



The South Carolina Court of Appeals

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April 25, 2012

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
2009135686

Dear Ms. Armstrong:

Please provide the Court with a status update of the above case within ten days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

JAK/laf

cc: Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stephen Groves, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

February 14, 2012

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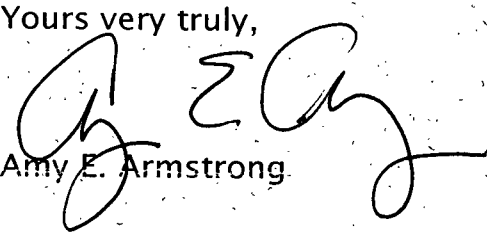
RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC.
Case Tracking Number 2009135686

Dear Ms. Allen:

I am responding to the Court's request for a status report
every 30 days from the date of the Court's Order remanding this
matter back to the ALC with instructions to remand back to
DHEC.

I have contacted the ALC and confirmed that the lower
court has received the Order. We are now waiting for the ALC to
remand the decision back to DHEC.

Yours very truly,


Amy E. Armstrong

cc: Bradley Churdar, Esquire
Carl Roberts, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

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FEB 17 2012

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
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January 12, 2012

Amy Elizabeth Armstrong, Esquire
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Mary D. Shahid, Esquire
Stephen Groves, Esquire
Nexsen Pruet, LLC
P O Box 486
Charleston, SC 29402

Re: Deerfield Plantation v. SCDHEC
2009135686

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding your Motions in the above case.

Appellant shall provide this Court with a status report within thirty days of the date of this letter, and every thirty days thereafter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stephen Groves, Esquire
Stanley E. Barnett, Esquire

The South Carolina Court of Appeals

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health-
and Environmental Control and
Deertrack Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach,
LLC,

Respondents

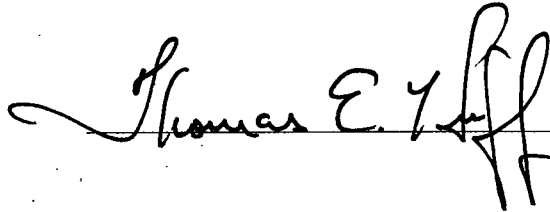
The Honorable John McLeod
Administrative Law Court
Trial Court Case No. 2008-AL-07-00221

ORDER

Respondent Deertrack Golf, Inc.'s motion to establish a briefing schedule is denied. Appellant's motion to remand is granted. As requested by Appellant and Respondent South Carolina Department of Health and Environmental Control (DHEC), this case is remanded to the ALC to further remand the matter to DHEC for additional administrative action. This Court takes note that this matter has been pending for a significant period of time. The parties, therefore, shall proceed expeditiously on remand.

IT IS SO ORDERED.

Columbia, South Carolina



FILED

1-12-12

cc: Amy Elizabeth Armstrong, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stephen Groves, Esquire
Stanley E. Barnett, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association.....Appellant,

VS.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC.....Respondents.

**RETURN OF DHEC
TO RESPONDENT'S MOTION TO ESTABLISH BRIEFING SCHEDULE
AND TO APPELLANT'S MOTION TO REMAND;
DHEC MOTION TO REMAND**

TO: THE COURT AND ALL PARTIES:

YOU WILL PLEASE TAKE NOTICE that the Respondent, South Carolina Department of Health and Environmental Control ("DHEC" or the "Department"), through its undersigned counsel, respectfully submits the following in Response to the motion filed by Respondent Deertrack Golf Inc. ("Deertrack Golf"), in which Deertrack Golf asks the Court of Appeals to establish a briefing schedule, and to the motion filed by Appellant Deerfield Plantation Phase IIB Property Owner's Association (the "POA"), in which the POA asks the Court of Appeals to remand this matter to the ALC with instructions to remand to DHEC staff.

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SC Court of Appeals

DHEC hereby joins in the POA's motion to remand to the ALC with instructions to remand to DHEC staff.¹ As the POA notes, Deertrack Golf's permit was issued based on the Notice of Intent ("NOI") submitted by Deertrack Golf. The NOI is the permit application form that by law must be completed by the applicant. The applicant is required by law to sign the permit application and certify to the accuracy of the facts contained on the application. By law, facts certified to by the applicant are conditions of the permit. *See 24 S.C. Code Ann. Regulation 61-9 § 122.41(o)*². Relying in part on the then-valid, but now-invalid wetland delineation by the U.S. Army Corps of Engineers, Deertrack Golf certified that there are no waters of the United States and no waters of the State on the property that is subject to the permit. Regardless of the basis underlying the applicant's certification of these facts, these facts were certified to by the applicant. Thus, these facts (that there be no waters of the United States and no waters of the state on the site) are valid conditions of permit coverage.³

Subsequent to the ALC's Final Order and Decision in this matter, the U.S. Army Corps of Engineers declared that there are in fact waters of the United States on the site. Deertrack Golf did not challenge that determination and the U.S. District Court, South Carolina District, issued an order upholding the U.S. Army Corps' decision. Thus, the condition of permit coverage does not exist. In addition, the Administrative Law Court's decision declared that there are waters of the State on the site. The NPDES permit coverage issued by DHEC does not account for discharges into waters of the State or waters of the United States. It is a condition of permit coverage that there be no waters of the State or waters of the United States on the site.

¹ To the extent necessary, in the alternative, DHEC independently moves to remand this matter for the reasons stated herein.

² The Regulation provides: "All application facts certified to by the applicant *shall be considered* valid conditions of the permit issued pursuant to the application." Section 122.41 of Regulation 61-9 is attached as Appendix C to the NPDES Construction General Permit applied for by Deertrack Golf.

³ In other words, Deertrack Golf's application did not seek permission to discharge stormwater or anything else into waters of the state or into waters of the United States. Therefore, DHEC has not addressed whether Deertrack Golf can discharge into waters of the State or into waters of the United States.

Though Judge McLeod affirmed permit coverage,⁴ he did not order DHEC to modify the permit terms, which include a condition that there be no waters of the State and a condition that there be no waters of the United States on the property.⁵ In other words, the permit by DHEC stands as is, and includes as condition that there be no waters of the state and no waters United States.⁶

Ms. Shahid acknowledges in her November 10, 2011 letter to Shannon Hicks that the permit must be changed before it can be used. In other words, the permit does not authorize most of the activity Deertrack Golf seeks to perform. Ms. Shahid's letter states that the applicant would rather wait until after this appeal is resolved before addressing the deficiencies of the permit. However, this approach would leave the parties to brief a permitting dispute that, at this point, is not ripe for review. In addition, some portions of the permitting dispute may become moot depending on the final administrative action on the permit.

Rather than establishing a briefing schedule and expending agency resources briefing an appeal of a permit that is currently of no utility to the applicant, DHEC agrees with the POA that judicial economy and administrative resources are best utilized by remanding this matter to DHEC so that Deertrack Golf can obtain a permit that is consistent with its intentions and which is of utility to the applicant. Once Deertrack Golf submits an application⁷ consistent with the facts and consistent with its plans and DHEC issues a final decision on that application, there will be a permit application that is ripe for judicial review, assuming there remains a case and

⁴ DHEC disagrees with Judge McLeod's ruling that the water quality standards and regulations have been superseded by the stormwater regulations.

⁵ DHEC has consistently maintained that if there are waters of the state on the property, additional review will be required. This is because there must be pretreatment before stormwater runoff can be discharged into waters of the State.

⁶ As noted in the October 6, 2011 letter from Shannon Hicks that was attached to Deertrack Golf's motion and to the POA's motion, there other deficiencies in Deertrack Golf's permit that need to be addressed.

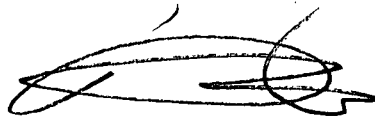
⁷ Depending on Deertrack Golf's plans, a new permit may be required, or the existing permit may be revised through a permit modification. In any event, DHEC agrees that it makes the most sense to have the permit decision fully baked and to have a permit that is consistent with Deertrack's Golf's intent and of utility to Deertrack Golf before proceeding with this briefing schedule.

controversy between the parties at that point.⁸ DHEC submits that the remand should be without prejudice to the positions of any of the parties and their respective positions in this appeal.

CONCLUSION

Based on the foregoing, DHEC joins in the POA's motion for remand and respectfully requests that this Court of Appeals issue an order remanding this matter to the ALC with instructions to further remand to DHEC so that the applicant can submit modified plans consistent with its intent and desire and so that DHEC can conduct reviews consistent with the ALC's finding that there are waters of the state on the property and so that the applicant and DHEC can address the finding by the U.S. Army Corps of Engineers that there are waters of the United States on the site. This remand should be without prejudice to the positions of the parties to this appeal. In the event the Court of Appeals declines to remand this matter and the Court of Appeals establishes a briefing schedule, DHEC respectfully reserves the ability to address permit deficiencies following judicial resolution of this appeal.

Respectfully submitted,



Davis A. Whitfield-Cargile, Staff Attorney
Bradley D. Churdar, Chief Counsel
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0229

Charleston, South Carolina
December 13, 2011

Attorney for Respondent SCDHEC

⁸ It is possible that the final administrative action would be acceptable to all parties.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners
Association.....Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
LLC.....Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served all parties in the above-captioned matter with a copy of the **RETURN OF DHEC TO RESPONDENT'S MOTION TO ESTABLISH BRIEFING SCHEDULE AND TO APPELLANT'S MOTION TO REMAND; DHEC MOTION TO REMAND.** by mailing a copy of the same via U.S. First Class Mail, postage prepaid, to the following address:

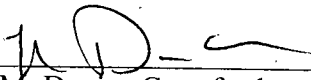
The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid, Esq.
Nexsen Pruet
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Amy E. Armstrong, Esq.
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Mount Pleasant, SC 29464

December 14, 2011


M. Denise Crawford

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C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

December 14, 2011

VIA U.S. MAIL

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case tracking number: 2009135686

Dear Ms. Gee:

Please find enclosed for filing the original and six (6) copies of the ***RETURN OF DHEC TO RESPONDENT'S MOTION TO ESTABLISH BRIEFING SCHEDULE AND TO APPELLANT'S MOTION TO REMAND; DHEC MOTION TO REMAND.*** By copy of this letter, and as evidenced by the certificate of service, I am serving all parties of record. Please let me know if you need anything additional from me or if you have any questions. My direct line is 843-953-0229. I appreciate your assistance.

Sincerely,

Davis A. Whitfield-Cargile

cc: Amy E. Armstrong, Esq.
Stanley E. Barnett, Esq.
Mary D. Shahid, Esq

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SC Court of Appeals

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

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Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

**RETURN TO RESPONDENT'S
MOTION SEEKING ESTABLISHMENT OF
AN APPELLATE BRIEFING SCHEDULE AND
MOTION TO REMAND**

TO: THE COURT OF APPEALS AND THE RESPONDENTS

The Appellant Deerfield Plantation Phase IIB Property Owners Association hereby responds to the Respondent Deertrack Golf, Inc.'s motion seeking establishment of an appellate briefing schedule and concurrently moves this honorable Court, pursuant to SCACR 240 and S.C. Code § 1-23-380(3), for an order remanding this matter to the Administrative Law Court ("ALC") with directions to remand to the Department of Health and Environmental Control ("DHEC") for consideration of new and additional evidence, and to complete all required permitting and certification processes triggered as a result of a new "jurisdictional determination" made by the U.S. Army Corps of Engineers regarding the presence of "waters of the United States" on the property that is the subject of this appeal. The basis for this request is that the S.C. Department of Health and Environmental Control's

("DHEC") permit which is the subject matter of this appeal no longer authorizes the construction activities proposed by Deertrack Golf, Inc. and further administrative action on the permit is required in order for Deertrack Golf to proceed with development on the property at issue, as stated by DHEC's letter of October 6, 2011. (Exhibit A, letter of DHEC's Shannon Hicks).

BACKGROUND

This case involves the appeal of a storm water permit and coastal zone consistency certification issued to Deertrack Golf, Inc., by the South Carolina Department of Health and Environmental Control (DHEC), in connection with the proposed development of a 278-lot residential subdivision on a portion of an old golf course. The DHEC decision in this case, and the decision of the Administrative Law Court, relied on a determination by the U.S. Army Corps of Engineers (Corps) that there were no "waters of the United States" on the subject property. Because the Corps initially determined that there were no "waters of the United States," DHEC's permit decision relied on the applicant's representation that there were no "waters of the State" on the property.

Based on the erroneous finding that there were no "waters of the United States" on the site, the agency did not authorize discharges into "waters of the United States" and conditioned the permit on there being no waters of the United States on the project site.¹

(Exhibit A). Shannon Hicks, manager of the stormwater and State certification section for DHEC's Office of Ocean and Coastal Resource Management, testified that if there are

¹In addition, DHEC did not conduct a 401 water quality certification review, as required by Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. A 401 water quality certification is required for all Section 404 Clean Water Act ("CWA") permits. Section 404 permits are required for discharges into "waters of the United States." Since the Corps had found no "waters of the United States" on the property when DHEC made a decision on Deertrack's permit, this 401 certification review was not conducted.

“waters of the United States” on the site, the analysis of the stormwater permit would change, and additional requirements might be imposed. (Exhibit B, Deposition of Shannon Hicks, pages 15-18).

In April, 2009, the Appellant filed an action in the United States District Court for the District of South Carolina challenging the validity of the federal jurisdictional determination made by the Corps for this property. Again, the Corps initially determined that the Deertrack Golf property contained no “waters of the United States” and this determination was what DHEC relied on in conducting its review of the permit on appeal. But on March 17, 2010, the Corps issued a new superseding jurisdictional determination in which it now asserts Clean Water Act jurisdiction over portions of the Deertrack Golf property that the Corps has determined to be “waters of the United States.” In other words, there are now “waters of the United States” on the subject property, whereas there were not recognized “waters of the United States” when DHEC made the decision at issue here. The areas deemed jurisdictional waters of the United States are depicted on the map identified as Exhibit C.

On May 4, 2010, the Appellant Deerfield moved to remand this case to the Administrative Law Court with instructions to remand to DHEC to consider this new information, which triggers additional approvals. At that time, DHEC responded suggesting that the appeal be held in abeyance. Rather than remand the case, this Court held the case in abeyance to give DHEC the opportunity to conduct additional administrative action.² Since that time, DHEC’s Shannon Hicks issued a letter informing Deertrack Golf that modifications

²Appellant notes that in order for DHEC to conduct administrative action, it must have a request pending before it. The permit at issue is under this Court’s jurisdiction so DHEC cannot take action on this permit, and Deertrack Golf has not submitted any other permits or requests for approvals in light of the new Corps jurisdictional determination. Thus, the agency cannot take administrative action until the permit is remanded to it.

to the permit are required; that the existing permit cannot authorize construction; and that DHEC would need to conduct additional reviews prior to any construction activities.

Deertrack Golf, Inc., admits that the current approved plans at issue in this appeal show road and lot construction impacting the areas deemed jurisdictional by the Corps, and “reflect and intent to pipe, fill, and eliminate the jurisdictional connection.” (Exhibit D, Shahid letter dated Nov. 10, 2011).

ARGUMENT

Establishing a briefing schedule in a case where the Respondent DHEC, the permitting agency, has unequivocally stated that the activity proposed by Deertrack Golf, Inc., is “**without authorization and certification from . . . DHEC**” is not prudent or warranted. (Exhibit A, Hicks letter). DHEC notified Deertrack that the impacts to newly declared “waters of the United States” proposed by Deertrack require modification of the permit at issue, as well as additional authorization and certification from DHEC to fill the “waters of the United States” via DHEC’s 401 water quality certification program. *See* S.C. Code Ann. Regs. 61-101, *et seq.* This Court has the authority under S.C. Code § 1-23-380(E) to remand this case for further proceedings and allow DHEC to review the necessary modifications and provide the necessary approvals.

Deertrack Golf, Inc., cites to the October 6, 2011, letter of Shannon Hicks of DHEC in its motion – the very document that declares that the permit on appeal cannot authorize the proposed activity and that the agency must conduct a new review. Specifically, Ms. Hicks’ letter states that “additional administrative action on the permit [is] warranted,” which was necessitated by the U.S. Army Corps of Engineers’ assertion of Clean Water Act jurisdiction over a portion of the Deertrack Golf, Inc. property **after** DHEC had issued the permit on

appeal and **after** the Administrative Law Court's Final Order and Decision which is pending before this Court. Recognizing that the Corps' decision to assert jurisdiction alters the agency's permit decision, Ms. Hicks notified Mary Shahid, counsel for Deertrack Golf, Inc., that

your client does not have authorization and certification from the Corps of Engineers and DHEC to impact waters of the United States. In addition, your client's permit does not authorize storm water discharges into waters of the United States without appropriate controls. The application that resulted in the DHEC permit coverage issued for this site [the permit on appeal] represented that there were no waters of the United States on the site, based on the Corps delineation in effect at the time. **It is a condition of your permit that there be no waters of the United States on the site.**

(Exhibit A, p. 1).

DHEC unequivocally states that "modifications need to be made to the permit before the permitted activity may be conducted" in order to comply with the applicable regulations.

(Exhibit A, p. 2).

Additional Review is Required for Compliance with the Applicable Regulations

As of October 6, 2011, there can be no dispute that the permit will have to be modified and additional approvals obtained before construction can commence on the Deertrack Golf site. Under the development plans proposed by Deertrack Golf, Inc., and approved by DHEC, most of the areas that are now deemed "waters of the United States" would be filled. *Compare* Corps delineation map Exhibit C, to the map entitled Master Site Plan, attached hereto as Exhibit E. A portion of the designated "waters of the United States" would be excavated, which is an activity that may not require a Section 404 Clean Water Act permit. However, the excavation would have to be assessed by DHEC under the requirements of the Coastal Management Program and the 401 water quality certification regulations. In addition, the discharge of materials into "waters of the United States" as depicted in

Deertrack's plans, will require a permit under Section 404 of the Clean Water Act. 33 U.S.C. § 1344 and a Section 401 water quality certification from DHEC required by Section 401 of the Clean Water Act, 33. U.S.C. 1341.³

The DHEC regulations require Deertrack Golf, Inc., to submit an application to DHEC and require the application to be put out on public notice. S.C. Code Regs. § R.61-101.C. & D. DHEC is required to prepare a written assessment of the water quality impacts of the proposed project and make conclusions about compliance with water quality standards and protection of classified uses. S.C. Code Regs. § R.61-101.F.1.

All of this will have to be done in order for Deertrack to obtain the approvals necessary to begin construction. Because additional approvals will be necessary, and the project will require modifications to obtain those approvals, a decision in this case for a project that is certain to change will not bring any finality to the permit or the issues raised in this appeal, and a briefing schedule is not appropriate.

³The water quality certification review is conducted by DHEC's Bureau of Water, utilizing the 401 Water Quality Regulations codified as S.C. Code Regs. § R.61-101, *et seq.* Specifically, the regulations require:

2. Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained. Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

- (a) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.
- (b) Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.
- (c) permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, *et seq.*

S.C. Code Regs. § R.61-101.A.

The new Corps jurisdictional determination is a critical factual and legal consideration under the Clean Water Act, the state water quality certification regulations, and the Coastal Management Program. The new Corps determination dramatically changes the context of the legal analysis of the proposed development, and requires a new review process by the Corps and DHEC. Deertrack Golf, Inc., will have to apply for and obtain a Section 404 permit prior to discharging into the "waters of the United States," as indicated in its approved plans. The Section 404 permit triggers the requirements for Section 401 water quality certification as well as a new coastal zone consistency certification by DHEC. DHEC must ensure that the project meets the standards set forth in the 401 water quality certification regulations and the Coastal Management Program. This new information which requires additional review by DHEC was not available during the contested case hearing before the Administrative Law Court. Moreover, during the contested case hearing, the Administrative Law Judge specifically excluded the presentation of evidence on the issue of whether the subject property contains "waters of the United States" and the Corps original ruling – that there were **no** waters of the United States on the property – was accepted as an established fact.

Accordingly, the new Corps' jurisdictional determination changes the factual and legal underpinning of the permit and certification decisions, and warrants a remand to the ALC with instructions to remand to DHEC for a new permit review including new reviews for consistency with S.C. Code Regs. § R.61-101 and consistency with the Coastal Management Program. As of October 6, 2011, DHEC has officially confirmed that new reviews and approvals will be necessary. In the interest of judicial economy, the new public notice, review and approval process should occur before this appeal is heard or decided given that the appeal could effectively become moot by the additional administrative action that is

necessary.

The New Evidence Requires That This Case Be Remanded for Factual Determinations

The new jurisdictional determination constitutes additional evidence justifying a remand of this case to the Administrative Law Court or to DHEC, pursuant to Section 1-23-380(4) of the South Carolina Administrative Procedures Act:

(3) If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

S.C. Code § 1-23-380(3). The decisions of DHEC and the Administrative Law Court – the decisions on appeal in this case – relied upon the original Corps jurisdictional determination. The new Corps jurisdictional determination shows that the original permit and certification were issued upon a flawed factual basis as to the presence of federal or state jurisdictional waters.

This matter is presently before the Court of Appeals on appeal from the Administrative Law Court. Since a reviewing court has no authority to determine factual issues, this case should be remanded to the agency for new consideration of the matter in light of the new factual situation. *Fox v. Newberry County Memorial Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995). Respondent DHEC has formally stated that it must take additional administrative action in light of the Corps' new decision to assert Clean Water Act jurisdiction over waters on the Deertrack property.

A new agency review, and new factual findings in light of the new federal jurisdictional determination, are necessary to determine compliance with S.C. Code Regs. §

R.61-101 and the Coastal Management Program.

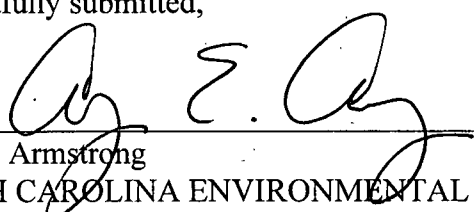
The Appellant has been informed that Deertrack Golf, Inc., may seek to modify its plans in order to avoid review for consistency with Regulation 61-101, either by eliminating fill in the “waters of the United States” or by applying for a “Nationwide Permit” – a general permit authorized under the Clean Water Act – or by bridging or avoiding impacts to the “waters of the United States.” If Deertrack Golf, Inc., intends to alter in any way the development plans which were approved by DHEC, then DHEC would need to review the new plans to ensure compliance with the Stormwater Regulations, the Coastal Management Program, and the 401 Water Quality Certification Regulations.

Under some circumstances, new evidence would warrant a remand to the Administrative Law Judge simply for the purpose of having the ALJ consider the new evidence and make any modifications to the ALJ’s ruling as the ALJ may deem appropriate. However, in this case, the new evidence triggers the requirement for a permit and certification that were not part of the original agency review: (1) a Section 404 permit under the Clean Water Act, and (2) a water quality certification under Section 401 of the Clean Water Act and DHEC Regulation 61-101. In addition, the new factual scenario triggers a new coastal zone consistency certification under S.C. Code § 48-39-80. These new requirements will require new public notices, an opportunity for public comments, and a new initial agency decision under S.C. Code § 44-1-60. Accordingly, any new plan must be reviewed initially by DHEC, not by the Administrative Law Court, and thus the order remanding this case to the Administrative Law Court should instruct the Administrative Law Court to further remand the case to DHEC for the purpose of conducting a review.

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners

Association respectfully requests that the Court of Appeals issue an Order Denying Respondent Deertrack Golf, Inc.'s Motion Seeking Establishment of an Appellate Briefing Schedule and Remanding this matter back to the Administrative Law Court with instructions to remand the staff decision to the Department of Health and Environmental Control for DHEC to take new administrative action on the permit in light of the presence of "waters of the United States," which was not disclosed or considered in DHEC's permitting decision.

Respectfully submitted,



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
Telephone (843) 527-0078
FAX (843) 527-0540

Attorney for the Appellant, Deerfield Plantation Phase
IIB Property Owners Association

Georgetown, South Carolina

December 8, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

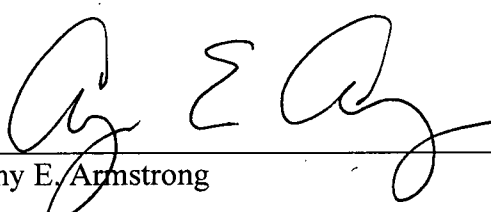
South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Return to Motion Seeking Establishment of an Appellate Briefing Schedule and Motion to Remand upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
Charleston, SC 29402



Amy E. Armstrong

Georgetown, South Carolina

December 8, 2011



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

October 6, 2011

VIA U.S. MAIL

Mary D. Shahid, Esq.
Member
Nexsen, Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

EXHIBIT

A

Dear Mary:

As you know, the Court of Appeals issued an Order on October 6, 2010 granting the Joint Motion to Stay that was filed on behalf of all parties. The motion requested that the appeal be held in abeyance pending resolution of the action in the United States District Court **and any subsequent administrative action on the permit if necessary.** In the motion, the Department represented that additional administrative action on the permit was warranted at the time of the filing of the motion, but SCDHEC agreed to refrain from taking any action on the permit until resolution of the action in the United States District Court. In July of this year, you asked the Court to set a briefing schedule given Judge Harwell's order in the U.S. District Court action. Amy's client opposed briefing and we asked for time to consider administrative action, consistent with the previous orders in this case. The Court of Appeals issued an Order on September 8, 2011 holding this in abeyance for thirty days for the Department to take administrative action. The purpose of this letter is to find out how you would like to proceed administratively with the permit.

As you know, your client does not have authorization and certification from the Corps of Engineers and DHEC to impact waters of the United States. In addition, your client's permit does not authorize storm water discharges into waters of the United States without appropriate controls. The application that resulted in the DHEC permit coverage issued for this site represented there were no waters of the United States on the site, based on the Corps delineation in effect at the time. It is a condition of your permit that there be no waters of the United States on the site. Subsequent to the ALC hearing in this case, the Corps issued a modified jurisdictional determination that shows there are waters of the United States on the site. This requires changes to your permit. If the activity shown on your permit drawings were to be conducted, there would be impacts to waters of the United States, which involve the storm water management system, without authorization and certification from the Corps of Engineers and DHEC. Since this is not authorized by the permit, the permit needs to be modified. How you modify the permit depends on your clients intentions. Your client's intentions will likely dictate whether this process follows that for major modification, which reopens the permit, or minor

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Charleston Office • 1362 McMillan Avenue •

1-800 • Fax: (843) 953-0201 • www.scdhec.gov

Exhibit A

modification. You also need additional authorization and certification from the Corps of Engineers and DHEC if you intend to fill the waters of the United States.

In addition, the issued permit coverage does not authorize the discharge of untreated storm water into waters of the State. It is a condition of permit coverage that there be no waters of the State on the site. The NOI represented that there are no waters of the State on the site and by law certified fact is a condition of the permit. Judge McLeod found that there are waters of the State on the site. Accordingly, there needs to be some form of pre-treatment before storm water can be discharged into waters of the State unless it can be demonstrated that the areas classified as waters of the State have been utilized as stormwater management ponds for water quality treatment. As I testified in my deposition, if there are waters of the state on the site, then DHEC needs to do additional reviews.

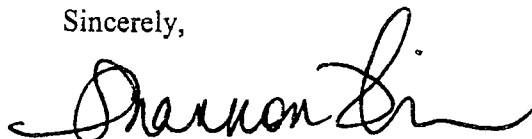
Additionally, after the decision to grant NPDES general permit coverage was appealed to the ALC, your client submitted revised plans to the Department. These revised plans have never been approved by the Department, as this matter was in litigation. The revised plans include technical changes such as pipe additions, pipe sizes, removal of outlet structures, outlet structure elevations, and post-development discharge flows. I understand that some aspects of the revised plans may be a result of requirements imposed by Horry County. Staff has determined that some of the proposed changes are major in nature and require additional technical review and a formal permit modification. How, if at all, would you like DHEC to proceed with review of the revised plans?

What administrative action, if any, to be taken on your clients permit really depends on your clients' intentions with regard to the property. With regards to the waters of the United States, I understand that you have acknowledged the need to modify your plans and get additional approvals. Since the permit does not authorize untreated storm water discharges into waters of the State, you will need to modify your plans to show the waters of the State. You will also need to meet pretreatment requirements or provide supporting information showing the waters of the State have been used to provide water quality treatment for stormwater discharges. How you meet these requirements is in large part up to your client. Thus, how to proceed administratively is really dependent upon your client's plans. Should your client wish to proceed with a permit modification the Notice of Intent/permit application will need to be modified accordingly. In addition, you will need to confirm that Jeffrey Farrell is authorized to represent and provide signatory authority for Deertrack Golf, Inc. as represented on the current Notice of Intent for this project. If he is no longer an authorized representative, the NOI needs to be modified to reflect an authorized representative.

If you think it more prudent to address these issues after the appeal is resolved, I am receptive to hear your opinion. However, in order to comply with the NPDES regulations, these modifications need to be made to the permit before the permitted activity may be conducted.

Please let me know how you would like to proceed administratively so that your permit is one that can be utilized by your client. I am also happy to facilitate a meeting with your client and staff (and Amy Armstrong's client, if necessary) if you think that would help resolve these issues more expeditiously. Please let me know. I will be standing by.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon Hicks". The signature is fluid and cursive, with a large initial "S" and "H".

Shannon Hicks, P.E., Manager
Stormwater & State Certification Section

cc: Amy E. Armstrong, Esq.
Richard M. Smith, Esq.
Davis A. Whitfield-Cargile, Esq.
Rheta Geddings DiNovo
Jill Stewart

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

DEERFIELD PLANTATION PHASE IIB) CASE NO.
PROPERTY OWNERS ASSOCIATION,) 08-ALC-07-0221-CC
)
Petitioner,)
)
vs.)
)
SOUTH CAROLINA DEPARTMENT OF)
HEALTH AND ENVIRONMENTAL CONTROL,)
AND DEERTRACK GOLF, INC.,)
)
Respondents.)
)
BILL CLARK HOMES OF MYRTLE BEACH,)
LLC,)
)
Intervenor.)

* * * * *

DEPOSITION OF: SHANNON M. HICKS
DATE TAKEN: Monday, November 3, 2008
TIME: 1:10 p.m.
PLACE: Suite 400
1362 McMillan Avenue
North Charleston, SC
REPORTED BY: TERI L. SAMPSON,
Registered Professional
Reporter and Notary Public

* * * * *

Exhibit B

POST OFFICE BOX 21784
CHARLESTON, SOUTH CAROLINA 29413-1784
CAROLINA REPORTING (843) 832-0801
www.carolina-reporting.com

A P P E A R A N C E S

REPRESENTING THE PETITIONER:

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SC ENVIRONMENTAL LAW PROJECT
430 Highmarket Street
Georgetown, SC 29440
(843) 527-0078
email: jchandler@scelp.org

REPRESENTING THE RESPONDENT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL:

ELIZABETH A. DIECK, ESQUIRE
DHEC-OCRM
Suite 400
1362 McMillan Avenue
North Charleston, SC 29405
(843) 953-0213
email: dieckea@dhec.sc.gov

REPRESENTING THE RESPONDENT DEERTRACK GOLF, INC.:

MARY A. SHAHID, ESQUIRE
McNair Law Firm
Suite 400, 100 Calhoun Street
Charleston, SC 29401
(843) 723-7831
email: mshahid@mcnair.net

REPRESENTING THE INTERVENOR:

STANLEY E. BARNETT, ESQUIRE
Smith, Bundy, Bybee & Barnett
Suite 100, Building F
1037 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464
(843) 881-1623
email: stanleyb@s3blaw.com

ALSO PRESENT:

FRANK YELINKO

I N D E X

WITNESS: SHANNON M. HICKS

Examination	Page
BY MR. CHANDLER.	4
REPORTER'S CERTIFICATE	19
ERRATA SHEET	20

EXHIBITS:

(No exhibits were offered or marked for identification.)

S T I P U L A T I O N S

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the reading and signing of the transcript is expressly reserved by the Deponent.

1 NORTH CHARLESTON, SC, MONDAY, NOVEMBER 3, 2008

2 1:10 P.M.

3 P R O C E E D I N G S

4 - - - - -

5 WHEREUPON,

6 SHANNON M. HICKS

7 being first duly sworn, testified as follows:

8 EXAMINATION

9 BY MR. CHANDLER:

10 Q Would you tell us your full name?

11 A Shannon Michelle Hicks.

12 Q And where do you live?

13 A I live in Mt. Pleasant, South Carolina.

14 Q Okay. What's your street address?

15 A 1653 Baltusrol Lane.

16 Q Okay. And you're employed by the South
17 Carolina Department of Health and Environmental
18 Control?

19 A Yes.

20 Q And for how long have you worked for this
21 agency?

22 A I've worked here for almost five years.

23 Q Okay. And what is your position?

24 A I'm currently the manager of the stormwater
25 and State certification section.

1 Q Okay. How long have you been in that
2 position?

3 A For almost two years.

4 Q Okay. And what are your duties and
5 responsibilities in that position?

6 A Overseeing the plan reviewers and asking
7 questions -- excuse me, answering questions that they
8 have regarding plan review, making sure that they have
9 an understanding of what's required in the regulations
10 and in the policies of the management program, and then
11 overseeing the incoming numbers and outgoing numbers
12 and general management to make sure we have enough
13 stuff.

14 Q Okay. And prior to taking your current
15 position, did you have a different position at this
16 agency?

17 A I had a couple, actually. I had a short
18 extent, for about four months, as the acting manager of
19 the enforcement section. And then prior to that, I
20 served as stormwater project manager. The latter part
21 of that, for about eight months, I managed the Myrtle
22 Beach office of OCRM on an acting basis.

23 Q Okay. What's your educational background?

24 A I have a degree in civil engineering and a
25 Master of Business Administration.

1 Q Where did you get those degrees?

2 A Clemson University.

3 Q Okay. What year did you get your degrees?

4 A In 1998, I finished my bachelor's, and in
5 2000, I finished my master, master's.

6 Q Okay. Did you come directly to work for the
7 agency?

8 A No, I did not.

9 Q Who did you work for after you got your
10 degree?

11 A I worked for an engineering consulting firm.

12 Q What was the name of that?

13 A Armstrong Glen.

14 Q And where were they?

15 A Charlotte, North Carolina.

16 Q How long did you work for them?

17 A I worked for them from August of 2000 to
18 October of 2003.

19 Q And what types of work did you do while you
20 were there?

21 A I worked on stormwater planning studies for
22 large municipal projects, capital improvement projects,
23 flood improvement projects. There's a little bit of
24 water quality design, but mainly government type
25 projects for stormwater.

1 Q Okay. And when you left there, was that when
2 you came to the Department of Health and Environmental
3 Control?

4 A Yes.

5 Q Okay. Now, we're here today about a case
6 that's been filed by the Deerfield Phase IIB Property
7 Owners Association about a permit issued for a project
8 known as the Old South Course Phase I. Are you
9 familiar with that project?

10 A Yes.

11 Q Okay. Tell me about your involvement with
12 this project as it came to the agency and moved through
13 the approval process.

14 A My involvement was oversight of Tara's
15 review, Tara Maddock, the project manager's review. We
16 had a public hearing and I assisted with that portion
17 as well, and we -- Tara, throughout her review, we
18 discussed the project and I took care of any concerns
19 that she had related to the review and looked over the
20 project in general terms myself.

21 Q Okay. Is it your understanding that the
22 property involved in this matter has no wetlands, no
23 waters of the State?

24 A That's correct.

25 Q Okay. Do you know whether there are any

1 ponds on the property?

2 A Yes.

3 Q Okay. And can you tell me about those ponds?

4 A They are ponds that were constructed for the
5 golf course that was there when it was built.

6 Q Okay. And what's the source of your
7 information about those ponds?

8 A My source comes from the plans that we looked
9 at.

10 Q Okay. Do you know -- or do you have any
11 information regarding whether there were any wetlands
12 at the golf course site before the golf course was
13 constructed?

14 A I do not have any information that would tell
15 me that there were wetlands on the site.

16 Q Okay. Do you know whether the ponds that are
17 on the site are linked together by any connection?

18 A Not that I recall.

19 Q Okay. Do you know whether there are any
20 drainage channels on the property that connect to a
21 larger drainage system that ultimately goes to the
22 Atlantic Ocean?

23 A Could you repeat the question?

24 Q Do you know whether there are any drainage
25 channels on the golf course property that link together

1 and flow into another channel that eventually goes to
2 the ocean?

3 A I know that there's a channel at the
4 downstream end of the project, but I'm not sure if
5 that's the exact outfall to the Atlantic Ocean.

6 Q Okay. Do you consider the ponds on the
7 property to be waters of the State?

8 A During the review, they were considered golf
9 course ponds and not waters of the State.

10 Q Okay. Will you tell me how you distinguish
11 between a water of the State and a pond that's not a
12 water of the State?

13 A My understanding during the review was that
14 waters of the State would be something more of a
15 natural pond. Those ponds appeared that they were
16 constructed for the golf course. So that's what I
17 utilized during the review, my understanding at the
18 time.

19 Q Okay. And your information about that, did
20 it come from anywhere other than the documents and
21 information submitted by the applicant?

22 A Not at the time, no.

23 Q Have you received some information since
24 then?

25 A I've read through the definition of waters of

1 the State in Regulation 61-9.

2 Q Okay. And has that new information changed
3 any of your view about whether those ponds are waters
4 of the State?

5 A A strict reading of the definition includes
6 ponds, and it doesn't distinguish on what type of pond.

7 Q Okay. Have you ever been to the site?

8 A No, I have not.

9 Q Have you ever looked at any aerial
10 photographs of the site?

11 A I don't think so.

12 Q Okay. Are any of the existing ponds shown on
13 any of the plan sheets that were submitted by the
14 applicant?

15 A There are some plan sheets that show the
16 locations of some existing ponds.

17 Q Okay. Do those plan sheets show any open
18 channels on the property?

19 A Not that I recall.

20 Q Now, do I understand that you did attend the
21 public hearing that was held?

22 A Yes, sir.

23 Q Okay. And can you tell me what types of
24 public comments were received at the public hearing?

25 A Generally speaking, the concerns were

1 regarding flooding issues.

2 Q Okay. And what was your understanding of the
3 nature of the flooding that was occurring?

4 A From what I recall, there was some flooding
5 that may have occurred during a tropical storm event.

6 Q Okay. Did you get an understanding that
7 there was any flooding that ever occurred that was
8 outside a tropical storm?

9 A Not that I recall. The review of the
10 flooding issues was mainly done by the project manager,
11 and I over -- I took an overview, looked at the project
12 as to how the stormwater for the site was being
13 handled.

14 Q Okay. Do you know anything about the history
15 of this property and the history of the development
16 that's already in existence adjacent to this golf
17 course?

18 A I do not know much about the history of the
19 development.

20 Q Did you or Tara Maddock undertake any
21 investigation of the concerns about flooding in the
22 area?

23 A Tara reviewed the documents provided by the
24 neighborhood association, any individuals that
25 submitted flooding. We do know that the County went

1 out on site several times to investigate the flooding,
2 but like I said, we did not go out on site and do any
3 flooding investigation.

4 Q Okay. How were the issues related to
5 concerns about flooding resolved?

6 A Well, the proposed drainage system routes the
7 off-site flow coming above the development through
8 ponds, and it appears to route the flow around the
9 existing Plantation Estates neighborhood.

10 Q Okay. Do you know whether the drainage would
11 ultimately go to the same channel that all the drainage
12 currently goes to?

13 A The outlet point for all of the flow at the
14 very downstream end is the same.

15 Q Okay. And what is your understanding of the
16 capacity of that downstream outlet point?

17 A I'm not sure I understand.

18 Q Well, I mean, do you see anything that is --
19 could be a constriction of flow at the downstream
20 point?

21 A Not that I recall.

22 Q Okay. Do you know what size pipe there is at
23 the downstream point?

24 A I know that one of the -- the main outlet for
25 the neighborhood area, there's, I think, an existing 36

1 inch and 42 inch, but that would be speculation. I
2 can't remember the exact sizes, but I know that the
3 main outfall is being replaced to be a 60-inch pipe.

4 Q Okay. And the -- you're saying that it's
5 your understanding that the main outfall would be
6 replaced with a 60-inch pipe?

7 A Yes.

8 Q Okay. And do you know how large an area is
9 going to be draining into -- ultimately into this
10 60-inch pipe?

11 A I do not recall the exact area.

12 Q Did you ever receive any information
13 indicating questions raised about whether the ponds on
14 the site were dug out of high ground or would
15 constitute wetlands or waters of the State during the
16 review phase?

17 A During the review, no. Not that I can
18 remember.

19 Q Do you recall whether the new residential
20 development that is proposed to this site was going to
21 be -- whether the lots were going to be elevated above
22 the existing grade?

23 A They are proposing to raise the site.

24 Q And do you know why they're going to raise
25 the site?

1 A I don't recall the specifics of the site
2 grading.

3 Q Would raising this site raise any concerns if
4 there is flooding on the existing development?

5 A Raising the site the way the project is
6 proposed, during my review, I saw that the flow is
7 routed to ponds around the development, the Plantation
8 Estates, so the project appears to reduce flow going
9 through Plantation Estates from off site.

10 Q And if it's all going to the same discharge
11 point, it's your understanding that by going around the
12 subdivision before getting there, that that's going to
13 resolve any flooding problems?

14 A Well, for the purposes of the State
15 regulations, they're routing existing off-site flow
16 around the subdivision, so that would be to say it
17 would not contribute to increasing flooding problems.

18 Q Did you or anybody at your agency take a look
19 at what it would take to resolve existing flooding
20 problems within the existing neighborhood?

21 A No. That's outside the scope of our
22 jurisdiction, as it's a neighborhood that was built
23 prior to our regulations becoming effective.

24 Q Okay. Were you aware that that neighborhood
25 was built by the same family that now owns the golf

1 course?

2 A I don't think I knew that, no.

3 Q Okay. If the ponds that are on the golf
4 course were considered waters of the State during your
5 review, would it affect your review in any way?

6 A It may change it, but during this review,
7 they weren't considered waters of the State. I would
8 have to do another review.

9 Q Okay. If there were areas that were
10 considered to be wetlands on this property in addition
11 to waters of the State, would it affect your review?

12 A Again, I would have to do a different review.
13 It may change it, but during this review, those weren't
14 taken into consideration.

15 Q In a review of a project that did have ponds
16 that were waters of the State and wetlands that were
17 waters of the State, would you be assessing this
18 project under the wetlands provisions of the coastal
19 management program?

20 A The wetlands section would assess -- the OCRM
21 wetlands would assess any wetland impacts during the
22 review. If there was stormwater flowing to the
23 wetlands, then we would make sure there was
24 pretreatment prior to stormwater flowing into the
25 wetlands. But other impacts are reviewed by the

1 wetlands section.

2 Q Okay. But in this project, all of your
3 review was based on the assumption that there were no
4 wetlands and no waters of the State on this property?

5 A That's correct, yes.

6 Q Are you familiar with the term
7 "jurisdictional wetlands"?

8 A Yes.

9 Q And what does that term mean to you?

10 A Wetlands that the U.S. Army Corps of
11 Engineers has jurisdiction over is my understanding of
12 that definition.

13 Q Okay. And are you also familiar with the
14 term "non-jurisdictional wetlands"?

15 A Yes.

16 Q And what does that mean to you?

17 A Wetlands that the U.S. Army Corps of
18 Engineers does not have jurisdiction over.

19 Q Okay. If non-jurisdictional wetlands are in
20 the coastal zone, do you consider them to be within
21 State jurisdiction for regulatory purposes under the
22 coastal management program?

23 A I know our wetlands section reviews impacts
24 to non-jurisdictional wetlands.

25 Q Okay. A minute ago you said that if the

1 ponds were waters of the State, they would have to --
2 any flow into them would have to be -- something would
3 have to be done to that before the flow went into those
4 waters. Can you tell me again what it was you said?

5 A That if waters of the State are on site and
6 stormwater flows to those waters of the State, a
7 pretreatment mechanism must be implemented.

8 Q Okay. Is it your understanding that the
9 ponds that are at the site now are going to be
10 incorporated into and become part of the stormwater
11 system for this proposed development?

12 A Some ponds are being incorporated into the
13 proposed system.

14 Q Okay. And are you saying that if these ponds
15 are considered waters of the State, then under your
16 rules, they would have to have pretreatment, but not
17 become part of the stormwater management plan?

18 A Under our rules, there would have to be
19 pretreatment provided for any flow, any stormwater flow
20 that enters waters of the State.

21 Q Okay.

22 MR. CHANDLER: Let me take a brief break.

23 (Recess from 1:32 p.m. to 1:36 p.m.)

24 MR. CHANDLER: No further questions.

25 A (Continuing) Okay. Can I clarify -- I

1 wanted to clarify the first question that you asked, I
2 wanted to make sure that it was during my review that
3 we didn't find any wetlands or waters of the state on
4 site.

5 Q Okay. Well, I mean, in terms of not finding
6 any, what did you do to determine whether there were
7 any?

8 A We used our understanding at the time and the
9 information provided by the consultant.

10 MR. CHANDLER: Okay. Thanks.

11 (Deposition concluded at 1:37 p.m.)
12
13
14
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25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

COUNTY OF BERKELEY:

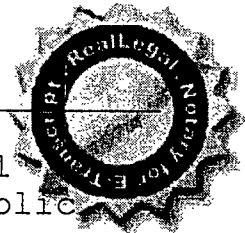
I, TERI L. SAMPSON, Registered Professional
Reporter and Notary Public, State of South Carolina at
Large, certify that I was authorized to and did
stenographically report the foregoing deposition; and
that the transcript is a true record of the testimony
given by the witness.

I further certify that I am not a relative,
employee, attorney or counsel of any of the parties,
nor am I a relative or employee of any of the parties'
attorney or counsel connected with the action, nor am I
financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 8th day of
November, 2008, in the Town of Hanahan, County of
Berkeley, State of South Carolina.

Teri L. Sampson

Teri L. Sampson,
Registered Professional
Reporter and Notary Public



My commission expires:
May 15, 2015

1 ERRATA SHEET

2 I have read the transcript of my deposition
3 and find that no changes are necessary.

4 _____
Shannon M. Hicks

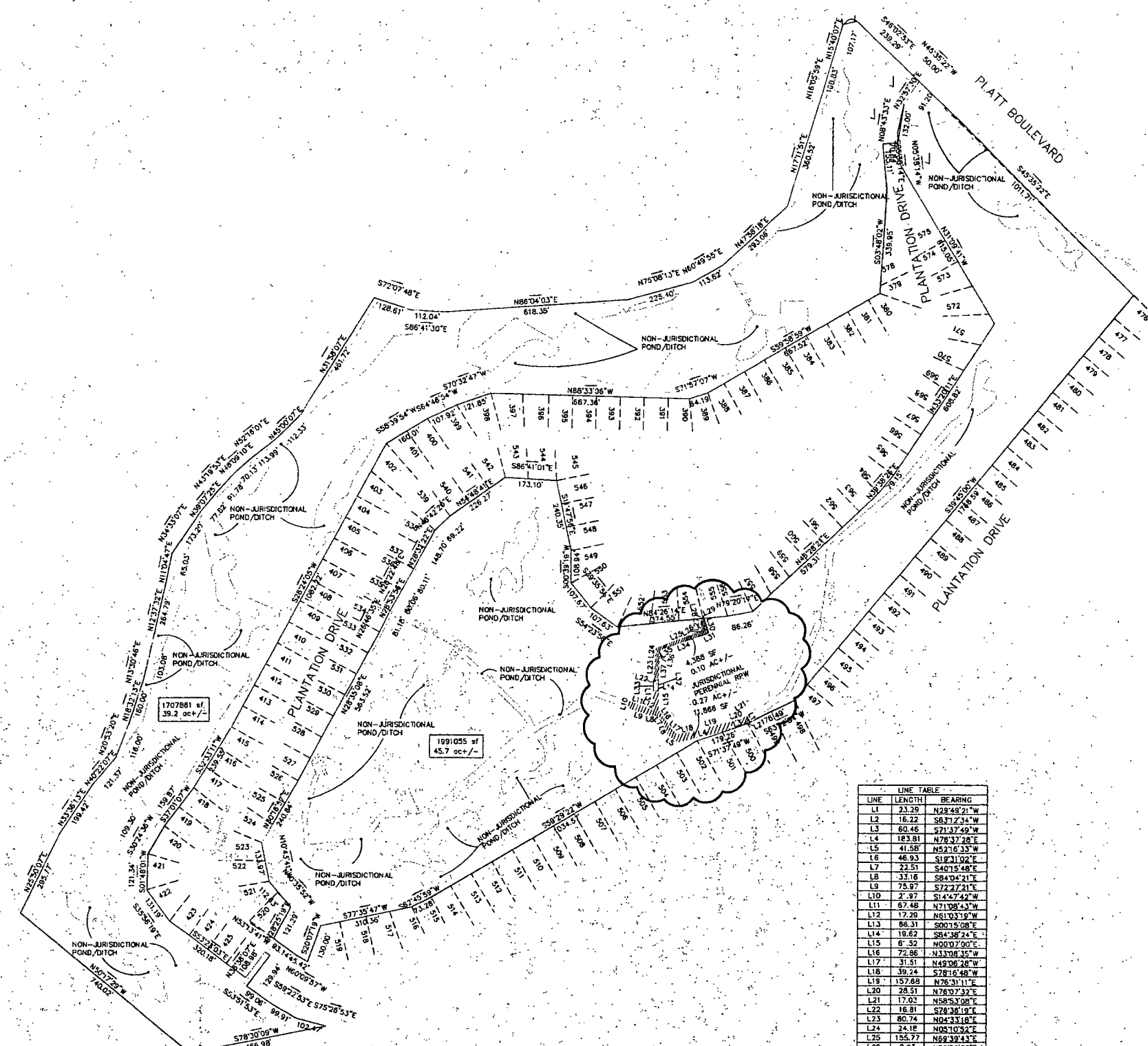
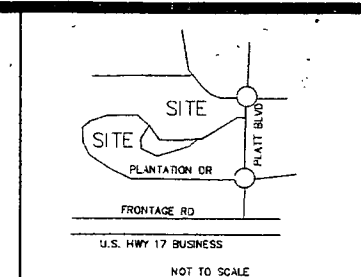
5 Having read the transcript of my deposition, I
6 wish to make the following corrections (Please state
reason):

7 Page _____ Line _____ : _____
8 Page _____ Line _____ : _____
9 Page _____ Line _____ : _____
10 Page _____ Line _____ : _____
11 Page _____ Line _____ : _____
12 Page _____ Line _____ : _____
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17 Page _____ Line _____ : _____
18 Page _____ Line _____ : _____
19 Page _____ Line _____ : _____
20 Page _____ Line _____ : _____

21 _____
22 Shannon M. Hicks

23 Sworn to and subscribed before me this _____ day of
24 _____, 2008, _____ County, South
Carolina.

25 _____
Notary Public
My commission expires _____



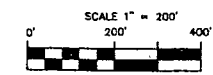
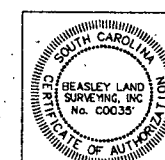
LINE	LENGTH	BEARING
L1	23.29	N29°49'21"W
L2	16.22	S63°12'34"W
L3	60.46	S71°37'49"W
L4	183.81	N76°37'28"E
L5	41.58	N52°16'33"W
L6	48.93	S19°31'02"E
L7	22.51	S40°15'48"E
L8	33.16	S84°04'21"E
L9	75.97	S72°27'21"E
L10	2.97	S14°47'42"W
L11	87.48	N71°08'43"W
L12	17.29	N61°31'12"W
L13	66.31	S00°15'08"E
L14	19.62	S84°38'24"E
L15	6.52	N00°07'00"E
L16	72.86	N33°08'35"W
L17	31.51	N49°06'48"W
L18	39.24	S78°16'48"W
L19	157.68	N76°31'11"E
L20	28.51	N76°07'32"E
L21	17.03	N58°53'08"E
L22	16.81	S78°38'19"E
L23	80.74	N04°33'18"E
L24	24.18	N03°03'52"E
L25	155.77	N69°39'43"E
L26	8.93	N52°22'33"E
L27	10.65	N03°51'08"E
L28	2.45	N12°53'45"W
L29	14.87	N64°02'38"E
L30	48.81	S17°39'58"E
L31	16.13	S63°41'13"W
L32	35.99	N01°52'16"W
L33	38.08	N03°01'12"E
L34	148.64	N71°31'07"E
L35	9.68	N52°38'09"E
L36	9.58	N17°03'10"E
L37	80.20	N02°08'49"E

Exhibit C

PRELIMINARY
DEERTRACK GOLF COURSE
OLD SOUTH COURSE
JURISDICTIONAL DETERMINATION

SOCASSEE TOWNSHIP, HORRY COUNTY, SOUTH CAROLINA, RECORDED IN THE
OFFICE OF THE CLERK OF COURT FOR HORRY COUNTY IN PLAT BOOK 58 PAGE 125.
DEED BOOK PAGE SURVEY WITHOUT BENEFIT OF TITLE SEARCH
SUBJECT TO EASEMENTS AND RESTRICTIONS. TAX MAP: 191-00-01-068
FLOOD HAZARD ZONE "X" BASE FLOOD ELEVATION N/ACOMMUNITY 450104 PANEL 45051CC751 H DATE 8-23-1999

I HEREBY STATE THAT TO THE BEST OF MY PROFESSIONAL KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STANDARDS OF PRACTICE MANUAL FOR LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS B SURVEY AS SPECIFIED THEREIN. ALSO, THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.



BEASLEY LAND SURVEYING, INC.
6084 FRIENDSHIP LANE
P.O. BOX 33784
MYRTLE BEACH, S.C. 29588
843-650-7722
FAX 843-650-7723
LARRY T. BEASLEY S.C. RPLS 9544
DATE: FEBRUARY 26, 2010
© 2010 ALL RIGHTS RESERVED

Mary D. Shahid
Member
Admitted in SC

November 10, 2011

VIA E-MAIL AND U. S. MAIL

Shannon Hicks, P. E., Manager
Stormwater & State Certification Section
1362 McMillan Avenue
Suite 400
Charleston, SC 29405

***Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf Inc., and Bill Clark Homes of Myrtle
Beach
2008-ALC-07-00221 (on Appeal to Court of Appeals)***

Dear Ms. Hicks:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Thank you for your letter of October 6, 2011, which was sent following the issuance of an Order of the South Carolina Court of Appeals regarding whether any administrative action was necessary before proceeding with the pending appeal. As you may know based on my filings, my client's preference is to proceed with briefing and obtaining resolution of the appeal, rather than delaying the progress of the appeal by focusing on administrative matters that have no bearing on the outcome of the appeal and can be addressed if, necessary, at the conclusion of the appeal.

You identified the following issues related to the NOI that was submitted to OCRM on March 5, 2007, to obtain permit coverage under the NPDES General Permit authorizing Stormwater Discharges from Large and Small Construction Activities:

1. New findings by the Corps of Engineers, in 2010, that .37 (37/100ths of an acre) of the 158 acre site owned by Deertrack Golf, Inc., ("Deertrack Golf") and formerly under contract to Bill Clark Homes of Myrtle Beach ("Bill Clark Homes"), is jurisdictional under the Clean Water Act.

Specifically, the lower reaches of a drainage ditch were determined by the Corps of Engineers to be a RPW, or jurisdictional connection, to traditional navigable waters.

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1788
F 843.414.8242
E MShahid@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

Exhibit D

Deertrack Golf Response

We are aware that the current approved plans show road and lot construction impacting this drainage ditch, and reflect an intent to pipe, fill, and eliminate the jurisdictional connection. Of course, at the time the plans were approved Deertrack Golf was in possession of a valid upland verification, or "no wet" letter, from the Corps of Engineers. The fact that the Corps determined three years later that .37 acres (920 linear feet) of an existing drainage feature is jurisdictional does not impact our ability to proceed with development of a 278 lot subdivision. We can simply build less than shown on the plans by eliminating development in the .37 care area in the lower reaches of the drainage ditch. Alternatively, we can seek authorization by the Corps of Engineers to pipe and fill the drainage feature.

I am cognizant of the terms and conditions of the General Permit authorization as relates to the necessity of a 404 permit. I remind you that the project as approved by your staff and the Administrative Law Judge was consistent with this requirement. I understand that, given the new Corps' action in 2010, in order to comply with the CGP my client must submit a modification request reflecting the jurisdictional areas and either a) eliminate impacts in the areas deemed jurisdictional or b) provide OCRM with approval from the Corps to eliminate the jurisdictional connection. However, the appropriate time for my clients to address this issue with OCRM is after this appeal is concluded. The appeal encompasses the entire proposed 278 lot residential development, and not simply the .37 acres of drainage ditch. Clearly, before spending time and money to produce modified plans or to obtain Nationwide Permit coverage to pipe and fill the ditch, my clients need to know whether they can proceed with this development by obtaining judicial finality.

- 2) Findings by the Administrative Law Court related to the golf course ponds.

Deertrack Golf Response

In contrast to the statement in your letter that Judge McLeod found that there are waters of the state located on the golf course, and these waters require pre-treatment, the lower court actually found that the golf course ponds were stormwater detention ponds, and that it was illogical to interpret the Department's regulations to require pre-treatment of discharges into stormwater ponds. I'm attaching the ALC's Final Order and Decision and I have high-lighted the applicable findings and conclusions for your review.

Moreover, the permit application was pending before SCDHEC staff for a year. The ponds in question were depicted on the pre-development drawings and assumed for

purposes of pre-development calculations. OCRM staff conducted at least one site visit to inspect the golf course. OCRM staff knew when it issued its authorization to Bill Clark Homes and Deertrack Golf that there was an interconnected system of ornamental drainage and irrigation ponds on the site. Nothing has changed, since the permit was issued, the underlying contested case was presented to the S. C. Administrative Law Court, and the lower court issued its order affirming issuance of the permit, an order that was not appealed by your agency.

If the Court of Appeals affirms the lower court's order, then there is no basis for you to add additional requirements related to the ponds. The findings and conclusions of the Court of Appeals, and of the ALC, become the law of the case. Consequently, I don't think that this is an issue that can be, or should be, addressed administratively at this time. Of course, if the Court of Appeals reverses the lower court's order or remands this case to the agency, these issues may need to be addressed. It is premature to address the status of the existing ponds until the Court of Appeals has had the opportunity to review the attached findings and conclusions of the ALC.

3) Submitted Plan Revisions.

Deertrack Golf Response

With regard to the plan revisions that were submitted by Bill Clark Homes, that submittal was to insure consistency between the stormwater permit application pending before Horry County and the stormwater permit issued by SCDHEC. Unfortunately, because Deerfield Plantation Phase II B filed an appeal of the ALJ order, Horry County cannot issue its stormwater permit. Horry County will not issue its stormwater permit until we have obtained judicial finality on the challenges made by Deerfield Plantation Phase II B.

Therefore, on behalf of Deertrack Golf, who obtained ownership of all professional work product produced by Bill Clark Homes upon termination of the purchase and sales agreement, I am withdrawing the plan revisions.

If the Court of Appeals affirms the ALC, and Horry County issues its stormwater approval, then we will submit the plan revisions. I understand that these constitute a major modification of the previously approved NOI and authorization.

4) Insufficiency of Permit Signators.

In 2009, Deerfield Plantation Phase IIB filed its ultimately unsuccessful citizens suit in Federal District Court. Once the action was filed in federal court, Bill Clark Homes realized that it faced a long, expensive and protracted battle in multiple forums. Bill

Shannon Hicks, P. E., Manager
November 10, 2011
Page 4

Clark Homes terminated the Purchase and Sale Agreement with Deertrack Golf. The termination was amicable between the Deertrack Golf and Bill Clark Homes. Bill Clark Homes has agreed to transfer and assign all entitlements to Deertrack Golf. Once Deertrack Golf has secured all entitlements, which it will be able to do upon successful conclusion of this appeal, it will give Bill Clark Homes an opportunity to purchase the property or, alternatively, Deertrack Golf will develop the property. We understand that the NOI upon which authorization was issued needs to be signed by the party undertaking the land disturbing activity. Assuming a successful outcome in the Court of Appeals, we will correct that deficiency before commencing any construction or land disturbance on the South golf course.

CONCLUSION

It is premature to address the issue noted in your October 6, 2011 letter. However, I can provide you the following assurances. My client will not commence land disturbing activities on the South golf course until it has addressed to OCRM's satisfaction the .37 acres of RPW (jurisdictional connection) obtains newly designated in 2010 and provides the appropriate signature on an NOI and/or approval of a transfer of the existing authorization. With regard to the revisions, Deertrack Golf understands that those revisions constitute a major modification to the previously approved permit. However, we are withdrawing those revisions and will re-submit them when, and if, we obtain a stormwater permit from Horry County. As relates to whether Deertrack is required to pre-treat a permitted discharge before it enters an existing stormwater pond, that is an issue that is before the Court of Appeals and Deertrack Golf will be bound, and will abide by, the ultimate judicial conclusions on this issue.

I'm going to provide a copy of your letter, and my response, to the Court of Appeals and request that the Court set a briefing schedule.

Shannon Hicks, P. E., Manager
November 10, 2011
Page 5

Very truly yours,

Nexsen Pruet, LLC

/s/ Mary D. Shahid

Mary D. Shahid
Member

MS/mds

cc: Deertrack Golf, Inc.
Bill Clark Homes of Myrtle Beach, LLC
Richard M. Smith, Esq.
Amy E. Armstrong, Esq.
Davis A. Whitfield-Cargile, Esq.
Rheta Dinovo, SCDHEC-OCRM
Jill Stewart, SCDHEC-BOW

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

December 8, 2011

Amy E. Armstrong
President

Michael G. Corley
Staff Attorney

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Pawleys Island, SC 29585

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michael@scelp.org
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*To protect the natural
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Carolina by providing
legal services and advice
to environmental
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and by improving the
state's system of
environmental
regulation.*

Honorable V. Claire Allen
Deputy Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

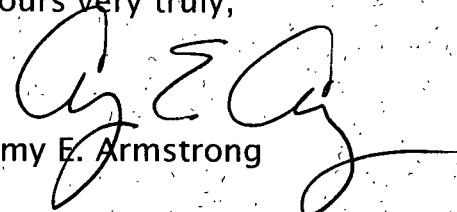
RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

Dear Ms. Allen:

I am enclosing for filing the original and seven copies of
Appellant's Return to Motion Seeking Establishment of an
Appellate Briefing Schedule and Motion to Remand, along with
me filing fee.

Kindly return a clocked-in copy in the enclosed envelope.

Yours very truly,


Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire

RECEIVED
DEC 12 2011
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

DEC 02 2011

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Honorable John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-00221

Deerfield Plantation Phase II B Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC, ... Respondents.

**MOTION FOR EXTENSION AND
TO FILE RESPONSE OUT OF TIME**

Appellant respectfully requests a 10-day extension to file a response to Respondent Deertrack Golf's Motion Seeking Establishment of an Appellate Briefing Schedule. Counsel for Deertrack Golf has consented to such an extension. The response was due yesterday, November 28, 2011.

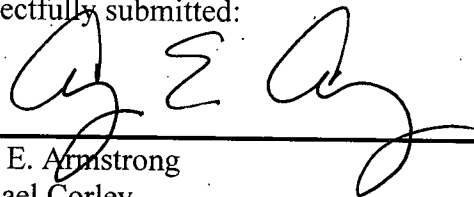
Counsel is one day late filing its request for an extension and response, but requests leniency from the Court due to exigent circumstances. Lead counsel, Amy Armstrong, was out of the office for the two weeks preceding the response deadline due to an out-of-state conference, two hearings, and the Thanksgiving holiday. The Respondent's motion was filed the first day of my absence and upon returning to my office on Monday, November 28, I had a large backlog to work through; and the 10-day response period had not been calendared in accordance with usual office practices.

Appellant asks this Court to exercise its discretion in considering its Motion for Extension, though tardy by one day.

Additionally, Appellant intends to file a motion for remand along with its response to the motion to set a briefing schedule. The motion for remand is based on very recent documents from both the Respondent Deertrack Golf, Inc., and DHEC. The motion for remand is a necessary component of Appellant's response to Respondent's motion. Counsel for Appellant needs an additional nine days to adequately prepare the motion and response.

Appellant hereby moves for a 10-day extension to file a response and for such motion to be granted one day out of time. Counsel contacted Mary Shahid, attorney for Deertrack Golf, on November 29, 2011, and Ms. Shahid consented to a 10-day extension to file a response. If this motion is granted the response to the motion would be due December 8, 2011.

Respectfully submitted:



Amy E. Armstrong

Michael Corley

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 430 Highmarket Street
Georgetown, SC 29440

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Attorneys for the Appellant

Georgetown, South Carolina

November 29, 2011

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

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President

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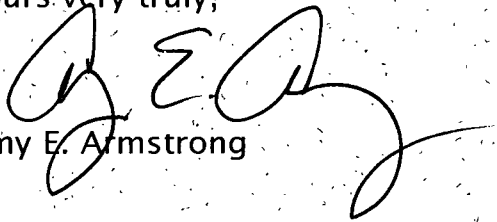
RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

Dear Ms. Allen:

I am enclosing for filing the original and six copies of
Appellant's Motion for Extension and To File Response Out of
Time, along with me filing fee.

Kindly return a clocked-in copy in the enclosed envelope.

Yours very truly,


Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge
Case No. 08-ALC-07-0221-CC

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Deerfield Plantation Phase IIB Property Owners Association Appellant,
vs.

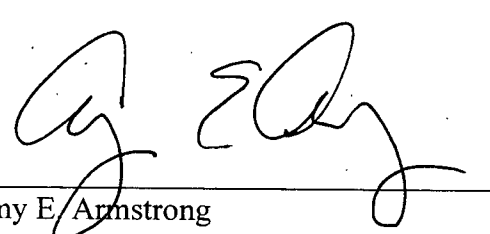
South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion for Extension and to File Response Out of Time upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
Charleston, SC 29402



Amy E. Armstrong

Georgetown, South Carolina

November 29, 2011

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

Appeal from the South Carolina Administrative Law Court
Honorable John D. McLeod, Administrative Law Judge
Docket No. 2008-ALJ-07-00221

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health and
Environmental Control, Deertrack Golf, Inc.,
and Bill Clark Homes of Myrtle Beach, LLC,

RECEIVED

NOV 17 2011

SC Court of Appeals

Respondents.

**RESPONDENT DEERTRACK GOLF, INC.'S
MOTION SEEKING ESTABLISHMENT
OF AN APPELLATE BRIEFING SCHEDULE**

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725

*Attorneys for the Respondent,
Deertrack Golf Inc.*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES NOW the Respondent, Deertrack Golf Inc. ("Deertrack Golf"), pursuant to Rule 240 of the South Carolina Appellate Court Rules, and respectfully requests this Court of Appeals to establish an appellate briefing schedule and, in turn, to permit this appeal to proceed in the normal course.

I. STATEMENT OF FACTS

The relevant facts supporting this Motion are as follows. The Administrative Law Court issued its Final Order and Decision in the underlying contested case on 9 June 2009 (the "2009 ALC Order"). The 2009 ALC Order had the effect of approving the issuance of a land disturbance and stormwater management permit to Deertrack Golf authorizing Deertrack Golf to commence redevelopment/transformation of a closed golf course, known as the Old South Golf Course, into a 278 lot residential subdivision (the "Golf Property") located in the Town of Surfside Beach, Horry County. The Appellant, Deerfield Plantation Phase II-B Property Owners Association ("Deerfield Plantation POA"), appealed the 2009 ALC Order on 29 July 2009. The Deerfield Plantation POA sought and was granted an extension to file its Initial Appellant's Brief on 25 September 2009.

Deerfield Plantation POA then moved stay this appeal, based on a Federal Court citizen's suit which Deerfield Plantation POA filed against the United States Corps of Engineers and others. That action resulted in the Corps of Engineers revoking its previous determination that the closed Old South Golf Course did not contain any wetlands or waters of the United States. This Court of Appeals granted the requested stay.

In March 2010, the Corps of Engineers issued its new jurisdictional determination finding there was 0.37 acres, or 920 linear feet, in a drainage ditch which could be considered a relatively permanent body of water and, therefore, constituted a jurisdictional connection to traditional navigable waters. Deerfield Plantation POA was not happy with this determination and continued to pursue its citizen's suit in the United States District Court for the District of South Carolina, Florence Division (the "Federal Litigation").¹ While the Federal Litigation was pending, this Court of Appeals again extended the then-existing stay of this appeal.

On 12 July 2011, the District Court issued its order in the Federal Litigation affirming the Corps of Engineers' March, 2010 Jurisdictional Determination (the "12 July USDC Order"). As this Court of Appeals is aware, Deertrack Golf immediately sent a copy of the 12 July USDC Order to this Court of Appeals seeking to lift any stay on this appeal.² The Respondent, South Carolina Department of Health and Environmental Control ("SCDHEC"), objected. This Court of Appeals, by order dated 8 September 2011, held this appeal in abeyance for an additional 30 days to allow SCDHEC "to expeditiously proceed with any administrative action."

¹ The Old South Golf Course a/k/a the Golf Property consists of approximately 158 acres. The Corps of Engineers' earlier determination that there were no wetlands or waters of the United States on the Golf Property addressed all 158 acres. On the other hand, the Corps of Engineers' new jurisdictional determination only addresses the lower nine holes of the golf course, approximately 80 acres, which was the subject of the development plan and the land disturbance and stormwater permit previously approved by the ALC. Obviously, a finding that 0.37 acres, or 920 linear feet, within a drainage ditch, is subject to federal permitting jurisdiction does not prevent Deertrack Golf from developing the remaining 79.63 acres into the original 278 lot subdivision approved by Horry County and by SCDHEC through issuance of the land disturbance and stormwater management permit approval.

² The Deerfield Plantation POA has appealed the 12 July USDC Order to the United States Court of Appeals for the Fourth Circuit.

On 6 October 2011, SCDHEC staff sent a letter to the undersigned as Deertrack Golf's legal counsel.³ The letter's author, Shannon Hicks, identified several issues of concern to SCDHEC's Office of Coastal Resource Management ("OCRM"),⁴ but advised that "If [the undersigned thought] it [wa]s more prudent to address these issues after the appeal [wa]s resolved, [she was] receptive to hear [the undersigned's] opinion."⁵ Finally, Ms. Hicks stated that "[h]owever, in order to comply with the NPDES regulations, these [proposed] modifications need to made to the permit before the permitted activity may be conducted."⁶ (Emphasis added.)

Deertrack Golf, via the undersigned, responded to the 6 October Hick's Letter on 10 November 2011,⁷ and agreed to the following:

- (1) Deertrack Golf would not undertake any "land disturbing activities" until and unless this Court of Appeals affirmed the 2009 ALC Order.⁸
- (2) If Bill Clark Homes of Myrtle Beach ("Bill Clark Homes MB") failed to purchase the Golf Property (the property at issue in this contested case), Deertrack Golf agreed it would amend the permit application to reflect that Deertrack Golf (as the property owner), rather than Bill Clark Homes MB was undertaking the development activity.⁹

³ See Letter to Mary D. Shahid, Esquire from Shannon Hicks, P.E., dated 6 October 2011 (the "6 October Hicks Letter"). A copy of the 6 October Hicks Letter is attached hereto as Exhibit "A" and incorporated herein by reference.

⁴ 6 October Hicks Letter, pp.1-2.

⁵ 6 October Hicks Letter, p.2, para. 4.

⁶ 6 October Hicks Letter, p.2, para. 4.

⁷ See Letter to Shannon Hicks, P.E. from Mary D. Shahid, Esquire, dated 10 November 2011 (the "10 November Shahid Letter"). A copy of the 10 November Shahid Letter is attached hereto as Exhibit "B" and incorporated herein by reference.

⁸ 10 November Shahid Letter, pp.3-4, Section 4; 10 November Shahid Letter, p.4.

⁹ 10 November Shahid Letter, p.4.

- (3) Deertrack Golf would obtain a transfer, if deemed necessary, of the permit that was the subject of the underlying contested case.¹⁰
- (4) Deertrack Golf agreed to take whatever steps deemed necessary by SCDHEC to reflect the existence of 0.37 acres, 920 linear feet, of waters of the United States on the plans submitted in support of the permit application.¹¹

II. ARGUMENT AND CITATION OF AUTHORITY

None of these administrative matters impact and/or otherwise affect the justiciability of this appeal.¹² This current appeal simply and directly addresses Deertrack Golf's to develop approximately 80 acres, not just **0.37 acres, or 920 linear feet, in a drainage ditch**. All of the issues identified by SCDHEC can be addressed at the conclusion of this appeal and Deertrack Golf has provided a written commitment to SCDHEC and to this Court of Appeals of its willingness to address these issues and to forebear from commencing any "land disturbing activities" until these issues are addressed.¹³

There simply is no other reasonable grounds to further delay the progress and ultimate finality of this appeal. Deertrack Golf anticipates the Deerfield Plantation POA may claim its appeal of the 12 July USDC Order to the United States Court of Appeals for the Fourth Circuit constitutes a rational basis for further delay of this appeal. The appeal pending in the Fourth Circuit is subject to a briefing schedule which commences

¹⁰ 10 November Shahid Letter, p.4. Importantly the permit was issued jointly to Deertrack Golf and Bill Clark Homes MB.

¹¹ 10 November Shahid Letter, p.4. The drainage feature is currently shown on the pre-development plans, but is not identified as a jurisdictional feature.

¹² See generally Rule 205, SCACR.

¹³ See 10 November Shahid Letter, pp.1-4.

early in 2012. Deertrack Golf sees no prejudice to any party for these two appeals moving forward simultaneously. In the event this Court of Appeals resolved this appeal in advance of any decision by the Fourth Circuit, Deertrack Golf agrees not to undertake any “land disturbing activity” until the issue of the 12 July USDC Order (i.e.; the Jurisdictional Determination) is finally resolved by the Fourth Circuit Court of Appeals. On the other hand, to delay this appeal until such time as the Fourth Circuit has issued its ruling is unfair to Deertrack Golf – especially in view of the two years which has already elapsed since the Deerfield Plantation POA filed this appeal.

Axiomatically, the Deerfield Plantation POA will always have “reasons” to suggest that this matter be delayed,¹⁴ and Deertrack Golf has certainly cooperated with all parties for the past two years. Nevertheless, at this point, with a favorable ruling from the ALC, a favorable ruling by the District Court on a collateral but significant issue, Deertrack Golf is entitled to obtain judicial finality on the issues raised in this appeal. Such finality is, however, dependent upon this Court of Appeals lifting all applicable stays and establishing a reasonable, but direct, appellate briefing schedule.

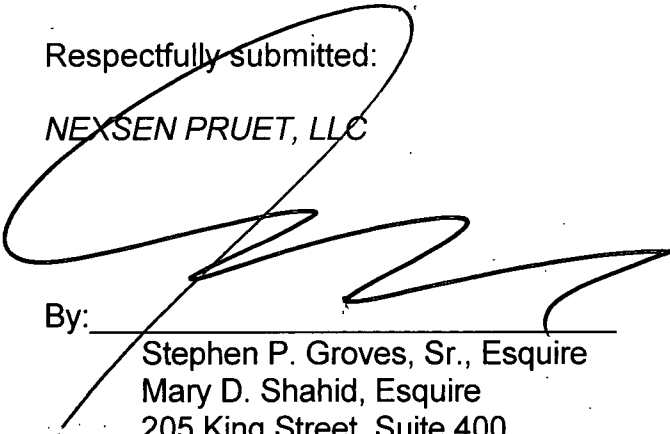
II. CONCLUSION

Based upon the forgoing arguments and citation of authority, the Respondent, Deertrack Golf, Inc., respectfully requests this Court of Appeals to lift all stays in this appeal, establish a reasonable appellate briefing schedule, and permit this appeal to proceed to a determination on the merits.

¹⁴ With apologies to former British Prime Minister and Statesman William E. Gladstone – “Justice delayed is justice denied.”

Respectfully submitted:

NEXSEN PRUET, LLC

By: 

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
Telecopier: 843.720.1777
E-Mail: SGroves@nexsenpruet.com

*Attorneys for the Respondent,
Deertrack Golf, Inc.*

Charleston, South Carolina

14 November 2011

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

Appeal from the South Carolina Administrative Law Court
Honorable John D. McLeod, Administrative Law Judge
Docket No. 2008-ALJ-07-00221

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health and
Environmental Control, Deertrack Golf, Inc.,
and Bill Clark Homes of Myrtle Beach, LLC,

Respondents.

**PROOF OF SERVICE
for the
RESPONDENT DEERTRACK GOLF, INC.'S
MOTION SEEKING ESTABLISHMENT
OF AN APPELLATE BRIEFING SCHEDULE**

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725

*Attorneys for the Respondent,
Deertrack Golf Inc.*

I, Stephen P. Groves, Sr., Esquire, hereby certify that on 14 November 2011, I served a copy of the **Motion Seeking Establishment of an Appellate Briefing Schedule** submitted by the Respondent, Deertrack Golf, Inc., on all counsel of record, via the United States Postal Service, postage pre-paid, and addressed as follows:

Amy Armstrong, Esquire
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 1380
Pawleys Island, South Carolina 29585

Attorneys for the Appellant

Davis A. Whitfield-Cargile, Esquire
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL –
OFFICE OF COASTAL RESOURCE MANAGEMENT
1362 McMillan Avenue, Suite 400
Charleston, South Carolina, 29405

Attorneys for Respondent, SCDHEC

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a series of loops and a horizontal line at the end.

Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

14 November 2011

NPCHAR1:761817.1-BR-(SPG) 048667-00004



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

October 6, 2011

VIA U.S. MAIL

Mary D. Shahid, Esq.
Member
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

EXHIBIT

A

Dear Mary:

As you know, the Court of Appeals issued an Order on October 6, 2010 granting the Joint Motion to Stay that was filed on behalf of all parties. The motion requested that the appeal be held in abeyance pending resolution of the action in the United States District Court **and any subsequent administrative action on the permit if necessary**. In the motion, the Department represented that additional administrative action on the permit was warranted at the time of the filing of the motion, but SCDHEC agreed to refrain from taking any action on the permit until resolution of the action in the United States District Court. In July of this year, you asked the Court to set a briefing schedule given Judge Harwell's order in the U.S. District Court action. Amy's client opposed briefing and we asked for time to consider administrative action, consistent with the previous orders in this case. The Court of Appeals issued an Order on September 8, 2011 holding this in abeyance for thirty days for the Department to take administrative action. The purpose of this letter is to find out how you would like to proceed administratively with the permit.

As you know, your client does not have authorization and certification from the Corps of Engineers and DHEC to impact waters of the United States. In addition, your client's permit does not authorize storm water discharges into waters of the United States without appropriate controls. The application that resulted in the DHEC permit coverage issued for this site represented there were no waters of the United States on the site, based on the Corps delineation in effect at the time. It is a condition of your permit that there be no waters of the United States on the site. Subsequent to the ALC hearing in this case, the Corps issued a modified jurisdictional determination that shows there are waters of the United States on the site. This requires changes to your permit. If the activity shown on your permit drawings were to be conducted, there would be impacts to waters of the United States, which involve the storm water management system, without authorization and certification from the Corps of Engineers and DHEC. Since this is not authorized by the permit, the permit needs to be modified. How you modify the permit depends on your clients intentions. Your client's intentions will likely dictate whether this process follows that for major modification, which reopens the permit, or minor

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

modification. You also need additional authorization and certification from the Corps of Engineers and DHEC if you intend to fill the waters of the United States.

In addition, the issued permit coverage does not authorize the discharge of untreated storm water into waters of the State. It is a condition of permit coverage that there be no waters of the State on the site. The NOI represented that there are no waters of the State on the site and by law certified fact is a condition of the permit. Judge McLeod found that there are waters of the State on the site. Accordingly, there needs to be some form of pre-treatment before storm water can be discharged into waters of the State unless it can be demonstrated that the areas classified as waters of the State have been utilized as stormwater management ponds for water quality treatment. As I testified in my deposition, if there are waters of the state on the site, then DHEC needs to do additional reviews.

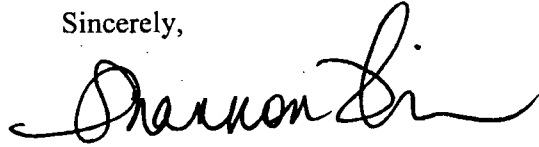
Additionally, after the decision to grant NPDES general permit coverage was appealed to the ALC, your client submitted revised plans to the Department. These revised plans have never been approved by the Department, as this matter was in litigation. The revised plans include technical changes such as pipe additions, pipe sizes, removal of outlet structures, outlet structure elevations, and post-development discharge flows. I understand that some aspects of the revised plans may be a result of requirements imposed by Horry County. Staff has determined that some of the proposed changes are major in nature and require additional technical review and a formal permit modification. How, if at all, would you like DHEC to proceed with review of the revised plans?

What administrative action, if any, to be taken on your clients permit really depends on your clients' intentions with regard to the property. With regards to the waters of the United States, I understand that you have acknowledged the need to modify your plans and get additional approvals. Since the permit does not authorize untreated storm water discharges into waters of the State, you will need to modify your plans to show the waters of the State. You will also need to meet pretreatment requirements or provide supporting information showing the waters of the State have been used to provide water quality treatment for stormwater discharges. How you meet these requirements is in large part up to your client. Thus, how to proceed administratively is really dependent upon your client's plans. Should your client wish to proceed with a permit modification the Notice of Intent/permit application will need to be modified accordingly. In addition, you will need to confirm that Jeffrey Farrell is authorized to represent and provide signatory authority for Deertrack Golf, Inc. as represented on the current Notice of Intent for this project. If he is no longer an authorized representative, the NOI needs to be modified to reflect an authorized representative.

If you think it more prudent to address these issues after the appeal is resolved, I am receptive to hear your opinion. However, in order to comply with the NPDES regulations, these modifications need to be made to the permit before the permitted activity may be conducted.

Please let me know how you would like to proceed administratively so that your permit is one that can be utilized by your client. I am also happy to facilitate a meeting with your client and staff (and Amy Armstrong's client, if necessary) if you think that would help resolve these issues more expeditiously. Please let me know. I will be standing by.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon Hicks". The signature is fluid and cursive, with a large initial "S" and "H".

Shannon Hicks, P.E., Manager
Stormwater & State Certification Section

cc: Amy E. Armstrong, Esq.
Richard M. Smith, Esq.
Davis A. Whitfield-Cargile, Esq.
Rheta Geddings DiNovo
Jill Stewart

November 10, 2011

VIA E-MAIL AND U. S. MAIL

Shannon Hicks, P. E., Manager
Stormwater & State Certification Section
1362 McMillan Avenue
Suite 400
Charleston, SC 29405

**Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf Inc., and Bill Clark Homes of Myrtle
Beach
2008-ALC-07-00221 (on Appeal to Court of Appeals)**

Dear Ms. Hicks:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Thank you for your letter of October 6, 2011, which was sent following the issuance of an Order of the South Carolina Court of Appeals regarding whether any administrative action was necessary before proceeding with the pending appeal. As you may know based on my filings, my client's preference is to proceed with briefing and obtaining resolution of the appeal, rather than delaying the progress of the appeal by focusing on administrative matters that have no bearing on the outcome of the appeal and can be addressed if, necessary, at the conclusion of the appeal.

You identified the following issues related to the NOI that was submitted to OCRM on March 5, 2007, to obtain permit coverage under the NPDES General Permit authorizing Stormwater Discharges from Large and Small Construction Activities:

1. New findings by the Corps of Engineers, in 2010, that .37 (37/100ths of an acre) of the 158 acre site owned by Deertrack Golf, Inc., ("Deertrack Golf") and formerly under contract to Bill Clark Homes of Myrtle Beach ("Bill Clark Homes"), is jurisdictional under the Clean Water Act.

Specifically, the lower reaches of a drainage ditch were determined by the Corps of Engineers to be a RPW, or jurisdictional connection, to traditional navigable waters.

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E MShahid@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

EXHIBIT

B

Deertrack Golf Response

We are aware that the current approved plans show road and lot construction impacting this drainage ditch, and reflect an intent to pipe, fill, and eliminate the jurisdictional connection. Of course, at the time the plans were approved Deertrack Golf was in possession of a valid upland verification, or "no wet" letter, from the Corps of Engineers. The fact that the Corps determined three years later that .37 acres (920 linear feet) of an existing drainage feature is jurisdictional does not impact our ability to proceed with development of a 278 lot subdivision. We can simply build less than shown on the plans by eliminating development in the .37 acre area in the lower reaches of the drainage ditch. Alternatively, we can seek authorization by the Corps of Engineers to pipe and fill the drainage feature.

I am cognizant of the terms and conditions of the General Permit authorization as relates to the necessity of a 404 permit. I remind you that the project as approved by your staff and the Administrative Law Judge was consistent with this requirement. I understand that, given the new Corps' action in 2010, in order to comply with the CGP my client must submit a modification request reflecting the jurisdictional areas and either a) eliminate impacts in the areas deemed jurisdictional or b) provide OCRM with approval from the Corps to eliminate the jurisdictional connection. However, the appropriate time for my clients to address this issue with OCRM is after this appeal is concluded. The appeal encompasses the entire proposed 278 lot residential development, and not simply the .37 acres of drainage ditch. Clearly, before spending time and money to produce modified plans or to obtain Nationwide Permit coverage to pipe and fill the ditch, my clients need to know whether they can proceed with this development by obtaining judicial finality.

2) Findings by the Administrative Law Court related to the golf course ponds.

Deertrack Golf Response

In contrast to the statement in your letter that Judge McLeod found that there are waters of the state located on the golf course, and these waters require pre-treatment, the lower court actually found that the golf course ponds were stormwater detention ponds, and that it was illogical to interpret the Department's regulations to require pre-treatment of discharges into stormwater ponds. I'm attaching the ALC's Final Order and Decision and I have high-lighted the applicable findings and conclusions for your review.

Moreover, the permit application was pending before SCDHEC staff for a year. The ponds in question were depicted on the pre-development drawings and assumed for

purposes of pre-development calculations. OCRM staff conducted at least one site visit to inspect the golf course. OCRM staff knew when it issued its authorization to Bill Clark Homes and Deertrack Golf that there was an interconnected system of ornamental drainage and irrigation ponds on the site. Nothing has changed, since the permit was issued, the underlying contested case was presented to the S. C. Administrative Law Court, and the lower court issued its order affirming issuance of the permit, an order that was not appealed by your agency.

If the Court of Appeals affirms the lower court's order, then there is no basis for you to add additional requirements related to the ponds. The findings and conclusions of the Court of Appeals, and of the ALC, become the law of the case. Consequently, I don't think that this is an issue that can be, or should be, addressed administratively at this time. Of course, if the Court of Appeals reverses the lower court's order or remands this case to the agency, these issues may need to be addressed. It is premature to address the status of the existing ponds until the Court of Appeals has had the opportunity to review the attached findings and conclusions of the ALC.

3) Submitted Plan Revisions.

Deertrack Golf Response

With regard to the plan revisions that were submitted by Bill Clark Homes, that submittal was to insure consistency between the stormwater permit application pending before Horry County and the stormwater permit issued by SCDHEC. Unfortunately, because Deerfield Plantation Phase II B filed an appeal of the ALJ order, Horry County cannot issue its stormwater permit. Horry County will not issue its stormwater permit until we have obtained judicial finality on the challenges made by Deerfield Plantation Phase II B.

Therefore, on behalf of Deertrack Golf, who obtained ownership of all professional work product produced by Bill Clark Homes upon termination of the purchase and sales agreement, I am withdrawing the plan revisions.

If the Court of Appeals affirms the ALC, and Horry County issues its stormwater approval, then we will submit the plan revisions. I understand that these constitute a major modification of the previously approved NOI and authorization.

4) Insufficiency of Permit Signators.

In 2009, Deerfield Plantation Phase IIB filed its ultimately unsuccessful citizens suit in Federal District Court. Once the action was filed in federal court, Bill Clark Homes realized that it faced a long, expensive and protracted battle in multiple forums. Bill

Clark Homes terminated the Purchase and Sale Agreement with Deertrack Golf. The termination was amicable between the Deertrack Golf and Bill Clark Homes. Bill Clark Homes has agreed to transfer and assign all entitlements to Deertrack Golf. Once Deertrack Golf has secured all entitlements, which it will be able to do upon successful conclusion of this appeal, it will give Bill Clark Homes an opportunity to purchase the property or, alternatively, Deertrack Golf will develop the property. We understand that the NOI upon which authorization was issued needs to be signed by the party undertaking the land disturbing activity. Assuming a successful outcome in the Court of Appeals, we will correct that deficiency before commencing any construction or land disturbance on the South golf course.

CONCLUSION

It is premature to address the issue noted in your October 6, 2011 letter. However, I can provide you the following assurances. My client will not commence land disturbing activities on the South golf course until it has addressed to OCRM's satisfaction the .37 acres of RPW (jurisdictional connection) newly designated in 2010 and provides the appropriate signature on an NOI and/or approval of a transfer of the existing authorization. With regard to the revisions, Deertrack Golf understands that those revisions constitute a major modification to the previously approved permit. However, we are withdrawing those revisions and will re-submit them when, and if, we obtain a stormwater permit from Horry County. As relates to whether Deertrack is required to pre-treat a permitted discharge before it enters an existing stormwater pond, that is an issue that is before the Court of Appeals and Deertrack Golf will be bound, and will abide by, the ultimate judicial conclusions on this issue.

I'm going to provide a copy of your letter, and my response, to the Court of Appeals and request that the Court set a briefing schedule.

Shannon Hicks, P. E., Manager
November 10, 2011
Page 5

Very truly yours,

Nexsen Pruet, LLC

/s/ Mary D. Shahid

Mary D. Shahid
Member

MS/mds

cc: Deertrack Golf, Inc.
Bill Clark Homes of Myrtle Beach, LLC
Richard M. Smith, Esq.
Amy E. Armstrong, Esq.
Davis A. Whitfield-Cargile, Esq.
Rheta Dinovo, SCDHEC-OCRM
Jill Stewart, SCDHEC-BOW

14 November 2011

The Honorable Tanya Gee
Clerk of Court
South Carolina Court Of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED
NOV 17 2011
SC Court of Appeals

Re: **Deerfield Plantation Phase II B Property Owners
Association v South Carolina Department of Health
And Environmental Control, Deertrack Golf, Inc.,
And Bill Clark Homes of Myrtle Beach, LLC.**
Appeal from South Carolina Administrative Law Court
Civil Action No.: 2008-ALJ-07-00221
Case Tracking No.: 2099135686
NP File No.: 048667-4

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Dear Ms. Gee:

Enclosed please the original and seven copies of the **Respondent Deertrack Golf, Inc.'s Motion Seeking Establishment of an Appellate Briefing Schedule** submitted on behalf of the Respondent, Deertrack Golf, Inc., in the above-referenced matter. Finally, I enclose the original and one copy of a **Proof of Service** indicating service of Deertrack Golf Inc.'s Motion Seeking Establishment of an Appellate Briefing Schedule upon counsel for the Appellant.

I would appreciate your filing these documents with the Court of Appeals and returning one stamped copy of each to my attention in the enclosed self-addressed stamped envelope.

If you need anything else or I otherwise may be of any assistance to you regarding this matter, please feel free to contact me at your convenience. My direct telephone number is

NEXSEN | PRUET

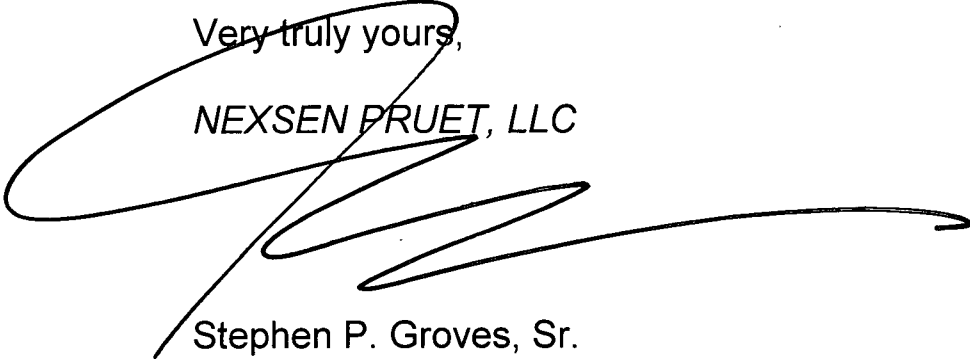
**Hon. Tanya Gee
Clerk of Court
29 April 2011
Page 2**

843.720.1725, direct telecopier is 843.414.8206, and the e-mail is sgroves@nexsenpruet.com.

With kindest regards, I remain

Very truly yours,

NEXSEN PRUET, LLC



Stephen P. Groves, Sr.

SPGsr:spg

Enclosures

CCE

Amy Armstrong, Esquire

Davis A. Whitfield-Cargile, Esquire

NPCHAR1:762960.1-LT-(SPG) 048667-00001



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

October 7, 2011

RECEIVED
OCT 12 2011

SC Court of Appeals

VIA U.S. MAIL

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

Dear Ms. Gee:

The Court's Order dated September 8, 2011 requires DHEC to provide a status update every thirty days. The purpose of this letter is to update the Court as to the status of this case. Staff sent the attached letter to the permittee this afternoon. On behalf of DHEC, I request that this matter remain in abeyance to allow time for the permittee to respond and to allow time for administrative action, if necessary. Depending on the permittee's response, the justiciability of the instant appeal may or may not be impacted.

Please do not hesitate to call me directly if you have any questions or if I can be of any further assistance. My direct line is 843-953-0229. I appreciate your assistance.

Very truly yours,

Davis A. Whitfield-Cargile

CC: Amy E. Armstrong, Esq.
Mary D. Shahid, Esq.



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

October 6, 2011

VIA U.S. MAIL

Mary D. Shahid, Esq.
Member
Nexsen Pruet, LLC
205 King Street, Suite 400
Charleston, SC 29401

RECEIVED
OCT 12 2011
SC Court of Appeals

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

Dear Mary:

As you know, the Court of Appeals issued an Order on October 6, 2010 granting the Joint Motion to Stay that was filed on behalf of all parties. The motion requested that the appeal be held in abeyance pending resolution of the action in the United States District Court **and any subsequent administrative action on the permit if necessary**. In the motion, the Department represented that additional administrative action on the permit was warranted at the time of the filing of the motion, but SCDHEC agreed to refrain from taking any action on the permit until resolution of the action in the United States District Court. In July of this year, you asked the Court to set a briefing schedule given Judge Harwell's order in the U.S. District Court action. Amy's client opposed briefing and we asked for time to consider administrative action, consistent with the previous orders in this case. The Court of Appeals issued an Order on September 8, 2011 holding this in abeyance for thirty days for the Department to take administrative action. The purpose of this letter is to find out how you would like to proceed administratively with the permit.

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Ocean and Coastal Resource Management

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modification. You also need additional authorization and certification from the Corps of Engineers and DHEC if you intend to fill the waters of the United States.

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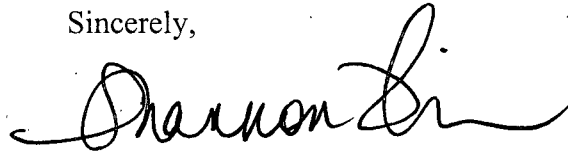
Additionally, after the decision to grant NPDES general permit coverage was appealed to the ALC, your client submitted revised plans to the Department. These revised plans have never been approved by the Department, as this matter was in litigation. The revised plans include technical changes such as pipe additions, pipe sizes, removal of outlet structures, outlet structure elevations, and post-development discharge flows. I understand that some aspects of the revised plans may be a result of requirements imposed by Horry County. Staff has determined that some of the proposed changes are major in nature and require additional technical review and a formal permit modification. How, if at all, would you like DHEC to proceed with review of the revised plans?

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If you think it more prudent to address these issues after the appeal is resolved, I am receptive to hear your opinion. However, in order to comply with the NPDES regulations, these modifications need to be made to the permit before the permitted activity may be conducted.

Please let me know how you would like to proceed administratively so that your permit is one that can be utilized by your client. I am also happy to facilitate a meeting with your client and staff (and Amy Armstrong's client, if necessary) if you think that would help resolve these issues more expeditiously. Please let me know. I will be standing by.

Sincerely,

A handwritten signature in dark ink, appearing to read "Shannon Hicks". The signature is fluid and cursive, with a large initial "S" and "H".

Shannon Hicks, P.E., Manager
Stormwater & State Certification Section

cc: Amy E. Armstrong, Esq.
Richard M. Smith, Esq.
Davis A. Whitfield-Cargile, Esq.
Rheta Geddings DiNovo
Jill Stewart



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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September 8, 2011

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Office of General Counsel
1362 McMillan Avenue, Ste 400
Charleston, SC 29405

Mary D. Shahid, Esquire
Nexsen Pruet, LLC
P O Box 486
Charleston, SC 29402

Stanley E. Barnett, Esquire
Smith, Bundy, Bybee & Barnett
P. O. Box 1542
Mt. Pleasant, SC 29465-1542

Re: Deerfield Plantation v. SCDHEC
2009135686

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding the above case.

Please be advised, the Respondent South Carolina Department of Health and Environmental Control shall provide this Court with a status report within thirty days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

The South Carolina Court of Appeals

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Deertrack Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach,
LLC,

Respondents

The Honorable John McLeod
Administrative Law Court
Case No. 2008-AL-07-00221

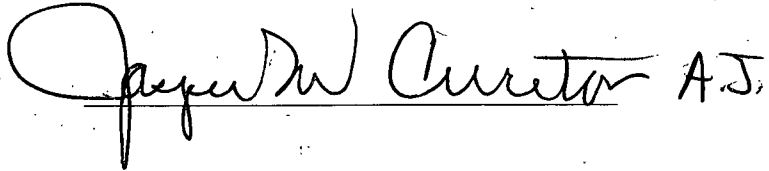
ORDER

This appeal was held in abeyance pending the resolution of the United States District Court action. Respondent Deertrack Golf, Inc. (Deertrack) has notified this Court that the District Court has issued an order and requests that this Court establish a briefing schedule. Appellant and Respondent South Carolina Department of Health and Environmental Control (the Department) oppose briefing at this time, arguing this Court should continue to hold this appeal in abeyance to allow the Department to take administrative action, as contemplated in this Court's order of July 9, 2010.

After careful consideration, we hold this appeal in abeyance for thirty days. During that time, the Department shall expeditiously proceed with any administrative action. The

Department shall provide this Court with a status report within thirty days. Upon receipt of the status report or after the expiration of thirty days, this Court will reevaluate Deertrack's request for a briefing schedule.

IT IS SO ORDERED.

A handwritten signature in cursive script, appearing to read "J. W. Curator A.J.", written over a horizontal line.

Columbia, South Carolina

cc: Amy Elizabeth Armstrong, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

FILED
9/8/11 

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
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July 29, 2011

RECEIVED

AUG 02 2011

SC Court of Appeals

Honorable V. Claire Allen
Deputy Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

Dear Ms. Allen:

I am writing in response to your letter dated July 22, 2011,
and Ms. Shahid's letter of July 13, 2011.

This case was stayed on joint motion of all parties. The
bases for the stay were that 1) the Appellant and Respondent
DHEC both asserted that additional administrative action was
warranted in light of a new jurisdictional determination by the
U.S. Army Corps of Engineers and 2) the Respondent Deertrack
acknowledged that Appellant's Clean Water Act jurisdictional
challenge in U.S. District Court could result in termination or
modification of the permit that is at issue in the pending
appeal.¹

The parties proposed that this case be stayed until the
U.S. District Court action was resolved and any subsequent
administrative action had been taken. The parties agreed that
administrative action would not occur until after the resolution
of the action in District Court. The District Court issued its ruling
on July 13, 2011. Appellant intends to appeal the adverse

¹The jurisdictional challenge was filed by the Appellants after the
U.S. Army Corps of Engineers ("Coprs") declined to assert Clean
Water Act jurisdiction over waters and wetlands on the subject
property. Areas that contain waters and wetlands over which the
Corps declines to assert jurisdiction are referred to as "isolated
wetlands."

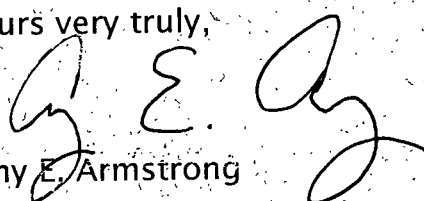
District Court ruling, and it is therefore not finally resolved. But regardless of that appeal, the Appellant asserts that administrative action on the permit must be concluded.

The need for administrative action has become even more critical after a July 11, 2011, ruling from the South Carolina Supreme Court in *League of Women Voters of Georgetown Co. v. Smith Land Company* (Opinion No. 27006). In that case, the Supreme Court ruled that the § 48-1-90(a) of the Pollution Control Act requires a permit prior to filling in "isolated wetlands," which are deemed "waters of the State." In the case pending before this Court, the ALJ ruled that the on-site waters and wetlands are "waters of the State," but that the requirements of the Pollution Control Act cannot be applied to the project that is the subject of this appeal. The *Smith Land* ruling dictates that the Pollution Control Act must be applied to projects like the one on appeal. *Smith Land* has a direct impact on this case, and it appears to change the Department's posture in this appeal.

For these reasons, the Appellants believe that administrative action is necessary to address both the new Corps jurisdictional determination and the S.C. Supreme Court's recent ruling in *Smith Land*. The administrative action could moot this pending appeal, therefore the Appellants request that the stay remain in place until the Department has either taken administrative action or determined that none is necessary. Appellant suggests that the Court set a deadline for any administrative action.

Please let me know if you have any questions or need additional information at this time.

Yours very truly,


Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire

RECEIVED

AUG 02 2011

SC Court of Appeals

SMITH, BUNDY, BYBEE & BARNETT, P.C.

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RECEIVED

AUG 04 2011

August 3, 2011

SC Court of Appeals

The Honorable V. Claire Allen, Deputy
SC Court of Appeals
1015 Sumter Street
Columbia, S.C. 29201

RE: Deerfield Plantation Phase IIB POA vs. SC DHEC and Deertrack
Golf, Inc.
Docket No.: 2009135686

Dear Ms. Allen:

Please be advised Mr. Barnett concurs with Ms. Shahid's letter of July 13, 2001 regarding suggestions to proceed with briefing in regards to the above-named matter.

In the event you have any questions, please do not hesitate to give us a call.

Sincerely,


Cindy Glover

cmg;

cc: Mary D. Shahid, Esq.
Amy Armstrong, Esquire
David A. Whitfield-Cargile, Esquire
Mr. Bill Clark



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

July 26, 2011

RECEIVED

JUL 27 2011

SC Court of Appeals

The Honorable V. Claire Allen
Deputy Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach.
Case Tracking No.: 2009135686

Dear Ms. Allen:

In your July 22, 2011 letter you requested that the parties provide their position with on Ms. Shahid's suggestion to proceed with briefing. As noted in my July 19 letter to the Court, DHEC objects to proceeding with briefing at this time because DHEC has not had an opportunity since receipt of Judge Harwell's decision to proceed with administrative action on the permit in light of the new jurisdictional determination. The October 6, 2010 Order signed by Judge Cureton holds this matter in abeyance pending resolution of the matter in U.S. District Court (which Judge Harwell's order appears to resolve) and administrative action on the permit by DHEC. At the request of Ms. Shahid's client, DHEC agreed to hold off on any further administrative action on the permit until after the matter in U.S. District Court was resolved. I will rely on my July 19 letter to the Court for more support of DHEC's position. Please let me know if I can provide the Court any additional information.

Very truly yours,

Davis A. Whitfield-Cargile

cc: Amy E. Armstrong, Esquire
Mary D. Shahid, Esquire

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel

Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405 • Phone: (843) 953-0200 • Fax: (843) 953-0201 • www.scdhec.gov



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

July 19, 2011

RECEIVED
JUL 22 2011
SC Court of Appeals

The Honorable V. Claire Allen
Deputy Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

Dear Ms. Allen:

I am in receipt of Mary Shahid's July 13, 2011 letter to the Court. I write in response to her letter. Ms. Shahid included with her letter a copy of the order of the Federal District Court, the Honorable Judge R. Bryan Harwell in which Judge Harwell affirmed the US Army Corps of Engineers' Jurisdictional Determination on Respondent Deertrack Golf Inc.'s property. In her letter, Ms. Shahid requests that the Court establish a briefing schedule.

SCDHEC objects to starting a briefing schedule at this time. On October 6, 2010, the Court issued an order granting the Joint Motion to Stay that was filed on behalf of all parties, including Ms. Shahid's clients. The motion requested that the appeal be held in abeyance pending resolution of the action in the United States District Court **and any subsequent administrative action on the permit if necessary.** In the motion, the Department represented that additional administrative action on the permit was warranted at the time of the filing of the motion, but SCDHEC agreed to refrain from taking any action on the permit until resolution of the action in the United States District Court. SCDHEC was first provided with a copy of Judge Harwell's order when we received Ms. Shahid's letter. SCDHEC needs time to move forward with administrative action on the permit prior to the establishment of a briefing schedule. This is consistent with the Order granting the Joint Motion to Stay signed by all parties.

Therefore, SCDHEC respectfully requests that the Court refrain from establishing a briefing schedule at this time and provide SCDHEC with adequate time to move forward with administrative action on the permit. SCDHEC will be happy to continue to provide status updates every 45 days as ordered by Judge Cureton's Order granting the Joint Motion to Stay.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405 • Phone: (843) 953-0200 • Fax: (843) 953-0201 • www.scdhecc.gov

Please contact me if you have any questions or if I can provide any additional information to the Court. I appreciate your consideration in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Davis A. Whitfield-Cargile', with a stylized, cursive-like flourish.

Davis A. Whitfield-Cargile

DWC/mdc

cc: Amy E. Armstrong, Esquire
Mary D. Shahid, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 22, 2011

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Re: Deerfield Plantation v. SCDHEC
2009135686

Dear Counsel:

This office has received Ms. Shahid's letter of July 13, 2011. We request that the other parties to the appeal provide their position on the suggestion to proceed with briefing. Please respond within ten days.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Mary D. Shahid, Esquire

Mary D. Shahid
Member
Admitted in SC

July 13, 2011

RECEIVED
JUL 15 2011
SC Court of Appeals

The Honorable V. Claire Allen
Deputy Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle
Beach
Admin. Law Court Case No.08-ALJ-07-0221-CC
Case Tracking Number 2009135686

Dear Ms. Allen:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

I am writing to provide an update on this case, which was stayed pending resolution of a matter involving the property that is subject of this appeal in the United States District Court.

Please find attached an Order of the Federal District Court, the Honorable Judge R. Bryan Harwell, in which Judge Harwell affirmed the U. S. Army Corps' of Engineers' Jurisdictional Determination on Respondent Deertrack Golf, Inc's property that is the subject of the above-referenced appeal before the Court of Appeals. Appellant Deerfield Plantation Phase IIB POA had challenged the Jurisdictional Determination in federal court but the attached Order resolves that challenge in favor of Respondent Deertrack Golf, Inc.

Therefore, it is Respondent's position that the above-referenced appeal can and should proceed. There is no longer any valid basis for Appellant or for Respondent SCDHEC to seek a stay of the proceedings before the Court of Appeals. This appeal has not progressed since September, 2009, when Appellant first sought a stay from the Court of Appeals based on Appellant's challenges to the Corps' Jurisdictional Determination. Now that those challenges have been resolved Respondent is anxious for resolution of this appeal. On behalf of Respondent Deertrack Golf, Inc., I would request that a briefing schedule be established for this appeal.

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Attorneys and Counselors at Law

The Honorable V. Claire Allen
July 13, 2011
Page 2

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Mary D. Shahid

MS/rp

cc: Deertrack Golf, Inc.
Amy Armstrong, Esq.
Davis Whitfield-Cargile, Esq.
Richard M. Smith, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Deerfield Plantation Phase II-B Property Owners
Association, Inc.,

Plaintiff,

v.

United States Army Corps of Engineers, Charleston)
District; Lt. General Robert L. Van Antwerp, *in his*)
official capacity as Chief of Engineers, U.S. Army)
Corps of Engineers; Lt. Colonel Trey Jordan, *in his*)
official capacity as District Engineer, U.S. Army)
Corps of Engineers, Charleston District;)
United States Environmental Protection Agency;)
Lisa P. Jackson, *in her official capacity as*)
Administrator of the U.S. Environmental Protection)
Agency; A. Stanley Meiburg, *in his official capacity*)
as Acting Regional Administrator, Region IV, U.S.)
Environmental Protection Agency;)
Deertrack Golf, Inc.;)

Defendants.

Civil Action No.: 4:09-cv-01023-RBH

ORDER

RECEIVED
JUL 15 2011
SC Court of Appeals

This case involves Deerfield Plantation Phase II-B Property Owners Association, Inc.'s ("Deerfield") challenge to a determination by the United States Army Corps of Engineers ("Corps") that it has jurisdiction and regulatory authority, under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, over only 0.37 acres (920.07 linear feet) of waters on property owned by Deertrack Golf, Inc. ("Deertrack") in Horry County, South Carolina. Deerfield contends that additional certain ponds and channels on this property should also be considered "waters of the United States" and thus subject to the Corps' jurisdiction and regulatory authority under the CWA. Pending before the court

are cross-motions for summary judgment.¹ The court held a hearing on the motions on May 25, 2011, and the motions are ripe for adjudication.

Background

Deertrack owns land in Horry County, South Carolina, including an 84.96-acre parcel known as the Old South Golf Course (“Deerfield Tract”). In or around 2005, Deertrack closed the Old South Golf Course and entered into a purchase contract with Bill Clark Homes of Myrtle Beach (“BCH”) for the sale of the Deerfield Tract. BCH intended to redevelop the Deerfield Tract as a residential subdivision. In connection with this redevelopment plan, on February 13, 2006, a consultant for BCH submitted a request for a jurisdictional determination (“JD”) by the Corps as to whether the Deerfield Tract contained “waters of the United States” subject to jurisdiction under Section 404 of the CWA. *See* Administrative Record (“A.R.”) at 372. On August 3, 2006, the Corps notified BCH that the Deerfield Tract did “not contain any wetland areas or other waters of the United States.” *Id.* at 362. That 2006 JD provided that it would be valid for five (5) years “unless new information warrant[ed] revision . . . before the expiration date.” *Id.*

On April 16, 2009, Deerfield filed the instant suit against the Corps, the United States Environmental Protection Agency (“EPA”),² and Deertrack, which challenged the Corps’ 2006 JD. *See* Compl. [Docket Entry 1].at 1. On August 21, 2009, the parties jointly moved to voluntarily

¹ Deerfield Motion for Summ. J. [Docket Entry 52]; Deertrack Motion for Summ. J. [Docket Entry 57]; and Federal Defs. Motion for Summ. J. [Docket Entry 58].

² The [Docket Entry 1] Complaint also named as defendants the following: Lt. General Robert L. Van Antwerp, in his official capacity as Chief of Engineers, U.S. Army Corps of Engineers; Lt. Colonel Trey Jordan, in his official capacity as District Engineer, U.S. Army Corps. of Engineers, Charleston District; Lisa P. Jackson, in her official capacity as Administrator of the U.S. Environmental Protection Agency; and A. Stanley Meiburg, in his official capacity as Acting Regional Administrator, Region IV, U.S. Environmental Protection Agency. These individual persons, along with the Corps and EPA, are referred to in this Order as the “Federal Defendants.”

remand the action so that the Corps could “reconsider” its 2006 JD. *See* Joint Motion to Remand [Docket Entry 32]. The court granted that motion on the same date. *See* Aug. 21, 2009 Order [Docket Entry 33].

On March 17, 2010, the Corps issued the superseding JD (“2010 JD”) that is at issue in these cross-motions for summary judgment and subject to review in this case.

Statutory and Regulatory Background

I. The Clean Water Act

“Congress passed the CWA in 1972 ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 287 (4th Cir. 2011) (quoting 33 U.S.C. § 1251). To achieve that objective, the CWA prohibits the “discharge of any pollutant” into navigable waters. 33 U.S.C. § 1311(a); *see also id.* § 1362(12). Section 404 of the CWA requires a permit for “discharge of dredged or fill material into the navigable waters.” *Id.* § 1344(a). The term “navigable waters” is defined by the CWA as “the waters of the United States.” *Id.* § 1362(7).

The Corps and EPA share responsibility for implementing and enforcing the CWA, and both have defined the term “waters of the United States” in substantially equivalent terms. *See* 33 C.F.R. § 328.3(a) (Corps definition); 40 C.F.R. § 230.3(s) (EPA definition).³ The Corps has specifically defined “waters of the United States” to include the following:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide [“traditional navigable waters”];
- (2) All interstate waters including interstate wetlands;

³ For simplicity reasons, the court will hereinafter cite to only the Corps’ regulations.

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(I) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a).

Wetlands are defined as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” *Id.* § 328.3(b).

“Adjacent” wetlands are ones “bordering, contiguous, or neighboring” other jurisdictional waters, and include “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” *Id.* § 328.3(c).

The Corps’ regulations authorize the Corps, upon request, to provide the agency’s view on whether a particular property contains “waters of the United States” within the agency’s regulatory jurisdiction under the CWA. *See id.* §§ 320.1(a)(6), 331.2. The process results in a written

“jurisdictional determination” that outlines the geographic extent of wetlands or water-bodies on a site that are within the Corps’ regulatory jurisdiction. *See id.* §§ 320.1(a), 331.2.

II. Supreme Court Case Law

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the United States Supreme Court held that Congress had included a broad definition of “navigable waters” in the CWA, “evidently intend[ing] to . . . exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Id.* at 133.

The Supreme Court again interpreted the CWA term “navigable waters” in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (“SWANCC”). In *SWANCC*, the Supreme Court considered whether “isolated ponds, some only seasonal, wholly located within two Illinois counties, f[e]ll under § 404(a)’s definition of ‘navigable waters’ because they serve[d] as habitat for migratory birds.” *Id.* at 171-72. The Court concluded that these ponds were not “navigable waters,” refusing to “hold that the jurisdiction of the Corps extend[ed] to ponds that are *not* adjacent to open water.” *Id.* at 168. The Court further noted that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed [its] reading of the CWA in *Riverside*” *Id.* at 167.

Most recently, the Supreme Court interpreted the term “waters of the United States” in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved consolidated cases in which the CWA had been applied to “four Michigan wetlands, which lie near ditches or man-made drains that eventually empt[ie]d into traditional navigable waters.” *Id.* at 729 (plurality opinion). The Court was required “to decide whether the term ‘navigable waters’ in the Clean Water Act extend[ed] to

wetlands that d[id] not contain and [were] not adjacent to waters that [were] navigable in fact.” *Id.* at 759 (Kennedy, J., concurring). While all members of the Court reaffirmed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense,”⁴ the “fractured Court proposed two different ways to limit the reach of its earlier [*Riverside*] ruling so as not to allow jurisdiction over wetlands lying alongside ‘remote and insubstantial’ ditches and drains,” *Precon Dev. Corp.*, 633 F.3d at 288 (quoting *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring)).

The four-Justice plurality, as authored by Justice Scalia, began by interpreting “the phrase ‘the waters of the United States’ [to] include[] only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, . . . oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. at 739 (citation omitted) (plurality opinion). The plurality further indicated that these “navigable waters,” i.e., streams, oceans, rivers, and lakes, are “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.” *Id.* at 733 (plurality opinion). Moreover, the Court noted that “[e]ven the least substantial of the definition’s terms, namely, ‘streams,’ connotes a continuous flow of water in a permanent channel[;] . . . [n]one of these terms encompasses transitory puddles or ephemeral flows of water.”⁵ *Id.* (plurality opinion). Applying this interpretation to wetlands, the plurality concluded that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so

⁴ See *id.* at 731 (plurality opinion); *id.* at 767-78 (Kennedy, J., concurring); *id.* at 793 (Stevens, J., dissenting).

⁵ The plurality similarly noted that “relatively continuous flow is a *necessary* condition for qualification as a ‘water[.]’” *Id.* at 736 n.7 (plurality opinion).

that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the [CWA].” *Id.* at 742 (plurality opinion). “Wetlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection to covered waters.” *Id.* (plurality opinion). Thus, the plurality set forth two requirements that must be met for *an adjacent* wetland to be covered by the CWA:

first, . . . the adjacent channel [must] contain[] a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, . . . the wetland [must] ha[ve] a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Id. at 742 (plurality opinion).

Justice Kennedy, in his concurrence, found the plurality’s test to be too limiting. *See id.* at 778 (noting that “the plurality reads nonexistent requirements into the [CWA]”) (Kennedy, J., concurring). Citing *SWANCC*, Justice Kennedy wrote that the applicable test for determining whether or not a “water or wetland” is “navigable” is the “significant nexus” test. *Id.* at 759 (quoting *SWANCC*, 531 U.S. at 167, 172) (Kennedy, J., concurring). Under that test, in order to be “navigable” under the CWA, “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* (Kennedy, J., concurring). Turning his attention to the wetlands involved in *Rapanos*, Justice Kennedy concluded that “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780 (Kennedy, J., concurring). To the contrary, “[w]hen . . . wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly

encompassed by the statutory term ‘navigable waters.’” *Id.* (Kennedy, J., concurring). Justice Kennedy further advised that “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. . . . however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.” *Id.* at 782 (Kennedy, J., concurring).

Justice Stevens indicated in his dissent that the four dissenting Justices would uphold CWA jurisdiction in all cases in which either the plurality’s “relatively permanent” test or Justice Kennedy’s “significant nexus” test is met. *See id.* at 810 (Stevens J., dissenting). Specifically, Justice Stevens wrote:

Given that all four Justices who have joined this [dissenting] opinion would uphold the Corps’ jurisdiction in both of these cases—and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.

Id. (Stevens, J., dissenting).

The Fourth Circuit has not had occasion to identify the controlling rule of law on the meaning of the term “waters of the United States” that emerged from the *Rapanos* decision.⁶ In our case, however, all parties are in agreement that if either test is met—the plurality’s “relatively permanent” test or Justice Kennedy’s “significant nexus” test—then the waters located on the Deerfield Tract fall under the jurisdiction of the CWA.⁷ Accordingly, the undersigned is not required to determine which

⁶ The Fourth Circuit addressed the *Rapanos* decision in *Precon Development Corp.*, 633 F.3d 278. However, in *Precon*, the parties stipulated that Justice Kennedy’s “significant nexus” test governed. *See id.* at 288. Therefore, the Fourth Circuit stated that it “d[id] not address the issue of whether the plurality’s ‘continuous surface connection’ test provide[d] an alternate ground upon which CWA jurisdiction [could] be established.” *Id.*

⁷ *See* Deerfield Memo. in Supp. of Summ. J. [Docket Entry 52-1] at 14 (“[S]ubmit[ting] that the Corps has jurisdiction over a body of water if either of the Rapanos standards is met.”); Federal Defendants Motion for Summ. J. at 11 n.7 (“The United States agrees that it may establish [CWA] coverage of a particular

Rapanos test is controlling to the exclusion of the other for purposes of this case—if either test is satisfied, CWA jurisdiction exists.

III. The Rapanos Guidance

After the Supreme Court issued its decision in *Rapanos*, the Corps and EPA prepared the [Docket Entry 58-1] Rapanos Guidance (the “Guidance”),⁸ which “instructs the Corps and EPA personnel on how to make jurisdictional determinations that comply with the new rules for CWA jurisdiction announced by the Supreme Court in *Rapanos*.” *Precon Dev. Corp.*, 633 F.3d at 283. The Guidance “focuses only on those provisions of the agencies’ regulations at issue in *Rapanos*”—i.e., “33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7)”– and states that “regulatory jurisdiction under the CWA exists over a water body if either the plurality’s or Justice Kennedy’s standard is satisfied.” Guidance at 3, 4 n.18.

The Guidance began by instructing that the EPA and Corps would continue to assert jurisdiction over all “traditional navigable waters, which includes all the waters described in 33 C.F.R. §§ 328.3(a)(1), and 40 C.F.R. § 230.3(s)(1).” *Id.* at 4. Similarly, the Guidance indicated that the *Rapanos* decision left unchanged the Corps’ continued assertion of jurisdiction “over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.” *Id.* at 4-5.

With respect to the plurality opinion, the Guidance provides that “[t]he agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively

water body by demonstrating either a ‘significant nexus’ to traditional navigable waters within the meaning of Justice Kennedy’s *Rapanos* concurrence or by satisfying the *Rapanos* plurality standard.”).

⁸ The Rapanos Guidance is also contained in the Administrative Record, pages 409 to 421.

permanent where the tributaries typically flow year round or have continuous flow at least seasonally,” *id.* at 6, and further that “[t]he agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries.” *Id.* For purposes of analyzing those tributaries, the Guidance instructs that “‘relatively permanent’ waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round[.]” *Id.* at 7. Rather, those types of non-permanent tributaries are to be evaluated under the “significant nexus” standard. *Id.*

With respect to Justice Kennedy’s “significant nexus” test, the Guidance provides that “[t]he agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.” *Id.* at 8. Per the Guidance, the “significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.” *Id.* In addition, the Guidance indicates that a significant nexus analysis will consider “hydrologic factors” and “ecologic factors.” *Id.* “Hydrologic factors” include, among other factors, “volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary,” and “proximity to the traditional navigable water.” *Id.* “Ecologic factors” include, among other factors, “potential of tributaries to carry pollutants and flood waters to traditional navigable waters” and “potential of wetlands to trap and filter pollutants or store flood waters maintenance of water quality in traditional navigable waters.” *Id.* Finally, the Guidance noted that “[t]he following geographic features generally are not jurisdictional waters: swales or erosional features (e.g., gullies, small washes

characterized by low volume, infrequent, or short duration of flow) [and] ditches . . . excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.” *Id.*

2010 Jurisdictional Determination

The Corps issued its 2010 JD on March 17, 2010. *See* Am. Compl. [Docket Entry 43] at 2, 9. The 2010 JD consists of three “approved jurisdictional determination forms,” A.R. at 12-34, an eight-page memorandum explaining the Corps’ findings, *id.* at 1-8, and multiple pictures taken by the Corps during its site inspections of the Deerfield Tract, *id.* at 36-38.⁹

The 2010 JD addressed 84.96 acres¹⁰ of the Old South Golf Course (“Deerfield Tract”), and ultimately asserted CWA jurisdiction over two channels on the Deerfield Tract that totaled 920.07 linear feet (or approximately 0.37 acres). *Id.* at 2. These “waters of the United States” are shaded on the map appended to the 2010 JD. *Id.* at 10. “Tommy Fennel, Supervisory Biologist and Chief of Northeast Branch of the Corps’ Charleston District, performed the new jurisdictional determination for [the Deerfield Tract].” *Id.* at 1.

In making its 2010 JD, the Corps first reviewed “infrared, aerial photography from 1994, 1999, and 2006 [which] reveal[ed] that the Deerfield Tract [was] a golf course with associated lakes/ponds.” *Id.* at 3; *see also id.* at 387, 399-400. The Corps then reviewed its own records, which indicated that “construction associated with the golf course on [the Deerfield Tract] was likely performed prior to regulation under the [CWA].” *Id.* at 3. The Corps next reviewed the United

⁹ The court notes that the Administrative Record also includes scientific literature, A.R. at 584-623, guidance documents, *id.* at 409-583, and documentation provided by Deerfield to the Corps, *id.* at 47-357.

¹⁰ The parties agreed during the hearing that although the 2010 JD relates to the approximately 84.96 acres comprising the Deerfield Tract, the majority of those acres are dry land which Deerfield concedes is not subject to jurisdiction under the CWA. Rather, only those remaining *water features* on the Deerfield Tract are truly at issue in this matter.

States Department of Agriculture's Soil Survey for Horry County. *Id.* The Soil Survey indicated the "potential presence of hydric soils onsite," which could have been "an indicator that wetlands or other jurisdictional waters [were] present on the site." *Id.* However, due to the age of the survey, which was prepared in 1974, the Corps noted that "this information [was] not conclusive that hydric soils [were] currently present on this tract." *Id.* The Corps next reviewed the most recent United States Geological Survey for Surfside Beach, prepared in 1984, "which revealed that the tract did not contain any evidence of wetlands or waters." *Id.* The Surfside Survey did have the words "golf course" handwritten over the Deerfield Tract, which "suggested [to the Corps] that this area had been a golf course for some period of time." *Id.* The Corps also reviewed the United States Fish and Wildlife Service's "National Wetland Inventory Map for Surfside Beach," and noted that it indicated the Deerfield Tract did not contain "wetlands or water features except for open water ponds." *Id.* An overlay analysis performed by Fennel "revealed that the Soil Survey depicted certain areas as potential wetlands, but the same areas were depicted as upland, or dry land, on the Surfside Beach Quad and the Surfside Beach NWI." *Id.* The 2010 JD noted that this "conflict [was] likely due to changes in the area from the construction of the golf course and surrounding residential community." *Id.*

To resolve any conflicts, Fennel, the Corps' supervisory biologist, conducted two on-site inspections of the Deerfield Tract, accompanied by Mike Wylie, an EPA wetlands expert,¹¹ on one of the visits. *Id.* at 4, 661-62. The first site visit occurred on December 7, 2009, and the second on

¹¹ The Federal Defendants represented at the hearing that Wylie is an EPA wetlands enforcement expert. Moreover, the court notes that Wylie's observations, on behalf of the EPA, appear to be consistent with the Corps' observations and findings in all material respects. *Compare* A.R. at 662 (Wylie's Memorandum) with A.R. at 1-8 (Corp's Memorandum Asserting Jurisdiction).

January 6, 2010. *Id.* at 4. The 2010 JD noted the following from the site visits:

The methodology used to prepare the site to construct the golf course . . . led to such significant alteration that the Corps could not conclusively determine whether the site was ever a wetland. Furthermore, Mr. Fennel did not observe any relic hydrophytic vegetation that would indicate whether this site historically contained wetlands. If the delineated portions of the Deerfield Tract contained wetlands at some point, such wetlands were likely filled prior to regulation under the [CWA].

Id.

I. Jurisdictional “Waters”

In the 2010 JD, the Corps concluded that two non-navigable tributaries of the Atlantic Ocean located on the Deerfield Tract—i.e., the 0.37 acres (920.07 linear feet)—were “waters of the United States.” *Id.* at 4-6. The first jurisdictional tributary¹² “flows offsite through a box culvert . . . continuing through a stormwater detention pond and into a culvert . . . under U.S. Highway 17 to Dogwood Lake. Dogwood Lake is a . . . ‘water of the United States.’ The flow then continues directly into the Atlantic Ocean, a traditional navigable water.” *Id.* at 5. The Corps began by noting that this tributary “had a firm, sandy bottom with a clearly defined channel that was free of vegetation” and “it was evident that a steady influx of groundwater contributed to the constant recharge and flow,” which “are strong indicators of a relatively permanent flow.” *Id.* at 4.

“In addition, Mr. Fennel observed a clearly defined ordinary high water mark present in the area where the tributary contained a clearly defined channel,” which is another indicator of “relatively permanent flow.” *Id.* Specifically, Fennel observed the following: “a clear natural line impressed on the bank,” an “absence of terrestrial vegetation within the . . . channel,” and “the presence of litter and debris being transported downstream.” *Id.* Similarly, the 2010 JD indicated

¹² Referred to in the 2010 JD as “Relatively Permanent Water (Attachment A at L1-L7, L13-37).” A.R. at 4; *see also id.* at 10.

that Fennel observed red-staining along the banks of the tributary, which “is the direct result of iron-oxidizing bacteria” which suggests “the tributary was being recharged from groundwater.” *Id.* at 5. Finally, the 2010 JD noted the “sinuosity of the channel” as “indicative of relatively permanent flow.” *Id.* Accordingly, the Corps concluded that this tributary was jurisdictional under the plurality’s test, based on its “continuous flow and . . . surface connection with the Atlantic Ocean.” *Id.*

The second tributary¹³ that the Corps determined to be jurisdictional “flows into the jurisdictional tributary discussed above and connects with the Atlantic Ocean.” *Id.* Fennel noted that this tributary similarly featured “flowing water, a well-defined channel with a firm, sandy bottom and a well-defined ordinary high water mark.” *Id.* Fennel also noted the “absence of vegetation within the channel[,]” as well as other “geomorphic indicators including groundwater influx, the red stained vegetation . . . within the tributary, [and] the sinuosity of the channel.” *Id.* Therefore, the Corps concluded that this tributary was “subject to the Corps’ jurisdiction under the [CWA]” based on its “perennial flow regime and a surface connection with the Atlantic Ocean.” *Id.* at 6. However, the Corps concluded that “the reach of the continuous flow ceased in the area where there was an abrupt change in the amount of plant life . . . with abundant vegetation in the tributary’s channel.” *Id.* Upstream from this point, the Corps observed that “vegetation was thick and prevalent,” “the channel lacked an ordinary high water mark, and there was no evidence of influence by the influx of groundwater,” and therefore the Corps concluded that “there was no continuous flow or relatively permanent flow” in those portions of the tributary. *Id.* Thus, the Corps concluded that the

¹³ Referred to in the 2010 JD as “Relatively Permanent Water (Attachment A at L8-L12).” A.R. at 5; *see also id.* at 10.

jurisdictional reach of the second tributary ceased at point L10, where the above changes were observed. *Id.* at 6, 10.

II. Non-Jurisdictional Ditches, Ponds, and Swales

While the Corps determined in the 2010 JD that the above two tributaries were jurisdictional, the Corps concluded that the remaining water bodies on the Deerfield Tract were not “waters of the United States.” *Id.* at 6-8. “The remaining water features on the delineated portion of the Deerfield Tract are a series of ponds that are interconnected by a series of ditches and swales.” *Id.* at 6. The Corps began by noting that it “generally does not consider swales or ditches that are excavated wholly in uplands and that do not carry a relatively permanent flow to be jurisdictional,” nor does it “consider small, ornamental waterbodies to be ‘waters of the United States’ if the artificial features are created by excavating wholly from uplands to retain water primarily for aesthetic reasons.” *Id.* at 6-7; *see also* Guidance at 8-13. Here, the Corps concluded that these “remaining water features” did “not have a significant nexus to a traditional navigable water because of the low volume, duration and frequency of water flow to the jurisdictional relatively permanent tributary.” A.R. at 6.

Specifically, as to the ditches and swales, Fennel observed a “prevalence of vegetation,” a lack of an ordinary high water mark, and a lack of sinuosity. *Id.* at 6-7. In addition, Fennel noted that “these ditch and swale features convey[ed] water from ponds and surrounding upland areas during and following storm events and there [was] no evidence of groundwater recharge.” *Id.* at 7. Based on these observations, the Corps concluded that “these ditches and swales contain[ed] . . . a low volume, duration and frequency of water flow, and d[id] not have an ordinary high water mark,” therefore, they were not “waters of the United States.” *Id.*

With respect to the ponds, the Corps concluded that they were “man-made in uplands” and that there “was no evidence of existent or remnant wetlands or tributaries” on the Deerfield Tract. *Id.* Based on Fennel’s on-site observations, the Corps also concluded that the “artificial ponds were likely constructed for the purpose of retaining water because the culverts that connected the ponds to the swales and ditches were elevated and constructed to maintain a certain water level and would flow only if the pond levels fluctuated above a certain point,” and that the ponds retained water “primarily for aesthetic reasons associated with typical golf course design.” *Id.* Thus, the Corps concluded that “these ponds drain to ditches . . . that contain such a low volume, duration and frequency of water flow, [that] these ponds do not have a significant nexus that would warrant departing from the Corps[’] policy that such areas generally are not ‘waters of the United States.’” *Id.*

Standard of Review

“Claims challenging federal agency action under the CWA . . . are subject to judicial review under the [Administrative Procedures Act (APA)].” *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (citing 5 U.S.C. § 702). Under the APA, “agency action, findings, and conclusions” will be set aside only when they are “found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Ohio Valley Envtl. Coal.*, 556 F.3d at 192. “Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid.” *Ohio Valley Envtl. Coal.*, 556 F.3d at 192; *see also Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993). “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.*, 556 F.3d at 192

(quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)).

“In determining whether agency action was arbitrary and capricious, the court must consider whether the agency considered the relevant factors and whether a clear error of judgment was made.”

Id. at 192 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

“Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”

Citizens to Preserve Overton Park, Inc., 401 U.S. at 416. “Deference 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 of U.S., Inc. v. State Farm Mut. Auto. Ins., Co.*, 463 U.S. 29, 43

(1983) (internal quotations and citations omitted)). Moreover, “[a]gencies are entitled to select their

own methodology as long as that methodology is reasonable,’ and [the court] must defer to such

agency choices.” *Id.* at 201 (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d

283, 289 (4th Cir. 1999)). Nonetheless, the court will vacate an agency’s decision if it

has relied on factors which Congress had 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 of the product of agency expertise.

Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 43).

Discussion

At first glance, this appears to be an unusual case. Parties generally challenge determinations of the Corps where the Corps has affirmatively asserted regulatory jurisdiction over water bodies

owned by those parties. *See, e.g., Precon Dev. Corp.*, 633 F.3d at 281. Here, however, Deerfield brought this action because the Corps is refusing to assert jurisdiction over the majority of the water bodies located on the Deerfield Tract.

All parties have filed cross-motions for summary judgment. Deerfield contends that the Corps' 2010 JD was arbitrary and capricious, asserting three main arguments: the Corps inappropriately focused solely on "flow," the Corps failed to conduct an appropriate "significant nexus" test, and the Corps arbitrarily decided to terminate jurisdiction mid-channel. The Federal Defendants, on the other hand, maintain that the 2010 JD was accurate, well-reasoned, and not arbitrary and capricious. Finally, Deertrack argues that the court lacks jurisdiction to review the Corps' 2010 JD.

The United States Supreme Court has explained that "the Corps must necessarily choose some point at which water ends and land begins." *Riverside Bayview Homes, Inc.*, 474 U.S. at 132. The Court has further noted that this is "no easy task" and "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.* Upon review, for the reasons set out below, the court finds that it has subject-matter jurisdiction to address the merits of this case, and, as to the merits, the court finds that Deerfield has failed to establish that the Corps arbitrarily and capriciously determined the point on the Deerfield Tract "at which water ends and land begins."¹⁴

¹⁴ In its Amended Complaint, Deerfield alleged that the EPA was liable under the CWA because it "fail[ed] to override or block the Corps' refusal to assert CWA jurisdiction over all of the Deertrack Golf waters and wetlands." Am. Compl. at 14-15. The Federal Defendants argue that Deerfield "has abandoned any claim it may have had against EPA" and therefore summary judgment should be granted in the EPA's favor. Federal Defendants Motion for Summ. J. at 20. In the alternative, the Federal Defendants contend the court "should conclude that EPA satisfied any duty it might have had to ensure that the Corps issued a reasonable jurisdictional determination in this case." *Id.* at 21. Accordingly, regardless of whether Deerfield abandoned any such claim and because the court ultimately concludes in this matter that the Corps' 2010 JD was not arbitrary and capricious, summary judgment should be granted in favor of the EPA on the basis that it has satisfied any duty it might have had to ensure that the Corps issued a reasonable JD in this case.

I. Jurisdiction for Judicial Review

Deertrack argues that the 2010 JD issued by the Corps was not a final agency action and that Deerfield cannot show that the Corps failed to perform any nondiscretionary act or duty under the CWA, and thus Deertrack contends the court lacks subject-matter jurisdiction over this matter.

In its Motion for Summary, Deertrack cited *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), and argued that the court should dismiss this action because the Corps' 2010 JD did not constitute final agency action.¹⁵ Deerfield responded that the Corps' determination did constitute final agency action, and, upon review, the court agrees.

In *Fairbanks*, the Ninth Circuit concluded that the district court did not have jurisdiction to review the Corps' approved jurisdictional determination that Fairbank's property contained wetlands subject to CWA regulatory jurisdiction. The case *sub judice* is distinguishable from *Fairbanks*. In *Fairbanks*, the Ninth Circuit Court of Appeals held that "the Corps' issuance of an approved jurisdictional determination finding that . . . property contained waters of the United States did not constitute final agency action under the APA for purposes of judicial review." *Id.* at 591. Specifically, the Ninth Circuit concluded that the Corps' determination that the property in question did contain wetlands subject to CWA regulatory jurisdiction was not final agency action because it did "not impose an obligation, deny a right or fix some legal relationship." *Id.* at 597. Rather, that court held that the "affirmative finding simply put[] Fairbanks on notice that the Corps believe[d] a permit [would be] necessary if Fairbanks decide[d] to proceed with its project." *Id.* Here, while the Corps did find 0.37 acres of "waters of the United States" on the Deerfield Tract, the Corps determined the majority of the acreage to be non-jurisdictional. Therefore, the portion of the 2010

¹⁵ The court notes that the Federal Defendants did not join in Deertrack's summary judgment motion.

JD challenged by Deerfield was not an “affirmative” determination as in *Fairbanks*, but a “negative” determination. Even the Ninth Circuit in *Fairbanks* recognized the difference, noting that “[w]hether a Corps finding that a property is not subject to regulatory jurisdiction under the CWA would constitute final agency action is beside the point here” *Id.* The undersigned is persuaded that legal consequences do flow from the Corps’ 2010 JD (“negative” determination), as any developer of the property could conceivably immediately begin to fill and dredge the eighty-plus acres that the Corps determined to be non-jurisdictional.

Moreover, in *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988), the Fourth Circuit considered an award of attorney’s fees to a group of plaintiffs “who challenged the Corps’ determination that two tracts of land in North Carolina were *not* wetlands under . . . the [CWA].” *Id.* at 315 (emphasis added). In analyzing the attorney’s fees award, the Fourth Circuit noted that “[t]he district court’s review of the Corps’ wetlands determination under APA standards was proper and did not alter the jurisdictional base of the court’s judgment.” *Id.* at 316. While admitting at the hearing that *Hanson* contained language favorable to Deerfield, Deertrack argued that this language should be considered as only dicta. Notwithstanding Deertrack’s contention, the court is persuaded that the applicable Fourth Circuit precedent suggests that subject-matter jurisdiction exists over Deerfield’s claims.¹⁶

¹⁶ Deertrack also contends that this court lacks jurisdiction because Deerfield cannot sustain its claim under 33 U.S.C. § 1365, arguing that Deerfield cannot show that the Corps has failed to perform a nondiscretionary act or duty under the CWA. However, this argument appears to be contradicted by *Hanson*, in which the Fourth Circuit concluded that “[t]he Corps has the nondiscretionary duty to regulate dredged or fill material, and to fulfill that duty it must make reasoned wetlands determinations. The Corps has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts.” *Hanson*, 859 F.2d at 315-16 (internal citations omitted); see also *Env’tl. Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1354 (E.D.N.C. 1992) (“[T]he Fourth Circuit determined [in *Hanson*] that the Corps’ responsibility to regulate dredged or fill material . . . is a non-discretionary duty . . . [and] [t]herefore . . . [the EPA’s and Corps’] actions ruling that certain lands did not constitute wetlands were non-discretionary duties.”).

Thus, for the reasons discussed above, the court finds that it has subject-matter jurisdiction over this matter and denies Deertrack's Motion for Summary Judgment on that basis.¹⁷

II. Merits

a. Relatively Permanent Waters

The plurality in *Rapanos* held that the "phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739 (internal citation omitted) (plurality opinion). Accordingly, the *Rapanos* Guidance provides that the Corps "will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are *relatively permanent* where the tributaries typically flow year-round or have continuous flow at least seasonally," as well as over "those adjacent wetlands that have a continuous surface connection to such tributaries." Guidance at 6 (emphasis added). Here, the Corps reasonably interpreted existing case law, regulations, and guidance documents, and permissibly concluded that only two of the water bodies on the Deerfield Tract were jurisdictional under the plurality's test.

The Corps reasonably concluded that the ditches, ponds, and swales on the Deerfield Tract were excavated wholly from and drain only to uplands. *See* A.R. at 7-8. The Corps reached this conclusion after conducting two on-site inspections and reviewing infrared, aerial photographs, topographic maps, a soil survey, and an inventory of wetlands in Horry County. While the court

¹⁷ In its [59] Memorandum in Opposition to Deerfield's summary judgment motion, Deertrack also argues, as do the Federal Defendants, that the 2010 JD was not arbitrary and capricious. Specifically, Deertrack argued that "[t]he requirements articulated by the United States Supreme Court were satisfied by the Corps in the 2010 JD. The Corps' action is entitled to deference. Moreover, the Corps fully considered whether the water features on the [Deerfield Tract] had a significant nexus to other waters and whether the water features on the [Deerfield Tract] had relatively permanent flow." Deertrack Memo. in Opp. at 25.

notes, as did the Corps, that a soil survey prepared in 1974 indicated the possible presence of hydric soils at that time, which is one indicator of wetlands, the Corps acted reasonably in determining that this evidence was “not conclusive” as to the current presence of wetlands on the Deerfield Tract, especially in light of the other evidence. Specifically, these potential wetlands “were depicted as upland, or dry land, on the Surfside Beach Quad and the Surfside Beach NWI.” *Id.* at 3. More importantly, the Corps’ supervisory biologist, Fennel, did not find any “relic hydrophytic vegetation” or any “evidence of existent or remnant wetlands or tributaries in the review area” during the two on-site inspections.¹⁸ *Id.* at 3, 7. Wylie, an EPA wetlands enforcement expert, accompanied the Corps on the second inspection and oversaw this matter for the EPA. *See id.* at 4, 661-662. Wylie’s observations were consistent with the Corps’ observations, and he specifically noted that “[t]he ponds appeared to be constructed in uplands with no wetland connections.” *Id.* at 662. Given this

¹⁸ Plaintiff provided deposition testimony of its own environmental expert, Jake Duncan, who concluded that the Deerfield Tract was excavated, at least partially, from wetlands. This testimony contradicts the above observations and findings of Fennel and Wylie. Duncan inspected the Deerfield Tract and performed several soil borings, detecting the presence of hydric soils in areas where the ponds were constructed. Duncan concluded, based on what he considered “overwhelming evidence of soil borings,” that the ponds “were clearly excavated and constructed out of wetlands and should be considered jurisdictional.” A.R. at 224. Fennel was aware of the possibility of hydric soils in the vicinity of the ponds, based on a review of the 1974 soil surveys for the area. However, Fennel was also knowledgeable, as was Duncan, of the extensive land disturbance that occurred during construction of the golf course on the Deerfield Tract. *See id.* at 4, 246-47. The Corps concluded that the “methodology used to prepare the site to construct the golf course (which [] typically involves site clearing, elevation manipulation, and backfill) led to such significant alteration that the Corps could not conclusively determine whether the site was ever a wetland. Furthermore, Mr. Fennel did not observe any relic hydrophytic vegetation that would indicate whether this site historically contained wetlands. If the delineated portions of the Deerfield Tract contained wetlands at some point, such wetlands were likely filled prior to regulation under the [CWA].” *Id.* at 4.

“When presented with conflicting evidence, courts must generally defer to the agency evaluation because ‘an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.’” *Ohio Valley Envtl. Coal.*, 556 F.3d at 201 (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). Similarly, “[a]gencies are entitled to select their own methodology as long as that methodology is reasonable.” *Id.* at 201 (quoting *Hughes River Watershed Conservancy*, 165 F.3d at 289-90); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1244 (9th Cir. 2005) (finding, in the context of a NEPA challenge, that because the Forest Service had provided a “thorough and reasoned explanation” for its position, the court would not “take sides in a battle of the experts” (internal quotations omitted)). Accordingly, the court finds that the Corps reasonably relied on its own two experts/specialists in making its determinations.

evidence, the court finds that the Corps' conclusion that the ponds, ditches, and swales were excavated entirely in uplands was not arbitrary or capricious.

Once the Corps made that determination, it acted reasonably in applying its longstanding interpretation of its regulations and concluding that the remaining ditches, swales, and ponds were not "waters of the United States." As to the ponds, the Corps' regulations provide that the agency generally does not assert jurisdiction over "small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). Here, the Corps reasonably concluded that "the artificial ponds were likely constructed for purpose of retaining water" and "retained water primarily for aesthetic reasons associated with typical golf course design, construction and operation," i.e., man-made water hazards on a golf course. A.R. at 7. Similarly, the Rapanos Guidance provides that

[s]wales . . . are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches . . . excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.

Guidance at 11-12 (citing 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)). Here, as discussed above, the Corps reasonably determined that these swales and ditches were excavated wholly in uplands and were not themselves "waters of the United States." A.R. at 6-7. The court concludes that there was nothing arbitrary and capricious about the Corps' interpretation and application of its regulations in this case relating to the remaining ditches, swales, and ponds. *See Precon Dev. Corp.*, 633 F.3d at 290 (recognizing that the Corps' "interpretation and application" of the *Rapanos* tests are entitled deference).

Deerfield, however, argues that the remaining ditches, swales, and ponds meet the plurality's "relatively permanent" test for jurisdiction. Specifically, Deerfield contends that the Corps inappropriately relied solely on "flow" characteristics in making its determination under the plurality's test, arguing that "[r]ate of flow is irrelevant to the plurality's relatively permanent waters test." Deerfield Memo. in Supp. of Summ. J. at 26. Deerfield further contends that the presence of "standing" water in the remaining ditches, swales, and ponds is sufficient to meet the "relatively permanent" test for jurisdiction under the CWA. The court finds Deerfield's arguments are without merit.

While the *Rapanos* plurality did hold that "relatively permanent, standing or continuing flowing bodies of water" are jurisdictional "waters of the United States," the plurality's analysis thereafter necessarily included "flow" as a factor. *Rapanos*, 547 U.S. at 732 (plurality opinion). The plurality noted that "[e]ven the least substantial of the definition's terms [(streams, oceans, lakes, and rivers)], namely, 'streams,' connotes a continuous *flow* of water in a permanent channel." *Id.* at 733 (plurality opinion) (emphasis added). The plurality continued, "[n]one of these terms encompasses transitory puddles or ephemeral *flows* of water," or "ordinarily dry channels through which water occasionally or intermittently *flows*." *Id.* (plurality opinion) (emphasis added). Finally, the plurality indicated in a footnote that "relatively continuous *flow* is a necessary condition for qualification as a 'water.'" *Id.* at 736 n.7 (plurality opinion) (emphasis added). Similarly, the *Rapanos* Guidance indicates that waters are relatively permanent "where the tributaries typically *flow* year-round or have continuous *flow* at least seasonally." Guidance at 6 (emphasis added). In addition, the Guidance explains that "'relatively permanent' waters do not include ephemeral tributaries which *flow* only in response to precipitation and intermittent streams which do not

typically *flow* year-round or have continuous *flow* at least seasonally.”¹⁹ *Id.* at 7 (emphasis added).

Here, the Corps’ consideration of flow was not unreasonable or inappropriate. As discussed above, the plurality in *Rapanos* necessarily included “flow” as a factor to be considered in its “relatively permanent” waters test, and therefore it was reasonable for the Corps to analyze the “flow” of the remaining waters on the Deerfield Tract. *See Precon Dev. Corp.*, 633 F.3d at 290 (recognizing that the Corps’ “interpretation and application” of the *Rapanos* tests are entitled deference). Moreover, the court finds that the Corps reasonably concluded that these remaining ditches, swales, and ponds were not “waters of the United States” under the plurality’s standard after analyzing their “flow.” While the court does note that Deerfield has presented evidence of the presence of “standing” water in these ditches, swales, and ponds, the Corps, based on Fennel’s and the EPA wetlands expert’s observations during the two on-site inspections, determined that several factors indicated a lack of “flow” in these remaining waters. Specifically, as to the ditches and swales, the Corps noted that these “areas where flow was less than seasonal demonstrated thick matted vegetation with no evidence of a channel or ordinary high water mark.” A.R. at 7. More importantly, the Corps determined that “these ditch and swale features convey[ed] water from ponds and surrounding upland areas during and following storm events and there [was] no evidence of groundwater recharge.” *Id.* In other words, the Corps determined that the “flow” in these ditches and swales was ephemeral, flowing only after “storm events.” Similarly, the Corps determined that the ponds were constructed to “maintain a certain water level” and would “flow” only if the water level increased above a certain point. *Id.* A photograph included in the Administrative Record supports

¹⁹ Nevertheless, the *Rapanos* Guidance does indicate that “these waters will be evaluated under the significant nexus standard.” Guidance at 7. The court notes that the Corps undertook such an analysis in this case, and the court’s discussion of the Corps’ significant nexus determination is below.

this conclusion, as it shows a raised culvert that would allow water to “flow” out of or exit the pond only if it increased to a heightened level—for example, from an influx of rainwater. *Id.* at 36 (Photo 5). Based on these observations and evidence, the Corps reasonably, and not arbitrarily or capriciously, concluded that these remaining ditches, swales, and ponds displayed no evidence of relatively permanent flow and were not “waters of the United States” under the plurality’s “relatively permanent” waters test.

Deerfield also contends that the Corps arbitrarily and capriciously determined to end jurisdiction at a point within the second “jurisdictional” channel. Upon review, the court finds that this simply is not the case. To the contrary, Fennel and the Corps provided a thorough explanation as to why jurisdiction was not extended to the entire tributary. *See generally id.* at 5-7. The Corps concluded that the “pronounced difference between the two flow regimes . . . and their lengths, warranted treating them as different reaches because no one flow regime was an accurate characterization of the entire tributary.” *Id.* at 6. With respect to the “non-jurisdictional” portion of the channel, the Corps noted a cessation of “the reach of continuous flow.” *Id.* Additionally, the Corps observed thick and prevalent vegetation throughout the non-jurisdictional channel, a lack of sinuosity, and “no evidence of influence by the influx of groundwater.” *Id.* Finally, and most importantly, Fennel observed that the channel “lacked an ordinary high water mark.” *Id.* The Corps’ relevant regulations provide that “[i]n the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark.” 33 C.F.R. § 328.4(c)(1); *see also Rapanos*, 547 U.S. at 761 (Kennedy, J., concurring) (“The Corps views tributaries as within its jurisdiction if they carry a perceptible ‘ordinary high water mark.’”). Accordingly, the court finds that the Corps reasonably determined the point at which jurisdiction ended, based on a number of factors, and this

determination was neither arbitrary nor capricious.

b. Significant Nexus

After determining that the remaining ditches, swales, and ponds were not jurisdictional under the “relatively permanent” waters test, the Corps further concluded that these remaining waters did “not have a significant nexus to a traditional navigable water.” A.R. at 7. Deerfield contends that the Corps’ significant nexus analysis was both arbitrary and capricious.

Under the “significant nexus” test, in order to be “navigable” under the CWA, “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). The Guidance states that the Corps will assert jurisdiction over tributaries of navigable waters if “the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary . . . significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.” Guidance at 8. “Where a tributary has no adjacent wetlands, the [Corps] will consider the flow characteristics and functions of only the tributary itself . . .” *Id.* at 10.

Here, as discussed above, the Corps first identified all of the remaining water features on the Deerfield Tract—i.e., the ditches, swales, and ponds—and found no evidence of any existing or past wetlands. A.R. at 3-4; *see also* 33 C.F.R. § 328.3(b) (defining “wetlands” as “areas that are inundated or saturated by surface or ground water” and are home to “vegetation typically adapted for life in saturated soil conditions”). The Corps then analyzed the flow characteristics of these ditches and swales, and concluded that they have such a “low volume, duration and frequency of water flow” they lack a significant nexus to a traditional navigable water. A.R. at 7. The Corps

determined this lack of “flow,” using all the same indicators as discussed above²⁰—i.e., lack of an ordinary high water mark, thick and matted vegetation, “no evidence of groundwater recharge,” and lack of sinuosity.²¹ *Id.* at 6-7; *see also* Guidance at 10 (“Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.”). Furthermore, the Corps determined that the ponds were constructed primarily to retain water and for aesthetic reasons, and that water flows out of the ponds only after storm events that cause their water levels to exceed a certain capacity. *Id.* at 7.

According to the Rapanos Guidance, in determining whether a significant nexus exists, the Corps will consider “hydrologic factors” and “ecologic factors.” Guidance at 8. “Hydrologic factors” include, among other factors, “volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary,” and “proximity to the traditional navigable water.” *Id.* “Ecologic factors” include, among other factors, “potential of tributaries to carry pollutants and

²⁰ *Supra* ¶¶ 13-14, 25-26.

²¹ Deerfield contends that the Corps’ “significant nexus” determination was arbitrary and capricious because the Corps failed to take specific measurements of flow. Specifically, Deerfield stated that “[t]he record in this case is entirely devoid of evidence to support the Corps superficial observations and conclusory determinations of flow.” Deerfield Resp. in Opp. at 8. Citing *Precon*, Deerfield argues that “the Corps must undertake sufficient investigation and gather sufficient evidence to justify its jurisdictional conclusion, regardless of whether it finds for or against jurisdiction.” *Id.* (emphasis removed).

Although the Fourth Circuit in *Precon* did reverse and remand that matter after “find[ing] the Corps’ administrative record [was] inadequate to support its conclusion that it [could assert] jurisdiction over Precon’s wetlands,” the present case is notably distinguishable as the Corps here did not attempt to assert jurisdiction over the remaining water bodies on the Deerfield Tract. *Precon Dev. Corp.*, 633 F.3d at 281. More importantly, the Fourth Circuit in *Precon* specifically addressed Deerfield’s argument that specific measurements of flow are required. The Fourth Circuit stated in *Precon* that it “d[id] not intend to place an unreasonable burden on the Corps” and additionally “agree[d] that the significant nexus test d[id] not require laboratory tests or any particular quantitative measurements in order to establish significance.” *Id.* at 296-97. Rather, the court indicated that “quantitative or qualitative” evidence could establish “significance.” *Id.* at 296-97. Here, the Corps relied on such “qualitative” evidence—the physical indicators discussed above—in determining that the remaining waters had a low or minimal “flow.” Accordingly, the court finds that Deerfield has failed to show that the Corps’ significant nexus determination was arbitrary or capricious on this basis.

flood waters to traditional navigable waters” and “potential of wetlands to trap and filter pollutants or store flood waters maintenance of water quality in traditional navigable waters.” *Id.* After assessing these flow characteristics, the Corps is to determine “whether the tributar[ies] . . . are likely to have an effect that is more than speculative or insubstantial.” *Id.* at 11. In our case, the Corps determined that the ditches, ponds, and swales were designed primarily to retain water, and they contained “low volume, duration and frequency of water flow.” A.R. at 7. Based on these waters’ low “flow” characteristics, their ability to *affect* downstream navigable waters is insubstantial and speculative, at best. For example, with such minimal “flow,” these waters are unlikely to “carry pollutants and flood waters to traditional navigable waters” or “significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.” Guidance at 8.

Accordingly, it was not arbitrary and capricious for the Corps to conclude that these remaining waters do “not have a significant nexus to a traditional navigable water because of the low volume, duration and frequency of water from these features, and [that they] therefore do[] not constitute ‘waters of the United States.’” *Id.*

Conclusion

Under the APA, “agency action, findings, and conclusions” will be set aside only when they are “found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Ohio Valley Envtl. Coal.*, 556 F.3d at 192. Further, “[r]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid.” *Ohio Valley Envtl. Coal.*, 556 F.3d at 192; *see also Natural Res. Def. Council, Inc.*, 16 F.3d at 1400. For the reasons stated above, the court finds that the methodology and procedures used by the Corps to arrive at its decision, as well as its findings and conclusions, were reasonable and not

arbitrary and capricious. Therefore, the court finds that the Corps' 2010 JD was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, it is therefore **ORDERED** that Deerfield's [Docket Entry 52] Motion for Summary Judgment is **DENIED**, Deertrack's [Docket Entry 57] Motion for Summary Judgment is **DENIED**, the Federal Defendants' [Docket Entry 58] Motion for Summary Judgment is **GRANTED**, and this case is **DISMISSED** *with prejudice*.

IT IS SO ORDERED.

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina
July 12, 2011

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

May 20, 2011

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Michael G. Corley

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and by improving the
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regulation.*

Honorable V. Claire Allen
Deputy Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

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MAY 25 2011

SC Court of Appeals

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

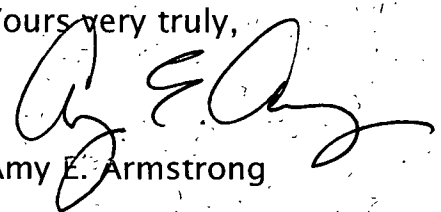
Dear Ms. Allen:

I am writing to provide an update on this case, which was
stayed pending resolution of a matter involving the property that
is the subject of this appeal in the United States District Court.

Briefing on the cross-motions for summary judgment has
been completed and arguments on the motions are scheduled for
May 25, 2011.

Please let me know if you have any questions or need
additional information at this time.

Yours very truly,


Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire

South Carolina Environmental Law Project

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March 21, 2011

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Honorable V. Claire Allen
Deputy Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

Dear Ms. Allen:

I am writing to provide an update on this case, which was
stayed pending resolution of a matter involving the property that
is the subject of this appeal in the United States District Court.

The Plaintiff in the federal case, Deerfield Plantation Phase
IIB Property Owners Association, filed its motion for summary
judgment on September 30, 2010. The federal Defendants and
Defendant Deertrack Golf, Inc., filed their responses and a cross-
motion for summary judgment on November 15, 2010. Plaintiff
filed its response and reply on February 7, 2011, and Defendants
filed their replies on March 4, 2011.

At this point briefing on the motions for summary
judgment is complete and the parties are awaiting a hearing date
for these motions.

Please let me know if you have any questions or need
additional information at this time.

Yours very truly,

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MAR 23 2011

Supreme Court of Appeals

Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

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January 20, 2011

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Honorable V. Claire Allen
Deputy Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

**RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach**
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

Dear Ms. Allen:

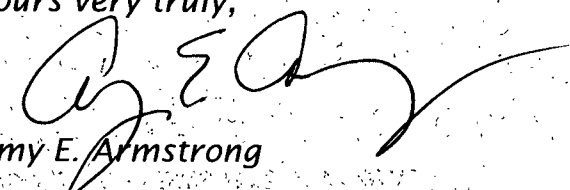
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motion for summary judgment on November 15, 2010.*

*Plaintiff's response and reply is due February 7, 2011, and
Defendants' replies are due March 4, 2011. A hearing date for
the motions for summary judgment has not been set at this time.*

*Please let me know if you have any questions or need
additional information at this time.*

Yours very truly,


Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire

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JAN 25 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 14, 2011

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Office of General Counsel
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Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, PA
P O Box 1431
Charleston, SC 29402

Re: Deerfield Plantation v. SCDHEC
Case Tracking #: 2009135686

Dear Counsel:

Please be reminded of the Court's letter of October 6, 2010 in which the Court requested that you provide written updates regarding the resolution of this matter in the United States District Court. As of the date of this letter we have not received any correspondence from you.

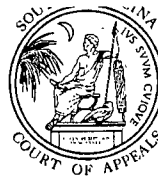
Please provide a written update regarding the status of this matter within ten days of the date of this letter. Correspondence from all counsel is not necessary.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: James S. Chandler, Jr, Esquire
Stanley E. Barnett, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
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October 6, 2010

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P O Box 1431
Charleston, SC 29402

Re: Deerfield Plantation v. SCDHEC

Dear Counsel:

The following Order has been endorsed on your "Joint Motion to Stay" in the above entitled case on appeal.

"Granted.

s/ Jasper M. Cureton A.J.

October 06, 2010."

Please be advised this matter will be held in abeyance pending resolution of the action in the United States District Court. Counsel for the Appellant is requested to provide status updates as to the progress of this matter no more than sixty days from the date of this letter and every sixty days thereafter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/ec

cc: James S. Chandler, Jr, Esquire
Stanley E. Barnett, Esquire

Granted.
[Signature]

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 20 2010

SC Court of Appeals

FILED

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

10/10

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners
Association.....Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
LLC.....Respondents.

JOINT MOTION TO STAY APPEAL

Pursuant to this Court's Order of July 9, 2010, the Parties¹ met on September 3, 2010 to discuss the best manner in which to proceed in light of the new jurisdictional determination by the United States Army Corps of Engineers. The Parties discussed the possibility of settlement negotiations, the underlying appeal in this matter, the companion cases pending before the Circuit Court and before the United States District Court, and the need for and propriety of administrative action on the permit by the Department.

There appears to be some room for settlement negotiations between Appellant and Respondent Deertrack Golf. In the absence of settlement, the Department and the Appellant take the position that additional administrative action is warranted at this point in time. The Respondent Deertrack Golf, Inc. takes the position that it can modify its plans to avoid activities in the areas determined by the U.S. Army Corps of Engineers to be jurisdictional waters of the United States. Respondent Deertrack Golf takes the position that administrative action such as permit modification or revocation is not warranted at this time. Respondent Deertrack Golf, Inc. acknowledges that if Appellant prevails in the matter pending before the United States District Court, then there would

¹Respondent Bill Clark Homes no longer has a contractual interest in the property and did not participate in the meeting on September 3, 2010.

be greater justification for administrative action on the permit such as termination and/or need for modification of Deertrack's Golf's permit.

In reality, the Department could initiate an administrative action on the permit today, which would likely be appealed by Respondent Deertrack Golf. Alternatively, Respondent Deertrack Golf could submit an application to revise its permit, which could potentially eliminate the need for the Department to initiate administrative action on the permit, but could be challenged by Appellant. Either scenario could have an impact on the justiciability of the issues in this appeal.

The parties to this appeal propose that any administrative action on the underlying permit not take place until resolution of the action in United States District Court. The parties also propose that this appeal be held in abeyance pending resolution of the action in United States District Court and any subsequent administrative action on the permit, if necessary. This would further judicial economy, avoid adding another layer of litigation to Respondent Deertrack Golf's efforts to develop this property, and also avoid briefing of issues that may become moot depending on the outcome of the action in Federal Court and/or any administrative action on the permit.

Therefore, the parties respectfully request an Order staying this appeal pending resolution of the action in United States District Court and/or any administrative action on the permit. The parties respectfully request that this stay be issued without prejudice to the parties and their respective positions on the merits of the issues in this appeal, and without prejudice to the parties and their respective positions regarding the necessity and propriety of any administrative action on the permit. In addition, the parties request that the stay be subject to the right of any party to file a motion to lift the stay if circumstances change that necessitate more expeditious resolution of the issues in this appeal. Finally, the Department agrees to refrain from taking action on the permit until resolution of the action in United States District Court for so long as the stay is in place.

Respectfully submitted,



Davis A. Whitfield-Cargile
South Carolina Department of Health and
Environmental Control
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Charleston, SC 29405
(843) 953-0229

Attorney for Respondent SCDHEC

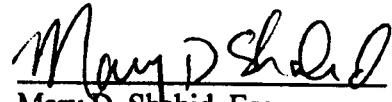
Charleston, South Carolina
September 16, 2010

We consent:

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(843) 527-0078

Attorney for Appellant

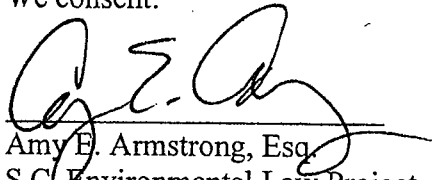
We Consent:



Mary D. Shahid, Esq.
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Attorney for Respondent Deertrack Golf

We consent:



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Attorney for Appellant

We Consent:

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Attorney for Respondent Deertrack Golf



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

September 16, 2010

VIA U.S. MAIL

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
SEP 20 2010
SC Court of Appeals

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

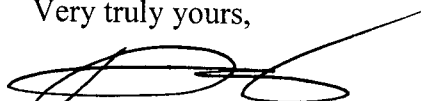
Dear Ms. Gee:

The Department writes to provide the Court with a status update in the above-referenced matter. Following a new wetlands and jurisdictional determination from the U.S. Army Corps of Engineers, Appellants filed a Motion to Remand this matter to the Administrative Law Court with instructions to remand to the Department. The Department indicated that it would consent to a remand, but suggested that the appeal be held in abeyance for a period of sixty days to allow the parties to discuss how best to proceed and to conduct additional administrative action in light of the new information. The Court issued an Order July 9, 2010 holding this appeal in abeyance for 60 days and instructing the parties to discuss how they would like to proceed and, if necessary, to conduct any additional administrative action. The Court also ordered periodic updates from the Department. This is the second update provided to the Court.

The parties met to discuss this matter on September 3, 2010. The parties discussed the possibility of a settlement agreement, the companion cases that are pending in circuit court and before the United States District Court and the need for and propriety of additional administrative action on the permit. The meeting culminated in an agreement among the parties that this action should be stayed pending resolution of an action in United States District Court. In addition, the parties agreed to refrain from additional administrative action on the permit pending resolution of the action in United States District.

Accordingly, I attached a Joint Motion to Stay this appeal. Please call me if you have any questions. I appreciate your consideration in this matter.

Very truly yours,



Davis A. Whitfield-Cargile

CC: Amy E. Armstrong, Esq.
Mary D. Shahid, Esq.



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

August 12, 2010

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AUG 16 2010

SC Court of Appeals

VIA U.S. MAIL

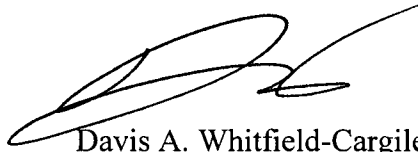
The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

Dear Ms. Gee:

Pursuant to this Court's order on the Motion to Remand, dated July 9, 2010, the Department writes to provide the Court with a status update in the above-referenced matter. The parties have been working diligently to arrange a meeting to discuss resolution of this matter. The parties have yet to schedule a meeting but it appears likely that a meeting will take place prior to September 3, 2010. As the Court is aware, Ms. Armstrong's law partner, Jimmy Chandler, recently passed away and the counsel for all parties have had multiple obligations that have limited the parties' ability to arrange a mutually convenient time to meet. Additionally, the parties are seeking to arrange a meeting with party representatives present, some of whom are out of state. Please contact me if the Court requires additional information from the Department at this time. The Department will provide the Court with an additional update within thirty (30) days from the date of this correspondence.

Very truly yours,



Davis A. Whitfield-Cargile

cc: Amy E. Armstrong, Esq.
Stanley E. Barnett, Esq.
Mary D. Shahid, Esq.



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 12, 2010

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

James S. Chandler, Jr, Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
2009135686

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding your Motion in the above case. Please provide this Court with a status update within thirty (30) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm

cc: Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

The South Carolina Court of Appeals

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health
and Environmental Control, Deertrack
Golf, Inc., and Bill Clark Homes of
Myrtle Beach, LLC,

Respondents,

The Honorable John McLeod
Administrative Law Court
Trial Court Case No. 2008-AL-07-00221

ORDER

Appellant filed a motion to remand this appeal to the Administrative Law Court. Respondent Deertrack Golf, Inc. filed a Return in opposition of Appellant's motion. Respondent South Carolina Department of Health and Environmental Control ("the Department") filed a return suggesting that we hold the appeal in abeyance for 60 days. Appellant's motion is hereby denied; however, we hold the appeal in abeyance for 60 days for the parties to discuss how they would like to proceed and, if necessary, to conduct any additional administrative action. We urge the parties to act as expeditiously as possible. The Department shall provide this Court with a status report in 30 days.

AND IT IS SO ORDERED.

Joseph W. Curcio A.J.

Columbia, South Carolina

July 9, 2010

cc: Amy Elizabeth Armstrong, Esquire
James S. Chandler, Jr, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

FILED

7/12/10 **MM**

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JUN 09 2010

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners
Association.....Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
LLC.....Respondents.

**DHEC'S REPLY TO DEERTRACK GOLF'S 'REPLY' TO
DHEC'S RETURN TO MOTION TO REMAND**

TO: THE COURT AND ALL PARTIES:

Respondent, South Carolina Department of Health and Environmental Control ("DHEC" or the "Department"), respectfully submits the following in Reply to Respondent, Deertrack Golf's ("Deertrack") "Reply" to DHEC's Return to Motion to Remand.

DHEC'S ALLEGED MISCHARACTERIZATION

Deertrack makes the astonishing allegation that DHEC mischaracterized Ms. Hicks' sworn testimony in its Return to the Motion to Remand. DHEC stated in the Return that "Ms. Hicks testified that if there are waters on the site, she would have to do another review." Deertrack quotes this language and alleges it is a mischaracterization of

Ms. Hicks' testimony. Ms. Hicks was asked by Counsel for Appellant, "If the ponds that are on the golf course were considered waters of the State during your review, would it affect your review in any way?" In response, Ms. Hicks answers: "It may change it, but during this review, they weren't considered waters of the state. **I would have to do another review.**" Deertrack's astonishing allegation that DHEC mischaracterized this testimony is made more baffling by the lack of any different characterization of the testimony than the characterization in DHEC's Return. She testified plainly that she "would have to do another review."

The Existence of Waters of The United States On The Property Warrants Additional
Review

It is undisputed that Deertracks' application represented that there were no wetlands, waters of the state, or waters of the United States on the property. It is undisputed that at the time the Department reviewed the application, it accepted the representation and all parties (except for Appellant) acted under the assumption that there were no Waters of the United States on the property¹. Thus, the permit application was reviewed, and permit coverage granted, based on the representation that there were no waters of the United States on the property, that the ponds and ditches on the property were golf course ponds created from upland, and that there was no connection between these ponds and waters of the State or Waters of the United States.

The U.S Army Corps of Engineers' ("Corps"), in its newest Jurisdictional Determination ("JD"), determined that there are in fact waters of the United States on the property. This reveals that representation of the applicant, and the basis for the

¹ In fact, Ms. Hicks testified that she has never been to the site (see Ex. A to Appellant's Motion to Remand at Tr. p10, line 8).

States on the property, and the permit application that the Department reviewed authorized activity that would discharge into and alter these waters. Moreover, the “ditches” on the property which were previously determined, based on the representations of Respondent Deertrack, to be drainage ditches dug out of upland, have a direct surface connection with the waters of the United States identified on the Corps JD. It appears from the drawings that many of the ponds have direct connections to the waters of the United States as well.

Thus, whereas the permit coverage was granted based on Deertrack’s representations that the ponds and ditches were mere golf course ponds and stormwater ditches that were dug from upland and did not have a direct surface connection to waters of the United States, the Corps JD establishes that these ponds and ditches very likely have a direct surface connection to waters of the United States on the Applicant’s property and within the project area. This changes the nature of the application and warrants additional review.

The Department, in agreeing that additional review is probably warranted, has not determined the most proper means or the scope of the additional review that should take place. Deertrack indicates that the applicant could avoid the Waters of the United States by altering its plans, which would require additional review by the Department. In addition, Section 7.1 and 7.2 of the CGP provide for modification, revocation, or termination of permit coverage in accordance with § 122.62, § 122.63, § 122.64, and § 124.5 of Regulation 61-9. Though the Department has attempted to consult with Counsel for Deertrack regarding the application to determine how the applicant intends to proceed, the Department has not determined what administrative action to take in light of

the new Corps JD. The Department is in the process of determining whether permit modification under § 122.62(d), or modification or revocation and reissuance under § 122.62(e), or termination under § 122.64 is the most appropriate administrative action. Obviously, Deertrack would have the right to appeal whatever decision the Department makes. In any event, it is the Department's decision to make in the first instance. See S.C. Code Ann. § 44-1-60(A).

Though the Department's ability to take administrative action is not affected by the appeal, (see Rule 205, SCACR), any administrative action taken by the Department could affect the appeal. For example, termination or revocation and reissuance could moot the appeal, whereas permit modification may or may not moot individual issues in the appeal. If the Department determines that no additional action is necessary, then that would obviously have no impact on the appeal.

The Department would respectfully suggest that the decision on the Motion to Remand (and the briefing of this appeal) be stayed for a period of sixty (60) days to afford the Department, the permit applicant, and the Appellant the opportunity to discuss the best manner in which to proceed, with leave to the parties to conduct additional administrative action notwithstanding this appeal and with instructions to provide status reports to the Court. In the alternative, the Department will consent to an Order Remanding the Matter to the Administrative Law Court with instruction to Remand to the Department staff, with leave for the Department and the parties to determine the appropriate administrative action necessary and without prejudice to the Appellant's appeal of the Administrative Law Court's decision.

[SIGNATURE BLOCK FOLLOWS]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Davis A. Whitfield-Cargile", written over a horizontal line.

Davis A. Whitfield-Cargile
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0229

Charleston, South Carolina
June 3, 2010

Attorney for Respondent SCDHEC

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUN 09 2010

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners
Association.....Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
LLC.....Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served all parties in the above-captioned matter with a copy of the *Department's Reply to Deertrack Golf's "Reply" to DHEC's Return to Motion to Remand* by mailing a copy of the same via U.S. First Class Mail, postage prepaid, to the following address:

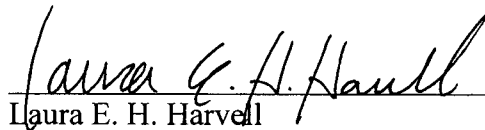
The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid, Esq.
McNair Law Firm, P.A.
Post Office Box 1431
Charleston, SC 29402

James S. Chandler, Jr., Esq.
S.C. Environmental Law Project
Post Office Box 1380
Pawley's Island, Sc 29585

Stanley E. Barnett, Esq.
Smith, Bundy, Bybee & Barnett, P.C.
Post Office Box 1542
Mount Pleasant, SC 29464

June 7, 2010


Laura E. H. Harvell



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

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JUN 09 2010

SC Court of Appeals

June 3, 2010

VIA U.S. MAIL

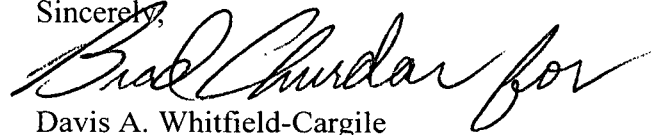
The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Docket No.: 08-ALJ-07-0221-CC

Dear Ms. Gee:

Please find enclosed for filing the original and six (6) copies of the Department's Reply to Deertrack Golf's "Reply" to DHEC's Return to Motion to Remand. Thank you for your attention in this matter. By copy of this letter, and as evidenced by the certificate of service, I am serving all parties of record.

Sincerely,



Davis A. Whitfield-Cargile

cc: James S. Chandler, Jr., Esq.
Stanley E. Barnett, Esq.
Mary D. Shahid, Esq



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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June 11, 2010

Mary D. Shahid, Esquire
McNair Law Firm, PA
P O Box 1431
Charleston, SC 29402

Re: Deerfield Plantation v. SCDHEC
Case Tracking #: 2009135686

Dear Counsel:

We have received "Respondent Deertrack Gold, Inc's Reply to Respondent DHEC's Return to Motion to Remand" in the above matter on appeal. We also acknowledge receipt of a filing fee (check no. 36126) in the amount of \$25.

Please be advised that the reply is accepted and a motion will not be necessary. We are herewith returning your check.

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/ec

cc: Amy Elizabeth Armstrong, Esquire
James S. Chandler, Jr, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Stanley E. Barnett, Esquire

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JUN 02 2010

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

DOCKET NO. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

v.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc. and Bill Clark Homes of Myrtle Beach, LLC..... Respondents.

**RESPONDENT DEERTRACK GOLF, INC.'S REPLY TO RESPONDENT
DHEC'S RETURN TO MOTION TO REMAND**

Respondent, Deertrack Golf, Inc., ("Deertrack") submits the following in Reply to the Respondent South Carolina Department of Health and Environmental Control ("SCDHEC") Return wherein SCDHEC erroneously concludes that the recent action of the U. S. Army Corps of Engineers ("the Corps") in declaring that .37 acres of an existing drainage ditch constitutes a jurisdictional connection to navigable waters, is new information warranting additional review.

SCDHEC bases its support for remand on testimony that it's staff, Shannon Hicks, provided in advance of the contested case hearing before the lower court. According to SCDHEC in its Return "Ms. Hicks testified that if there are waters on the site, she would have to do another review." In addition, SCDHEC asserts in its Return

that the Corps, in its new Jurisdictional Determination ("JD"), indicated that there are wetlands and waters of the State located on the South Golf Course.

As to this latter basis for seeking remand, there is nothing contained in the Corps March 17, 2010, findings from which SCDHEC can reasonably conclude that the Corps found wetlands and waters of the State on the South Course. The Corps makes the following finding in its Memorandum to Assert Jurisdiction for SAC 2006-02612-3:

The Corps finds that the delineated portion of the Deerfield Tract contains "waters of the United States" as depicted by the crosshatched areas on Attachment A. This finding is based on the presence of tributaries with a relatively permanent flow of water that has a surface connection with the Atlantic Ocean, a traditional navigable water.... The two relatively permanent waters at issue in this memorandum total approximately 0.37 acres (920.07 linear feet) in size.

See Memorandum to Assert Jurisdiction for SAC 2006-02612-3, attached hereto as Exhibit A, at page 2. Nowhere in the Corps' JD or within this supporting Memorandum does the Corps suggest there are waters of the state or wetlands present on the South Course. The Corps describes the remaining water features on the site as "a series of ponds that are interconnected by a series of ditches and swales." See Exhibit A at page 6. However, these features are not determined to be federally jurisdictional. The water features on the site, which formed a "pond, ditch, and swale system," were determined to be excavated from uplands. Exhibit A at page 7. Furthermore, the Corps specifically noted the absence of wetlands on the site. Exhibit A at page 7.

This Jurisdictional Determination is substantially consistent with the Corps' Jurisdictional Determination in 2006, in which the ponds and ditches were deemed to be upland areas. See Wetland Determination dated August 3, 2006, attached hereto as

Exhibit B.¹ The only difference between the Corps' findings in August of 2006, and in March of 2010, is the designation of .37 acres of Relatively Permanent Waters ("RPW") providing a connection to Traditional Navigable Waters.

And, as to whether Ms. Hicks' pre-trial testimony supports a remand, SCDHEC states "it is clear that there are waters on the property and the Department agrees that some form of additional review is necessary and appropriate." Yet the fact that the Old South Golf Course contained ponds, ditches, and swales was certainly no secret to SCDHEC when it conducted its review of the permit application that is the basis for this appeal. These water features are readily visible in aerial photography of the site, as is depicted on Deertrack's trial Exhibit #9, attached hereto as Exhibit C. Respondent Deertrack's permit application was pending before SCDHEC for almost a full year before the permit was issued – from March 5, 2007 until February 29, 2008. The existing water features on the site are depicted on pre-development plats and surveys of the property submitted in support of Respondent Deertrack's permit application, and are accounted for in the pre-development stormwater calculations submitted by Respondent Deertrack. SCDHEC clearly understood the nature of the water features – ponds, swales, and ditches - as being constructed for the purpose of drainage of the existing golf course and surrounding development.

SCDHEC's return to the motion to remand states, "Ms. Hicks testified that if there are waters on the site, she would have to do another review." This is a mischaracterization of the witness's sworn testimony:

¹ The attached copy is poor quality but it is undisputed that the basis for the 2006 JD is the Corps' conclusion that the entire tract was "uplands."

Q: Okay. If the ponds that are on the golf course were considered waters of the State during your review, would it affect your review in any way?

A: It may change it, but during this review, they weren't considered waters of the State. I would have to do another review.

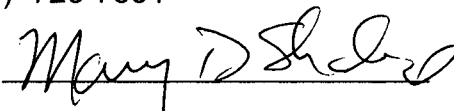
As is discussed above, and as is evident upon review of Exhibit A, and of the Corps' March 17, 2010 Jurisdictional Determination which was attached to Respondent Deertrack's Return, the Corps has made no findings regarding whether there are "waters of the State" on the South Course, so as to warrant or trigger a remand and additional review. Notably, the testimony upon which SCDHEC relies is limited to questions regarding the ponds. The RPWs identified by the Corps don't even connect to any of the existing ponds, since the extent of jurisdiction is quite limited. So it is incomprehensible how the identification of these RPWs changes the status of the multiple ponds located on the property that are not directly connected to the RPWs.

Deertrack opposes remand for the reasons set forth herein and in Deertrack's Return to Appellant's Motion for Remand. Deertrack has endured enough delay while Appellant caused the Corps to conduct a new investigation of these matters. Appellant is obviously unhappy with the Corps' most recent findings. Respondent SCDHEC misapprehends the most recent findings. Clearly, the Corps has made no new findings that effect the status of the ponds which the Corps still considers to be upland ponds. The Corps has made it abundantly clear that it found no wetlands on site. The existence of the ponds, ditches and swales were known to all parties at all times that the permit application was pending, and were evaluated in SCDHEC's review of the application. It is inequitable to send this matter back to SCDHEC to review whether

there are "waters of the State" or "wetlands" on the site when the Corps' new JD doesn't include findings that there are "waters of the State" or "wetlands" on the South Course.

Respectfully submitted,

Mary D. Shahid, S.C. Bar No. 1794
McNair Law Firm, P.A.
Post Office Box 1431
Charleston, South Carolina 29402-1431
mshahid@mcnair.net
(803) 723-7831

By: 

Attorneys for Respondent
Deertrack Golf, Inc.

June 1, 2010
Charleston, South Carolina



DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69-A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

REPLY TO
ATTENTION OF

CESAC-RD-NE

17 March 2010

MEMORANDUM TO ASSERT JURISDICTION FOR SAC 2006-02612-3 (f.k.a. 84-2006-0273-3)

SUBJECT: Jurisdictional Determination for SAC 2006-02612-3 (f.k.a. 84-2006-0273-3)
Charleston District, Bill Clark Homes/Deerfield Golf Tract

1. Summary

The U.S. Army Corps of Engineers (Corps) regulations authorize (but do not require) the Corps, upon a landowner's written request, to provide the agency's view on whether particular property contains "waters of the United States" within the agency's regulatory jurisdiction under Section 404 of the Clean Water Act.¹ Bill Clark Homes, originally, and now Deertrack Golf Inc. requested the Corps' view on whether certain portions of their property contain areas subject to regulation under the Clean Water Act. As outlined in this memorandum and on the attached plat prepared by Beasley Land Surveying Inc., dated February 26, 2010, and titled, "PRELIMINARY DEERTRACK GOLF COURSE OLD SOUTH COURSE JURISDICTIONAL DETERMINATION" (Attachment A), the Corps finds that portions of the property are within the agency's regulatory jurisdiction under the Clean Water Act. This determination supersedes the previous determination made August 3, 2006 in agency file number SAC 84-2006-0273-3. Tommy Fennel, Supervisory Biologist and Chief of Northeast Branch of the Corps' Charleston District, performed the new jurisdictional determination for this tract.

2. Background

On February 13, 2006, a consultant for Bill Clark Homes, LLC, requested the Corps to provide the agency's view on whether a 152.485 acre tract known as Deerfield Golf Course located in Horry County, South Carolina (Deerfield Tract), contained "waters of the United States" subject to the Corps Section 404 Clean Water Act jurisdiction. On August 3, 2006, the Corps notified the property owner that the property did not contain any wetland areas or "waters of the United States." That August 2006 jurisdictional determination was valid for five years, unless the Corps determines that "new information warrants revision . . . before the expiration date." As explained herein, the Corps recently obtained new information about the tract that warranted revision of its August 2006 jurisdictional determination.

¹ See 33 C.F.R. 320.1(a)(6), 331.2; 33 C.F.R. Pt. 331 App. C. and see also Regulatory Guidance Letter 08-02, SUBJECT: Jurisdictional Determinations (June 26, 2008)(RGL 08-02) available at: <http://www.usace.army.mil/CECW/Documents/cecwo/reg/rgls/rgl08-02.pdf>



On April 16, 2009, Deerfield Plantation Phase II-B Property Owners Association, Inc. filed suit in the United States District Court for the District of South Carolina against the Corps, the Environmental Protection Agency (EPA) and Deertrack Golf, Inc., challenging the Corps August 2006 jurisdictional determination. Based on information new to the Corps including documentation that post-dates the Corps' August 2006 determination, the Corps requested and the Court granted a voluntary remand so that the Corps could reconsider its previous jurisdictional determination.

On March 3, 2010, the property owner, Deertrack Golf, Inc., provided written notification to the Corps that it was modifying its request for a jurisdictional determination, and it requested that Corps' new jurisdictional determination would no longer include approximately 68 acres of the Deerfield Tract, located adjacent to and northwest of Double Eagle Drive and southeast of US Highway 17 and referred to as the northern portion of the South Course (33.62939 N. Latitude, -78.98542 W Longitude). Accordingly, while this superseding jurisdictional determination covers the remaining 84.96 acres of the Deerfield Tract, it nevertheless supersedes the August 2006 jurisdictional determination in all respects.

3. CWA Jurisdictional Determination

The Corps finds that the delineated portion of the Deerfield Tract contains "waters of the United States" as depicted by the crosshatched areas on the Attachment A. This finding is based on the presence of tributaries with a relatively permanent flow of water that has a surface connection with the Atlantic Ocean, a traditional navigable water. The subject relatively permanent waters are located at approximately 33.62083° N. Latitude and -78.98018° W. Longitude, and 33.62056° N. Latitude and -78.97999 ° W. Longitude. The two relatively permanent waters at issue in this memorandum total approximately 0.37 acres (920.07 linear feet) in size. See Attachment A. The two relatively permanent waters flow approximately 1.10 miles into the Atlantic Ocean via an impounded reach known as Dogwood Lake.

The Corps also finds the other water features on the delineated portion of the Deerfield Tract are not "waters of the United States." Those non-jurisdictional areas are depicted as "non-jurisdictional pond/ditch" on Attachment A.

4. Basis for Determination

The Corps will assert jurisdiction under the Clean Water Act whenever a water feature meets either the "continuous surface connection" standard or the "significant nexus" standard as outlined in *Rapanos v. United States*.² As explained below, the Corps finds that certain features

² 126 S. Ct. 2208 (2006). See also the joint Corps and Environmental Protection Agency Memorandum on "Clean Water Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" at 2-3 (Dec. 02, 2008) (*Rapanos* Guidance) available at: http://www.usace.army.mil/CECW/Documents/cecw/reg/cwa_guide/cwa_juris_2dec08.pdf

of the delineated portion of the Deerfield Tract have a relatively permanent continuous surface connection to a traditional navigable water, and are therefore jurisdictional.

A. Initial Observations

A new review of the infrared; aerial photography from 1994, 1999, and 2006 reveal that the Deerfield Tract is a golf course with associated ponds/lakes. There were no areas on tract that appeared to be in a natural state that would provide information about the nature of the delineated portions of the Deerfield Tract prior to the construction of the golf course. The tract was completely developed and encompassed by housing and infrastructure.

The Corps also reviewed its records, which revealed no prior permits or noted any unauthorized actions for the delineated areas. This indicates that construction associated with the golf course on this tract was likely performed prior to regulation under the Clean Water Act.

The Corps also reviewed the *United States Department of Agriculture, Natural Resources Conservation Service's Soil Survey for Horry County*, 1974 (Soil Survey), which indicated the potential presence of hydric soils onsite. Hydric soils could be an indicator that wetlands or other jurisdictional waters are present on the site. The listed hydric soils were Leon, Lynn Haven, and Johnston. However, due to the age of the Soil Survey, this information is not conclusive that hydric soils are currently present on this tract.

The Corps next reviewed the most recent United States Geological Survey 7.5 Minute Quadrangle for Surfside Beach from 1984 (Surfside Beach Quad), which revealed that the tract did not contain any evidence of wetlands or waters (blue lines depicting tributaries, blue dash lines with vegetation depicting wetland areas). Additionally, the Surfside Beach Quad displayed the handwritten words "GOLF COURSE" over the tract, suggesting that this area had been a golf course for some period of time because of this dated designation on the Surfside Beach Quad.

The Corps also reviewed the Department of the Interior, United States Fish and Wildlife Service's, circa mid to late 1980s, National Wetland Inventory Map for Surfside Beach (Surfside Beach NWI), which revealed that there were two basic units identified on the tract; U17 (upland other urban) and PUBHx (open water). Both descriptions were used to describe conditions in areas where the Soil Survey depicted hydric soils. U17 was typically descriptive of the golf course, and the PUBHx described the lakes/ponds. This suggests that the tract does not contain wetlands or water features except for open water ponds.

Mr. Fennel performed an overlay analysis using the Corps' Geographic Information System. This revealed that the Soil Survey depicted certain areas as potential wetlands, but the same areas were depicted as upland, or dry land, on the Surfside Beach Quad and the Surfside Beach NWI. The conflict is likely due to changes in the area from the construction of the golf course and surrounding residential community.

To resolve conflicts, the Corps conducted two separate site visits. On December 7, 2009, the Corps visited the site with the property owner's representative and on January 6, 2010, the Corps and EPA conducted a joint site visit. The methodology used to prepare the site to construct the golf course (which is typically involves site clearing, elevation manipulation, and backfill) led to such significant alteration that the Corps could not conclusively determine whether the site was ever a wetland. Furthermore, Mr. Fennel did not observe any relic hydrophytic vegetation that would indicate whether this site historically contained wetlands. If the delineated portions of the Deerfield Tract contained wetlands at some point, such wetlands were likely filled prior to regulation under the Clean Water Act.

B. Jurisdictional Areas

(1). Relatively Permanent Water (Attachment A at L1 - L7, L13 - L37)³

The Corps asserts jurisdiction over non-navigable tributaries of "traditional navigable waters" where the tributaries are "relatively permanent waters", i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months).⁴ Mr. Fennel observed that the feature located adjacent to and south of the lot 555 (TMS# 191-17-01-555) and flowing in a southerly direction until exiting the property between lots 499 (TMS# 191-17-01-499) and 500 (TMS# 191-17-01-500), depicted on Attachment A, had a firm, sandy bottom with a clearly defined channel that was free of vegetation. In this area, it was evident that a steady influx of groundwater contributed to the constant recharge and flow. Such observations are strong indicators of a relatively permanent flow.

A clearly defined channel devoid of vegetation demonstrates continuous flow more than seasonally, because vegetation will not have a chance to establish itself due to the water's flow. Conversely, areas where there is no clearly defined channel and a prevalence of this vegetation (thick, matted vegetation throughout the conveyance) is indicative of a flow regime that is not of sufficient volume or frequency to maintain a clear channel.

In addition, Mr. Fennel observed a clearly defined ordinary high water mark present in the area where the tributary contained a clearly defined channel.⁵ This is further evidence of a relatively permanent flow. The ordinary high water mark is a physical indicator used to determine the lateral limits of federal jurisdiction within a waterbody. Mr. Fennel observed physical characteristics of an ordinary high water mark in the tributary. Specifically, Mr Fennel observed a clear natural line impressed on the bank of the tributary, absence of terrestrial vegetation within the tributary's wetted channel, and the presence of litter and debris being transported downstream from the riparian vegetation along the tributary, all leading to the conclusion that this tributary had a relatively permanent or continuous flow.

³ Attachment B, Jurisdictional Form 2 of 3.

⁴ *Rapanos* Guidance at 6-7 (citing *Rapanos v. United States*, 126 S. Ct. 2208, 2221 n. 5 (2006)).

⁵ See 33 CFR § 328.3(e) and also Regulatory Guidance Letter 05-05, SUBJECT: Ordinary High Water Mark Identification (Dec. 7, 2005) available at: <http://www.usace.army.mil/CECW/ Documents/cecwo/reg/rgls/rgl05-05.pdf>

Mr. Fennel also observed groundwater influx along the banks of the tributary and red staining on vegetation along the channel. This staining is the direct result of iron-oxidizing bacteria present in the channel, which indicate that the tributary was being recharged from groundwater rich in iron. (Attachment C, photos 9 and 11).

The amount of curvature of a tributary, its sinuosity, is an indicator of whether the tributary supports a relatively permanent flow. The tributary's meanders, or curves, are the result of the deposit of suspended sediment in the water flow. The presence of sediment deposition bars indicated that the channel experienced a relatively permanent, continuous flow regime as sediment was continually deposited and re-deposited to form the bars and meanders of the tributary. The sinuosity of the channel (Attachment C, photo 9) is also indicative of relatively permanent flow as streams or tributaries that flow intermittently, generally exhibit a less sinuous, or straighter, channel than those with relatively permanent or perennial flow.

The water from this feature flows offsite through a box culvert between lots 499 and 500 (Attachment C, photo 14), continuing through a stormwater detention pond and into a culvert (Attachment C, photo 15) under U.S. Highway 17 to Dogwood Lake. Dogwood Lake is an impounded reach of a relatively permanent water and, as such, a "water of the United States." The flow then continues directly into the Atlantic Ocean, a traditional navigable water.

Based on this evidence of a continuous flow and a surface connection with the Atlantic Ocean, the Corps finds that this feature is a tributary of a traditional navigable water that has a relatively permanent flow of water. This tributary is subject to federal jurisdiction under the Clean Water Act.⁶

(2). Relatively Permanent Water (Attachment A at L8-L12)⁷

Mr. Fennel observed during both site visits water flowing in the water feature identified on the Attachment A at survey lines L8 through L12. This tributary shared the same characteristics as the tributary described above in 4.B.(1). Mr. Fennel also observed that the feature displayed flowing water, a well-defined channel with a firm, sandy bottom and a well-defined ordinary high water mark. Mr. Fennel observed physical characteristics of an ordinary high water mark in the tributary. Specifically, a clear natural line impressed on the bank of the tributary, absence of vegetation within the channel's wetted perimeter and the presence of litter and debris being transported downstream from the riparian vegetation along the channel. In addition to the above, the same geomorphic indicators including groundwater influx, the red stained vegetation resulting from the presence of iron-oxidizing bacteria within the tributary, the sinuosity of the channel, and deposition bars were also observed. The water from this feature flows into the jurisdictional tributary discussed above and connects with the Atlantic Ocean.

⁶ *Rapanos* Guidance at 6-7.

⁷ Attachment B, Jurisdictional Form 3 of 3.

Based on Mr. Fennel's onsite observations, the reach of the continuous flow ceased in the area where there was an abrupt change in the amount of plant life within the tributary with abundant vegetation in the tributary's channel. See Attachment A at L10. From this area to the southwest (against the flow), Mr. Fennel observed that the vegetation was thick and prevalent throughout the channel, the channel lacked an ordinary high water mark, and there was no evidence of influence by the influx of groundwater. Furthermore, the channel was less sinuous, which is an indicator of a more intermittent flow. Based on Mr. Fennel's observations in the area of L10 on Attachment A, there was no continuous flow or relatively permanent flow in the remaining portions of the tributary. This pronounced difference between the two flow regimes within this segment in the area of L10 on Attachment A, and their lengths, warranted treating them as different reaches because no one flow regime was an accurate characterization of the entire tributary.⁸

Based on this evidence of a perennial flow regime and a surface connection with the Atlantic Ocean, this feature is a tributary of a traditional navigable water that has a relatively permanent flow of water. It is thus subject to the Corps jurisdiction under the Clean Water.⁹

C. Non-Jurisdictional Areas¹⁰

The remaining water features on the delineated portion of the Deerfield Tract are a series of ponds that are interconnected by a series of ditches and swales. The Corps will assert jurisdiction over such features (i.e. non-navigable, not relatively permanent tributaries) where such the features have a significant nexus to traditional navigable water.¹¹ The remaining water features on the delineated portion of the Deerfield Tract do not have a significant nexus to a traditional navigable water because of the low volume, duration and frequency of water flow to the jurisdictional relatively permanent tributary.

(1) The Ditch and Swale System

The Corps generally does not consider swales or ditches that are excavated wholly in uplands and that do not carry a relatively permanent flow to be jurisdictional under the Clean Water Act.¹² As discussed in 4.A., if the delineated portions of the Deerfield Tract contained wetlands at some point, such wetlands were likely filled prior to regulation under the Clean Water Act.

The remaining ditches and swales depicted on Attachment A are non-jurisdictional.¹³ Mr. Fennel observed no ordinary high water mark. In the transition area from the relatively

⁸ *Rapanos* Guidance at 6 n.24.

⁹ *Rapanos* Guidance at 6-7.

¹⁰ Attachment B, Jurisdictional Form 1 of 3.

¹¹ *Rapanos* Guidance at 8.

¹² *Rapanos* Guidance at 11-12.

¹³ *Rapanos* Guidance at 6.

permanent waters reach of the ditches, Mr. Fennel observed a change in the prevalence of vegetation. Areas where there was relatively permanent flow demonstrated a clear channel, free of vegetation, whereas areas where flow was less than seasonal demonstrated thick matted vegetation with no evidence of a channel or ordinary high water mark. Additionally, the channel was less sinuous, which is an indicator of a more intermittent flow. Furthermore, these ditch and swale features convey water from ponds and surrounding upland areas during and following storm events and there is no evidence of groundwater recharge. Since these ditches and swales contain such a low volume, duration and frequency of water flow, and do not have an ordinary high water mark (and no adjacent wetlands), they are not “waters of the United States.”¹⁴

(2) The Ponds

The Corps does not generally consider small, ornamental waterbodies to be “waters of the United States” if the artificial features are created by excavating wholly from uplands to retain water primarily for aesthetic purposes.¹⁵ As discussed in 4.A, based on Mr. Fennel’s review of infrared aerial photography, the Surfside Beach Quad, the Soils Survey and the Surfside Beach NWI and two site visits, the ponds were man-made in uplands.¹⁶ There was no evidence of existent or remnant wetlands or tributaries in the review area. Based on Mr. Fennel’s on-site observations of the pond and ditch system, the artificial ponds were likely constructed for the purpose of retaining water because the culverts that connected the ponds to the swales and ditches were elevated and constructed to maintain a certain water level and would flow only if the pond levels fluctuated above a certain point (Attachment C, photo 5). The Corps finds that the on site ponds in the delineated portion of the Deerfield Tract retained water primarily for aesthetic reasons associated with typical golf course design, construction and operation. Since these ponds drain to ditches and swales that contain such a low volume, duration and frequency of water flow, these ponds do not have a significant nexus that would warrant departing from the Corps policy that such areas generally are not “waters of the United States.”

(3) Overview of Upland Pond, Ditches and Swales as a System

The Corps reviewed the entire upland excavated pond, ditch and swale system as a whole. This review included two site visits and an in-office review of infrared aerial photography, the Soil Survey, Surfside Beach Quad and the Surfside Beach NWI. This system of water features, as a whole, does not have a significant nexus to a traditional navigable water because of the low volume, duration and frequency of water flow from these features, and it therefore does not constitute “waters of the United States.”¹⁷ Furthermore, the features of this system were excavated solely from and draining only upland; were not themselves “waters of the

¹⁴ 33 C.F.R. § 328.4(c)(1) and *Rapanos* Guidance at 8 – 12.

¹⁵ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (see (d) under discussion of waters generally not considered waters of the United States).

¹⁶ *Rapanos* Guidance at 11-12.

¹⁷ *Rapanos* guidance at 8 – 12.

United States” and they did not connect a water of the United States to another “water of the United States.”

5. Conclusion

The Corp notified the property owner, Deertrack Golf c/o Mr. Jason Murphy, of this jurisdictional finding via a letter dated March 17, 2010. (Attachment D).

/s/Tommy Fennel for

TINA B. HADDEN
Chief, Regulatory Division
U.S. Army Corps of Engineers,
Charleston District

Attachment A, Beasley Land Surveying Inc., “PRELIMINARY DEERTRACK GOLF COURSE
OLD SOUTH COURSE JURISDICTIONAL DETERMINATION” (February 26, 2010)

Attachment B, Jurisdictional Forms

Attachment C, Photographs from Administrative File

Attachment D, Property Owner Jurisdiction Determination Notification



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

August 3, 2006

Regulatory Division

Mr. Norman Boatwright
Milliken Forestry Company
P.O. Box 23629
Columbia, South Carolina 29224

Re: SAC 84-2006-0273-3
Horry County

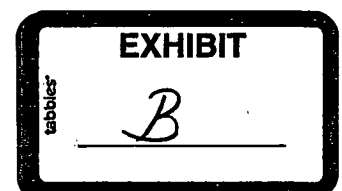
Dear Mr. Boatwright:

This is in response to your letter of February 8, 2006, requesting a wetland determination, on behalf of Jeff Farrell, for a 152.485 acre tract located south U.S. Highway 17 Bypass, within Deerfield Plantation, Surfside Beach Township, Horry County, South Carolina. The project area is depicted on sheets 1 through 10 of 10 on a copy of the survey plat you submitted which was prepared by ETS-Engineering and Technical Services, Inc., dated January 31, 2006, and entitled "ALTA/ACSM LAND TITLE SURVEY/ OF/ A PORTION OF/ DEERFIELD GOLF COURSE/ FOR BILL CLARK HOMES/ LOCATED AT/ SURFSIDE BEACH TOWNSHIP, HORRY COUNTY, S.C./ JANUARY 31, 2006".

Based on a review of aerial photography and soil survey information, it has been determined that the referenced property does not contain any wetland areas or other waters of the United States and, as such, Department of the Army authorization will not be required for mechanized land clearing, excavation, or the placement of dredged or fill material on this site.

Please be advised that this determination is valid for five (5) years from the date of this letter unless new information warrants revision of the delineation before the expiration date. All actions concerning this determination must be complete within this time frame, or an additional delineation must be conducted. For the purposes of 33 CFR 331.2, this is considered to be an approved jurisdictional determination.

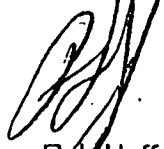
In future correspondence concerning this matter, please refer to SAC 84-2006-0273-3. A copy of this letter is being forwarded to the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management for their information.



Deertrack Golf, Inc.
Deertrack, SC 29511

If you have any questions concerning this matter, please contact me at 843-365-4316.

Respectfully,

A handwritten signature in black ink, appearing to read 'Rob Huff', written over the printed name.

Rob Huff
Project Manager

Copy Furnished:

South Carolina Department of Health
and Environmental Control
Office of Ocean and Coastal
Resource Management
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

JURISDICTIONAL DETERMINATION
U.S. Army Corps of Engineers

Revised 8/13/04

DISTRICT OFFICE: Charleston

FILE NUMBER: 84-2006-0273-3

PROJECT LOCATION INFORMATION:

State: South Carolina

County: Horry

Center coordinates of site (latitude/longitude): 78.98388/33.62059

Approximate size of area (parcel) reviewed, including uplands: 152.485 acres.

Name of nearest waterway: AIWW

Name of watershed: Waccamaw

JURISDICTIONAL DETERMINATION

Completed: Desktop determination

Site visit(s)



Date: August 3, 2006

Date(s):

Jurisdictional Determination (JD):

☒ Preliminary JD - Based on available information, ☐ there appear to be (or) ☐ there appear to be no "waters of the United States" and/or "navigable waters of the United States" on the project site. A preliminary JD is not appealable (Reference 33 CFR part 331).

☒ Approved JD - An approved JD is an appealable action (Reference 33 CFR part 331).
Check all that apply:

☒ There are "navigable waters of the United States" (as defined by 33 CFR part 329 and associated guidance) within the reviewed area. Approximate size of jurisdictional area:

☒ There are "waters of the United States" (as defined by 33 CFR part 328 and associated guidance) within the reviewed area. Approximate size of jurisdictional area:

☒ There are "isolated, non-navigable, intra-state waters or wetlands" within the reviewed area.



Decision supported by SWANCC/Migratory Bird Rule Information Sheet for Determination of No Jurisdiction.

BASIS OF JURISDICTIONAL DETERMINATION:

A. Waters defined under 33 CFR part 329 as "navigable waters of the United States":

☒ The presence of waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

B. Waters defined under 33 CFR part 328.3(a) as "waters of the United States":

☒ (1) The presence of waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

☒ (2) The presence of interstate waters including interstate wetlands¹.

☒ (3) The presence of other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce including any such waters (check all that apply):

☐ (i) which are or could be used by interstate or foreign travelers for recreational or other purposes.

☐ (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

☐ (iii) which are or could be used for industrial purposes by industries in interstate commerce.

☒ (4) Impoundments of waters otherwise defined as waters of the US.

☒ (5) The presence of a tributary to a water identified in (1) - (4) above.

☒ (6) The presence of territorial seas.

☒ (7) The presence of wetlands adjacent² to other waters of the US, except for those wetlands adjacent to other wetlands.

Deertrack Golf, Inc.
Deertrack - 0113

Rationale for the Basis of Jurisdictional Determination (applies to any boxes checked above). *If the jurisdictional water or wetland is not itself a navigable water of the United States, describe connection(s) to the downstream navigable waters. If B(1) or B(3) is used as the Basis of Jurisdiction, document navigability and/or interstate commerce connection (i.e., discuss site conditions, including why the waterbody is navigable and/or how the destruction of the waterbody could affect interstate or foreign commerce). If B(2, 4, 5 or 6) is used as the Basis of Jurisdiction, document the rationale used to make the determination. If B(7) is used as the Basis of Jurisdiction, document the rationale used to make adjacency determination:*

Lateral Extent of Jurisdiction: (Reference: 33 CFR parts 328 and 329)

☒ Ordinary High Water Mark indicated by: ☐ clear, natural line impressed on the bank ☐ the presence of litter and debris ☐ changes in the character of soil ☐ destruction of terrestrial vegetation ☐ shelving ☐ other:	☒ High Tide Line indicated by: ☐ oil or scum line along shore objects ☐ fine shell or debris deposits (foreshore) ☐ physical markings/characteristics ☐ tidal gages ☐ other:

- ☒ **Mean High Water Mark indicated by:**
☐ survey to available datum; ☐ physical markings; ☐ vegetation lines/changes in vegetation types.

- ☒ **Wetland boundaries, as shown on the attached wetland delineation map and/or in a delineation report prepared by:**

Basis For Not Asserting Jurisdiction:

- ☒ The reviewed area consists entirely of uplands.
- ☒ Unable to confirm the presence of waters in 33 CFR part 328(a)(1, 2, or 4-7).
- ☒ Headquarters declined to approve jurisdiction on the basis of 33 CFR part 328.3(a)(3).
- ☒ The Corps has made a case-specific determination that the following waters present on the site are not Waters of the United States:
- ☐ Waste treatment systems, including treatment ponds or lagoons, pursuant to 33 CFR part 328.3.
 - ☐ Artificially irrigated areas, which would revert to upland if the irrigation ceased.
 - ☐ Artificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
 - ☐ Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
 - ☐ Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States found at 33 CFR 328.3(a).
 - ☐ Isolated, intrastate wetland with no nexus to interstate commerce.
 - ☐ Prior converted cropland, as determined by the Natural Resources Conservation Service. Explain rationale:
 - ☐ Non-tidal drainage or irrigation ditches excavated on dry land. Explain rationale:
 - ☐ Other (explain):

DATA REVIEWED FOR JURISDICTIONAL DETERMINATION (mark all that apply):

- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant.
- ☒ Data sheets prepared/submitted by or on behalf of the applicant.
- ☐ This office concurs with the delineation report, dated _____, prepared by (company): _____
- ☐ This office does not concur with the delineation report, dated _____, prepared by (company): _____
- ☒ Data sheets prepared by the Corps.
- ☒ Corps' navigable waters' studies:
- ☒ U.S. Geological Survey Hydrologic Atlas:
- ☒ U.S. Geological Survey 7.5 Minute Topographic maps:
- ☒ U.S. Geological Survey 7.5 Minute Historic quadrangles: Surfside Beach
- ☒ U.S. Geological Survey 15 Minute Historic quadrangles:
- ☒ USDA Natural Resources Conservation Service Soil Survey: 90
- ☒ National wetlands inventory maps:
- ☒ State/Local wetland inventory maps:
- ☒ FEMA/FIRM maps (Map Name & Date): _____
- ☒ 100-year Floodplain Elevation is: _____ (NGVD)
- ☒ Aerial Photographs (Name & Date): 94:7440-138/ 11222:122
- ☒ Other photographs (Date): _____
- ☒ Advanced Identification Wetland maps:
- ☒ Site visit/determination conducted on: _____
- ☒ Applicable/supporting case law: _____
- ☒ Other information (please specify): _____

Signature: Project Manager _____ Rob Huff



¹Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology).

²The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.

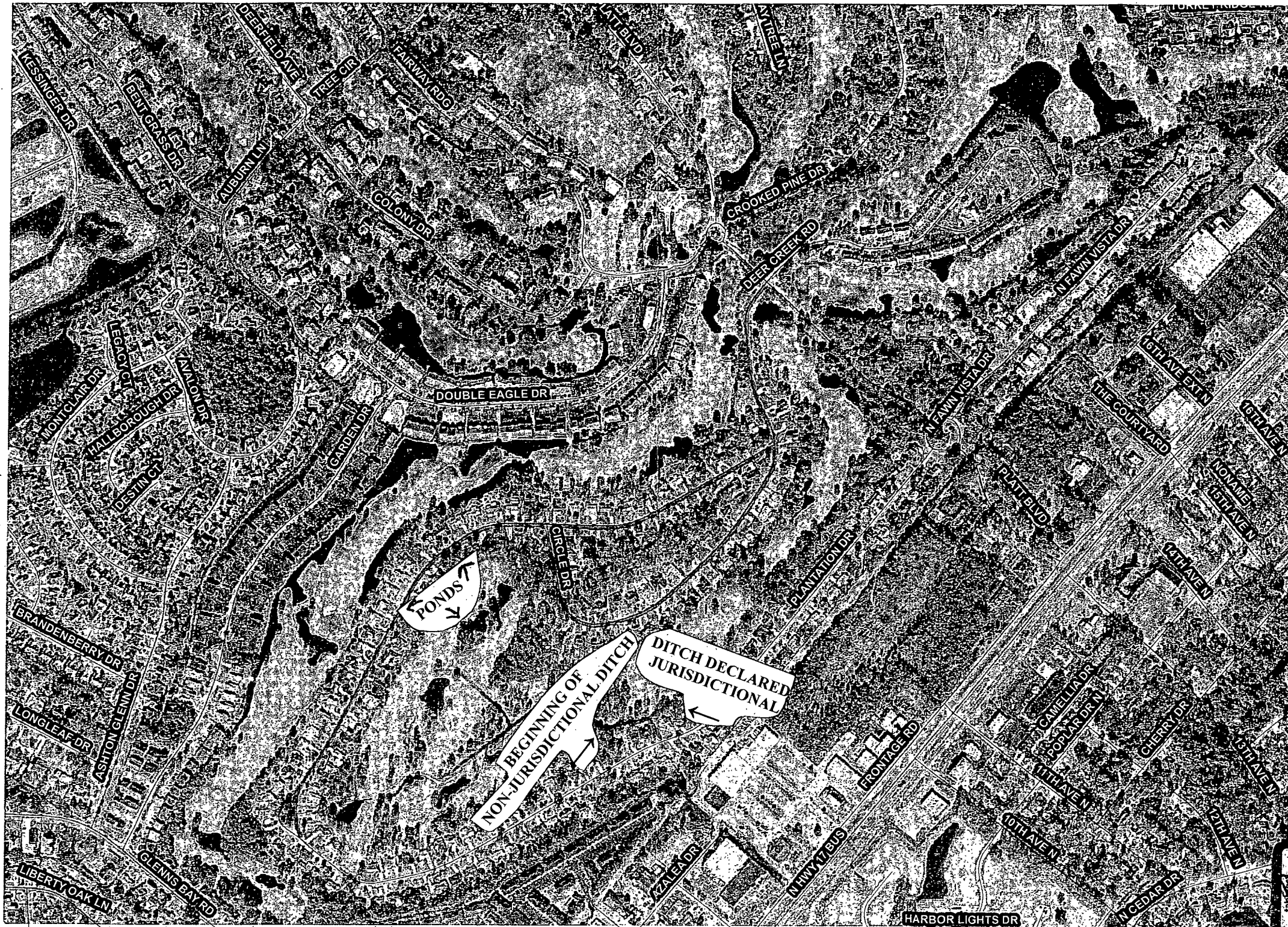


EXHIBIT
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tabbles

EXHIBIT
Post Dec 1960
#9

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 02 2010
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

DOCKET NO. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

v.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc. and Bill Clark Homes of Myrtle Beach, LLC Respondents.

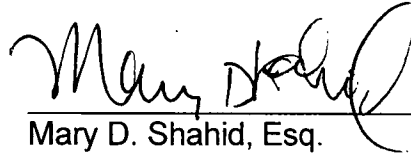
PROOF OF SERVICE

The undersigned hereby certifies that on the 1st day of June, 2010, that she served **RESPONDENT DEERTRACK GOLF, INC.'S REPLY TO RESPONDENT DHEC'S RETURN TO MOTION TO REMAND** via U.S. Mail, postage pre-paid, on the following parties and counsel of record as listed below:

James S. Chandler, Jr., Esq.
Amy E. Armstrong, Esq.
SC Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Davis A. Whitfield-Cargile, Esq.
SCDHEC
1362 McMillan Ave., Suite 400
Charleston, SC 29405

Stanley E. Barnett, Esq.
Smith, Bundy, Bybee & Barnett, P.A.
Post Office Box 1542
Mt. Pleasant, SC 29465-1542

A handwritten signature in black ink, appearing to read "Mary D. Shahid", written over a horizontal line.

Mary D. Shahid, Esq.
McNair Law Firm, P. A.
Attorney for Appellant

Mary D. Shahid

mshahid@mcnair.net

T (843) 723-7831

F (843) 722-3227

June 1, 2010

RECEIVED

JUN 02 2010

SC Court of Appeals

Honorable Tanya Gee
Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number: 2009-135686

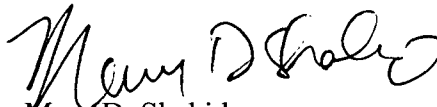
Dear Ms. Gee:

I am requesting leave to file on behalf of Respondent Deertrack Golf, Inc., a Reply to DHEC's Return to Motion to Remand. I am enclosing my firm's check in the amount of \$25.00 associated with this request.

In that regard, please find enclosed the original and six (6) copies of the Respondent Deertrack Golf, Inc.'s Reply to Respondent DHEC's Return to Motion to Remand in the above-captioned appeal.

By copy of this letter and by Proof of Service appended to the Reply, we are serving all parties of record in this matter.

Sincerely,



Mary D. Shahid

MDS:rgm
Enclosure

cc: James S. Chandler, Jr., Esq.
Amy E. Armstrong, Esq.
Davis Whitfield-Cargile, Esq.
Stanley E. Barnett, Esq.
Deertrack Golf, Inc.

McNair Law Firm, P. A.
100 Calhoun Street, Suite 400
Charleston, SC 29401

Mailing Address
Post Office Box 1431
Charleston, SC 29402

mcnair.net

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT **RECEIVED**

Honorable John D. McLeod, Administrative Law Judge MAY 26 2010

SC Court of Appeals

DOCKET NO. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

v.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc. and Bill Clark Homes of Myrtle Beach, LLC Respondents.

**RESPONDENT DEERTRACK GOLF, INC.'S RETURN TO APPELLANT'S
MOTION TO REMAND**

Respondent, Deertrack Golf, Inc., objects to remand of this appeal for the purposes and reasons stated by Appellant. Appellant requests remand as a result of recent findings and conclusions of the U.S. Army Corps of Engineers ("the Corps") regarding whether there are federally jurisdictional waters or wetlands on the Respondent's property known as the South Golf Course ("South Course"). This Court should note as a preliminary matter that Respondent South Carolina Department of Health and Environmental Control ("SCDHEC") was, during its review of the permit that is the subject of the contested case below and this appeal, knowledgeable of the existence of water features on the South Course. The South Course includes multiple irrigation and drainage ponds, along with drainage

ditches, all of which are visible upon site inspection and are depicted on pre-development surveys prepared in support of the permit application. The only new information is that where previously the Corps did not assert jurisdiction over these water features, now the Corps has determined that 920.07 linear feet of drainage ditch (37/100th of an acre) are federally jurisdictional waters of the United States.

BACKGROUND

On or around 2005 Respondent closed the South Course for play and offered the property for sale with the expectation that the property could be redeveloped. The South Course is located in the Town of Surfside Beach, Horry County, S. C. The South Course is located within the existing residential development known as Deerfield Plantation.

On December 23, 2005, Respondent entered into a contract to sell the South Course to a home builder, Bill Clark Homes of Myrtle Beach, LLC ("BCH"). As a prerequisite to redevelopment, BCH obtained a Jurisdictional Determination ("JD") from the Corps for the South Course and on August 3, 2006, the Corps issued its JD finding that there were no federally jurisdictional wetlands or waters on the entire South Course. BCH designed Phase I of a residential subdivision on 84.96 acres of the South Course¹ and obtained preliminary plat approval from Horry County Planning Commission for this redevelopment. BCH and Respondent then sought the necessary State permits for development, including the Stormwater Management and Land Disturbance permit that is the subject of the contested case before the Administrative Law Court ("ALC") and this appeal.

¹ The South Course consists of 152.485 acres. The BCH development plan is for Phase I and encompasses 84.96 acres.

Appellant initiated a citizen's suit under the Clean Water Act that prompted the Corps to revisit its earlier JD. On March 17, 2010, the Corps issued a new JD in which it concluded that the South Course contained .37 acres of "waters of the United States." Consequently 37/100th acre, of an 84.96 acre site, is now under federal jurisdiction but the remaining 84.59 acres retains the same status it had prior to the new JD. One and one tenth acres (1.1) constitute 1% of the acreage on this site, so .37 acres is only 1/3rd of 1% of the buildable acreage on this site. This mathematical analysis is only important for this Court to understand the scope of this change. Previously Respondent owned 84.96 acres free and clear of federal jurisdiction. Now Respondent owns 84.59 acres free and clear of federal jurisdiction, and must seek a federal permit if it intends to utilize the .37 acres that are impacted by the new JD.

ARGUMENTS IN OPPOSITION TO REMAND

1. Remand is entirely inappropriate in this instance because of the negligible percentage of buildable and developable land that is impacted by the Corps' new JD. The Corps' assertion of jurisdiction over 37/100th of an acre is irrelevant for purposes of this Court's review of the ALC's Final Order and Decision. The matters at issue before the ALC are listed as issues 1-13 on pages 3-4 of the ALC's Final Order and Decision. Many of the issues raised by Appellant related to whether there are wetlands on the South Course. The new JD has resolved that issue – there are no wetlands, only .37 acres of a Relatively Permanent Water ("RPW") with a connection to a Traditional Navigable Water ("TNW").

The new JD has no impact on the relief provided by the ALC, not just because of the limited scope of the new JD, but also because the Corps' determination to assert jurisdiction over a small section of an existing drainage feature does not change the analysis of issues 1-13 in the ALC's Order. Note that the issues are framed by the ALC as whether there were waters on site with connections to navigable waters (issue 2) or whether the permit application was erroneous (issue 3). At the time the matter was heard and decided by the ALC, the August 3, 2006, JD was valid and the parties and the Court were entitled to rely on the findings of the Corps set forth in the August 3, 2006, JD. In fact no party, other than the Corps of Engineers, can speak to the extent of and existence of waters of the United States. The Corps, not the parties to this appeal, make the determination of whether there are jurisdictional connections or wetlands on the South Course. These issues represent only 2 of the 13 issues raised and reviewed by the ALC. And, for the reasons set forth below, Respondent can moot these issues by either seeking authorization to fill and eliminate the jurisdictional ditches or by simply avoiding and staying out of the ditches.

Given the multiple issues resolved by the ALC that are not connected to the question of federal jurisdiction over the site, the limited scope of federal jurisdiction, and the fact that the new assertion of jurisdiction does not render the earlier findings inaccurate or incorrect since those findings were based on a valid JD, remand is not necessary nor is it equitable to Respondent who is entitled to finality on the 13 issues reviewed by the ALC.

2. Importantly, the 37/100th of an acre is located within an existing drainage ditch. The Corps of Engineers found no wetlands on site. The Corps found no Traditional Navigable Waters on site. Instead, the Corps found that sections of the existing drainage ditches are Relatively Permanent Waters. A RPW with evidence of a perennial flow regime and a connection to the Atlantic Ocean is federally jurisdictional under *Rapanos v. U. S.* 126 S. Ct. 2008 (2006). This drainage ditch can be filled and eliminated in accordance with the Corps' Nationwide Permit 29 which allows up to 1/2 an acre of fill in waters of the United States and wetlands in furtherance of residential development. Respondent SCDHEC has already imposed conditions on Nationwide Permit 29 and SCDHEC's review is limited to insure that the request for permit coverage under Nationwide Permit 29 is consistent with these conditions. These conditions do not operate to prevent Respondent Deertrack Golf, Inc. ("Deertrack") from implementing Nationwide Permit 29 and eliminating the .37 acres of RPW on site.

3. Alternatively, Respondent can avoid these areas. Since these areas constitute 1/3rd of 1% of Respondent's buildable areas, Respondent can build less than what was authorized by Horry County Planning Commission and by Respondent SCDHEC. Avoiding these RPW's simply results in Respondent abandoning approximately 5 residential lots in a 272 lot subdivision.

4. Finally, remand is not appropriate when the party seeking remand in this forum is claiming in another forum that the Corps' JD of March 17, 2010, is "arbitrary and capricious, contrary to law, a clear error of judgment and a violation of the APA." Respondent attaches the Amended Complaint filed by Appellant in the

Clean Water Act citizen's suit, in which Appellant disagrees with the Corps' March 17, 2010 JD. (Attached hereto as Exhibit "A".) Appellant cannot, in one forum, seek a remand to the ALC for consideration of the Corps' new JD and, in another forum file a Complaint seeking to have the new JD declared invalid.

CONCLUSION

This appeal is one of four actions in which Appellant has sued Respondent over Respondent's rights to sell and/or redevelop the South Course. Appellant has two civil actions pending in the Court of Common Pleas of Horry County. *Deerfield Plantation Phase 2 B POA v. Horry County Planning Commission and Deertrack Golf, Inc.*, 2008-CP-26-7692, is a pending challenge to the Planning Commission's approval along with a request for declaratory judgment regarding Respondent's rights to redevelop the South Course. *Blaine Liljenquist individually, and on behalf of a class of all others similarly situated v. Deertrack Golf, Inc.*, (Class Action - South Course) 2006-CP-26-818 is pending class action and all property owners in Deerfield Plantation, including those who comprise Deerfield Plantation Phase 2 B are members of the class. The class challenges Respondent's rights to redevelop the South Course. *Deerfield Plantation Phase II-B POA, Inc. v. U. S. Army Corps of Engineers et al.* No.: 4:09-cv-01023-RBH is the Clean Water Act citizen's suit referenced herein where Appellant seeks review by the Federal District Court of the new JD.

These four separate legal actions illustrate a campaign and strategy implemented by Appellant to delay the proposed redevelopment of the South Course by challenging it through every available legal avenue, regardless of

whether the challenge has merit. This Motion to Remand is yet another example of this strategy. Appellant cannot possibly believe that the Corps' assertion of federal jurisdiction over .37 acres of an existing drainage ditch is material to Respondent's ability to redevelop the South Course. But, in demanding reconsideration by the Corps, in challenging the Corps' new JD in federal court, and insisting here and in State Court that the new JD is cause for remand², Appellant, who has already brought this project to a standstill, can now do even better than that and throw it into reverse with agencies conducting multiple review of matters that should have been made final four years ago!

Respondent has a right to expeditious resolution of the matters raised on appeal. These matters are unaffected by the new JD. The new JD is uncertain at this time based on Appellant's aggressive attack in federal court. If the JD changes in scope, then Respondent will respond accordingly with whatever necessary modifications are needed to make the project work. These modifications will trigger new review and public notice requirements and Appellant can participate at that time. But it is premature and unnecessary at this time to subject Respondent to the delay and uncertainty occasioned by a remand.

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² Appellant filed an identical Motion recently in *Deerfield Plantation Phase 2 B POA v. Horry County Planning Commission and Deertrack Golf, Inc.*, 2008-CP-26-7692, claiming that the development approval must be remanded back to the Planning Commission. Horry County staff advised Appellant and the Court that the scope of the Corps' new decision did not warrant or necessitate a remand.

Respectfully submitted,

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Deertrack Golf, Inc.

May 24, 2010
Charleston, South Carolina

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

DEERFIELD PLANTATION PHASE II-B
PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, CHARLESTON DISTRICT; LT.
GENERAL ROBERT L. VAN ANTWERP, in his
official capacity as Chief of Engineers, U.S. Army
Corps of Engineers; LT. COLONEL TREY
JORDAN, in his official capacity as District
Engineer, U.S. Army Corps of Engineers,
Charleston District; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
LISA P. JACKSON, in her official capacity as
Administrator of the U.S. Environmental
Protection Agency; A. STANLEY MEIBURG, in
his official capacity as Acting Regional
Administrator, Region IV, U.S. Environmental
Protection Agency; and DEERTRACK GOLF,
INC.,

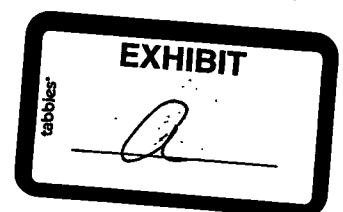
Defendants.

No. 4:09-cv-01023-RBH

**AMENDED
COMPLAINT**

INTRODUCTION

1. This action arises out of the failure of the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA") to regulate waters of the United States, including wetlands having a direct surface connection to the Atlantic Ocean, a navigable water of the United States, and situate upon property known as the Deerfield South Golf Course in the Surfside Beach area of Horry County, South Carolina, and owned by Deertrack Golf, Inc.



(“Deertrack”). This action was filed initially against Defendants Corps and EPA for improperly determining that the waters and wetlands upon the Deertrack property are not subject to federal jurisdiction under the Federal Water Pollution Control Act, as amended (commonly referred to as the “Clean Water Act” or “CWA”), 33 U.S.C. § 1251, *et seq.* (2009) in connection with a proposal by Defendant Deertrack to fill, alter and otherwise destroy portions of the waters and wetlands on the Deertrack property for purposes of development. Following the commencement of this action, this Court issued its Order on Joint Motion for Voluntary Remand on August 21, 2009, remanding the case to the Corps for reconsideration of its Clean Water Act jurisdictional determination and staying further litigation and proceedings in this case pending completion of the reconsideration process. The Corps issued its new jurisdictional determination on March 17, 2010. In anticipation of the new jurisdictional determination, this Court issued its Order Governing Further Proceedings on March 12, 2010, setting forth a schedule for further proceedings in this case, including a deadline for filing an amended Complaint.

Through this Amended Complaint, Plaintiff seeks a declaratory judgment that the Corps’ March 17, 2010, jurisdictional determination is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the applicable law, and therefore unlawful and invalid, and that while the new jurisdictional determination covers a small portion of the “waters of the United States” on the subject property, there are additional waters and wetlands on the property that are “waters of the United States” requiring CWA protection. Plaintiff also seeks relief enjoining Deertrack from discharging any dredged or fill material into the Deertrack waters and wetlands without a permit under the CWA, including a water quality certification pursuant to Section 401 of the CWA.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to the Clean Water Act Section 505(a)(2), 33 U.S.C. § 1365(a)(2), because it is alleged that the Corps and EPA have failed to perform specific non-discretionary duties under the CWA. The Court has further jurisdiction and authority to review this case pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361, 28 U.S.C. § 2201 and 2202 (declaratory judgment), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

3. The violations of law alleged herein have occurred within the District of South Carolina. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, 5 U.S.C. § 703, and Local Rule 3.01(A)(1).

PARTIES AND STANDING

Plaintiff

4. Plaintiff Deerfield Plantation Phase II-B Property Owners Association, Inc., is a nonprofit membership organization whose members consist of the owners of property within the development known as Phase II-B of Deerfield Plantation. Deerfield Plantation Phase II-B Property Owners Association owns roads and other common areas within this development and brings this action on behalf of itself and its members. Deerfield Plantation Phase IIB was developed in a common scheme of development with the Deertrack golf course property, and the homes in the subdivision are surrounded by and directly border upon the golf course property and the waters and wetlands contained therein. Drainage from the development known as Phase II-B enters the waters and wetlands at issue in this case.

5. Members of the Deerfield Plantation Phase II-B Property Owners Association use and enjoy the waters, wetlands, birds and other natural resources of the Deertrack golf course which will be degraded and/or destroyed if the project is allowed to proceed as planned.

6. The project as proposed would include the filling and destruction of waters and wetlands of the United States within properties immediately surrounding the Deerfield Plantation Phase II-B Property Owners Association. The Plaintiff has a substantial interest in this case for a number of reasons. As an initial matter, the failure to apply Clean Water Act protections for the waters and wetlands at issue in this case would result in the elimination or degradation of the Deertrack waters and wetlands and all of the benefits and services they provide in the watershed. Destroying the Deertrack waters and wetlands would eliminate suitable habitat for birds, reptiles, fish, and other wildlife and likely result in the discharge of sediment and other pollutants associated with storm water, including nutrients, thereby degrading waters downstream, including Lake Elizabeth, Lake Dogwood, and the Atlantic Ocean. The loss of the Deertrack waters and wetlands would injure Plaintiff and its members, all of whom live or own property in the immediate vicinity of the waters and wetlands at issue in this case.

7. Defendants' actions have caused Plaintiff and its members ongoing and threatened injury to concrete, particularized interests, including injury to Plaintiff's procedural rights, and the relief requested of this Court would redress that injury. Further, this controversy is ripe for adjudication and Plaintiff's injuries fall within the zones of interest protected by the CWA and the APA.

Defendants

8. Defendant the Corps is an agency of the federal government that has the duties of

making jurisdictional determinations and evaluating applications for Department of the Army permits under Section 404 of the CWA, ensuring that the requirements of Section 404 are fulfilled. The Charleston District of the Corps is responsible for implementing the CWA in South Carolina and is headquartered in Charleston, South Carolina.

9. Defendant Lieutenant General Robert L. Van Antwerp is Chief of Engineers and Commanding General of the Corps. As such, he is the official responsible for actions taken by the Corps and is sued in his official capacity.

10. Defendant Trey Jordan is the Commander and District Engineer for the Charleston District of the U.S. Army Corps of Engineers, and is sued in his official capacity. He supervises and manages all Charleston District decisions and actions.

11. Defendant EPA is charged with the administration of the CWA. EPA has an oversight role over Corps decisions made under Section 404 of the CWA and ultimate responsibility for all decisions made under Section 404 of the CWA relating to jurisdiction and permitting. See, e.g., 33 U.S.C. § 1344(c).

12. Defendant, Lisa P. Jackson, is the Administrator of the EPA and is sued in her official capacity. Pursuant to the CWA and the regulations promulgated thereunder, Administrator Jackson is charged with the supervision and management of all EPA decisions and actions, including the administration of the CWA.

13. Defendant A. Stanley Meiburg is the Acting Regional Administrator of Region IV of the U.S. EPA, which is based in Atlanta, Georgia and is the region encompassing the state of South Carolina. He is sued in his official capacity.

14. Defendant Deertrack Golf, Inc., is a corporation organized under the laws of the state

of South Carolina. Deertrack Golf, Inc. has substantial operations in the District of South Carolina, including the golf course and proposed new development thereon that would destroy or degrade the waters and wetlands of the United States that are the subject of this action.

Deertrack Golf, Inc., has filed state and local applications for permits for development; these applications indicate that Deertrack Golf, Inc., is planning to discharge dredged and/or fill material to the subject wetlands and waters without a permit under the CWA.

REGULATORY AND STATUTORY BACKGROUND

Clean Water Act

15. In 1972, Congress passed the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, Section 301 of the CWA, *Id.* § 1311(a), prohibits “the discharge of any pollutant” into “navigable waters,” defined broadly as “waters of the United States,” *Id.* § 1362(7), except in accordance with water quality standards promulgated and permits issued under other sections of the CWA. “Pollutants” include dredged spoil, rock, and sand, among other materials. *Id.* § 1362(6).

16. Section 404 of the CWA, *Id.* § 1344, authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into “navigable waters,” including wetlands, when certain conditions are met. The Section 404 permitting program is administered by the Corps, with oversight from the EPA. Unless exempted by Section 404(f)(1) of the CWA under circumstances not relevant to this action, all discharges of dredged or fill material into waters of the United States, including wetlands, are prohibited unless authorized under a Section 404 permit issued by the Corps.

17. The CWA empowers states to certify that any federally-permitted activity will be

consistent with state water quality laws and regulations. This certification procedure, established in Section 401 of the CWA, 33 U.S.C. § 1341(a)-(b), directs states to review applications for federal permits to ensure proposed discharges do not violate limitations and standards imposed under the CWA and state law. Pursuant to section 401 of the CWA, and following a procedure set forth in state regulations, South Carolina reviews proposed federal Section 404 permits to certify that the permits comply with state water quality standards and other state requirements. See 25A S.C. Code Ann. Regs. 61-101 (Supp. 2001).

18. In order to give the CWA the broadest possible scope, Congress defined navigable waters to include all “waters of the United States, including the territorial seas.” *Id.* § 1362(7). The Senate’s Conference Report made in connection with passage of the Act in 1972 explained that the “waters of the United States” definition was intended to “be given the broadest possible constitutional interpretation.” S. Conf. Rep. No. 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327.

19. The term “waters of the United States” includes wetlands. 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(a). Wetlands are defined as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” 33 C.F.R. § 328.3(b). The Corps and the EPA use the 1987 Corps of Engineers Wetlands Delineation Manual to define wetlands for purposes of the Clean Water Act Section 404 permitting program. According to the 1987 Wetlands Delineation Manual, there are three key parameters that must be present in order for an area to qualify as a wetland. These indicators include hydrophitic

vegetation, hydric soil, and wetland hydrology. 1987 Wetlands Delineation Manual, Part II at ¶ 26.

20. The scope of Clean Water Act jurisdiction is broad and applies to “virtually all bodies of water.” International Paper v. Ouellette, 474 U.S. 481, 492 (1987). Wetlands that affect, either individually or in the aggregate, the chemical, physical, and biological integrity of traditionally navigable waters, such as the Atlantic Ocean and its tributaries, have a “significant nexus” to traditionally navigable waters and are “waters of the United States.” Rapanos, 547 U.S. at 2248 (Kennedy, J., concurring). Flood water retention, pollutant filtration, hydrological connection, and habitat provision are among the ecological functions that can establish a “significant nexus” between wetlands and downstream navigable waters. Additionally, *inter alia*, wetlands are “waters of the United States” where they have a “continuous surface connection” to “relatively permanent” waters connected to traditionally navigable waters. Id. at 2213 (Scalia, J.). Relatively permanent waters do not exclude “seasonal” waters. Id. at 2221, n.5.

21. After the Supreme Court issued its decision in Solid Waste of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), the U.S. Court of Appeals for the Fourth Circuit ruled that wetlands with a hydrological connection to traditionally navigable waters are “waters of the United States” for purposes of the CWA. See Treacy v. Newdunn Assocs., 344 F.3d 407, 410, 415 (4th Cir. 2003); United States v. Deaton, 332 F.3d 698, 708 (4th Cir. 2003).

22. Section 404 of the CWA places a non-discretionary duty on the Corps to regulate the dredging and filling of “waters of the United States.” 33 U.S.C. § 1344. To fulfill this duty, the

Corps must make reasoned wetland determinations, including properly asserting jurisdiction over waters of the United States. National Wildlife Federation v. Hanson, 859 F.2d 313, 315 (4th Cir. 1988) (citing Riverside Bayview Homes v. U.S. Army Corps of Engineers, 474 U.S. 121, 138-139 (1985)).

23. EPA has oversight responsibility for the protection of wetlands. The Corps acts as EPA's agent, pursuant to a Memorandum of Understanding, when it renders wetland and other jurisdictional determinations. EPA has the authority to block or override permit decisions made by the Corps. See 33 U.S.C. § 1344(c).

Administrative Procedure Act

24. The Administrative Procedure Act, 5 U.S.C. §§ 701-06, provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

25. The Corps and EPA are federal agencies subject to the APA. In 2006, when the Corps initially determined that the Deertrack Golf waters and wetlands are not waters of the United States, it performed an agency action subject to judicial review under the APA. On March 17, 2010, when the Corps issued its new jurisdictional determination, it also performed an agency action subject to judicial review under the APA.

26. The APA provides that a court shall set aside agency "findings, conclusions, and actions" that are "arbitrary, capricious, or an abuse of discretion of otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

27. The reviewing court must carefully "consider whether the decision was based on a

consideration of the relevant factors and whether there has been a clear error in judgment.”

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

FACTS

Project Setting and History

28. Deertrack Golf, Inc. proposes to develop a residential subdivision on the 84.609-acre tract of land in Horry County, South Carolina, that has served for more than 25 years as the Deerfield south golf course. The proposed project site is located between Highway 17 Business and Highway 17 Bypass, near the Town of Surfside Beach.

29. According to Deertrack Golf, Inc., the company plans to develop an area consisting of nine holes of the old 18-hole golf course into a residential development containing 278 single family housing units. Plans for the development call for the filling and alteration of virtually every square inch of the waters and wetlands on the property.

30. On behalf of Deertrack Golf, Inc., a request for wetland delineation was submitted to the Corps of Engineers in 2006. The request indicated that there are no waters or wetlands of the United States on the property. The Corps, without making a visit to the property, issued its determination that the site is all high ground, containing no waters or wetlands of the United States.

31. In 2009, the Corps began the process of reconsidering its jurisdictional determination for the Deertrack Golf property, and on March 17, 2010, the Corps issued a new jurisdictional determination through which the Corps asserted Clean Water Act jurisdiction over approximately 0.37 acres of “waters of the United States” on the Deertrack Golf property.

32. The waters and wetlands on the Deertrack Golf property have a surface connection to

the Atlantic Ocean. In addition, prior to the creation of the subject golf course, this property contained wetlands that also had a surface connection to the Atlantic Ocean, and the ponds and lakes on the property were dug in waters and wetlands of the United States.

Significant Nexus Between the Deertrack Golf Waters and Wetlands
and Other CWA Jurisdictional Waters

33. The Deertrack Golf waters and wetlands are typical of wetlands found at the head of small inlets along the coast of South Carolina. These waters and wetlands have important water quality and water quantity functions. The Deertrack Golf waters and wetlands, especially when considered in the aggregate with similarly situated wetlands in the region, likely provide a number of important and significant functions and services to downstream waters.

34. The Deertrack Golf waters and wetlands store floodwater, protecting downstream water bodies from harmful erosion and scouring of river and stream banks. As opposed to damaging downstream navigable waters in this way, the Deertrack Golf waters and wetlands capture storm water and allow it to release slowly as opposed to flowing unimpeded downstream. It is likely the Deertrack Golf waters and wetlands filter and purify storm water, thereby protecting downstream water bodies, such as Lake Elizabeth, Lake Dogwood, and the Atlantic Ocean, from increased turbidity, excessive nutrients, and harmful heavy metals. Thus, if the Deertrack waters and wetlands are destroyed or degraded, it is likely that downstream water quality would be degraded.

35. The Deertrack Golf waters and wetlands provide habitat for numerous aquatic and semi-aquatic life and some of these species are a common source of food for larger fish that inhabit water bodies like Lake Elizabeth, Lake Dogwood and the Atlantic Ocean.

36. It is also likely that the Deertrack Golf waters and wetlands have an important role in nutrient recycling and carbon export that is vital to support downstream ecological communities.

The Corps' Decision

37. On August 3, 2006, the Charleston District of the Corps, without conducting an inspection of the Deertrack Golf property, issued its initial decision in which the Corps stated that there are no waters or wetlands subject to the CWA on the Deertrack Golf Property.

38. The Charleston District indicated on its jurisdictional determination data form that the rationale for the basis of the determination is that the Deertrack Golf site consists entirely of high ground.

39. The Corps entirely failed to consider, or even mention, the historic hydrologic connectivity with Lake Elizabeth, Lake Dogwood, and the Atlantic Ocean. The Atlantic Ocean is a navigable water of the United States.

40. There is no evidence in the record to indicate that the Corps considered readily-available information, including the surface hydrologic connectivity of the Deertrack Golf waters and wetland to navigable waters, which is plainly visible to anyone who visits the property.

41. In 2009, following the issuance of this Court's Order on Joint Motion for Voluntary Remand, the Corps began a new review of the Deertrack Golf property, and on March 17, 2010, the Corps issued a new jurisdictional determination, concluding that the property contains approximately 0.37 acres of "waters of the United States." The new jurisdictional determination is set forth in a document entitled "MEMORANDUM TO ASSERT JURISDICTION FOR SAC 2006-02612-3 (f.k.a. 84-2006-0273-3).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

**(Violation of CWA – Failure to Identify the Deertrack Golf Waters
and Wetlands as Waters of the U.S.)**

42. Plaintiffs repeat the allegations of paragraphs 1-41 as if set forth in full.

43. On August 3, 2006, the Corps issued a jurisdictional determination in which it found that the Deertrack Golf property contains no waters or wetlands of the United States, and that no part of this property is subject to the jurisdiction of the Corps under the CWA. The Corps did not make any inspection of the property prior to making its determination.

44. On March 17, 2010, the Corps issued a new jurisdictional determination in which it found that the Deertrack Golf property contains 0.37 acres of waters or wetlands of the United States but also stated that there are additional waters and wetlands lying within the Deertrack Golf property which have surface connections to waters of the United States, yet they are not subject to the jurisdiction of the Corps under the CWA.

45. The Deertrack Golf property contains far more waters and wetlands that have a historical and present hydrological connection to navigable waters and other “waters of the United States” than the 0.37 acres identified in the 2010 Corps jurisdictional determination. The Corps failed to properly consider these direct hydrological connections in determining that the Deertrack property contains only 0.37 acres of waters or wetlands of the United States.

46. The additional Deertrack Golf waters and wetlands are tributaries of a navigable water, the Atlantic Ocean. *See* 33 C.F.R. § 328.3(a)(5), (7). The Corps failed to consider this direct hydrologic connection to the Atlantic Ocean in determining that the Deertrack property

contains only 0.37 acres of waters or wetlands of the United States.

47. Both individually and in combination with similarly situated wetlands in the region, the Deertrack Golf waters and wetlands have a significant nexus with traditionally navigable waters and have an impact on the chemical, physical, and biological integrity of downstream traditionally navigable waters.

48. The Corps acted arbitrarily and capriciously, abused its discretion and otherwise acted unlawfully in setting an artificial boundary between the 0.37 acres of acknowledged waters of the United States and the additional waters and wetlands that have a direct surface connection and ecological relationship to the waters of the United States on the Deertrack Golf property and other waters of the United States, in making its jurisdictional determination.

49. Since the Deertrack Golf property contains waters and wetlands that are “waters of the United States,” the Corps has a mandatory duty to protect these waters and wetlands and to prohibit any dredge and fill activities in the waters and wetlands without a permit.

50. The Corps’ failure to assert jurisdiction over the full extent of all waters and wetlands of the United States on the Deertrack Golf property is a failure to perform the agency’s duty under Sections 301 and 404 of the CWA. 33 U.S.C. §§ 1311 and 1344.

51. By failing to assert jurisdiction over all of the Deertrack Golf waters and wetlands, the Corps and EPA deprived the South Carolina Department of Health and Environmental Control from having the opportunity to certify whether the proposed activity will be consistent with state water quality laws and regulations.

52. Because EPA has the ultimate responsibility under the CWA to implement the Section 404 permitting program, EPA’s failure to override or block the Corps’ refusal to assert

CWA jurisdiction over all of the Deertrack Golf waters and wetlands is a failure by the Administrator to perform her duties under Sections 301 and 404 of the CWA. 33 U.S.C. §§ 1311 and 1344; *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988).

SECOND CLAIM FOR RELIEF

**(Violation of APA – Failure to Identify All of the Deertrack Golf Waters
and Wetlands as Waters of the United States)**

53. Plaintiffs repeat the allegations of paragraphs 1-52 as if set forth in full.

54. The Corps' jurisdictional determination in which it found that the Deertrack Golf property contains only 0.37 acres of waters or wetlands of the United States and failed to assert CWA jurisdiction over the remaining waters of the United States at the site was a final agency action subject to review by this Court pursuant to the APA.

55. The Corps' jurisdictional determination failed to apply the express provisions of the CWA and the applicable provisions of the Corps' governing regulations, case law and guidance documents, and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that the Court grant the following relief:

1. Declare that the Corps' jurisdictional determination that the Deertrack Golf property contains only 0.37 acres of jurisdictional waters and wetlands under the CWA is arbitrary and capricious, contrary to law, a clear error of judgment and a violation of the APA;

2. Declare that all of the Deertrack Golf waters and wetlands are "waters of the United States" subject to CWA jurisdiction;

3. Declare that the Corps and EPA have failed to perform their mandatory duties under Sections 301 and 404 of the CWA to assert jurisdiction over all of the Deertrack Golf waters and wetlands;

4. Issue an injunction requiring the Corps to issue a new jurisdictional determination for the entire Deertrack Golf property consistent with this Court's rulings;

5. Issue an injunction prohibiting Deertrack Golf from discharging any dredged or fill material into any portion of the Deertrack Golf waters and wetlands unless Deertrack Golf obtains a permit under the CWA, including a water quality certification pursuant to Section 401 of the CWA;

7. Award Plaintiffs all costs and expenses of this action; and

8. Award such additional relief as to the Court appears proper.

Respectfully submitted this 5th day of May, 2010.

s/ James S. Chandler, Jr.

James S. Chandler, Jr. (ID # 91)

Amy E. Armstrong (ID # 9625)

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

Attorneys for the Plaintiff, Deerfield Plantation
Phase II-B Property Owners Association

Georgetown, South Carolina

May 5, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable John D. McLeod, Administrative Law Judge

RECEIVED

DOCKET NO. 08-ALC-07-0221-CC

MAY 26 2010

SC Court of Appeals

Deerfield Plantation Phase IIB Property Owners Association Appellant,

v.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc. and Bill Clark Homes of Myrtle Beach, LLC Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the 24th day of May, 2010, that she served **RESPONDENT DEERTRACK GOLF, INC.'S RETURN TO APPELLANT'S MOTION TO REMAND** via U.S. Mail, postage pre-paid, on the following parties and counsel of record as listed below:

James S. Chandler, Jr., Esq.
Amy E. Armstrong, Esq.
SC Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Davis A. Whitfield-Cargile, Esq.
SCDHEC
1362 McMillan Ave., Suite 400
Charleston, SC 29405

Stanley E. Barnett, Esq.
Smith, Bundy, Bybee & Barnett, P.A.
Post Office Box 1542
Mt. Pleasant, SC 29465-1542



Mary D. Shahid, Esq.
McNair Law Firm, P. A.
Attorney for Appellant

Mary D. Shahid

mshahid@mcnair.net

T (843) 723-7831

F (843) 722-3227

May 24, 2010

RECEIVED

MAY 26 2010

SC Court of Appeals

Honorable Tanya Gee
Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

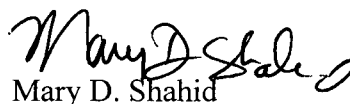
Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number: 2009-135686

Dear Ms. Gee:

Enclosed herewith for filing with the Court, please find the original and six (6) copies of the Respondent Deertrack Golf, Inc.'s Return to Appellant's Motion to Remand in the above-captioned appeal.

By copy of this letter and by Proof of Service appended to the Return, we are serving all parties of record in this matter.

Sincerely,


Mary D. Shahid

MDS:rgm
Enclosure

cc: James S. Chandler, Jr., Esq.
Amy E. Armstrong, Esq.
Davis Whitfield-Cargile, Esq.
Stanley E. Barnett, Esq.
Deertrack Golf, Inc.

McNair Law Firm, P. A.
100 Calhoun Street, Suite 400
Charleston, SC 29401

Mailing Address
Post Office Box 1431
Charleston, SC 29402

mcnair.net

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 25 2010

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

SC Court of Appeals

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association.....Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC.....Respondents.

DHEC'S RETURN TO MOTION TO REMAND

TO: THE COURT AND ALL PARTIES:

PLEASE TAKE NOTICE that the Respondent, South Carolina Department of Health and Environmental Control ("DHEC" or the "Department"); respectfully submits the following Return to the Motion to Remand filed by Appellant, Deerfield Plantation Phase IIB Property Owners Association.

The Department agrees with Appellant that, in light of the new jurisdictional determination by the U.S. Army Corps of Engineers ("Corps"), it would be appropriate for the Department to conduct additional review of the permit application in this matter. The Deposition of Shannon Hicks, Section Manager of the Stormwater and State Certification Section at the Department's Office of Ocean and Coastal Resource Management, was admitted into evidence. (Attached to Appellant's Motion to Remand as Exhibit A (hereinafter, Ex. A)). Ms. Hicks testified that when the Department conducted its review of this permit, it accepted the applicants

representation that there were no “waters of the United States,” no “waters of the state,” and no “wetlands” on the property (“waters of the United States” “waters of the state” and “wetlands” will be referred to collectively herein as “waters”). Ms. Hicks testified that if there are waters on the site, she would have to do another review. (Exhibit A, p. 15-17). Given the Corps’ new determination, it is clear that there are waters on the site. Additionally, in its new jurisdictional determination, the Corps indicated that there are other waters connected to the newly jurisdictional waters of the United States that may be waters of the state or wetlands. It is clear that there are waters on the property and the Department agrees that some form of additional review is necessary and appropriate.

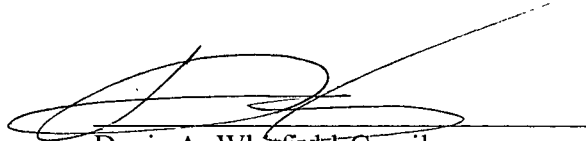
S.C. Code Reg. 61-9 § 122.62 provides for modification or revocation and reissuance of permits. Part 7 of the Construction General Permit also provides for permit modification or revocation in accordance with § 122.62, § 122.63, § 122.64, and § 124.5 of Regulation 61-9. Though it is clear that additional administrative action is necessary and appropriate, the Department has not determined which procedure would be most appropriate in order to proceed with administrative review. Ultimately, the Department’s decision as to the appropriate course of administrative procedure will likely depend on what the applicant proposes to do and the technical implications in light of the new jurisdictional determination by the Corps.

Though the Department does not necessarily agree that an Order Remanding this case is necessary to allow the Department to accomplish additional administrative action on this permit, Rule 205, SCACR¹, the Department agrees that any further administrative action by the Department with regards to this permit could have some impact on the issues that are the subject of this controversy. On the other hand, it is also possible that after conducting additional

¹ “Nothing in these Rules shall prohibit the lower court, commission, or tribunal from proceeding with matters not affected by the appeal.”

administrative review, it will be necessary to proceed with the briefing of this appeal. The Department would respectfully suggest that the decision on the Motion to Remand (and the briefing of this appeal) be stayed for a period of sixty (60) days to afford the Department, the permit applicant, and the Appellant the opportunity to discuss the best manner in which to proceed, with leave to the parties to conduct additional administrative action notwithstanding this appeal and with instructions to provide status reports to the Court. In the alternative, the Department will consent to an Order Remanding the Matter to the Administrative Law Court with instruction to Remand to the Department staff, with leave for the Department and the parties to determine the appropriate administrative action necessary and without prejudice to the Appellant's appeal of the Administrative Law Court's decision.

Respectfully submitted,



Davis A. Whitfield-Cargile
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0229

Charleston, South Carolina
May 24, 2010

Attorney for Respondent SCDHEC

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 25 2010

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALJ-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association.....Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC.....Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served all parties in the above-captioned matter with a copy of the Department's *Return to Motion for Remand* by mailing a copy of the same via U.S. First Class Mail, postage prepaid, to the following address:

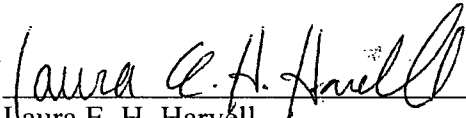
The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Mary D. Shahid, Esq.
McNair Law Firm, P.A.
Post Office Box 1431
Charleston, SC 29402

James S. Chandler, Jr., Esq.
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Post Office Box 1542
Mount Pleasant, SC 29464

May 24, 2010


Laura E. H. Harvell



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

May 24, 2010

RECEIVED
MAY 25 2010
SC Court of Appeals

VIA U.S. MAIL

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Case Tracking No.: 2009135686

Dear Ms. Gee:

Please find enclosed for filing the original and seven (7) copies of the Department's Return to Motion to Remand. I would appreciate your returning a clocked copy in the enclosed envelope. By copy of this letter, I am serving all parties of record. Thank you for your attention in this matter.

Sincerely,

Davis A. Whitfield-Cargile

cc: James S. Chandler, Jr., Esq.
Stanley E. Barnett, Esq.
Mary D. Shahid, Esq.

The South Carolina Court of Appeals

Deerfield Plantation Phase II B Property
Owners Association,

Appellant,

v.

South Carolina Department of Health and
Environmental Control and Deertrack
Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach, LLC,

Respondents

The Honorable John McLeod
Richland County
Trial Court Case No. 2008-AL-07-00221

ORDER

For good cause having been shown, the time for serving and filing the Return the Motion to
Remand in the above entitled matter is hereby extended until June 7, 2010.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY

V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

05-28-2010

cc: Amy Elizabeth Armstrong, Esquire
James S. Chandler, Jr, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

FILED

5/28/10

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 25 2010

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

MOTION TO REMAND

TO: THE COURT OF APPEALS AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, Deerfield Plantation Phase IIB Property Owners Association, hereby moves the Court of Appeals, pursuant to SCACR 240 and S.C. Code § 1-23-380(3), for an order remanding this matter to the Administrative Law Court with directions to remand to the Department of Health and Environmental Control for consideration of new and additional evidence, and to complete all required permitting and certification processes warranted as a result of a new "jurisdictional determination" made by the U.S. Army Corps of Engineers regarding the presence of "waters of the United States" on the property that is the subject of this appeal.

The basis for this motion is that the new jurisdictional determination issued by the Corps

ORIGINAL

of Engineers on March 17, 2010, dramatically changes the factual and legal analysis of the development proposed by Respondents Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC, and requires new findings of fact and agency review of these facts; furthermore, the new evidence requires state water quality review under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and S.C. Code Ann. Regs. § R.61-101, which was not part of the original permit review by DHEC and the ALC. In support of this motion, the Appellant submits the following:

Background

This case involves the appeal of a storm water permit and coastal zone consistency certification issued to Deertrack Golf, Inc., by the South Carolina Department of Health and Environmental Control (DHEC), in connection with the proposed development of a 278-lot residential subdivision on a portion of an old golf course. The DHEC decision in this case, and the decision of the Administrative Law Court, were based on a determination by the U.S. Army Corps of Engineers (Corps) that there were no “waters of the United States” on the subject property. Because the Corps initially determined that there were no “waters of the United States,” DHEC accepted the permit applicant’s representation that there were no “waters of the State” on the property. See Transcript of Deposition of Shannon Hicks, manager of the stormwater and State certification section for DHEC’s Office of Ocean and Coastal Resource Management, admitted into evidence during the contested case hearing before the Administrative Law Court, and attached hereto as Exhibit A, at pages 7, 9, and 15-18.

Based on the assumption that there were no waters or wetlands on the site, the agency did not apply all of the rules of the South Carolina Coastal Management Program that apply to state

waters and wetlands, and did not conduct a 401 water quality certification review, as required by Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. Shannon Hicks, manager of the stormwater and State certification section for DHEC's Office of Ocean and Coastal Resource Management, testified that if there are waters on the site, the analysis of the stormwater permit would change, and additional requirements might be imposed. Exhibit A, pages 15-18.

In April, 2009, while this case was pending in the Administrative Law Court, and following rulings by the ALC that precluded the presentation of evidence of the existence of "waters of the United States" on the subject property, the Appellant filed an action in the United States District Court for the District of South Carolina challenging the validity of the federal jurisdictional determination made by the Corps for this property. See Complaint, Exhibit B, attached hereto. A jurisdictional determination involves the question of whether a tract of land contains "waters of the United States" that are regulated by the Corps under the Clean Water Act. See, e.g., *Solid Waste Authority of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 62 ERC 1481, 165 L.Ed.2d 159 (2006). The Corps initially determined that the Deertrack Golf property contained no "waters of the United States." See Final Order and Decision of Administrative Law Judge McLeod, June 9, 2009, attached hereto as Exhibit C, at pages 11 (FF 24), 35 (CL 7). The Complaint in the federal action alleges that the jurisdictional determination was issued in error, and that in fact there are "waters of the United States" on the subject property. Exhibit C, pp. 12-14.

On August 21, 2009, Federal District Judge R. Bryan Harwell issued an order granting a motion to remand the jurisdictional determination to the Corps for the purpose of considering a

new jurisdictional determination. See Order on Joint Motion for Remand, August 21, 2009, attached hereto as Exhibit D.

On March 17, 2010, the Corps issued a new superseding jurisdictional determination in which it now asserts Clean Water Act jurisdiction over portions of the Deertrack Golf property that the Corps has determined to be "waters of the United States." See Corps Jurisdictional Determination, MEMORANDUM TO ASSERT JURISDICTION FOR SAC 2006-02612-3, March 17, 2010, attached hereto as Exhibit E.

The New Evidence Requires A Remand to Comply With Water Quality Regulations

The new Corps jurisdictional determination significantly alters the underlying factual situation at the project site, and triggers additional state and federal permitting and certification requirements. Under the development plans proposed by Deertrack Golf, Inc., and approved by DHEC, most of the areas that are now deemed "waters of the United States" would be filled by discharging fill material into those waters. Compare Map entitled Deertrack Golf Course Jurisdictional Determination, showing the "waters of the United States" as indicated by the 2010 Corps Determination, attached hereto as Exhibit F, to the map entitled Master Site Plan, attached hereto as Exhibit G. A portion of the designated "waters of the United States" would be excavated, which is an activity that may not require a Section 404 Clean Water Act permit. However, the excavation would have to be assessed by DHEC under the requirements of the Coastal Management Program and the water quality certification regulations, as set forth below.

The discharge of fill materials into "waters of the United States" requires a permit under Section 404 of the Clean Water Act. 33 U.S.C. § 1344. When a Section 404 permit is required, the State must review the proposed work for consistency with the State Water Quality

Certification Program required by Section 401 of the Clean Water Act, 33 U.S.C. 1341. *See, e.g., Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). The water quality certification review is conducted by DHEC's Bureau of Water, utilizing the 401 Water Quality Regulations codified as S.C. Code Regs. § R.61-101, *et seq.* Specifically, the regulations require:

2. Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained. Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

- (a) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.
- (b) Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.
- (c) permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, *et seq.*

S.C. Code Regs. § R.61-101.A.

The DHEC regulations require Deertrack Golf, Inc., to submit an application to DHEC and require the application to be put out on public notice. S.C. Code Regs. § R.61-101.C. & D. DHEC is required to prepare a written assessment of the water quality impacts of the proposed project and make conclusions about compliance with water quality standards and protection of classified uses. S.C. Code Regs. § R.61-101.F.1. The applicant must demonstrate that the project is consistent with the water quality certification regulations and DHEC must consider the following factors in making its determination:

- (a) whether the activity is water dependent and the intended purpose of the activity;

(b) whether there are feasible alternatives to the activity;

(c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

(1) impact on existing and classified water uses;

(2) physical, chemical, and biological impacts, including cumulative impacts;

(3) the effect on circulation patterns and water movement;

(4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

S.C. Code Regs. § R.61-101.F.3. Under these regulations, DHEC must consider not only the impact of the project on “waters of the United States” but also all cumulative water quality impacts of the project. *Id.*

In the case pending before this Court, because the Corps had originally concluded, erroneously, that there were no “waters of the United States” on the property, no federal 404 permit had been required. Deertrack Golf, Inc., did not submit an application, there was no public notice and DHEC did not conduct a 401 water quality certification review, did not prepare a written staff assessment and did not issue a certification that the proposed project was consistent with the 401 water quality regulations, as required by S.C. Code Regs. § R.61-101. In turn, the Administrative Law Judge did not rule on the applicability of or compliance with S.C. Code Regs. § R.61-101.

In addition, because of the erroneous Corps determination that there were no “waters of the United States” on the property, DHEC accepted the representation of the permit applicant that there were also no “waters of the State” or “wetlands” on the property. Accordingly, DHEC did not consider or apply the rules of the South Carolina Coastal Management Program

pertaining to coastal waters and wetlands in issuing a coastal zone consistency certification for the development plan. Section 48-39-80 of the South Carolina Coastal Zone Management Act requires a coastal zone consistency certification which takes into account “all lands and waters in the coastal zone.” *See Spectre, LLC v. DHEC*, 386 S.C. 357, 688 S.E.2d 844 (2010); *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988).

The new Corps jurisdictional determination is a critical factual and legal determination relating to requirements under the Clean Water Act, the state water quality certification regulations, and the Coastal Management Program. The new Corps determination dramatically changes the context of the legal analysis of the proposed development, and requires a new review process by the Corps and DHEC. Deertrack Golf, Inc., will have to apply for and obtain a Section 404 permit prior to discharging into the “waters of the United States,” as indicated in its approved plans. The Section 404 permit triggers the requirements for Section 401 water quality certification as well as a new coastal zone consistency certification by DHEC. DHEC must ensure that the project meets the standards set forth in the 401 water quality certification regulations and the Coastal Management Program. This new information which requires additional review by DHEC was not available during the contested case hearing before the Administrative Law Court. Moreover, during the contested case hearing, the Administrative Law Judge specifically excluded the presentation of evidence on the issue of whether the subject property contains “waters of the United States” and the Corps original ruling – that there were **no** waters of the United States on the property – was accepted as an established fact.

Accordingly, the new Corps’ jurisdictional determination changes the factual and legal

underpinning of the permit and certification decisions, and warrants a remand to the ALC with instructions to remand to DHEC for a new permit review including new reviews for consistency with S.C. Code Regs. § R.61-101 and consistency with the Coastal Management Program.

The New Evidence Requires That This Case Be Remanded for Factual Determinations

The new jurisdictional determination constitutes additional evidence justifying a remand of this case to the Administrative Law Court or to DHEC, pursuant to Section 1-23-380(4) of the South Carolina Administrative Procedures Act:

(3) If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

S.C. Code § 1-23-380(3). The decisions of DHEC and the Administrative Law Court – the decisions on appeal in this case – relied upon the original Corps jurisdictional determination. The new Corps jurisdictional determination shows that the original permit and certification were issued upon a flawed factual basis as to the presence of federal or state jurisdictional waters.

This matter is presently before the Court of Appeals on appeal from the Administrative Law Court. Since a reviewing court has no authority to determine factual issues, this case should be remanded to the agency for new consideration of the matter in light of the new factual situation. *Fox v. Newberry County Memorial Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995). As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence. *MRI at Belfair v. DHEC*, 379 S.C. 1, 664 S.E.2d 471 (2008) (citing *Roper Hosp. v. Bd. of S.C. DHEC*, 306 S.C. 138, 140, 410 S.E.2d

558, 559 (1991)).

A new agency review, and new factual findings in light of the new federal jurisdictional determination, are necessary to determine compliance with S.C. Code Regs. § R.61-101 and the Coastal Management Program.

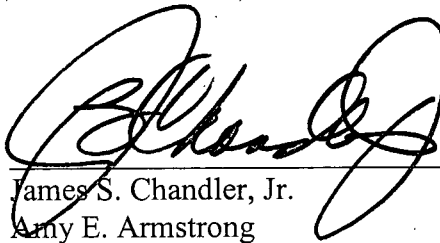
The Appellant has been informed that Deertrack Golf, Inc., may seek to modify its plans in order to avoid review for consistency with Regulation 61-101, either by eliminating fill in the “waters of the United States” or by applying for a “Nationwide Permit” – a general permit authorized under the Clean Water Act – or by bridging or avoiding impacts to the “waters of the United States.” If Deertrack Golf, Inc., intends to alter in any way the development plans which were approved by DHEC, then DHEC would need to review the new plans to ensure compliance with the Stormwater Regulations, the Coastal Management Program, and the 401 Water Quality Certification Regulations.

Under some circumstances, new evidence would warrant a remand to the Administrative Law Judge simply for the purpose of having the ALJ consider the new evidence and make any modifications to the ALJ’s ruling as the ALJ may deem appropriate. However, in this case, the new evidence triggers the requirement for a permit and certification that were not part of the original agency review: (1) a Section 404 permit under the Clean Water Act, and (2) a water quality certification under Section 401 of the Clean Water Act and DHEC Regulation 61-101. In addition, the new factual scenario triggers a new coastal zone consistency certification under S.C. Code § 48-39-80. These new requirements will require new public notices, an opportunity for public comments, and a new initial agency decision under S.C. Code § 44-1-60. Accordingly, any new plan must be reviewed initially by DHEC, not by the Administrative Law Court, and

thus the order remanding this case to the Administrative Law Court should instruct the Administrative Law Court to further remand the case to DHEC for the purpose of conducting a new initial review.

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals issue an Order Remanding this matter back to the Administrative Law Court with instructions to remand the staff decision to the Department of Health and Environmental Control for a new permit and certification review in light of new evidence regarding "waters of the United States."

Respectfully submitted,



James S. Chandler, Jr.
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
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Appellant, Deerfield Plantation
Phase IIB Property Owners Association

Georgetown, South Carolina

May 4, 2010

List of Exhibits

- A Transcript of Deposition of Shannon Hicks, manager of the stormwater and State certification section for DHEC's Office of Ocean and Coastal Resource Management
- B Complaint filed in Federal District Court, Case No. 4:09-cv-01023-RBH
- C Final Order and Decision of Administrative Law Judge McLeod, June 9, 2009
- D Order on Joint Motion for Remand, August 21, 2009
- E Corps Jurisdictional Determination, MEMORANDUM TO ASSERT JURISDICTION FOR SAC 2006-02612-3, March 17, 2010
- F Map entitled Deertrack Golf Course Jurisdictional Determination, showing the "waters of the United States" as indicated by the 2010 Corps Determination
- G Master Site Plan

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 25 2010

SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

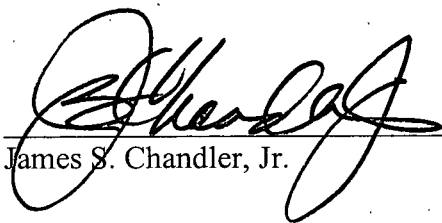
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion to Remand upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Elizabeth Applegate Dieck, Esquire
Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
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Stanley Barnett, Esquire
Smith, Bundy, Bybee & Barnett, P.C.
P.O. Box 1542
Mount Pleasant, SC 29464


James S. Chandler, Jr.

Georgetown, South Carolina

May 4, 2010

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

May 21, 2010

RECEIVED

MAY 25 2010

SC Court of Appeals

James S. Chandler, Jr.
Amy E. Armstrong

Staff Attorneys

OFFICE ADDRESS

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to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation.*

Honorable Tanya A. Gee
ATTENTION: V. Claire Allen, Deputy Clerk
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009-135686

Dear Ms. Allen:

Enclosed for filing please find a new original of our Motion
to Remand and a new Certificate of Service, along with one copy
of each. These new originals are identical to the motion that was
served on all other counsel on May 4, 2010, and the certificate of
service that was enclosed in that packet.

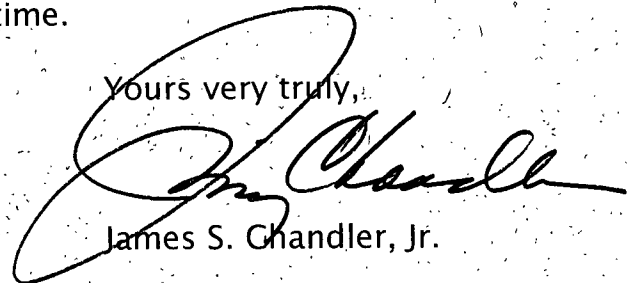
We apologize for any inconvenience caused by the failure to
provide the original in the original filing packet.

Please return clocked-in copies in the envelope provided.

Thank you very much for your kind cooperation and
assistance.

Please let me know if you have any questions or need
additional information at this time.

Yours very truly,



James S. Chandler, Jr.

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

May 14, 2010

RECEIVED

MAY 17 2010

SC Court of Appeals

VIA FACSIMILE AND U.S. MAIL

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Docket No.: 08-ALJ-07-0221-CC

Dear Ms. Gee:

I write with regard to the above-referenced appeal and the Motion to Remand filed by the Appellant on May 4, 2010. The Department's return is due May 14, 2010. I write to request a ten-day extension to respond the Appellant's Motion to Remand, making the Department's response deadline May 24, 2010. The basis for this request is the need for additional time to consider the impact of the new jurisdictional determination by the Corps as well as the Department counsel's workload, which includes matters before the Administrative Law Court, the Circuit Courts, this Court, and the Supreme Court. Please contact me if a formal motion is necessary. As of the writing of this request, I have not discerned whether any of the parties will have any objection to this request. By copy of this letter, I am notifying all parties of record of the Department's request. Thank you for your consideration in this matter.

Sincerely,

Davis A. Whitfield-Cargile

cc: James S. Chandler, Jr., Esq.
Stanley E. Barnett, Esq.
Mary D. Shahid, Esq.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Office of General Counsel

Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405 • Phone: (843) 953-0200 • Fax: (843) 953-0201 • www.scdhec.gov

The South Carolina Court of Appeals

Deerfield Plantation Phase II B
Property Owners Association,

Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Deertrack Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach,
LLC,

Respondents

The Honorable John McLeod
Richland County
Trial Court Case No. 2008-AL-07-00221

ORDER

For good cause having been shown, the time for serving and filing a Return to the Motion to Remand in the above entitled matter is hereby extended until May 24, 2010.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY

V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

05-20-2010

cc: Amy Elizabeth Armstrong, Esquire
James S. Chandler, Jr, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

FILED

5/20/10 

RECEIVED

MAY 14 2010

SC Court of Appeals

MCNAIR
ATTORNEYS

May 13, 2010

Mary D. Shahid

mshahid@mcnair.net
T (843) 723-7831
F (843) 722-3227

Via Fax & U.S. Mail

Honorable Tanya Gee
Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach,
Admin. Law Court Case No. 08-ALJ-07-0221-CC

Dear Ms. Gee:

I am writing with regard to the above-referenced appeal and the Motion to Remand filed by the Appellant on May 4, 2010, which is due May 14, 2010. Please accept this letter as a request for a ten-day extension to respond, which would move the deadline to May 24, 2010. This case has a unique procedural posture and due to time constraints, workload, and the need to consult with out-of-state clients as to the most appropriate response, this request is necessary. I have enclosed the appropriate filing fee for this request. If a more formal motion is necessary, please let me know. I am informing counsel of this request by copy of this letter.

Sincerely,


Mary D. Shahid

MDS:mds
Enclosure

cc: James S. Chandler, Jr.
Davis Whitfield-Cargile, Esq.
Stanley E. Barnett, Esq.

McNair Law Firm, P. A.
100 Calhoun Street, Suite 400
Charleston, SC 29401

Mailing Address
Post Office Box 1431
Charleston, SC 29402

mcnair.net

CHARLESTON 319981v1

ANDERSON BLUFFTON CHARLESTON CHARLOTTE COLUMBIA GREENVILLE HILTON HEAD MYRTLE BEACH PAWLEYS ISLAND

5-14-2010
5-24-2010
151



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 19, 2010

James S. Chandler, Jr, Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking #: 2009135686

Dear Mr. Chandler:

This will acknowledge receipt of your Motion for Extension of Time and your Motion to Remand in the above entitled matter.

Please be advised that the Motion to Remand that was received in this office is a copy. Please provide the original motion and original proof of service within ten days of the date of this letter or the Court cannot consider your motion.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Amy Elizabeth Armstrong, Esquire
Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

RECEIVED

MAY 05 2010

SC Court of Appeals

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

MOTION TO REMAND

TO: THE COURT OF APPEALS AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, Deerfield Plantation Phase IIB Property Owners Association, hereby moves the Court of Appeals, pursuant to SCACR 240 and S.C. Code § 1-23-380(3), for an order remanding this matter to the Administrative Law Court with directions to remand to the Department of Health and Environmental Control for consideration of new and additional evidence, and to complete all required permitting and certification processes warranted as a result of a new "jurisdictional determination" made by the U.S. Army Corps of Engineers regarding the presence of "waters of the United States" on the property that is the subject of this appeal.

The basis for this motion is that the new jurisdictional determination issued by the Corps

COPY

of Engineers on March 17, 2010, dramatically changes the factual and legal analysis of the development proposed by Respondents Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC, and requires new findings of fact and agency review of these facts; furthermore, the new evidence requires state water quality review under Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and S.C. Code Ann. Regs. § R.61-101, which was not part of the original permit review by DHEC and the ALC. In support of this motion, the Appellant submits the following:

Background

This case involves the appeal of a storm water permit and coastal zone consistency certification issued to Deertrack Golf, Inc., by the South Carolina Department of Health and Environmental Control (DHEC), in connection with the proposed development of a 278-lot residential subdivision on a portion of an old golf course. The DHEC decision in this case, and the decision of the Administrative Law Court, were based on a determination by the U.S. Army Corps of Engineers (Corps) that there were no “waters of the United States” on the subject property. Because the Corps initially determined that there were no “waters of the United States,” DHEC accepted the permit applicant’s representation that there were no “waters of the State” on the property. See Transcript of Deposition of Shannon Hicks, manager of the stormwater and State certification section for DHEC’s Office of Ocean and Coastal Resource Management, admitted into evidence during the contested case hearing before the Administrative Law Court, and attached hereto as Exhibit A, at pages 7, 9, and 15-18.

Based on the assumption that there were no waters or wetlands on the site, the agency did not apply all of the rules of the South Carolina Coastal Management Program that apply to state

waters and wetlands, and did not conduct a 401 water quality certification review, as required by Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341. Shannon Hicks, manager of the stormwater and State certification section for DHEC's Office of Ocean and Coastal Resource Management, testified that if there are waters on the site, the analysis of the stormwater permit would change, and additional requirements might be imposed. Exhibit A, pages 15-18.

In April, 2009, while this case was pending in the Administrative Law Court, and following rulings by the ALC that precluded the presentation of evidence of the existence of "waters of the United States" on the subject property, the Appellant filed an action in the United States District Court for the District of South Carolina challenging the validity of the federal jurisdictional determination made by the Corps for this property. See Complaint, Exhibit B, attached hereto. A jurisdictional determination involves the question of whether a tract of land contains "waters of the United States" that are regulated by the Corps under the Clean Water Act. See, e.g., *Solid Waste Authority of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 62 ERC 1481, 165 L.Ed.2d 159 (2006). The Corps initially determined that the Deertrack Golf property contained no "waters of the United States." See Final Order and Decision of Administrative Law Judge McLeod, June 9, 2009, attached hereto as Exhibit C, at pages 11 (FF 24), 35 (CL 7). The Complaint in the federal action alleges that the jurisdictional determination was issued in error, and that in fact there are "waters of the United States" on the subject property. Exhibit C, pp. 12-14.

On August 21, 2009, Federal District Judge R. Bryan Harwell issued an order granting a motion to remand the jurisdictional determination to the Corps for the purpose of considering a

new jurisdictional determination. See Order on Joint Motion for Remand, August 21, 2009, attached hereto as Exhibit D.

On March 17, 2010, the Corps issued a new superseding jurisdictional determination in which it now asserts Clean Water Act jurisdiction over portions of the Deertrack Golf property that the Corps has determined to be "waters of the United States." See Corps Jurisdictional Determination, MEMORANDUM TO ASSERT JURISDICTION FOR SAC 2006-02612-3, March 17, 2010, attached hereto as Exhibit E.

The New Evidence Requires A Remand to Comply With Water Quality Regulations

The new Corps jurisdictional determination significantly alters the underlying factual situation at the project site, and triggers additional state and federal permitting and certification requirements. Under the development plans proposed by Deertrack Golf, Inc., and approved by DHEC, most of the areas that are now deemed "waters of the United States" would be filled by discharging fill material into those waters. Compare Map entitled Deertrack Golf Course Jurisdictional Determination, showing the "waters of the United States" as indicated by the 2010 Corps Determination, attached hereto as Exhibit F, to the map entitled Master Site Plan, attached hereto as Exhibit G. A portion of the designated "waters of the United States" would be excavated, which is an activity that may not require a Section 404 Clean Water Act permit. However, the excavation would have to be assessed by DHEC under the requirements of the Coastal Management Program and the water quality certification regulations, as set forth below.

The discharge of fill materials into "waters of the United States" requires a permit under Section 404 of the Clean Water Act. 33 U.S.C. § 1344. When a Section 404 permit is required, the State must review the proposed work for consistency with the State Water Quality

Certification Program required by Section 401 of the Clean Water Act, 33 U.S.C. 1341. *See, e.g., Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). The water quality certification review is conducted by DHEC's Bureau of Water, utilizing the 401 Water Quality Regulations codified as S.C. Code Regs. § R.61-101, *et seq.* Specifically, the regulations require:

2. Any applicant for a Federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by Federal law to first obtain a certification from the Department. Potential applicants are encouraged to contact the Department prior to submitting an application. Federal law provides that no Federal license or permit is to be granted until such certification is obtained. Federal permits or licenses for which certification is required as determined by the Federal agency include but are not necessarily limited to:

- (a) individual or general Federal permits issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Section 1344.
- (b) Federal permits issued pursuant to Sections 9 and 10 of the Federal River and Harbor Act, 33 U.S.C. Sections 401 and 403.
- (c) permits or licenses issued by the Federal Energy Regulatory Commission, 16 U.S.C. Section 1791, *et seq.*

S.C. Code Regs. § R.61-101.A.

The DHEC regulations require Deertrack Golf, Inc., to submit an application to DHEC and require the application to be put out on public notice. S.C. Code Regs. § R.61-101.C. & D. DHEC is required to prepare a written assessment of the water quality impacts of the proposed project and make conclusions about compliance with water quality standards and protection of classified uses. S.C. Code Regs. § R.61-101.F.1. The applicant must demonstrate that the project is consistent with the water quality certification regulations and DHEC must consider the following factors in making its determination:

- (a) whether the activity is water dependent and the intended purpose of the activity;

(b) whether there are feasible alternatives to the activity;

(c) all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

(1) impact on existing and classified water uses;

(2) physical, chemical, and biological impacts, including cumulative impacts;

(3) the effect on circulation patterns and water movement;

(4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

S.C. Code Regs. § R.61-101.F.3. Under these regulations, DHEC must consider not only the impact of the project on “waters of the United States” but also all cumulative water quality impacts of the project. *Id.*

In the case pending before this Court, because the Corps had originally concluded, erroneously, that there were no “waters of the United States” on the property, no federal 404 permit had been required. Deertrack Golf, Inc., did not submit an application, there was no public notice and DHEC did not conduct a 401 water quality certification review, did not prepare a written staff assessment and did not issue a certification that the proposed project was consistent with the 401 water quality regulations, as required by S.C. Code Regs. § R.61-101. In turn, the Administrative Law Judge did not rule on the applicability of or compliance with S.C. Code Regs. § R.61-101.

In addition, because of the erroneous Corps determination that there were no “waters of the United States” on the property, DHEC accepted the representation of the permit applicant that there were also no “waters of the State” or “wetlands” on the property. Accordingly, DHEC did not consider or apply the rules of the South Carolina Coastal Management Program

pertaining to coastal waters and wetlands in issuing a coastal zone consistency certification for the development plan. Section 48-39-80 of the South Carolina Coastal Zone Management Act requires a coastal zone consistency certification which takes into account "all lands and waters in the coastal zone." *See Spectre, LLC v. DHEC*, 386 S.C. 357, 688 S.E.2d 844 (2010); *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988).

The new Corps jurisdictional determination is a critical factual and legal determination relating to requirements under the Clean Water Act, the state water quality certification regulations, and the Coastal Management Program. The new Corps determination dramatically changes the context of the legal analysis of the proposed development, and requires a new review process by the Corps and DHEC. Deertrack Golf, Inc., will have to apply for and obtain a Section 404 permit prior to discharging into the "waters of the United States," as indicated in its approved plans. The Section 404 permit triggers the requirements for Section 401 water quality certification as well as a new coastal zone consistency certification by DHEC. DHEC must ensure that the project meets the standards set forth in the 401 water quality certification regulations and the Coastal Management Program. This new information which requires additional review by DHEC was not available during the contested case hearing before the Administrative Law Court. Moreover, during the contested case hearing, the Administrative Law Judge specifically excluded the presentation of evidence on the issue of whether the subject property contains "waters of the United States" and the Corps original ruling – that there were **no** waters of the United States on the property – was accepted as an established fact.

Accordingly, the new Corps' jurisdictional determination changes the factual and legal

underpinning of the permit and certification decisions, and warrants a remand to the ALC with instructions to remand to DHEC for a new permit review including new reviews for consistency with S.C. Code Regs. § R.61-101 and consistency with the Coastal Management Program.

The New Evidence Requires That This Case Be Remanded for Factual Determinations

The new jurisdictional determination constitutes additional evidence justifying a remand of this case to the Administrative Law Court or to DHEC, pursuant to Section 1-23-380(4) of the South Carolina Administrative Procedures Act:

(3) If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

S.C. Code § 1-23-380(3). The decisions of DHEC and the Administrative Law Court – the decisions on appeal in this case – relied upon the original Corps jurisdictional determination. The new Corps jurisdictional determination shows that the original permit and certification were issued upon a flawed factual basis as to the presence of federal or state jurisdictional waters.

This matter is presently before the Court of Appeals on appeal from the Administrative Law Court. Since a reviewing court has no authority to determine factual issues, this case should be remanded to the agency for new consideration of the matter in light of the new factual situation. *Fox v. Newberry County Memorial Hosp.*, 319 S.C. 278, 461 S.E.2d 392 (1995). As to factual issues, judicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence. *MRI at Belfair v. DHEC*, 379 S.C. 1, 664 S.E.2d 471 (2008) (citing *Roper Hosp. v. Bd. of S.C. DHEC*, 306 S.C. 138, 140, 410 S.E.2d

558, 559 (1991)).

A new agency review, and new factual findings in light of the new federal jurisdictional determination, are necessary to determine compliance with S.C. Code Regs. § R.61-101 and the Coastal Management Program.

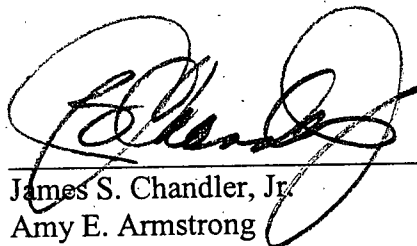
The Appellant has been informed that Deertrack Golf, Inc., may seek to modify its plans in order to avoid review for consistency with Regulation 61-101, either by eliminating fill in the "waters of the United States" or by applying for a "Nationwide Permit" – a general permit authorized under the Clean Water Act – or by bridging or avoiding impacts to the "waters of the United States." If Deertrack Golf, Inc., intends to alter in any way the development plans which were approved by DHEC, then DHEC would need to review the new plans to ensure compliance with the Stormwater Regulations, the Coastal Management Program, and the 401 Water Quality Certification Regulations.

Under some circumstances, new evidence would warrant a remand to the Administrative Law Judge simply for the purpose of having the ALJ consider the new evidence and make any modifications to the ALJ's ruling as the ALJ may deem appropriate. However, in this case, the new evidence triggers the requirement for a permit and certification that were not part of the original agency review: (1) a Section 404 permit under the Clean Water Act, and (2) a water quality certification under Section 401 of the Clean Water Act and DHEC Regulation 61-101. In addition, the new factual scenario triggers a new coastal zone consistency certification under S.C. Code § 48-39-80. These new requirements will require new public notices, an opportunity for public comments, and a new initial agency decision under S.C. Code § 44-1-60. Accordingly, any new plan must be reviewed initially by DHEC, not by the Administrative Law Court, and

thus the order remanding this case to the Administrative Law Court should instruct the Administrative Law Court to further remand the case to DHEC for the purpose of conducting a new initial review.

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals issue an Order Remanding this matter back to the Administrative Law Court with instructions to remand the staff decision to the Department of Health and Environmental Control for a new permit and certification review in light of new evidence regarding "waters of the United States."

Respectfully submitted,



James S. Chandler, Jr.

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

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Appellant, Deerfield Plantation
Phase IIB Property Owners Association

Georgetown, South Carolina

May 4, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

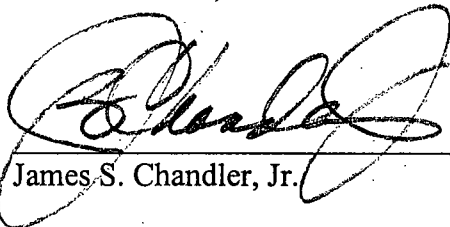
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion to Remand upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Elizabeth Applegate Dieck, Esquire
Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
Charleston, SC 29402

Stanley Barnett, Esquire
Smith, Bundy, Bybee & Barnett, P.C.
P.O. Box 1542
Mount Pleasant, SC 29464


James S. Chandler, Jr.

Georgetown, South Carolina

May 4, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

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MAY 05 2010
SC Court of Appeals

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

**MOTION FOR EXTENSION OF TIME
FOR FILING INITIAL BRIEF OF APPELLANT**

TO: THE COURT OF APPEALS AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, Deerfield Plantation Phase IIB Property Owners Association, hereby moves the Court of Appeals for an order extending the time for filing the Initial Brief of Appellant and Appellant's Designation of Matter To Be Included in the Record on Appeal in this matter, and staying the briefing in this matter pending resolution of the Motion to Remand which is being filed contemporaneously herewith.

This case involves the appeal of a contested case proceeding before the Administrative Law Court. Briefing in the case was stayed pending the issuance of a new Jurisdictional Determination by the U.S. Army Corps of Engineers. The new Jurisdictional Determination was

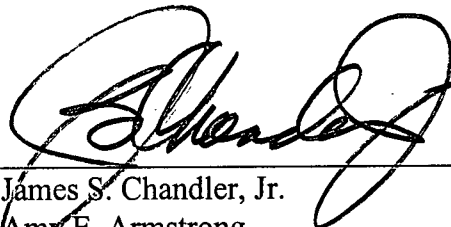
issued on March 17, 2010, and thereafter the due date for the Initial Brief of Appellant was set for May 4, 2010.

Upon careful consideration of the new Jurisdictional Determination by the U.S. Army Corps of Engineers, the Appellant believes that the new Jurisdictional Determination is a significant change in the underlying facts of this case to justify remanding this case to the Administrative Law Court and thence to the South Carolina Department of Health and Environmental Control, pursuant to S.C. Code § 1-23-380(3). Accordingly, the Appellant has filed today a Motion to Remand which is now pending before this Court. The Appellant respectfully submits that a stay of the briefing schedule is warranted to avoid unnecessary effort pending a decision on the Motion to Remand.

Counsel for the Appellant has consulted with counsel for the Respondents and has been informed that the Respondent DHEC may join in this motion, and that the other Respondents may oppose this motion.

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals issue an order staying the deadline for filing the Initial Brief of Appellant and Appellant's Designation of Matter To Be Included in the Record on Appeal until thirty (30) days after the Motion to Remand is resolved.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380

Office address: Pawleys Island, SC 29585
430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Appellant, Deerfield Plantation
Phase IIB Property Owners Association

Georgetown, South Carolina

May 4, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge
Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
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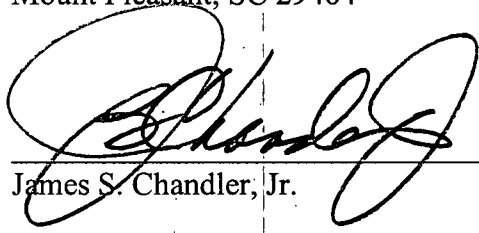
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion for Extension of Time upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Elizabeth Applegate Dieck, Esquire
Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
Charleston, SC 29402

Stanley Barnett, Esquire
Smith, Bundy, Bybee & Barnett, P.C.
P.O. Box 1542
Mount Pleasant, SC 29464



James S. Chandler, Jr.

Georgetown, South Carolina

May 4, 2010

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

May 4, 2010

James S. Chandler, Jr.
Amy E. Armstrong

Staff Attorneys

OFFICE ADDRESS

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OUR MISSION

*To protect the natural
environment of South
Carolina by providing
legal services and advice
to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation.*

Honorable Tanya A. Gee
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RECEIVED

MAY 05 2010

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009-135686

Dear Ms. Gee:

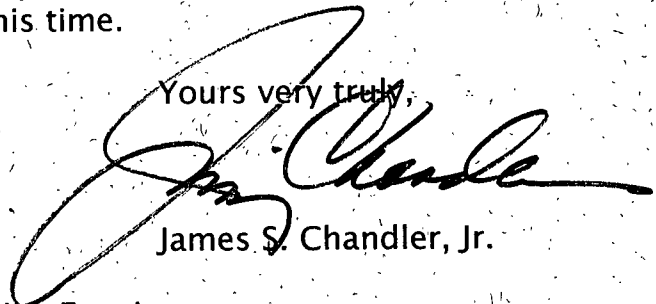
Enclosed for filing please find the original and six copies of each of the following motions: (1) Motion to Remand, and (2) Motion for Extension of Time for Filing the Initial Brief of Appellant. I also enclose my certificates of service and a check for the filing fees.

Please return clocked-in copies in the envelope provided.

Thank you very much for your kind cooperation and assistance.

Please let me know if you have any questions or need additional information at this time.

Yours very truly,



James S. Chandler, Jr.

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
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March 31, 2010

Carlisle Roberts, Jr., Esquire
Davis A. Whitfield-Cargile, Esquire
Office of General Counsel
1362 McMillan Avenue, Ste 400
Charleston, SC 29405

Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Counsel:

We are in receipt of your request to be substituted as the Department's counsel.

Be advised, the record now reflect that Carlisle Roberts, Jr., Esquire and Davis A. Whitfield-Cargile are the counsel of record for the South Carolina Department of Health and Environmental Control.

Very truly yours,

V. Claire Allen, Deputy Clerk
CLERK

TAG/pd

cc: Amy Elizabeth Armstrong, Esquire
James S. Chandler, Jr, Esquire
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



C. Earl Hunter, Commissioner
Promoting and protecting the health of the public and the environment

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MAR 30 2010
SC Court of Appeals

March 29, 2010

VIA U.S. MAIL

The Honorable Tanya A. Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Ms. Gee:

I write to respectfully request that Carlisle Roberts, Jr., Esq and I be substituted as the Department's counsel in the above-referenced matter. If a formal Motion of Substitution is necessary, please do not hesitate to contact me and one will be filed as soon as possible. I appreciate your consideration of this request.

Sincerely,

Davis A. Whitfield-Cargile

DWC/lehh

cc: Carlisle Roberts, Jr., Esq.
James S. Chandler, Jr., Esq.
Mary D. Shahid, Esq.
Stanley E. Barnett, Esq.

The South Carolina Court of Appeals

Deerfield Plantation Phase II B Property
Owners Association,

Appellant,

v.

South Carolina Department of Health and
Environmental Control and Deertrack
Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach, LLC,

Respondents

The Honorable John McLeod
Richland County
Trial Court Case No. 2008-AL-07-00221

ORDER

After review of Appellant's correspondence dated March 26, 2010, the times for perfecting this appeal are no longer held in abeyance. The Appellant's Initial Brief and Designation of Matter should be served and filed no later than May 04, 2010.

IT IS SO ORDERED.

V. Claire Allen, Deputy Clerk
CLERK

Columbia, South Carolina

3/30/2010

cc: Amy Elizabeth Armstrong, Esquire
James S. Chandler, Jr, Esquire
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

March 26, 2010

James S. Chandler, Jr.
Amy E. Armstrong

Staff Attorneys

Honorable Tanya A. Gee
Clerk, S. C. Court of Appeals
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RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009-135686

Dear Ms. Gee:

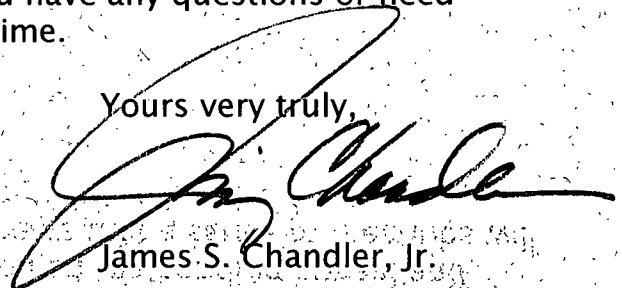
I am writing to provide an update on this case, which was
stayed pending the issuance of a new "waters of the United
States" jurisdictional determination by the U.S. Army Corps of
Engineers.

The new Corps' jurisdictional determination was issued on
March 17, 2009. Since then, the parties have been assessing the
impact of this new determination on the pending appeal and
associated controversies. It appears that a series of meetings will
occur next week as we work through the issues.

I have talked to counsel for all parties, and I propose that
the due date for the initial brief of appellant be set for May 4,
2009. This date is 30 days from the end of next week, to give us
a little more time to assess the impacts of the new jurisdictional
determination. All counsel are in agreement with this proposed
due date for this brief.

Please let me know if you have any questions or need
additional information at this time.

Yours very truly,



James S. Chandler, Jr.

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

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MAR 29 2010

SC Court of Appeals



The South Carolina Court of Appeals

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March 22, 2010

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

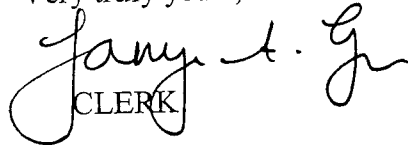
Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Ms. Armstrong:

According to your correspondence dated March 11, 2010, "The Corps of Engineers will provide its jurisdictional determination and decision documents to all parties on March 17, 2010."

Please provide a written update regarding the status of this matter within ten (10) days from the date of this correspondence.

Very truly yours,


CLERK

TAG/pd

cc: James S. Chandler, Jr, Esquire
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project

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March 11, 2010

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Amy E. Armstrong

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Honorable Tanya A. Gee
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MAR 15 2010

SC Court of Appeals

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009-135686

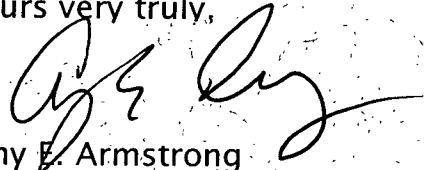
Dear Tanya:

I am writing to provide an update on this case, which was stayed pending the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers.

On March 8, 2010, the parties received notice that the U.S. Army Corps of Engineers has completed its reconsideration process and made a new jurisdictional determination. The Corps of Engineers will provide its jurisdictional determination and decision documents to all parties on March 17, 2010.

Please let me know if you have any questions or need additional information at this time.

Yours very truly,


Amy E. Armstrong

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

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February 15, 2010

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SC Court of Appeals

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Honorable Jeanette Barber
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009-135686

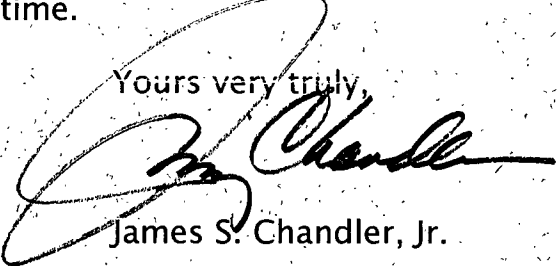
Dear Ms. Barber:

I am writing to provide an update on this case, which was stayed pending the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers.

On December 23, 2009, Federal District Judge Bryan issued an order extending the deadline for a new jurisdictional determination to March 8, 2010. The Order also states: "No further stays will be entered." To date, the Corps of Engineers has not yet issued a new jurisdictional determination, but we expect one by March 8, 2010.

Please let me know if you have any questions or need additional information at this time.

Yours very truly,



James S. Chandler, Jr.

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cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

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February 15, 2010

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FEB 16 2010

SC Court of Appeals

Honorable Jeanette Barber
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-AIJ-07-0221-CC
Case Tracking Number 2009-135686

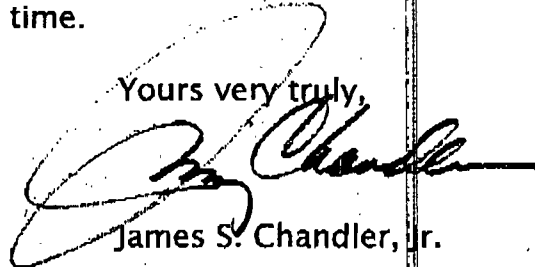
Dear Ms. Barber:

I am writing to provide an update on this case, which was stayed pending the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers.

On December 23, 2009, Federal District Judge Bryan issued an order extending the deadline for a new jurisdictional determination to March 8, 2010. The Order also states: "No further stays will be entered." To date, the Corps of Engineers has not yet issued a new jurisdictional determination, but we expect one by March 8, 2010.

Please let me know if you have any questions or need additional information at this time.

Yours very truly,



James S. Chandler, Jr.

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project

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E-mail: jchandler@scelp.org
www.scelp.org

Mailing Address:
P. O. Box 1380
Pawleys Island, SC 29585

FAX COVER SHEET

DATE: February 15, 2010

TO: CLERK, COURT OF APPEALS 803-734-1839
MARY D. SHAHID, ESQUIRE
DAVIS WHITFIELD-CARGILE, ESQUIRE
STANLEY E. BARNETT, ESQUIRE

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FEB 16 2010

SC Court of Appeals

FROM: JAMES S. CHANDLER, JR.

PAGES: 2 (including this page)

Our FAX #: (843) 527-0540

Our voice phone #: (843) 527-0078

The attached information is **CONFIDENTIAL** and is intended only for the use of the addressee(s) named above. If the reader of this message is not the intended recipient(s) or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any dissemination, distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us at the above address via the U.S. Mail.

MESSAGE:

RE: Deerfield Plantation Phase IIB Property Owners Association v.
SCDHEC, Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-AIJ-07-0221-CC

See attached letter

.....Jimmy Chandler



The South Carolina Court of Appeals

TANYA GEE
CLERK

V. CLAIRE ALLEN
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February 09, 2010

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

James S. Chandler, Jr, Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Counsel:

Please be advised that it was requested that you provide a written status update every forty-five (45) days. The current update was due January 29, 2010.

Please provide a written update regarding the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers within ten (10) days from the date of this correspondence.

Very truly yours,

V. Claire Allen, Deputy Clerk
CLERK

TAG/pd

cc: Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project

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December 15, 2009

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DEC 18 2009

SC Court of Appeals

James S. Chandler, Jr.
Amy E. Armstrong

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Honorable Jeanette Barber
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009-135686

Dear Ms. Barber:

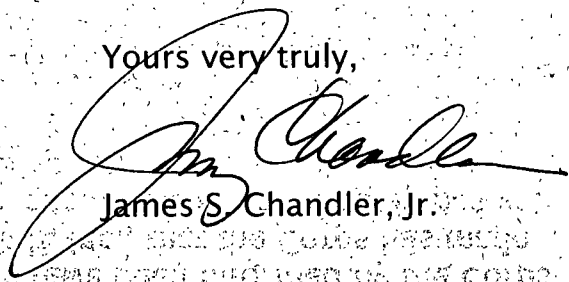
I am writing in response to the letter of December 11,
2009, requesting an update regarding the issuance of a new
"waters of the United States" jurisdictional determination by the
U.S. Army Corps of Engineers.

To date, the Corps of Engineers has not yet issued a new
jurisdictional determination. We have been informed by the Corps
and by counsel for Deertrack Golf, Inc., that the Corps has made
one or more recent visits to the site, but no final decision has yet
been made about a new determination.

Under the order of Federal District Court Judge R. Bryan
Harwell in a closely-related case, the Corps is to complete the
review process by January 1, 2010, or the parties will have to
request another stay in that case.

Please let me know if you have any questions or need
additional information at this time.

Yours very truly,



James S. Chandler, Jr.

cc: Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

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December 11, 2009

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Ms. Armstrong:

Please provide a written update regarding the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers within ten (10) days from the date of this correspondence.

Very truly yours,

A handwritten signature in cursive script that reads "V. Claire Allen, Deputy".

CLERK

JFB/pd

cc: James Chandler, Jr., Esquire
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



The South Carolina Court of Appeals

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October 22, 2009

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

James Chandler, Jr., Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Counsel:

Pursuant to the enclosed order dated October 19, 2009, this case is held in abeyance until December 11, 2009.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Barber", is written over a horizontal line.

CLERK

JFB/pd

cc: Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

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October 15, 2009

James Chandler, Jr., Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking Number 2009-135686

Dear Mr. Chandler:

The following Order has been endorsed on your Motion to Stay Appeal in the above entitled case on appeal.

"Granted. Appellant's motion for an extension of time to file Appellant's Initial Brief is deemed moot.

s/ Jasper M. Cureton A. J.
For the Court

October 15, 2009."

Please be advised that the time lines for perfecting this appeal are held in abeyance pending the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers. You are requested to provide a written status update every forty-five (45) days. The first update is due November 30, 2009.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J. Barber", is written over the typed name of the clerk.

CLERK

JFB/pd

cc: Amy Elizabeth Armstrong, Esquire
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 28 2009
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

MOTION TO STAY APPEAL

TO: THE COURT OF APPEALS AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, Deerfield Plantation Phase IIB Property Owners Association, hereby moves the Court of Appeals, pursuant to SCACR 224, for an order staying further proceedings in this appeal pending a new "jurisdictional determination" by the U.S. Army Corps of Engineers regarding the property that is the subject of this appeal.

In support of this motion, the Appellant submits the following:

This case involves the appeal of a storm water permit and coastal zone consistency certification issued to Deertrack Golf, Inc., by the South Carolina Department of Health and Environmental Control (DHEC). The DHEC decision in this case, and the decision of the Administrative Law Court, were based on a determination by the U.S. Army Corps of Engineers

(Corps) that there were no “waters of the United States” on the subject property. If “waters of the United States” are on the property, the development proposed for the property would be required to obtain a permit from the Corps, a water quality certification from DHEC, and possibly other permits and approvals. DHEC would also be required to review the project for coastal zone consistency certification approval under rules that the Administrative Law Court ruled inapplicable in the absence of waters of the United States.

In April, 2009, the Appellant filed an action in the United States District Court for the District of South Carolina challenging the jurisdictional determination made by the Corps for this property. A jurisdictional determination involves the question of whether a tract of land contains “waters of the United States” that are regulated by the Corps under the Clean Water Act. The Corps had determined that the Deertrack Golf property contained no waters of the United States. The Complaint in the federal action alleges that the jurisdictional determination was issued in error, and that in fact there are “waters of the United States” on the subject property.

On August 21, 2009, Federal District Judge R. Bryan Harwell issued an order granting a motion to remand the jurisdictional determination to the Corps for the purpose of considering a new jurisdictional determination. (See Order on Joint Motion for Voluntary Remand, August 21, 2009, *Deerfield Plantation Phase IIB Property Owners Assn. v. United States Army Corps of Engineers*, Case No. 4:09-cv-01023-RBH, attached hereto as EXHIBIT A; see also, Joint Motion for Voluntary Remand, attached hereto as EXHIBIT B, and Declaration of Tommy Fennell, attached hereto as EXHIBIT C).

As noted in the Joint Motion for Voluntary Remand and the Declaration of Tommy Fennell, the Corps’ recent inspection of the property revealed “a series of pipes and ditches that

led from the site to the Atlantic Ocean,” which he considers “information that would warrant additional consideration.” (Exhibit C, page 3).

The Corps has not yet completed its new review of the jurisdictional determination for this property, but the Declaration of Tommy Fennell and the Corps’ agreement to a remand of the lawsuit for a new determination indicate that the Corps may conclude that the property in fact contains “waters of the United States.” *See, e.g., Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). If such a determination is made, it will significantly change the legal complexion of this case, triggering additional state and federal permitting and certification requirements. Such a new determination would constitute additional evidence justifying a remand of this case to the Administrative Law Court or to DHEC, pursuant to Section 1-23-380(4) of the South Carolina Administrative Procedures Act:

(3) If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

S.C. Code § 1-23-380(3). The decisions of DHEC and the Administrative Law Court – the decisions on appeal in this case – relied upon the original Corps jurisdictional determination.

This appeal remains in its initial stage. The Appellant’s initial brief is due September 28, 2009. The order of the Federal District Court remanding the jurisdictional determination to the Corps of Engineers calls for a Corps decision by January 1, 2010. If the Corps meets this deadline, this requested stay would not be in effect for very long. The preparation of initial briefs is the most time-consuming part of the appeal process, and if this appeal is not stayed, the parties

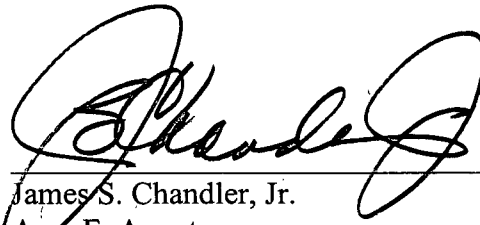
will have to invest substantial resources in the preparation of briefs that could be rendered moot by a new Corps jurisdictional determination.

The Appellant believes that the slight delay caused by staying this case pending a new Corps jurisdictional determination is outweighed by the possibility that substantial resources could be devoted to initial briefs that may be rendered moot.

Counsel for the Appellant has consulted with counsel for the Respondents; Respondent DHEC does not object to this motion; Respondent Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC, object to this motion.

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals issue an order staying all proceedings in this appeal, including the filing of briefs, pending the issuance of a new "waters of the United States" jurisdictional determination by the U.S. Army Corps of Engineers.

Respectfully submitted,



James S. Chandler, Jr.
Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
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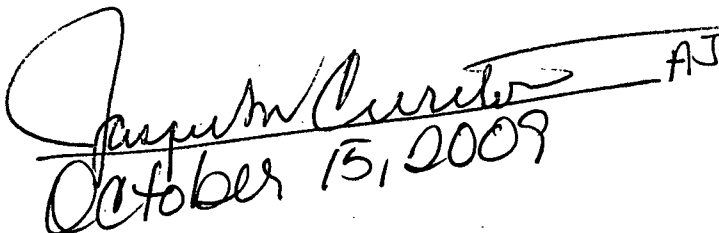
Attorneys for the Appellant, Deerfield Plantation
Phase IIB Property Owners Association

Georgetown, South Carolina
September 25, 2009

FILED

10/15/09 4 

Granted. Appellant's
motion for an extension
of time to file Appellant's
Initial Brief is deemed
moot.


October 15, 2009

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

DEERFIELD PLANTATION PHASE II-B)
PROPERTY OWNERS ASSOCIATION, INC.,)

Plaintiff,)

v.)

C/A No.: 4:09-cv-01023-RBH

UNITED STATES ARMY CORPS OF)
ENGINEERS, CHARLESTON DISTRICT; LT.)
GENERAL ROBERT L. VAN ANTWERP, in his)
official capacity as Chief of Engineers, U.S. Army)
Corps of Engineers; LT. COLONEL TREY)
JORDAN, in his official capacity as District)
Engineer, U.S. Army Corps of Engineers,)
Charleston District; UNITED STATES)
ENVIRONMENTAL PROTECTION AGENCY;)
LISA P. JACKSON, in her official capacity as)
Administrator of the U.S. Environmental)
Protection Agency; A. STANLEY MEIBURG, in)
his official capacity as Acting Regional)
Administrator, Region IV, U.S. Environmental)
Protection Agency; and DEERTRACK GOLF,)
INC.,)

Defendants.)

Order on Joint Motion for Voluntary Remand

This cause comes before the Court on the parties' joint motion for voluntary remand.

Upon due consideration of the motion, memorandum, and declaration in support, the Court **grants** the joint motion. The Court **orders** as follows:

1. The United States Army Corps of Engineers (Corps) may, in light of new information, reconsider its Clean Water Act jurisdictional determination dated August 3, 2006, and reopen the administrative record.

2. On reconsideration, the Corps may follow its own practice and procedure, including, as applicable, 33 C.F.R. part 331. The Corps will, consistent with its practices, accept information relevant to its decision-making process, and such information will become part of the new administrative record.
3. Further litigation and proceedings in this case – including but not limited to Federal Defendants' answer or other response to the complaint and cross-claim – are stayed pending the earlier of either: 1) completion of the reconsideration process; or 2) January 1, 2010 - whichever occurs first.
4. The parties shall promptly notify the court when the reconsideration process is complete. In the event the reconsideration process is not complete by January 1, 2010, the parties may request another stay.

It is so ordered.

s/ R. Bryan Harwell

R. Bryan Harwell

United States District Judge

August 21, 2009

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

DEERFIELD PLANTATION PHASE II-B
PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff,

v.

C/A No.: 4:09-cv-01023-RBH

UNITED STATES ARMY CORPS OF
ENGINEERS, CHARLESTON DISTRICT; LT.
GENERAL ROBERT L. VAN ANTWERP, in his
official capacity as Chief of Engineers, U.S. Army
Corps of Engineers; LT. COLONEL TREY
JORDAN, in his official capacity as District
Engineer, U.S. Army Corps of Engineers,
Charleston District; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
LISA P. JACKSON, in her official capacity as
Administrator of the U.S. Environmental
Protection Agency; A. STANLEY MEIBURG, in
his official capacity as Acting Regional
Administrator, Region IV, U.S. Environmental
Protection Agency; and DEERTRACK GOLF,
INC.,

Defendants.

Joint Motion For Voluntary Remand

Plaintiff Deerfield Plantation Phase II-B Property Owners Association, Inc. (Deerfield) challenges an August 3, 2006 jurisdictional determination issued by the United States Army Corps of Engineers (Corps) that declined to assert Clean Water Act jurisdiction over an approximately 152-acre tract of land in Horry County, South Carolina. The Corps' jurisdictional determination is valid until August 2011, unless the Corps determines that "new information warrants revision . . . before the expiration date." *See* Exhibit 1 (August 3, 2006 Jurisdictional Determination). As explained below, the Corps recently obtained new information about the subject property that it believes warrants reconsideration of its August 2006 jurisdictional determination. Given this, all parties

agree that continuing to litigate this matter would waste the Court's and the parties' resources. Accordingly, the parties ask that the Court enter the attached order remanding the August 2006 jurisdictional determination to the Corps for further proceedings, and staying this case pending a new jurisdictional determination.

Memorandum of Law

I. Background

The Clean Water Act prohibits the "discharge of any pollutant," defined as the addition of any pollutant to the "waters of the United States" from any point source—except "as in compliance with" specified provisions of the Act. 33 U.S.C. §§ 1311(a), 1362(7), 1362(12). As relevant here, the Corps' regulations authorize (but do not require) the Corps, upon a landowner's written request, to provide the agency's view on whether particular property contains "waters of the United States" within the agency's regulatory jurisdiction under the Clean Water Act. *See* 33 C.F.R. § 320.1(a)(6), 331.2; 33 C.F.R. Pt. 331 App. C.

In February 2006, a representative for defendant Deertrack Golf, Inc. asked the Corps for the agency's determination on whether Deertrack's 152-acre property in Horry County is subject to the Corps' regulatory jurisdiction under the Clean Water Act. *See* Exhibit 2 (Declaration of Tommy Fennel, Chief of the Northeast Branch of the Charleston District of the Corps ("Fennel Decl.")) at ¶ 4. The Corps subsequently conducted an in-office review of various photographs, maps, and soil-survey information. *Id.* ¶¶ 5-7. During its review, the Corps found that this information "did not indicate any areas that were indicative of wetlands or streams" and "noted no features that would indicate offsite flow, either current or relic." *Id.* ¶ 9. Accordingly, the Corps issued its jurisdictional determination concluding that the property does not contain wetlands or waters of the United States subject to the Corps regulatory authority. *Id.* ¶ 9.

In December 2008, Deerfield notified the Corps and the United States Environmental Protection Agency (EPA) of its intent to seek judicial review of the Corps' jurisdictional determination of Deertrack's property. The notice of intent alleged that "the determination that the Deertrack property contains no jurisdictional waters or wetlands violates the Clean Water Act." *See* Exhibit 3 (Deerfield's notice of intent). The notice of intent also included various information that post-dates the Corps' August 2006 jurisdictional determination. *See id.* In April 2009, Deerfield filed this suit against the Corps, EPA, and Deertrack, based on the allegations contained in its notice of intent.

In June 2009, Mr. Fennel, a Corps attorney, and Deertrack's counsel visited the Deertrack property so that the Corps could "evaluate the contentions made" in Deerfield's notice of intent. Fennel Decl. ¶ 11. During this visit, Mr. Fennel noticed certain "ponds and interconnecting ditches that served as water features and irrigation," and "a series of pipes and ditches that led from the site to the Atlantic Ocean." *Id.* Mr. Fennel, the same Corps official who conducted the August 2006 jurisdictional determination, later explained that the existence of these features "constitutes information that would warrant additional consideration" of his prior jurisdictional determination. *Id.* ¶ 11.

II. Argument

It is well-settled that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *See Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980); *see also Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004); *Tung Mung Dev. Co., Ltd. v. United States*, 354 F.3d 1371, 1379 (Fed. Cir. 2004). The Corps' regulations define "jurisdictional determination" to include not only an initial determination but also a superseding one

"where new information has become available that may affect the previously written determination." 33 C.F.R. § 331.2. Moreover, the specific jurisdictional determination at issue in this case provides that "new information" may "warrant[] revision . . . before the expiration date." Here, the parties agree that the Corps may reconsider its jurisdictional determination.

The parties also agree that an appropriate mechanism to allow the Corps to reconsider its determination is to remand this matter to the Corps while staying the litigation pending a new determination. "When a court reviews an agency action, the agency is entitled to seek remand 'without confessing error, to reconsider its previous position.'" *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)); see also *Ethyl Corp. v. Browner*, 989 F.2d 522 (D.C. Cir. 1993) (granting voluntary remand to EPA and expressing preference for granting motions for voluntary remand to avoid "wasting the courts' and the parties' resources"). Moreover, when a case is dependent on the outcome of an ongoing review by an agency, a court may stay the case until the agency has completed that review. See, e.g., *Smith v. GTE Corp.*, 236 F.3d 1292, 1298 n.3 (11th Cir. 2001).

In this case, the Corps has new information that it believes warrants reconsideration of its August 2006 jurisdictional determination. If, after further review, the Corps determines that new information warrants the assertion of Clean Water Act jurisdiction – one of the options available to the agency – then the present litigation may possibly be rendered moot. If, on the other hand, the Corps determines that the new information does not affect the agency's initial determination that the subject property is not jurisdictional – another option available to the agency – then plaintiff may continue its challenge. In either scenario, it is likely that the agency action challenged in this case will be amended, supplemented, or replaced. Given the circumstances, the parties agree that this

Court should enter the attached order staying litigation and remanding the jurisdictional determination to the Corps for further consideration.

Respectfully submitted,

W. Walter Wilkins
UNITED STATES ATTORNEY

By: s/ R. Emery Clark
R. Emery Clark (I.D. #1183)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
(803) 929-3000

/s/
Adam J. Katz (*pro hac vice*)
FOR FEDERAL DEFENDANTS

/s/
James S. Chandler, Jr. (Bar No. 91)
Amy E. Armstrong (Bar No. 9625)
FOR PLAINTIFF

/s/
Mary D. Shahid (Bar No. 643)
FOR DEFENDANT DEERTRACK

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

DEERFIELD PLANTATION PHASE II-B)
PROPERTY OWNERS ASSOCIATION, INC.,)

Plaintiff,)

v.)

C/A No.: 4:09-cv-01023-RBH

UNITED STATES ARMY CORPS OF)
ENGINEERS, CHARLESTON DISTRICT; LT.)
GENERAL ROBERT L. VAN ANTWERP, in his)
official capacity as Chief of Engineers, U.S. Army)
Corps of Engineers; LT. COLONEL TREY)
JORDAN, in his official capacity as District)
Engineer, U.S. Army Corps of Engineers,)
Charleston District; UNITED STATES)
ENVIRONMENTAL PROTECTION AGENCY;)
LISA P. JACKSON, in her official capacity as)
Administrator of the U.S. Environmental)
Protection Agency; A. STANLEY MEIBURG, in)
his official capacity as Acting Regional)
Administrator, Region IV, U.S. Environmental)
Protection Agency; and DEERTRACK GOLF,)
INC.,)

Defendants.)

DECLARATION OF TOMMY FENNEL

I, Tommy Fennel, declare the following:

1. My employer is the Charleston District of the United States Army Corps of Engineers ("Corps").
2. My current title is Chief of the Northeast Branch.
3. I am a biologist.
4. The Corps received a request for a Clean Water Act ("CWA") jurisdictional determination from Mr. Norman Boatwright by letter dated February 8, 2006 on behalf of Jeff Farrell for a 152.485 acre tract of real estate located for an existing golf course within the existing Deerfield Plantation residential sub-division in Horry County, South Carolina.

5. I was assigned the jurisdictional request. Upon receiving the request, I conducted a preliminary in-office review of the area to determine if a site visit would be required to gather additional data. The review included a review of infrared aerial photography, topographic mapping, and National Wetland Inventory mapping. My review of the topographic mapping revealed that the tract in question did not contain any signs of wetlands or waters (blue lines depicting tributaries, blue dash lines with vegetation depicting wetland areas). Additionally, I noted that the topographic maps depicted the words "GOLF COURSE" directly over the area where I was conducting my review. This information is important as it reveals the age and relative timeframe the course was constructed and indicates significant disturbance such as fill, re-contouring, and excavation.

6. My review of the infrared, aerial photography revealed that the area submitted for review was a golf course with associated ponds/lakes. There were no areas that appeared to be in the natural state that would provide information about the nature of the site prior to the construction of the golf course. The tract was completely developed and encompassed by housing and infrastructure.

7. My review of the soils mapping indicated the potential presence of hydric soils onsite. The hydric soils were Leon, Meggett, Lynn Haven, and Johnston. In addition, the soils mapping showed the non-hydric soils Echaw, Lakeland, Centenary, Yemassee, and Yauhannah to be present on site.

8. My review of the National Wetland Inventory (NWI) maps revealed that there were three basic units identified on the tract; U11 (upland residential), U17 (upland other urban), and PUBHx (open water). The NWI maps used all three descriptions for areas where the soils mapping depicted either hydric or non-hydric soils. On the NWI maps, the U11 designation was typically in areas where residential homes and infrastructure were present and the U17 was typically descriptive of the golf course. Finally, the NWI map depicted the lakes and ponds on-site as PUBHx.

9. After I reviewed the information above, I concluded that it was sufficient to make a determination on the tract without further investigation. The NWI mapping described both soil types, hydric and non-hydric, as "Upland", confirming that the site had been significantly altered and the soils were no longer indicative of the nature and condition of the site. My review of aerial photography did not indicate any areas that were indicative of wetlands or streams and I noted no features that would indicate offsite flow, either current or relic. Based on available information, I determined that the site did not contain any areas within our jurisdiction and further determined that a site visit would not provide information that would lead to a different determination. Corps policy is to do site visits where beneficial based on available information and is not required in every case.

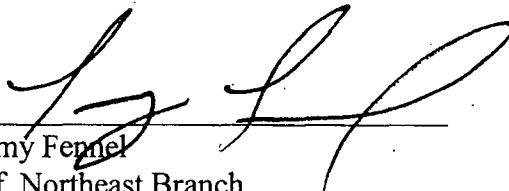
10. Based on the above, I contacted Mr. Boatwright and requested a closed boundary survey of the area so that I could proceed with issuing a determination. After receiving the plat, I transferred the file to Rob Huff, who then prepared and signed the jurisdictional determination letter detailing the Corps determination. After my review and approval, the Corps issued the jurisdictional determination letter to the property owner on August 3, 2006.

11. On the morning of June 10, 2009, Michelle Crawford, Mary Shahid (Counsel for Property Owner) and I visited the site. The purpose of the site visit was to evaluate the contentions made by the in the South Carolina Environmental Law Project's Notice of Intent dated December 22, 2008. We viewed the ponds and the interconnecting ditches that served as water features and irrigation for the course. We noted that there was a series of pipes and ditches that led from the site to the Atlantic Ocean. See Exhibit 1.

12. I believe the observations from the site visit noted above constitutes information that would warrant additional consideration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed in Conway, South Carolina, on this 17th day of August, 2009.



Tommy Fennel
Chief, Northeast Branch
Charleston District
United States Army Corps of Engineers

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 28 2009
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge
Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

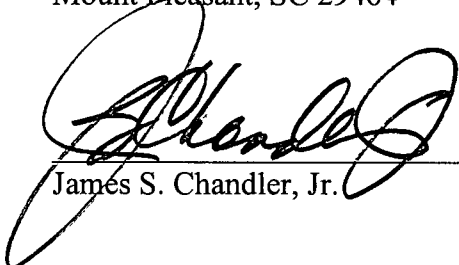
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion to Stay Appeal upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Elizabeth Applegate Dieck, Esquire
Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
Charleston, SC 29402

Stanley Barnett, Esquire
Smith, Bundy, Bybee & Barnett, P.C.
P.O. Box 1542
Mount Pleasant, SC 29464


James S. Chandler, Jr.

Georgetown, South Carolina

September 25, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 28 2009
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

MOTION FOR EXTENSION OF TIME
FOR FILING INITIAL BRIEF OF APPELLANT

TO: THE COURT OF APPEALS AND THE RESPONDENTS:

PLEASE TAKE NOTICE that the Appellant, Deerfield Plantation Phase IIB Property Owners Association, hereby moves the Court of Appeals for an order extending the time for filing the Initial Brief of Appellant and Appellant's Designation of Matter To Be Included in the Record on Appeal in this matter, so that the new due date will be October 28, 2009.

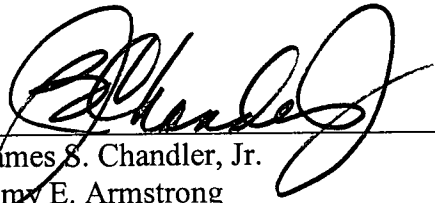
This case involves a lengthy hearing before the Administrative Law Court, and the briefs will require a substantial amount of time and effort. Counsel for the Appellant have had a very heavy schedule of hearings and briefing due dates and have been unable to complete the work needed to prepare an appropriate brief in this appeal.

② A113/dsm
9.28.09
10.28.09

Counsel for the Appellant has consulted with counsel for the Respondents and has been informed that the Respondents do not object to this requested extension of time.

WHEREFORE, the Appellant, Deerfield Plantation Phase II-B Property Owners Association respectfully requests that the Court of Appeals issue an order extending the deadline for filing the Initial Brief of Appellant and Appellant's Designation of Matter To Be Included in the Record on Appeal to October 28, 2009.

Respectfully submitted,



James S. Chandler, Jr.

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

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Appellant, Deerfield Plantation
Phase IIB Property Owners Association

Georgetown, South Carolina

September 25, 2009

GRANTED
KAYE G. HEARN, C.J.
FOR THE COURT

By: 
(Clerk) (Deputy Clerk)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 28 2009
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge
Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
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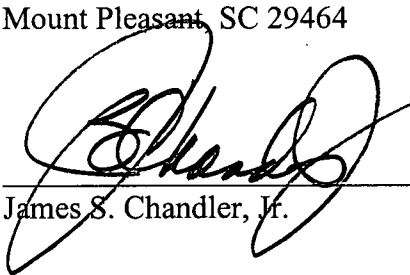
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Motion for Extension of Time upon counsel for the Respondents, by placing copies of same in the United State Mail, addressed to:

Elizabeth Applegate Dieck, Esquire
Davis Whitfield-Cargile, Esquire
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Mary D. Shahid, Esquire
McNair Law Firm, P. A.
P. O. Box 1431
Charleston, SC 29402

Stanley Barnett, Esquire
Smith, Bundy, Bybee & Barnett, P.C.
P.O. Box 1542
Mount Pleasant, SC 29464


James S. Chandler, Jr.

Georgetown, South Carolina

September 25, 2009

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

September 25, 2009

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SEP 28 2009

SC Court of Appeals

James S. Chandler, Jr.
Amy E. Armstrong,

Staff Attorneys

OFFICE ADDRESS

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OUR MISSION

*To protect the natural
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to environmental
organizations and
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and by improving the
state's system of
environmental
regulation.*

Honorable Jeanette Barber
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC
Case Tracking Number 2009135686

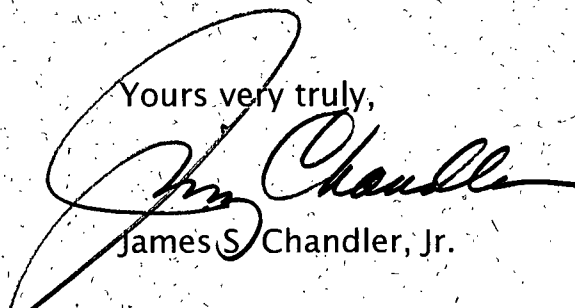
Dear Ms. Barber:

Enclosed for filing please find the original and seven copies
of the following motions: (1) Motion to Stay Appeal, and (2)
Motion for Extension of Time. I also enclose certificates of service
for each motion and a check for the motion filing fees.

Please return clocked-in copies in the envelope provided.

Thank you very much for your kind cooperation and
assistance.

Yours very truly,



James S. Chandler, Jr.

cc: Elizabeth Applegate Dieck, Esquire
Davis Whitfield-Cargile, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

The South Carolina Court of Appeals

Deerfield Plantation Phase II B Property
Owners Association,

Appellant,

v.

South Carolina Department of Health and
Environmental Control and Deertrack
Golf, Inc.,

Respondents,

v.

Bill Clark Homes of Myrtle Beach, LLC, Respondents

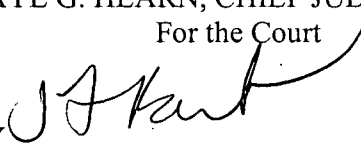
The Honorable John McLeod
Richland County
Trial Court Case No. 2008-AL-07-00221

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 28, 2009.

IT IS SO ORDERED.

KAYE G. HEARN, CHIEF JUDGE
For the Court

BY 

CLERK

Columbia, South Carolina

8/25/2009

cc: Amy Elizabeth Armstrong, Esquire
James Chandler, Jr., Esquire
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

August 13, 2009

James S. Chandler, Jr.
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Honorable Jeanette Barber
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

ck # 62168
\$ 25

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AUG 17 2009

SC Court of Appeals

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Admin. Law Court Case No. 08-ALJ-07-0221-CC

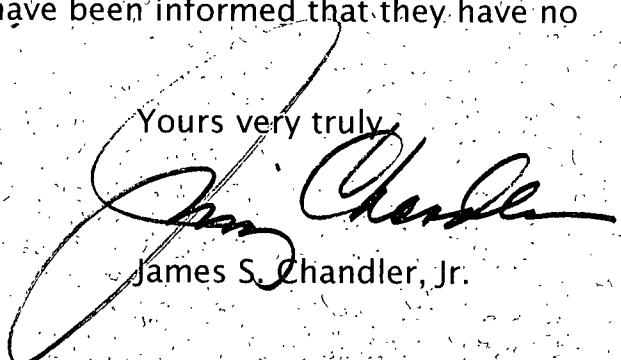
Dear Ms. Barber:

Notice of Appeal was served in this case on July 29, 2009. The parties obtained the transcript of the hearing before the Administrative Law Court while the case was still pending in that Court. We received that transcript on or about April 6, 2009. Accordingly, I believe there is no need to order a transcript pursuant to SCACR 207.

The initial brief of appellant is due on August 28, 2009. I have a major trial the week the brief is due and another the following week, plus a brief due in your court in another case this Friday. Accordingly, I respectfully request a 30-day extension of time for filing the initial brief of appellant and initial designation of matter to be included in the record on appeal, making these due on September 28, 2009.

I have consulted with counsel for the Respondents about this extension request and have been informed that they have no objection.

Yours very truly,


James S. Chandler, Jr.

cc: Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

8-28-09
9-28-09
151



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
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August 17, 2009

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

James Chandler, Jr., Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking #: 2009135686

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence (but not on briefs, records, motions, and the like) relating to this matter.

I wish to call the attention of the parties to the August 13, 2007 order of the South Carolina Supreme Court relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours;

A handwritten signature in dark ink, appearing to be "JFB", is written over the typed name "CLERK".

CLERK

JFB/ec

cc: Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire



The South Carolina Court of Appeals

JEANETTE F. BARBER
CLERK

V. CLAIRE ALLEN
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TELEPHONE: (803) 734-1890
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August 17, 2009

Amy Elizabeth Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

James Chandler, Jr., Esquire
P.O. Box 1380
Pawleys Island, SC 29585

Re: Deerfield Plantation v. SCDHEC
Case Tracking #: 2009135686

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the

transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Jeanette F. Barber
CLERK

 JFB/ec

cc: Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

RECEIVED

JUL 31 2009

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 08-ALC-07-0221-CC

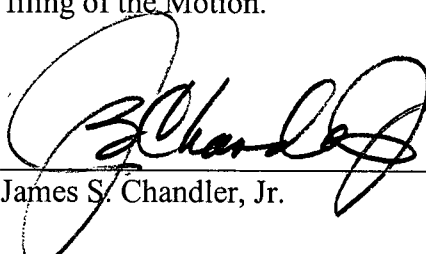
Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

NOTICE OF APPEAL

Deerfield Plantation Phase IIB Property Owners Association hereby appeals from the Order of the Honorable John D. McLeod, Administrative Law Judge, dated June 9, 2009, and received by counsel for the Appellants on June 10, 2009. On June 22, 2009, the Appellants filed a Motion for New Trial and To Alter or Amend. Pursuant to Rule 29(d) of the Rules of Procedure for the Administrative Law Court, the Motion was deemed denied when no order was filed by Judge McLeod within 30 days of the filing of the Motion.


James S. Chandler, Jr.

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Attorneys for the Appellant, Deerfield Plantation
Phase IIB Property Owners Association

Georgetown, South Carolina

July 29, 2009

OTHER COUNSEL OF RECORD:

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JUL 31 2009

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge
Case No. 08-ALC-07-0221-CC

Deerfield Plantation Phase IIB Property Owners Association Appellant,

vs.

South Carolina Department of Health and Environmental Control,
Deertrack Golf, Inc., and Bill Clark Homes of Myrtle Beach, LLC Respondents.

CERTIFICATE OF SERVICE

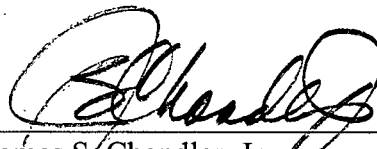
I hereby certify that on this date I served the foregoing Notice of Appeal upon the
Administrative Law Judge and on counsel for the Respondents, by placing copies of same in the
United State Mail, addressed to:

Honorable John D. McLeod
Judge, Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Mary D. Shahid, Esquire
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James S. Chandler, Jr.

Georgetown, South Carolina

July 29, 2009

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non-profit
organization

July 29, 2009

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OUR MISSION

*To protect the natural
environment of South
Carolina by providing
legal services and advice
to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation.*

Honorable Kenneth A. Richstad
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

RECEIVED

JUL 31 2009

SC Court of Appeals

RE: Deerfield Plantation Phase IIB Property Owners
Association v. SCDHEC, Deertrack Golf, Inc., and Bill
Clark Homes of Myrtle Beach
Administrative Law Court Case No. 08-ALJ-07-0221-
CC

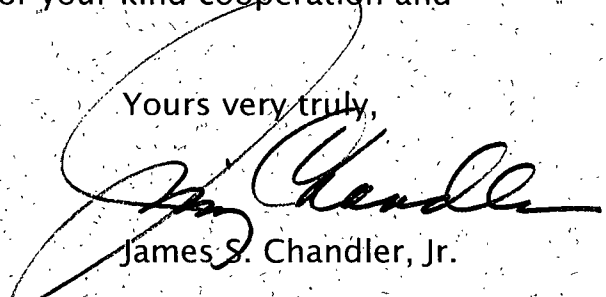
Dear Mr. Richstad:

Enclosed for filing please find the Notice of Appeal in this
case, together with my Proof of Service and check for the filing
fee.

Please return a clocked-in copy in the envelope provided.

Thank you very much for your kind cooperation and
assistance.

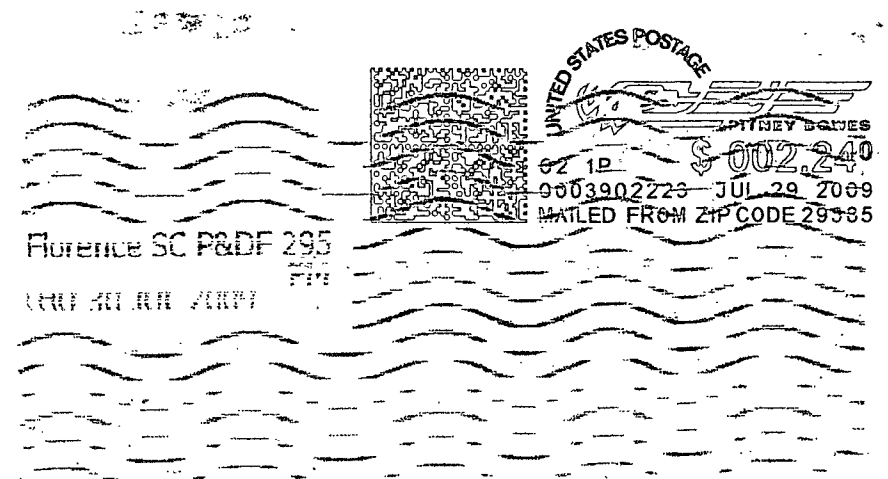
Yours very truly,



James S. Chandler, Jr.

cc: Honorable John D. McLeod
Elizabeth Applegate Dieck, Esquire
Mary D. Shahid, Esquire
Stanley E. Barnett, Esquire

South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585



Honorable Kenneth A. Richstad
Clerk, S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Deerfield Plantation Phase II B
Property Owners Association,

Petitioner,

-VS-

South Carolina Department of
Health and Environmental Control
and Deertrack Golf, Inc.,

Respondents.

-VS-

Bill Clark Homes of Myrtle Beach, LLC,

Intervenor.

Docket No. 08-ALJ-07-0221-CC

FINAL ORDER AND DECISION

FILED

JUN 08 2009

SC ADMIN. LAW COURT

Appearances

Petitioner:

James S. Chandler, Esq.

Amy E. Armstrong, Esq.

Respondent, SCDHEC:

Elizabeth A. Dieck, Esq.

Respondent,

Deertrack Golf, Inc.:

Mary D. Shahid, Esq.

Intervenor:

Stanley E. Barnett, Esq.

FILED

JUN 09 2009

SC ADMIN. LAW COURT

This matter was before me for a contested case hearing on March 10, 11, and 12, 2009.

Petitioner challenges the decision of Respondent, South Carolina Department of Health and Environmental Control (“DHEC” or “the Department”), to issue permit coverage under the National Pollutant Discharge Elimination System (“NPDES”) General Permit for Storm Water Discharges from Large and Small Construction Activities. Based on the testimony, evidence, and legal arguments presented at the contested case hearing, I affirm the Department’s decision

to issue permit coverage to Respondent Deertrack Golf, Inc. authorizing redevelopment of the property known as the Old South Golf Course (also referred to herein as the "Old South Course" or "South Course.")

Background

Respondent Deertrack Golf, Inc., ("Deertrack") is the record owner of real property located in Horry County, South Carolina, known as the Old South Golf Course, consisting of approximately 158 acres. Deertrack decided to sell the Old South Course and offered the property for sale and on September 2, 2005, Intervenor Bill Clark Homes of Myrtle Beach, LLC, ("Bill Clark Homes") entered into a contract to purchase the Old South Course. The contract included a condition that the Seller cease golf play on the course. Bill Clark Homes has designed a residential subdivision to be constructed within the acreage known as Phase I of the Old South Golf Course. Bill Clark Homes has obtained approval from Horry County for this subdivision consisting of 278 lots. The Old South Course is contiguous to the development known as Deerfield Plantation Phase II B. Petitioner filed this contested case on behalf of the residents of Phase II B who are opposed to redevelopment of the Old South Course.

Redevelopment of the Old South Course triggered the requirement for a land disturbance and stormwater management permit. DHEC has developed a General Permit known as the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("the General Permit"). DHEC administers the NPDES General Permit for Storm Water Discharges under 24 S.C. Code Ann. Reg. 61-9.122.26 et seq. (Supp. 2007) and 26 S.C. Code Ann. Reg. 72-300 et seq. Since the proposed activity is located within one of the eight coastal counties that comprise the State's coastal zone, the Department's Office of Ocean and

Coastal Resource Management ("OCRM") reviews the project to determine consistency with the Policies and Procedures of the South Carolina Coastal Management Program ("CMP").

Respondent submitted its application, known as a Notice of Intent ("NOI"), seeking coverage under the General Permit on March 5, 2007. The application was deemed to be complete on April 30, 2007. Pet. Exh. 3. The application triggered significant opposition from landowners surrounding the golf course, and OCRM conducted a public hearing to receive comments regarding the application in July of 2007. OCRM provided its Coastal Zone Consistency Certification on February 29, 2008, and the Department authorized coverage under the General Permit on February 29, 2008. Pet. Exh. 1, 2, Resp. Exh. 31.

Petitioner challenges the Department's authorization of permit coverage based on the following grounds as set forth in the Amended Pre-hearing Statement:

1. Are there existing waters of the state and wetlands on the site of the proposed development?
2. Are the waters of the state and wetlands on the site connected to navigable waters of the United States by surface connections, and are the wetlands thus federal jurisdictional wetlands?
3. Did the permit application erroneously state that there are no waters of the state or wetlands on the site?
4. Did DHEC issue the certification and permit without making a proper determination of the presence of waters of the state or wetlands on the property?
5. Will the proposed development exacerbate the existing flooding problems within Deerfield Plantation?

6. Does the proposed stormwater management system for the proposed development properly assess the overall drainage area that will be impacted by the proposed development?
7. Will the proposed development permanently alter wetlands in violation of the South Carolina Coastal Management Program?
8. Will the project restrict or limit the continued use of a recreation open area or disrupt the environmental or aesthetic character of the area?
9. Are there feasible alternatives to the proposed development?
10. Does the proposed stormwater management plan comply with the applicable statutes and regulations?
11. Does the proposed stormwater management plan violate the Pollution Control Act by making discharges of stormwater and pollutants into waters of the state without pretreatment and buffers?
12. Are the ponds, lakes and channels on the subject property "waters of the State?"
13. If the downstream waters are waters of the State, what is the boundary line for the end point of these waters of the State?

FINDINGS OF FACT

Having observed the witnesses and reviewed the evidence and testimony presented at the contested case hearing, and taking into account the burden of proof, I make the following Findings of Fact by a preponderance of the evidence:

1. Respondent Deertrack is the owner of the Old South Golf Course. Based on review of historical aerial photography it appears that construction of the Old South Course was completed by 1982. Tr. v. 3 p. 68 l. 1-20.

2. The Petitioner's members are residents of Phase II B of Deerfield Plantation, which was platted and recorded in 1978. Pet. Exh. 9. Phase II B consists of 124 lots. Tr. v. 1 p. 34 l. 3-6.

3. Intervenor Bill Clark Homes is a land development company that has developed more than one thousand multiple family units and more than two thousand single-family units in the Myrtle Beach area. Tr. v. 2 p. 278. Jeff Farrell is the Division President of Bill Clark Homes of Myrtle Beach and has held that position since 1997. Tr. v. 2. p. 275.

4. Farrell became interested in 2005 in the purchase of the Old South Course for redevelopment. Tr. v. 2 p. 278. Farrell met with staff from the Horry County Planning and Zoning departments to determine whether there were any impediments to redevelopment of the Old South Golf Course. He learned that the area surrounding the course, which includes homes and lots in the Phase II B development, had experienced flooding. Tr. v. 2. p. 280.

5. On at least 15 occasions, Farrell met with the residents of Phase II B. and discussed their concerns regarding the potential for flooding. Tr. v. 2. p. 283. Farrell retained the services of a local engineering firm, Engineering Technical Services, Inc. ("ETS") to assist Bill Clark Homes in designing a subdivision for the Old South Golf Course, including the design of a stormwater management plan that would satisfy both the Department's and Horry County's requirements.¹ ETS was specifically instructed to insure that their design did not exacerbate the potential for flooding properties located in Phase II B. When the subdivision plan was completed, Farrell organized a meeting with the residents, County staff, and ETS to review the subdivision plan. Farrell offered to pay for an independent engineer to confirm ETS' work and

¹ Respondents Deertrack Golf and Bill Clark Homes were required to satisfy State regulatory requirements related to stormwater discharges and the Horry County stormwater ordinance. The Horry County stormwater ordinance has more stringent design requirements than the State regulation because Horry County requires an applicant to design for a less frequent storm event – the 25 year storm.

their predictions that redevelopment of the Old South Golf Course would not exacerbate or increase the potential for flooding of properties in Phase II B. Residents and representatives of Phase II B did not accept his offer. Tr. v. 2. p. 293.

6. Bill Clark Homes is currently under contract with Deertrack Golf, Inc. with an option to purchase Phases I, II, and III of the South Course. Tr. v. 2. p. 300. Phase I consists of approximately 85 acres. ETS designed a residential subdivision consisting of 278 single family lots in Phase I. Resp. Exh. 31 p. 1.

7. The property is currently zoned R-7, which allows for a maximum of seven units per acre. Tr. v. 2 p. 294 l. 24-25, p. 295, l. 1-17. The subdivision plans for Phase I reflect a density of slightly over three units per acre. p. 295, l. 6-7.

8. The Old South Course is depicted on the subdivision plat for Deerfield Plantation Phase II B, prepared in 1978 and revised and recorded in 1979. The plat includes the following notation: "All streets, easements and golf course area shown on the plat are private and are not intended for public use." Pet. Exh. 9, Tr. v. 1 p. 142 ll.22-25.

Coastal Zone Consistency Review

9. The practice of OCRM is to require applicants for stormwater permits to provide a delineation of the extent of wetlands on the project site and to have this delineation verified by the U.S. Army Corps of Engineers ("the Corps"). While the Corps does not exert jurisdiction over all wetlands, only those satisfying certain interstate commerce requirements, it typically reviews and approves delineations of all wetlands on a site so as to determine the extent of its own jurisdiction. Tr. v.3, p. 160-163.

10. The engineer preparing a stormwater permit application submits the findings of the Corps to OCRM for the purpose of confirming the extent of all wetlands on the site. Tr. v.

3, p. 160-163. If there are wetlands on the site, OCRM applies its CMP policies related to wetlands in evaluating the application. Pet. Exh. 85, p. 15-16.

11. Petitioner argues that there are wetlands on the site which will be disturbed by the permitted activity and that the CMP policies require consideration of those impacts before OCRM may issue a stormwater permit. Specifically, Petitioner cites the policies contained at pages III-14 thru 17 and 73 of the CMP and the mitigation provisions of the refinements to the CMP. Pet. Amended Pre-Hearing Statement.

12. The CMP was published in the State Register in October 1978 pursuant to a requirement of the Coastal Zone Management Act, S.C. Code Ann. §48-39-80. It is not published in the S. C. Code of Regulations and was not promulgated as a regulation. It contains, in addition to the policies cited by Petitioner, descriptions of various parts of the coastal environment, but does not contain a specific definition of wetlands.²

13. All parties concede that there is only one method generally accepted and used to determine whether a site is a wetland. That method is set forth in a manual published by the Corps' Waterways Experiment Station in 1987 and referred to as the "'87 manual." The '87 Manual "describes technical guidelines and methods using a multiparameter approach to identify and delineate wetlands." Exh. 1 to Int. Exh. 1. The '87 Manual is not a federal regulation, but a technical document adopted for use by the Corps in delineating areas meeting the federal definition of wetlands set forth in Corps regulations at 33 C.F.R. Part 320, et seq.:

...those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil

² The regulations governing water pollution control permits at Reg. 61-9.122.2 include a definition of wetlands which is identical to the definition set forth in federal regulations. These regulations do not, however, set forth any requirements with respect to application of the NPDES General Permit if wetlands are present on a site where land clearing and construction activity is proposed.

conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Exh. 1 to Int. Exh. 1, p. 9, para. 26.a.

14. While the manual was designed by the Corps for use in identifying wetland areas subject to its jurisdiction pursuant to Section 404 of the federal Clean Water Act, 33 U.S.C. § 1344, in the absence of any method for identifying wetlands adopted by DHEC or OCRM, it is a method accepted by OCRM for determining the existence of wetlands it asserts are subject to the CMP policies. Both witnesses offered as experts in wetland identification testified they used the manual to perform their assessment of the site. Int. Exh. 1, p. 5-8; Pet. Exh. 84, p. 9, 20 and Tr. v. 2, p. 235.

15. The '87 Manual requires that three indicators of a wetland condition – called parameters – be found on any site before land may be classified as wetland: hydric soils, hydrophytic vegetation and wetland hydrology. Exh. 1 to Int. Exh. 1, p. 9-10.

16. Hydric soils are those soils formed over time in conditions of periodic inundation. Inundation of the soil by water to a sufficient extent causes the soil to display characteristics consistent with anaerobic conditions. Exh. 1 to Int. Exh. 1, p. 20.

17. The site must also support a prevalence of vegetation adapted for life in saturated soil conditions – called hydrophytic vegetation. The '87 Manual provides for classification of vegetation according to the degree of the relationship between the presence of a specific plant and saturated soil conditions. Obligate plants typically are nearly always found in saturated soil. Facultative plants are sometimes found in saturated soils and sometimes not. Upland plants are typically not found in saturated soils. Exh. 1 to Int. Exh. 1, p. 12; Int. Exh. 1, p. 9-14.

18. Finally, a site must have wetland hydrology, regardless of the other two parameters in order to be classified as a wetland. Exh. 1 to Int. Exh. 1, p. 28. Water need not be present at or over the surface of the land, but it must be within ten inches of the surface for

several weeks in the growing season for the hydrology parameter to be satisfied. Int. Exh. 1, p. 21-22. The '87 Manual lists a number of indicators of wetland hydrology including stream gauge data, visual observation of inundation, visual observation of soil saturation, and various physical marks caused by inundation. Exh. 1 to Int. Exh. 1, p. 30-34.

19. The '87 Manual requires that the wetland condition meeting the standards set forth for the three parameters reflect the "normal circumstances" of the site. Exh. 1 to Int. Exh. 1, p. 4, 6. Where a site has been recently altered so that one or more of the parameters has been removed, the '87 Manual provides for a method referred to as the "Atypical Method." This method set out at page 73 of the '87 Manual permits reliance on other parameters in the absence of the parameter which has been removed. Where, however, the altered condition of the site is not the result of unlawful activity, has been in existence for many years and has become the normal circumstances of the site – which is to say, the permanent condition of the site – this method is not sanctioned by the '87 Manual. In such situations, all three parameters must be present for a site to be classified as a wetland. Int. Exh. 1, p. 31-32. The '87 Manual specifically prohibits use of the Atypical Method where a site has been altered – drained, for instance – lawfully. Exh. 1 to Int. Exh. 1, p. 74, para. 71 a.

20. Prior to applying for a stormwater permit, Bill Clark Homes retained through its engineer a wetlands consultant, Norman Boatwright, to perform a wetlands delineation of the site. Tr. v. 3, p. 160-163. Boatwright holds a degree in forestry and has performed wetland delineations since 1991 and has done by his estimate between 60 and 100 per year since that time. His work has been primarily in the Carolinas and Georgia, although he has worked in other parts of the country as well. He has been qualified as an expert in wetlands delineation by the Court of Common Pleas in Horry County. Int. Exh. 1, p.3-5, 32-33. The Court finds that Mr.

Boatwright is an expert qualified to render an opinion as to whether a site meets the criteria for delineation as a wetland pursuant to the '87 Manual.

21. Boatwright spent one day at the site in the early winter of 2006. Int. Exh. 1 p. 15-16. He used a golf cart to traverse the entire property. At the time the site was an active golf course. Boatwright testified he sampled the soil in some 100 places across the property using a hand auger with which he dug holes up to 3 to 4 feet deep. Int. Exh. 1 p. 16, 20. He found no water in any of these holes. Int. Exh. 1 p. 20-21. Boatwright did not find a prevalence of wetland vegetation at any location on the property. He did, however, find that the natural soils across the site (often below a significant amount of earthen fill) were those typically associated with historic flooding. Int. Exh. 1, p. 17-20, 64.

22. Boatwright noted the presence of the many ponds on the site, which he observed to be collecting stormwater from the site for use as irrigation of the golf course. He observed that in creating the golf course the site had been significantly altered in terms of its surface features and in terms of the displacement of the natural hydrology of the site. The pond and ditch system, in his opinion, had fundamentally altered the hydrology of the site. Int. Exh. 1, p. 21-22, 36, 38-39, 61, 66.

23. Boatwright explained that the '87 Manual addresses sites like the one he described as fundamentally altered. Where the hydrology of a site has been altered artificially for a significant period of time, he testified that the manual does not permit determination of hydrology by the use of soils and vegetation alone. Use of soils and vegetation as "secondary" indicators of hydrology is only appropriate at a disturbed site, he explained, if the site has only been recently disturbed. He testified that there is no part of this site which possesses the requisite hydrology to qualify for delineation as a wetland, including the one small site where

Petitioner's wetlands expert testified he performed a wetlands determination. Int. Exh. 1, p. 14, 31-32, 60-61.

24. Boatwright testified that in his opinion no part of the project site is a wetland. The site consists in his opinion of upland intersected with some drainage ditches and drainage ponds. Int. Exh. 1, p. 36, 61, 64, 66. Boatwright reported his conclusions to the Corps, and the Corps provided him a letter certifying that there were no wetlands on the site. Based on this letter from the Corps, which was attached to the application to OCRM, ETS completed the application for the stormwater permit and coverage under the General Permit by indicating there were no wetlands on the site. Tr. v. 3, p. 160-163; Pet. Exh. 84, p. 17-18.

25. Petitioner offered the testimony of Jake Duncan, a former Corps of Engineers employee and since 2002 a private consultant performing wetland delineations. This Court finds that Mr. Duncan is an expert qualified to render an opinion as to whether a site meets the criteria for delineation as a wetland pursuant to the '87 Manual. Tr. v. 2, p. 188-189.

26. Duncan visited the site on two occasions, once on August 20, 2008 and again on December 4, 2008. Pet. Exh. 83.

27. During his visit in August 2008, Duncan was hired to examine the site and to "determine whether or not this was a wetland," and he made no determinations that any part of the site was currently a wetland. Pet Exh. 84, p. 18, 29. At that time, his evaluation led him to the conclusion that the site of the golf course and at least some part of each of the ponds on the course had been a wetland defined by the '87 Manual prior to construction of the golf course. He based this conclusion primarily on what he determined to have been the natural soils on the site. Like Boatwright, he explained that the site had been substantially disturbed by excavation and deposit in many cases of soil on top of the natural soils. Tr. v. 2, p. 232-233. In some cases,

he said the fill was too deep for him to measure with his auger without extensions. Pet. Exh. 84, p. 26-27. He also noted some wetland vegetation existing in non-wetland areas, which he believed to be left from the time prior to construction of the golf course. Duncan, Tr. v. 2, p. 217-218.

28. Immediately after his deposition was taken, Duncan was asked by Petitioner's counsel to return to the site. He did so on December 4, 2008 and produced a letter report of his findings on January 13, 2009. Pet. Exh. 83.

29. Duncan's January 13, 2009 letter essentially repeats the conclusions he set out in his original report and in his deposition testimony with one exception. He testified that he made a wetland "determination" of one spot which he marked with a star on an infrared photograph attached to his letter. Duncan testified that at this site he found a prevalence of wetland vegetation, including a swamp tupelo, and wetland soils. He did not say in his letter report or in his testimony at the hearing that he found wetland hydrology, other than as might be indicated by the vegetation and soils. He did not provide any demarcation of the boundaries he believed to be a wetland. Pet. Exh. 83. During his first visit in August 2008, Duncan explained that he made no determination of the presence of wetland hydrology. Pet. Exh. 84, p. 29. He testified at his deposition that he was not saying there were wetlands on the property "today" and that all three parameters would need to be present to make such a finding. Pet. Exh. 84, p. 35.

30. Duncan's testimony concerning the "star area" referenced in his January 13, 2009 letter is the only evidence submitted by Petitioner and admitted into the record of the existence of wetlands on the project site. The Court does not find this evidence persuasive. First, Duncan's extensive reports and testimony prior to this post-deposition visit to the site are devoid of any mention of current wetland conditions on the site. Pet. Exh. 84. The Court cannot help but

question why his extensive first visit, all for the purpose of making a wetland evaluation, failed to alert him to the presence of wetlands. Second, his claim that a part of the site indicated only by a roughly drawn "star" on an infrared photograph is insufficient to describe the extent of area he is claiming to be currently a wetland and for that reason alone is not sufficient as evidence on which this Court can rely. Third, Boatwright's testimony, which this Court finds to be equally as credible, directly contradicts Duncan's conclusions as to the type of vegetation and the presence of wetland hydrology. For instance, Boatwright testified that he evaluated the exact spot indicated by Duncan's "star" and found a predominance of upland vegetation, specifically loblolly pines, which he explained showed up on the infrared photo itself, and no swamp tupelo. Int. Exh. 1, p. 28-31, 63-64. Fourth, Duncan failed to rebut Boatwright's testimony that the '87 Manual does not permit conclusions concerning wetland hydrology like those offered by Duncan, using only soils and plants on a site which has been as altered as long as this one. Int. Exh. 1, p. 31-32. Boatwright's opinion on this point is also more consistent with the actual wording of the '87 Manual concerning use of the Atypical Method. Exh. 1 to Int. Exh. 1, p. 73-74.³ At a minimum, this Court must conclude that Petitioner has failed to carry their burden of proof as to the presence of any wetlands on any part of the project site.

Waters of the State

31. In its Amended Pre-Hearing Statement, Petitioner framed the issues before this Court as: 1) whether the ponds on the Old South Golf Course are "waters of the state" as that

³ The Court also finds Mr. Duncan's testimony on applicability of the Atypical Method to this site contradictory. On the one hand, like Mr. Boatwright, he testified that the site had been fundamentally altered through filling and grading so as to create the golf course decades ago (Pet. Exh. 84, p. 22-23) and that were he to evaluate whether wetlands were on the site, all three parameters need to present (Pet. Exh. 84, p. 35). On the other hand, he testified that it was appropriate to use the Atypical Method, as he apparently did when he visited the "star area" during his December 2008 visit and to conclude that wetland hydrology was present using only soil and vegetation indicators. (Pet. Exh. 84, p. 22-23). His explanation that this was appropriate because, in his opinion, the Corps should have been applying the '87 Manual to delineate wetlands years before it existed is not persuasive to this Court. (Pet. Exh. 84, p. 22-40).

term is defined in Reg. 61-9.122.2; and, 2) whether the proposed storm water management plan violates the Pollution Control Act with discharges of storm waters and pollutants into waters of the state without pretreatment and buffers. Petitioner did not identify in its Amended Pre-Hearing Statement, or at the contested case hearing, what specific regulatory requirement(s) would be triggered if the ponds were considered to be waters of the state.

32. 24 S. C. Code Ann. Reg. 61-9.122.2(b), defines "waters of the state" as:

...lakes, bays, sounds, ponds, impounded reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction. (emphasis added)

33. Petitioner offered into evidence portions of the deposition testimony of Shannon Hicks, a civil engineer and Manager of the Storm Water and State Certification Section of OCRM. Hicks testified that the plans submitted by Bill Clark Homes depicted the existing golf course ponds. Pet. Exh. 85 p. 8 l. 2-9. Hicks acknowledged that a "strict reading" of the definition of "waters of the state" would encompass these golf course ponds. Pet. Exh. 85 p. 10 l. 5-6. Hicks further testified that "during this review" the golf course ponds were not considered to be waters of the state. Hicks testified that the ponds on site, "appeared that they were constructed for the golf course. So that's what I utilized during the review, my understanding at the time." Pet. Exh. 85, p. 9. l. 15-18. When asked if OCRM's review of the project would have been affected in any way "if the ponds were considered waters of the state," Hicks replied, "[I]t may change it, but during this review they weren't considered waters of the state." Pet. Exh. 85, p. 15 l. 6-7. She went on to explain that the significance of the "water of the State" designation is that if storm water flows into a "water of the state," a pretreatment mechanism must be implemented." Pet. Exh. 85, p. 17. l. 5-7.

34. All witnesses who testified at the Hearing, including Petitioner's expert civil engineer, characterized the ponds on the Old South Golf Course as stormwater ponds. Tr. v. 2, p. 115 l. 18-21; Tr. v. 3, p. 65-67, 96-98; Int. Ex. 1, p. 21-22, 38-39. Hicks testified that "some ponds" would be incorporated into the new stormwater plan. Pet. Ex. 85, p. 17 l. 12-13.

35. It is not disputed that the ponds on the Old South Course are stormwater ponds, also alternatively referred to in the testimony as "drainage ponds," "retention ponds," or "detention ponds." Such ponds are the predominant method for controlling stormwater runoff associated with development. These ponds collect stormwater, hold it for a time to allow sediments to settle out, and then release the water in a controlled fashion. Tr. v. 2, p. 115; Tr. v. 3, p. 96-98; Int. Exh. 1, p. 21-22, 38-39.

36. This court is cognizant of the breadth of the regulatory definition set forth in Reg. 61-9.122.2(b), which appears to derive from the statutory definition of "waters" contained in the S. C. Pollution Control Act: "...lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction." S. C. Code Ann. §48-1-10(2). This Court agrees with the OCRM staff's conclusion that a strict reading of this definition encompasses the existing golf course ponds on the Old South Course.

37. The origin of the "pre-treatment requirements" referenced in Ms. Hicks' testimony, while not specifically identified by OCRM or by Petitioner, appears to be 25 S. C. Code Ann. Reg. 61-68, Water Classifications & Standards, which includes the following "General Rules and Standards Applicable to all Waters": "[a]ny discharge into waters of the

State must be permitted by the Department and receive a degree of treatment and/or control which shall produce an effluent which is consistent with the Act, the Clean Water Act ... this regulation, and related regulations.” 25 S. C. Code Ann. Reg. 61-68(E)(4)(a).

38. Ultimately this matter is determined based on the rules of statutory and regulatory construction. Reg. 61-68(E) states, on its face, that it is intended to be a regulation of general applicability. A requirement of general applicability must be read in concert with specific regulatory requirements. “A specific statutory provision prevails over a more general one.” Atlas Food Systems & Serv., Inc., v. Crane, 319 S. C. 556, 462 S.E.2d 858 (1995). 26 S. C. Code Ann. Reg. 72-300 et seq. and 24 S. C. Code Ann. Reg. 61-9.122.26 are specifically applicable to stormwater discharges. In accordance with 26 S. C. Code Ann. Reg. 72-301(11) a “detention structure” is a structure that stores and controls stormwater runoff. It is undisputed that the stormwater ponds located on the South Course are detention ponds. Reg. 72-305(B)(3) and (B)(5) refer specifically to the construction of ponds to achieve water quality improvement. Reg. 72-307(C)(5) sets forth specific design requirements for ponds “used for water quality protection.” and for “permanent water quality ponds.”

39. In accordance with S. C. Code Ann. Reg. 61-9.122.26, a stormwater discharge associated with “construction activity including clearing, grading, and excavation” of an area greater than 5 acres is classified as a “stormwater discharge associated with industrial activity.” Reg. 122.26(b)(14). Reg. 61-9.122.26(c)(ii) sets forth the requirements for obtaining permit coverage, which include providing information as to the “proposed measures to control pollutants in stormwater discharges during construction” and “after construction.” These measures include the use of ponds or detention structures, as is evident in the General Permit which refers specifically to the construction of “sediment basins” to store stormwater runoff.

Pet. Ex. 12 p. 23. A "storm water retention pond" is identified as a Best Management Practice ("BMP") in the General Permit. Pet Ex. 12 p. 32.

40. Consequently, and consistent with the rules of statutory construction, the specific regulations governing the construction and use of stormwater ponds as a method of controlling water quantity and water quality in stormwater runoff prevail over those rules generally applicable to all waters of the State.

Historic Drainage Concerns

41. Frank Yelinko is a resident of Deerfield Plantation at Lot 539, 1022 Plantation Drive and is President of the Deerfield Plantation Phase II B Homeowners Association. Tr. v. 1 p. 11 ll.3-21. Yelinko has resided at 1022 Plantation Drive since 1995. He is presently retired and does not hold any professional licenses in the State of South Carolina. Tr. v. 1 p. 120 ll. 13-17. This Court considers Mr. Yelinko to be an expert in commercial and subdivision land development based on his work experience prior to his relocation to South Carolina. Tr. v. 1 p. 128 ll. 3-12.

42. Yelinko's lot is located immediately adjacent to the Old South Course. Since 1995 he has observed four major floods, which he defined as a rain event where water would flood homes in the subdivision, and approximately eight minor floods, where some of the residents would experience flooding in their garages, within Deerfield Plantation Phase II B. Tr. v. 1 p. 73 ll. 6-25. According to Yelinko, Petitioner's chief concern and the basis for objection to redevelopment of the South Course is the potential for increased flooding resulting from the redevelopment. Tr. v. 1 p. 94 ll. 23-25; p. 95 ll. 15-18.⁴

⁴ A representative of Deerfield Golf, Inc., Jason Murphy, testified that he met with representatives of Deerfield Plantation Phase II B POA to discuss redevelopment of the Old South Course. At that meeting, the POA and Mr.

43. In 1997, twenty-two lots in Phase II B flooded, but in most instances the garages were the only portions of the houses that became inundated with water. Tr. v. 1 p. 36 l. 19-25.

44. Property owners in Phase II B have not experienced any flooding since 2001. Tr. v. 1 p. 74 l. 1-3.

45. The specific examples of flooding cited by Petitioner's witnesses were limited to impacts to properties located on Circle Drive. Tr. v. 2 p. 24 l. 23; p. 25 l. 9; p. 31 l. 20; p. 55 l. 4; p. 111 l. 10.

46. Mike Taylor resides at 569 Circle Drive. In September of 2000, following Hurricane Floyd⁵, he suffered flooding that impacted his home. Tr. v. 2 p. 149-150. Mr. Taylor observed flooding in his neighbors' homes in March of 2001, at 571 Circle Drive, 572 Circle Drive, and 568 Circle Drive. Tr. v. 2 p. 154 l. 9-12. Mike Couture resides at 570 Circle Drive. His home flooded during Hurricane Floyd and in 2001. Tr. v. 2 p. 259 l. 19-25; p. 260 l. 1-23. Couture confirmed that there have been no flooding events affecting Circle Drive properties in the past six years. Tr. v. 2 p. 262 l. 25, p. 263 l. 1-2.

47. Many residences on Circle Drive are slab on grade construction and are located at elevations below the elevation of Circle Drive. Tr. v. 1 p. 195 l. 8-13.

48. Stormwater run-off drains from Deerfield Plantation Phase II B into a series of drainage ponds constructed on the golf course, and from the ponds into a channel leading out of

Yelinko, expressed additional objections to redevelopment, including a request that the golf course be dedicated to public use. Tr. v.3 p. 178-179.

⁵ Hurricane Floyd formed off the coast of Africa and lasted from September 7 to September 19, 2000, peaking in strength as a very strong Category 4 hurricane. It was among the largest Atlantic hurricanes of its strength ever recorded. The hurricane produced torrential rainfall in eastern North Carolina. The rains caused widespread flooding over a period of several weeks; nearly every river basin in the eastern part of the state exceeded 500-year flood levels. In total, Floyd was responsible for 57 fatalities and \$4.5 billion in damage. (www.nhc.noaa.gov)

the development. The discharge is then piped under U. S. Highway 17, where it flows into another pond, and is then released into Lake Elizabeth, and then Lake Dogwood, and finally into the Atlantic Ocean. Tr. v.1 p. 43, p. 68-69.

49. Lake Elizabeth and Lake Dogwood are large lakes located in the Town of Surfside Beach adjacent to the Atlantic Ocean. Pet. Exh. 14, 73, 74.

50. Tom Garigen, the Stormwater Manager for Horry County, testified on behalf of Respondent Deertrack Golf, Inc. Garigen oversees implementation of the County's stormwater management ordinance which was adopted in 2000. In addition to implementing the stormwater management ordinance and permitting program, Garigen also oversees the coordination of drainage improvement projects and capital improvement projects related to the County's stormwater systems. Tr. v. 3 p. 7. Garigen's responsibilities include extensive field work and investigation, and he is familiar with the Old South Golf Course, the surrounding development, and the proposed redevelopment. Tr. v. 3 p. 10 l. 24-25; p. 11 l. 1-18.

51. According to Garigen, Deerfield Plantation Phase II B was developed in a low-lying area prior to the current regulatory requirements and there were also inadequacies in the downstream drainage system that contributed to the historic flooding problems. Tr. v. 3 p. 19.

52. Horry County responded to the historic flooding problems in the Deerfield Plantation Phase II B subdivision by hiring an engineering firm, the LPA Group in Columbia, South Carolina to study the drainage issues. LPA prepared an initial report, which was updated twice for the County, to reflect changes in the watershed. Tr. v. 3 p. 11 l. 12-25, p. 12 l. 1-16. Resp. Exh. 8, 18, 26.

53. LPA identified the outfall from Deerfield Plantation Phase II B as Node 27. LPA modeled existing conditions at Node 27 in its initial report in 2000 and predicted the peak water

surface elevation during the 25 year storm event to be 24.67. Resp. Exh. 26; Tr. v. 3 p. 21 l. 13-18. This is the most significant prediction in the LPA report for purposes of designing a stormwater management plan for redevelopment of the South Course because it reflects the tailwater condition at the point where the drainage from the Deerfield residential development and the golf course tie in to the County's drainage system. Tr. v. 3 p. 91 l. 4-10. This tailwater condition can be incorporated into stormwater models for new developments that discharge into Node 27 to insure that at peak conditions water from the new development will still flow out of the development. Tr. v. 3 p. 95 l. 2-13.

54. The LPA report set forth three alternatives, which would improve drainage in the watershed. Alternative 1 proposed the construction of detention ponds at various locations upstream of Highway 17 and culvert replacements in the Caropines subdivision and along Glenns Bay Road. Alternative 1 was the most costly as it would have required substantial land acquisition. Alternative 2 proposed major piping upgrades upstream of Lake Elizabeth, improvements in the Town of Surfside Beach and an acre of additional storage upstream of Glenns Bay Road. Alternative 3 was a combination of the first two alternatives with less proposed land acquisition. Resp. Exh. 26, Tr. v.3 p. 22-23.

55. Horry County implemented Alternative 2 in 2001, immediately following the submission of the LPA study. Tr. v.3 p. 23. Initially, the County installed an additional 42" pipe culvert under Glenns Bay Road.

56. More recently, the County installed a dual culvert system consisting of two 60" pipes leading out to and under Highway 17 Business. The pipe under Highway 17 was increased to 72". Horry County acquired property in the vicinity of Node 27 to construct an additional detention pond. Resp. Exh. 9, 28, Tr. v. 3 p. 24 l. 3-7, p. 34 l. 16-25, p. 35 l. 1-25.

57. Petitioner claims that the County's improvements are defective based on the installation of a screening structure at the headwaters of the dual culvert system and based on the fact that of the dual 60" pipes intersect with a gravity sewer line. Tr. v. 2 p. 102 l. 16-25. The County did install a screening system at the point where the pipes discharge into a drainage basin that flows into Lake Elizabeth and Lake Dogwood. Tr. v.3 p. 24. As Garigen explained, the original screening structure accumulated so much trash that it blocked the water flow, so the County redesigned it. Tr. v. 3 p. 32 l. 14-25; p. 33 l. 1-12; Resp. Exh. 21a, b. Garigen testified that the redesign has been successful and has eliminated the potential for accumulation and obstruction of water flow. Tr. v. 3 p. 33 l. 17-21. Garigen also confirmed that the dual 60" pipes intersect with a gravity sewer line. In order to insure that the flow from the dual 60" pipes is not blocked or impeded by the sewer line, the County installed a conflict box, 14' x 8' x 7', described by Garigen as being the size of a "small room" which allows water to flow above and below the gravity sewer line. Tr. v.3 p. 30-31, Resp. Exh. 27.

58. Garigen testified that he is the Horry County staff person contacted regarding reports of flooding and flooding complaints from County residents, and there have been no reports of flooding in homes in Deerfield Plantation Phase II B since 2001. Tr. v.3. p. 30. The last significant rain event in Horry County, prior to the contested case hearing, occurred in October of 2008. This rain event resulted in an accumulation of approximately 4 inches of rain in a short period of time. Tr. v. 3 p. 36 l. 22-23. No flooding was reported.

59. In October of 2007, LPA revised its report of April, 2000 to reflect the initial improvements installed by Horry County. In its October, 2007 report, LPA predicted a lower peak water surface elevation at Node 27 following a 25 year storm event of 21.38. Resp. Exh. 8.

60. LPA's October 2007 report was revised in July of 2008 to reflect installation of the dual 60" pipes and the new pond at Node 27, and to reflect the development proposed by Deerfield Golf and Bill Clark Homes. LPA predicted a peak water surface elevation following the 25 year storm event of 20.64 at Node 27 as a result of the improvements.

61. Following the significant rain event in October of 2008, Garigen inspected the pond at the headwaters of the dual 60" pipes to determine the water surface elevation at Node 27. The debris marks left on the screen provided visible evidence that the water surface elevation was raised to approximately 20 feet, considerably down from the LPA predictions of 24.67 in 2000, and consistent with LPA's predictions in 2007 and 2008.⁶

62. Horry County has spent over two million dollars in improving drainage infrastructure in order to address the flooding problems in Deerfield Plantation Phase II B.

63. The LPA Group was hired to address flooding in both the Deerfield development and in an adjacent development known as Caropines. Garigen testified that the drainage improvements have also resulted in alleviating the flooding problems in Caropines. Tr. v. 3 p. 42 l. 4-5.

64. In addition to OCRM's review, Horry County conducted their own review of the stormwater design for the project. Horry County requires that a new development be designed to insure that post-development peak discharge rates do not exceed pre-development peak discharge rates for the 25 year storm event. Tr. v. 3 p. 13. Garigen testified that his staff has spent more time reviewing the stormwater management design and calculations for redevelopment of the South Course than they have spent on any other project they have

⁶ Garigen described the accumulation of rain as "four inches ... over a fairly short period of time." Tr. v. 3 p. 36 l. 22-23. Petitioner's counsel and witnesses disputed whether Deerfield Phase II B experienced a significant rain event in October of 2008, but Garigen's inspection of the screening device at the location of Node 27 indicates that stormwater flowed into Node 27. Garigen estimated that the water elevation in the pond rose from its normal levels of 15.5 feet to 20 feet within two hours. Tr. v. 3 p. 49 l. 15-17, p. 51 l. 21-25, p. 52 l. 1-8.

reviewed. The reason for the level of review, aside from the scrutiny of the surrounding property owners, was the County's investment in stormwater infrastructure in the drainage area, and its desire to insure that future development approvals are consistent with the County's investment of resources. Tr. v. 3 p. 38 l. 20-25, p. 39 l. 1-15.

Project Design

65. Thomas Bevins is a professional engineer with the firm Engineering and Technical Services, Inc. ("ETS") and has been employed by ETS since 1986. During the past 23 years, Bevins has participated in the design and development of at least 600 residential and commercial development projects, primarily located in Horry and Georgetown Counties. Tr. v. 3 pp. 58-60. He is a licensed professional engineer in South Carolina and North Carolina and testified in this contested case as an expert in the field of civil engineering and stormwater management. Tr. v. 3 p. 63.

66. Bevins has designed golf courses and incorporated golf course ponds into his design. Tr. v. 3 p. 60. According to Bevins, golf course ponds typically serve as part of a stormwater drainage system for the golf course and, sometimes, for adjacent residential development. Tr. v. 3 p. 65, l. 15-25, p. 66 l. 11-9.

67. The requirements for redevelopment of the Old South Course were unique. ETS was required to model for projected stormwater flows from the new residential subdivision it had designed, and for actual flows from the existing development. Tr. v.3 p. 64 l. 14-25, p. 65 l. 1-4.

68. The LPA reports established a watershed described by Bevins as the "Lake Elizabeth and Lake Dogwood drainage watershed." This watershed is depicted in Figure 7.1 of ETS's Drainage Report, which was submitted to OCRM as part of the request for stormwater

permit coverage. This watershed consists of 1,115 acres. Pet. Exh. 31; Tr. v. 3 p. 76 l. 5-13. ETS's depiction of the watershed is identical to Figure 1-2 of the LPA Report prepared in April, 2000, "Dogwood Lake Watershed." LPA noted in its initial report that the "Dogwood Lake Watershed is approximately 1,115 acres." Resp. Exh. 26.

69. ETS's calculations, however, are based on a subset of the 1,115 acre Dogwood Lake Watershed. ETS identified the portion of the watershed that drains through the Deerfield property and discharges at Node 27. ETS included a depiction of this drainage basin in its report. Resp. Exh. 31 – Figure 6.1. The difference between ETS's drainage basin and LPA's watershed is that all 1,100 acres of LPA's watershed discharge through an outlet downstream of Lake Elizabeth and Lake Dogwood. ETS focused on the contributing drainage area of approximately 864 acres that discharges through Node 27. Tr. v. 3 p. 81 l. 14-25. ETS selected this drainage basin, over the 1,100 acre watershed utilized by LPA, because LPA's watershed discharged downstream of Node 27. ETS's focus was on the condition at Node 27 and on the contribution to that condition attributable to the proposed residential subdivision. Tr. p. 77 l. 22-25, p. 81 l. 14-22.

70. ETS utilizes stormwater models that simulate the performance of a stormwater system and predict how the system will behave during a storm event. Computer models are standard industry tools for use in the design of interconnected pond stormwater systems. Tr. v. 3 p. 89 l. 1-19, p. 86 l. 19-20, p. 90 l. 11-16. In designing Phase I of the redevelopment of the South Course, ETS utilized the computer model known as ICPR, Interconnected Pond Routing System. Tr. v. 3 p. 88 l. 2-9, p. 89 l. 15-19.

71. When ETS prepared its stormwater calculations for purposes of submitting its permit application to DHEC, it incorporated the data contained in the LPA report dated October,

2007. LPA predicted a tailwater condition at Node 27 during the 25 year storm event to be a water surface elevation of 21.38 ft. Resp. Exh. 8 – Analysis of Proposed Changes. ETS utilized a more conservative post-development peak water surface elevation assumption of 22 feet as its assumed worst-case tailwater condition during the 25 year storm event. ETS designed sufficient detention for Phase I of the redevelopment to achieve reductions in post development peak discharge rates. ETS's design included sufficient storage capacity so "the calculated post development peak discharge rates are less than or equal to the pre-development peak flow rates." Resp. Exh. 31 p. 11. Tr. v. 3 p. 93 l. 22-25, p. 94, p. 95 l. 1-13.

72. In addition to meeting the State regulatory standard for the 2 and 10 year storm events, and Horry County's ordinance requiring design for the 25 year storm event, Horry County specifically requested that ETS's design for Phase I of the redevelopment of the South Course incorporate measures to improve conditions for adjacent property owners. Tr. v.3 p. 72 l. 1-11.

73. ETS determined that the existing golf course ponds, which are providing a stormwater detention function for Deerfield Plantation Phase II B, are inefficient. The ponds are shallow and have limited storage capacity. Tr. v. 3 p. 96 l. 12-25, p. 97 l. 1-6. Bevins testified that the flooding in the existing subdivision is, in part, attributable to the limitations in the existing ponds. Tr. v. 3 p. 97 l. 12-19. The redevelopment of the golf course created an opportunity to improve stormwater storage capacity for the residents and properties at Deerfield Plantation Phase II B. Presently there are 11.55 acres of stormwater ponds on the golf course providing stormwater detention for Phase II B, with existing storage capacity of 5.66 acre feet. The plans for redevelopment include 22.36 acres of ponds and 100.62 acre feet of storage capacity resulting in an increase of approximately 90 acre feet in additional storage capacity.

Resp. Exh. 31 p. 12, Exh. 19-a and 19-b. Bevins testified that in his opinion, as an expert in civil engineering with expertise in stormwater management, the proposed new ponds will function better than the existing detention ponds. Tr. v. 3 p. 100 l. 3-7.

74. Along with adding storage and detention capacity by substantially increasing the number of ponds, ETS's design routes stormwater around the properties located on Circle Drive, instead of through those properties. Tr. v. 3 p. 103 l. 9-25, p. 104 l. 1-18, Resp. Exh. 11 a, 11 b, and 11 c. Presently, in the absence of redevelopment of the Old South Course, approximately 100 acres contribute to stormwater run-off through the Circle Drive properties. With the re-routing proposed by ETS, the contributing drainage area impacting Circle Drive is reduced to approximately 10-12 acres. Consequently, redevelopment of the Old South Course results in a 90% reduction in stormwater discharges directly onto Circle Drive. Tr. v. 3 p. 105 l. 1-11. The re-routing was accomplished by intercepting stormwater along the perimeter of the proposed development and discharging it into the ponds. Tr. v. 3 p. 105 l. 18-25. As Bevins testified, "that water will have a route that will go around the Circle Drive area and it will discharge downstream of that particular part of Circle Drive." Tr. v. 3 p. 106 l. 5-8. In Bevins' opinion, re-routing stormwater discharges around Circle Drive will improve the drainage conditions and further eliminate the potential for nuisance flooding on Circle Drive. Tr. v. 3 p. 106 l. 22-23.

75. Petitioner expressed concern over the elevations of the proposed development relative to properties on Circle Drive. Horry County requires that the lowest elevation for roads in the proposed redevelopment be above the peak stage of the 25 year storm event. Tr. v.3 p. 112, l. 20-25. Horry County also requires that the houses be built a foot above the elevation of the centerline of the proposed roads. Bevins testified that in some instances along Circle Drive the existing houses may be at elevations approximately 4 feet lower than the floor elevation of

adjacent houses in the redevelopment. The effect on the existing houses will be that adjoining properties will have structures at higher elevations, affecting the views from existing houses that formerly enjoyed unobstructed views of a golf course. Tr. v. 3 p. 115 l. 23-25. Bevins testified that the construction of new houses adjacent to the homes on Circle Drive at elevations approximately 4 feet higher than the homes on Circle Drive, would not increase the potential for flooding on Circle Drive. Tr. v. 3 p. 118 l. 5-22. Bevins' design includes swales constructed on either side of the building pads, between the new homes. Moreover, as is discussed above, most of the drainage traditionally flowing through Circle Drive will be captured by a series of ditches and pipes located within the new construction, and routed directly to the stormwater management ponds.

76. Petitioner presented the testimony of Steven Powell, a Professional Engineer and owner of Venture Engineering Co. in Conway, S. C. Powell is recognized by this court as an expert in civil engineering and stormwater engineering. Tr. v. 2 p. 8 l. 25. Powell reviewed the permit application prepared by ETS, prior to permit issuance, at the request of an attorney representing residents who opposed the redevelopment. Tr. v. 2 p. 10 l. 2-13. In his initial review, Powell found no problems with ETS's stormwater calculations. Tr. p. 11 l. 2-5. Following his initial review, Powell's opinion was that the redevelopment of the Old South Course could potentially improve drainage conditions for surrounding residents. Tr. v. 2 p. 11 ll. 15-20.

77. After December 3, 2008, the date of Powell's first deposition, Powell was retained by Petitioner to perform additional work related to the ETS permit application and supporting documentation. Powell subsequently concluded that the ETS "watershed" was

insufficient.⁷ Powell also concluded that the LPA data was unreliable because it had not been verified and the LPA model had not been calibrated. Powell believes that the anecdotal evidence of flooding along Circle Drive should have been incorporated in the LPA model. Tr. v. 2 p. 22 l. 21-25, p. 23 l. 1-3.

78. Powell illustrated his concern with the lack of calibration by comparing the post development peak discharge rate predicted in the most recent LPA model with the peak elevations witnessed in 2001. Tr. v. 2 p. 31 l. 17-23. However, Powell overlooks the changes in the drainage infrastructure that were installed between 2001 and publication of LPA's 2007 and 2008 revisions. Powell expressed concern that the tailwater conditions utilized by ETS, and developed by LPA, are inaccurate, but Powell admits that he did not perform any independent calculations to derive a more accurate tailwater elevation. Tr. v. 2 p. 14 ll. 21-22. p. 37, l. 1-11. Powell acknowledges that he has "every reason to believe that there probably is more capacity [for stormwater flows] there than there was in 2001." Tr. v. 2. p. 39 l. 4-6. Powell believes, however, that the conflict between the dual 60" pipes and the gravity sewer line will result in a 40% loss of conveyance, or water flow, through the pipe. Tr. v. 2 p. 39 l. 10-25.

79. On cross examination Powell admitted that he had sent an e-mail to the attorney who initially asked him to review the plans and calculations stating that "after studying the report, plans and calculations of ETS for the Old South Course, my conclusion is that drainage will likely be improved for the existing homeowners there. I can find no technical basis, from a stormwater management side, to oppose the issuance of the stormwater permit." Tr. v. 2 p. 64 l. 16-22. Powell qualified this assessment in his testimony: "But remember those calculations were based on the un-calibrated model of LPA. So if LPA's model is not correct, I'm sorry, but

⁷ As is noted herein, ETS selected a drainage basin within the Dogwood Lake watershed. The Dogwood Lake watershed consists of 1,115 acres. The ETS drainage basin within that watershed consists of 864 acres. Tr. v. 2 p. 20 l. 4-5.

ETS's calculations are not either." Tr. v. 2 p. 67 l. 4-8. Powell acknowledged, however, that the LPA report describes the methodology used, which included "[g]ather additional input from the public, Horry County officials, Town of Surfside officials, and site investigations;" and "[c]alibrate the model using information gathered." Pet. Exh. 26 Section 2.0 Methodology. But, according to Powell, "if they gathered the data ... its not reflected in the report." Tr. v. 2 p. 70 l. 20-22. However, the data that Powell believes should have been included in the model was from a flooding event in March of 2001, a year after the publication of the LPA report. Tr. v. 2 p. 55 l. 1-15. In fact, all anecdotal evidence of flooding presented at the contested case hearing, documented with photographs, were of flooding events that occurred after publication of the April 2000 LPA report.⁸

80. This Court understands and appreciates Mr. Powell's concerns that the predictions in the LPA model be based on as much accurate data as possible. However, this Court finds that the LPA model and report is reliable and that it is appropriate for ETS to have utilized assumptions developed by LPA. The most recent flood event described by the Phase II B residents occurred eight years ago, in 2001. This Court does not believe that it is pure coincidence that incidents of flooding ceased at the same time that Horry County began implementing the recommendations of the LPA report. LPA recommended significant, and expensive, infrastructure improvements that have been undertaken by the County. LPA has, in its 2007 and 2008 reports, attempted to calibrate, or at least revise, the model to reflect the installation of the County improvements and the redevelopment plans. This Court cannot overlook Garigen's undisputed testimony that four inches of rain fell in a two hour period in October of 2008, flowed into Node 27, and raised the levels from 15.5 feet to approximately 20

⁸ Mike Taylor testified and provided photographs documenting flooding events that occurred after he purchased his property in February of 2000. Mike Couture testified regarding Hurricane Floyd, in September of 2000, and the flood event in March of 2001.

feet. Although this Court acknowledges that no determination has been made to classify that storm event by frequency⁹, the water level as observed by Garigen is entirely consistent with predictions made by LPA in its July 2008 revised report for peak tailwater conditions at Node 27 for the 10 (20.08 ft.) and 25 (20.64 ft.) year storm event. Resp. Exh. 18 p. 9.

81. Petitioner has the burden of proving that the Respondent failed to meet the requirements of S. C. Code Ann. Reg. 72-300 and 61.9-122. Petitioner has not cited to a specific requirement in either the Standards for Stormwater Management and Sediment Reduction in S. C. Code Reg. 72-300 et seq. or in S. C. Code Reg. 61-9.122.26 governing storm water discharges. Pertinent requirements of S. C. Code Reg. 72-300 are set forth in Reg. 72-307(C)(4) which require an applicant to design for the two and ten year storm events but also gives the Department the discretion to utilize a less frequent storm event “(e.g. 25 year, 24 hour) to address existing or future stormwater quantity or quality problems.” Here, with the historic flooding problems, the County’s focus on and study of the watershed, the nature of this project – redevelopment of a tract formerly utilized as a golf course, and because the golf course served as the stormwater detention system for the adjacent development, this is certainly an instance where the Department should use its discretion and impose requirements based on a less frequent storm event. That was accomplished because of the County’s more stringent requirements.

This Court certainly understands the concerns of the Petitioner’s members. It is undisputed that up until 2001 property owners on Circle Drive were vulnerable to flooding and suffered from flooding and significant property damage. But, it is also undisputed that flooding has not occurred since 2001 and that the cessation of flooding coincides with the County’s implementation of the LPA recommendations. This Court places great weight on the testimony

⁹ Garigen described the October 2008 storm as “so bad because it occurred ... it was thunderstorm related and those happen very quickly. It was probably a storm that generated those four inches in an hour or two.” Tr. v. 3 p. 49 l. 12-17. Garigen also described the October 2008 storm as a “pretty serious storm.” Tr. v. 3 p. 52 l. 2-3.

of the County's stormwater manager, Tom Garigen. Mr. Garigen has been intimately involved in addressing the drainage conditions in the Dogwood Lake Watershed and has a vested interest, as the staff person responsible for spending millions of dollars of public funds on improvements, in determining whether the new investment in drainage infrastructure is working. Garigen's testimony that he has inspected the area following different rain events for purposes of determining water surface elevations, and has found his site inspections to be consistent with LPA's predictions is compelling. Tr. v. 3 p. 28 l. 16-24, p. 29 l. 1-25. Garigen's conclusion that "the LPA model accurately represents what's actually occurring in the watershed" is supported by his undisputed observations. Tr. v. 3 p. 29 l. 23-25. Garigen's observations are significant in evaluating Powell's testimony. Powell expressed concern that the LPA assumptions in the revised reports that the drainage improvements were functioning as designed might be flawed based on the possible impediments caused by the trash screen at the termination of the dual 60" pipes, and based on the intersection of the dual 60" pipes with the gravity sewer line. But Garigen's field observations following rainfall events reveal that the infrastructure is functioning consistent with LPA's predictions.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I conclude the following as a matter of law:

1. This Court has subject matter jurisdiction in this case pursuant to S.C. Code Ann. §1-23-310 et seq. (2005 & Supp. 2006) and S.C. Code Ann. §44-1-60 (2008). The hearing before the ALC is a contested case hearing pursuant to the APA and is heard *de novo*. Marlboro Park Hosp. v. S. C. Dep't of Health and Env'tl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004). The proper standard of proof to be applied is a preponderance of the evidence. Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 496 S.E.2d 17(1998); National Health Corp.

v. Dep't of Health and Env'tl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989).

Furthermore, the burden of proof is upon the party asserting the affirmative of an issue, and, therefore, the Petitioner bears the burden of proving that the agency decision was in error under the statutory and regulatory standards. Leventis v. Dep't of Health and Env'tl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).

2. The S.C. Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §48-14-10 et seq. and the regulations promulgated thereunder, 26 S.C. Code Ann. Reg. 72-300 et seq. require a permit for land disturbing activities, unless an exemption applies. §48-14-30(A). Additional stormwater management requirements are contained in 24 S. C. Code Ann. Reg. 61-9.122.26. Compliance under both sets of requirements is accomplished in one permitting action through authorization of coverage under the NPDES General Permit. Pet. Exh. 12.

3. "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999). The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See, S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992).

With regard to expert testimony, it is generally recognized that "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence" and that "the triers of the facts cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding contrary to the opinion." 32A C.J.S. Evidence § 727, at 82-83 (1996). However, the trier

of fact may give an expert's testimony the weight he or she determines it deserves, Florence County Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct.App. 1992), and may accept the testimony of one expert over that of another, S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992). In weighing such expert testimony, the general principles for determining whether evidence warrants a finding remain applicable; accordingly, "an expert's opinion which is based on guess, surmise, or conjecture has little evidentiary value, and expert opinion evidence lacks probative force where the conclusions are contingent, speculative, or merely possible." 32A C.J.S. Evidence § 730, at 87 (1996).

4. In its review of the proposal for redevelopment of the South Course, OCRM did not apply the standards generally applicable to waters of the State. S. C. Code Ann. § 48-14-10 et seq. and 26 S. C. Code Ann. Reg. 72-300 et seq. and 24 S. C. Code Ann. Reg. 61-9.122.26, related to stormwater management and stormwater discharges, were promulgated after adoption of the S. C. Pollution Control Act and after promulgation of 25 S. C. Code Ann. Reg. 61-68(E)(4). "It is well-settled that a specific statute controls over a more general one, e.g., Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006), and that a more recent legislative enactment prevails over an earlier one. E.g., Town of Duncan v. S.C. Budget & Control Bd., 326 S.C. 6, 482 S.E.2d 768 (1997)." Bursey v. SCDHEC, 369 S. C. 176, 631 S. E. 2d 897 (2006).

5. To endorse Petitioner's position, that the existing drainage ponds on the golf course cannot be incorporated into the stormwater management plan and system for the proposed redevelopment of the golf course without requiring pre-treatment of the stormwater discharge, would require this Court to ignore not only the intent and purpose of the Stormwater Management Act and regulations, but common sense as well. Pre-treatment of stormwater

running into a stormwater pond is a contradiction in terms. The very purpose of the stormwater pond is to intercept and treat the stormwater before discharge into a receiving waterbody.

6. The S. C. Supreme Court recognized the inherent conflict in denying a stormwater permit based on regulations promulgated under the S. C. Pollution Control Act in Responsible Economic Development et al. v. SCDHEC and Wal-Mart et al., 371 S. C. 547, 641 S.E.2d 425 (2007). "In the absence of statutory authorization to apply the two acts and their corresponding regulations to each other, the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations." Id. at 555. While this contested case is factually distinct,¹⁰ Responsible Development supports a conclusion that the requirements from the Pollution Control Act and the Stormwater Management and Sediment Reduction Act must be reconciled, and one set of requirements cannot be applied so as to defeat the other. The issue raised by Petitioner – whether, in light of the pre-treatment requirement in 25 S. C. Code Ann. Reg. 61-68(E)(4), the Department can approve a stormwater management plan and land disturbance permit application which allows for an existing system of stormwater ponds to be incorporated into a new development – creates a potential inconsistency between two statutory and regulatory schemes intended to protect water quality. The appropriate response to this potential inconsistency is to construe the potentially conflicting requirements in a manner that reconciles any inconsistency, which is what OCRM staff did when it did not apply Reg. 61-68(E)(4) to the golf course ponds on the Old South Course. "Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation. Mims v. Alston, 312 S. C. 311, 440 S.E.2d 357 (1994). Moreover the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them." Capco of

¹⁰ Wal-Mart obtained a stormwater permit in 2003 under S. C. Code Ann. Reg. 72-300 et seq., prior to implementation of the General Permit in 2006. Deertrack Golf, Inc., obtained permit coverage under the General Permit, which combined requirements of Reg. 61-9.122.26 and Reg. 72-300 et seq.

Summerville, Inc., v. J. H. Gayle Const. Co., 368 S. C. 137, 142, 628 S.E.2d 38,41 (2006), quoting City of Rock Hill v. South Carolina DHEC, 302 S. C. 161, 167, 394 S.E.2d 327, 331 (1990).

7. Petitioner has raised the following question for resolution in this contested case: “are the waters of the state and wetlands on the site connected to navigable waters of the United States by surface connections and are the wetlands thus federal jurisdictional wetlands?”

It is uncontested that the U.S. Army Corps of Engineers determined that there are no waters of the United States on the site. This conclusion involves considerations entirely of federal law turning on the presence of interstate commerce. In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (known commonly as the SWANCC case), the Court concluded the federal government does not have statutory authority to regulate wetlands where such areas are isolated from the surface water system of creeks, streams and rivers which drain into traditional navigable waters. Again, in Rapanos v. U.S., 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed. 159 (2006), the Court held that the Corps’ authority was limited to areas with a substantial connection to navigable waters and, thus, to interstate commerce.

Respondents and Intervenor filed a Motion in Limine with this Court to exclude any and all evidence related to this issue as one outside this Court’s jurisdiction and one not relevant to any issue properly before the Court. In response to the Motion, this Court ruled that evidence of the existence of wetlands on the project site is relevant to Petitioner’s argument regarding the CMP policies, but evidence as to the presence of wetlands or other areas constituting “waters of the United States” subject to the Corps’ jurisdiction under the federal Clean Water Act, 33

U.S.C. §1301, et seq. is irrelevant. Subject to that ruling, this Court accepted evidence from the parties concerning whether any part of the project site is a wetland.

8. Petitioner claims that there are wetlands on the site which will be disturbed by the permitted activity and that the CMP policies require consideration of those impacts before OCRM may issue a storm water permit. Petitioner failed to carry their burden of proof, however, as to the existence of any wetlands on the project site. As there are no wetlands on the site, the provisions of the CMP policies related to wetlands have no application to the stormwater plan at issue. OCRM did not violate any provision of the CMP policies or the Coastal Zone Management Act in issuing the stormwater permit at issue.¹¹

9. The legislative intent behind the Stormwater Management and Sediment Reduction Act is “to reduce the adverse effects of stormwater runoff and sediment and to safeguard property and the public welfare by strengthening and making uniform the existing stormwater management and sediment control program.” Responsible Economic Development et al. v. SCDHEC and Wal Mart et al., 371 S.C. 547, 641 S.E.2d 425 (2007). The program requires detailed engineering analysis and information regarding routing and management of storm water from the site.

Reg. 72-305 contains the regulatory review and permitting procedures, and Reg. 72-307 contains the minimum design standards and specific design criteria. That regulation requires that a project be designed to meet the pre and post development requirements for the two and ten year storm event. Reg. 72-307(C). This project exceeds the State standards as it has been

¹¹ In Spectre, LLC v. S.C. Department of Health and Environmental Control, Case No. 06-ALJ-07-0711-CC, this Court concluded that the CMP policies Petitioner claims were violated by OCRM were not properly promulgated as regulations and could not, therefore, be applied as binding norms, as Petitioner seeks to have them applied. This Court also found that, even if these policies may legally be applied to storm water permits, they do not, by their own terms, apply to isolated wetlands. As the evidence does not support a finding of the existence of any wetland on the site to which the CMP policies might apply, the Court does not need to reach the issue that was addressed in the Spectre case.

designed to meet the 25 year storm event. The permit application includes design measures that will limit the potential for flooding Petitioner's residents. These measures include a substantial increase in the storage capacity with the construction of additional ponds and the re-routing of approximately 90% of the contributing drainage area around Circle Drive, rather than through Circle Drive. Moreover, the applicant properly relied on the extensive watershed modeling performed by Horry County.

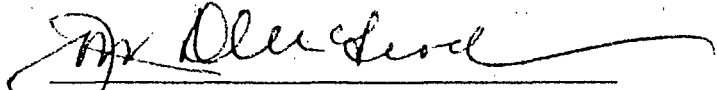
Here, Petitioner's expert expressed concern over a lack of calibration of the LPA model, over the ETS designation of drainage basin boundaries, and over the reliability of the LPA model and predictions in the event the Horry County drainage improvements are not functioning as assumed by LPA. This testimony, based on concerns and conjecture and is not supported by the evidence. This Court, while appreciative of Mr. Powell's professional concerns, assigns more weight to the opinions of Deertrack's expert and to the field observations of Mr. Garigen.

The stormwater management plan prepared by ETS, which incorporated predictions made by LPA for Horry County and accounted for the drainage improvements that Horry County has undertaken over the past eight years in the Dogwood Lake Watershed, is consistent with the requirements of S. C. Code Ann. §48-14-10 et seq., the Stormwater Management and Sediment Reduction Act, and with R. 72-300 et seq., R. 61-9.122.26 et seq., and the terms and conditions of the General Permit.

10. As to other issues and allegations of error raised by Petitioner in its Amended Prehearing Statement that are not specifically addressed herein, this Court concludes that Petitioner failed to carry its burden of proof and to put forth any testimony or evidence to support its position on issues.

It is, therefore, ORDERED, that the Coastal Zone Consistency Certification and Grant of General Permit coverage issued by the Department on February 29, 2008, to Deertrack Golf, Inc. be, and it is hereby, AFFIRMED.

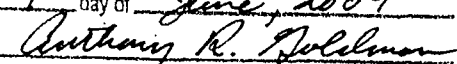
AND IT IS SO ORDERED.


JOHN D. MCLEOD
ADMINISTRATIVE LAW JUDGE

, 2009
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 9 day of June, 2009
By: 
Judicial Law Clerk.