RLowell@Willoughbyhoefer.com]; Philip L. Lawrence (plawrence@scspa.com); Michael Corley [Michael@scelp.org]; jessie@scelp.org

Friday, March 14, 2014 8:04 AM

You forwarded this message on 3/14/2014 8:08 AM.

Ms. Armstrong:

I apologize for the delay in responding. Thank you for confirming that the only document subpoena issued was to Rawle Murdy and for providing us with copies of the subpoenas Petitioners have issued. We wanted to clarify the number of subpoenas that had been issued and to whom.

As to the Disher Hamrick Myers subpoena, that subpoena was never formally served on August 19. As I understand it from Mr. Lowell, an email with the subpoena followed a telephone conversation with Mr. Hamrick and a request that he agree to accept service. After several exchanges, he ultimately did not agree and a motion to quash followed, waiving any argument about service. We opposed the motion to quash on the ground that the documents related to a court proceeding on a pending motion and, specifically, to an affidavit attached to that motion.

Finally, document subpoenas are discovery. *See, e.g., Integra Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 561 (S.D. Cal. 1999) ("Plaintiffs are correct in their assertion that the subpoena issued by Defendants was an improper use of discovery devices after the close of discovery in this case. ***Case law establishes that subpoenas under Rule 45 are discovery***, and must be utilized within the time period permitted for discovery in a case.") (emphasis added). Subpoenas for ***trial attendance*** for witnesses or to ensure the production of ***original documents at trial are a separate matter***. *E.g., Mortgage Information Svcs, Inc. v. Kitchens*, 210 F.R.D. 562 (W.D.N.C. 2002).

Thank you again for your response. The Ports Authority deems this matter concluded for the present. However, should Petitioners issue additional document subpoenas, especially without notice as required by the Rule, the Ports Authority reserves its rights to seek relief as appropriate.

Tracey

From: Phyllis Nisoff [mailto:phyllis@scelp.org]
Sent: Tuesday, March 11, 2014 11:07 AM
To: Amy Armstrong; Tracey Green
Cc: Blan Holman; jl@leathbouchlaw.com; churdabd@dhec.sc.gov; Chad Johnston; Randy Lowell; Philip L. Lawrence

Exhibit C

PRESERVATION SOCIETY OF CHARLESTON, et al. v. SPA & DHEC
SPA's Discovery Responses

DATE	DOCUMENT	BATES LABEL	NUMBER OF PAGES
06/28/2013	SPA Response to Petitioners' Interrogatories and Request for Production of Documents	000001-003954	3,954
08/12/2013	SPA Supplemental Production of Documents	00001-01361	1,361
08/28/2013	SPA 2nd Supplemental Production of Documents	003955-005364	1,409
09/05/2013	SPA 3rd Supplemental Production of Documents	005365-005369	4
09/25/2013	SPA 4th Supplemental Production of Documents	005370-006434	1,064
10/04/2013	SPA 5th Supplemental Production of Documents	006435–007172	737
10/09/2013	SPA 6th Supplemental Production of Documents	007173-007913	740
10/18/2013	SPA 7th Supplemental Production of Documents	007914-008276	362
12/09/2013	SPA 7th [sic] Supplemental Production of Documents	008227-008808	581
01/06/2014	SPA 9th Supplemental Production of Documents	008809-10651	1,842
01/21/2014	SPA 10th Supplemental Production of Documents	010652-010914	252
02/14/2014	SPA 11th Supplemental Production of Documents	010915-015764	4,849
02/17/2014	SPA 12th Supplemental Production of Documents	015765-017613	1,848
03/04/2014	SPA 13th Supplemental Production of Documents	017614-020341	2,727
03/05/14	SPA 14th Supplemental Production of Documents	020342-023139	2,797

03/06/2014	SPA 15th Supplemental Production of Documents	023140-024666	1,526
03/07/2014	SPA 16th Supplemental Production of Documents	024667-026396	1,729
		TOTAL	**27,782**

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 RESPONSE TO CRUISE OPPONENTS' MOTION FOR RECONSIDERATION OF ORDER GRANTING SANCTIONS** Docket No. 13-ALJ-07-0056-CC

The South Carolina State Ports Authority (Ports Authority) opposes the Motion for Reconsideration of the Court's Order Granting Sanctions, filed on March 3, 2014. The motion should be denied because Cruise Opponents are not entitled to relief under Rule 29(D), RPALC.

Cruise Opponents' counsel told this Court that they "certainly will accept anything the court wishes to do" on the motion for sanctions and even acknowledged that "reasonable [attorneys' fees] for filing their brief opposing the motion" to remand would be an appropriate sanction award. Ex. 1, Transc. Hrg. 74:4-6, 80:22-24 (Sept. 6, 2013). Unsurprisingly, the Cruise Opponents reverse course from what they initially represented.[1]

[1] As another example, Carrie Agnew, a leader of the anti-cruise crusade, offered a sworn statement to the South Carolina Supreme Court (which was filed with this Court) testifying to a nuisance and also signed a residential disclosure form for the sale of her residence claiming that no nuisance existed. Ex. 2, Ltr. of Lowell to Anderson, dated Nov. 15, 2013.

The Motion for Reconsideration should be denied and the Ports Authority should be awarded its additional attorneys' fees for filing the sanctions motion, post-judgment interest for the Cruise Opponents failure to comply with the Court's order and failure to obtain a stay of the sanction, and attorneys' fees for responding to this Motion for Reconsideration.

ARGUMENT

The sum and substance of the Motion for Reconsideration is to reargue the original motion for sanctions. The Cruise Opponents add nothing new and point to no real error in the application of existing law. They are just incredulous that they have been reprimanded for their frivolous conduct.

They reargue the statutory language and try to create an ambiguity where none exists, and where no court or counsel had ever read the statute that way (until they found the need to delay the litigation even further). In fact, Cruise Opponents' counsel made the exact opposite representations to the South Carolina Supreme Court, and there are numerous examples of this Court and the appellate courts recognizing the discretionary nature of the DHEC Board process. *See* Order For Sanctions at 4-5. Opposing counsel has been through this process before, never once trying to make this inane and wholly unsupported claim of automatic and mandatory review conferences for every request filed with the DHEC Board. Indeed, the same lawyer who claimed credit for the remand idea is the same lawyer who signed a brief at the Supreme Court acknowledging that the "*Board has the option of conducting a conference or not after a request for review is made.*" Ports Auth. Mot. for Sanctions, Ex. D, filed July 1, 2013 (League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added)).

The Cruise Opponents then discuss several cases that have nothing to do with the sanctions motion or the legal issues in this case. They then turn to the question of whether a

"reasonable attorney" would have filed the Motion to Remand, here again rearguing the Motion for Sanctions. As a threshold matter, Rule 72, RPALC, governs. While the Frivolous Sanctions Proceedings Act, S.C. Code Ann. § 15-36-10, is guidance in determining whether sanctions are appropriate, ultimately the Court need only determine "that a ... motion ... is frivolous or taken solely for purposes of delay." Rule 72, RPALC; *see Black's Law Dictionary* 739 (9th ed. 2009) (defining frivolous as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful."); *Webster's New World Dictionary* 560 (2d College Ed. 1986) (defining frivolous as something that is "of little value or importance" or "not properly serious or sensible."). But, borrowing from a Rule 11 violation analysis, a "party or his attorney need not act in subjective bad faith or with malice to trigger a violation. A party or his attorney cannot use ignorance of the law or legal procedure as an excuse. The rule 'was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, professional incompetence.'" *Barnhill v. Iowa Dist. Court for Polk Cnty.*, 765 N.W.2d 267, 273 (Iowa 2009) (internal citations omitted). Here, the Court found the motion frivolous and a violation of Rule 72, RPALC, and the Sanctions Act. Order For Sanctions at 6.

The Cruise Opponents state that a "reasonable attorney" standard is elusive. However, again borrowing from Rule 11, the standard

> clearly provides that an attorney is sanctionable for signing a pleading without first conducting a "reasonable inquiry." The "reasonable inquiry" requirement mandates that an attorney stop, think, and assure himself of the legal and factual basis of a pleading before signing and presenting it to the court. Whether a reasonable inquiry was conducted and reasonable conclusions were drawn therefrom is governed by an objective standard. Thus, **an attorney's good faith belief in the merit of factual allegations and legal claims asserted in a pleading is not sufficient to avoid Rule 11 sanctions**. Rather, the attorney's belief must be based on a reasonable inquiry and "in accord with what a reasonable, competent attorney would believe under the circumstances." The

> attorney may not merely argue that "a competent attorney could have made a colorable claim based on the facts and law at issue; [he] must actually present a colorable claim."

Taylor v. United States, 151 F.R.D. 389, 392-93 (D. Kan. 1993) (internal citations omitted) (emphasis added). Further, the attorney "has a duty prior to filing a complaint not only to **conduct a reasonable factual investigation**, but also to **perform adequate legal research** that confirms whether the theoretical underpinnings of the complaint are 'warranted by existing law or a good faith argument for an extension, modification or reversal of existing law.'" *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (emphasis added). Here the Cruise Opponents' counsel neither conducted a factual investigation nor performed adequate legal research.

Given the prior conduct of the Cruise Opponents' counsel before the DHEC Board, this Court, the Court of Appeals, and the Supreme Court, and given the extensive number of decisions reflecting the discretionary nature of the Board process, it is difficult to believe that opposing counsel undertook any research—much less "performed adequate legal research"—prior to filing the motion to remand, since every order and opinion referencing this issue recognizes the discretionary nature of the Board review process. The Ports Authority's opposition to the motion to remand and motion and reply for sanctions as well as this Court's Order For Sanctions demonstrates that no reasonable attorney who had done any legal research would have thought there was any basis for making this argument—especially since opposing counsel had been implementing this review process (and its discretionary nature at the Board level) since its implementation in 2006.[2] Indeed, the Cruise Opponents claim that "neither the Court nor [the Ports Authority] has cited to a single decision in which the [Cruise Opponents']

[2] The Ports Authority sent a consultation letter on March 6, 2013, that cited to several cases demonstrating the lack of legal authority for the frivolous motion. Ex. 3, Ltr. of Lowell to Armstrong, dated March 6, 2013.

reading of the law was argued and rejected." Motion at 9. However, this merely demonstrates that everyone who has looked at the statute since its enactment in 2006 has found it to be unambiguous and clear that a final review conference is optional—just as the Cruise Opponents' counsel stated to the South Carolina Supreme Court and numerous ALC decisions and appellate opinions recognized. *See* Order Denying Motion to Remand at 3-4 (stating that it was "clear" and "obvious" from the statute that Board has discretion). Thus, this ***supports*** the untenable and frivolous nature of the argument.

As the Ports Authority has asserted, the Cruise Opponents wanted to remand back to the agency to delay the project.[3] The Cruise Opponents claim that the use of the motion to remand as a delay tactic is baseless.[4] Motion at 9 n.5. However, their own internal emails and documents show delay was at the forefront of their strategy. Ports Auth. Reply in Supp. of the Mot. for Sanctions at 3-5. Cruise Opponents' counsel stated at the hearing that they had not consulted with the client nor were aware of the emails and documents, but that just further demonstrates that no reasonable or diligent inquiry or evaluation was undertaken prior to filing the motion to remand or after being put on notice through the consultation letter, and therefore this admission

---

[3] At least delay long enough to lose on summary judgment for lack of standing. After this Court denied the Ports Authority's motion to dismiss for lack of standing (and prior to the Supreme Court's opinion), one of the leading Cruise Opponents (and member of the South Carolina Bar) stated: "I would not get excited about this ruling. **Many of us were hoping he would toss out the appeal on standing grounds so that he would not be in a position to enter a very harmful ruling on the merits after trial, which we fear he is inclined to do.**" Ex. 4, Pelzer E-mail dated Dec. 3, 2013 (emphasis added).

[4] The Cruise Opponents further claim that they "did not seek to stay this case while the motion for remand was briefed," but this shows a further lack of understanding of the administrative process. As this Court knows, the permit was automatically stayed as a matter of law with the filing of the request for contested case. S.C. Code Ann. § 1-23-600(H)(2).

further supports the imposition of sanctions.[5] Transc. Hrg. 71:15-17 (Sept. 6, 2013) ("There was no discussion with any of these clients. I've never seen any of those emails.").

Further, while the Cruise Opponents complain about the summary rejection of their proffered affidavits, the truth is that the Court properly found they lacked credibility and persuasive weight. An affidavit from the law partner of an attorney who is the subject of a sanction motion lacks credibility from the outset. The other affidavit was proffered from their next-door-neighbor, and that affidavit spends as much time attacking Ports Authority counsel as it does trying to defend the misconduct. The Court rejected the affidavits because neither affidavit was useful nor, under these circumstances, was either affiant credible. *See* Order at 6 ("Neither affidavit is persuasive...."); Ports Auth. Reply in Supp. of the Mot. for Sanctions at 10-13 (discussing why the affidavits have no value); *cf.* Warren Moise, *Common Civil Litigation Errors: Don't Let Them Happen To You!*, S.C. Lawyer (Nov. 2004) ("Rambling affidavits filed by the lawyers reciting facts known from file reviews or with legal arguments may fail [the personal knowledge of the matter] test miserably.").

The Cruise Opponents' claim that "the imposition of sanctions against the Petitioners constitutes a serious expense that will not only cause harm to them and this case but also to future parties in the administrative arena who may be discouraged from participation entirely" is without any merit and is frivolous in its own right. Motion at 10. First, Cruise Opponents' counsel told this Court that the proper and appropriate sanction (if one was found) would be an

[5] The Cruise Opponents drop a footnote citing to this Court's prior order in *Louis v. S.C. Dep't of Employment and Workforce*, Docket No. 11-ALJ-22-0292-AP (Oct. 14, 2011) (Anderson, C.J.). But *Louis* **supports** the imposition of sanctions here. This Court in *Louis* stated that "if anyone should be sanctioned under the ALC rules in this case, it should be Appellant, who has filed six motions, most of which are devoid of merit." Here, the Cruise Opponents filed a motion to remand, a motion to strike inflammatory references, a motion to vacate, a motion for declaratory ruling, and unauthorized surreplies, "most of which are devoid of merit," and in this case the frivolous motions were filed by *attorneys* rather than a *pro se* petitioner (as in *Louis*).

award of attorneys' fees. Ex. 1, Transc. Hrg. 80:22-24 (Sept. 6, 2013). Second, the Cruise Opponents have used this litigation as a fundraising opportunity. *See* Ex. 5, Ltr. from Beach, dated Dec. 31, 2012. Third, the Coastal Conservation League had over $1,000,000 in cash or cash equivalent assets as of December 31, 2012. Ex. 6, Excerpt from Financial Statement. Fourth, the Coastal Conservation League has almost 70 listed contributors at the $10,000 and over mark. Ex. 7, Excerpt from Winter 2014 Newsletter. The assertion that the sanction of $9,300 for their frivolous conduct is a "serious expense" is in and of itself frivolous.

Moreover, the idea that a sanction will deter and chill future misconduct is exactly the point. Unfortunately, it appears that a $9,300 sanction is a minor inconvenience and may not serve as an adequate deterrent to this type of "press release" litigation. *Cf. Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1158-59 (10th Cir. 1991) (affirming a sanction against counsel and noting that the lawyers' strategy was "the type known colloquially as 'throw - as - much - mud - against - the - wall - as - you - can - and - hope - some - of - it - sticks.'"). Pursuant to the Rule the Court "may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, RPALC. The Court very well could have (and should have) awarded additional sanctions. *See also Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 402 (6th Cir. 2009) ("Because we believe that sanctions against Leonard and Roach in the amounts of $2,500 and $250 are insufficient to serve Rule 11's deterrent purposes, we conclude that the district court abused its discretion in imposing sanctions in these amounts.").

As to the request for a stay, that request is too late and the Cruise Opponents currently stand in violation of this Court's order. "The filing of a motion for reconsideration shall **not stay the order** of the administrative law judge **or excuse or delay compliance with the order** of the administrative law judge." Rule 29(D)(3), RPALC (emphasis added). Here, the Cruise Opponents have

failed to comply with the order by failing to tender the $9,300.00 to the Ports Authority. Having previously told this Court that it would accept this Court's ruling on the motion for sanctions and that attorneys' fees would be a reasonable sanction, they now reverse course and file this motion forcing the Ports Authority to expend more time and resources and incur more attorneys' fees in seeking to enforce the order of this Court for the Cruise Opponents' frivolous conduct.[6] Because the Cruise Opponents failed to comply with the order by failing to tender the sanction award of $9,300.00 within the ten-day time period set forth in the order and failed to obtain a stay of the effectiveness of the order prior to the date for compliance, the Cruise Opponents should be required to pay post-judgment interest from the time of compliance in addition to the Ports Authority's attorneys' fees incurred in responding to this motion.

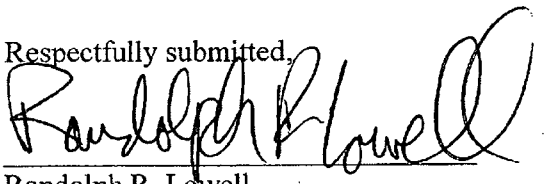
CONCLUSION

For the foregoing reasons, on reconsideration it is proper and appropriate for the Court to deny the Motion for Reconsideration for the Cruise Opponents, award the full amount originally requested by the Ports Authority ($20,972.50), award post-judgment interest on the $9,300.00 which the Cruise Opponents failed to tender pursuant to the order, and award additional attorneys' fees in defending against this Motion for Reconsideration since the Cruise Opponents.

---

[6] This Court has the authority to enforce its own orders through the power of contempt. *See* S.C. Code Ann. § 1-23-630 (each law judge of the Administrative Law Court has the same power at chambers or in open hearing as do circuit court judges); *Lindsay v. Lindsay*, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("Contempt results from a willful disobedience of a court order. A compensatory contempt award may include attorney fees.") (internal citations omitted); *S.C. Dep't of Revenue v. Club Rio, LLC*, Docket No. 06-ALJ-17-0647-IJ, 2006 WL 2617194 (Aug. 22, 2006) (Anderson, J.); *Fields v. S.C. Dep't of Health & Envtl. Control*, Docket No. 00-ALJ-07-0372-CC, 2001 WL 790083 (June 22, 2001) (Geathers, J.) ("Disobedience of a Court's lawful or valid Order, Judgment, or Decree is such interference with the administration of justice as to constitute 'contempt,'.... Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed." (internal citations omitted)).

Respectfully submitted,



Randolph R. Lowell
Tracey C. Green
Chad N. Johnston
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
rlowell@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

March 27, 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,	)	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 Ports Authority's Response to Cruise Opponents' Motion for Reconsideration of Order Granting 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:

Amy Armstrong, 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

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Breanna M. Karns

Columbia, South Carolina
This 27th day of March 2014.