

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM ADMINISTRATIVE LAW COURT  
Hon. Ralph King Anderson, III, Administrative Law Judge SC Court of Appeals

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Lower Court Case No. 15-ALJ-07-0258-CC  
Appellate Case No.: 2015-001989

Tract 7, LLC,

Appellant,

v.

South Carolina Department of Health  
and Environmental Control, and BP Amoco  
Chemical Company, Cooper River Plant,

Respondents.

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**APPELLANT'S INITIAL BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii, iii
STATEMENT OF ISSUES ON APPEAL.....	1
I. STATEMENT OF THE CASE.....	1
II. STATEMENT OF THE FACTS.....	3
A. Regulatory Backdrop.....	3
B. Facts Relevant to the Appeal.....	4
III. ARGUMENT AND STATEMENT OF LAW.....	7
A. STANDARD OF REVIEW.....	7
B. AN EXPIRED DREDGE AND FILL PERMIT CANNOT BE USED, EXTENDED OR MODIFIED.....	8
C. DHEC’S RECISSION OF ITS NOTICE OF INTENT DID NOT RENDER THIS MATTER MOOT.....	11
1. DHEC’s Present Day Rescission Of Its Notice Of Intent Is Not Moot Where The CZM Determination Issue Is A Matter That Is Capable Of Repetition, Yet Evading Review.....	12
2. Construction Activities Undertaken In The State’s Environmentally Sensitive Areas Without Proper Review Is Of Important Public Interest.....	15
a. Proper Review Of Construction Activities In Environmentally Sensitive Areas Is Of Public Importance.....	15
b. Proper Review of Construction Activities In Environmentally Sensitive Areas Is Of Imperative and Manifest Urgency.....	16
3. The Rescission Of The Notice Of Intent Does Not Render This Appeal Moot Where A Ruling On These Permitting And Review Issues Would Affect Future Events And Have Collateral Consequences For The Parties.....	18
IV. CONCLUSION .....	19

**TABLE OF AUTHORITIES**

**CASES**

<i>Byrd v. Irmo High Sch.</i> , 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996).....	12
<i>Curtis v. State</i> , 345 S.C. 557, 549 S.E.2d 591 (2001).....	15
<i>Sloan v. Greenville Cnty.</i> , 356 S.C. 531, 546, 590 S.E.2d 338, 346 (2003)....	12
<i>Sloan v. Greenville Cnty.</i> , 361 S.C. 568, 606 S.E.2d 464 (2004).....	17
<i>Sloan v. Greenville Cnty.</i> , 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).....	12, 13, 15
<i>Sloan v. Dep’t of Transp.</i> , 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008)....	12, 18
<i>Sloan v. Dep’t of Transp.</i> , 365 S.C. 299, 618 S.E.2d 876 (2005).....	14
<i>Sloan v. Dep’t of Transp.</i> , Appellate Case No. 2012-213599 (March 4, 2015).....	12

**STATUTES AND REGULATIONS**

33 U.S.C. § 1341(a)(1).....	13
S.C. Code Ann. § 1-23-610(B).....	8
S.C. Code Ann. § 40-90-260.....	8
S.C. Code Ann. § 56-1-20.....	8
S.C. Code Ann. § 56-1-215.....	9
61 S.C. Code Ann. Regs. 9.122.6.....	9
61 S.C. Code Ann. Regs. 9.122.6(a).....	9
61 S.C. Code Ann. Regs. 9.122.6(c).....	9
61 S.C. Code Ann. Regs. 96(C)(6).....	9
61 S.C. Code Ann. Regs. 96(F).....	8

61 S.C. Code Ann. Regs. 102(A)(2)(a).....	8
61 S.C. Code Ann. Regs. 107.3(H)(1).....	8
61 S.C. Code Ann. Regs. 107.7(D)(1).....	8
3061 S.C. Code Ann. Regs. 4(F).....	9
40 C.F.R. § 122.6.....	9
40 C.F.R. § 122.6(b).....	9
40 C.F.R. § 122.6(c).....	9

**OTHER AUTHORITIES**

<a href="https://www.scdhec.gov/library/D-3901.pdf">https://www.scdhec.gov/library/D-3901.pdf</a> .....	8
<a href="https://www.scdhec.gov/HomeAndEnvironment/Water/CoastalManagement/oneManagement/CoastalManagementProgram/">https://www.scdhec.gov/HomeAndEnvironment/Water/CoastalManagement/oneManagement/CoastalManagementProgram/</a> .....	16

## **STATEMENT OF ISSUES ON APPEAL**

- A. AN EXPIRED DREDGE AND FILL PERMIT CANNOT BE USED, EXTENDED OR MODIFIED
- B. DHEC'S RECISSION OF ITS NOTICE OF INTENT DID NOT RENDER THIS MATTER MOOT
  - 1. DHEC's Present Day Rescission of its Notice of Intent is Not Moot Where the CZM Determination Issue is a Matter that is Capable of Repetition, Yet Evading Review
  - 2. Construction Activities Undertaken In The State's Environmentally Sensitive Areas Without Proper Review Is Of Important Public Interest
    - a. Proper Review of Construction Activities in Environmentally Sensitive Areas is of Public Importance
    - b. Proper Review of Construction Activities in Environmentally Sensitive Areas is of Imperative and Manifest Urgency
  - 3. The Rescission of the Notice of Intent Does Not Render this Appeal Moot Where a Ruling on these Permitting and Review Issues Would Affect Future Events and Have Collateral Consequences for the Parties

### **I. STATEMENT OF THE CASE**

In December 2014, Respondent BP Amoco Chemical Company ("BP") sought to modify an expired permit pertaining to a T-Dock constructed at its Cainhoy facility in the 1970's pursuant to a 1976 permit authorizing construction in the state's environmentally sensitive areas. On March 24, 2015, the DHEC Staff issued a Notice of Intent to provide a determination that BP's proposed construction project was consistent with the State's Coastal Zone Management Program ("CZC determination"). *(BP Amoco Chemical Company's Motion to Dismiss for Lack of Jurisdiction, Exhibit*

F.) DHEC subsequently determined instead of issuing a new CZC determination, the agency would instead slide the new construction activities under an earlier 1989 CZC determination. This had the effect of avoiding review of the CZC determination. On April 3, 2015, DHEC sent the United States Army Corps of Engineers (“Corps”) a letter that stated DHEC was rescinding the Notice of Intent and explained that DHEC would not, and did not need to, issue any CZC determination for BP’s new proposal. (*Id. at Exhibit B.*)

On April 7, 2015, Tract 7, LLC (“Tract 7”), an owner of land in the immediate vicinity of BP’s Cainhoy facility, filed a Request for Review (RFR) with the DHEC Board with respect to the March 24, 2015 Notice of Intent. (*Id. at Exhibit G.*) On May 7, 2015, the DHEC Board, acting through its RFR Committee, refused to order a full review of the Notice of Intent. On May 29, 2015, Tract 7 filed a Request for a Contested Case with the Administrative Tribunal.

Respondents filed a Motion seeking relief from the stay of the RFR determination and a Motion to Dismiss the Contested Case. The Administrative Tribunal (also “ALC”) denied the request to lift the Stay and proceeded to address the Motion to Dismiss. The Motion to Dismiss contended that the CZM determination could not be the subject of review because DHEC had rescinded the Notice of Intent and replaced it with reference to the 1989 CZC determination. (*BP Amoco Chemical Company’s Motion to Dismiss for Lack of Jurisdiction*). In essence, Respondents argued that the appeal was mooted by the rescission of the Notice of Intent, but Respondents couched their argument in terms of subject matter jurisdiction. (*Id.*) Tract 7 took the position that the appeal should proceed because DHEC could not take any valid action on an

expired permit, an issue that was still appropriate for resolution. (*Tract 7, LLC's Memorandum in Opposition to BP Amoco Chemical Company's Motion to Dismiss for Lack of Jurisdiction.*)

On July 28, 2015, the Administrative Tribunal issued its Order of Dismissal finding that the ALC had subject matter jurisdiction over the Contested Case, but that the procedural posture of the case, specifically the appeal of the Notice of Intent that had been rescinded, precluded the Contested Case. (*Order of Dismissal dated July 28, 2015.*) Although the ALC couched its decision under the label of "procedural jurisdiction," the essence of the ruling was that the rescission rendered the Contested Case moot. *Id.* The Administrative tribunal also determined that Appellant's attempt to obtain review of state action on state environmental program actions was seeking a state ruling on federal law, which the ALC did not have authority to determine. (*Id.*)

Respondents filed a Motion for Reconsideration raising exception to mootness and explaining that the review was sought over state action and not federal law. (*Defendant Tract 7, LLC's Motion for Reconsideration.*) On August 18, 2015, the Administrative Tribunal issued its Order denying Tract 7's Motion for Reconsideration. (*Order denying Motion for Reconsideration dated August 18, 2015.*) No oral hearings were held on any motions before the ALC.

Tract 7 subsequently filed this timely appeal on September 17, 2015.

## **II. STATEMENT OF FACTS**

### **A. REGULATORY BACKDROP**

The Clean Water Act prohibits the discharge of materials into waters of the United States absent a Section 404 permit specifically authorizing the activities. Such

permits are informally known as “dredge and fill” permits and are issued to allow such activities as the filling of wetlands, the dredging of rivers and harbors and the installation of docks. Projects requiring such a permit can be as small as installing a culvert for a road crossing or as substantial as filling hundreds of acres to allow for construction. In some instances, South Carolina, through its DHEC, takes the lead on reviewing, processing and issuing such permits and in other instances the Corps takes the lead. However, no Corps permit may be issued under Section 404 without the DHEC certifying that the activities proposed will not violate South Carolina’s water quality standards. In addition, the state must determine that the proposed regulated activities are consistent with the state’s Coastal Zone Management Plan (“CZC”).

Importantly, the permits allowing regulated dredge and fill activities only provide the authorization to undertake the initial regulated action. There is no permit required to allow the dredged or filled area to exist in that installed or constructed location and condition on an ongoing basis.<sup>1</sup> Moreover, once a permit authorizing such fill activities expires no further work can be completed under that permit. Once a permit expires, a new permit must be applied for, processed and issued by the government before additional regulated activities can be undertaken.

## **B. FACTS RELEVANT TO THE APPEAL**

In 1976, a predecessor corporation to the current BP applied for and later received a permit from the United States Army Corps of Engineers (“Corps”) allowing the installation of a “T-Dock,” which is the subject of this appeal, at its Cainhoy facility. (*Order of Dismissal dated July 28, 2015*, at p. 1.) The terms and conditions of the 1976

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<sup>1</sup> A new permit is, however, required for subsequent dredging or filling needed to maintain the original site, for example dredging to remove sediment that has collected in a previously dredged shipping lane or berth.

permit allowed work to be commenced and completed by a set period of time, after which the permit expired by its own terms, and BP could complete no additional work under that 1976 permit.

The dock was installed, and the permit authorizing any work at the site expired: no further work could be taken under the expired permit. In fact, BP would have been subject to civil and criminal enforcement actions had BP attempted to undertake activities under the expired permit. Neither the United States nor South Carolina condones such unpermitted activities.

In December 1988, despite the 1976 permit having expired years prior, BP sought to “modify” the 1976 permit to make alterations to the T-Dock. (*Id.*) On April 17, 1989, the Corps, with the state participation and approval, issued a permit modification of the 1976 permit purporting to allow BP to conduct regulated activities to alter the T-Dock. (*Id.*) Even if the “modification” of the expired permit was a valid act, the 1989 Permit expired by its own terms on March 31, 1992. (*Id.*)

In 2009, years after the 1989 permit expired, BP filed an application which sought, ostensibly, to again “modify” the expired 1976/1989 permits relative to the T-Dock. (*Id.*) Although aware that the 1989 permit, even if valid, had expired and thus had no legal existence, South Carolina joined in the attempt to modify the expired permit. On March 19, 2009 a modified Permit, renumbered as Permit #2009-00159 from the formerly numbered Permit PN#88-3E-332, was issued to BP to allow structures on and components of the T-Dock area to be altered. (*Id.*) Again, even if the expired permit could have been modified, it would have expired before the end of 2014.

On December 14, 2014, BP applied once again to the Corps and DHEC, for still another “modification” of Permit PN#88-3E-332/#2009-00159. (*Id.*) This time, BP sought to alter the configuration of its existing dock to include three new mooring dolphins. (*Id.*, at p. 1-2.) BP did not give notice of this application to Appellant Tract 7, LLC. However, Tract 7 discovered BP’s application and objected to any new action being taken to modify the long expired permit, including State action in the form of Water Quality Certification and a CZC determination.

The State received Tract 7’s January 29, 2015 objections to the proposed actions and thus was aware that attempts to modify the expired permit would be opposed. (*Id.*)

The State’s Water Quality Certification on the expired permit was issued and on March 24, 2015, the State, acting through DHEC issued a staff decision letter providing the Notice of Intent of the Office of Ocean and Coastal Resource Management to find the new project consistent with the State’s Coastal Zone Management Program. (*Order of Dismissal dated July 28, 2015*, at p. 2.) Thereafter, on April 3, 2015, DHEC’s Wetland Section Manager, Blair Williams, issued a letter opining that “it had been determined that the proposed work will not increase the scope of work originally authorized via the Coastal Zone Consistency Certification issued for P/N 88-3E-332 on February 27, 1989, and therefore that CZM Certification is still effective.” DHEC Letter dated April 3, 2015. Tract 7 filed a Written Request for Final Review and Notice of Intent to Appeal, which request was declined by DHEC in writing on May 7, 2015. (*Id.*) The DHEC Board never addressed the issue of authorizing activity under an expired permit. On May 29, 2015, Tract 7 filed a Request for Contested Case Hearing with the Administrative Law Court (ALC). (*Id.*)

The ALC determined it had subject matter jurisdiction of the Contested Case, *Id.*, and its issues, but dismissed the Contested Case based on the procedural background. (*Id.* at p.4.) The ALC held that DHEC's rescission of the Notice of Intent to issue a CZC determination on the project and instead to slide the BP project in under the quarter century old CZC determination from the earlier 1989 permitting activity precluded review. (*Id.*) The ALC refused to address the issue of DHEC's rescission action creating an exception to the mootness that may have otherwise applied to prevent the proper judicial review of DHEC's actions. (*Id.*)

DHEC's actions, if they stand, create a situation that effectively circumvents all review by attempting to rescind the proposed Staff Decision and invoking an older decision on the long-expired permit. Respondents have stated that there is no ability to obtain review on this CZC determination because the agency is using a decision that was made too long ago to be subject to review or challenge. (*See Plaintiff BP Amoco Chemical Company's Motion to Dismiss for Lack of Jurisdiction* at p. 8 (June 19, 2015).) The Administrative Law Court also declined to look at the issue of the agency sculpting its actions such that judicial review is precluded. (*Id.*) Tract 7 is seeking to prevent this denial of the opportunity for review in this and future actions by filing this appeal.

### **III. ARGUMENT AND STATEMENT OF LAW**

#### **A. STANDARD OF REVIEW**

The Administrative Procedures Act establishes standard of review for cases brought to the Court from the ALC. The Court of Appeals will reverse the Administrative Tribunal's decision if it is: (a) in violation of statutory or constitutional provisions; (b) in excess of the agency's statutory authority; (c) made upon unlawful

procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-610(B). Furthermore, "[t]he court may not substitute its judgment for the judgment of the [A]dministrative [Tribunal] as to the weight of the evidence on questions of fact." *Id.* As demonstrated herein, the ALC's dismissal of this action without even considering the issue of mootness or the legal status of an expired permit is reversible error and the Court of Appeals should vacate the ALC decisions and reinstate the Contested Case to address these issues on the merits.

**B. AN EXPIRED DREDGE AND FILL PERMIT CANNOT BE USED, EXTENDED OR MODIFIED**

The legislature is well aware that when a permit expires it ceases to exist and can no longer be extended. There are myriad instances where a government permit or license expires and when such permit expires it is unlawful to carry on regulated conduct require such a permit. *See, for example*, 61 S.C. Code Ann. Regs. 107.7 (D)(1) (Solid Waste); 61 S.C. Code Ann. Regs. 96(F) (athletic trainer); 61 S.C. Code Ann. Regs. 102(A)(2)(a) (birthing center operation); 61 S.C. Code Ann. Regs. 107.3(H)(1) (waste tire processing facility); S.C. Code Ann. § 40-90-260 (funeral service); and S.C. Code Ann. § 56-1-20 (driving vehicles). Given the general knowledge that when a permit expires it can no longer be amended, extended or used to authorize any conduct, it is no surprise that the State reminds the regulated community that action to extend or modify the permit must be initiated *prior* to the expiration of the permit involved. *See, for example*, DHEC-OCRM Critical Area Permit Notice, <https://www.scdhec.gov/library/D-3901.pdf> ("Once a permit has expired, it cannot be extended"). Moreover, when the State desires to

deviate from the normal situation where a permit can no longer legally function once it expires, there is specific language that authorizes the continuing existence of the permit. *See, for example*, 61 S.C. Code Ann. Regs. 96(C)(6) (Athletic Trainer has two years from expiration for reinstatement); S.C. Code Ann. § 56-1-215 (driver's license can be renewed within nine months after expiration). This same procedure is found in DHEC's permitting systems as well, although the express exception that allows action after permit expiration is typically tied to the regulated entity having already applied for a new or successor permit. For example, at the state and federal levels, permits allowing for the regular discharge of pollutants into our waters (NPDES Permits) are considered to have a legal existence after expiration as long as the regulated entity has applied for a renewal permit and meets other conditions. *See*, 40 C.F.R. §122.6; 61 S.C. Code Ann. Regs. 9.122.6 (expired permit continues until new permit issued by agency). However, even this exception is limited because the NPDES permits *can only be modified before they expire*. Any operation allowed on the expired permit pending action by the government on a new permit must comply with the terms and conditions of the expired permit. 40 C.F.R. §122.6(b) & (c); 61 S.C. Code Ann. Regs. 9.122.6(a) & (c). Any deviation from such authorization is considered to be unlawful and unpermitted activity. *Id.*

In the instant action, the permit issued to BP's predecessor allowing the initial construction of the BP T-Dock expired decades ago. Once the permit expired, BP was prohibited from undertaking any additional activities in these environmentally sensitive areas. 3061 S.C. Code Ann. Regs. 4(F). However, there was no need for an extension of the permit because all of the authorized construction was completed before the permit expired. If BP had been unable to complete its work it could have sought an extension on

the permit *before* the permit expired. In contrast to the NPDES program where a permit is explicitly given a life after expiration, there is no comparable provision in the dredge and fill permit arena. When BP's first permit expired there was no legal basis to "modify" the expired permit at all, let alone to expand the activities allowed to be conducted on the expired permit. The fact that there was not objection to the governments' serial attempts to modify an expired permit leaves it unclear whether such modifications are void *ab initio* or merely voidable. This appeal, however, does not seek to overturn unlawful permit modification attempts in 1989 and 2009. Rather, this appeal concerns only the most recent 2014 attempt to modify an expired permit. As demonstrated above, there was no authority for the BP permit to be modified once it expired. There was no legal ability of DHEC to take any action in support of modifying the expired permit. All Tract 7 seeks is for BP follow the law and apply anew for its new proposed activities. All Tract 7 seeks is for DHEC to wait until BP takes such action before DHEC reviews and issues any current decisions on such a BP application.

The ALC appeared to contend that the Contested Case below was seeking resolution of federal law issues. (*Order of Dismissal dated July 28, 2015*, at p. 5.) This was never the case. The Request for Review before the DHEC Board sought to address only state action and refusal to take action. The Contested Case before the ALC sought to address only state action and the state refusal to take action. The only issues before the court relate to state action and the state government's decisions not to take action that would trigger the right to administrative and judicial review.

After misapprehending the nature of this appeal, the ALC dismissed the Contested Case. The ALC in essence believed that DHEC's decision to rescind its Notice of Intent

in favor of taking no action and simply craving reference to a 25 year-old CZM determination on a different construction project left the matter of the government action moot and unreviewable. The ALC also indicated that the rescission decision should have been appealed. However, the decision to rescind a Notice of Intent to take action in favor of the modification of an expired permit would be the proper action. The issue that needs to be addressed in this context is the “non-decision” of DHEC to simply remain silent and point to the 1989 CZM consistency decision on an expired permit for a different project as covering BP’s newly planned dock facility changes. As demonstrated below, this type of action falls squarely into exceptions to the mootness doctrine. However, the ALC never addressed the mootness exceptions. The decision below should be reversed and this action remanded to require the ALC to move forward to address the merits of the Contested Case.

**C. DHEC’S RECESSON OF ITS NOTICE OF INTENT DID NOT RENDER THIS MATTER MOOT**

The Administrative Law Court determined that it had subject matter jurisdiction over this matter. (*Order of Dismissal dated July 28, 2015*, at p.2.) That court, however, decided that procedurally, the State had avoided any review of its actions on the 2014 BP permit modification by rescinding the Notice of Intent and simply refusing to review BP’s permit application under current standards and conditions, and without addressing the issue of being asked to review action on a 1970’s permit that had already expired. In essence, the ALC determined that the controversy was moot because DHEC had rescinded its Notice of Intent and decided to slide the permit issues under the cover of a 1989 consistency determination on a prior permit request for different work at the same

BP T-Dock site. The court did not even address the exceptions to mootness in dismissing the Contested Case.

There must be a justiciable controversy present for a court to address a lawsuit. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). A mere “contingent, hypothetical or abstract” controversy is not real and substantial enough for appropriate judicial determination. *Sloan v. Greenville Cnty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (2003) (2000/2001 road projects and 1999 forensics lab renovation). Simply put, a “court does not concern itself with moot or speculative questions.” *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008) (Ladson Road). *See also, Sloan v. Dep't of Transp.*, Appellate Case No. 2012-213599 (March 4, 2015).

A matter is not moot, however, when any one of three conditions is present: 1) Where the issue raised is capable of repetition but generally will evade review; 2) Where there are questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest; and 3) Where a decision by the trial court may affect future events, or have collateral consequences for the parties even if the appellate court cannot give effective relief in the present case. *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (Sloan 2009). Where any of the three exceptions exist, an appeal from that decision is not moot.

**1. DHEC’s Present Day Rescission of its Notice of Intent is Not Moot Where the CZM Determination Issue is a Matter that is Capable of Repetition, Yet Evading Review**

An action does not have to be dismissed simply because a party changed its position in a manner that might negate the impact of the action’s review. Where, as in the cause *sub judice*, the issues are capable of repetition yet the circumstances are such

that they evade review, those issues are not moot and the reviewing tribunal is free to address the issues. *Id.*

In this case, DHEC began its process of reviewing a request for a modification to a permit that had already expired. The Corps could not issue the permit unless and until the State of South Carolina reviewed the issues and approved them. 33 U.S.C § 1341(a)(1). By simply acknowledging that the permit at issue had expired and no longer had the legal existence to be modified, the State could have properly and easily resolved the matter. Instead, the state first purported to review the actions that BP proposed for our state's environmentally sensitive aquatic habitat. DHEC proceeded to issue its Notice of Intent to approve BP's attempt to modify the expired permit. Then, DHEC withdrew the Notice of Intent.

Simply withdrawing the Notice of Intent would have not been an issue if DHEC had replaced the Notice of Intent with specific action either affirmatively refusing or allowing BP's proposal based on current standards and a current review of the project. DHEC, however, instead replaced the current decision with a decision to abdicate its responsibilities and to do nothing. The State used a lack of action to inform the Corps that no CZM consistency determination was even necessary because of the action taken 25 years earlier. The rescission indicated that DHEC was simply sliding the 2014 BP activities under a CZM finding issued a quarter century ago. DHEC and BP then adopted the position that because the 25 year-old determination was no longer appealable, there was no ability to challenge DHEC's actions or to obtain review of those actions. (*See, for example, Plaintiff BP Amoco Chemical Company's Motion to Dismiss*, (June 19, 2015).)

This scenario entirely negates the Legislature's intent to allow parties to obtain impartial judicial review of administrative actions.

The situation faced by Tract 7 is similar to that addressed by the Supreme Court in *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (Bridge Bids). In *Bridge Bids*, the plaintiff claimed that the State had violated statutory bidding requirements in awarding contracts for the Ravenel Bridge between Mount Pleasant and Charleston. Because the construction project was completed, the State sought dismissal of the lawsuit as moot. The Supreme Court disagreed. *Bridge Bids* explicitly held that the issue of compliance with regulatory requirements for bidding was not moot because the issues were capable of repetition but evading review. In *Bridge Bids*, the plaintiff was at least able to bring an initial challenge before the contract was completed. How much more egregious is the State action here where it entirely circumvents the judicial review process from the very outset.

In this appeal, DHEC has replaced a required new CZM consistency determination based on a current review of a new project under current standards and requirements with a refusal to make any determination. Because the avenue pursued by BP and DHEC is to claim no agency action is even required, there is no "action" that Tract 7 could use to obtain review of the agency's approach to compliance with its regulatory and statutory obligations. Review is effectively negated. Given the history of BP repeatedly seeking to modify expired permits, there is nothing to stop the Respondent and others from using this same approach over and over to continue to evade review by posturing all applications as not needing review under the 1989, or any other prior, determination. Given the facts and the regulatory program at issue, the State action to

rescind its Notice of Intent in a manner that effectively precludes review falls squarely into the exception for mootness for controversies that are capable of repetition yet evade review. The decision of the ALC dismissing Tract 7's appeal, essentially on mootness grounds but without ever analyzing the exceptions to mootness should be reversed.

**2. Construction Activities Undertaken in the State's Environmentally Sensitive Areas Without Proper Review is of Important Public Interest**

Our supreme court has recognized a "public importance" exception to mootness allowing an appellate court to decide questions of imperative and manifest urgency in order to "establish a rule for future conduct in matters of important public interest." *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001)(internal citations omitted); *Sloan 2009*, 380 S.C. at 535, 670 S.E.2d at 667. The determination whether a particular suit raises "questions of imperative and manifest urgency" must be decided on an individual basis. *Id.* This appeal also falls within the public interest exception to mootness. In order to apply this public interest exception to mootness, the question at issue must both be of public importance and of imperative and manifest urgency.

**a. Proper Review of Construction Activities In Environmentally Sensitive Areas is of Public Importance**

Conservation of our state's natural environment is of great public importance to every sector of our state. Conservation connotes the effective use of our resources. This requires standards and proper review to allow the appropriate development of infrastructure and commercial and industrial operations relying on access, use or proximity to such resources and at the same time to protect the public health and safety. The State's CZM Program is an example of project review to balance these concerns and to ensure compliance with the priorities set forth by the Legislature. There is little more

important to the public than and protection of health, safety and a vibrant economy all in relation to the conservation of natural resources and amenities. In fact, Respondent DHEC explicitly acknowledges the public importance of the CZM Program on its website:

The South Carolina Coastal Management Program was established under the guidelines of the national Coastal Zone Management Act (1972) as a state-federal partnership to comprehensively manage coastal resources. It was authorized in 1977 under SC's Coastal Tidelands and Wetlands Act (CTWA) *with the goal of achieving balance between the appropriate use, development, and conservation of coastal resources in the best interest of all citizens of the state.*

<https://www.scdhec.gov/HomeAndEnvironment/Water/CoastalManagement/CoastalZoneManagement/CoastalManagementProgram/> (Emphasis provided).

**b. Proper Review of Construction Activities in Environmentally Sensitive Areas is of Imperative and Manifest Urgency**

Each year there are numerous plans, proposals and applications for projects that may have economic value but may also impact the environment. Many of these projects find their way to the various DHEC processes, including the water quality and CZM programs. It is vital to the public regulated community that their projects are approved properly with the complete review required in order to economically minimize the negative impacts of a project and to protect the projects from other attack or negative publicity. Likewise, it is important for the non-regulated citizen public to trust that the projects approved have undergone the full scope of review under current standards and that the mandated balance “between the appropriate use, development, and conservation of coastal resources in the best interest of all citizens of the state” is accomplished. *Id.*

This very balance is called into question if the State avoids review of its actions simply by refusing to make a current CZM consistency determination which can be properly vetted and reviewed by the judicial process. The process followed here fails to provide the security and the certainty that the regulatory process was designed to embody and provide. It is axiomatic that the issues of proper review by DHEC and by the judicial process rises to the level of imperative and manifest urgency that calls for a court ruling to guide all members of the public on their future projects.

Nor is this an instance where Respondents have avoided the public interest exception by making a subsequent change in policy that eliminates the need for this litigation. *See, for example, Sloan v. Greenville Cnty.*, 361 S.C. 568, 571-72, 606 S.E.2d 464, 466 (2004) (Sloan 2004). In Sloan 2004, the Supreme Court reinstated the trial court's dismissal of an attack on government procurement methods where both the government changed its ordinance to address the issues raised in the lawsuit and intervening court rulings also addressed the issues. *Id.* Contrawise in this action, there are not intervening court rulings addressing the State's ability to take part in the modification of an already-expired permit. Nor are there any such rulings on the ability of the State to couch a new CZM matter under a 25 year old, non-reviewable CZM consistency decision. Finally, there has been no change in regulation or policy by the State that would be consistent with preserving the right to judicial review. Rather, Respondents assert that the decision on CZM consistency for the project at issue cannot be reviewed by invoking the 1989 determination on a different project and where there has been no current determination.

In this case, there are questions of imperative and manifest urgency that call for the courts to establish rules for future conduct in these matters of important public interest. The ALC incorrectly dismissed the Contested Case without ever evaluating the exception to mootness that would provide clear guidance on Respondents' review processes. The decision below should be reversed.

**3. The Rescission of the Notice of Intent Does Not Render this Appeal Moot Where a Ruling on these Permitting and Review Issues Would Affect Future Events and Have Collateral Consequences for the Parties**

This appeal raises issues that will "affect future events or have collateral consequences" and as such is not mooted by DHEC's rescission of its Notice of Intent. In *Ladson Road*, 379 S.C. at 167, 666 S.E.2d at 240, the issue was the authority of SCDOT to authorize emergency procurement on a construction project. There was no caselaw in South Carolina concerning such authority. Our supreme court determined that the lack of judicial guidance and the fact that emergency conditions can, and will likely, develop other times prevented the lawsuit issues from being moot even though the construction project was completed.

This is similar to this appeal. Here, the Respondents have taken action on an expired permit and have determined not to take action on the CZM consistency determination. Given the various operations BP undertakes at its industrial facility, the history of attempts to modify permits relevant to those operations, and the close proximity of Tract 7's land to BP's operations, it is a certainty that the Respondents will have similar permitting issues in the future. Tract 7 and the Respondents would both benefit from determinations of the issues of this appeal. These issues will affect future

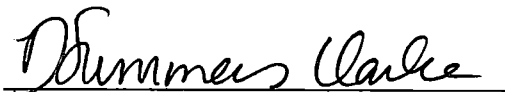
activities of the parties. The ALC incorrectly dismissed the Contested Case without ever even considering an exception to mootness and that decision should be reversed.

#### IV. CONCLUSION

As shown above, the procedures Respondents utilized in this action have the effect of evading of judicial review as of 1989 on matters that did not even arise until 25 years later in 2014. The Court should vacate the decision of the Administrative Tribunal and enter the Order the ALC should have issued prohibiting DHEC from taking any action on or in support of BP's attempt to modify an expired permit. In the alternative, the Court should vacate the ruling of the Administrative Tribunal and remand the matter for the Contested Case to be addressed on the merits.

Respectfully submitted,

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*Attorneys for Appellant Tract 7, LLC*

November 16, 2015

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM ADMINISTRATIVE LAW COURT

Hon. Ralph King Anderson, III, Administrative Law Judge

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Lower Court Case No. 15-ALJ-07-0258-CC  
Appellate Case No.: 2015-001989

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NOV 17 2015

SC Court of Appeals

Tract 7, LLC,

Appellant,

v.

South Carolina Department of Health  
and Environmental Control, and BP Amoco  
Chemical Company, Cooper River Plant,

Respondents.

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**PROOF OF SERVICE**

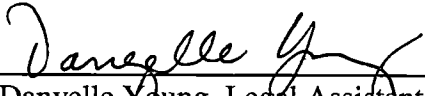
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I, the undersigned, of the law offices of Barnwell Whaley Patterson & Helms, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Appellant's Initial Brief and Designation of Matter

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SC Court of Appeals

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November 16, 2015

**SENT VIA FEDERAL EXPRESS, TRACKING NUMBER: 809473894940**

4008.001  
The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**Re: Tract 7, LLC, v. South Carolina Department of Health and Environmental Control, and BP Amoco Chemical Company, Cooper River Plant  
Appellate Case No.: 2015-001989**

Dear Madame Clerk:

Please find enclosed the original and two (2) copies of Appellant's Initial Brief along with Designation of Matter To Be Included In The Record on Appeal in the above-referenced matter. Please file the original of the same and return one (1) stamped "filed" copy to our office in the envelope provided.

By copy of this letter and enclosure to opposing counsel, I am serving the same.

Sincerely,

D. Summers Clarke, II

DSC, II/dly

Enclosures

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