

22081

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Presiding Judge

Case No. 12 ALJ-07-0434-CC

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee,
Mary Feron, individually and as Trustee, Sally Saegmuller Haley and
Terrell Page Haley, individually and as Co-Trustees, Martha James
and Don Haarmeyer, individually and as Co-Trustees, and
Pamela S. North.....Appellants,

v.

SCDHEC and Cat Island POA, c/o Gary Meyer..... Respondents.
In Re: Garfield Park, Phase 3

Case No. 12 ALJ-07-0436-CC

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

v.

SCDHEC.....Respondent.
In Re: Garfield Park, Phase 3

RECORD ON APPEAL

VOLUME I

John E. North, Jr.
Regions Bank Bldg.
916 Bay Street, Ste. 100
Beaufort, SC 29902
843-379-0800

Mary Duncan Shahid
Angelica M. Colwell
PO Box 486
Charleston, SC 29402
843-720-1769

Stephen Peterson Groves, Sr.
205 King Street, Suite 400
Charleston, SC 29401
843-720-1725

Nathan Michael Haber
1362 McMillian Ave, Suite 400
Charleston, SC 29405
843-953-0229

INDEX

VOLUME I

ORDERS, PLEADINGS

DOCUMENT	PAGE
Final Order, July 23, 2014	1
Order Denying Motion for Summary Judgment, November 5, 2013	20
Order Denying Motion for Reconsideration, August 27, 2014	24
Request for Contested Case Hearing, October 5, 2012	26
Final Agency Decision, September 8, 2012	43
Petitioner Cat Island POA's Motion for Summary Judgment and Memorandum in Support Thereof, September 18, 2013	47
Petitioner Cat Island POA's Motion to Disqualify Petitioner's Counsel, January 7, 2014	300
Motion for Reconsideration of Final Order, August 1, 2014	316
Respondent South Carolina Department of Health and Environmental Control's Return to Petitioners' Motion for Reconsideration, August 18, 2014	353
Joint Proposed Order of Cat Island POA c/o Gary Meyer and South Carolina Department of Health and Environmental Control, March 27, 2014	415

VOLUME II
TRIAL TRANSCRIPT

DOCUMENT	PAGE
Opening Statements	483
Gary Meyer – Direct Examination - Petitioners	510
Gary Meyer – Cross-Examination - DHEC	537
Gary Meyer – Cross-Examination – Cat Island POA	541
Gary Meyer – Re-Direct Examination - Petitioners	561
Gary Meyer – Re-Cross Examination – DHEC	577
Gary Meyer – Re-Cross Examination – Cat Island POA	582
Richard Geer – Direct Examination – Petitioners	592
Richard Geer – Cross-Examination – DHEC	760
Richard Geer – Cross-Examination – Cat Island POA	801
Richard Geer – Re-Direct Examination – Petitioners	830
Pamela North – Direct Examination – Petitioners	850
Pamela North – Cross-Examination – Cat Island POA	883
Pamela North – Cross-Examination – DHEC	901
Pamela North – Re-Direct Examination – Petitioners	910
Pamela North – Re-Cross Examination – Cat Island POA	913
David Feron – Direct Examination – Petitioners	915
David Feron – Cross-Examination – DHEC	924
David Feron – Cross-Examination – Cat Island POA	927
David Feron – Re-Direct Examination – Petitioners	928

Sally Haley – Direct Examination – Petitioners	930

VOLUME III

TRIAL TRANSCRIPT, CONTINUED

DOCUMENT	PAGE
Sally Haley – Cross-Examination – DHEC	937
Sally Haley – Cross-Examination – Cat Island POA	940
Ken Bruning – Direct Examination – Petitioners	941
Ken Bruning – Cross-Examination – DHEC	945
Ken Bruning – Cross-Examination – Cat Island POA	946
Ryan Lytle – Direct Examination – Petitioners	949
Ryan Lytle – Cross-Examination – DHEC	1093
Ryan Lytle – Cross-Examination – Cat Island POA	1098
Ryan Lytle – Re-Direct Examination – Petitioners	1164
George Madlinger – Direct Examination – DHEC	1183
George Madlinger – Cross-Examination – Cat Island POA	1198
George Madlinger – Cross – Examination – Petitioners	1208
George Madlinger – Re-Direct Examination – DHEC	1227
George Madlinger – Re-Cross Examination – Petitioners	1239
Blair Williams – Direct Examination – DHEC	1243
Blair Williams – Cross-Examination – Petitioners	1270
Blair Williams – Redirect Examination – DHEC	1285
Christopher Moore – Direct Examination – Petitioners	1287

Christopher Moore – Cross-Examination – DHEC	1334
Christopher Moore – Cross-Examination – Cat Island POA	1348
Christopher Moore – Redirect Examination – Petitioners	1364
Petitioners' Exhibit 1	1383

VOLUME IV

DOCUMENT	PAGE
Petitioners' Exhibit 2	1436
Petitioners' Exhibit 3	1444
Petitioners' Exhibit 5	1487
Petitioners' Exhibit 6	1502
Petitioners' Exhibit 14	1510
Petitioners' Exhibit 15	1516
Petitioners' Exhibit 18	1520
Petitioners' Exhibit 19	1522
Petitioners' Exhibit 20	1567
Petitioners' Exhibit 22	1609
Petitioners' Exhibit 23	1617
Petitioners' Exhibit 24	1629
Petitioners' Exhibit 25	1633
Petitioners' Exhibit 26	1641
Petitioners' Exhibit 31	1646

Petitioners' Exhibit 33	1650
Petitioners' Exhibit 34	1657
Petitioners' Exhibit 36	1663
Petitioners Exhibit 37	1664
Petitioners' Exhibit 41	1674
Petitioners' Exhibit 44	1679
Petitioners' Exhibit 51	1680
Petitioners' Exhibit 63	1681
Petitioners' Exhibit 76	1689
Petitioners' Exhibit 82	1703
Cat Island POA Exhibit 2A	1707
Cat Island POA Exhibit 2B	1708
Cat Island POA Exhibit 2C	1709
Cat Island POA Exhibit 2D	1710
Cat Island POA Exhibit 2E	1711
Cat Island POA Exhibit 2F	1712
Cat Island POA Exhibit 7A	1713
Cat Island POA Exhibit 7B	1714
Cat Island POA Exhibit 7C	1715
Cat Island Exhibit 8	1716
Cat Island Exhibit 10	1722
Cat Island Exhibit 11	1753
Cat Island POA Exhibit 37	1762

Cat Island POA Exhibit 40	1824
Cat Island POA Exhibit 41	1828
Cat Island POA Exhibit 43	1837
DHEC Exhibit 1	1838
DHEC Exhibit 2	1859
DHEC Exhibit 3	1868
DHEC Exhibit 4	1872
DHEC Exhibit 5	1887
DHEC Exhibit 6	1889
DHEC Exhibit 7	1895
DHEC Exhibit 8	1897
Petitioners' Proposed Order	1899

VOLUME V

OVER-SIZE EXHIBITS SUBMITTED SEPARATELY

DOCUMENT	PAGE
Petitioners' Exhibit 52	1936
Petitioners' Exhibit 53	1937
Petitioners' Exhibit 55	1938
Petitioners' Exhibit 56	1944
Petitioners' Exhibit 58	1945
Petitioners' Exhibit 64	1946
Petitioners Exhibit 65	1953

Petitioners Exhibit 72	1961
Petitioners' Exhibit 73	1962
Petitioners Exhibit 84	1963
Cat Island POA Exhibit 1 – A,	1964
Cat Island POA Exhibit 1 - B	1965
Cat Island POA Exhibit 1 - C	1966

FILED

JUL 23 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Ken Bruning; Janet Bruning; David Feron,
individually and as Trustee; Mary Feron,
individually and as Trustee; Sally Saegmuller
Haley and Terrell Page Haley, individually and
as Co-Trustees; Martha James and Don
Haarmeyer, individually and as Co-Trustees;
and Pamela S. North,

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

In Re: Garfield Park Phase 3.

Docket No.: 12-ALJ-07-0434-CC

FINAL ORDER

Docket No.: 12-ALJ-07-0436-CC

APPEARANCES:

For the Petitioners:
For the SC Department of Health & Environmental Control:
For Respondent/Petitioner Cat Island POA:

John E. North, Jr., Esquire
Nathan M. Haber, Esquire
Mary D. Shahid, Esquire and
Angelica M. Colwell, Esquire

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court ("ALC" or "the Court") pursuant to consolidated requests filed by Bruning, et al. (hereinafter "the Petitioners") and Petitioner/Respondent Cat Island POA (hereinafter "Cat Island POA" or "POA") related to action taken by the Board of Health and Environmental Control ("the Board"). The Petitioners are all owners of property on Cat Island who oppose the installation of filters in storm drain inlets in the stormwater drainage system for a development on Cat Island known as Garfield Park Phase 3 (hereinafter "GPP3"). The stormwater drainage system on GPP3 formerly drained to an impoundment known as Cat Island Lake. Cat Island Lake existed before Cat Island was developed, having been impounded by construction of a dike at some point, likely the early 1960's per review of historical aerial photography. The dike was breached in or around 2009 and presently Cat Island Lake is subject to the ebb and flow of the tide from Chowan Creek. The permit application and action that is the subject of this contested case is entitled "Garfield Park Phase 3 – Drainage System Retrofit, Beaufort County." This project involves the stabilization of the breached dike and the installation of water quality filters in storm drain inlets within the drainage system at Garfield Park Phase 3 located on Cat Island, Beaufort County, S.C. The filters are proposed by Cat Island POA as an alternative for addressing water quality requirements associated with stormwater discharges from Garfield Park Phase 3. Prior to the breach of the dike Cat Island Lake detained stormwater from GPP3, which is adjacent to the lake.

The three and one-half day hearing was held January 14-17, 2014, before the Administrative Law Court in Columbia, South Carolina.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

GPP3 is one of several phased developments located on Cat Island in Beaufort County, South Carolina. Cat Island was purchased in 1982 by Gary Meyer, developer and POA representative. Cat Island Lake was already established at the time of purchase. The lake was created by construction of a dike installed between 1960 and 1965, and was likely created as habitat for ducks and for water fowl hunting.

The dike included a water control structure or outfall device that Meyer refers to as a "flashboard riser." This flashboard riser was comprised of three boards and an outfall pipe. When it was functional, the flashboard riser maintained water levels within the lake through placement or removal of the boards. Having all three boards in place maximized the depth of the

lake. However, the lake was subject to the ebb and flow of the tide through the pipe in the flashboard riser and over the riser itself.

Having been constructed in the 1960's, the dike and outfall device were built before the promulgation of South Carolina's stormwater management regulations (S.C. Code Reg. Ann. 72-300 et seq. and 61-9.122.26 et seq.) However, the impoundment created by the dike, Cat Island Lake, was considered a stormwater management pond for purposes of development of GPP3, and the Lake satisfied state requirements for controlling the release of stormwater and for providing water quality treatment to stormwater. GPP3 obtained a stormwater permit from the Department on June 9, 2004.

In June 2009, a leak developed at the outfall structure of the dike, causing the Lake to drain. Initially, the POA attempted repair of the dike; however after this attempt to repair the dike failed¹, the POA submitted an NOI (Notice of Intent to seek permit coverage) for authorization to retrofit the stormwater permit coverage for GPP3 by installing water quality filters. This "drainage system retrofit" application was submitted to the South Carolina Department of Health and Environmental Control ("SCDHEC" or "the Department") on October 1, 2010. Public Notice of the application was provided and during the public comment period, the Petitioners objected to the proposed retrofit, and suggested that the impoundment be re-established. After consideration of the public comments, on June 18, 2012, SCDHEC granted a detention waiver, authorized installation of water quality filters, and issued General Permit coverage to the POA for the Stormwater Retrofit of GPP3.

Shortly thereafter, on June 26, 2012, the Petitioners challenged the authorization for the Stormwater Retrofit by submitting a Request for Final Review Conference to the Board of Health and Environmental Control. In response, the Department staff asserted that the applicable stormwater regulations and the General Permit allow for alternative treatment mechanisms and recommend measures other than ponds to achieve water quality improvement for smaller sites. See S.C. Code Reg. Ann. 72-300 et seq., specifically, S.C. Code Reg. Ann. 72-305(B)(3). Department staff noted that GPP3 is a "smaller site," being less than ten acres with the drainage area to each in-line filter being even smaller. Id. Department staff further explained that its analysis indicated that the proposed filters would meet all regulatory requirements for controlling

¹ An authorization to perform Maintenance and Repair of the dike was issued February 18, 2010.

water quality and that proper justification was provided by the professional engineer of record for a waiver from the water quantity requirements. Id.

The Board granted the Petitioners' request for final review conference and a hearing was held August 9, 2012 before a three-member Committee of the Board appointed pursuant to S.C. Code Ann. § 44-1-60(F). Petitioners presented arguments before the Board that the proposed retrofit, which eliminated the need for detention of stormwater in Cat Island Lake, violated Chapter III(C)(3) of the South Carolina Coastal Zone Management Program Refinements (August 1993), in particular, the Stormwater Runoff Storage Requirements: "...for those projects which are located within 1000 (one thousand) feet of shellfish beds, the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site."²

At the conclusion of the hearing, the Committee announced that the Final Board Decision would be held in abeyance for one week and urged the parties to work on a voluntary resolution. The parties were unable to resolve the matter, and on August 21, 2012 the Board reconvened and issued its decision rescinding the coastal zone consistency determination for Cat Island's project.

In its Final Agency Decision the Board stated that the basis for the decision "related only to the Requestors' arguments surrounding the project's proximity to shellfish grounds." Specifically, the three-member Committee found that no party had presented sufficient evidence to determine the exact distance of the project to shellfish beds.

It has been five years since the initial breach of the dike and four years since the attempt to repair it failed. The impoundment, formerly Cat Island Lake, is now a tidal marsh, inundated at high tide but dry in many areas at low tide. It is undisputed that Cat Island Lake has been naturalizing since the breach. The Department contends that at this point, Cat Island POA no longer qualifies for maintenance and repair of the dike and would have to embark on a permitting process with the U.S. Army Corps of Engineers and the Department to re-impound the naturalized area.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following findings of fact by a preponderance of the evidence:

² Chapter III(C)(3) of the South Carolina Coastal Zone Management Program Refinements (August 1993) refers to the Storm Water Management Guidelines as starting on p. III-74. The same guideline is stated on p. III-60 of the 1995 Update to the Program Refinements.

General

1. Notice of the time, date, place and subject matter of the hearing was given to the Petitioners and Respondents. All parties were present at the scheduled hearing which commenced on January 14, 2014, and were represented by counsel.

2. Petitioners filed a timely Request for Contested Case hearing with the Court on October 5, 2012. Cat Island POA c/o Gary Meyer timely filed a Request for Contested Case hearing with the Court on or about October 8, 2012 resulting in the initiation of two challenges to the Board's decision which were consolidated. All parties timely filed Prehearing Statements on or about June 6, 2013 identifying the issues before the Court.

3. All parties participated in full discovery prior to commencement of this hearing.

4. Cat Island POA c/o Gary Meyer filed a Motion for Summary Judgment on September 18, 2013 on the issue of the standing of the Petitioners to seek resolution through a proceeding before this Court. A Response to the Motion and supporting depositions were filed by the Petitioners on October 16, 2013. Oral arguments were conducted on the Motion on October 23, 2013. The Court's Order denying the Motion was issued November 5, 2013.

5. Cat Island POA filed a Motion to Disqualify Petitioners' Counsel on or about January 7, 2014, based on Petitioners' Counsel and his wife Petitioner Pamela North listing of their residence for sale and allegedly making statements in the listing and accompanying disclosure that contradicted the Petitioners' positions in this case.³ All parties participated by phone in a hearing before the Court. The Court's decision denying the Motion was issued that same day.

Summary of Petitioners' Objections and Position

6. Petitioners raised the following objections before the Board and the ALC:
 - a. The detention wavier was improper.
 - b. The discharge is within 1,000 feet of shellfish beds.
 - c. The Board erred in failing to order repair of the dike.
 - d. The Board erred in failing to enforce the Maintenance Agreement with the developer.

³ The residential data form signed by Mr. and Mrs. North as owners of the listed property, also called a disclosure, specifically asks the property owners to indicate whether or not they are aware of any problems caused by fire, smoke, or water during the ownership, or any drainage, soil stability, atmosphere or underground problems during the ownership, any erosion or erosion control affecting the property or any flood hazard, wetlands or flood hazard designations affecting the property. Mr. and Mrs. North checked "NO" when answering all these questions.

- e. The Lake provides detention for surrounding developments, not just GPP3.
- f. The stormwater retrofit causes adverse impacts to surrounding property owners.
- g. The existing tidal pond that has replaced the lake is negatively impacting freshwater wetlands adjacent to the lake bed.

7. Petitioners argued that Cat Island Lake provided habitat for “colonial birds, including ibis, egrets, herons, night herons, mergansers, and wood storks. ... In addition to birds, the lake was a prime habitat for alligators, otters, and other mammals and reptiles.” Now, the Petitioners no longer see and enjoy the wildlife drawn to the lake, and the lake itself is a “huge, smelly mud pit.”

8. Petitioners claim that their properties are damaged by “tidal ocean waters” that “have reached as close as three feet from one residence and the electrical lines of the property owner are submerged by ocean waters during full and new moon tides.” Furthermore, Petitioners’ claim their properties are “at risk of flooding and erosion.” “During periods of heavy rain, the free flowing stormwaters erode the bed of the former lake and the property of the owners surrounding it.”

9. The adverse impacts identified by the Petitioners associated with leaving the lake bed in its current condition include: a loss of aesthetic enjoyment because Petitioners consider the lake bed at low tide to be unsightly. With regards to property damage resulting from leaving the lake bed in its current condition, Petitioner Pamela North identified photographs of tidal waters encroaching into her yard during an extreme high tide event and a loss of landscaping at the lake’s edge. Petitioner David Feron testified to a difference in appraisals, before the loss of the dike and after, of \$190,000.00⁴ and a loss of aesthetic enjoyment of the lake. Feron provided no testimony regarding property damage and confirmed that his objection was primarily based on loss of his view of the lake. Petitioner Sally Haley testified that she hadn’t suffered from erosion, but had lost her view of the lake and wildlife. Petitioner Ken Bruning does not own property on the lake but testified regarding the loss of view.

10. S. C. Code Reg. Ann. 72-302(B)(2) provides that “A project may be eligible for a waiver or variance of stormwater management for water quantity control if the applicant can demonstrate that: (a) The proposed project will have no significant adverse impact on the

⁴ The higher appraisal was in 2006 and the lower appraisal was in 2010.

receiving natural waterway or downstream properties ...” Here, Cat Island POA’s engineer, at the request of the Department, was required to calculate the effect of mean high high tide⁵ on Petitioners’ properties. Mr. Lyle’s analysis demonstrated that the effect of stormwater at mean high high tide on Petitioners’ properties without the dike was not measurably different from the effect of stormwater at mean high tide without the dike. Petitioners’ testimony confirms Mr. Lyle’s analysis, since the dike has been breached for approximately five years. The only testimony regarding loss of property, from Pamela North, was associated with a tidal event but not a storm-driven tidal event.

11. The Department considers “significant adverse impact” as referenced in S.C. Code Reg. Ann. 72-302(B)(2) as applicable to an adverse impact associated with stormwater discharges and a storm event. I find that a waiver of stormwater management for water quantity control is based on a consideration of whether an un-detained stormwater discharge or flow could adversely impact downstream properties and not whether a tidal event, unaffected by a storm event, adversely impacts downstream properties.

Action of the Board of Health and Environmental Control

12. The Board issued its Final Agency Action in which it concluded that the Requestors met their burden of proof in showing that the staff analysis was insufficient in this case to support the finding that the distance to shellfish beds was greater than 1,000 feet.

13. The Board’s conclusion was based on a finding that the staff “did not survey the site or conduct a field inspection to measure the distance, and did not consider tidal cycles.”

14. The Board was provided a copy of a drawing prepared by a surveyor, David S. Youmans. However, the Board did not have the benefit of Mr. Youmans’ testimony, which was presented to this Court through introduction of his *de bene esse* deposition. This deposition was taken several months after the Board conducted its review.

15. Importantly, Mr. Youmans used the same method of measurement that the Department staff employed – by measuring distances from an aerial image. The points that the lines connected, the discharge pipe, the dike and the oyster beds, were established recoverable points in the field, but the measurement of distance was based on aerial imagery. Additionally, the points were established when the surveying crew was out at the lake bed at low tide, not at

⁵ Mean high high tide represents the average of the higher high water height of each tidal day.

high tide. Youmans did not physically observe the flow of water at high tide and merely drew the lines connecting the points by using his judgment.

16. Consequently, the basis for the Board's conclusion, that Petitioners had carried their burden of proving that the staff analysis was insufficient, may have been based on a misapprehension of the nature of Mr. Youmans' measurements.

17. In preparation for trial, the POA's engineers produced an aerial image, overlain with Youmans' drawings, and provided measurements. Consequently, all parties utilizing this exhibit produced by the POA's engineers, Cat Island Exhibit 1A, were utilizing the points established by Youmans as the location of the drainage pipe and outfall, the dike, and the oyster beds for measurement purposes. There was no inconsistency in the methods of measurements or disagreement as to the location of critical features between Youmans' drawing, and the measurements undertaken by Richard Geer as part of the Department's analysis. The only inconsistency was in the analysis, with the measurements made by Geer and the POA's engineers using a clearly defined drainage pathway, and Youmans using judgment, not observation, to predict a straight-line drainage path at high tide.

18. The Board did not have the benefit of Cat Island Ex. 1A or of the parties' agreement and adoption of Youmans' recoverable points representing the location of the dike, the discharge point, and the oyster beds. Moreover, based on the Board's rejection of the Department's measurements, it may have misapprehended the Youmans' drawing, which represents application of the same method of measurement – aerial imagery – that the Department relied upon.

Tidal Nature of Cat Island Lake

19. SCDHEC provided a series of photographs that compared the conditions in the lake bed between December of 2011 and September of 2013. There is substantially more marsh grass in the lake bed in the more recent photos. According to the Department's biologist, George Madlinger, the changes reflected in the photographs demonstrate that the lake bed is naturalizing as a tidal salt marsh habitat. A salt marsh habitat will support a variety of wildlife, including "wading birds ... and all sorts of animals." In fact, the photographs taken in September of 2013 indicate the presence of numerous birds in and around the lake bed. Madlinger testified that marsh grass is "spreading around the perimeter and in the center pretty much uniformly."

20. Petitioners' attorney referred to Cat Island Lake as a freshwater lake. However, in reviewing Petitioners' Exhibit 63, which includes photographs of the Lake, Madlinger noted the presence of smooth cord grass, which thrives on good tidal exchange. Prior to the breach, Madlinger testified that the Lake was tidally influenced in and around the dike, but more brackish away from the dike.

21. To further clarify the nature of the Lake, prior to the breach, Department witness Blair Williams testified that Cat Island Lake "had some tidal influence and it still had a degree of salinity where there is saltwater vegetation."

22. According to Mr. Williams, because of the naturalization that has occurred in the lake bed, the POA cannot repair the dike without obtaining a critical area permit and a permit from the Corps of Engineers. Mr. Williams testified that at least three different authorizations would be required in order to repair the dike and restore Cat Island Lake.

Applicability of Critical Area Regulations

23. Petitioners claim that S.C. Code Ann. § 48-39-10 et seq., the Coastal Tidelands and Wetlands Act, is applicable to resolution of this case. In particular, Petitioners claim that the Department failed to consider the effect of the permit on adjoining property owners as is required under S.C. Code Ann. § 48-39-150.

24. The work proposed by the POA is to be done in uplands, not in critical areas. S.C. Code Ann. § 48-39-150 sets forth the general considerations applicable to review of critical area permit applications.

25. Petitioners claim that the authorized work will impact critical areas since the failure to restore the dike will allow the lake bed to naturalize as a tidal salt marsh. Petitioners further claim that the critical area regulations are applicable because stabilization of the dike constitutes an activity in the critical area.

26. I find that S.C. Code Ann. § 48-39-130 requires permits for alteration of critical area. With regard to the lake bed, no alteration is occurring. The alteration occurred in the 1960's, when the dike was installed and a tidal, salt marsh became an open water pond. Now the area is naturalizing. If, as the Petitioners argue, the addition of the former lake bed to the critical is an effect on the critical area as contemplated in S.C. Code Ann. § 48-39-130, the project is exempt from the requirement for a critical area permit by virtue of S.C. Ann. § 48-39-130(D)(3).

27. With regard to the stabilization of the dike, POA engineer Ryan Lyle confirmed that the work proposed did not include working on the lower portions of the dike that are subject to tidal flows. Instead, the POA was planning to reinforce the top portions of the dike.

28. S.C. Code Ann. § 48-39-150(A)(10) imposes a requirement on the Department staff to consider whether an activity proposed in critical areas could affect the value and enjoyment of adjacent owners. Petitioners have testified that their property values and their enjoyment of their property have been negatively impacted by the loss of Cat Island Lake. However, this consideration is inapplicable in the context of the stormwater permit issued to the POA. There is no similar provision in S.C. Code Reg. Ann. 61-9.122.26 or 72-300 and Petitioners' loss of view and possible loss of value are not redressable under the applicable regulations.

Installation of Water Quality Filters

29. The POA proposes to install a product known as a "Curb Inlet Basket." According to the product information, "[t]he curb inlet basket provides full coverage of inlets such that all catch basin influent, as rated flows, is conveyed to the filter. The filter will retain all windblown and swept debris entering the drain." The filters have "an expected service life of 10 to 15 years." "The filter basket is readily removable from the mounting/support frames for maintenance or replacement."

30. The "first flush" or highest concentration of pollutants will be captured by the filters. According to the testimony, the POA proposes to install seven filters in a combination of grate inlet filters and curb inlet filters.

31. When GPP3 was permitted, the first flush was stored in Cat Island Lake to allow pollutants to settle out before the stormwater discharged into Chowan Creek. As was represented in the stormwater calculations provided to the Department to support the permit application for GPP3, "The South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management requires that the first half (1/2) inch of run-off over the entire site or the first one (1) inch of run-off over the built upon portion of the site depending on which is greater be stored and released over a twenty-four (24) hour period. The

outlet control structure of the existing pond will be used to control the release of the required first flush.”⁶

32. S.C. Code Reg. Ann. 72-301(5) defines “Best Management Practices” (“BMPs”) as “a wide range of management procedures, schedules of activities, prohibitions on practices and other management practices which have been demonstrated to effectively control the quality and/or quantity of stormwater runoff and which are compatible with the planned land use.” For sites less than ten acres, “the use of measures other than ponds to achieve water quality improvements are recommended.” S.C. Code Reg. Ann. 72-305(B)(3).

33. Petitioners claim that the language of the Coastal Zone Management Program Refinements limit the options available to the POA to “retention, detention or infiltration systems.” However, I find that the language is permissive, not mandatory: “Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site.” (emphasis added.) Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).

Coastal Zone Consistency Certification/Measurement of Distance to Shellfish Beds

34. A coastal zone consistency certification is required to complete the permit application for this project as it is required for all state and federal permit applications in the coastal counties.

35. S.C. Code Reg. Ann. 72-307(C)(5)(d) and (e) and Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993) state a “design criteria” requiring storage and release of the first ½ inch of runoff over a 24-hour period from a site with a permanent water quality pond having a permanent pool or of the first inch of runoff over a 24-hour period from a site with a permanent water quality pond not having a permanent pool. The Coastal Zone Management Program Refinements further require the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property to be retained on site of those projects which are located within 1,000 (one thousand) feet of shellfish beds. Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).

⁶ This requirement originates in Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), Storm Water Runoff Storage Requirements at p. III-74. It is also stated on p. III-60 of the 1995 Update to the Program Refinements.

36. S.C. Code Reg. Ann. 72-307(E) specifically exempts residential subdivisions “which were approved prior to the effective date of these regulations.” This requirement prevents the Department from retroactively applying stormwater regulatory requirements to developments that existed prior to June 6, 1992, the effective date of the regulations.

37. In reviewing NOI and submittals supporting request for permit coverage under the NPDES General Permit for Stormwater Discharges from Construction Activities, the Department shall approve proposals that are consistent with the applicable regulatory requirements.

38. Garfield Park Phase 3 is the only development on Cat Island that relied on Cat Island Lake to meet stormwater quality treatment and storage requirements.

39. Petitioners produced no evidence to refute the Department staff’s conclusion that none of the other developments in Cat Island relied on Cat Island Lake for stormwater treatment. Petitioners’ engineer confirmed that there was no information in the permitting file for Tabby Park, the only other area that was developed after the enactment of the South Carolina stormwater regulation requirements, indicating that Tabby Park relied on the lake for stormwater treatment.

40. The Department staff, specifically Richard Geer, appropriately consulted with other divisions within SCDHEC and outside agencies when evaluating the permit application for the retrofit submitted by Cat Island POA.

41. For purposes of the coastal zone consistency review that was triggered by submittal of the NOI, Geer consulted with the Department of Natural Resources (“DNR”) to identify the location of the shellfish beds in Chowan Creek in order to measure the distance to the beds from the retrofit project area.

42. Petitioners have failed to establish by a preponderance of the evidence that the method of measurement utilized by the Department to determine whether a project “is located within 1,000 feet of shellfish beds”⁷ is inconsistent with the requirement. It is well-settled that this Court defers to an agency in interpreting its regulations. “The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74 716 S.E.2d 877, 881 (2011). Moreover, “[t]he agency’s experience, technical

⁷ Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).

competence and specialized knowledge may be utilize in the evaluation of the evidence.” S.C. Code Ann. § 1-23-330. Here, the method of measurement is subject to construction because the applicable statutes, regulations, and policies do not provide for a specific method of measurement.

43. The measurements taken by the Petitioners’ surveyor reflect a straight line path of the stormwater flow from GPP3 with no regard to the clear and defined drainage pathway that the stormwater flow from the outfall has created over the past several years. Petitioners have failed to demonstrate by a preponderance of the evidence that their surveyor’s measurements are more reliable than the measurements made by Geer. The surveyor never observed the flow of water at high tide or low tide and merely justified the depicted straight line path as “judgment.”

44. Moreover the opinions of Petitioners’ engineer are not sufficient to rebut SCDHEC’s method of measurement. Petitioners’ engineer Moore has only observed the lake bed on one occasion in 2011 for half a day. His observations were at low tide. He has performed no measurements of the depth of the stormwater drainage channel. His deposition was taken shortly before this contested case convened for trial, on December 23, 2013, and at that time he had not considered the appropriate methods of measurement of the distance between the discharge outfall and the oyster beds. Moore acknowledged that direct observation of the flow of water at high tide “would be helpful before assuming a high tide pathway of water.” Yet, neither Moore nor Petitioners’ surveyor, who prepared measurements for the Board, had made such observations. Petitioners have the burden of not merely casting doubt on the propriety of the Department’s measurements, but of also demonstrating by a preponderance of the evidence that their purported measurement is more reliable. Petitioners have failed to carry that burden here.

45. The testimony provided by SCDHEC and Cat Island’s engineer Ryan Lyle regarding the measurement of the distance to the shellfish beds is probative and persuasive, and of higher evidentiary value than the testimony of Petitioners’ expert civil engineer, Chris Moore, and surveyor, David Youmans.

Detention Waiver

46. Detention and retention structures control the quantity of water released after a storm event. A detention structure means a permanent stormwater management structure whose primary purpose is to temporarily store storm water runoff and release the stored runoff at

controlled rates. S.C. Code Reg. Ann. 72-301(11). Retention structure means a permanent structure whose primary purpose is to permanently store a given volume of stormwater runoff. Release of the given volume is by infiltration and/or evaporation. S.C. Code Reg. Ann. 72-305(35). These regulatory definitions of detention and retention structures apply to the permit application submitted by the POA.

47. Cat Island Lake met the definition of a detention structure when the outfall structure was in place because the flashboard riser allowed water to flow into and out of the former Cat Island Lake.

48. Cat Island Lake did not meet the definition of a retention structure because the design of the flashboard riser outfall structure always allowed water to flow between Chowan Creek and the lake. While there is no transcription of the Board's proceedings regarding this retrofit permit, if the Board was operating under the assumption that the impoundment was providing retention, that assumption was flawed.

49. S.C. Code Reg. Ann. 72-302(B)(2) provides for waivers from stormwater management for water quantity control if the applicant can demonstrate that the proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties. If an applicant obtains a waiver for water quantity control then detention is unnecessary.

50. "Adverse impact," as used in S.C. Code Reg. Ann. 72-300, *et seq.*, means an impact resulting from a land disturbing activity. SCDHEC correctly limited its considerations of adverse impact when evaluating Cat Island POA's request for a waiver to impacts associated with stormwater flow.

51. Petitioners failed to establish by a preponderance of the evidence that their properties have suffered significant adverse impacts due to stormwater flow from GPP3. As described by Petitioners, encroachment that has occurred on their properties has resulted from the tidal flow through the breach in the dike.

52. Petitioners failed to produce evidence sufficient to establish that the proposed retrofit project would cause significant adverse impacts on the receiving natural waterway or downstream properties. Additionally, Petitioners also failed to produce any evidence showing that the receiving natural waterway, Chowan Creek, has been degraded or that its designation as

shellfish harvesting waters has been negatively impacted by the exchange of tidal flow into and out of the former Cat Island Lake.

53. SCDHEC required the POA's engineers to calculate the elevation of Cat Island Lake with and without the dike in place and to calculate the velocity of water exiting the breach in the dike to determine whether any adverse impacts on downstream properties might result from the retrofit project. Furthermore, SCDHEC required that the calculations be done using mean high high water elevation, which presents the "worst case scenario" for stormwater runoff analysis since it would be the highest level of water outside the dike. Mr. Lyle confirmed that OCRM had first requested these calculations be modeled against a mean high water elevation and then subsequently against a mean high high water elevation with the intent of reviewing the entirety of the dike breach flowing full.⁸ The analysis showed very little effect of the stormwater on the water level in the former lake at mean high high tide, meaning that the stormwater presented very little potential for flooding properties located on the borders. Petitioners presented no evidence to rebut these findings of the POA's engineers.

54. As relates to Petitioners' allegations that Chowan Creek is being degraded by the condition of the lake, and degradation will continue if the dike isn't restored, there is water quality data available for segments of Chowan Creek adjacent to the lake and outfall, and Petitioners provided no data or evidence to support their claims of degradation. While Petitioners' engineer testified that stormwater from surrounding developments was being discharged untreated, I find that control structures are present on these properties and provide water treatment. Discharges from the developed areas have the capacity to flow through the ponds and over vegetated areas before flowing into the lake. All of the golf course ponds have been built with pipes that provide exit pathways for the pond water. Piping provides detention by controlling the amount of water flow. Other examples of control structures present at the GPP3 site and on Cat Island include earthen spillways, vegetation, matting or rock cover. The golf course ponds within the drainage basin for the lake overflow their banks through vegetated spillways that provide filtration. The edges of the ponds are vegetated and allow for controlled release of stormwater runoff.

⁸ The mean high water level used for these calculations was 4.10 feet and mean high high was 4.48 feet. P. 523:13-18. These elevations were provided to Andrews and Burgess by a surveyor.

Drainage Area and Regulatory Reliance on Cat Island Lake

55. While there are areas outside of GPP3, such as the golf course, that are part of the drainage basin and ultimately drain into Cat Island Lake, SCDHEC had no requirement under South Carolina law to include these areas in its analysis for compliance with stormwater management requirements when evaluating the POA's application for the retrofit project permit. S.C. Code Reg. Ann. 72-305(A). South Carolina law imposes no stormwater treatment requirements on wholly undeveloped and untouched areas such as Tract G.

56. SCDHEC performed an appropriate investigation - through review of its files relating to the Cat Island developments and consideration of when the developments were built - to conclude that no area other than GPP3 relied on Cat Island Lake for detention. Although Petitioners' expert opined that Tabby Park area might have relied on Cat Island Lake to meet the applicable stormwater requirements, the lack of any documentation confirming this in the Tabby Park permitting file is reliable evidence to support SCDHEC's conclusion that it did not.

57. Contrary to Petitioners' claims that Cat Island Lake must be restored under Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), Cat Island Lake never served as a retention structure. P. 313:5-9. GPP3 could not use the restored lake to meet the regulatory requirement for retention under a new permit. Moreover, the lake is also not "on site" as required by the Stormwater Runoff Storage Requirements stated in Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993): "...for those projects which are located within 1000 (one thousand) feet of shellfish beds the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site." It is undisputed that the lake is a separate tract from GPP3.

58. Even if Cat Island Lake was restored to its former condition, Petitioners presented no evidence to demonstrate how the lake could be used to meet the regulatory requirement for retention under a new permit. Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993). Mr. Geer confirmed that Cat Island Lake never served as a retention structure. And, as referenced above, the lake is not on the GPP3 site.

CONCLUSIONS OF LAW

The Court concludes the following as a matter of law:

1. The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600 et seq. (APA), the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-10 et seq. (Rev. 2008 and Supp. 2011) and its regulations, 25A S.C. Code Reg. Ann. 61-101, and the South Carolina Stormwater Management and Sediment Reduction Act, §§ 48-14-10 et seq.

2. In reviewing this matter, the Court serves as the finder of fact and makes a de novo determination regarding the matters in controversy. See S.C. Code Ann. § 1-23-600(B) (Supp. 2010); Brown v S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004).

3. The proper standard of proof to be applied in a contested case before the ALC is a "preponderance of the evidence" standard. Anonymous (M-156-90) v. State Bd. Of Medical Examiners, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998).

4. "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). The moving party bears the burden of proof in a contested case hearing. S.C. Code Ann. § 44-7-21(e)(Supp. 2010); see also 2 Am Jr. 2d Administrative Law § 360 (1994); Alex Sanders, et al., South Carolina Trial Handbook § 9:3 Party With Burden, Civil Cases (1999) (In civil cases, generally, the burden of proof rests upon burden of proving that the Department erred in its issuance of the Certification.) Here, Petitioner failed to demonstrate by a preponderance of the evidence that the proposed construction is inconsistent with the requirements of S.C. Code Ann. Regs. 61-9.122.26 and 72-300 and the policies of the Coastal Zone Management Program Refinements.

5. 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).

6. In South Carolina, scientific evidence is considered admissible only where the trial judge finds that such evidence will (1) assist the trier of fact, (2) the expert witness is qualified and (3) the underlying science is reliable. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508 (1999). When examining the third factor, "reliability", a court is to determine "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." Id. at 19 quoting State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

7. South Carolina's stormwater management regulations (S.C. Code Reg. Ann. 72-300 et seq.), S.C. Code Reg. Ann. 61-9.122.26 and policies and procedures of the Coastal Zone Management Program Document and 1993 Refinements, which are enforceable like regulations in the consistency review of state and federal permits, i.e., Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), are applicable to this retrofit project and the permit application submitted by Cat Island POA. Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (S.C. 2010).

8. This Court's finding that the project is consistent with the Coastal Zone Management Program, and SCDHEC's authorization for the Stormwater Retrofit was proper is dispositive of the contested issues in this matter. Therefore, I decline to address SCDHEC's contention that the formerly impounded Cat Island Lake in its current state is tidelands critical area as defined in S.C. Code Ann. § 48-39-10(G), and any effort to restore the dike is subject to the permitting procedures set forth in S. C. Code Ann. § 48-39-130 through § 48-39-150.

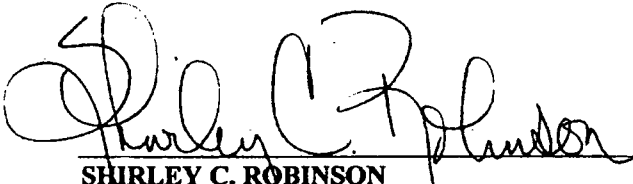
CONCLUSION

Based on the Findings of Fact set forth herein and the applicable legal requirement discussed above, I find that Cat Island POA has demonstrated that its request to retrofit the storm drainage system in Garfield Park Phase 3 is consistent with the applicable requirements of S.C. Code Reg. Ann. 72-300 et seq., S.C. Code Reg. Ann. 61-9.122.26, and the Coastal Zone Management Program Refinements referenced herein.

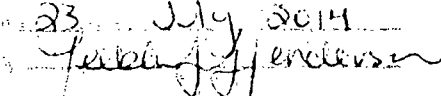
IT IS, THEREFORE, ORDERED that the action of the Board in rescinding the coastal zone consistency determination related to the installation of water quality filters in storm drain inlets located in the Garfield Park Phase 3 subdivision on Cat Island in Beaufort County is hereby reversed, and the previous decision by SCDHEC-OCRM staff that the project is consistent with the Coastal Zone Management Program is reinstated.

IT IS FURTHER ORDERED that SCDHEC-OCRM's authorization to stabilize the breached dike and install water quality filters in storm drain inlets is **AFFIRMED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
South Carolina Administrative Law Judge

July 23, 2014
Columbia, South Carolina

23 July 2014


FILED

NOV 05 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

Ken Bruning, et al.,

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No.: 12-ALJ-07-0434-CC

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

Docket No.: 12-ALJ-07-0436-CC

This matter came on for hearing on October 23, 2013, on the Motion for Summary Judgment filed by the Respondent, Cat Island POA, c/o Gary Meyer ("Cat Island POA"). Present on behalf of Cat Island POA was Gary Meyer, as well as its counsel, Mary D. Shahid and Angelica M. Colwell. South Carolina Department of Health and Control ("DHEC") appeared through its counsel, Nathan Haber. The Petitioners, Martha James, Donald Haarmeyer, Salley Haley, Ken Bruning, and Pamela North, appeared in person and through counsel for all Petitioners, John E. North, Jr.

The Court, having reviewed the evidence offered by the parties, and having considered the written and oral arguments of counsel, finds as follows:

1. The Petitioners are owners of lakefront residential lots platted around a 7-acre lake that has been previously permitted and used as the approved detention basin for stormwater

treatment pursuant to a stormwater permit issued by DHEC in 2004.

2. After the dike that created the lake failed and subsequent efforts to repair the dike also failed, Cat Island POA sought authorization from DHEC to change the manner of treating stormwater from the previously approved detention provided by the lake to treatment by in-line filters.

3. In its Motion Cat Island POA requested that the Court grant summary judgment in Cat Island POA's favor and against the Petitioners on the ground that there is no case or controversy because the Petitioners failed to establish standing to challenge the rescission of the coastal zone consistency certification for the Drainage System Retrofit project and the issuance of NPDES General Permit SCR100000 (2006 NPDES CGP) SCR 10N463 for Storm Water Discharge from Large and Small Construction Activities ("General Permit"). In essence, Cat Island POA argues that none of the Petitioners are claiming that they have been or would be injured by installation of the water quality filters, and that the Petitioners' concerns are more about restoration of the detention basin called Cat Island Lake.

4. Under *Sea Pines Assn. for the Prot. of Wildlife, Inc. v. S. C. Department of Natural Resources*, 345 S.C. 594 (2001), the Petitioners have standing if they can demonstrate an injury-in-fact that is causally related to issuance of the General Permit and that the injury is likely to be redressed by a favorable decision of this Court. The Petitioners argue that, in order to evaluate the standing of the Petitioners, it is necessary to consider the totality of the agency action to which they object, as well as the consequences to Petitioners of that agency action.

5. The Court finds that the agency action in question involves more than permission for the installation of water quality filters. DHEC's approval of the General Permit grants Cat Island POA approval to retrofit the previously approved and permitted stormwater treatment system for Garfield Park, Phase 3. Implicit in such a retrofit is the abandonment of the previously approved system of treatment by the detention provided by the lake that abuts the residential property of the Petitioners. Cat Island POA's Motion concedes at page 18 that "because installation of the filters is intended to be an alternative to any repair, the breach in the dike would be allowed to remain if the General Permit was declared final and complete."

6. The Petitioners allege that, should the General Permit coverage become final and the dike and lake abandoned, the consequences to them include the following:

- a. Encroachment of tidal waters onto their residential property.

- b. Destruction of their landscaping by the exposure to tidal salt water.
- c. Loss of the value of the lakefront property of Petitioners.
- d. Loss of the aesthetics of the lake and its wildlife.

7. In addition to the economic impact to them if the General Permit coverage becomes final, Petitioners relied upon *Sea Pines, supra*, to establish that deprivation of their aesthetic and recreational interests in enjoying and observing wildlife is a “judicially cognizable legal injury in fact” which also provides them standing in this matter. 345 S.C., at 600-601.

8. This Court finds that, when considering the totality of the agency action, which not only allows use of in-line filters but further allows for the abandonment of the lake as the detention basin and permits the dike to remain unrepaired, the Petitioners have demonstrated that there is the possibility the Petitioners may suffer some injury resulting from the agency action.

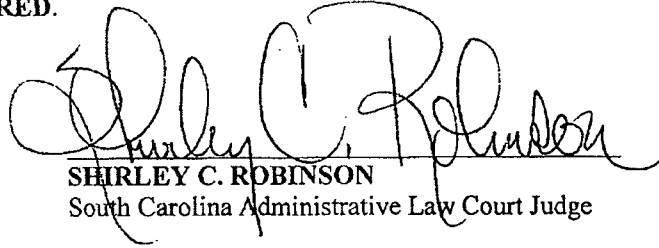
9. Cat Island POA further argues that Petitioners lack standing because the injuries to Petitioners are not likely to be redressed by a favorable decision of this Court. In support of its position, Cat Island POA argues that this Court cannot order the repair of the dike and restoration of the lake because other federal and state regulatory action may be required before any such repair could be made.

10. Whether this Court can or should order the dike repaired need not be decided at this juncture of the proceedings. What is clear is that, if the Petitioners are able to carry their burden to show at trial that DHEC’s approval of the General Permit violates numerous laws and regulations, this Court has the power to set aside the issuance of the Permit. If that were to happen, the permission of DHEC to change the stormwater system from detention by the lake to filters will have been rescinded. That would leave the original stormwater permit in place and any injuries to the Petitioners arising from DHEC permanently authorizing the use of filters and the abandonment of the lake as the detention basin will be redressed.

11. Cat Island POA contends on page 5 of its Motion that, “The fate of the dike would be in the hands of multiple state and federal permitting and resource agencies. It is unknown whether the outcome of that process would be successful...” However, the fact that other agency action might be required before an actual repair to the dike is commenced does not deprive the Petitioners of their standing to object to the DHEC’s approval of the General Permit.

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by the Respondent, Cat Island POA, is hereby **DENIED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
South Carolina Administrative Law Court Judge

November 5th, 2013
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 5 day of November 2013
By: Jeanele Henderson
Jeanele Henderson

FILED

AUG 27 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Docket No. 12-ALJ-77-0434-CC

Ken Bruning; Janet Bruning; David Feron,
individually and as Trustee; Mary Feron,
individually and as Trustee; Sally Saegmüller
Haley and Terrell Page Haley, individually
and as Co-Trustees; Martha James and Don
Haarmeyer, individually and as Co-Trustees;
and Pamela S. North,

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

In Re: Garfield Park Phase 3.

**ORDER DENYING
MOTION FOR
RECONSIDERATION**

Docket No. 12-ALJ-07-0436-CC

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to consolidated Requests for Contested Case Hearings filed by Ken Bruning, et al. ("Petitioners") and Petitioner/Respondent Cat Island POA ("Cat Island POA") challenging the South Carolina Department of Health and Environmental Control's ("the Department's") determination that Cat Island POA met all applicable requirements to retrofit the storm drainage system in a development known as Garfield Park Phase 3. Petitioners argued the Department's

*Rec'd
9/5/14*

decision was in error because it violated the South Carolina Coastal Zone Management Program, among other violations. In a Final Order dated July 23, 2014, this Court upheld the Department's decision.

Subsequently, on August 1, 2014, Petitioners filed a motion requesting the Court to reconsider its decision, citing several exceptions to the Final Order. Cat Island POA and the Department both filed Responses in opposition to Petitioners' motion. Having considered the facts of this case, and having reviewed Petitioners' Motion for Reconsideration and the Department's and Cat Island POA's Responses, the Court finds its July 23, 2014 Order must stand. Among other issues, Petitioners raise three specific issues in their Motion to Reconsider, which they contend the Court failed to address: (1) the alleged violation of covenants protecting dedicated freshwater wetlands; (2) the encroachment of tidal water on an existing, platted development, and (3) the import of an OCRM Sediment and Erosion Control Checklist. I find these issues were adequately covered in the July 23, 2014 Order and require no further discussion.

THEREFORE, IT IS HEREBY ORDERED that Petitioners' Motion for Reconsideration is **DENIED**.

AND IT IS SO ORDERED.

August 27th, 2014
Columbia, South Carolina


SHIRLEY C. ROBINSON
Administrative Law Judge

27 August 2014
Jebber Henderson

South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM

Last Name: Bruning, et. al., c/o North & Black, P.C. on behalf of attached Exhibit A list of parties requesting this proceeding ☐ Mr. ☐ Miss ☐ Mrs. ☐ Ms. Docket No. (To Be Completed by ALC)

Mailing Address: 916 Bay Street, Suite 100 City: Beaufort State and Zip: S.C. 29902

Home Number: (843) 379-0800 Work Number: (843) 379-0800 Cell Number: (843) 338-5552 *E-Mail Address: north@northblack.com

*By providing your e-mail address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? No If No, please complete the following:

Are you represented by an Attorney? ☒ Yes

Are you represented by a CPA? ☐ Yes ☐ No

Name of Attorney: John E. North, Jr.

Name of CPA:

Mailing Address: 916 Bay Street, Suite 100

Mailing Address:

City, State and Zip: Beaufort, S.C. 29902

City, State and Zip:

Work Number, Cell Number and E-mail Address: (843) 379-0800 (W)
(843) 338-5552 (C) north@northblack.com

Work Number, Cell Number and E-mail Address:

CASE INFORMATION

Name of the Agency that issued the decision: DHEC (OCRM)

(Example - Dept. of Revenue, Dept. of Insurance, DHEC)

In order to have your case processed, **you must attach the agency decision.** Is it attached? If no, please explain:

Yes, as Exhibit D.

Date the decision was issued: September 10, 2012

Date the decision was received: September 10, 2012

Please provide a brief statement regarding why the hearing is being requested and the relief sought:
OCRM issued a storm water permit that violates numerous applicable regulations and ordinances and failed to order the repair of a previously approved storm water system. See the attached Exhibit B for additional grounds and details.

Payment via ☐ Check for \$500.00
submitted today to the Administrative Law Court via

(applicable **filing fee pursuant to ALC Rule 71**) is being
☐ U.S. Postal Service

John E. North Jr.
X Your Signature or Signature of Attorney/CPA

October 5, 2012
Date

CERTIFICATE OF SERVICE (MUST BE COMPLETED)

Your Name:

Date:

City:

State:

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing **on all other parties** to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

DHEC/OCRM
Name and/or Agency

2600 Bull Street
Address

Columbia, SC 29201
City, State and Zip

Thomas Holloway, Attorney for Permittee P.O. Drawer 1107
Name and/or Agency Address

Beaufort, SC 29901
City, State and Zip

John E. North Jr.
X Your Signature or Signature of Attorney/CPA

October 5, 2012
Date

Exhibit A

List of Parties Requesting a Contested Case Hearing

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

Exhibit B

Grounds for Requested Hearing and Relief Sought

The grounds for the requested hearing are as follows:

1. OCRM issued a storm water permit that violates numerous applicable regulations and ordinances and failed to order the repair of a previously approved storm water system despite the fact that the lack of repair resulted in damage to the property of the adjacent homeowners who have requested the hearing. The DHEC Board rescinded the Coastal Zone Consistency Determination of the OCRM staff, but did not rescind the underlying storm sewer permit.
2. The DHEC Board found no other compelling reasons to amend, modify, or revise the staff decision despite the fact that the preponderance of the evidence presented showed the multiple additional grounds and reasons as summarized on the attached Exhibit C, which is incorporated herein by reference.
3. The DHEC Board failed to direct that stormwater treatment for both the Garfield Park and Tabby Park subdivisions on Cat Island include detainment of stormwaters in accordance with the applicable regulations despite the facts and grounds set forth in the attached Exhibit C.
4. The DHEC Board failed to Order the immediate repair of the previously approved stormwater system for Garfield Park, pursuant to the Maintenance Agreement executed by Developer, including its outfall device and/or issue a permit for such repair despite the facts and grounds set forth in the attached Exhibit C.
5. The DHEC Board failed to Order that the water level of the previously approved stormwater detention basin be restored to its former level despite the facts and grounds set forth in the attached Exhibit C.
6. The DHEC Board failed to grant relief that would fairly protect the interests of the Property Owners whose property is being subjected to tidal water flow and otherwise damaged as a result of the failure to repair the dike of the previously approved stormwater detention basin.

The relief requested by these interested parties is as follows:

A. A finding and order of the Court that the issued storm water permit violates numerous applicable regulations and ordinances and should be rescinded.

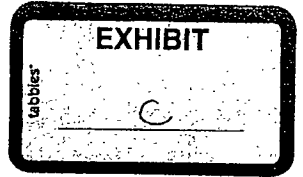
B. A finding and order of the Court that there are other compelling reasons to amend, modify, or revise the staff decision as summarized on the attached Exhibit C.

C. A finding and order of the Court that that stormwater treatment for both the Garfield Park and Tabby Park subdivisions on Cat Island include detainment of stormwaters in accordance with the applicable regulations.

D. A finding and order of the Court that the previously approved stormwater system for Garfield Park be immediately repaired pursuant to the Maintenance Agreement executed by Developer, including its outfall device and that DHEC/OCRM issue a permit for such repair.

E. A finding and order of the Court that the water level of the previously approved stormwater detention basin be restored to its former level.

F. A finding and order of the Court that grants relief that would fairly protect the interests of the Property Owners whose property is being subjected to tidal water flow and otherwise damaged as a result of the failure to repair the dike of the previously approved stormwater detention basin.



NORTH & BLACK, P.C.
Attorneys at Law
Regions Bank Building
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel) (843) 379-0900 (fax)

June 25, 2012

Via Fax (803) 898-3393

Clerk of the Board
SC – Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Re: Garfield Park Phase 3 (file number 07-04-04A), Cat Island
stormwater treatment, repair of approved dike and outfall device, and
Coastal Zone Consistency Certification

Dear Clerk:

Our office represents all of the property owners who reside immediately adjacent to the former detention basin involved in the referenced matters, each of whom is an affected person who has asked for notice of the actions of the Ocean and Coastal Resource Management division of DHEC ("OCRM") with regard to these matters. Each of these property owners is copied on this correspondence and they are listed below ("Property Owners").

The Property Owners object to the granting of the permits contemplated or referred to in the correspondence of Richard V. Geer, dated June 18, 2012, the failure of OCRM to order the repair of the dike and outfall device of the former detention basin adjacent to the residences of the Property Owners, the failure of OCRM to address and remedy the discharge of improperly treated stormwater into protected wetlands and critical areas, and the issuance of a Coastal Zone Consistency Certification, dated June 18, 2012. Copies of the decisions of OCRM, to the extent that they have been provided to us, are attached hereto. I have arranged to mail to your office a check in the amount of \$100.00 for the filing fee.

The Property Owners request a final review conference by the Board of the actions and omissions of OCRM staff relating to these matters. The grounds

upon which the OCRM decisions are challenged and the significant issues and factors that the Board should consider include the following:

1. DHEC Should Consider the History of the Detention System.

The referenced matters relate to the failure of a dike and outfall device that controlled the level of a 6.2 acre lake used by the Cat Island developer as a detention basin for various phases of the Cat Island development. The dike and the lake are directly adjacent to the waters of Chowan Creek, which empties into Port Royal Sound and contains numerous oyster beds. In its development plans for Cat Island in the 1980s, the developer fortified an existing dike and installed an aluminum splashboard riser pipe to control the level of a lake so that lots could be created, platted, and sold to Property Owners, and to simultaneously provide for the detention of the stormwater discharges from the surrounding property.

A development permit was issued by the Beaufort County Planning Commission in April, 1988, on the basis of a site plan depicting the lake and adjacent wetlands as part of the stormwater runoff system and subjected both the lake and the wetlands to a drainage easement granted by the developer. A copy of that site plan was previously provided to OCRM, together with a copy of the Plat prepared by the developer showing the lake and the easements. Multiple subsequent subdivisions of the property of the developer have been undertaken which used the lake as the detention basin for the treatment of the stormwater.

The most recent approval involving this lake and outfall device was in 2004, when the Phase 3 of the Garfield Park subdivision was developed. The approved plans show the lake and the "existing outfall structure" as an integral part of the approved stormwater system. The 2004 correspondence from the developer's engineer to OCRM's Mr. Geer said that Mr. Geer's stated concern about sediment and runoff would be addressed by use of the lake as a detention basin. The correspondence in the OCRM file also shows that the engineers at that time were meeting the requirements for control of erosion, water treatment, and the detention requirements for storm events by reliance on the lake and the outfall device.

In June, 2009, the dike failed and drained the lake. Since that time, untreated stormwaters, including those from an adjacent golf course, have discharged directly into Chowan Creek and the remains of the dike and the collected sediment on bed of the former detention basin have also been washed into these critical areas.

When the outfall device failed, OCRM had the power to simply order the stormwater system restored to its former operative condition. The power to make

such a simple order is clear in the approval documents that contain the requirement that the developer undertake such responsibility as a condition of the permit approval. OCRM did not do so. For almost three years, OCRM allowed the developer to submit plans for other methods of stormwater control. The permit approval recently issued is the result of that process.

2. The Subject Permit Sanctioned a Change to the Historical Detention System that Violates Applicable Law.

Rather than repair the dike and restore lake, the developer has acquired the blessing of OCRM to abandon the former lake and dike and to change the previously approved manner in which stormwaters have been handled from use of the lake as a detention basin to an "in-line" filtering system. OCRM's approval of the developer's application is wholly inconsistent with the policies of the Coastal Zone Management Act ("CZMA"), its implementing Regulations, S.C. Reg. 30-11, the S.C. Stormwater Management and Sediment Reduction Act, and was issued without regard to the relevant facts and its own stormwater treatment requirements.

3. DHEC Should Review the Compliance of OCRM with its Duties.

Under the CZMA, high priority is to be given to protecting natural systems in the coastal zone and critical areas should be used in a manner that benefits the people, but not necessarily in ways that provide the maximum dollar benefits. See: S.C. § 48-39-20; § 48-39-30.

In considering an application for a stormwater permit, OCRM is also required to give due consideration to all of The General Guidelines contained in the implementing regulations, Reg. 30-11. *Brown v. DHEC*, 348 S.C. 507, 560 S.E. 2d 410 (2002). Failure to do so is improper.

Those considerations include but are not limited to: 1) the extent of the impact on "fish, shrimp, oysters, crabs, or clams or any marine life or wildlife and other natural resources in the area; 2) the extent to which the activity could cause erosion; 3) the impact on habitats for rare and endangered species; 4) the extent of the economic benefits compared with the benefits from unaltered state; 5) the extent of adverse environmental impact which cannot be avoided by reasonable safeguards; 6) the extent to which the proposed use could affect the value and enjoyment of adjacent owners; and 7) the extent to which the project will have on the general character of the area.

In granting approval to the developer's proposed change in stormwater management and in failing to require it to comply with the maintenance agreement it executed with respect to the dike and lake, OCRM has failed to comply with the CZMA, Reg. 30-11, and other state and local requirements.

OCRM has also disregarded its own storm water regulations and ignored relevant and material facts.

4. OCRM Failed to Consider the Impact on the Property Owners.

Under S.C. § 48-39-150, OCRM is required to consider the impact of a permit on adjoining property owners. In failing to require the developer to repair the dike and the existing stormwater detention system and in granting approval to install a completely new system, OCRM has approved a permit which will not only result in significant economic damage to the Property Owners, but puts their property at risk of flooding and erosion.

Without the dike in place, the tidal ocean waters have reached as close as three feet from one residence and the electrical lines of the property owner are submerged by ocean waters during full and new moon tides. Those tides are also within three feet of the front walkway, cover the trunks and roots of the oaks, palms, camellias, and azaleas on the property with ocean water, and the owner cannot walk around the south side of the house from the front porch during these high tides without wading through the ocean water. A survey provided to OCRM established that even average high tides intrude onto the owner's property.

None of the shorelines of the lake have been subjected to tidal influences since the dike was originally built in the 1960s and the home sites along the edge of the lake have all been in place since the developer established the level of the lake in 1986. Shortly after the dike failed, the fresh water vegetation that grew along the edge of the lake died and at this point, the large oaks are showing the stress of the salt-water exposure.

During periods of heavy rain, the free flowing stormwaters erode the bed of the former lake and the property of the owners surrounding it. Without the dike in place, the property surrounding the former lake is unprotected from ocean waves coming through the dike opening. Waves in Chowan Creek, which enjoys an open view of the Atlantic Ocean, can reach six feet in height.

A hydrologic analysis is required by OCRM's established procedures and, although OCRM requested it of the developer, it was never provided. The permit was issued anyway. That study was especially critical when the Property Owners had repeatedly complained that tidal flows were encroaching on their land and submitted a survey that established such encroachment even at mean high water and without regard to the full and new moon tides.

The submittals to OCRM from the developer's engineers support the Property Owner's contention that the tides come onto their land. Those submittals show that the elevation of the lake was initially established by the developer at 3.3 feet and that the mean high water of the incoming tide is 4.1

feet. However, OCRM also has a copy of correspondence from the developer's engineer stating that spring tides are about 2.9 feet higher than the mean high tide in this area. Accordingly, the spring tides are 3.7 feet higher than the established elevation of the former lake when the Property Owners purchased their home sites.

OCRM not only approved the developer's application without a hydrological study, it apparently did so without consideration of the impact of both the mean high tides and the almost 4 foot higher levels associated with spring tides. In doing so, it clearly failed to consider the real impact on the Property Owners of the breached dike.

The decision of OCRM also fails to take into account that the consequence of the approval of a new and different system for treating the stormwater is that the Property Owners are subjected to living on a smelly, unsightly mud pit instead of the beautiful lakefront property that they purchased. In addition to the obvious aesthetic and environmental impact of this decision, it results in actual economic loss to the Property Owners. An appraisal of one of the homes adjoining the lake showed an increased value of \$100,000 solely due to the proximity to the lake. Not only has that increased value been lost, but the property value is negatively impacted by being adjacent to an unsightly and smelly mud pit. Taken together, the economic impact to the Property Owners that I represent exceeds \$1 million.

5. OCRM Has Improperly Based its Decision On the Economic Interests of the Developer Rather than on the Protection of the Environment.

The Property Owner's engineer both submitted his report and appeared before the OCRM personnel to offer his opinion that detention was the best and most effective manner to treat stormwater and, as more specifically set out hereafter, that the proposed in-line filtering system would be ineffective and not appropriate for stormwater treatment in the circumstances presented. The developer has offered no specific reason for its desire to abandon the dike and lake detention system, but presumably it is economic. It is certainly not aesthetic.

The CZMA is specific in that its specific objective is protection of the environment, even if a particular economic interest is not served by its denial or approval of a permit. Clearly, in this case, it is only the developer's economic interests that are being served by the proposed change in the entire storm water management system, to the detriment of all other considerations.

6. OCRM's Approval of a Different Stormwater Treatment System Will Adversely Impact the Environment, the Habitats for Rare and Endangered Species, and Change the General Character of the Area.

As previously indicated, the dike and the resulting 6.2 acre lake had been in existence since the 1960s. As a result, it created a prime nesting and feeding area for colonial birds, including ibis, egrets, herons, night herons, mergansers, and wood storks, which are a listed endangered species. In fact, the subdivision developed around the lake was named by the developer "The Rookery". In addition to birds, the lake was a prime habitat for alligators, otters, and other mammals and reptiles. OCRM was provided sections of a wildlife journal kept regularly by one of the Property Owners in which she identified each of the varied species she saw and when and observed that the birds returned each year essentially at the same time to the same areas to nest and raise their young. Even owners who did not live immediately adjacent to the lake enjoyed the presence of those birds and animals and often came specifically to watch them. The lake presented a unique and pristine environment for both the animals and birds and for the people who enjoyed seeing them.

Not only is that environment gone, but a huge, smelly mud pit has taken its place. OCRM's acquiescence in that result is inconsistent with the goals that it is supposed to serve.

Restoring the lake that provides this excellent habitat will assure that the birds and animals would promptly return. To preserve the existence of that habitat and simultaneously detain the stormwaters of the huge drainage basin of the development, rather than serve the economic interests of the developer, is the proper goal for OCRM in considering the pending application.

7. OCRM's Approval of the In-line Filtering System Violates its Own Regulations and Adversely Impacts Oysters and Other Marine Life.

As part of granting the developer's request to change the manner of treating stormwater, OCRM granted a detention waiver. From the beginning of the permitting process, OCRM advised the developer that it must "meet our heightened requirements for areas draining to shellfish beds". Ultimately, OCRM simply ignored its own regulations and the articulated "heightened requirements" and just waived them. That action is completely without authority and contrary to the goals of the CZMA and the S.C. Stormwater Management and Sediment Reduction Act.

There is no question that the in-line filtering system will result in stormwater discharge points less than 1,000 feet from the shellfish beds in Chowan Creek. The Property Owners have provided OCRM with a survey establishing that fact. Waiver of detention when the discharges of stormwater are within 1,000 feet of shellfish beds are clearly not allowed and inappropriate.

There is no question that the OCRM written Policies and Procedures provide at page III-62 that:

The regulations of the Stormwater Management and Sediment Reduction Act require that 'permanent water quality ponds having a permanent pool shall be designed to store and release the first ½ inch of runoff from the site over a 24-hour period' ".

Those Procedures further state that "In addition, for those projects which are located within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site".

Further, Table 2-3 of the South Carolina Coastal Zone Management Program lists the Stormwater Quality BMP Requirements for Beaufort County. In addressing the types of water quality facilities that are required in different situations, the requirements clearly state that a water quality facility without a permanent pool of water is "Not applicable" to areas within 1,000 feet of shellfish beds.

Under OCRM Policies and Procedures, because golf courses involve "significant negative impacts from runoff of sediments, pesticides, herbicides, and other pollutants" all drainage should be routed to interior lagoons or an equivalent stormwater management system and that "all outfalls from the lagoon system must be located at an elevation above the critical area AND above the normal water elevation a distance to allow for storage of the first one inch of runoff. Because the discharge in question is within 1,000 feet of shellfish beds, this requirement becomes 1 ½ inch of runoff.

In the present case, drainage from the adjacent Sanctuary golf course and the Tabby Park development drains directly through a PVC pipe into the bed of the former lake without any detention or treatment. OCRM has photographs taken by Mr. Geer documenting that situation.

Without restoration of the dike and the resulting detention of stormwater, OCRM's own requirements cannot be met and there is no basis for waiving them.

8. The In-line Filtering Devices Approved by OCRM are Inappropriate for Stormwater Treatment in the Area in Which The Developer Proposes to Use Them.

In considering whether to issue or deny a permit, OCRM is not to act in a "vacuum" but to consider the effects of the project on pristine habitats and the general character of the area, not just the precise location of the project. *Kiawah Development Partners II v. DHEC*. ____ S.E. 2d ____, 2011 WL 5840326.

Despite the site's close proximity to a wildlife habitat and the pristine waters of Chowan Creek, OCRM approved a new stormwater system that is no more sophisticated than in-line filters that are designed to allow all stormwater to move over and past the filters during periods of heavy rain or when the filters are clogged. The stormwater treatment system approved by OCRM ensures that when there are heavy water flows, the water just goes over the filtering device, directly into the former lakebed and out to sea less than 1,000 feet away. Such a system ensures that state water quality regulations are violated on a regular basis since the stormwater that bypasses the filters goes into the critical areas without any treatment at all.

The in-line filter system presents a variety of different problems that make it wholly unsuitable for the area in which it is to be used. The developer has provided no maintenance plan. The Specifications for the proposed in-line filters are attached to the stormwater calculations performed by the developer's engineers, dated June 10, 2011 state that the in-line filters must be cleaned out a minimum of four times per year, plus after any and all qualifying rain events. On Cat Island, a qualifying rain event can easily occur on a weekly basis during certain times of the year. Unless there is a plan for monitoring the site regularly and maintaining the in-line filters, they are essentially useless in treating stormwater runoff.

The OCRM Sediment and Erosion Control Checklist provides that sediment traps are only appropriate for developments of less than five acres. It also requires that such traps have 80% efficiency during a 10-hour, 24-hour storm event. The information provided to OCRM on the pollutant removal efficiency of the proposed filter devices shows that the relevant pollutants are only removed to the extent of between 37% and 57%, depending on the type of the pollutant. During times of high water volume, the design provides for bypassing the filtering device and directly discharging the stormwater into the critical area. By their very nature and design, the approved in-line filters do not meet OCRM's own requirements.

Any new stormwater system must be built so that no erosion will occur when stormwaters are draining. All channels and diversion ditches must be able to handle 10-year storm events without having erosive velocities of water.

As the result of the failure of the dike, the entire former lakebed has become a channel and diversion ditch. Rather than drain directly into the lake, stormwater is now flowing from both Tabby Park and Garfield Park across the mud of the lakebed, cutting crevasses into the mud, and depositing the resulting sediment into the waters of the State. There is nothing in the approved plans to impede the discharge rates and runoff velocities of the stormwater. The result is that these large crevices will continue to be cut across the entire length of the

lakebed, which are deepening with every passing week. The sediment that was deposited into the former detention basin since the 1960s is being washed over the oysters on a daily basis. Photos provided to OCRM show the severe angle of the dike opening and the falling portions of the dike negate any suggestion that the dike has stabilized. The permit conditions contain no method for adequately addressing erosion, sediment, or the attenuation of peak flows on the former lakebed.

The permit issued by OCRM effectively sanctions the continuing pollution of the critical areas of Chowan Creek with the sediment of the lakebed and fails to address any of the discharge rates and velocity issues and is improper.

9. The Approved Permit Does Not Address the Fact That, Without the Lake as a Detention Device, Large Areas of the Tabby Park Subdivision have No Storm Water Treatment.

As noted in OCRM's correspondence to the developer's engineers, dated February 23, 2011, the drainage area of the former lake is greater than the topography supplied by the engineers. The actual drainage basin includes all phases of Garfield Park, the Rookery, the 10th and 18th holes of the Sanctuary golf course, and a large part of the Tabby Park subdivision, which was developed after 1999. Tabby Park is largely within the drainage area of the failed former detention lake. Accordingly, if the dike and lake are not restored, any proposal to change the manner of treating stormwater must also provide for the treatment of stormwater from the Tabby Park Subdivision.

On the eastern end of the Tabby Park Subdivision, there are two golf course ponds that connect to each other under National Boulevard. The storm sewer along the eastern end of National Boulevard discharges directly into these ponds. These ponds also are connected to wells so that the golf course can use the ponds for irrigation. The water from the wells flows through the two ponds and then through a 10 inch PVC pipe under the 18th fairway to another golf course pond that connects directly to the wetland areas of the lakebed of the former detention basin.

Photos provided to OCRM show the pipes running from the golf course ponds to the Cat Island detention basin. These photos show the pipes that have a constant flow, even in times of drought, due to the fact that the golf course ponds are being fed by well water.

Although the developer's engineers contend that the ponds on the golf course detain storm water from Tabby Park, the report of the engineer retained by the Property Owners establishes that this is not the case for a number of reasons, including that there are no outfall devices and any incoming stormwater is immediately discharged without detention due to the full capacity in which

these ponds are maintained. In addition, with regard to the center section of the Tabby Park Subdivision, the topography of the area demonstrates otherwise. The center portion is designed so that the stormwaters flows from both east and west to a central point on the south side of National Boulevard. From this point, the stormwater is discharged through a PVC pipe under the 18th fairway directly to the wetlands of the lakebed. There is no golf course pond or detention of any of these waters other than what was previously provided by the outfall device of the failed dike.

Unless the developer is required to provide stormwater treatment for the area of Tabby Park and the golf course that previously used the lake as a detention basin, there will be unlawful discharges of untreated stormwater into the critical areas and the waters and oyster beds of Chowan Creek.

10. The Permit Allows Interference with Vested Right of Adjacent Property Owners and the U.S. Army Corps. of Engineers.

Pursuant to the Declaration of Restrictive Covenants for Wetlands Preservation, dated March 27, 1995, a copy of which has been provided to OCRM, certain fresh water wetlands were permanently dedicated by the developer to remain "substantially in their natural condition forever". This grant was in exchange for the developer's ability to fill certain jurisdictional freshwater wetlands in connection with the development of Garfield Park. Included in the dedication were wetlands areas that are a part of the lakebed and its included uplands and the dedication was for "for the protection or enhancement of the Property's scenic, conservation, resource, or other values".

Failing to repair the dike and restore the lake allows salt-water tides to flood the dedicated freshwater wetlands with salt-water, adversely impacting all of those wetlands and the vegetation that are a part of them. The Covenants further prohibit the developer from "draining", "altering the natural state" of the wetland areas, or "reducing the reach of the waters". By failing to repair the dike, the protected freshwater wetlands have been drained. Clearly, the impact of the absence of the dike has "altered" the state of those wetlands.

Daily, the freshwater wetlands are inundated with the tidal salt-water. The residents report that at least 42 trees in this protected area have died. Photos of the salt-water encroaching on this area have been provided to OCRM, together with photos of some of the dead trees. The lineal number of feet of flooded fresh water wetlands that are governed by the Dedication that are now submerged under the tidal salt-waters at high tide is 137 feet of tidal salt-water from the curb where the protected area begins to the end of the standing salt-water. The elevations previously provided to OCRM by the developer's engineer show that, even at an average high tide, the salt-water intrudes into the protected area. If this situation continues, this protected freshwater wetland will become a saltwater

marsh.

In addition to the dedicated wetlands, the entire lake had freshwater wetlands surrounding it that have been or are in the process of being destroyed. OCRM should not consider any option for the treatment of stormwater that results in the violation of the rights granted pursuant to the Covenants, that destroys freshwater wetlands, or that does not include maintaining the water level of the lake in accordance with the Covenants and in accordance with all of the existing development permits.

11. OCRM has Not Required the Developer to Comply with Applicable Regulations Concerning New Storm Water Treatment Systems.

Since the proposed project is a new and substitute storm water treatment system, it must comply with the regulations and ordinances currently in effect. Those requirements include bio-retention and the submittal of worksheets depicting the effectiveness of the system on treating phosphorus, bacteria, and total nitrogen. This is especially important where the stormwaters drain from the adjoining golf course.

The proposed project would also have to comply with the Beaufort County requirement that a Sediment Control Certification Form be completed and filed and approved by the Beaufort County Engineer. Finally, any new plan would have to have certifications that the flow rates of discharge post development do not exceed the flow rates pre-development for 2-year and 10-year storm events. Without the lake to collect and detain the stormwaters, such a certification is not possible. Pre-development, the lake detained the stormwaters. Without the lake, the waters flow unimpeded and would obviously exceed the pre-development rates of flow. Any proposed system that does not have as a component a permanent wet detention basin cannot meet these requirements and it is folly for OCRM to approve a permit that can never satisfy other relevant regulations. That course only ensures that there will more years of continued discharge of untreated stormwaters into Chowan Creek and the critical areas surrounding it.

12. The Position of the Property Owners is Supported and Substantiated by the Engineering Firm of Jon Guerry Taylor & Associates, Inc.

The Property Owners retained its own engineering firm to assist in presenting these matters to OCRM. The report of that firm has been provided to OCRM and representatives of the firm have been made available to OCRM to discuss the matter and to provide further information. The Property Owners rely on all of the material contained in the report and all additional information provided to OCRM in opposition to the actions and omissions of OCRM.

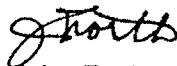
Clerk of the Board, SCDHEC
June 25, 2012
Page 12

The Property Owners respectfully request that the Board convene a hearing within the statutory period and, after hearing the position of the parties and reviewing the evidence, take the following action:

1. Deny the developer's pending application.
2. Direct that stormwater treatment for both the Garfield Park and Tabby Park subdivisions on Cat Island include detainment of stormwaters in accordance with the applicable regulations.
2. Order the immediate repair of the previously approved stormwater system for Garfield Park, pursuant to the Maintenance Agreement executed by Developer, including its outfall device and/or issue a permit for such repair.
3. Order that the water level of the previously approved detention basin be restored to its former level.
4. Grant such other relief as will fairly protect the interests of the Property Owners whose property is being subjected to tidal water flow and otherwise damaged.

If you have any questions or need any additional information, please contact me. Your consideration of these matters is appreciated.

Yours truly,



John E. North, Jr.

c: Ken Bruning
Janet Bruning
David Feron, individually and as Trustee
Mary Feron, individually and as Trustee
Byrnal Haley, individually and as Trustee
Sally Haley
Martha James, individually and as Trustee
Don Haarmeyer, individually and as Trustee
Pamela S. North

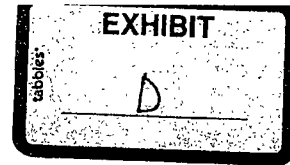
Enclosures: (1)

BOARD:
Allen Anslet
Chairman
Mark S. Lutz
Vice Chairman



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment



BOARD:
R. Kenyon Wells
L. Clarence Batts, Jr.
Ann B. Kirol, DDS
John O. Hurto, Sr., MD

South Carolinas Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

September 10, 2012

U.S. Mail – Certified and Electronic Mail

91 7199 9991 7031 3702 7536

John E. North, Jr., Esq.
North & Black, P.C.
916 Bay Street
Beaufort, SC 29902

91 7199 9991 7031 3702 7543

Thomas A. Holloway
Harvey & Battey, P.A.
PO Box 1107
Beaufort, SC 29901

Via Interagency Mail Delivery

Roger P. Hall, Esq.
SCDHEC – Office of General Counsel
2600 Bull Street
Columbia, SC 29201

Docket No. 12-RFR-33 – Decisions dated June 18, 2012, to approve the Stormwater Pollution Prevention Plan (Garfield Park Phase 3 – Drainage System Retrofit); Coastal Zone Consistency Certification

Dear Counsel of Record:

Please find enclosed the Final Agency Decision in the above referenced matter.

Sincerely,

Lisa Lucas Longshore
Clerk

SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL

FINAL AGENCY DECISION

*In Re: Request for Review of Staff Decisions dated June 18, 2012,
to approve the stormwater Pollution Prevention Plan
(Garfield Park Phase 3 - Drainage System Retrofit);
Coastal Zone Consistency Certification.*

Board Docket No. 12-RFR-33

Appearance of Counsel:

John E. North, Jr., Esq., for Requestors

Thomas A. Holloway, Esq., for Garfield Park Phase 3 subdivision, Cat Island

Roger P. Hall, Esq., for South Carolina Department of Health and Environmental Control

This matter came before the South Carolina Board of Health and Environmental Control ("Board") on August 9, 2012, pursuant to a request for final review filed on June 26, 2012, by John E. North, Jr. on behalf of several residents that live in the vicinity of Garfield Park Phase 3 subdivision on Cat Island in Beaufort County. The Requestors challenge two decisions by South Carolina Department of Health and Environmental Control ("Department") staff issued June 18, 2012 related to the installation of water quality filters in storm drain inlets located in the Garfield Park Phase 3 subdivision. The installation of the water quality filters was proposed by the applicant for stormwater control after the dike from a previously impounded area retaining water failed. This former impoundment, built prior to the implementation of state stormwater regulations, was permitted for stormwater control when the neighborhood was first constructed in 2004.

Two staff decisions were necessary to approve the drainage system retrofit. The first is a decision to grant coverage under the General Permit for Stormwater Discharges from Large and Small Construction Activities (2006 NPDES General Permit SCR100000, coverage #SCR10N463). The second is a determination that the proposed project is consistent with the South Carolina Coastal Management Program, referred to as a coastal zone consistency determination.

On July 12, 2012, the Board decided to conduct a Final Review Conference. Subsequently a three member Committee of the Board was appointed pursuant to S.C. Code 44-1-60(F) to conduct the Final Review Conference. The review conference was held August 9, 2012 and presentations were made by all parties. After hearing from all parties, the Committee announced that it would hold its decision in abeyance for one week and urged the parties to negotiate and seek a voluntary resolution. The Board reconvened for a meeting held by conference call on August 21, 2012, at which time the Committee announced its decision.

The decision of the Committee rescinded the coastal zone consistency determination for the project. The Requestors challenge included numerous issues raised for Board review; however, the Committee held that the basis for the decision related only to the Requestors' arguments surrounding the project's proximity to shellfish grounds. Section XIII of the Policies and Procedures of the South Carolina Coastal Zone Management Program Document, states:

In addition, for those projects which are located within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property must be retained on site.

During the Final Review Conference, staff expounded the basis for determining that this project is located more than 1000 feet from the nearest shellfish beds. While staff had reviewed aerial photographs, permit plans from 2004 and 2010, and implemented GIS to measure the drainage path, staff did not survey the site or conduct a field inspection to measure the distance, and did not consider tidal cycles in determining the most direct drainage path from the former impoundment. The Requestors asserted that the distance was less than 1000 feet. The Committee found that no party presented sufficient evidence for the Committee to determine the exact distance of this project to shellfish beds. However, the Board held the Requestors met their burden of proof in showing that the staff analysis was insufficient in this case to support the finding that the distance to shellfish beds was greater than 1,000 feet.

CONCLUSION

On basis set forth above, the Committee rescinds the staff decision that the project is consistent with the Coastal Zone Management Program, and finds that there are no other compelling grounds to amend, modify or rescind the staff decision.

AND IT IS SO ORDERED.



Mark Lutz, Vice Chair

On behalf of the Committee of the
Board of Health and Environmental Control:
Mark Lutz
L. Clarence Batts, Jr.
John O. Hutto, Sr., MD

September 8, 2012
Columbia, South Carolina

Notice of Right to Request Contested Case Hearing Before Administrative Law Court

S.C. Code §44-1-60(F)(2) provides that within thirty days after the receipt of the Board's written final agency decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address:

Lisa L. Longshore
Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

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

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Petitioners,

v.

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

Respondent.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control and Garfield Park
Phase 3,

Respondents.

Docket No.: 12-ALJ-07-0434-CC

**PETITIONER CAT ISLAND POA C/O
GARY MEYER'S MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT**

Petitioner Cat Island POA, c/o Gary Meyer ("Cat Island POA") respectfully moves this Court pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for entry of summary judgment in Cat Island POA's favor and against Petitioners on the ground that there is no case or

NPCHAR1:1201903.1-PG-(AMC) 052058-00001

controversy because these Petitioners have failed to establish standing to challenge the rescission of the coastal zone consistency certification for the Drainage System Retrofit project and the issuance of NPDES General Permit SCR100000 (2006 NPDES CGP) SCR 10N463 (“the General Permit”) for Storm Water Discharges from Large and Small Construction Activities.

This Motion is based upon the Memorandum of Law below, the pleadings, and the applicable law.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 91 L.Ed.2d 202 (1986); *see* Fed.R.Civ.P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See* Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985), *overruled on other grounds*, Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327, 106 S. Ct. 2548. It is the “affirmative obligation of the trial judge to prevent factually unsupported claims and defenses

from proceeding to trial. Drewitt v. Pratt, 999 F.2d 774, 778-779 (4th Cir. 1993) (internal quotation marks omitted).

BACKGROUND AND PROCEDURAL HISTORY

This is a contested case arising from consolidated requests filed by Petitioners related to action taken by the Board of Health and Environmental Control (“the Board”). The Petitioners are all owners of property on Cat Island who purport to oppose installation of filters in storm drain inlets in a dike that formerly impounded Cat Island Lake. The permit application and action that is the subject of this contested case is entitled “Garfield Park Phase 3 – Drainage System Retrofit, Beaufort County.” The project involves the installation of storm water management filters within the drainage system at Garfield Park Phase 3 located on Cat Island, Beaufort County, S.C. The filters were proposed as an alternative to replacing the dike and an outlet control structure that breached in or about 2009.

After an attempt to repair the dike failed¹, Cat Island POA submitted an NOI (Notice of Intent to seek permit coverage) for authorization to install the water quality filters on or about September 28, 2010, after consulting with staff from the South Carolina Department of Health and Environmental Control (“the Department”) regarding the storm water management requirements.. All the requesting Petitioners submitted comments to the Department objecting to the new technology and stating a continued preference for the dike to be repaired to restore the impoundment. After carefully considering all the public input, the Department issued the General Permit to Cat Island on June 18, 2012.

Shortly thereafter, on June 26, 2012, the Petitioners submitted a Request for Final Review Conference regarding issuance of the General Permit to the Board. The Board granted final review and a hearing was held August 9, 2012. All parties were in attendance and presented

¹ This repair was authorized by a Maintenance and Repair Permit issued February 18, 2010.

their positions to the Board. After the hearing, a three-member Committee of the Board appointed pursuant to S.C. Code § 44-1-60(F) to conduct the Final Review Conference announced that the Final Board Decision would be held in abeyance for one week and urged the parties to work on a voluntary resolution. The Board then reconvened on August 21, 2012 and announced the decision to rescind the coastal zone consistency determination for Cat Island's project.

In the Final Agency Decision, the Board clearly states that the basis for the Board's decision "related only to the Requestors' arguments surrounding the project's proximity to shellfish grounds." Final Agency Decision, p. 2. Specifically, the three-member Committee found that no party had presented sufficient evidence to determine the exact distance of the project to shellfish beds. According to the Board, this distance is of significance due to the requirement of Section XIII of the Policies and Procedures of the South Carolina Coastal Zone Management Program Document, i.e., the South Carolina Coastal Zone Management Program Refinements, Policies and Procedures (August 2, 1993) ("the Program Document"), which states:

In addition, for those projects which are located within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property must be retained on site.

It has now been about four years since the initial breach of the dike and three years since the attempt to repair it failed. The impoundment, formerly Cat Island Lake, is now a tidal marsh, inundated at high tide but dry in many areas at low tide. It is undisputed that the area that was Cat Island Lake has begun to naturalize. At this point, Cat Island POA no longer qualifies for maintenance and repair of the dike and would have to embark on a permitting process with the U.S. Army Corps of Engineers and the Department to re-impound the naturalized area. Such

permits are controversial and the process is protracted and costly. More importantly, this Court cannot order that the impoundment be restored. Yet it is that relief that the Petitioners seek.

Petitioners have no basis upon which to continue their quest to seek restoration of the impoundment. Cat Island POA has no authority to re-impound a tidal marsh and destroy many acres of tidal wetlands in the process. The fate of the dike would be in the hands of multiple state and federal permitting and resource agencies. It is unknown whether the outcome of that process would be successful but it is most likely to become controversial. This is important for purposes of resolving this motion - the injury to Petitioners is the loss of Cat Island Lake and no amount of legal maneuvering on their part will bring it back.

STATEMENT OF FACTS

Garfield Park Phase 3 ("GPP3") is one of several planned unit developments located on Cat Island in Beaufort County, S.C. The dike and outlet control structure that is the subject of the General Permit that was built during the early development of Cat Island, in the 1960's, well before the creation of South Carolina's storm water management regulations (S.C. Code Reg. 72-300 *et seq.*) While the impoundment created by the dike and control structure was used to address state storm water quantity and quality control requirements for GPP3, during the application process the Department confirmed that GPP3 is the only development on Cat Island that relied on the impoundment to meet these requirements. Drainage plans for Garfield Park submitted to the Department were approved on June 9, 2004.

At some point, the dike and outlet control structure was breached. It has been alleged in correspondence attached to the Request for Contested Case Hearing filed by counsel for Petitioners Ken Bruning, et al., that this breach occurred in June 2009 and drained the lake. Initially, Cat Island applied for and was issued a Maintenance and Repair permit to repair the

dike. An attempt to restore the dike pursuant to this permit failed. Rather than undertaking a second attempt at a repair, Cat Island decided to employ the new technology mentioned above to meet the applicable water quality requirements - involving the installation of water quality filters in storm drains.

Cat Island submitted an NOI (Notice of Intent to seek permit coverage) for authorization to install these water quality filters on or about September 28, 2010, after consulting with members of the Department staff regarding the storm water management requirements that had to be addressed by the new technology. The NOI was placed on Public Notice by the Department on October 1, 2010. During the Public Comment period, the Department acknowledged and carefully considered comments and concerns raised by Petitioners suggesting that the impoundment should be re-established and objecting to allowing the proposed alternative means of storm water management. Then, and in compliance with all required procedures set forth in the applicable State policies and regulations, the Department issued the General Permit to Cat Island on June 18, 2012.

On June 26, 2012, several property owners residing adjacent to the area that was formerly an impounded lake submitted a Request for Final Review Conference with the Board of Health and Environmental Control. In response, the Department took the position that the applicable storm water regulations allow for alternative treatment mechanisms and recommend measures other than ponds to achieve water quality improvement for smaller sites. The Department recognized that the Garfield Park area as such a "smaller site," being less than ten acres with the drainage area to each in-line filter being even smaller. The Department further explained that its staff analysis indicated that the proposed filters would meet all regulatory requirements for controlling water quality and that proper justification was provided by the professional engineer

of record for a waiver from the water quantity requirements. As such, Department staff requested that the Board affirm the prior issuance of the General Permit.

On July 12, 2012, the Board decided to conduct a Final Review Conference, which was held August 9, 2012. All parties presented their positions to the South Carolina Board of Health and Environmental Control. According to the Staff Statement of Position provided to the Board prior to the Final Review Conference, the filters are an alternative treatment mechanism allowed by the applicable storm water regulations. Staff Statement of Position, p. 4. Moreover, the Staff Position was that the regulations recommend measures other than ponds to achieve water quality improvement for smaller sites such as GPP3, as previously explained. Id. Analysis by the Department Staff indicated that the proposed filters would meet all regulatory requirements for controlling water quality and that proper justification for a waiver from the water quantity requirements had been provided by the professional engineer of record, Andrews & Burgess, Inc. Staff Statement of Position, p. 5.

After the hearing, a three-member Committee of the Board announced that the Final Board Decision would be held in abeyance for one week and urged the parties to work on a voluntary resolution. The Board then reconvened on August 21, 2012 and announced the decision to rescind the coastal zone consistency determination for the retrofit project. The written Final Board Decision states that the decision was based only on the Committee's finding that no party had presented sufficient evidence to determine the exact distance of the project to shellfish beds. According to the Board, this distance is of significance due to the requirement of Section XIII of the Policies and Procedures of the South Carolina Coastal Zone Management Program Document, i.e., the South Carolina Coastal Zone Management Program Refinements, Policies and Procedures (August 2, 1993), which states:

In addition, for those projects which are located within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property must be retained on site.

The Final Board Decision further states and concludes that “there are no other compelling grounds to amend, modify, or rescind the staff decision,” emphasizing the existence of this singular issue.

The Board’s decision to rescind the Coastal Zone consistency determination had the effect of rendering the General Permit for the retrofit “incomplete” and not final. Cat Island POA has never received a formal notice of revocation of the General Permit as would be required by the procedure set forth in S.C. Code Reg. 61-9.124 if revocation was being sought. There is no pending permit application relating to repair of the dike for any reason. Cat Island POA maintains authorization to discharge storm water under the permit previously issued for storm water control when the neighborhood was first constructed in 2004.

ARGUMENT

A contested case request challenging a permit issued by the Department must necessarily take issue with the environmental impacts caused by the permitted activity. The permitted activity here is the installation of water quality filters. Testimony given by Petitioners in discovery amply demonstrates that Petitioners’ criticisms of the proposal to install these filters and the issuance of the General Permit relate not to the installation of the water quality filters themselves, but rather to loss of the impoundment that would persist if Cat Island’s retrofit permit were made final, because then a repair of the dike would not be required. None of the named Petitioners are claiming that they have been or would be injured by installation of the water quality filters. Rather, Petitioners’ challenge is based in claims made to redress injuries

causally connected to the loss of the impoundment. As will be fully explained below, the Court should dismiss Petitioners' contested case requests for lack of standing.

I. PETITIONERS LACK STANDING TO CHALLENGE THE RETROFIT PERMIT.

Standing, in a dispute with DHEC, "[s]hall be determined on the basis of applicable statutes, regulations, case law and Board orders." S.C. Code Reg. 61-72.401. The "irreducible constitutional minimum of standing contains three elements [:] (1) injury-in-fact; (2) a causal connection between the injury and the conduct complained of by the party seeking to demonstrate standing; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Sea Pines Ass'n for the Prot. Of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)); see also Smiley v. South Carolina Dep't. of Health and Env't'l. Control, 374 S.C. 326, 328, 649 S.E.2d 31, 32-33 (2007) ("First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace(able) to the challenged action of the defendant, and not ... the[d] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."") The party seeking to establish standing has the burden of proof. Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 (citing Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999)). The testimony of Petitioners establishes that these Petitioners have failed to meet this burden.

A. Petitioners have not established injuries-in-fact from the issuance of the General Permit because they have only alleged a generalized concern for shellfish in Chowan Creek and loss of lake view but not alleged any particularized injury related to the permitted activity of installing water quality filters.

Because the basis of this action is a challenge to the issuance of the General Permit authorizing installation of water quality filters for storm water treatment, Petitioners must show injuries-in-fact resulting from that governmental action. An injury-in-fact is “an invasion of a legally protected interest [that] is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291. There is no injury-in-fact where a Petitioner only puts forth a generalized concern or grievance without showing a harm that would affect the Petitioner in a personal and individual way. Id. (finding that a person does not have standing unless actual or imminent injury exists that is concrete and particularized and “not merely a general interest common to all members of the public”); see also Warth v. Selding, 422 U.S. 490, 501 (1975) (reasoning that the party seeking to establish standing must show “distinct and palpable injury to himself” even if a larger class of other possible litigants also shares in the injury). An injury-in-fact will be recognized when a plaintiff can show he or she is “adversely affected” or “aggrieved,” having a direct stake in the outcome of a litigation as opposed to a mere interest in the subject problem. Smiley v. South Carolina Dep’t. of Health and Env’tl. Control, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007), citing U.S. v. Student Challenging Regulatory Agency Procedures, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)(*SCRAP*).

Petitioners have not established injuries-in-fact in this case. First, the Final Agency Decision identifies one unanswered issue as the ground for the Board’s decision to rescind the coastal zone consistency certification for the retrofit project: whether the project is located within 1,000 feet of shellfish beds allegedly present in Chowan Creek. Regarding this issue,

Petitioners' Prehearing Statement alleges that "[a]pproval of the in-line filtering system violates [the Department's] own regulations and adversely impacts oysters and other marine life." Petitioners' PHS, p. 9.

Even if Petitioners' allegation is interpreted to assert an interest in shellfish in the creek, such interest only amounts to a generalized concern for damage to the shellfish. Such generalized concern has specifically been found by this Court to be insufficient to confer standing upon a party. See Sue A. O'Sullivan v. SCDHEC-OCRM and Gary L. Rowe, Docket No. 01-ALF-07-0491-CC (January 18, 2002), Hon. John D. Geathers, attached as Ex. A. Nothing in Petitioners' Prehearing Statement demonstrates how harm to the oysters would "affect [any Petitioner] in a personal and individual way" so as to grant standing to bring this case. No Petitioner has given testimony demonstrating a particularized injury flowing from alleged damage to the oyster beds. The testimony that has been given by Petitioners fails to establish how any single Petitioner may be individually adversely aggrieved by an impact on the oysters and other marine life in Chowan Creek. While Petitioners may be interested in this potential problem, they cannot establish standing based on this claim in this case.

Second, Petitioners' Prehearing Statement characterizes the interest of the Petitioners as follows: "[t]he Petitioners are adversely impacted by any such proposed retrofit because the effects include the encroachment of damaging tidal water flows onto land of Petitioners, the destruction of the fresh water habitat of the lakefront property purchased by Petitioners, including landscaping of the Petitioners, and the loss of the lake-front amenity purchased by Petitioners in reliance on the continued existence of the lake."

The alleged destruction of fresh water habitat is not a particularized injury that affects any Petitioner in a personal and individual way. Again, this amounts only to a generalized

concern for damage to the environment or a mere interest in a problem that is insufficient to confer standing. This concern fails to articulate allegations of harm any different than what may be suffered by the public generally. See, Taubman Realty Group Ltd. P'ship v. Mineta, 198 F.Supp.2d 744, 755 (E.D.Va. 2002) (stating that courts do not sit to entertain generalized grievances that are shared by the public at large") (Citing Lujan, 504 U.S. at 573-574.) Moreover, this claim also fails because the alleged loss of habitat has nothing to do with the General Permit. And, no natural habitat has even been lost due to the breach in the dike; it has just been changed from a freshwater lake - that was actually not even natural since it was artificially created after construction of the dike - to a re-naturalized tidal marsh.

None of the testimony given by David Feron, Salley Haley or Martha James establishes injury to property owned by these Petitioners. In fact, Mr. Feron testified that there has been no loss of landscaping on his property (Transcript p. 11, attached as Ex. B). In addition, Mr. Feron confirmed that there has not been erosion causing him to consider installing a bulkhead or other erosion control structure (Ex. B, p. 19). Similarly, there has been no loss of landscaping or shrubbery that Salley Haley can attribute with certainty to tidal waters coming onto her property (Transcript pp. 13 and 15, attached as Ex. C). She has not experienced flooding and does not know whether there has been any erosion on her property. Id. Martha James testified that she has not lost any property and sustained property damage from encroachment by tidal waters, nor has her property been damaged by erosion (Transcript p. 26-27, attached as Ex. D). Finally, though Pamela North did testify to loss of landscaping and possibly to property, she could not cite to any evidence which could quantify with any certainty the property damage she alleges has occurred since the dike was breached (Transcript p. 21, attached as Ex. E). Whatever concern she may have for her property, she confirmed that it has not risen to such level as to cause her to

investigate methods for protecting the property. Id. Rather, Ms. North testified to a belief that her property has lost value due to the loss of the impoundment. Id.

In fact, all of the Petitioners' testimony clarifies that the primary injury each of the Petitioners claims is the loss of their lake-front view. David Feron testified that the lack of water in the impoundment did not affect his use, but rather affected the "pretty view" that "[he and his wife Petitioner Mary Feron] really enjoyed" (Ex. B, p. 14; see also p. 18, in which Mr. Feron confirms his belief that loss of view has made his property less desirable). Salley Haley testified that aside from being on a kayak one time in the nine years she has lived on her property, she has not used the impoundment for any recreational purposes (Ex. C, p. 11). She characterized her injury related to the impoundment as loss of the lake view that has been replaced by marsh (Ex. C, p. 11-12). Martha James similarly characterized the lost amenity she was claiming to her property as a loss of the natural beauty of the area (Ex. D, p. 22).

The only reasonable interpretation for the "natural beauty" mentioned in this claim, in light of the characterization of Petitioners' lost interest as "the lake-front amenity," is as loss of a lake view. Loss of view is not a cognizable claim in South Carolina. See O'Shea v. Lesser, 308 S.C. 10, 18, 416 S.E.2d, 629, 633 (1992), citing Hill v. The Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983). And, Petitioners cannot claim total loss of natural view since there has only been a transformation of the impoundment to a tidal marsh and not a complete loss of the natural environment.

Ms. James other claimed injury, that there has been a loss of wildlife with this transformation, is conjectural and as such, cannot confer standing. Petitioners cannot establish a total loss of wildlife in this case because clearly, tidal marshes are natural habitats capable of supporting wildlife. Further, even if it is supposed, *arguendo*, that there has been a change in the

resident wildlife population, Ms. James cannot say with certainty that such change would decrease the number of wildlife that she actually might view each day. South Carolina courts have specifically identified this type of claim, where there is no evidence presented that an interest in viewing wildlife will be diminished by the permits, as conjectural and incapable of setting forth the particularized harm required to establish standing. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 602 S.E. 287, 292 (2001); see also Smiley v. South Carolina Dep't. of Health and Env'tl. Control, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) at FN 3.

Petitioners have alleged "economic loss to [Petitioners]" which they further allege derives from the loss of an increase in value based solely on proximity to the lake and a negative impact of now being located on a tidal marsh (Petitioners' Request for Final Review Conference, attached as Ex. C to Petitioners' Request for Contested Case Hearing, p. 5). Petitioners claim to have an appraisal proving loss of property value. However, the one written appraisal that has been obtained by any of the Petitioners' pertains only to the Feron property and states on its face that the valuation was based on sales of comparable properties (attached as Ex. F). The appraisal is silent as to any change in view and in fact, identifies the same view - "LAGOON" - in 2006 and 2010. See Ex. F. In short, nothing in the document indicates or even suggests that the lower valuation reached in 2010 had anything to do with the change of view to the property.

It must be recognized that Petitioners' allegations of property damage fail to state a concrete injury resulting from issuance of the General Permit. Petitioners all clearly attribute their alleged damages to the tidal waters they claim to now experience as a result of the breach in the dike, which has nothing to do with the governmental action that Petitioners are now

challenging. Rather, the allegations relate to loss of the impoundment, which has nothing to do with the General Permit.

Petitioners have alleged a generalized concern that the filters will not adequately treat GPP3's storm water but cited to nothing which substantiates this concern other than a report of an engineer that they obtained during Cat Island's application process (attached as Ex. G). This report was submitted to the Department by Petitioners during the application process and was fully considered. The report enumerates eleven issues of concern to Petitioners. Id. None of these concerns state a concrete and particularized injury to any Petitioner, as follows: #8 does not state an injury but instead criticizes the attempt that was made to repair the dike. #5, #6, #7 and #10 state generalized concerns for adverse effects on shellfish beds, freshwater wetlands, the critical area, and the bird habitat and population that constitute only generalized concerns incapable of granting Petitioners' standing. #3 and #11 criticize the lack of any maintenance agreement regarding the filters, which was remedied by Cat Island prior to issuance of the General Permit. Though Petitioners' engineers complain about the efficiency of the proposed filters in #4, there is no conclusion that the filters do not provide storm water treatment. In fact, the engineers' report establishes that the criticisms could be addressed by a maintenance agreement, which was ultimately submitted by Cat Island. The Department reviewed several permit files to determine that Tabby Park and the golf course did not rely on the impoundment for storm water treatment, contrary to the assertions in #2. And, Petitioners cite to no evidence showing that the Department failed to thoroughly review storm water calculations submitted by Cat Island's engineers, nor that the issues identified by their engineers were never addressed by Cat Island prior to getting the General Permit. In fact, given that nothing other than the measurement of the distance to the shellfish beds was cited by the Board as a reason for

rescinding the coastal zone consistency determination, the Board clearly disagreed that any of the issues cited in the report remained unresolved after the permitting process.

Simply put, Petitioners' testimony fails to establish that any of the "interests" they enumerate and allege have been violated in their Prehearing Statement – property encroachment, habitat destruction, or loss of the lake-front amenity – has resulted from the permitted activity that should be the proper subject of this action. Petitioners' PHS, p. 5. The permitted activity at issue in this case is installation of water quality filters. Petitioners cannot show that the injuries that they have claimed are actual or imminent or particularized or occurred as a result of the governmental action of issuing the General Permit. Even if Petitioners were able to establish that any of these injuries could be classified as injuries-in-fact, which Cat Island maintains they cannot do for the reasons previously explained, it must be recognized that the injuries Petitioners have are wholly attributable only to the breach of the dike. Clearly, Petitioners' concern is not about the issuance of General Permit but about restoration of the impoundment they call Cat Island Lake. For this reason, Petitioners cannot substantiate any injury-in-fact related to the General Permit to establish standing for their claims.

B. Even if any of the Petitioners were able to allege an injury-in-fact, which Cat Island does not concede, such injury is not traceable to the action of the Department in issuing the General Permit.

In addition to the failure to show injury-in-fact, Petitioners have not alleged any basis for concluding that their alleged injuries are fairly traceable or caused by the permitted activity that has been challenged. Absent such a showing, an injury-in-fact will still fail for lack of a causal connection between the activity – the installation of water quality filters in storm drains – and the alleged harm. See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 (“[T]here must be a causal connection between the injury and the conduct complained of – the injury must be ‘fairly ...

trace[able] to the challenged action of the defendant””) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555 at 559-561 (1992)).

There is nothing in Petitioners’ contested case request or Prehearing Statement to support a conclusion that the Department’s action of issuing the General Permit authorizing installation of water quality filters in the existing storms drains caused any of the injuries alleged by Petitioners. Only Pamela North cited an objection to the filters, which she stated was based on solely on her belief that the filters would not be as effective in controlling water quality as detention (Ex. E, p. 26). Ms. North testified to no first-hand knowledge supporting this belief. Id. Thus, this claim must also be recognized as conjectural and speculative. Moreover, the engineering report referenced by Ms. North was submitted during Cat Island’s permit application process and fully considered by the Department, and all concerns raised in the report regarding effectiveness of the filters were addressed by the engineers who prepared the application for Cat Island. See, Staff Statement of Position attached as Ex. H.

As previously explained, the Department reviewed permit files for other developments surrounding the impoundment during the processing of the application for the General Permit at issue and determined that only GPP3 relied on the impoundment to meet storm water treatment requirements. See, Ex. H. Other developments in proximity of the impoundment were either constructed before the effective date of South Carolina’s storm water management regulations or use methods other than detention in the former Cat Island Lake for storm water treatment. Currently, Cat Island POA maintains authorization to discharge storm water under a permit previously issued in 2004. While the proposed filters constitute an alternative method for treatment of storm water discharged from GPP3, neither the issuance of the General Permit nor

the installation of the filters will restore the impoundment, which is Petitioners' true motivation for pursuing this action.

In short, all of the injuries alleged by Petitioners relate to the breach in the dike. The General Permit at issue addresses only the installation of filters for water quality treatment. It does not directly address repair of the dike, though because installation of the filters is intended to be an alternative to any repair, the breach in the dike would be allowed to remain if the General Permit was declared final and complete.

C. To the extent that any Petitioner has alleged injury-in-fact, it is not redressable by a decision of this Court in Petitioners' favor regarding the General Permit.

Petitioners cannot show that their injuries would be redressable by a decision from this Court in their favor. See Sea Pines, 345 S.C. at 601, 55 S.E.2d at 291 (providing that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision) (citing Lujan, 504 U.S. at 560-61); see also Vt. Agency of Natural Res. v. Stevens, 529 U.S. 765, 771 (2000) (stating that there must be "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact") (emphasis added) (internal citations omitted). That is, a decision in Petitioners' favor, which would uphold the Board decision to rescind the coastal zone consistency determination, would not redress any injuries that Petitioners have claimed because it would only prevent finalization of the General Permit authorizing the retrofit to Cat Island POA. It would not force re-establishment of the impoundment through a repair of the breach.

Overall, Petitioners' allegations cannot be redressed by a decision in their favor because the limitations of this action do not allow this Court to order Cat Island to restore the impoundment. Petitioners requested this contested case as a challenge to the Department's action in issuing the General Permit to Cat Island. The General Permit addresses installation of

water filters in existing storm drains but does not address repair of the dike or restoration of the impoundment. As such, even if Petitioners could obtain a favorable decision, it would only prevent Cat Island POA from installing the filters as proposed. It would not have any effect on the status of the lost impoundment, nor would it redress the injuries Petitioners have claimed to their interests, which all relate to the loss of impoundment. As a result, Petitioners are unable to establish the third element required to establish standing for their case.

CONCLUSION

Petitioners have failed to meet their burden of proving standing to challenge SCDHEC's issuance of NPDES General Permit SCR100000 (2006 NPDES CGP) SCR 10N463 Storm Water Discharges from Large and Small Construction Activities by the Department to Cat Island. All three elements of standing are lacking as Petitioners have failed to alleged an actual or imminent injury-in-fact, the harm alleged is not traceable to the permitted activity giving rise to this contested case, and the "injuries" claimed by Petitioners are not redressable by a decision in favor of the Petitioners of this Court. Accordingly, this Court should award summary judgment in Cat Island's favor on the grounds that Petitioners lack standing to bring this case.

Respectfully submitted,



Mary D. Shahid
Angelica M. Colwell
NEXSEN PRUET, LLC
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29401
PHONE: 843.577.9440
FACSIMILE: 843.414.8242
MShahid@nexsenpruet.com
AColwell@nexsenpruet.com

Attorneys for Cat Island POA

September 18, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Kenneth Bruning, Janet Bruning, David Feron,
Individually and as Trustee, Mary Feron,
Individually and as Trustee, Byrnel Haley,
Individually and as Trustee, Martha James and
Don Haarmeyer, Individually and as Co-
Trustees, and Pamela North,

Case No. 12-ALJ-07-0434-CC

CERTIFICATE OF SERVICE

Petitioners,

vs.

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

Respondents.

In re: Garfield Park Phase 3

Cat Island POA c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

In re: Garfield Park Phase 3

This is to certify that a copy Cat Island POA c/o Gary Meyer's Motion for Summary Judgment and Memorandum in Support have been served upon the following counsel of record by mail, addressed to the following as shown below this 18 day of September, 2013.

NPCHAR1:1217396.1-TBF-(MSHAHID) 052058-00001

John E. North, Jr.
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902

The Honorable Shirley Robinson
S.C. Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street Suite 224
Columbia, SC 29201

Nathan Haber, Esquire
1362 McMillan Avenue
Suite 400
Charleston, SC 29405



NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Telephone: 843.577.9440

O'Sullivan v. South Carolina Department of Health and Environmental Control, 011802 SCALC,
01-ALJ-07-0491-CC

Sue A. O'Sullivan, Petitioner,

v.

**South Carolina Department of Health and Environmental Control, Office of Ocean and
Coastal Resource Management and Gary L. Rowe, Respondent**

No. 01-ALJ-07-0491-CC

South Carolina Administrative Law Court Decisions

January 18, 2002

ORDER OF DISMISSAL

JOHN D. GEATHERS, Administrative Law Judge.

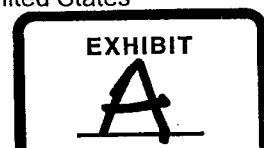
This matter is before the Administrative Law Judge Division (ALJD) as a contested case brought by Petitioner Sue A. O'Sullivan to challenge the decision of the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) to issue a permit to Respondent Gary L. Rowe (Respondent) for the construction of a private dock on the Okatie River in Beaufort County. On November 30, 2001, Respondent moved to dismiss this case on the ground that Petitioner lacks standing to challenge his permit. Petitioner has not filed a response to this motion.

In her request for a contested case hearing dated October 8, 2001, Petitioner cited the following as the basis for her challenge to Respondent's permit:

1. The proposed dock is located over a major bed of cultivated oysters that are under lease.2. OCRM failed to make a field inspection of the proposed project and assess ecological resources and address the cumulative impacts of dock developments in this area.3. OCRM failed to consider consistency [sic] with the goals and objectives of the Special Area Management Plan and the Beaufort County dock ordinance.

(Letter from Petitioner to OCRM of 10/8/01.) Petitioner's Prehearing Statement contains an elaboration of these grounds: "Construction of this dock and associated structures will have adverse effects. The Petitioner will show that the dock will seriously impact the shellfish in the area, have other environmental consequences and cumulative impacts not allowed by law." (Pet'r Prehearing Statement ¶ 5.) Respondent contends that Petitioner's allegations are merely "general" and "hypothetical" in nature, and thus fail to articulate the sort of concrete and particularized injury to Petitioner that would confer upon her standing to bring this contested case. (Resp't Mot. to Dismiss of 11/30/01, at 2.) After reviewing the pleadings and motions filed in this matter and the applicable law, I find that Petitioner does not have standing to pursue this contested case and that this case must, therefore, be dismissed.

"A party may appeal an administrative decision if he has standing to sue." 6 Jacob A. Stein et al., *Administrative Law* § 50.01, at 50-3 (Supp. 2000). Accordingly, a person may not challenge OCRM's decision to issue a permit unless that person is "adversely affected" by the granting of the permit and thus has standing to bring the challenge. S.C. Code Ann. § 48-39-150(D) (Supp. 2000); 23A S.C. Code Ann. Regs. 30-6 (Supp. 2000).^[1] In analyzing questions of standing, the South Carolina Supreme Court has adopted the three-prong test enunciated by the United States



Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). See *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001).

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

Id. at 601, 550 S.E.2d at 291 (quoting *Lujan*) (alteration in original).

In the case at hand, Petitioner cannot satisfy the first prong of the *Lujan* test. She has not articulated a legally protected interest either in the oysters surrounding Respondent's proposed dock or in OCRM's decision-making process to which she might suffer an injury in fact. First, while "an injury to one's aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact, " *Id.* at 602, 550 S.E.2d at 291-92, such an alleged injury must, nevertheless, be concrete and particularized to confer standing upon a party. Thus, even if Petitioner can be understood to be asserting such an interest in the oysters near Respondent's dock, she has only put forth a generalized concern for damage to the oyster bed, and has not shown how harm to the oysters would "affect [her] in a personal and individual way" so as to grant her standing to bring this case. *Id.* Second, "[w]hat may be perceived as another interest, [a] concern with assuring the Agency fulfills its governmental obligation to carry out the state's policy regarding property in the coastal zone, is not a property interest recognized as sufficiently individual to provide standing." *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 565-66, 505 S.E.2d 598, 605 (Ct. App. 1998).^[2] Accordingly, Petitioner's concerns with the process by which OCRM reached its decision to grant Respondent's permit are not sufficiently individualized to provide her with standing to challenge the permit.^[3]

Petitioner has failed to allege or otherwise establish that OCRM's decision to grant Respondent's permit has resulted in a particularized injury or threat of injury to a legally protected interest. Petitioner has, therefore, failed to establish standing to bring this challenge to Respondent's permit.

ORDER

IT IS THEREFORE ORDERED that Respondent Gary L. Rowe's Motion to Dismiss for Petitioner's lack of standing is GRANTED.

AND IT IS SO ORDERED.

Notes:

[1] The requirement that a person bringing a contested case be "adversely affected" by the agency's decision is essentially synonymous with traditional standing requirements. See, e.g., *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995) ("The phrase 'person adversely affected or aggrieved' is a term of

art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts."); *Morris v. Gressette*, 425 F.Supp. 331, 339 (D.S.C. 1976) ("The only party which could be 'adversely affected' by the Attorney General's determination... would be the State or political subdivision, whose proposed change was denied clearance; and it would be only that State or political subdivision which would have standing to invoke judicial review.")

[2] See also *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) ("[I]t is 'substantially more difficult' to establish standing where a challenge to the government action is brought by one who is not the object of the action, but rather seeks to challenge government action or inaction because of alleged illegality.") (citing *Lujan*).

[3] See *Beaufort Realty Co.*, 346 S.C. at 301, 551 S.E.2d at 589 (A party "has standing only if it alleges that it... will suffer an individualized injury; a mere interest in a problem is not enough.") (quoting *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999)).

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KENNETH BRUNING, JANET BRUNING, DAVID FERON,
Individually and as Trustee, MARY FERON,
Individually and as Trustee, MARTHA JAMES and
DON HAARMAYER, Individually and as Co-Trustees,
and PAMELA NORTH,

Petitioners,

vs.

DOCKET NUMBER

12-ALJ-07-0434-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL and CAT ISLAND PA c/a GARY
MEYER,

Respondents.

IN RE: GARFIELD PARK PHASE 3

-----/
CAT ISLAND POA c/o GARY MEYER,

Petitioner,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL,
Respondent.

IN RE: GARFIELD PARK PHASE 3

-----/
DEPOSITION OF DAVID FERON
AUGUST 6, 2013

EXHIBIT

B

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16 -----/

17

18 The deposition of DAVID FERON, a witness

19 in the above-entitled cause, taken pursuant to

20 Notice and agreement, before Kyle J. Saniga,

21 Certified Court Reporter and Notary Public, at

22 the Law Offices of North & Black, P.C. 916 Bay

23 Street, Beaufort, South Carolina, on the 6th day

24 of August 2013, commencing at or about the hour

25 of 3:35 p.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES OF COUNSEL:

FOR THE PETITIONERS:

JOHN E. NORTH, JUNIOR, ESQUIRE
North & Black, P.C.
916 Bay Street
Beaufort, South Carolina 29902
north@northblack.com
843.379.0800

FOR THE RESPONDENTS:

MARY D. SHAHID, ESQUIRE
ANGELICA M. COLWELL, ESQUIRE
Nexsen, Pruet
205 King Street
Suite 400
Charleston, South Carolina 29402
acolwell@nexsenpruet.com
843.720.1769

AND

NATHAN M. HABER, ESQUIRE
DHEC Ocean & Coastal Resource Management
1362 McMillan Avenue
Suite 400
Charleston, South Carolina 29405
habernm@dhec.sc.gov
843.953.0229

ALSO PRESENT:

Gary Meyer
Sally Haley
Pamela North

- - -

1		
2	I N D E X	
3		PAGE
4		
5		
	EXHIBIT INDEX -----	5
6		
7	OPENING REMARKS AND STIPULATIONS -----	6
8		
9		
10		
11		
12		
13		
14		
	DIRECT EXAMINATION:	
15	By Ms. Shahid -----	6
	CROSS-EXAMINATION:	
16	By Mr. Haber -----	28
	CROSS-EXAMINATION:	
17	By Mr. North -----	31
18		
19		
20		
21		
22		
23		
24		
25	CERTIFICATE -----	32

1

2

D O C U M E N T A R Y E V I D E N C E

3

NUMBER

DESCRIPTION

PAGE

4

EX-306

Photo of Property

7

5

EX-307

Photo of Property

7

6

7

8

9

REPORTERS' NOTE ALL EXHIBITS WERE

10

RETAINED BY COUNSEL

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 SHAHID - FERON (DIRECT EXAMINATION)

2 DAVID FERON,

3 having been produced and first duly sworn as a
4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. SHAHID:

7 Q If you could state your full name,
8 please.

9 A David Feron, F-e-r-o-n.

10 Q Okay. Mr. Feron, you're a resident of
11 Number 5, Sheridan Road?

12 A 7.

13 Q Number 7 Sheridan Road?

14 A I own Number 5, too.

15 Q Got it. Mr. Feron, do you own three
16 properties on Cat Island?

17 A I don't now. I did own three, yes.

18 Q I have records for 10 Dockside Lane, 7
19 Sheridan and 5 Sheridan.

20 A And I own -- let's see, 5, 7 it was Lot
21 3 I owned first and then I bought Lot 1 and sold
22 Lot 3.

23 Q Okay.

24 A But I -- and I had Dockside with that
25 at Dolphin Point Road, too.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Okay. And am I correct, based on your
3 statement, that you do not own Dockside lane any
4 longer?

5 A No.

6 Q You sold that?

7 A Uh-huh.

8 Q Okay. But you still own Number 7 and
9 Number 5?

10 A (Witness nods head.)

11 Q And you reside at which one?

12 A 7.

13 Q Okay. And what are you doing with
14 Number 5?

15 A I'm holding it because -- well, I'm
16 holding it.

17 Q Okay. First witness left second
18 witness still here.

19 (Whereupon, Exhibit

20 Numbers 306 and 307 were marked
21 for identification.)

22 BY MS. SHAHID:

23 Q I have a very short memory. Did you
24 say you live at 7 or 5?

25 A I live at 7.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Okay. So I'm going to hand you --

3 A That's 7.

4 Q Okay. That's on Exhibit 306. And is

5 -- there is a home constructed on 7?

6 A Yes.

7 Q Okay.

8 A That's 5.

9 Q Is there a home constructed --

10 A No.

11 Q -- on 5?

12 A No.

13 Q No construction on 5?

14 A No construction.

15 Q Okay. And 5 was 307 -- okay.

16 And when did you move in to the home

17 that's located at Number 7 Sheridan Road?

18 A We built it in 2006.

19 Q Okay. Where do you live prior to that?

20 A We lived out on St. Helena's Island on
21 Dockside Lane.

22 Q Okay. Oh so, Dockside Lane is not in
23 Cat Island?

24 A It's -- tell me what this -- again what
25 addresses you have?

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q 10 Dockside Lane, Cat --

3 A Yes -- no, that's Dolphin Point, should
4 be Dolphin Point Road.

5 Q Okay, okay.

6 A And I -- Dockside Lane is out on St.
7 Helena.

8 Q Okay.

9 A You somehow mixed them up.

10 Q Okay. So that would be 10 Dolphin?

11 A It was Lot 37. I don't know what the
12 numbers are.

13 Q So you think it's Dolphin?

14 A Dolphin Point Road.

15 Q Okay. And that is on Cat Island?

16 A Yes.

17 Q Okay, good. But this other property,
18 Dockside, has nothing to do with Cat Island?

19 A No, that's where we -- well, that's
20 where we lived before we moved to Cat Island.

21 Q Okay. And how long have you lived in
22 the Beaufort County area?

23 A We bought property here in 1988 and we
24 moved here in 1997.

25 Q Uh-huh. And what made you decide to

1 SHAHID - FERON (DIRECT EXAMINATION)

2 move from St. Helena to Cat Island?

3 A We -- well, I did -- I moved to St.
4 Helena for the fishing, it was deepwater and
5 when I was getting a little older and we wanted
6 to just to come down with a few other things we
7 had in property that we planned to build on
8 since 1988 so that's when we built the house --

9 Q Okay.

10 A -- in 2006.

11 Q Oh, so you've owned the property since
12 1988?

13 A (Witness nods head.)

14 Q Okay. Did you buy from the developer?

15 A Yes.

16 Q Did you --

17 A Well, I bought two -- three pieces --
18 two pieces from the developer, originally.

19 Q Uh-huh.

20 A And then I bought a third from somebody
21 else. Then I sold one piece that I bought and
22 bought the piece next to my -- 5 I bought from
23 the realtor.

24 Q Uh-huh.

25 A Who had bought it before me.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Uh-huh.

3 A I bought it from him.

4 Q Okay. And -- and 5 is the undeveloped

5 lot?

6 A Yes.

7 Q What is your plans for 5, if any?

8 A Right now I don't have any plans,

9 really. Originally I was going to build on 5.

10 Q Uh-huh.

11 A But the house was a little too large

12 for the plot.

13 Q Uh-huh.

14 A So that I move it over to 7.

15 Q Okay. But you -- you haven't abandoned

16 the middle, the shared boundary line? You're

17 not treating it as --

18 A Oh no, no, it's two plots, separate.

19 Q Okay. Is 5 listed for sale?

20 A No.

21 Q Okay. Is 10 Dolphin Point listed for

22 sale?

23 A It's sold. I sold it years ago.

24 Q Okay. That's the one you sold, okay.

25 The other property on Cat Island?

1 SHAHID - FERON (DIRECT EXAMINATION)

2 A I don't. --

3 Q This may be an error. We just rely on
4 the Beaufort County --

5 A Well, let me look at the picture.

6 Q Yeah, well here. Let me see if I've
7 got the -- okay. That --

8 A This is -- yeah, this is St. Helena.

9 Q Okay.

10 A This is Lot 12.

11 Q Okay.

12 A This is -- this is a piece of property
13 I own now.

14 Q Yeah.

15 A This is the house I used to in.

16 Q Okay, not even Cat Island, all right.

17 A No.

18 Q All right. You can see my source of
19 confusion.

20 A Right.

21 Q Thank you, all right.

22 And is there any particular thing about
23 this piece of property, Number 7 Sheridan, that
24 led you to decide to build your house there?

25 A Well, I was -- I had both of those

1 SHAHID - FERON (DIRECT EXAMINATION)

2 pieces of property and we originally wanted to
3 build on one because it would be closer to the
4 river.

5 Q Uh-huh.

6 A And we had dreams of building it up
7 higher so you could see up to the Beaufort River
8 but it was a little too large a plot because the
9 other houses were smaller and they said this was
10 too large a plot compared to the other house to
11 up -- plot of the house.

12 Q Uh-huh, okay. But is there anything
13 about the piece of property that you liked other
14 than --

15 A Yeah, I like it fine because you see it
16 comes out to a point.

17 Q Uh-huh.

18 A And just the same as the other one did
19 and it's got a very good view because --

20 Q Okay.

21 A Well, we had the whole pond and then we
22 could see the river, also.

23 Q Can you still see the river?

24 A Yes.

25 Q Now, so you've been living, abutting

1 SHAHID - FERON (DIRECT EXAMINATION)

2 the pond for a period of time from 2006 until
3 2009?

4 A Until it went away, yes.

5 Q Yeah. And how has the lack of water
6 24-hours in the pond affected your use of your
7 property?

8 A When you say 'use' I don't think it's
9 affected my use that much for physically using
10 it.

11 Q Uh-huh. How has it affected your
12 enjoyment of your property?

13 A Well, like the other people say, you
14 know, we had all these birds, we had alligators
15 right directly across from us. We had all the
16 birds they mentioned and then we had even punted
17 -- painted puntings would come in.

18 Q Uh-huh.

19 A It was very pretty.

20 Q Uh-huh.

21 A And that's what we really enjoyed.

22 Q Do you think it's pretty now?

23 A At a high, high tide it can be pretty
24 but most of the time it's not.

25 Q Okay.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 A And there's no birds and there's no
3 alligators and there's no ducks or any --
4 although the ducks are birds.

5 Q Uh-huh, okay. And have you gotten a
6 recent appraisal of your property?

7 A I've had two appraisals done, one when
8 it was built and one in 2010.

9 Q Okay. And what did it appraise for
10 when it was built?

11 A 836,000.

12 Q What did it appraise for in 2010?

13 A 578.

14 Q Okay. And do you have copies of those
15 appraisals?

16 A Yes.

17 Q Have you given them to your attorney?

18 A Yes.

19 Q Do you have any idea, from the basis of
20 the appraisal, how it lost that value?

21 A Well, the house itself is appraised at
22 the same in each one.

23 Q Uh-huh.

24 A It's only the property that went down.

25 Q Okay. And were there any statements on

1 SHAHID - FERON (DIRECT EXAMINATION)

2 the appraisal from the appraiser as to why the
3 value of the lot went down?

4 A You know, I don't think there's any
5 statements. There must be some statements. I
6 don't remember them, offhand.

7 Q Okay.

8 A But I know that it's -- I just remember
9 that the house was 450 and 450 in both of them.

10 Q Uh-huh.

11 A And then the -- well, there's a lagoon
12 mentioned in the appraisal.

13 Q Uh-huh.

14 A So but I don't really know the facts.
15 I haven't read it recently.

16 Q Okay. Are you assuming it went down
17 because the lake is gone?

18 A Oh --

19 MR. NORTH: Objection to the form.

20 THE WITNESS: I think so.

21 BY MS. SHAHID:

22 Q Okay. But do you remember that
23 statement being expressed in the document,
24 itself?

25 A No, I don't.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Okay. And when was that most recent
3 appraisal you said 2010?

4 A '10.

5 Q Why did you have that done?

6 A I was going to -- I had like \$40,000
7 left from the building loan and I was going to
8 expand it to a \$200,000 equity loan.

9 Q Uh-huh.

10 A And that's why I had the appraisal
11 done.

12 Q Okay. Were you denied the loan as a
13 result --

14 A No.

15 Q -- of that appraisal? Okay.

16 What are your long-term plans with
17 regard to this property? Do you plan to stay
18 there as long as you can?

19 A It's up in the air now.

20 Q Uh-huh.

21 A Because -- well, for a lot of factors.

22 Q Okay.

23 A The use of the -- the view, the back of
24 the yard and I should expand on this but we left
25 it natural and kept it low so we could see

1 SHAHID - FERON (DIRECT EXAMINATION).

2 everything.

3 Q Uh-huh.

4 A Now, since it's gone we let it grow up
5 so we can only see out to the river. We don't
6 have to look at the mud.

7 Q Uh-huh.

8 A As much as we did -- as we do. But
9 we've talked about moving.

10 Q Uh-huh. And when you say you've talked
11 about moving, you've talked about moving
12 somewhere else in Beaufort County?

13 A Yes.

14 Q Okay. And is your -- is your current
15 house undesirable or not as desirable?

16 A No, the house is fine.

17 Q Your current property not as desirable?

18 A It's not as desirable, right.

19 Q Okay. So, is it the loss of view that
20 is leading you to talk about moving?

21 A Yes.

22 Q Okay. Have you attempted to list or
23 sell your property?

24 A Not yet.

25 Q Okay. So, you mentioned that at some

1 SHAHID - FERON (DIRECT EXAMINATION)

2 point in time you had I guess low visibility
3 landscaping and now you've let things grow up,
4 is that correct?

5 A I'm trying to -- trying to block the
6 mud.

7 Q Okay. Have you suffered any property
8 damage as a result of the tidal action?

9 A I'm not so sure about Lot Number 1
10 because there's a point here where the lagoon or
11 whatever you want to call it comes in and the --
12 when the water is really high it comes out
13 really quickly and it -- it's kind of washing
14 away this little corner here.

15 Q Uh-huh. How do you know it's washing
16 it away, did you see it?

17 A Well, I just look at it. Looked at it,
18 you know, it's -- and, frankly, you can see more
19 roots on the back of this property, too, now
20 than we used to have.

21 Q Have you talked to anybody about
22 putting in a bulkhead or an erosion control
23 structure?

24 A No, I never thought I'd have to do
25 that.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Uh-huh.

3 A Or be necessary.

4 Q Do you think it is necessary right now?

5 Are you threatened by erosion?

6 A I'm threatened by the thought of the
7 high water, yes, but I'm not planning on
8 building a bulkhead.

9 Q So you've seen some exposed roots and
10 you believe you've lost an edge of some
11 property?

12 A I've seen additional exposed roots that
13 were not there until the dam went and I think
14 looking at the property, the corner, it looks
15 like there's more erosion there.

16 Q Okay. Have you lost any landscaping,
17 like plants?

18 A No.

19 Q Okay. Lost any trees?

20 A Well, on the other piece of property
21 there's a dead tree now but I'm not sure that
22 that -- this caused it, you know.

23 Q Is it near the water?

24 A Yes.

25 Q Okay. Does the water at high tide or

1 SHAHID - FERON (DIRECT EXAMINATION)
2 extreme high tides come up into your yard?
3 A Because we left it natural -- we don't
4 call it a yard. It comes up to the edge and
5 over where it used to.
6 Q Uh-huh.
7 A But it's not our yard, it's our --
8 Q Okay.
9 A -- our back part.
10 Q You have a yard that surrounds your
11 house?
12 A Yes.
13 Q Okay. And then you have an area that
14 you have just not landscaped, at all?
15 A No, we have -- not going to say that.
16 I have an area with a cement patio and there's
17 chairs but behind all that is natural.
18 Q Okay. And by 'natural', does that mean
19 you haven't done any improvements to it?
20 A No, no, I have not done any
21 improvements. I just -- I kept it all trimmed.
22 I trimmed some of it into a hedge and the palm
23 trees, you know, with -- I keep them all trimmed
24 and looking nice.
25 Q Okay. Now, did I ask you this, do you

1 SHAHID - FERON (DIRECT EXAMINATION)
2 live there alone?
3 A No, my wife.
4 Q Your wife lives there with you?
5 A (Witness nods head.)
6 Q And she's also a named petitioner in
7 this case. Does she share your sentiment about
8 this?
9 A Oh yes, very much.
10 Q Okay. Did you -- did you use the lake
11 for anything other than an aesthetic amenity?
12 A Not really.
13 Q Did you ever wade or swim?
14 A No.
15 Q Boat?
16 A No.
17 Q Fish?
18 A Yes. I tried fishing.
19 Q Did you. How frequently?
20 A Oh, in the beginning maybe a dozen
21 times.
22 Q Could you stand on your backyard and --
23 A Yes.
24 Q In your backyard?
25 A Yes.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Did you ever catch anything?

3 A No.

4 Q Okay.

5 A I had a man come in with a boat one
6 time. He cam in with a skiff, with a fancy
7 skiff and he -- with a fly rod.

8 Q Oh really.

9 A And he was going around the whole
10 thing, which was really amusing.

11 Q What public access would have existed
12 to that lake? How would you put a boat in
13 there?

14 A You -- other than a kayak I don't think
15 you could put any -- you know, a canoe.

16 Q Okay. But what you just described, was
17 that --

18 A Well, that's after the dam broke.

19 Q Oh.

20 A He came in at one time at high tide.

21 Q Okay, okay. Do you ever recall
22 anything unpleasant about the lake, such as a
23 smell or an algae bloom?

24 A I think occasionally I saw an algae
25 bloom but the smell, it depends on the wind.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 Q Uh-huh.

3 A You know, once in awhile you get a
4 whiff of something that's decayed.

5 Q Are you talking now or before?

6 A Now.

7 Q Now, okay. Does -- is it more frequent
8 that you smell something bad?

9 A I don't know. I -- I can't really tell
10 you.

11 Q Okay. Did you have belief or
12 understanding that there would always be a lake
13 there?

14 A Yes, I did.

15 Q What did you do for a living?

16 A I ran a company in New York,
17 manufacturing company, Precision Instruments.

18 Q Okay. Did you understand, when you
19 were living there, what created the lake or why
20 there was a lake in your backyard?

21 A Well, I was told about the duck
22 hunters --

23 Q Uh-huh.

24 A -- originally putting -- putting a pond
25 in and then that the Chowen Creek Partners

1 SHAHID - FERON (DIRECT EXAMINATION)

2 reinforced that.

3 Q Uh-huh.

4 A And the dam -- put the dam in.

5 Q Uh-huh, okay.

6 A That's what I was told.

7 Q Had you ever considered that the dam
8 could fail?

9 A No, not really.

10 Q Okay. Do you have any engineering
11 background?

12 A No.

13 Q Is it your belief that the developer
14 has an obligation to you to repair the dam?

15 A Yes.

16 Q Why do you think he's obligated or the
17 POA would be obligated?

18 A First -- well, first of all, because
19 that's what it was there, you know, when we
20 bought it. When we bought the property it was
21 advertised as lakefront.

22 Q Uh-huh.

23 A There was a picture of -- and it said
24 lake and then -- and all those properties. This
25 is it described in the sales brochure as lake

1 SHAHID - FERON (DIRECT EXAMINATION)

2 and the prices on the lakefront were higher than
3 the interior ones, so yes, I thought it was
4 going to be there forever.

5 Q Do you still have that marketing
6 literature or that brochure?

7 A I do. I've been looking for it. I do
8 have it and I can't seem to locate it right now.
9 We did some repair or improvements on the
10 upstairs and there's a lot of things missing or
11 misplaced.

12 Q Okay. So you have not provided
13 anything like that like that to your lawyer?

14 A Other than the assessments, no.

15 Q Okay.

16 A But I've spoken at it with him.

17 Q Were you planning to participate in the
18 trial of the case?

19 A Yes, if -- I think I will.

20 Q Okay. Do you have any understanding of
21 what it would cost to repair the breach or the
22 dike?

23 A I don't have any understanding. Only
24 hearsay from what was told to us.

25 Q Uh-huh.

1 SHAHID - FERON (DIRECT EXAMINATION)

2 A I haven't got anything in concrete.

3 Q Have you ever inspected the breach or
4 the break?

5 A I've walked out there, yes.

6 Q Recently?

7 A Not recently, no, when it first
8 happened.

9 Q Okay.

10 A We can see how wide it's getting,
11 though.

12 Q Okay. Does that concern you?

13 A Yes.

14 Q Why?

15 A Because everything planned is gone. I
16 mean if it just keeps getting wider then there
17 won't be any pond, there won't be anything but
18 saltwater there.

19 Q Okay. Have you ever -- have you ever
20 lived on a salt marsh property?

21 A I live -- no, a tidal creek I lived on.

22 Q Okay. Have you ever investigated the
23 value of salt marsh property?

24 A No.

25 Q Is this area navigable at high tide?

1 SHAHID - FERON (DIRECT EXAMINATION)

2 A The pond?

3 Q Well, whatever you want to call it now,
4 the --

5 A It's not now, no. The only time I saw
6 a boat come in I told you the fly fisherman.

7 Q Uh-huh. But he was able to get through
8 in his boat?

9 A (Witness nods head.)

10 Q Okay.

11 A He was all the way down to Sally's
12 house.

13 Q Okay. You have an opposition to the
14 developer's idea of putting water quality
15 filters in his drainage system?

16 A My opposition is only it's a
17 replacement of the pond. That would be my
18 opposition.

19 Q Okay, all right.

20 MS. SHAHID: I don't have any
21 other questions.

22 CROSS-EXAMINATION

23 BY MR. HABER:

24 Q I just have just one followup question.

25 My name's Nathan Haber. I represent

1 HABER - FERON (CROSS-EXAMINATION)

2 the Department in this matter.

3 You said prior to moving the house or
4 your property on Cat Island, you'd lived over on
5 St. Helena and you had a house on deepwater out
6 there and you said you did it for fishing?

7 A Dolphin Point Road.

8 Q For fishing?

9 A Yes.

10 Q And you said previously that once this
11 or prior to the impoundment breaking you went
12 out a few times and tried to fish in the former
13 impoundment you said?

14 A No, no, no, I only fish from my
15 backyard.

16 Q But into the former impoundment?

17 A Yes.

18 Q And did you that about a dozen times
19 and weren't successful?

20 Outside of seeing the person come in on
21 the skiff with the fly rod, have you attempted
22 fishing, at all, out there?

23 A No.

24 Q None. And when you had lived on the
25 tidal creek at St. Helena did you do a lot of

1 HABER - FERON (CROSS-EXAMINATION)

2 fishing out there?

3 A Well, I had a float and I had a boat
4 and a boat lift and it was deepwater and we went
5 out, you know, into the St. Helena Sound around
6 the creeks all around Morgan Island out to Fripp
7 Island.

8 Q Out in the flats?

9 A Flats, up to flats.

10 Q And did you catch a lot of red fish out
11 there?

12 A Red fish and trout.

13 Q Are you aware if there's any red fish
14 in this --

15 A I haven't caught any.

16 Q But you had said you hadn't tried since
17 it opened up?

18 A Not recently, no.

19 Q Okay.

20 A They have to swim out right away, I
21 guess.

22 Q Sure. That's it.

23 MR. HABER: No further questions.

24 CROSS-EXAMINATION

25 BY MR. NORTH:

1 NORTH - FERON (CROSS-EXAMINATION)

2 Q I have one followup.

3 You had mentioned something about a
4 smell that you've noticed, occasionally, that
5 smelt like a smell of decay, do you recall that?

6 A Yes.

7 Q Is that smell since the dike broke and
8 it became a mud pit?

9 A Yes.

10 Q Okay.

11 MR. NORTH: I have no further
12 questions.

13 MS. SHAHID: That's all I have.

14 (Whereupon, the deposition of
15 David Feron was concluded at
16 approximately 3:55 p.m.)

17

18

19

20

21

22

23

24

25

1

2

C E R T I F I C A T E

3

4

STATE OF GEORGIA:

5

CHATHAM COUNTY:

6

7

I, Kyle J. Saniga, Court Reporter and

8

Notary Public in and for the above county and

9

state, do hereby certify that the foregoing

10

testimony was taken before me at the time and

11

place herein-before set forth; that the witness

12

was by me first duly sworn to testify to the

13

truth, the whole truth, and nothing but the

14

truth, that thereupon the foregoing testimony

15

was later reduced by computer transcription; and

16

I certify that this is a true and correct

17

transcript of my stenographic notes so taken.

18

I further certify that I am not of

19

counsel to either party, nor interested in the

20

event of this cause.

21

22

23

Kyle J. Saniga, CCR

24

Notary Public, B-2038

25

Savannah, Georgia

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KENNETH BRUNING, JANET BRUNING, DAVID FERON,
Individually and as Trustee, MARY FERON,
Individually and as Trustee, MARTHA JAMES and
DON HAARMEYER, Individually and as Co-Trustees,
and PAMELA NORTH,

Petitioners,

vs.

DOCKET NUMBER

12-ALJ-07-0434-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL and CAT ISLAND PA c/a GARY
MEYER,

Respondents.

IN RE: GARFIELD PARK PHASE 3

-----/

CAT ISLAND POA c/o GARY MEYER,

Petitioner,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL,

Respondent.

IN RE: GARFIELD PARK PHASE 3

-----/

DEPOSITION OF SALLY HALEY
AUGUST 6, 2013

EXHIBIT

C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

-----/

The deposition of SALLY HALEY, a witness
in the above-entitled cause, taken pursuant to
Notice and agreement, before Kyle J. Saniga,
Certified Court Reporter and Notary Public, at
the Law Offices of North & Black, P.C. 916 Bay
Street, Beaufort, South Carolina, on the 6th day
of August 2013, commencing at or about the hour
of 3:20 p.m.

1
2 APPEARANCES OF COUNSEL:
3

4 FOR THE PETITIONERS:

5 JOHN E. NORTH, JUNIOR, ESQUIRE
6 North & Black, P.C.
7 916 Bay Street
8 Beaufort, South Carolina 29902
north@northblack.com
843.379.0800

9 FOR THE RESPONDENTS:

10 MARY D. SHAHID, ESQUIRE
11 ANGELICA M. COLWELL, ESQUIRE
12 Nexsen, Pruet
205 King Street
Suite 400
Charleston, South Carolina 29402
acolwell@nexsenpruet.com
843.720.1769

13 AND

14 NATHAN M. HABER, ESQUIRE
15 DHEC Ocean & Coastal Resource Management
16 1362 McMillan Avenue
Suite 400
Charleston, South Carolina 29405
17 habernm@dhec.sc.gov
843.953.0229

18 ALSO PRESENT:

19 Gary Meyer
20 David Feron
21 Pamela North
22
23
24
25

1

2

I N D E X

3

PAGE

4

EXHIBIT INDEX ----- 5

5

OPENING REMARKS AND STIPULATIONS ----- 6

6

7

8

9

10

11

12

13

14

DIRECT EXAMINATION:

15

By Ms. Shahid ----- 6

16

17

18

19

20

21

22

23

24

25

CERTIFICATE ----- 24

1

2

D O C U M E N T A R Y E V I D E N C E

3

NUMBER

DESCRIPTION

PAGE

4

EX-305

Photo of property

7

5

REPORTERS' NOTE ALL EXHIBITS

6

WERE RETAINED BY COUNSEL

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 SALLY HALEY,

3 having been produced and first duly sworn as a
4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. SHAHID:

7 Q If you don't mind could you state your
8 full name for the record.

9 A Sally Haley.

10 Q And Ms. Haley, where do you reside?

11 A 15 Sheridan Road, Cat Island.

12 Q And how long have you lived there?

13 A Since 1994.

14 Q Okay. And where did you live prior to
15 living on Cat Island?

16 A Richmond, Virginia.

17 Q And what brought you to Beaufort?

18 A My husband retired and we decided we'd
19 like to live in Coastal South Carolina.

20 Q Okay. And who lives with you at 15
21 Sheridan Road?

22 A Currently?

23 Q Yes.

24 A My daughter.

25 Q Okay. Is your husband deceased?

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 A Yes.

3 Q He was part -- he also owned the
4 property with you?

5 A Yes.

6 Q Okay. Are you planning to stay at 15
7 Sheridan Road, Cat Island?

8 A I am.

9 Q I'm going to show you -- let me go
10 ahead and mark this.

11 (Whereupon, Exhibit
12 Number 305 was marked for
13 identification.)

14 THE WITNESS: Well, I don't know.

15 This is -- this is Mrs. James' home.

16 BY MS. SHAHID:

17 Q Oh, is that not you?

18 A No.

19 Q Did I pull the wrong one out?

20 A Is that -- yes, that is.

21 Q That is you?

22 A That is me, sorry.

23 Q Okay, all right. So you were pointing
24 at the red shaded area on Exhibit 305 and you
25 confirmed that that's the location of your

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 residence?

3 A Yes.

4 Q 15 Sheridan Road? Okay.

5 Now, did you build your home or was

6 it -- was it built when you bought the lot?

7 A We built the home.

8 Q Okay. Who did you buy the lot from?

9 A Gary Myers.

10 Q Okay. And what -- why did you purchase

11 the lot on the lake?

12 A Because we wanted waterfront.

13 Q Okay. And did you specifically ask,

14 when you were looking for property, for

15 waterfront property?

16 A We actually saw the property and liked

17 it.

18 Q Okay.

19 A We found it ourselves.

20 Q You did? All right. And then did you

21 contact somebody to -- was that Mr. Myers?

22 A Yes.

23 Q Okay. Do you recall whether or not Mr.

24 Myers made any express representation to you

25 that the property was waterfront?

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 A Well, I'm not sure I understand.

3 Obviously you could see it's waterfront.

4 Q Right. But did he, himself, actually
5 describe it as waterfront property, do you
6 recall?

7 A Yes.

8 Q You think so? Were you provided any
9 marketing literature about the property?

10 A No.

11 Q Were you provided any written
12 information about the property?

13 A As advertising?

14 Q Yes.

15 A No.

16 Q Okay. Did you look at other waterfront
17 properties?

18 A Marsh front.

19 Q Okay. Where?

20 A On Cat Island.

21 Q Okay. Was that at the same time you
22 were looking for this property?

23 A Yes.

24 Q And was there anything in particular
25 that had you select 15 Sheridan Road over the

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 marsh front properties?

3 A There was constant water.

4 Q Okay. And that would be in the lake?

5 A Yes.

6 Q And tell me, again, what year you

7 purchased?

8 A 1994.

9 Q So have you lived there since 1994?

10 A Yes.

11 Q And what uses did you make of the lake?

12 A Just enjoying it.

13 Q Okay.

14 A Viewing it.

15 Q The view of the lake?

16 A Uh-huh.

17 Q Okay. You didn't have a boat that you

18 put in the lake?

19 A No.

20 Q Would the lake accommodate boating, to

21 your knowledge?

22 A To my knowledge, no.

23 Q Did you ever fish in the lake?

24 A No.

25 Q Okay. Swim?

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 A No.

3 Q Or wade?

4 A No.

5 Q Okay. So it was exclusively just the

6 amenity of seeing it?

7 A Yes.

8 Q And you heard testimony, from an

9 earlier witness, about the wildlife. Did you

10 observe wildlife?

11 A Yes.

12 Q What did you observe?

13 A Anhingas, ormoras, black skimmers, wood

14 storks, ibis, herons, egrets, otters, turtles.

15 (Phonetic)

16 Q Okay.

17 A Alligators. One mink.

18 Q Really.

19 A 1 mink. Buffalo heads, wood ducks,

20 hooded mergansers.

21 Q Okay. Those are mostly bird species

22 that you identified, right?

23 A Mostly birds.

24 Q Are you a bird watcher?

25 A I am.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 Q Are those birds indigenous to the
3 Beaufort County area, do you know? I mean do
4 you -- can you see them other place in Beaufort
5 County?

6 A Well, some of them are migratory.

7 Q Okay. The birds -- I'm assuming based
8 on Ms. James' testimony that you don't see that
9 many birds anymore, is that right?

10 A Correct.

11 Q Do you see them other places in the
12 area or on Cat Island?

13 A Yes.

14 Q And where are they now?

15 A In the freshwater ponds.

16 Q Okay. And by 'freshwater ponds', are
17 you talking about the drainage ponds in other
18 developments?

19 A The retention ponds, yeah.

20 Q Okay. Do you have an appraisal of your
21 property?

22 A Not recently.

23 Q How old is the last appraisal that you
24 had done?

25 A Probably '94.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 Q Okay. You have not appraised your
3 property since 1994?

4 A (Witness shakes head.)

5 Q Do you have any idea of the value of
6 your property, the fair market value if you were
7 to list it and sell it?

8 A No.

9 Q Are you -- are you -- do you have any
10 plans to list and sell your property?

11 A No.

12 Q Have you suffered any property damage
13 resulting from the influx of tidal waters
14 following the breach of impoundment?

15 A Some of the shrubbery in my backyard
16 that was adjacent to the pond has died.

17 Q Uh-huh.

18 A Whether it's because of the salt water
19 or old age I don't know.

20 Q Okay. Have you observed tidal water
21 actually encroaching into the area where that
22 shrubbery is located?

23 A Yes.

24 Q Okay. On how many occasions?

25 A Many.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 Q Okay. So the area does get tidal flow,
3 correct?

4 A Yes.

5 Q Do you -- do you get any enjoyment or
6 pleasure at looking at the tidal water that has
7 replaced the lake water?

8 A I see it for such a short time that
9 there's not much time to enjoy it.

10 Q Okay. Can you describe, like Ms. James
11 did, sort of the period of time that you do get
12 to see water in the lake?

13 A I've been timing, actually.

14 Q Good.

15 A When it reaches my backyard and when it
16 leaves my viewing area and it ranges from
17 45 minutes to an hour.

18 Q Okay. In terms of proximity to the
19 river, are you one of the property's farther
20 away from the river?

21 A I am the farthest away.

22 Q Okay. Does the water reach you last?

23 A Yes.

24 Q Does it leave you, first?

25 A Yes.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 Q Other than bushes that have potentially
3 died from salt water intrusion, have you lost
4 any other aspect of your landscaping or your
5 yard?

6 A No.

7 Q Do you feel that your property is
8 threatened with flood waters?

9 A Threatened with trash.

10 Q Okay. What's the origin of the trash?

11 A It comes in on the tides.

12 Q Okay. What kind of trash?

13 A Building boards, styrofoam coolers,
14 styrofoam bumpers from boats, cans, bottles.

15 Q Okay. But have you felt that you were
16 flooding or suffering from flooding?

17 A No.

18 Q Okay. Have you made any inquiry --
19 have you felt like you've lost land through
20 erosion because of the movement of the tidal
21 waters?

22 A I don't know.

23 Q Okay. Have you made any inquiry about
24 building any kind of erosion control structure
25 such as a bulkhead on your shoreline?

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 A No.

3 Q Is that something you would consider
4 doing if you thought you were losing property?

5 A No.

6 Q Any other landscaping other than the
7 shrubbery?

8 A No.

9 Q Any utility lines exposed or
10 threatened?

11 A No.

12 Q Other than losing your view, have you
13 been able to use your home and your property as
14 you used to use it?

15 A No.

16 Q Why is that?

17 A Because of the smell of the mud.

18 Q Okay. So there's -- is it a pluff mud
19 odor?

20 A Well, it's worse than pluff mud.

21 Q Is it really? Do you know what that --
22 do you have any thoughts about why it would be?

23 A Possibly because there's a lot of the
24 triotus that's trapped under the trees in my
25 backyard and it rots.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 Q Okay. And is there any particular time
3 of year or time of day that that smell is worse?

4 A I can't answer that. I don't know.

5 Q Is it worse at low tide?

6 A Oh yes.

7 Q Is it worse in the summer?

8 A I'm more aware of it in the summer
9 because I'm outside.

10 Q Okay. And is that smell a new
11 characteristic that didn't exist before?

12 A Yes.

13 Q Have you got any oak trees that are
14 showing any stress from salt water exposure?

15 A I do have large live oaks that dip down
16 into the water and some of the limbs, branches
17 that are down in the water have, of course, lost
18 leaves.

19 Q Okay. Because they're making contact
20 with the water?

21 A With the saltwater.

22 Q With the saltwater, okay. The tree,
23 itself, is still alive, as far as you know?

24 A As far as I know.

25 Q Have you suffered any erosion from

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 periods of heavy rain?

3 A No.

4 Q Have you suffered any damage or

5 witnessed any ocean waves coming up to your

6 property?

7 A No.

8 Q Are you a party in a civil action

9 that's been filed in Beaufort County against the

10 POA --

11 A Yes.

12 Q -- Mr. Myers?

13 MR. NORTH: Objection. I don't

14 think you meant POA.

15 MS. SHAHID: I don't even know who

16 it's filed against, okay. Mr. Myers.

17 MR. NORTH: I'll represent to you

18 that the defendants are Chowen Creek

19 Partners and its general partner.

20 MS. SHAHID: Okay.

21 MR. NORTH: A corporate entity.

22 BY MS. SHAHID:

23 Q Okay. Is this your full-time

24 residence?

25 A Yes.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 Q Do you recall whether or not algae
3 would ever cover the surface of the lake?

4 A It did.

5 Q Do you recall how frequently?

6 A Very infrequently.

7 Q Any particular thing that you
8 associated with causing the algae bloom?

9 A I was just told it was a natural thing
10 that happened from time to time.

11 Q Do you recall the lake emitting any
12 odor?

13 A Not really.

14 Q Okay. Do you recall whether or not the
15 level of the lake changed prior to the
16 impoundment breaching?

17 A No.

18 Q Okay. You -- is that -- is it your
19 testimony the level of the lake was stable?

20 A Yes.

21 Q Did you have any understanding of the
22 purpose of the lake when it was originally
23 constructed?

24 A I had heard the same thing that Ms.
25 James had heard, that it was originally a

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 hunting area.

3 Q Okay. Did you ever see anybody hunting
4 there since you lived there?

5 A No.

6 Q Why do you object to the proposal to
7 install filtration devices in the drainage
8 system?

9 A Because it doesn't bring the pond back.

10 Q Okay. Is it your belief that Mr. Myers
11 doesn't need to ask permission to bring that
12 pond back?

13 A From whom?

14 Q From a permitting agency? Do you
15 believe he can do it without permission?

16 A I don't know.

17 Q Okay. Would you be surprised to learn
18 that he had to get permission to put the
19 impoundment back?

20 A No.

21 Q Had you ever considered the possibility
22 that perhaps he wouldn't obtain permission to
23 put the impoundment back?

24 A Yes.

25 Q And what would your situation be if,

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 assume for the sake of argument, he could not
3 get permission to put the impoundment back?

4 A I'd be devastated.

5 Q Okay. Would you continue to reside at
6 15 Sheridan Road?

7 A Yes.

8 MS. SHAHID: I think that's all
9 I've got.

10 MR. NORTH: I have no questions.

11 MR. HABER: No questions from the
12 department.

13 MS. SHAHID: You know what, I have
14 one more question. I keep forgetting
15 because it's not in my folder. Can I
16 ask her one more?

17 MR. NORTH: Sure.

18 MS. SHAHID: Okay.

19 MR. NORTH: If she knows.

20 BY MS. SHAHID:

21 Q Yeah. Do you recall at the time you
22 purchased your property, which understandably
23 was --

24 A 19 years ago.

25 Q -- yeah, 19 years ago, being advised

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 regarding covenants and restrictions?

3 A Yes.

4 Q Do you recall if you reviewed those
5 covenants and restrictions?

6 A I know I reviewed them at the time,
7 yes.

8 Q Do you remember anything that they
9 said?

10 A Probably not.

11 Q Have you had any occasion, since then,
12 to look at those covenants and restrictions?

13 A No.

14 Q Did you understand, at the time of
15 purchase, that the developer was reserving
16 particular rights?

17 A Yes.

18 Q Okay. Did you know what those rights
19 were?

20 A I read it at the time. I probably
21 understood what it said.

22 Q Okay. Do you recall whether or not the
23 developer reserve a right to handled drainage?

24 A I don't remember.

25 Q Okay.

1 SHAHID - HALEY (DIRECT EXAMINATION)

2 MS. SHAHID: That's all I've got.

3 MR. NORTH: No further questions.

4 (Whereupon, the deposition of

5 Sally Haley was concluded at

6 approximately 3:35 p.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2 C E R T I F I C A T E
3

4 STATE OF GEORGIA:

5 CHATHAM COUNTY:
6

7 I, Kyle J. Saniga, Court Reporter and
8 Notary Public in and for the above county and
9 state, do hereby certify that the foregoing
10 testimony was taken before me at the time and
11 place herein-before set forth; that the witness
12 was by me first duly sworn to testify to the
13 truth, the whole truth, and nothing but the
14 truth, that thereupon the foregoing testimony
15 was later reduced by computer transcription; and
16 I certify that this is a true and correct
17 transcript of my stenographic notes so taken.

18 I further certify that I am not of
19 counsel to either party, nor interested in the
20 event of this cause.
21

22 _____
23 Kyle J. Saniga, CCR

24 Notary Public, B-2038

25 Savannah, Georgia

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KENNETH BRUNING, JANET BRUNING, DAVID FERON,
Individually and as Trustee, MARY FERON,
Individually and as Trustee, MARTHA JAMES and
DON HAARMEYER, Individually and as Co-Trustees,
and PAMELA NORTH,
Petitioners,
vs.

DOCKET NUMBER
12-ALJ-07-0434-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL and CAT ISLAND PA c/a GARY
MEYER,

Respondents.

IN RE: GARFIELD PARK PHASE 3

-----/

CAT ISLAND POA c/o GARY MEYER,

Petitioner,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL,

Respondent.

IN RE: GARFIELD PARK PHASE 3

-----/

DEPOSITION OF MARTHA JAMES

AUGUST 6, 2013

EXHIBIT

D

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

-----/

The deposition of MARTHA JAMES, a
witness in the above-entitled cause, taken
pursuant to Notice and agreement, before Kyle J.
Saniga, Certified Court Reporter and Notary
Public, at the Law Offices of North & Black,
P.C. 916 Bay Street, Beaufort, South Carolina,
on the 6th day of August 2013, commencing at or
about the hour of 2:40 p.m.

1
2 APPEARANCES OF COUNSEL:
3

4 FOR THE PETITIONERS:

5 JOHN E. NORTH, JUNIOR, ESQUIRE
6 North & Black, P.C.
7 916 Bay Street
8 Beaufort, South Carolina 29902
north@northblack.com
843.379.0800

9 FOR THE RESPONDENTS:

10 MARY D. SHAHID, ESQUIRE
11 ANGELICA M. COLWELL, ESQUIRE
12 Nexsen, Pruet
205 King Street
Suite 400
Charleston, South Carolina 29402
acolwell@nexsenpruet.com
843.720.1769

14 AND

15 NATHAN M. HABER, ESQUIRE
16 DHEC Ocean & Coastal Resource Management
1362 McMillan Avenue
Suite 400
Charleston, South Carolina 29405
habernm@dhec.sv.gov
843.953.0229

19
20 ALSO PRESENT:

Gary Meyer
Sally Haley
David Feron
Pamela North

23 - - -
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

PAGE

EXHIBIT INDEX ----- 4

OPENING REMARKS AND STIPULATIONS ----- 5

DIRECT EXAMINATION:

By Ms. Shahid ----- 6

CROSS EXAMINATION:

By Mr. North ----- 35

REDIRECT EXAMINATION:

By Ms. Shahid ----- 36

CERTIFICATE ----- 38

1

2

D O C U M E N T A R Y E V I D E N C E

3

NUMBER

DESCRIPTION

PAGE

4

EX-303

Plat

8

5

EX-304

Declaration of Covenants and
Restrictions

36

6

7

8

REPORTERS' NOTE ALL EXHIBITS

9

WERE RETAINED BY COUNSEL

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 MARTHA JAMES,

3 having been produced and first duly sworn as a
4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. SHAHID:

7 Q If you could state your full name for
8 the record, please.

9 A Martha James.

10 Q And Ms. James, I'm Mary Shahid. I
11 represent Mr. Meyer and the POA, the parties
12 that are involved in this litigation relating to
13 the Cat Island permit and I've got to ask you
14 some questions because you're also a named
15 petitioner in this case. Can you tell me your
16 address, please.

17 A 11 Sheridan Road, Beaufort, South
18 Carolina.

19 Q Okay. And is that located on Cat
20 Island?

21 A Yes.

22 Q And which development or neighborhood
23 is it located in?

24 A It's called The Rookery.

25 Q Okay. How long have you opened

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 property in The Rookery?

3 A Nine years.

4 Q I assume you do own your property?

5 A Yes.

6 Q Okay. Are you currently married?

7 A No.

8 Q Okay. Do you own the property outright

9 or does anybody own it with you?

10 A It's owned with someone else.

11 Q Okay. Who else do you own it with?

12 A Mr. Harmeyer.

13 Q Okay. Does Mr. Harmeyer reside there?

14 A Yes.

15 Q Okay. And you've lived there

16 nine years. What -- did you live in Beaufort

17 County prior to living in The Rookery?

18 A No.

19 Q Where did you live before that?

20 A Naples, Florida.

21 Q Okay. What brought you to Cat Island

22 and The Rookery in particular? What led you to

23 buy a property there?

24 A The lake.

25 Q Okay. And I think I have a -- let me

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 see if I've got a plat of your property to help
3 me identify it.

4 This has been printed off of a -- I
5 thought it was a Beaufort County website but it
6 might be something else. And presumably the
7 shaded area --

8 A Uh-huh because we're right -- if you
9 come down Waveline you're in our living room.

10 Q Okay.

11 A Right there.

12 (Whereupon, Exhibit
13 Number 303 was marked for
14 identification.)

15 BY MS. SHAHID:

16 Q All right. So this property on what's
17 marked as Exhibit 303 but shaded in red, that's
18 a depiction of your parcel that you --

19 A Yes.

20 Q In The Rookery, all right. When you
21 purchased in The Rookery nine years ago, was
22 there a house located on that parcel?

23 A Yes.

24 Q Did you build that house or was it
25 built before you bought the property?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 A It was built before we bought.

3 Q Okay. And let me ask you, more
4 generally, you said you were drawn to that area
5 because of the lake.

6 Is there any particular reason you
7 relocated to Beaufort County?

8 A We were planning to move out of Florida
9 and just happened to find Beaufort --

10 Q Okay.

11 A -- on a trip.

12 Q All right. And are you currently
13 employed?

14 A No.

15 Q Okay. Did you have an occupation or
16 profession?

17 A Yes.

18 Q What was that?

19 A I was a soldier in the United States
20 Army.

21 Q Okay. And when did -- when did you
22 leave the Army?

23 A I retired in 1997.

24 Q All right. Have you held any other
25 positions or employment since 1997?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 A No.

3 Q What rank were you when you retired
4 from the Army?

5 A Colonel.

6 Q Okay. And what's your educational
7 background?

8 A Masters.

9 Q From?

10 A From Websters.

11 Q Okay. What was your Masters degree in?

12 A It was in Management.

13 Q And now looking at this property, were
14 you particularly in the market for lakefront
15 property? Is -- were you -- were you actually
16 trying to find a piece of property on the water?

17 A Yes.

18 Q Okay. And does your property include
19 any water access such as a dock?

20 A No.

21 Q Have you utilized the lake, at least up
22 until the point that the lake altered because of
23 the breach and the impoundment, did you use it
24 for any recreational purposes?

25 A Like what?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Did you fish on the lake?

3 A No.

4 Q Did you swim in the lake?

5 A No.

6 Q Did you boat on the lake?

7 A No.

8 Q Did you ever use kayaks or any other

9 small craft on the lake?

10 A I was in a kayak once.

11 Q On the lake?

12 A On the lake.

13 Q Okay. Just one time?

14 A Yes.

15 Q So what -- what attribute about the

16 lake was a positive for you? Since it doesn't

17 seem like there were many recreational uses,

18 what other attributes were there?

19 A It was magical.

20 Q In what way? Was it -- are you talking

21 about aesthetics? Are you talking about a view?

22 A It was so beautiful.

23 Q Okay. And I don't want to put words in

24 your mouth, but was the view important to you?

25 A Yes.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Okay. And has that view changed?

3 A Yes.

4 Q Can you tell me, describe for me how
5 the view has changed for you, personally?

6 A There's only water when the tide comes
7 in.

8 Q Okay.

9 A The rest of the time I look at mud.
10 For the majority of my view there's a small
11 section now that has marsh grass --

12 Q Uh-huh.

13 A -- growing in but if I wanted to live
14 on a marsh I would have bought on a marsh.

15 Q Uh-huh.

16 A I wanted to live on a lake, not a mud
17 hole and not a marsh. There's very few birds
18 around, the wildlife that we saw when we had a
19 lake, very few. They come in, a few Ibis come
20 in when the tide's there.

21 Q Uh-huh.

22 A And maybe some of the -- I think it's a
23 Great Herring or something, a White Herring, I'm
24 not sure of the name of it. It was -- it was,
25 like I said, magical, when it was there.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Did you -- who sold you your property?

3 A It was previously owned by Mr. and Mrs.
4 Ball.

5 Q Okay. So it wasn't Mr. Meyer or Cat
6 Island Reality were they involved --

7 A No.

8 Q -- in that transaction?

9 A (Witness shakes head.)

10 Q Did you make any inquiry upon the
11 purchase of your property as to the history of
12 the lake?

13 A We were told by Mr. Ball that it had
14 been there -- it was there when he built.

15 Q Uh-huh.

16 A And he had pictures of it and that's
17 the only thing I knew about it.

18 Q Did you make any inquiry with Mr. Ball
19 or anybody else about -- so that's it, that's
20 all? That was the end of your inquiry?

21 A Uh-huh.

22 Q Okay. Did you understand at the time
23 of the purchase of the property what a title
24 impoundment was?

25 A No.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Had you -- were you familiar with that
3 phrase, at all?

4 A No.

5 Q I was out there standing near the gate
6 that goes to Mr. North's property yesterday and
7 I was looking at the lake and I saw water coming
8 in at -- it was -- it appeared to be -- I don't
9 know what tide we were at but it appeared to be
10 coming in pretty rapidly.

11 In your experience, how quickly does
12 the lake fill up during the tidal cycle?

13 A It depends, number one, on the height
14 of the tide.

15 Q Uh-huh.

16 A Sometimes the lake does not fill.

17 Q Uh-huh.

18 A If the tide's a low tide it never
19 fills.

20 Q Am I correct that you are in the upper
21 reaches of the lake? Is that a good way to
22 describe where you are?

23 A I don't know.

24 Q I would say your property, as relates
25 to the river or whatever's feeding the lake or

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 the area, now, are you in the upper reaches
3 farther away from the water that feeds the lake,
4 the tidal water?

5 A I -- from my view it looks like we're
6 about halfway.

7 Q Okay. And so no water at low tide?

8 A At low tide there's water, I can see
9 water, but it never comes up to where it was
10 before when there was a lake.

11 Q Okay. And what's it like at mid tide?

12 A There's some water, again.

13 Q Uh-huh.

14 A But it doesn't go all the way into
15 where the lake covered previously.

16 Q And what's it like at high tide?

17 A There's water all the way in.

18 Q Okay. So during high tide you have
19 water coming up to your property boundaries?

20 A If it's it up.

21 Q Uh-huh.

22 A If it's a high tide above a certain
23 footage.

24 Q Uh-huh.

25 A There are some high tides that are only

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 like four or five, six feet and they don't cover
3 the lake, no.

4 Q Uh-huh.

5 A And they don't get all the way up to
6 our property.

7 Q Any idea, how often in a 30-day cycle,
8 you have water that comes up to your property
9 boundary?

10 A No.

11 Q Is it -- is it one time or is it more
12 than one time in a 30-day cycle?

13 A That it comes all the way up to my
14 property?

15 Q Uh-huh.

16 A I would say it's more than one time.

17 Q Okay. What was -- what was the depth
18 of the lake before the impoundment was breached?

19 A I don't know.

20 Q Okay. What was the extent of the lake
21 boundary? I mean, how -- could you access the
22 lake? And by 'access' I just mean walk out to
23 the edge from your property.

24 A Yes.

25 Q Was the location of the water fairly

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 constant?

3 A Yes.

4 Q I mean -- okay. And the changes, now,
5 that sometimes you walk to the edge of your
6 property and the water hasn't reached it, at
7 that point?

8 A Yes.

9 Q And that there would be some days where
10 the water never reaches the edge of your
11 property?

12 A Yes.

13 Q Okay. Tell me about the birds. What
14 kind of birds were out there prior to the
15 breach?

16 A We had Wood Storks. We had Ibis. I
17 had little Blue Tonnie's. (Phonetic) We had
18 Blue Herrings and in the winter the Pelicans
19 came in. We had the ducks that would come in
20 twice a day. I'm trying to think of all of
21 them. The Egrets, the Snowy Egrets, the big
22 Egrets. Just about every wading bird that is --
23 that I'm familiar with in South Carolina --

24 Q Uh-huh.

25 A -- was in that area.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Okay. And that's -- has that changed?

3 A Yes.

4 Q Can you describe, was that a dramatic
5 change or was it a gradual change?

6 A It was dramatic when there was no --
7 the lake was gone.

8 Q How quickly was the lake gone?

9 A Over night..

10 Q Really?

11 A I woke up one morning and it wasn't
12 there.

13 Q Okay. And has anything -- has there --
14 has anything changed in terms of the physical
15 nature of the lake since that morning that you
16 saw it and it wasn't there?

17 I mean have there been any -- was there
18 any change when perhaps they tried to fix it or
19 was it ever restored, at any point?

20 A No.

21 Q And am I correct that that was
22 approximately four years ago?

23 A Yes.

24 Q Okay. Have you -- do you know or have
25 you seen the species of birds that utilize that

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 area as habitat, have you seen them other places
3 in the vicinity of your neighborhood?

4 A Yes.

5 Q Where are they?

6 A They're on other fresh water ponds in
7 the area.

8 Q And you refer to this as a fresh water
9 pond.

10 Was it truly fresh water? Did you ever
11 test the salinity?

12 A No.

13 Q Did you ever have occasion to taste it
14 or?

15 A No. There were alligators in it.

16 Q Yeah. Are you familiar with the term
17 brackish water?

18 A I've heard of the term.

19 Q It applies to water bodies that have
20 some degree of salinity. Do you not whether or
21 not the term brackish was applicable to be this
22 pond?

23 A No.

24 Q Okay. Are you planning to participate
25 at the hearing that's scheduled at the end of

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 the month?

3 A It depends on the situation with our
4 son.

5 Q Okay. If you were participating, have
6 you prepared any photographs or depictions or
7 anything that you wanted to share with the
8 Judge?

9 A I haven't prepared anything, no.

10 Q Do you have anything that you --

11 A Yes, I have photos.

12 Q Okay. Do you know if you're going to
13 be using them in court?

14 A I don't.

15 Q Okay. Have you provided them to your
16 attorney?

17 A Yes.

18 Q Is Mr. North acting as your attorney in
19 this matter?

20 A Yes.

21 Q Okay. What range of times do those
22 photographs cover?

23 A I have photographs from, like I said,
24 when the previous owner was building the home
25 and some that he took while they there.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Uh-huh.

3 A And ever since that we have lived
4 there.

5 Q Okay.

6 A Plus some that were taken after the dam
7 broke.

8 Q Okay. Have you had any appraisals done
9 of your property since the time of purchase?

10 A No.

11 Q Have you attempted to refinance your
12 property since the time of purchase?

13 A No -- yes, excuse me. We did but we
14 didn't have to have an appraisal.

15 Q When was that?

16 A A year and-a-half or so ago.

17 Q Okay. Why didn't you have to have an
18 appraisal?

19 A Because the bank didn't require it.

20 Q Okay. Were you refinancing your
21 mortgage?

22 A Yes.

23 Q Getting a different interest rate?

24 A Yes.

25 Q Okay. Other than photographs, do you

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 have any other documents or evidence that you
3 think you would be providing to your attorney or
4 have provided to your attorney that reflects
5 your position in this case?

6 A Not that I know of.

7 Q Okay. Is it -- is it accurate to say
8 that you would be communicating to the Court
9 that you feel like you've lost an amenity to
10 your property?

11 A Yes.

12 Q Okay. And is it accurate to say that
13 that amenity was the natural beauty of the area?

14 A And the wildlife.

15 Q And the wildlife?

16 A (Witness nods head.)

17 Q Okay. And has anybody ever said to you
18 that your property is worth less, now, in terms
19 of market value than it was before?

20 A No.

21 Q Are you familiar with the market value
22 of marsh front lots in the vicinity of your
23 property?

24 A No.

25 Q Have you ever -- okay. So have you

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 ever compared marsh front lot values to
3 lakefront lot values?

4 A No.

5 Q Okay. Are you planning to testify that
6 your property has lost financial value, monetary
7 value?

8 A Not unless I get an appraisal on it.

9 Q And do you have any plans to get an
10 appraisal between now and then?

11 A I don't know.

12 Q Are you -- are you aware of the fact
13 that -- well, are you aware of permitting
14 requirements, state and federal, environmental
15 permitting requirements?

16 A No.

17 Q Have you ever investigated whether or
18 not the repair of the dike would require state
19 and/or federal environmental permits?

20 A No.

21 Q Have you ever personally tried to get a
22 state or federal environmental permit?

23 A No.

24 Q If permitting agencies were unable to
25 permit the restoration of the dike, would you

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 still object to the installation of the water
3 filters to treat water quality?

4 A I'm not sure I understand.

5 Q If you could just assume for me, for
6 the sake of argument, that Mr. Myers and the POA
7 could not obtain the appropriate permits to
8 repair the dike, in other words, it wasn't going
9 to be allowed under state and/or federal law,
10 would you still object to the installation of
11 the water filters?

12 A I can't answer that.

13 Q Okay.

14 A He's gotten permits.

15 Q Okay. He's gotten authorization to
16 repair the dike?

17 A Uh-huh.

18 Q Which is a little bit different from a
19 permit. It's a maintenance and repair
20 authorization, were you aware of that?

21 A I just know he had authorization.

22 Q Permission?

23 A Permission, uh-huh.

24 Q Permission, yeah. But do you -- you
25 object to the installation of the water quality

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 filters?

3 A I don't object to them. I mean I don't
4 know. I don't know where you're coming at for
5 this question. I really don't understand your
6 question.

7 Q Okay. The permit that was issued by
8 DHEC allowed the installation of water quality
9 filters --

10 A Uh-huh.

11 Q -- into the drainage system, were you
12 aware of that?

13 A Yes.

14 Q And --

15 A And that was appealed.

16 Q Yes. And so you -- some group of
17 individuals challenged that permit and my belief
18 is that you're part of that group challenging
19 that permit so I need to understand why you
20 would object to the installation of filters
21 within the water -- within the drainage system.

22 A I would object to them because then the
23 dam wouldn't be repaired.

24 Q Okay. Do you have a concern about
25 water quality?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 A Yes.

3 Q Have you had any encroachment of
4 damaging tidal water onto your property?

5 A We have had tidal water since the dam
6 broke come onto the property.

7 Q Okay. And did you suffer any loss of
8 property as a result of that?

9 A No.

10 Q Was your property damaged as a result
11 of that?

12 A No. There were no plants there.

13 Q Okay. And did the water encroach
14 further than the lake water had ever encroached?

15 A Yes.

16 Q Has that happened more than one time?

17 A Yes.

18 Q How often does that happen?

19 A I'm trying to remember. I'd say maybe
20 three or four times.

21 Q Is there any particular that causes it
22 to happen or that you attribute it to?

23 A Really high tide.

24 Q Okay. Have you -- have you lost any
25 yard or landscaping as a result of that?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 A We had none back there.

3 Q Okay. Have you lost any utility lines
4 as a result of encroaching water?

5 A No.

6 Q Do you have any oak trees on your
7 property that are showing stress of salt water
8 exposure?

9 A No.

10 Q Have you witnessed any erosion within
11 the lake bed?

12 A Yes.

13 Q Where have you seen that erosion?

14 A There is a pipe on an easement next to
15 our property that goes out into the mud hole.

16 Q Uh-huh.

17 A And there is erosion there.

18 Q Uh-huh.

19 A Where the water, storm water goes out.

20 Q Okay.

21 A And I -- there's a big ditch, it looks
22 like, in the middle of the mud hole from one end
23 to the other, the length of it that goes down
24 that I can see, that's very easy to see.

25 Q Has that damaged your property?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 A No.

3 Q Have you made any complaint or request
4 of the property owners association regarding
5 that pipe?

6 A The pipe?

7 Q Uh-huh.

8 A No.

9 Q Do you know if it's a neighborhood pipe
10 or if it's a Beaufort County pipe?

11 A I don't know.

12 Q Okay. Are ocean waves effecting your
13 property?

14 A No.

15 Q Are you involved in another lawsuit
16 related to this that's been filed in Beaufort
17 County Court of Common Pleas?

18 A Yes.

19 Q You're a plaintiff in that lawsuit?

20 A Yes.

21 Q Do you recall whether or not there was
22 algae or algae blooms in the surface of the lake
23 when the lake existed?

24 A Yes.

25 Q Did you observe algae blooms?

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 A Yes.

3 Q Do you know how frequently?

4 A Very infrequently in the time that we
5 there.

6 Q Okay. Did the lake ever have or emit
7 an odor?

8 A No.

9 Q Do you ever recall the levels of the
10 lake changing --

11 A No.

12 Q -- based on tidal action?

13 A No.

14 Q Did you ever understand the original
15 purpose of the lake?

16 A The original purpose? I was -- I was
17 told --

18 (Whereupon, Mr. Meyer joined the
19 proceedings.)

20 BY MS. SHAHID:

21 Q What were you told?

22 A What -- I was told that it was used for
23 duck hunting.

24 Q Okay. Do you know if the people in
25 your neighborhood are allowed to take out their

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 guns and shoot ducks on that lake at the time it
3 existed before it was breached?

4 A I don't know.

5 Q Would you want people shooting guns in
6 and around that lake, given the proximity of
7 houses?

8 A I wouldn't, no.

9 Q Have you considered the construction of
10 a bulkhead or some type of an erosion control
11 device to protect your property boundary as it
12 surrounds the lake bed now?

13 A We are -- we have considered it, yes.

14 Q Okay. And you understand that that
15 would protect you from erosion?

16 A I would hope so.

17 Q Okay. Are you -- do you have any
18 opinion as to exact -- as to the monetary value
19 that you would assign to the loss that you're --
20 experienced?

21 A It -- the view, the aesthetics, they
22 were all priceless to me, they really were.

23 Q Okay.

24 A I only -- I don't know how you -- I
25 don't know how you put a monetary value on it.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Okay. Which year did you buy your
3 property?

4 A It would have been 2004.

5 Q Okay. Was it -- that's not it. Was it
6 for \$350,000?

7 A Yes.

8 Q Do you believe your property has
9 increased in value from 2004?

10 A I don't know.

11 Q Have you talked to anyone at DHEC or
12 the Office of Ocean and Coastal Resource
13 Management about your concerns about the lake?

14 A I --

15 Q You personally?

16 A I talked to Mr. Geer.

17 Q Okay.

18 A And I've talked to what's his name, Mr.

19 Matlinger --

20 Q Uh-huh.

21 A -- of DHEC.

22 Q Did they -- were they responsive to
23 you?

24 A They listened to me.

25 Q Do you have an understanding about what

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 it would take to fix the impoundment, at this
3 point, money wise?

4 A Huh-uh.

5 Q The cost?

6 A No.

7 Q Have you ever offered to participate
8 and help pay for the cost of help fixing the
9 impoundment?

10 A Yes.

11 Q When did you make that offer?

12 A It was within the first year that it
13 broke.

14 Q Okay. Are you a member of a property
15 owners association?

16 A Yes.

17 Q Do you know which one?

18 A The Cat Island.

19 Q Okay. Do you pay dues to the property
20 owners association?

21 A Yes.

22 Q Do you recall any special assessment
23 from the property owners associates since you've
24 owned your property?

25 A Not that I recall.

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 Q Something in excess of what you're
3 required to pay, annually, in dues?

4 A No.

5 Q Are you aware of the covenants and
6 restrictions that were in place at the time you
7 bought your property?

8 A I read them.

9 Q Okay. Are you familiar with the
10 reservations that the developer retained when he
11 developed the neighborhood?

12 A What reservations?

13 Q The rights that the developer retained
14 when he developed the neighborhood?

15 A I'm --

16 Q You don't recall those, specifically?

17 A No.

18 Q Do you understand that the developer
19 did retain rights that he did not convey to
20 individual lot owners when he developed the
21 neighborhood?

22 A I vaguely remember reading something
23 but I don't -- (Witness shakes head.)

24 Q Do you believe that the POA or Mr.
25 Meyer has a legal requirement to fix the

1 SHAHID - JAMES (DIRECT EXAMINATION)

2 impoundment?

3 A Yes, I do.

4 Q Okay. What do you base that conclusion
5 on? And I don't want to know what your attorney
6 has told you, I just want to know what you,
7 personally, think the developer's obligation or
8 Mr. Myer's obligation is.

9 A The property we bought was on a lake.
10 The lake had a dam. The developer owns the dam
11 and the lake and I believe the developer has the
12 responsibility, if the dam is breached, to
13 restore that dam to replace the lake.

14 Q Okay. Do you recall anything expressly
15 stating that in any of the -- in your deed or
16 any of the other recorded documents related to
17 the title to this property, your property?

18 A No.

19 Q Okay.

20 MS. SHAHID: That's all I've got.

21 Thank you.

22 MR. NORTH: I have one quick
23 question.

24 CROSS-EXAMINATION

25 BY MR. NORTH:

1 NORTH - JAMES (CROSS-EXAMINATION)

2 Q Martha, in your testimony you were
3 asked some questions about high tides and high
4 tides that were lower than some other high
5 tides. I just want to clarify a couple of
6 things.

7 At low tide is there any water, at all,
8 in the mud pit?

9 A No.

10 Q At mid tide is there any water, at all,
11 in the mud pit?

12 A Yes.

13 Q At mid tide?

14 A At mid tide, when tide's coming in --
15 what's mid tide? Let's clarify, what is a mid
16 tide.

17 MS. SHAHID: Three hours after
18 low. Is a tidal cycle six hours? I
19 don't even know.

20 THE WITNESS: What is mid tide? I
21 mean I need to --

22 BY MR. NORTH:

23 Q Let me ask you this, let's assume for
24 purposes of my question, that a tidal cycle from
25 low tide to high tide is 6 hours and 22 minutes,

1 NORTH - JAMES (CROSS-EXAMINATION)

2 what period of that tidal cycle do you observe
3 water in the mud pit?

4 A For about -- from my house for about
5 maybe an hour before the high tide, 45 minutes
6 to an hour.

7 Q 45 to an hour, okay. So would it be
8 fair to assume that until the last 1/6th of the
9 tidal cycle there is no water in the mud pit?

10 A If it's based on a six-hour cycle, yes.

11 Q Okay.

12 MR. NORTH: I have no further
13 questions.

14 MS. SHAHID: Let's go ahead and
15 mark this.

16 (Whereupon, Exhibit
17 Number 304 was marked for
18 identification.)

19 REDIRECT EXAMINATION

20 BY MS. SHAHID:

21 Q You mentioned that you recall seeing
22 the Declaration of Covenants and Restrictions.

23 I'm going to show you a document that I
24 believe applies to the property owners on Cat
25 Island and ask you if this looks like the

1 SHAHID - JAMES (REDIRECT EXAMINATION)

2 document that you referenced in your testimony
3 that's marked Exhibit 304.

4 A I'm thinking this is the one that I
5 have but I'm not sure.

6 Q Okay.

7 A I was thinking the date on the one I
8 had was a later date.

9 Q Okay.

10 A But I can't be sure.

11 MS. SHAHID: Okay. Thank you. I
12 don't have anything further.

13 Thank you.

14 MR. NORTH: No further questions.

15 You can be excused.

16 (Whereupon, the deposition of
17 Martha James was concluded at
18 approximately 3:16 p.m.)
19
20
21
22
23
24
25

1

2

C E R T I F I C A T E

3

4

STATE OF GEORGIA:

5

CHATHAM COUNTY:

6

7

I, Kyle J. Saniga, Court Reporter and

8

Notary Public in and for the above county and

9

state, do hereby certify that the foregoing

10

testimony was taken before me at the time and

11

place herein-before set forth; that the witness

12

was by me first duly sworn to testify to the

13

truth, the whole truth, and nothing but the

14

truth, that thereupon the foregoing testimony

15

was later reduced by computer transcription; and

16

I certify that this is a true and correct

17

transcript of my stenographic notes so taken.

18

I further certify that I am not of

19

counsel to either party, nor interested in the

20

event of this cause.

21

22

23

Kyle J. Saniga, CCR

24

Notary Public, B-2038

25

Savannah, Georgia

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KENNETH BRUNING, JANET BRUNING, DAVID FERON,
Individually and as Trustee, MARY FERON,
Individually and as Trustee, MARTHA JAMES and
DON HAARMAYER, Individually and as Co-Trustees,
and PAMELA NORTH,

Petitioners,

vs. DOCKET NUMBER
12-ALJ-07-0434-CC

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL and CAT ISLAND PA c/a GARY
MEYER,

Respondents.

IN RE: GARFIELD PARK PHASE 3

-----/
CAT ISLAND POA c/o GARY MEYER,

Petitioner,

vs.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL,

Respondent.

IN RE: GARFIELD PARK PHASE 3

-----/
DEPOSITION OF GARY MEYER
AUGUST 5, 2013

EXHIBIT

E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

-----/

The deposition of GARY MEYER, a witness
in the above-entitled cause, taken pursuant to
Notice and agreement, before Kyle J. Saniga,
Certified Court Reporter and Notary Public, at
the Law Offices of North & Black, P.C., 916 Bay
Street, Beaufort, South Carolina, on the 6th day
of August 2013, commencing at or about the hour
of 2:40 p.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES OF COUNSEL:

FOR THE PETITIONERS:

JOHN E. NORTH, JUNIOR, ESQUIRE
North & Black, P.C.
916 Bay Street
Beaufort, South Carolina 29902
north@northblack.com
843.379.0800

FOR THE RESPONDENTS:

MARY D. SHAHID, ESQUIRE
ANGELICA M. COLWELL, ESQUIRE
Nexsen, Pruet
205 King Street
Suite 400
Charleston, South Carolina 29402
acolwell@nexsenpruet.com
843.720.1769

AND

NATHAN M. HABER, ESQUIRE
DHEC Ocean & Coastal Resource Management
1362 McMillan Avenue
Suite 400
Charleston, South Carolina 29405
habernm@dhec.sv.gov
843.953.0229

ALSO PRESENT:

Martha James
Sally Haley

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

PAGE

OPENING REMARKS AND STIPULATIONS ----- 5

DIRECT EXAMINATION:

By Mr. North ----- 5

CROSS-EXAMINATION:

By Mr. Haber ----- 55

CERTIFICATE ----- 65

1 NORTH - MEYER (DIRECT EXAMINATION)

2 GARY MEYER,

3 having been produced and first duly sworn as a

4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. NORTH:

7 Q State your full name and address,

8 please.

9 A Gary Meyer, 5 Sheffield Court,
10 Beaufort, South Carolina, that's on Cat Island.

11 Q Okay. And are you the managing partner
12 of Chowan Creek Partners?

13 A That's right, I'm President of the
14 corporation.

15 Q Okay. Do you -- do you effectively
16 have control of the corporation?

17 A I'm the President and own about
18 33 percent of the stock.

19 Q Okay. And are you also the chairman of
20 the Cat Island POA?

21 A I think we call it president, but
22 that's true, right.

23 Q Okay. Describe for me the history of
24 the Cat Island development.

25 A We purchased Cat Island in 1982 from a

1 NORTH - MEYER (DIRECT EXAMINATION)

2 local group and started on the development, had
3 the golf course built. We subcontracted that,
4 actually sold it, a group in Atlanta, and then
5 started on the development which involved
6 putting sewer system, bringing water lines and
7 doing residential development.

8 Q Okay. Did you do that development in
9 phases?

10 A Yes, we did.

11 Q What was the first phase?

12 A First phase -- well, just backtrack a
13 little bit. Dolphin Point existed when we
14 purchased the island and we bought the unsold
15 lots in Dolphin Point and then our first
16 development was The Point, which was just beyond
17 Dolphin Point, and that was our first
18 development that we did, I think 17 lots in
19 there.

20 Q Okay. And was that in the mid '80's?

21 A I think '85, '86, right in there.

22 Q Okay. What was your next phase of
23 development?

24 A It was The Rookery, which was the
25 second -- second subdivision that we did and

1 NORTH - MEYER (DIRECT EXAMINATION)

2 that was maybe a year later, I think maybe '87.

3 I can't recall but right in that area.

4 Q Okay. And what was the next phase

5 after that?

6 A I'm just trying to think. I think we

7 went to the Sheffield area down on Chowan Creek.

8 I can't remember the exact -- it was probably a

9 little gap in there before we started because

10 the economy, the ups and downs, and I believe

11 the Sheffield Creek area was our next

12 development.

13 Q Do you remember about when that was

14 undertaken?

15 A I think it was early '90's but I can't

16 remember exactly.

17 Q Okay. What came after Sheffield?

18 A I'm trying to think. I think Hunter's

19 Ridge is where we went next. Maybe -- I can't

20 remember. Garfield Phase 1 and 2, maybe.

21 Hunter's Ridge. I think Hunter's Ridge probably

22 was the next one.

23 Q Okay. And then Garfield?

24 A Yeah and then Garfield 1 and then there

25 was 2 and then eventually 3, the one we're

1 NORTH - MEYER (DIRECT EXAMINATION)

2 talking about, now.

3 And then we had Wooddale in there and
4 let's see there was something, I'm not sure of
5 the -- you know, the progression. I'd have to
6 go back. (Phonetic).

7 Q Okay. In connection with the
8 development of The Rookery --

9 A Uh-huh.

10 Q -- what did you have to do with the
11 dike or its outfall device to establish the
12 level of the lake?

13 A Nothing. It was existing. It was
14 designed and built way back in '50's or '40's, I
15 don't even know. We did nothing with the dike.

16 Q You didn't have anything to do with
17 setting the level of the dike --

18 A No.

19 Q -- or the outfall device?

20 A No, we did not.

21 Q Is it fair to say -- what -- after you
22 started the development of The Rookery, is there
23 anything that you had to do to the dike or the
24 outfall?

25 A I don't believe we did anything. We

1 NORTH - MEYER (DIRECT EXAMINATION)

2 might have changed the flashboard thing and I
3 don't really remember. Nothing that obviously
4 required any permitting or whatever. It was
5 never permitted.

6 Q What do you mean by 'changing the
7 flashboard'?

8 A Well, the flashboard is the flow
9 control device on the back part and I think we
10 replaced some of the boards in there from time
11 to time but that was about it.

12 Q Are you saying that when you bought the
13 property in 1982 that the aluminum pipe that ran
14 through the dike that had the outfall device as
15 a part it was all in place?

16 A There was -- there was some changes
17 made but I don't -- there was never anything
18 major. It might have been even changed before
19 we bought it, I couldn't swear to that. There
20 was an outfall device but I don't remember
21 making any changes or whatever.

22 Q Okay. Did you ever have to do anything
23 to do with the dike or the outfall device, any
24 modifications of it or?

25 A Just the only thing we ever did is I

1 NORTH - MEYER (DIRECT EXAMINATION)

2 remember some of the boards rotted and I think
3 we put some new boards in the flashboard.

4 Q Okay. Is that only thing you ever had
5 to do to modify the dock or touch or the dike or
6 anything?

7 A No, until obviously it failed when --
8 four years ago or whatever.

9 Q Okay.

10 A Yeah.

11 Q When you sold the lots that were part
12 of The Rookery, were those sold as lakefront
13 properties?

14 A They were sold with -- the way they
15 were. I mean it showed a lake on the plat. I
16 guess you would say they were lakefront
17 properties that were -- it was the way it was.

18 Q Okay. Do you have any records of any
19 of your advertising or listing or anything that
20 would show the manner in which those lots were
21 marketed?

22 A I think it was pretty low-key
23 marketing. I don't remember any -- I think that
24 was -- we might have had a master plan but I
25 don't think there was any major marketing that

1 NORTH - MEYER (DIRECT EXAMINATION)

2 occurred with that. I mean we showed it on a
3 plat and, you know, that's kind of -- it was --
4 it was -- the subdivision was called The Rookery
5 and that's, you know, what I remember.

6 Q Okay. Is it fair to say that that
7 lake, at the time, was a rookery?

8 A Well, there were -- I mean sure there
9 were birds in it and there are birds in it,
10 today, but I guess, you know, you could call it
11 a rookery. We kind of named the subdivision
12 because there were birds in the lake.

13 Q What's your next intended phase of
14 development on Cat Island?

15 A Don't really know right now. Kind of
16 looking at the economy, don't have anything
17 really -- we've done a lot of preliminary on
18 some of the out parcels but haven't done
19 anything more than that.

20 Q Okay. Have you started development of
21 G Tract?

22 A No, we haven't.

23 Q Have you had it platted into lots?

24 A No.

25 Q I'm handing you what's been marked as

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Exhibit 60.

3 A Uh-huh.

4 Q Can you tell me what that document is?

5 A Yeah. That looks like Phase 1 and
6 Phase 2 of Garfield Park.

7 Q What differentiates Phase 1 From Phase
8 2?

9 A That would be Phase 1 right there.

10 Q You're showing the lots along Sheffield
11 Court?

12 A 1 through 5 on Sheffield Court and
13 Phase 2 was up along Sheridan Road and then
14 making the corner over to Wheland Avenue.

15 Q How far apart in time were those two
16 phases of development?

17 A You know, I really don't know. I know
18 Phase 1 obviously was first because that was all
19 -- we had the office and lots over here. I
20 really don't know. I know this was after --
21 this was -- 2 but I can't really say.

22 Q Okay. Do you remember having multiple
23 discussions with homeowners about fixing the
24 dike?

25 A Yes, more than discussions. I dealt

1 NORTH - MEYER (DIRECT EXAMINATION)

2 with you on the project and we had a contract
3 and whatever, yes, absolutely.

4 Q Okay.

5 A More than discussions.

6 Q Is fair to say that originally you were
7 not opposed to fixing the dike but you were
8 concerned that the timing was bad and that
9 property wasn't selling and it wasn't a good
10 time to be spending money on a dike?

11 A Yeah, I think that's a pretty fair
12 assessment. I think, you know, we weren't wild
13 about fixing it but, you know, we agreed to give
14 it a shot.

15 Q Okay. Do you remember, at one point,
16 offering to sell the homeowners a lot and using
17 the proceeds to fix the dike?

18 A I don't remember selling -- yes, yes, I
19 do remember that.

20 Q No, just offered to?

21 A Yeah, I think that's true, yes.

22 Q Okay. And do you remember finally
23 entering into an agreement with the homeowners
24 where they would supply the funds that would be
25 repayable once you started developing --

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A Yes, I remember.

3 Q -- the G Tract? Okay.

4 Are you familiar with the attempt that
5 was made by Duncan O'Quinn to fix the dike?

6 A Yes, I'm very familiar with that.

7 Q Okay. Why do you think that fix
8 failed?

9 A I really don't know. I guess he
10 couldn't get enough fill in there. I mean I
11 think -- we didn't do no postmortem on that, at
12 all, but it didn't work and he didn't want to
13 try again, that's for sure.

14 Q Did Duncan ever acknowledge to you that
15 he used the wrong soil and it was his fault and
16 he just botched it and he'd be willing to do it
17 the right way?

18 A No, he didn't. I didn't hear that.

19 Q Okay, Okay. I'm handing you what's
20 been marked as Exhibit 36.

21 Do you recognize that as a proposal
22 to fix the dike a second time or attempt it a
23 second time for a higher price?

24 A Yeah, I remember this. Right, right.

25 Q Is it fair to say that the price for

1 NORTH - MEYER (DIRECT EXAMINATION)

2 the first attempt was significantly less than
3 the price on Exhibit 36?

4 A Excuse me? You know, repeat that
5 question. You say the --

6 Q Is fair to say that Duncan O'Quinn's
7 price for his failed attempt was significantly
8 less than the amount on exhibit --

9 A I can't -- it was some less. I can't
10 remember exactly what it was.

11 Q Okay. At any point in time did you
12 agree to allow Duncan O'Quinn to go ahead and
13 give it a second shot doing it a different way?

14 A No. I think we did not want to pursue
15 that anymore because of the problems we ran into
16 the first time.

17 Q Well, was part of the problem that in
18 order to do it a second -- with a second method
19 you had to make improvements to G Tract to get
20 access to the dike?

21 A That was a proposal. The improvements
22 to G -- to try and build a road through the G
23 parcel was not viable, in our mind.

24 The access to the lake should have been
25 at the end of Rush Street and for whatever

1 NORTH - MEYER (DIRECT EXAMINATION)

2 reason that wasn't pursued but, yes, we did not
3 want to try and build a road for the G Tract.

4 Q Okay.

5 A That's very true.

6 Q Okay. Were you willing to allow a
7 repair to the dike if the access did go from the
8 north side of the dike from the end of Rush
9 Street?

10 A I don't think we ever got there, quite
11 frankly. That, I don't think some of the
12 homeowners in that area -- and I think you'd
13 know more about that than I do -- really wanted
14 that approach.

15 Q Were you ever told by Duncan O'Quinn
16 that there wasn't enough room between the edge
17 of the lake and the home at the end of Rush
18 Street to have big equipment fit through to the
19 dike?

20 A I don't think I really discussed that
21 with Duncan. I think you were really dealing
22 with Duncan at that time.

23 Q Was it at least fair to say that the
24 idea of going through G Tract was a non-starter,
25 from your standpoint?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A I think that's fair to say that we --
3 we were not entertaining any construction site
4 going through parcel fee. (Phonetic)

5 Q Who actually owns the lake and the
6 dike?

7 A We obviously have the deed to it but it
8 was impounded tidal marsh and our best guess is
9 that the State of South Carolina owns it.

10 Q When you say 'we' are you talking about
11 Chowan Creek Partners?

12 A Chowan Creek Partners had a deed. It
13 shows on the deed but we've had things like that
14 before.

15 We had another tract of marsh that was
16 deeded to us, too, but we don't -- we don't know
17 own it. I mean it's the State of South Carolina
18 I think can find it.

19 Q But up until the point in time, if any,
20 that the title or ownership of those rights
21 reverted to the state, was Chowan Creek
22 Partnership the owner of the lake and the dike?

23 A I just told you. I don't believe we
24 ever owned it because it was impounded way
25 before we bought it and impounded marsh reverts

1 NORTH - MEYER (DIRECT EXAMINATION)

2 to the -- unless there's a special deed from the
3 Queen or whatever my understanding is State of
4 South Carolina owns it.

5 Q Are you saying that even from 1982 it's
6 your view --

7 A Yeah.

8 Q -- that the state owned the lake?

9 A Exactly, exactly. We never -- it was a
10 nonissue. We didn't have anything to do with
11 it. It was there and we just left it. I mean
12 we didn't have anything to do with it.

13 Q Now, when you say 'it was the waters of
14 the state', are you suggesting that it was a
15 saltwater impoundment?

16 A Absolutely.

17 Q Are you aware that up until the breach
18 in the dike all of the vegetation surrounding
19 the lake was freshwater vegetation?

20 MS. COLWELL: Object to the form."

21 THE WITNESS: Absolutely not.

22 It's saltwater.

23 BY MR. NORTH:

24 Q The live oaks and the pine trees and
25 all that?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A Live oaks were above the line, they
3 weren't -- they're not in the water.

4 There are marsh grass and spartina
5 grasses all around the lake even when the dike
6 -- before the dike broke.

7 Q Is it your position that the lake was
8 never a freshwater lake?

9 A Absolutely.

10 Q Okay. What real estate, if any, did
11 the Cat Island POA own?

12 A They own -- they don't own all the
13 roads and right-of-ways but because it's a
14 progression when the things are sold or most of
15 them are sold we'll turn it over.

16 I know Hunter's Ridge is owned and
17 Sheffield is owned by the POA. Garfield Park is
18 owned by the POA. The Rookery -- which includes
19 The Rookery.

20 I'm -- there are a few that we still
21 have like I believe Wooddale is still owned by
22 the partnership.

23 Q And when you 'say is still owned by the
24 partnership' --

25 A Yeah.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q -- are you saying that you conveyed all
3 of the interest in all of the common areas and
4 roads and everything else to the POA?

5 A I said not all of them, most of them,
6 yes.

7 Q I'm handing you what's been marked as
8 Exhibit 16.

9 A All right.

10 Q Do you recognize that as a printout
11 from the Beaufort County Real Estate Records
12 indicating that the Cat Island Lake is owned by
13 Chowan Creek Partners?

14 A Oh yeah. As I say we received the deed
15 to it. I'm not surprised -- yes, I'm aware of
16 this.

17 Q And you pay taxes on this lake every
18 year, don't you?

19 A The taxes were miniscule. You can see
20 what they are, they're nothing. It was more --
21 it was -- you know, we just -- we didn't contest
22 it. I mean you try to do something with it and
23 you find out whether you own it or not and we
24 just didn't -- you know, it's just a nonissue
25 from our standpoint. Yes, we did pay those

1 NORTH - MEYER (DIRECT EXAMINATION)

2 taxes.

3 Q And you have it registered with the
4 assessor as recreational lake?

5 A It was -- I mean I didn't register it
6 that way that's what they called it. I don't
7 use -- where the term 'recreational' came from.

8 Q I'm handing you what's been marked as
9 Exhibit 17.

10 A Okay.

11 Q Are you aware of any conveyance to the
12 Cat Island POA, other than the conveyance of two
13 of the roads in Garfield Park, as reflected on
14 that deed?

15 A I'm sorry, repeat it. Did you say any
16 other?

17 Q Yes.

18 A Yes, I believe, as I said, I can't -- I
19 don't have it in front of me but I believe
20 the -- the Sheffield, I believe Hunter's Ridge,
21 I think Wooddale.

22 I'm not -- I'd have to check the -- you
23 know, based on which ones were conveyed. Not
24 all of them have them. I know Garfield Park
25 was.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q I notice on Exhibit 17 that the
3 conveyance is from the Rose Harrin Company, L.P.
4 (phonetic)

5 A Right.

6 Q What is that?

7 A They were the developer of Garfield
8 Park.

9 Chowan Creek, that was my old partner,
10 Michael J. Myers, and he was -- he's since left
11 us but he -- I mean we lost him about four, five
12 years ago.

13 Q Deceased you mean?

14 A Yes. And we actually kind of monitored
15 the development on it but this is -- this would
16 be the deed that he was actually the owner.

17 Q Well, who was the developer of Garfield
18 Park?

19 A Well, I guess, Chowan -- well, it
20 depends on which phase. I think we did the
21 first phases, Chowan Creek, and then the -- the
22 Rose Herrin, I believe this is, did the third
23 phase.

24 Q Okay.

25 A That's where the deed comes from.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q Well, I -- you acknowledge, I assume
3 that the stormwater permit was applied for and
4 obtained by Chowan Creek Partners?

5 A We could have done that. We might have
6 -- that's very possible.

7 Q Are you saying that at some point in
8 time you conveyed the streets and common areas
9 in The Rookery to the Cat Island POA?

10 A I think we did but I can't remember,
11 you know. I just -- I'm assuming we did because
12 it was a long time ago.

13 Q Because, what, The Rookery was
14 completed a long time ago?

15 A Uh-huh, right, exactly.

16 Q And when was The Rookery completed?
17 The sale of all the lots?

18 A I'd have to go back. I mean I think it
19 came about in '86 or '8 -- let's see. We bought
20 in '8 -- I think '86, '87. My guess is by 1990
21 it'd been sold.

22 Q Okay. Now, if all the lots had been
23 sold, does the POA still control the common
24 areas of that subdivision?

25 A I don't think it has anything to do

1 NORTH - MEYER (DIRECT EXAMINATION)

2 with the conveyance or what -- everything's been
3 sold or not. It's when the roads and -- are
4 conveyed to the POA and that -- if you read the
5 covenants it's pretty open as to when it's done
6 and when it isn't done.

7 I mean it eventually -- technically you
8 could say wait until the whole project is done,
9 all of Cat Island before you convey and is -- I
10 think what we've seen we've conveyed some of the
11 projects that are more completed have been
12 conveyed and I believe The Rookery was. If it
13 isn't it certainly should be.

14 Q No, but as far as being members of the
15 POA, once all the lots in The Rookery are sold,
16 don't those lots, as a stand alone subdivision,
17 go their own way or do you --

18 A No.

19 Q -- you contend they stay as part of the
20 POA?

21 A They're part of the covenants, yeah.
22 They're POA members.

23 Q Okay.

24 A So they don't go their own way.

25 Q Is it your view that all of Cat Island

1 NORTH - MEYER (DIRECT EXAMINATION)

2 is one big development and everybody is tied to
3 that POA?

4 A No, that's not the way it is. Dolphin
5 Point is separate, Tabby Park is separate and
6 the rest of the island is all under the Cat
7 Island POA.

8 Q Okay.

9 A Yeah.

10 Q So Tabby Park, just to clarify, it was
11 sold to other developers, is that correct?

12 A Right.

13 Q So they're completely independent of
14 your development company?

15 A That's true, that's true.

16 Q And for one reason or another Dolphin
17 Point is free an independent of your POA?

18 A That's right, that's right.

19 Q Okay. But is it your position that all
20 of the other lots in Cat Island are all part of
21 the one big subdivision and all under the
22 control of that POA?

23 A Separate subdivisions but all under
24 that POA, correct. And the future of like of GH
25 & K will also be under --

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q Well, it's one big subdivision with
3 various phases of development?

4 A No, we call them separate subdivisions.
5 They're different phases but they're different
6 names and different configurations, different
7 covenants.

8 Q Okay.

9 A The general covenants are the same but
10 they can have different, you know, architectural
11 and whatever.

12 Q Okay. Why were you opposed to allowing
13 access to the dike through G Tract?

14 A Why were --

15 Q For purposes of repair?

16 A Yeah. Our biggest problem with even
17 rebuilding the dike was the fact that what if it
18 were to break again and based on the water
19 quality issue where we would be tied to the dike
20 as a part of the water quality, try and provide
21 easements, access in the future would have been
22 a problem.

23 Plus, it's a long haul and to try to
24 and put a construction road in there would have
25 -- it would have lessened the value of the

1 NORTH - MEYER (DIRECT EXAMINATION)

2 property.

3 Q Lessened the value of G Tract?

4 A Oh absolutely.

5 Q And when you say 'easements' are you
6 talking about?

7 A Well, to get in to repair the dike.

8 Q Are you saying that long-term you'd
9 have to have some easement --

10 A I believe so.

11 Q -- to get access?

12 A I believe so, yes, yes.

13 Q So that easement would run, I assume,
14 from the dike to some portion of G Tract?

15 A From the dike in the road to bring
16 repair units in to get there.

17 Q Okay.

18 A Yes. I think you see that on the other
19 side, too, you know, on Rush Street even when
20 there is an access to the pond it doesn't right
21 get to the dike but you have the same issue
22 there.

23 Q Okay. So just from the standpoint of
24 being the developer, you did not want to
25 encumber G Tract with those sorts of headaches?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A I think that's a good -- absolutely.

3 Q Okay.

4 A Absolutely.

5 Q What do you see as the benefits of not
6 fixing the dike?

7 A I see the benefits it will turn that
8 area, I call it the semi-impounded lake into a
9 vital tidal marsh, which will be, our opinion,
10 way more attractive and valuable than a
11 semi-impounded pond, which we had before.

12 Q Why do you say 'semi-impounded'?

13 A Well, because it wasn't totally. I
14 mean you had saltwater coming in and out twice a
15 day and we had some grass but we had a lot of
16 algae and bad things in the pond. I mean it --
17 I didn't think it was that attractive, myself.

18 Q If it was a saltwater impoundment, how
19 do you explain the presence of algae?

20 A It was algae, I mean that was it. It
21 was saltwater in and out twice a day but there
22 was no flow. You didn't get the full flow
23 because you had the flashboard on there which
24 would stop of some outflow.

25 Q I'm handing you what's been marked as

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Exhibit 18.

3 Do you remember getting that letter in
4 2010 from your engineer, Andrews & Burgess?

5 A I kind of remember this. I'm kind of
6 assuming this is where we would put the filters
7 in but then detain some of the water in there I
8 think is what we were saying.

9 Q Well, this was the summer of 2010?

10 A Yeah.

11 Q And just by point of reference I think
12 your discussion of a weer was a year later.

13 MS. SHAHID: How do you know it's
14 2010?

15 MR. NORTH: Because it's talking
16 in the second paragraph about the
17 permit expiring on August 18th 2010.

18 MS. SHAHID: So we assume that
19 hadn't happened yet, okay.

20 MR. NORTH: Correct.

21 THE WITNESS: You know, I can't
22 remember this but I just --

23 BY MR. NORTH:

24 Q Well, do you remember discussing, with
25 Steve Andrews, his opinion that repairing the

1 NORTH - MEYER (DIRECT EXAMINATION)

2 dike in accordance with the existing maintenance
3 permit is the cleanest, easiest and most
4 efficient option relative to engineering and
5 permitting?

6 A Yeah and we tried to do that and I mean
7 we kind of agreed with that that we would do
8 that and try, which we tried and it didn't work
9 and there was no acc -- we figured if we could
10 get water access and it was -- which we tried
11 and we did try it and it -- we couldn't get
12 access through the creek to get the job done and
13 we had to face -- you know, if you're going
14 build it from land access you better provide
15 easements and whatever for -- because if it
16 broke once there's a good chance it'll break
17 again.

18 Q Okay. At the point in time this
19 opinion was rendered and delivered to you, this
20 was August of 2010.

21 Exhibit 36 is the second proposal by
22 O'Quinn to fix the dike after his first effort
23 had failed.

24 So at the point in time that Exhibit 18
25 was delivered we're months past the -- the

1 NORTH - MEYER (DIRECT EXAMINATION)

2 attempted repair of the dike, so my question to
3 you is, why did you oppose following the
4 recommendation of your engineer to repair the
5 dike as the cleanest, easiest and most efficient
6 option relative to engineering and permitting?

7 A I just think we felt that long-term
8 that dike was not a reliable -- a reliable
9 structure that would maintain our -- the water
10 quality and satisfy DHEC requirements.

11 Q Okay.

12 A And I think that's the decision we came
13 up with. We didn't want to pursue that anymore.
14 Let's go to alternative.

15 Q Is it fair to say that a big part of
16 that decision process was your opposition to any
17 potential easements or entanglements of G
18 Tract --

19 A That's very possible.

20 Q -- long-term?

21 A I think that's a very good -- yes, I
22 think that's true.

23 Q Okay.

24 A Yeah, absolutely.

25 Q In the bottom paragraph of page 1 he

1 NORTH - MEYER (DIRECT EXAMINATION)

2 talks about a benefit of reinstating the
3 freshwater pond as providing an opportunity for
4 future conversion of the pond to a salt marsh
5 mitigation bank. Do you know what he's talking
6 about there?

7 A Well, you could turn it over, you say
8 when -- establish it as a freshwater pond.
9 Well, you know, the issue of freshwater,
10 saltwater it was a saltwater pond and I think we
11 got to figure that out down the road and then
12 you could turn it over to the saltwater, in
13 other words, to the state to give them -- and
14 get credit for wetlands and whatever. Well, we
15 never got to that. I mean that never came
16 about.

17 That was a way to maybe help finance
18 the rebuilding of the dike and whatever. Well,
19 it just -- that wasn't part of the deal. I mean
20 it just didn't work that way.

21 Q Did you ever have any -- did you or
22 your engineers ever have any dealings with the
23 Corps of Engineer or anybody else having to do
24 with mitigation credits?

25 A I don't believe so. There was talk

1 NORTH - MEYER (DIRECT EXAMINATION)
2 about that but I -- I mean I wasn't part of it.
3 I don't really --
4 Q Who was part of it?
5 A I don't know if anybody was part of it.
6 Q Did you ever obtain any mitigation
7 credits?
8 A No.
9 Q When I say 'you' I mean Chowan Creek
10 Partners.
11 A No, no, we didn't get any.
12 Q How does having the lake become a basin
13 benefit G Tract?
14 A It turns a stinky algae lake into a
15 vital tidal marsh and if you go out there today
16 you'll see it's about 2/3rds there.
17 Q I'm handing you what's been marked as
18 Exhibit 58. Do you recognize that as a --
19 A This is a preliminary layout for G that
20 we did. In fact there were two of three that we
21 did, none of which we really accepted, but we
22 started to do that.
23 Q Okay.
24 A Yeah.
25 Q Directing your attention to the most

1 NORTH - MEYER (DIRECT EXAMINATION)

2 easterly, northeasterly corner of that G Tract,
3 do you see the area where there is a freshwater
4 wetlands delineated?

5 A Over here.

6 Q No, I'm talking about right here in the
7 corner right by the dike.

8 A Yeah, it's not freshwater but it's -- I
9 know exactly what you're talking about.

10 Q Okay. There's a big inlet there, isn't
11 there?

12 A Well yeah, that's -- that's where the
13 dike -- that's the land that built the dike,
14 originally, that's what that is.

15 Q How do you know that?

16 A Everybody knows that. You can just
17 look at it. It wouldn't -- that had to be
18 excavated or it would never be that way. That's
19 the fill that put the dike in probably in the
20 '50's or whenever it was built.

21 Q Okay. At one point were you in favor
22 of totally removing the dike, the entirety of
23 the dike?

24 A Actually we go way back. We talked
25 about it a lot, yeah, yeah.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q And what would you do with the spill or
3 what would --

4 A That become a problem.

5 Q Okay. Was the plan to put it back
6 where it came from?

7 A We never got that far. We talked
8 something about that but, again, you had
9 wetland, you had grass, marsh grass in there or
10 whatever.

11 Q Okay.

12 A It was discussed but I don't think with
13 we got very far.

14 Q With the lake now being a tidal
15 basin --

16 A Uh-huh.

17 Q -- would you agree that this area that
18 is shown on Exhibit 48 as a freshwater wetlands
19 of .201 acres would now be a tidal basin and you
20 would not be able to fill or otherwise develop
21 that portion of G Tract?

22 A Yes, I'm well aware of that.

23 Q Okay.

24 A I think that's fair, yes. That would
25 be a saltwater wetland in there.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q Okay.

3 A Yes, exactly.

4 Q So the three lots that are drawn on
5 this particular drawing would no longer exist?

6 A No, that's not true.

7 Q How would they exist?

8 A Well, you can come over that, you can
9 get it -- yeah, it's -- it depends on -- you
10 wouldn't lay it out like this now.

11 Q Okay.

12 A But no, it doesn't -- you can't use
13 the -- this portion to excavate or whatever.
14 You can cross it. You can do all kinds --

15 Q Cross it with a dock, you mean?

16 A I mean some type of a -- well, like a
17 walkway or whatever. Wouldn't fill it, that's
18 for sure.

19 Q As the developer of G Tract, would you
20 not be better off if the lake were returned to a
21 freshwater lake instead of having the
22 involvement of the Corps of Engineers in your
23 development plans?

24 A Well, the Corps -- I already answered
25 that question, no. It -- the tidal marsh is a

1 NORTH - MEYER (DIRECT EXAMINATION)

2 way more valuable asset than the partially
3 impounded pond.

4 Q Okay.

5 A No question about it.

6 Q Whose idea was it to change the manner
7 of treating stormwater for Garfield Park from
8 detention to inlaying filters?

9 A Well, I think Steve and -- I think we
10 looked for alternatives and that one came up,
11 alternatives to detention.

12 Q Okay.

13 A And what were the alternatives and
14 inline filters and the catch basins was one of
15 the alternatives and maybe the only one, I don't
16 know, that came up.

17 Q Okay. Ultimately are you the one who
18 made the decision to apply for that retrofit?

19 A Well, I think we discussed, with
20 Andrews Engineering and whatever, and I think we
21 all agreed that was the way to go.

22 I might add one thing, we had
23 discussions that since it would -- the question
24 of the POA's involvement we -- I'd call them
25 informal discussions with a lot of property

1 NORTH - MEYER (DIRECT EXAMINATION)

2 owners that would be involved in maintaining the
3 dike long-term and it was a bad -- it was a
4 high-risk. If it went out again we'd have to --
5 because of water quality we'd have to do
6 something about it and we felt the filters might
7 have been a very good alternative.

8 Q Which property owners are you referring
9 to?

10 A Oh, I can't remember. It's -- it was
11 all very informal but I mean I was just taking
12 the temperature. (Phonetic)

13 Q As part of this retrofit, are you
14 planning to stabilize the dike?

15 A I think if you look at the dike, right
16 now, it's very stabilized. I don't live quite
17 as close to it as you do but I've been over
18 there and they've questioned that one tree,
19 maybe, I don't know that, but we're willing to
20 do, you know, whatever we have to do.

21 Q Do you believe that Chowan Creek
22 Partners still owns the remainder of the dike?

23 A I don't think we own any of the dike,
24 no.

25 Q Who does?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A I believe the State of South Carolina.

3 Q Well, if the State of South Carolina
4 were to only own property up until the point
5 that is the mean high tide level and the dike is
6 higher than that, will you agree that Chowan
7 Creek Partners continues to own the remainder of
8 the dike?

9 A No.

10 Q Why?

11 A We didn't build it. It was impounded
12 marsh and the dike is part of the impounded
13 marsh, that's it.

14 Q You bought all of Cat Island, did you
15 not?

16 A We bought it. We have a deed to what
17 you're talking about. I'm just talking about
18 what -- when you really get down to it, that
19 whole area was tidal marsh and you can't claim
20 something that was impounded tidal marsh,
21 including the dike.

22 Q Well, getting back to the first
23 question, are you saying that you are or are not
24 going to stabilize the dike as part of this
25 retrofit?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A I just told you I think it's stabilized
3 but it requires some other further things like
4 vegetation or whatever and we're prepared to do
5 that.

6 Q Does Chowan Creek Partners control the
7 POA?

8 A I don't think we control the POA. The
9 set of covenants that spells out the ground
10 rules, I mean we didn't make it up. It's there
11 and we manage it.

12 Q You didn't make up the covenants?

13 A Yeah, we made up the covenant but
14 they're required and everybody bought property
15 bought subject to the covenants.

16 Q Okay. Pursuant to those covenants, do
17 -- does Chowan Creek partners control the POA?

18 A What do you mean 'control the POA'?
19 We're managing it. We're managing the POA,
20 right now, that's what we've done. We've had
21 different board members in and out and whatever
22 but --

23 Q Do you not have the ability to
24 determine who is going to act as an officer or
25 director of the POA?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A I guess you say we do, yeah.

3 Q Okay. Does not your company have a
4 vote equal to a hundred percent of all of the
5 lots plus one?

6 A That's the way the covenants are
7 written.

8 Q So your company, does it not control
9 the POA?

10 A Well, if you want to say control I mean
11 that's -- those are the ground rules and since
12 1985 I think when they were recorded and that's
13 the way it's been.

14 Q Who are the officers or directors of
15 the POA?

16 A Right now I'm the President, Gerry
17 Martin is the Secretary. That's all we have
18 right now.

19 Q And is Gerry Martin your personal
20 secretary?

21 A He works for the partnership.

22 Q Chowan Creek Partners?

23 A Yes, Chowan Creek Partners.

24 Q And how many years has held that -- has
25 she worked for Chowan Creek?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A Since the inception, '82, '83 something
3 like that. '82 I think.

4 Q Okay. Does she ever disagree with you?

5 A Sure.

6 Q Did she participate in the decision to
7 change the storm water drainage system for
8 Garfield Park Phase 3?

9 A I don't think she's been that involved
10 in that, particular, no.

11 Q Is that something you just handled,
12 yourself, on behalf of the POA?

13 A Well, we've had engineers, we've had
14 other partners involved.

15 Q I'm talking about the structure of the
16 POA and who was the decision maker?

17 A Well, the corporate, the general
18 partner, the partnership, yeah, we're -- we run
19 -- there's no question we run the POA.

20 Q Okay. Have you advised any of the
21 members of the POA about the application to
22 retrofit the stormwater system?

23 A Informally, as I mentioned to you,
24 we've talked about the issues on the dike and
25 whatever. I mean that -- the problems

1 NORTH - MEYER (DIRECT EXAMINATION)

2 associated with that and long-term, you know,
3 the -- we felt that the retrofit was the best --
4 the best deal for the property owners
5 association. We still do.

6 Q How many members have you spoken to?

7 A I don't know, maybe a dozen, 15, I
8 just --

9 Q How many members are there?

10 A 180 probably, 170, 180.

11 Q Do you recall at some point in time
12 having your engineers request a second repair
13 permit with a one-year term?

14 A I think I remember that, right.

15 Q Okay. And do you recall that the
16 one-year term was so that you'd have time to try
17 and raise the funds to pay for a repair?

18 A I don't remember that was the reason
19 for it. I think that we were just trying to
20 figure out what's the best way to go on this
21 thing. I don't know. And I think we -- because
22 we wanted to look at the retrofit thing and to
23 see how that would work out, and to be honest
24 with you I don't really remember the details on
25 that. I do remember the -- going for the

1 NORTH - MEYER (DIRECT EXAMINATION)

2 extension, though.

3 Q What was the rational for having the
4 extension and the application for a retrofit
5 going on at the same time?

6 A I think -- I can't really remember
7 that. I mean I'm going to take your word that
8 it went on at the same time, I don't know.

9 Q I'm handing you what's been marked as
10 Exhibit Number 1.

11 Do you remember getting a copy of that
12 during the hearing before the DHEC Board?

13 A I -- this was at the hearing?

14 Q Yes, before the DHEC Board.

15 A I don't remember this, no. Well, this
16 was in -- this was distributed in the -- I don't
17 think I got a copy of this. I was sitting in
18 the back of the -- yeah, but I remember seeing
19 part of this, yeah.

20 Q Do you remember reviewing it?

21 A I didn't really review it. I saw it,
22 you know. This had to do with all -- some of
23 the Tabby Park stuff and whatever. You've got
24 all of that in there and then we had nothing to
25 do with that so I didn't really pay a lot of

1 NORTH - MEYER (DIRECT EXAMINATION)

2 attention to it. I could never quite figure
3 that out, you know.

4 Q Take a look, if you would -- strike
5 that.

6 Take a look, if you would, at pages 25
7 and 26.

8 A All right.

9 Q Do you see in each of those pictures
10 the bird feeder?

11 A I don't see a bird feeder in there.

12 Q On the right-hand side.

13 A Oh, on the right, okay. Yeah, I do.

14 Q Okay. Do you see any negative
15 attributes on page 26 that result from not
16 having the water depicted on page 25?

17 A I don't know what you're saying. What
18 do you mean 'negative attributes' of the what?

19 Q Yeah. Would you think that --

20 A It's a pretty picture.

21 Q On 25?

22 A Yeah, yeah.

23 Q 25 is a pretty picture.

24 A No, is that before the -- is that -- I
25 don't know what that is.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 Q That's a picture of the -- from the
3 deck with the bird feeder looking at --

4 A All right.

5 Q -- the water in the lake.

6 A Before the dike broke?

7 Q Don't know if that's water in the lake.

8 A Depends on what time it is. It could
9 be before or after the dike broke.

10 Q Would you agree that the view on page
11 26 is far less attractive than the view on page
12 25?

13 A Now what is 26? I don't know what is
14 -- I mean.

15 Q Page 26 is the same view.

16 A It's a totally different scale and
17 whatever. I mean I don't know. I can't make --
18 when was -- I don't even know when that picture
19 was taken. That's after the dike broke but
20 before the marsh grass grew in, I suppose. I
21 don't know.

22 Q I'll represent to you that the picture
23 on 26 -- well, I'll get better than that,
24 without worrying about the timeframe, would you
25 agree that the view on page 26 is not nearly as

1 NORTH - MEYER (DIRECT EXAMINATION)

2 attractive as the view on 25?

3 MS. SHAHID: Object to the form.

4 You can answer.

5 THE WITNESS: You've got water in

6 one and no water in the other one, so

7 that's.

8 BY MR. NORTH:

9 Q So that's, what?

10 A Yeah, I like the one with the water in
11 it.

12 Q Okay. You think most buyers would like
13 the one with the water in it?

14 A Yeah or the one with the marsh grass in
15 it, whatever.

16 Q Take a look, if you would, at page 30.

17 And my question -- that didn't turn out
18 nearly as well as this one.

19 Would you agree that the view on page
20 30 is not nearly as attractive as the view on
21 page 25?

22 A I would agree with that.

23 Q Okay. Have you heard of the complaints
24 of homeowners about tidal waters encroaching
25 upon their lots?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A Yes, I've heard that.

3 Q Okay. Do you dispute it?

4 A Yes.

5 Q On what basis?

6 A Because they don't.

7 Q How do you know that?

8 A Because I live there.

9 Q And --

10 A I live around the corner. I know they

11 don't.

12 Q If tidal water did encroach upon those

13 lots, would you agree that that would be an

14 adverse impact to those homeowners?

15 A To what extent, but yes, it would be.

16 Q Okay.

17 A Yes.

18 Q Do you dispute that freshwater

19 vegetation surrounding the lake bed has died

20 since the breach in the dike?

21 A Yeah, I dispute that.

22 Q On what basis?

23 A That it didn't, it didn't happen.

24 Q Plants didn't die?

25 A I've been there. Yeah, no, it didn't

1 NORTH - MEYER (DIRECT EXAMINATION)

2 happen. There's no -- the level has never
3 really changed, at all.

4 Q The level of the lake?

5 A Uh-huh, didn't change.

6 Q Okay.

7 A Tidal marsh.

8 Q You're saying the level before the dam
9 broke is no different than the level after the
10 dam broke?

11 A That's what I'm saying, yes.

12 Q Do you know what the level was before
13 the dam broke in terms of what --

14 A No, I don't know exactly how many feet.

15 Q Do you know what the foot level is for
16 mean high tide in that area?

17 A No.

18 Q Have you had any dealings with Beaufort
19 County in connection with the application to
20 retrofit the storm water system?

21 A I haven't but I believe Andrews, Steve
22 Andrews has.

23 Q Do you know what dealings he's had with
24 them?

25 A I really don't know. I mean he

1 NORTH - MEYER (DIRECT EXAMINATION)

2 mentioned it a couple of times but I don't know
3 what -- you know, what specifically they dealt
4 with.

5 Q When you say 'Steve Andrews' are you
6 talking about his firm or are you talking about
7 Mr. Lyle?

8 A Could have been both or either or both
9 or, you know.

10 Q Would you agree that the repair
11 authorizations that were issued by OCRM were
12 issued in the name of Chowan Creek Partners?

13 A Could be, very possibly. I don't -- I
14 really don't know. Possible.

15 Q Handing you what's been marked as
16 Exhibit 33.

17 Do you recognize those -- this document
18 as a variety of documents all relating to
19 maintenance and repair requests and
20 authorizations all in the name of Chowan Creek
21 Partners?

22 A Yeah, could be. Yeah, I recognize
23 this.

24 Q Okay. And is that because the permit
25 for the existing 2004 storm water system was

1 NORTH - MEYER (DIRECT EXAMINATION)

2 applied for and issued to Chowan Creek Partners?

3 A They could -- that could very well be,
4 yeah.

5 Q Okay. As a part of the Garfield Park
6 Phase 3 stormwater construction, did Chowan
7 Creek Partners be -- have to agree to repair and
8 maintain the stormwater system?

9 A I really don't know. Andrews
10 Engineering would have the -- I really don't
11 know.

12 Q Okay. Well, if the dike was to be
13 repaired, was it your understanding that that
14 would be an expense and responsibility of Chowan
15 Creek Partners?

16 A Well, yes, yeah. We took that -- I
17 mean we were not going to the property owners
18 association for that if that's what you mean.

19 Q Now, when you made application to
20 retrofit the system, did you then have that
21 application be made in the name of the property
22 owners association?

23 A Yes.

24 Q Why?

25 A Because the drainage system in the

1 NORTH - MEYER (DIRECT EXAMINATION)

2 roads were owned by the property owners
3 association.

4 Q Would you agree that by having the
5 homeowners association pay to change to a new
6 system Chowan Creek Partners saved itself the
7 expense or liability for repairing the dike in
8 the old system?

9 A We were not having the properties
10 owners pay for the retrofitting.

11 Q You aren't --

12 A No.

13 Q -- having the property owners pay for
14 it?

15 A No, we're not.

16 Q Even though the application's --

17 A Yes.

18 Q -- in the name of the property owners?

19 A Yes.

20 Q So, are you saying that Chowan Creek
21 Partners intends to pay for the cost of the
22 retrofit?

23 A Yes, that's absolutely true.

24 Q Does that include the costs of the
25 engineering services that relate to it?

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A Absolutely.

3 Q Okay. What expenses, if any, relating
4 to the Garfield Park Phase 3 storm sewer system
5 do you envision being put upon the property
6 owners association?

7 A I don't envision any with the retrofit
8 system, at all.

9 Q What about with any other aspects of
10 the POA as it relates to Garfield Park, are
11 there any expenses that you see coming down the
12 pike that would be --

13 A That the property owners will have to
14 pay for?

15 Q Yes.

16 A Not with -- not having anything to do
17 with the retrofit system, no, and I don't know
18 what else. I mean --

19 Q Anything related to Garfield Park?

20 A No.

21 Q Okay. Nothing related to the dike or
22 the lake?

23 A Well, the dike -- the dike or the lake,
24 no.

25 Q Okay.

1 NORTH - MEYER (DIRECT EXAMINATION)

2 A I mean they're --

3 Q I'm handing you what's been marked as
4 Exhibit 67.

5 Do you recognize that as a true and
6 correct copy of a in-depth communication from
7 Amanda Nodoff at OCRM to you on or about June 22
8 of 2010.

9 A I guess, yeah, I remember -- I mean I
10 remember getting this.

11 Q Is it fair to say that at least by
12 early June of 2010 the idea of installing inline
13 filters or removing the dike was being explored
14 by you with regard to Garfield Park Phase 3?

15 A Well, it says -- removing the -- well,
16 I don't think this really talks about that. It
17 says the -- talking about the dike. I guess it
18 would have to be some alternative but it doesn't
19 really say that --

20 Q At any point in time, do you remember
21 discussing, with your engineers or anybody else,
22 a type of stormwater treatment other than
23 detention from the original lake or inline
24 filters?

25 A Well yeah, we -- we talked about it,

1 NORTH - MEYER (DIRECT EXAMINATION)

2 yeah. That was going to be the alternative, I
3 don't --

4 Q What other methods, other than inline
5 filters were considered?

6 A I don't remember any.

7 Q Okay. You think that was the only
8 other alternative?

9 A I think that's the only -- that isn't
10 because we said that's -- you know, that's
11 because what other option did they have.

12 Q Okay.

13 A So.

14 MR. NORTH: I have no further
15 questions.

16 MS. SHAHID: I don't have any
17 questions.

18 MR. HABER: I have.

19 CROSS-EXAMINATION

20 BY MR. HABER:

21 Q Mr. Meyer, are you involved in any
22 other litigation in regard to this matter?

23 A Yes.

24 Q What's the scope of that litigation?

25 A Well, it's underway right now. I'm

1 HABER - MEYER (CROSS-EXAMINATION)
2 really kind of a little bit out of date on that.
3 Yeah, there's a civil.
4 Q Civil suit.
5 A Yeah with this thing but it's not with
6 the POA it's against the partnership and general
7 partner.
8 Q Who's a party to that action besides --
9 A Same -- the same plaintiffs that are
10 involved in the -- this.
11 Q In the matter?
12 A Administrative -- yeah.
13 Q Okay.
14 A And the defendants are Chowan Creek
15 Partners and Chowan Creek Development Corp.
16 Q And does that matter pertain to the --
17 A Same.
18 Q Okay.
19 A Things you were talking about, you
20 know, the damages and whatever..
21 Q Just for my clarity sake --
22 A Uh-huh.
23 Q -- Mr. North was speaking to you about
24 the ownership of the dike.
25 When you're referring to the state

1 HABER - MEYER (CROSS-EXAMINATION)

2 owning the dike, are you referring to the land
3 that was formerly impounded or are you referring
4 to the actual dike structure?

5 A Well, I'm referring to both.

6 Q Okay.

7 A Both, because that was part of the --
8 where the dike is is part of the impounded
9 marsh, too, not just the area behind it.

10 Q Okay. Clarity sake and I think this
11 has come up multiple times.

12 Are you aware -- initially when you
13 wished to repair the dike, you did not receive a
14 permit from the Department, is that correct?

15 A Well, no, we got a -- what they call a
16 maintenance and repair.

17 Q It's an authorization from the
18 Department?

19 A Right, right.

20 Q Would that be correct?

21 A Right. I think that came from Jerry
22 Mattlinger, from my --

23 Q For reference sake I'm going to read
24 you the definition as set forth in 30-5D which
25 is listed under exceptions to permits from the

1 HABER - MEYER (CROSS-EXAMINATION)
2 critical area regulations.
3 'Normal maintenance and repair applies
4 only to work on a structure which has been
5 previously permitted or is grandfathered or
6 exempted and is still generally intact and
7 functional in its present condition. The work
8 may only extend to the original dimensions of
9 the structure and any expansion, additions or
10 major rebuilding will require either a
11 Department permit or documentation to and
12 written approval from the Department.' Does
13 that sound familiar with the regulations you're
14 referring to?

15 A Well, that's a good question.

16 Q I'll refer you to Mr. North's
17 Exhibit 33.

18 There's a letter in here written from
19 Jerry Mattlinger to you on September 3, 2010
20 which has an excerpt of that regulation, a
21 definition.

22 A Well, I mean looking at this in -- the
23 normal maintenance and repair applies only to
24 work on a structure that's previously permitted,
25 well, it wasn't previously --

1 HABER - MEYER (CROSS-EXAMINATION)

2 Q Or grandfathered?

3 A Well, I don't know what grandfathered
4 is. I don't --

5 Q If it was there at the time before the
6 regulations came into play so it wouldn't have
7 needed a permit --

8 A Okay, so grandfathered, so it was
9 there.

10 Q It was previously existing?

11 A Yeah, okay, well, that would -- that
12 would apply here then.

13 Q Okay.

14 A Okay.

15 Q So what you were getting from the
16 Department is authorization or an acknowledgment
17 of a request to maintain and repair that dike,
18 is that correct?

19 A Correct, correct.

20 Q Okay. I'll refer you to Mr. North's
21 Exhibit 36.

22 I'll let you use your copy so I can
23 refer -- I think it's in that stack there. It's
24 labeled Number 36.

25 A 36?

1 HABER - MEYER (CROSS-EXAMINATION)

2 Q Yes. That's a proposal in contract
3 from a Duncan O'Quinn.

4 A Yeah.

5 Q Number 4 on there --

6 A Uh-huh.

7 Q -- is to place one hundred tons of
8 rip-rap to armor 12 to 15 feet along the north
9 side of the riser and armor south side, is that
10 correct?

11 A Yes, I see that cost \$10,000.

12 Q Where is the north side of this
13 property?

14 A North side would be on the -- let me
15 think. North side -- that doesn't seem the
16 right direction. Would be I'm assuming on the
17 outside, on the creek side.

18 Q On the creek side?

19 A Yes.

20 Q And was it discussed as to whether or
21 not a departmental permit would be required to
22 put that rip-rap out?

23 A That's a good question. I don't know.
24 I don't know.

25 Q In regards to the G Tract access that

1 HABER - MEYER (CROSS-EXAMINATION)

2 you and Mr. North were speaking of, are there
3 any wetlands on that site towards the -- I guess
4 more towards the golf course area?

5 A Well there are some but I mean we --
6 you know, yeah, there's some wet but we wouldn't
7 be going through wetlands to go to G.

8 Q To go through G to access the dike?

9 A No.

10 Q In Mr. North's hypothetical there was
11 construction trucks going through --
12 construction vehicles going through the G Tract
13 to get to the dike, is that correct?

14 A Oh yes, absolutely, there would be wet
15 -- down to get to the breach, down in front of
16 the dike, yes, exactly there would be. Would be
17 on both sides, the other access, too, would also
18 be wetland.

19 Q Okay. Mr. North's Exhibit 1 was a
20 Board packet.

21 On the front package of that could you
22 tell me when this document was prepared? I
23 think it says --

24 A You mean August 9th 2012.

25 Q So if it was -- if that was the date of

1 HABER - MEYER (CROSS-EXAMINATION)

2 the review conference, would it be safe to
3 assume this document was prepared prior to that
4 date?

5 A Yeah, this was presented at the appeal,
6 wasn't it?

7 Q Refer to page 26 and also page 30 is
8 the pictures you were discussing.

9 A Right.

10 Q Would this be an accurate illustration
11 of what this looks like, today?

12 A No, not at all.

13 Q And page 30?

14 A It's hard to figure out where these
15 were taken from what we're looking at here, but
16 yeah, I mean that's the section though.

17 Q Would you say if I took a close picture
18 of a beach and didn't put any water on it it
19 might not look as pretty --

20 A Yeah, that's right, that's right.

21 Q Did the dike, when it was, intact, was
22 it a constant height? Was it a constant
23 elevation? The dike, itself, the structure?

24 A Yes, I mean it -- it had a flashboard
25 riser on the inside.

1 HABER - MEYER (CROSS-EXAMINATION)

2 Q Uh-huh.

3 A Which would inhibit flow coming out of
4 the impounded area but there was an open pipe so
5 the tidal water would come in twice a day at
6 high tide or even 2/3rds tide.

7 Q And the earthen structure around that
8 constant elevation?

9 A Right, right, the earthen structure was
10 constant elevated, right.

11 Q Then there's a lot of discussions
12 between you and the homeowners regarding fixing
13 the dike and development of Tract G and whether
14 you would be better off in these different
15 situations.

16 At the end of the day, what did you
17 apply for with the Department?

18 A You mean after the -- we tried, once to
19 be -- with the deal with the filters and, you
20 know, to put the -- solve the water problem by
21 putting filters in the catch basins.

22 Q Okay.

23 A That's what we applied for.

24 MR. HABER: No further questions.

25 MR. NORTH: No further questions.

1 HABER - MEYER (CROSS-EXAMINATION)

2 (Whereupon, the deposition of

3 Gary Meyer was concluded at

4 approximately 3:55 p.m.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2 CERTIFICATE
3

4 STATE OF GEORGIA:

5 CHATHAM COUNTY:
6

7 I, Kyle J. Saniga, Court Reporter and
8 Notary Public in and for the above county and
9 state, do hereby certify that the foregoing
10 testimony was taken before me at the time and
11 place herein-before set forth; that the witness
12 was by me first duly sworn to testify to the
13 truth, the whole truth, and nothing but the
14 truth, that thereupon the foregoing testimony
15 was later reduced by computer transcription; and
16 I certify that this is a true and correct
17 transcript of my stenographic notes so taken.

18 I further certify that I am not of
19 counsel to either party, nor interested in the
20 event of this cause.
21

22
23 _____
24 Kyle J. Saniga, CCR

25 Notary Public, B-2038

Savannah, Georgia

二

Uniform Residential Appraisal Report

File # 221A136

There are 10 comparable properties in the subject neighborhood ranging in price from \$ 3,200,000.00 to \$ 3,200,000.00
There are 10 comparable sales in the subject neighborhood within the past twelve months ranging in sale price from \$ 389,000.00 to \$ 930,000.00

FEATURE		SUBJECT		COMPARABLE SALE # 1		COMPARABLE SALE # 2		COMPARABLE SALE # 3	
Address		7 Sheridan Road		7 Claires Point		62 Woodland Ridge Circle		16 Long Pond Drive	
City/Town/County		Cat Island/Beaufort, SC		Distant Island/Beaufort, SC		Coosaw Point/Beaufort, SC		Coosaw Point/Beaufort, SC	
Proximity to Subject				1.5 miles north		8.5 miles north		8.5 miles north	
Sale Price		\$ N/A		\$ 865,000		\$ 847,075		\$ 791,940	
Sale Price/Gross Liv. Area		\$ 164 sq. ft.		\$ 319 sq. ft.		\$ 256 sq. ft.		\$ 247 sq. ft.	
Data Source(s)				MLS/Public Records		MLS/Public Records		MLS/Public Records	
Verification Source(s)									
VALUE ADJUSTMENTS		DESCRIPTION		DESCRIPTION		DESCRIPTION		DESCRIPTION	
Sales Financing		Conventional		Conventional		Conventional		Cash	
Conventions									
Date of Sale/Time		03/10/2006		07/28/2006		03/17/2006			
Location		Suburban		Suburban		Suburban		Suburban	
Usual/Unusual Fee Simple		Fee Simple		Fee Simple		Fee Simple		Fee Simple	
Site		0.36 +/- Acres		0.50 +/- Est		0.72 +/- Acres		0.77 +/- Acres	
View		Lagoon		Marsh/Sim		Interior/15%		Interior/15%	
Design (Style)		Traditional		Traditional		Traditional		Traditional	
Quality of Construction		VGood		Stip/\$20 psf		Stip/\$20 psf		VGood	
Actual Age		New		New		New		New	
Condition		New		New		New		New	
Above Grade		Total Bdrms. Baths		Total Bdrms. Baths		Total Bdrms. Baths		Total Bdrms. Baths	
Porch/Court		9 4 3/2		8 3 2/2		10 4 3/1		9 4 3/1	
Gross Living Area		3,192 sq. ft.		2,714 sq. ft.		3,313 sq. ft.		3,201 sq. ft.	
Basement(s) & Finished		None Noted		None Noted		None Noted		None Noted	
Basement(s) & Unfinished		None Noted		None Noted		None Noted		None Noted	
Functional Utility		Good		Good		Good		Good	
Heating/Cooling		ZoneCentral		ZoneCentral		ZoneCentral		ZoneCentral	
Exterior Elements		InsWindws		InsWindws		InsWindws		InsWindws	
Garage/Capacity		2 Car/701 SF		2 Car/Similar		2 Car/Similar		2 Car/Similar	
Pool/Hot Tub/Deck		688 SF CPCh		CvdPch/Sup.		CvdPch/Sim.		CvdPch/Sim.	
Fireplaces		1 Fireplace		None		1 Fireplace		1 Fireplace	
Bn/Cty DM/PW		200-21A-136		200 018A-233		200-6-557		200-6-485	
Landscape/Irrigation		Good/Yes		Good/Yes		Good/Yes		Good/Yes	
Net Adjustment (Total)				Net Adj. -3.1%		Net Adj. -2.2%		Net Adj. 4.8%	
Adjusted Sale Price				Gross Adj. 12.8%		Gross Adj. 32.6%		Gross Adj. 25.7%	
Final Price				\$ 838,010		\$ 828,601		\$ 829,856	

☒ I did not research the sale or transfer history of the subject property and comparable sales. If not, explain:

☒ I did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this report.

Date Searched: Beaufort County Public Records - Beaufort Multiple Listing Service

☒ I did not reveal any prior sales or transfers of the comparable sales for the past year to the date of sale of the comparable sale.

Date Searched: Beaufort County Public Records - Beaufort Multiple Listing Service

Report the results of the research and analysis of the prior sale or transfer history of the subject property and comparable sales (see 8050000 prior sales on page 3)

DATE OF SALE/TRANSFER	SUBJECT	COMPARABLE SALE # 1	COMPARABLE SALE # 2	COMPARABLE SALE # 3
Date of Prior Sale/Transfer	No Sale/Transfer	No Sale	No Sale	No Sale
Period of Prior Sale/Transfer	Prior (3) Three Years	Prior Year	Prior Year	Prior Year
Date Searched	Bn/Cty Public Records	Bn/Cty Public Records	Bn/Cty Public Records	Bn/Cty Public Records
Effective Date of Data Searched	08/11/2006	08/11/2006	08/11/2006	08/11/2006

Analysis of prior sale or transfer history of the subject property and comparable sales: A search of Beaufort County Public Records reveals no sale/transfer of the subject site within the past (3) three years. A search of Beaufort County Public Records reveals no sale of any comparable within the prior year.

Summary of Sales Comparison Approach: All comparables utilized are the most appropriate sales discovered and are considered to be the best available indicators of value. It is the appraiser's opinion that the Direct Sales Comparison Approach is the most reliable indication of value for the subject property. The Cost Approach is supportive, however, is allocated less consideration. The Income Approach is unreliable as typically residences similar to the subject are not purchased for income or revenue producing purposes. The adjusted sales price of the comparables range from \$845,303 to \$828,601, therefore it is reasonable to assume an estimated opinion of market value of \$836,000 for the subject property. This estimated opinion of market value for the subject is supported by the (4) four comparables utilized within this report.

Valuation by Sales Comparison Approach: \$836,000

Valuation by Cost Approach: \$836,000

Valuation by Income Approach: N/A

Emphasis is allocated to the Market Data Analysis as it best reflects the typical market action between buyers and sellers. The Cost Approach is supportive. The Income Approach is unreliable for the reason(s) stated above. This appraisal is presented "Subject to Completion of Plans and Specifications."

The appraiser is aware that the subject property is located in a flood zone and is subject to flood damage. The appraiser has not been instructed to inspect the property for flood damage. The appraiser is not a licensed engineer and is not qualified to inspect the property for flood damage. The appraiser is not a licensed engineer and is not qualified to inspect the property for flood damage.

Based on a complete visual inspection of the property and vicinity thereof, the subject property, defined herein as land, buildings, improvements, and fixtures, is in good condition and is well maintained. The appraiser is not a licensed engineer and is not qualified to inspect the property for structural damage. The appraiser is not a licensed engineer and is not qualified to inspect the property for structural damage.

Final Price: \$836,000

Date: 08/11/2006

Appraiser: [Signature]

EXHIBIT

F

Uniform Residential Appraisal Report

10904554

File No. 7103383472

There are 20 comparable properties currently offered for sale in the subject neighborhood ranging in price from \$ 379,000 to \$ 1,500,000

There are 5 comparable sales in the subject neighborhood within the next twelve months ranging in sale price from \$ 285,000 to \$ 429,000

FEATURE	SUBJECT	COMPARABLE SALE NO. 1	COMPARABLE SALE NO. 2	COMPARABLE SALE NO. 3
Address	7 SHERIDAN ROAD BEAUFORT, SC 29907	31 TIMBER TRAIL BEAUFORT, SC 29907	12 S EASTOVER BEAUFORT, SC 29906	62 WOODLAND RIDGE CIR BEAUFORT, SC 29907
Proximity to Subject		0.50 MILES WNW	8.23 MILES WNW	8.82 MILES N
Sale Price	\$ N/A	\$ 429,000	\$ 525,000	\$ 543,150
Sale Price/Gross Ltr. Area	\$ 0.00 sq. ft.	\$ 143.00 sq. ft.	\$ 186.17 sq. ft.	\$ 156.66 sq. ft.
Data Source(s)	OBSERVATION	MLS #122703	MLS #108236	MLS #118624
Verification Source(s)	TAX RECORDS	R200 021 00A 0306	R100 027 000 0452	R200 006 000 0556
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	DESCRIPTION	DESCRIPTION
Sale of Financing	N/A	CONVENTIONAL	CONVENTIONAL	CONVENTIONAL
Concessions	N/A	TYPICAL	TYPICAL	TYPICAL
Date of Sale/Time	N/A	05/10/2010	07/17/2010	10/06/2010
Location	CAT ISLAND	CAT ISLAND	HABERSHAM	COOSAW POINT
Leasehold/Ten Simple	FEE SIMPLE	FEE SIMPLE	FEE SIMPLE	FEE SIMPLE
Sale	0.36 ACRES	0.43 ACRES	0.15 ACRES	0.72 ACRES +/-
View	LAGOON	WOODED	COMM PARK	WOODED
Design (Style)	1.5-STORY	1.5-STORY	2-STORY	2-STORY
Quality of Construction	GOOD	GOOD	GOOD	GOOD
Actual Age	3	4	4	2
Condition	GOOD	GOOD	GOOD	GOOD
Above Grade	Total Rooms: 7, Baths: 4, 4.5	Total Rooms: 7, Baths: 4, 4	Total Rooms: 7, Baths: 4, 3.5	Total Rooms: 10, Baths: 4, 3.5
Room Count	7, 4, 4.5	7, 4, 4	7, 4, 3.5	10, 4, 3.5
Gross Living Area \$0.00	3,287 sq. ft.	3,000 sq. ft.	2,820 sq. ft.	3,467 sq. ft.
Basement & Finished	N/A	N/A	N/A	N/A
Rooms Below Grade	N/A	N/A	N/A	N/A
Functional Utility	AVERAGE	AVERAGE	AVERAGE	AVERAGE
Heating/Cooling	CENT./CENT.	CENT./CENT.	CENT./CENT.	CENT./CENT.
Energy Efficient Items	INS. WINDS.	INS. WINDS.	INS. WINDS.	INS. WINDS.
Garage/Carport	2-CAR GARAGE	2-CAR GARAGE	NONE NOTED	2-CAR GARAGE
Porch/Patio/Deck	2 C PCHLS PCH	2 C PCHLS PCH	3 COVERED	COVERED PCH
FIREPLACE	FIREPLACE	FIREPLACE	FIREPLACE	FIREPLACE
EXTRAS	NONE NOTED	FENCE	NONE NOTED	NONE NOTED
DAYS ON MARKET	N/A	87	1404	501
Net Adjustment (Total)	\$ 2,117	\$ 106,125	\$ 46,798	\$ 47,000
Adjusted Sale Price		Net Adj. 24.7%	Net Adj. 8.9%	Net Adj. 8.7%
Comparable		Gross Adj. 30.7%	Gross Adj. 11.4%	Gross Adj. 12.1%

I (we) did not research the sale or transfer history of the subject property and comparable sales. If not, explain

My research did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this appraisal.

Data Source(s): TAX RECORDS RECORDED IN THE RMC OFFICE OF BEAUFORT COUNTY

My research did not reveal any prior sales or transfers of the comparable sales for the year prior to the date of sale of the comparable sales.

Data Source(s): TAX RECORDS RECORDED IN THE RMC OFFICE OF BEAUFORT COUNTY

Report the results of the research and analysis of the prior sale or transfer history of the subject property and comparable sales (report additional prior sales on page 3).

DATE	ITEM	SUBJECT	COMPARABLE SALE NO. 1	COMPARABLE SALE NO. 2	COMPARABLE SALE NO. 3
	Date of Prior Sale/Transfer	THERE WAS NO SALE	THERE WAS NO SALE	THERE WAS NO SALE	THERE WAS NO SALE
	Date of Prior Sale/Transfer	IN THE PREVIOUS 3 YEARS	IN THE PREVIOUS YEAR	IN THE PREVIOUS YEAR	IN THE PREVIOUS YEAR
	Date Source(s)	TAX RECORDS	TAX RECORDS	TAX RECORDS	TAX RECORDS
	Effective Date of Data Source(s)	11/06/2010	11/06/2010	11/06/2010	11/06/2010

Analysis of prior sale or transfer history of the subject property and comparable sales: THE PRIOR SALES HISTORY OF THE SUBJECT WAS CONFIRMED THROUGH BOTH THE COUNTY RECORDS AND THE MLS. ALL SALES PROVIDED HAVE BEEN VERIFIED AS CLOSED SALES WITHIN THE PAST YEAR AND IF ANY OF THESE SALES HAVE RESOLD / TRANSFERRED WITHIN ONE YEAR PRIOR TO THE EFFECTIVE DATE OF APPRAISAL THEN THIS INFORMATION HAS BEEN PROVIDED ABOVE.

Selection of Sales Comparison Approach: AFTER ANALYZING ALL OF THE DATA AVAILABLE & WEIGHING THE COMPS CHOSEN, MY OPINION OF VALUE WAS BASED ON PER SQUARE FOOT WAS USED FOR DIFFERENCES IN GROSS LIVING AREA & \$2,000 PER YEAR FOR ACTUAL AGE. SEE ATTACHED APPENDIX FOR FURTHER EXPLANATION OF ADJUSTMENTS.

Estimated Value by Sales Comparison Approach: \$ 379,000

Estimated Value by Cost Approach: \$ 379,000

Estimated Value by Income Approach: \$ 379,000

Final Appraised Value: \$ 379,000

Effective Date of Appraisal: 11/06/2010

Appraiser: [Signature]

Broker: [Signature]

Supervisor: [Signature]

Client: [Signature]

Property: [Signature]

Address: [Signature]

City: [Signature]

State: [Signature]

Zip: [Signature]



**Jon Guerry Taylor
& Associates, Inc.**

ENGINEERS - PLANNERS - ENVIRONMENTAL CONSULTANTS

P.O. BOX 1082; MOUNT PLEASANT, SC 29465 USA
PHONE: 843.884.6415
FAX: 843.884.4026
www.jgtinc.com

November 14, 2011

SCDHEC-OCRM
Attn: Richard Geer
1362 McMillan Ave., Suite 100
Charleston, SC 29405

RECEIVED

NOV 15 2011

**DHEC-OCRM
CHARLESTON OFFICE**

Re: Chowan Creek Partners Cat Island Detention-Basin Restoration

Dear Mr. Geer:

The homeowners along the Rookery on Cat Island have enlisted the help of Jon Guerry Taylor & Associates, Inc. (JGT, Inc.) to look into the failure of the dike at the lake that served as a detention basin on Cat Island and the need to restore the basin to its condition prior to the dike failure. We were also asked to review the proposed retro-fit, in-line filter treatment measures and determine if they are an acceptable alternative to restoring the detention basin.

A meeting was held on Thursday October 13, 2011 to discuss our concern with the dike failure at the Cat Island detention basin. In attendance were Chris Moore, P.E. and Megan Burns B.I.T of JGT, Inc., Richard Geer and Shannon Hicks of OCRM, John North, Jr., attorney for Cat Island homeowners, and several other homeowners along the Rookery on Cat Island. As a result of this meeting, OCRM has requested that we put together a detailed report outlining our review supporting why the detention basin must be restored to its condition prior to the dike failure. The following is an itemized list of our findings.

1. Original stormwater calculations performed by Andrews Engineering Co., Inc. dated April 5, 2004 for the Garfield Park Subdivision on Cat Island show an increase in flow from pre-development conditions to post-development conditions of 6 cubic feet per second (cfs). In the more recent stormwater calculations performed by Andrews and Burgess Engineering & Surveying, Inc. dated June 10, 2011 for the same development, the report shows no increase in flow from pre-development to post-development. We have performed an extensive review of both sets of stormwater calculations, and we cannot find where this discrepancy originates. Our only idea as to where this difference may be occurring lies in the fact that some calculation input data for the 2010 report is omitted from the calculations. Our concern is that the values used for these calculations are inconsistent. If the same input values had been used in both sets of calculations, the increase of 6 cfs should be shown in both sets of calculations. The values for the two sets of calculations should be identical if the

MB-2600.doc



DHEC000221

same input data was used. Additionally, there is no rational reason why the post-development stormwater runoff values for a development of the nature of Garfield Park would be less than the pre-development stormwater runoff values when there is a significant increase in impervious surface areas.

2. Tabby Park Subdivision (developed 1999) has two stormwater collection systems. Please see attached Exhibit A, Grading and Drainage Plan for Tabby Park Subdivision, developed 1999. Exhibit A1 shows the first stormwater drainage collection system. The entire system either flows into an existing basin (Lagoon #1) or a detention basin that was designed for the Tabby Park development (Lagoon #2).

Exhibit A2 shows the drainage system (SD-1 through SD-11) that flows into two interconnected golf course ponds on the eastern end of Tabby Park Subdivision. This drainage system collects the stormwater along the roadway and home sites and deposits it directly into the aforementioned golf course ponds. These ponds are constantly being filled by underground wells, so the golf course can use them for irrigation. These ponds have no outfall device, and were never intended to be used for stormwater detention or treatment. All water from this drainage system is deposited into these golf course ponds and then travels through a 10" PVC pipe under the 18th fairway and is deposited directly into the Cat Island detention basin. As a result, there is a constant flow of water, even during times of drought, due to the fact that the ponds are constantly being fed by well water. Please refer to Exhibit B for photos of the pipes flowing from the golf course ponds to the detention basin. Photos 1 and 3 show the 10" PVC pipe discharging from the golf course ponds into the Cat Island detention basin. Please note that these pipes maintain a constant flow. Photos 2 and 4 show the pipes that connect the two golf course ponds. As you can see, there is no outfall device; in fact, the pipes are constantly under water in one of the ponds.

In the stormwater calculations performed by EMC Engineering Services, Inc. for the Tabby Park Subdivision, dated March 3, 1999, it is clear that the golf course pond was not to be used to treat the stormwater from SD-1 through SD-11, as no pond sizing or calculations were ever done. The only calculations performed were for the stormwater collection system shown in A1. Please see Exhibit C, stormwater calculations for Tabby Park, to support these findings. This leads to the conclusion that any stormwater calculations done for the Cat Island detention basin must also include the portion of Tabby Park Subdivision shown in Exhibit A1, as it is clearly depending on the Cat Island detention basin for treatment of the stormwater. Additionally, the stormwater flowing from the golf course pond to the Cat Island detention basin has not been detained for 24 hours, nor has it been treated by other means, both of which are required by state regulations and Beaufort County Ordinances. For these reasons, either the Cat Island detention basin must be repaired to its previous condition so as to allow for the treatment of stormwater prior to discharging into Chowan Creek, or Tabby Park Subdivision must implement a system to provide the required detention and treatment of the stormwater.

3. The plans for the original Garfield Park Subdivision show the "existing outfall structure" of the failed dike as a part of the stormwater system. Rather than repair this component of the existing approved stormwater system, the developer (Chowan Creek Partners) proposes to change the manner of treatment and to rely solely on in-line filters for water treatment. The in-line filter retro-fit system being proposed for the Garfield Park Subdivision presents a variety of problems. First, the proposal does not include a maintenance plan. Specifications for the proposed in-line filters are attached to the stormwater calculations performed by Andrews and Burgess Engineering and Surveying, Inc. dated June 10, 2011. The specifications state that the in-line filters will need to be cleaned out a minimum of four times per year, plus after any and all qualifying rain events. On Cat Island, a qualifying rain event can easily occur on a weekly basis during certain times of the year. Someone will need to monitor the site regularly to determine when these qualifying rain events occur. If the developer plans to monitor rainfall and maintain the in-line filters, they must provide a maintenance plan outlining how they plan to provide for the monitoring and treatment. If the developer plans for Beaufort County, SC to take on the responsibility of rainfall monitoring and maintenance of the in-line filters, Beaufort County must approve the system and maintenance plan prior to OCRM approval.

Additionally, the specifications for the proposed in-line filters state that the filters have a life span of approximately 10-15 years. The maintenance plan provided by the developer must address the process of replacing the filters every 10 years (or possibly sooner, as the filters only have a five year warranty) so they remain in proper working condition. The replacement of the filters every 10 years will lead to a high cost to the developer compared to repairing the dike at the Cat Island detention basin. Our concern is that these in-line filters will be put in place, but will not be properly maintained, making them an unacceptable alternative to repairing the dike at the Cat Island detention basin.

4. The in-line filter retro-fit system proposal poorly addresses the water quality issue, and it does not at all address the issue that there is a 6 cfs increase from pre-development to post-development. Both state regulations and Beaufort County ordinances require that the stormwater system must not just treat the first 1.5" of runoff, but that it must also store the first 1.5" of runoff and allow for release over the next 24 hours. Additionally, OCRM requirements state that "for all projects, regardless of size, which are located within one-half (1/2) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first 1/2 inch of runoff from the entire site or storage of the first one (1) inch of runoff from the built-upon portion of the property, whichever is greater." See Exhibit D, Section 15, "Permanent Water Quality Requirements" for these requirements. The developer, Chowan Creek Partners, has applied for a detention waiver for this project; however, according to OCRM's requirements, a detention waiver may not be granted in this case. Also shown in Exhibit D, Section 14, Detention Waiver, "if the 2- and 10-year, 24-hour post-developed flow rates exceed the pre-developed rates, waivers from detention may be granted in accordance with regulation 72-302(B) on a case by case basis. Justification and a written request, including the following statement, 'the increased

flows will not have a significant adverse impact on the downstream/adjacent properties". In this case, granting a detention waiver will have an extremely adverse impact on the adjacent properties. Granting a detention waiver would allow erosion to occur at the adjacent property sites, as well as decrease the value of these properties. Also, a detention waiver may only be granted in the case of the 2- and 10-year storms. This does not address the fact that the original stormwater calculations dated April 5, 2004 show an increase in stormwater flow from pre-development to post-development for 2-, 10-, and 25-year, 24-hour storm event. A detention waiver may not be granted for the 25-year, 24-hour storm event. For these reasons, a detention waiver is unacceptable.

Additionally, there has been concern on the part of the Cat Island homeowners that during a qualifying rain event, one or more of the in-line filters may become clogged. Their concern is that this would cause a water backup which would proceed to flood their roadways and/or properties. With some research, it was determined that during a qualifying rain event, if the in-line filter became clogged, water would not back-up and flood the roadways/properties because the filters are designed to allow water and debris to flow past the filter in this case. This addresses the flooding concern; however, it further demonstrates why the proposed in-line filter system is an unacceptable alternative to repairing the dike at the Cat Island detention basin. If water and debris pass over the filter, there is zero treatment of the stormwater. Approving a filtration system that is designed to allow storm event waters to bypass the filter is not an appropriate substitute for the proper detention and treatment of stormwater. Without the repair of the dike at the Cat Island detention basin, all of the pollutants will be directly diverted to Chowan Creek without any type of treatment.

5. OCRM Policy and Procedures specify that a water quality facility without a permanent pool of water is "not applicable" within 1,000 feet of shellfish beds when golf courses are adjacent to receiving water bodies. As described in line item #2, water from the Tabby Park Subdivision and the adjacent golf course, is flowing into the Cat Island detention basin without any prior treatment via a 10" PVC pipe. According to Exhibit B (Policies and Procedures of the South Carolina Coastal Management Program), Section XIII D (Golf Courses Adjacent to Receiving Water Bodies), "All projects which are within 1000 feet of shellfish beds must retain the first 1 1/2 inches of runoff as otherwise described in Section XIII C above." These requirements cannot be met without restoring the permanent detention basin to its previous condition, and there is no option under these policies for a waiver of this detention. Shellfish beds are immediately adjacent to the affected area; therefore, the in-line filter retro-fit system proposed for Garfield Park Subdivision is an unacceptable maintenance alternative to the previously existing detention basin. More areas than Garfield Park Subdivision are currently relying on the Cat Island detention basin for stormwater treatment, as previously outlined. Currently, all stormwater flowing into the location of the Cat Island detention basin is flowing over and contaminating the shellfish beds. Please see Exhibit F for pictures of the contaminated shellfish beds. Photos 1-4 show the stormwater flowing over the muddy flats collecting sediment, and then flowing over the shellfish beds. Allowing

the golf course pollutants and untreated stormwater to flush to the shellfish beds causes innumerable negative consequences.

6. There are multiple areas of freshwater wetlands surrounding the lake that are now being flushed daily with tidal waters. One of these is an area of protected freshwater wetlands immediately adjacent to the affected area in the Garfield Park subdivision. This area of wetlands is shown on Sheet 1 of the plans prepared by Andrews Engineering Co., Inc. for Garfield Park, Phase 3 with a revision date of July 14, 2004. Not only is this area of wetlands protected, but they are governed by a permanent Dedication of Restrictive Covenants for Wetlands Preservation. These Covenants provide that the developer is prohibited from "altering the natural state" of the wetland areas or "reducing the reach of the waters". If the developer is allowed to change the manner of treating stormwater from using the lake as the detention basin to using in-line filters, the result will be the alteration of the natural state of the freshwater wetlands. Due to the failure of the dike at the Cat Island detention basin, these wetlands are currently being encroached upon by the saltwater tide. The residents report, that due to this encroachment, at least 42 trees have died. Please refer to Exhibit G for photos of this area. Photos 1-8 show the saltwater tide encroaching on the freshwater wetlands in several different areas. The wetlands are being destroyed more and more with each tide cycle. Photos 9-12 show several of the trees that have been killed due to the saltwater tide entering the wetlands. If this situation is allowed to continue, this protected freshwater wetland will turn into a saltwater marsh. In order to get these wetlands back to their protected status, the dike at the Cat Island detention basin must be repaired.
7. The failure of the dike at the Cat Island detention basin is currently affecting the critical area. Exhibit H outlines the general guidelines for all critical areas. These guidelines state "in assessing the potential impacts of projects in critical areas, the Department will be guided by the policy statements in Sections 48-39-20 and 48-39-30 and following the ten considerations in Section 48-39-150." Some of these considerations are "the extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historical and archeological sites of South Carolina's coastal zone", "the extent to which the proposed use could affect the value and enjoyment of adjacent owners", "the extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs, clams, or any marine life or wildlife, or other natural resources in a particular area, including but not limited to water and oxygen supply", and "the extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water". All of these considerations are being violated in this case. The only solution is to repair the dike at the Cat Island detention basin. Implementing the proposed in-line filters will not adequately solve these issues.
8. At the time of the dike failure at the Cat Island detention basin, the Rookery homeowners sought to pay a contractor to repair the dike. Since the developer (Chowan Creek Partners) owns the property where the Cat Island detention basin is located, they approached the developer about their planned repair. They asked the

developer to allow their contractor access to the upland portion of the detention basin so that they could properly repair the dike. Chowan Creek Partners denied access to the upland portion of the detention basin, so the contractor hired by the homeowners was forced to access the site from the river side of the dike. Due to the forced limited access to the failure site by Chowan Creek Partners, the proper repair was unable to be completed. Shortly after the repair, the dike failed a second time. Since this second failure, the developer has still made no effort to repair the dike.

9. State regulations require an attenuation of peak flows for a 10-year storm event. In addition, the requirements of Reg. 72-305(A) and (I), as well as Reg. 72-307(H) and (I) must be met. The enclosed photos of the significant erosion of the lakebed and the crumbling dike preclude any credible certifications required by these regulations. Rather than drain directly into the lake, stormwater is now flowing from both Tabby Park and Garfield Park across the mud of the lakebed, cutting crevasses into the mud, and depositing the resulting sediment into the waters of the State. The photos showing the severe angle of the dike opening and the falling portions of the dike negate any suggestion that the dike has stabilized. The dike at the Cat Island detention basin has been in place and functioning since the 1920s. Allowing the ocean waves to enter the lakebed will result in unpredictable erosion issues in an area that has been developed with houses as close as 8 feet from the water's edge. The pending permit request contains no method for adequately addressing erosion, sediment, or the attenuation of peak flows. The restoration of the dike and its previously approved outfall device will address these issues.
10. Without the repair of the dike, the wood storks and other birds that resulted in naming the first Subdivision "The Rookery" will be gone. The developer installed the outfall device in the mid-1980s and then platted waterfront home sites based on the established level of the lake. Allowing the developer to change the manner of treating storm water and substituting a muddy lakebed for an attractive lake will have obvious negative impacts to the adjacent property owners and the values of their properties. Under Section 48-39-150, these adverse impacts should preclude approval of any change in the manner of treating the stormwater of these developments.
11. A requirement of OCRM for the development of a stormwater system is that OCRM must have a "signed agreement from the responsible party accepting ownership and maintenance of the structure". (See Exhibit D, Section 12, Permanent Stormwater Management Structure Maintenance for this requirement.) Although we do not have this agreement in our possession, it must exist since the detention basin was approved for the treatment of stormwater. So far, the developer has done nothing to uphold the agreement to maintain this structure. We see that the only acceptable solution to the current problem is for Chowan Creek Partners to make the necessary repairs in accordance with OCRM regulations in order to properly maintain this stormwater system.

Jon Guerry Taylor & Associates, Inc.

We have compiled this list on behalf of the homeowners along the Rookery on Cat Island and for SCDHEC-OCRM. Please review these comments as well as the attached exhibits and provide us with responses. Please feel free to contact me if you have any questions or require additional information. Thank you for your assistance with this important project.

Sincerely,

JON GUERRY TYALOR & ASSOCIATES, INC.



Christopher Moore, P.E.
President and Principal Engineer

Enclosure

Cc: John North, Attorney for Cat Island Homeowners

RECEIVED

NOV 15 2011

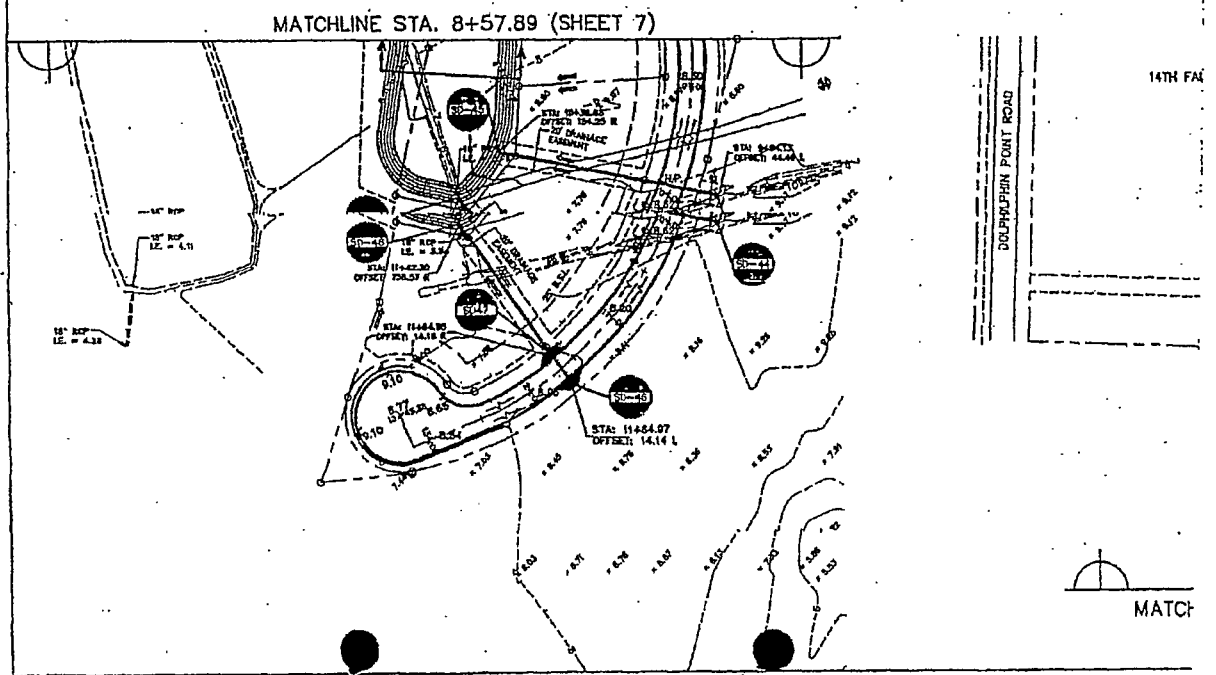
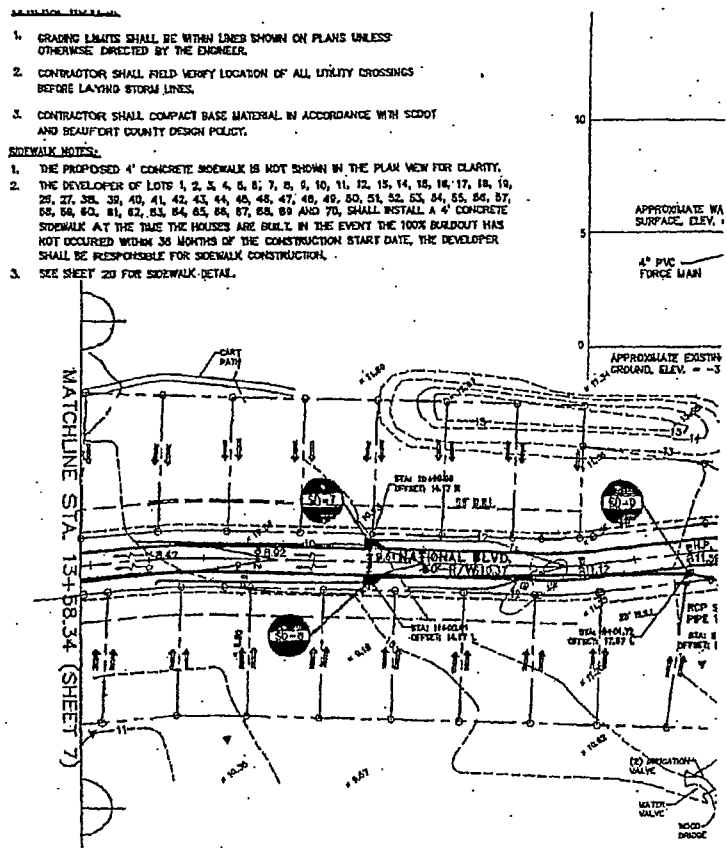
DHEC-OCRM
CHARLESTON OFFICE

ME-2011

DHEC000227

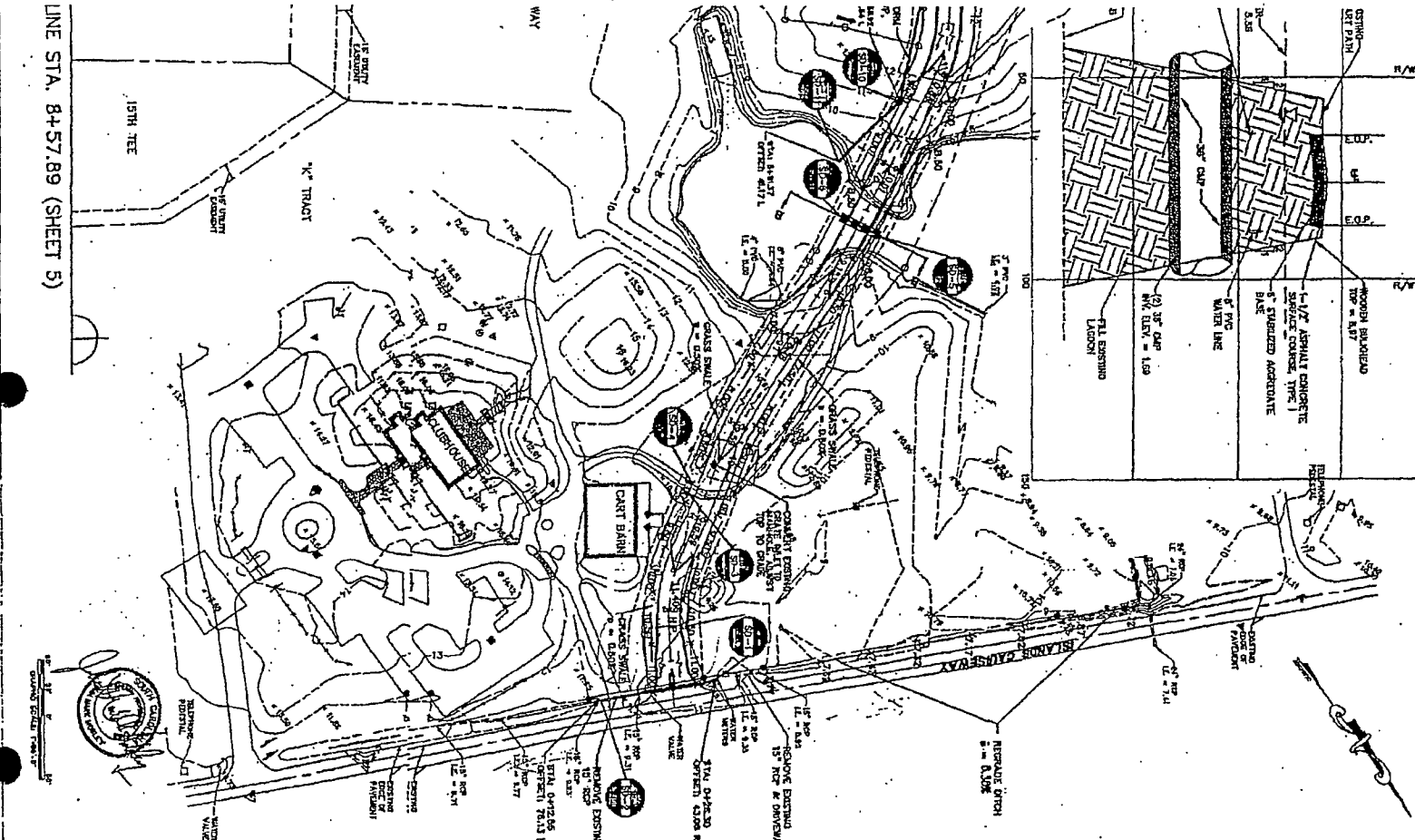
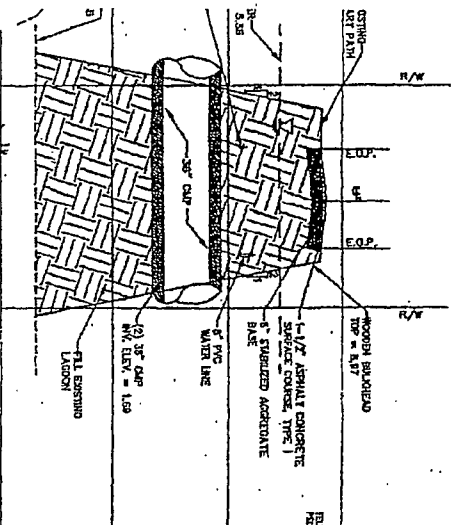
ATTACHMENTS

NO.	STRUCTURE TYPE	FRIDGE	INVERT IN	OUT	RCP LENGTH	RCP SIZE	PIPE MATERIAL	PIPE SIZE	PIPE SLOPE
SD-1	P.E.	-	-	7.77	10	18	RCP	18	0.25
SD-2	P.E.	-	-	8.23	10	18	RCP	18	0.25
SD-3	P.E.	-	-	8.94	8	18	RCP	18	0.20
SD-4	P.E.	-	-	8.31	8	18	RCP	18	0.20
SD-5	INLET	-	-	1.29	2	18	RCP	18	0.20
SD-6	OUTFALL	-	-	1.89	2	18	RCP	18	0.20
SD-7	CURB INLET	8.40	-	8.00	22	18	RCP	18	0.25
SD-8	CURB INLET	8.80	-	8.93	22	18	RCP	18	0.25
SD-9	STLM MANHOLE	11.19	-	8.13	120	18	RCP	18	0.25
SD-10	STLM MANHOLE	10.22	7.404	4.06	72	18	RCP	18	0.25
SD-11	OUTFALL	-	-	4.88	22	18	RCP	18	0.25
SD-12	CURB INLET	8.11	-	8.43	22	18	RCP	18	0.25
SD-13	CURB INLET	8.11	4.26	4.36	124	18	RCP	18	0.25
SD-14	STLM MANHOLE	8.37	4.08	6.00	142	18	RCP	18	0.25
SD-15	CURB INLET	8.37	3.38	3.86	83	18	RCP	18	0.25
SD-16	CURB INLET	8.13	3.25	3.30	83	18	RCP	18	0.25
SD-17	CURB INLET	8.34	-	3.84	83	18	RCP	18	0.25
SD-18	CURB INLET	8.13	3.59	3.58	108	18	RCP	18	0.25
SD-19	CURB INLET	11.14	2.81	2.81	24	18	RCP	18	0.25
SD-20	CURB INLET	10.44	2.78	2.78	127	18	RCP	18	0.25
SD-21	CURB INLET	8.88	2.46	2.46	22	18	RCP	18	0.25
SD-22	CURB INLET	8.68	2.88	2.88	132	18	RCP	18	0.25
SD-23	CURB INLET	8.18	2.65	2.68	38	18	RCP	18	0.25
SD-24	CURB INLET	8.48	1.88	1.97	142	18	RCP	18	0.25
SD-25	CURB INLET	7.54	1.44	1.44	22	18	RCP	18	0.25
SD-26	CURB INLET	7.36	1.55	1.58	140	18	RCP	18	0.25
SD-27	CURB INLET	7.40	1.25	1.25	207	18	RCP	18	0.25
SD-28	OUTFALL	-	-	0.64	22	18	RCP	18	0.25
SD-29	CRATE INLET	8.35	-	4.88	128	18	RCP	18	0.25
SD-30	STLM MANHOLE	10.19	4.98	4.36	248	18	RCP	18	0.25
SD-31	CURB INLET	8.61	5.94	3.06	24	18	RCP	18	0.25
SD-32	CURB INLET	8.61	-	4.03	24	18	RCP	18	0.25
SD-33	CURB INLET	8.61	4.88	3.06	24	18	RCP	18	0.25
SD-34	CURB INLET	8.48	3.33	3.33	224	18	RCP	18	0.25
SD-35	CURB INLET	8.48	-	1.40	88	18	RCP	18	0.25
SD-36	CURB INLET	8.40	3.33	3.33	176	18	RCP	18	0.25
SD-37	CRATE INLET	7.80	2.80	2.80	187	18	RCP	18	0.25
SD-38	OUTFALL	-	-	0.47	187	18	RCP	18	0.25
SD-39	CURB INLET	8.99	-	0.23	40	18	RCP	18	0.25
SD-40	CURB INLET	8.04	8.23	8.23	36	18	RCP	18	0.25
SD-41	STLM MANHOLE	8.70	5.07	0.67	84	18	RCP	18	0.25
SD-42	CURB INLET	8.78	4.83	4.83	74	18	RCP	18	0.25
SD-43	CRATE INLET	8.28	-	0.00	47	18	RCP	18	0.25
SD-44	CURB INLET	8.18	4.83	4.83	22	18	RCP	18	0.25
SD-45	CURB INLET	8.18	4.78	4.78	142	18	RCP	18	0.25
SD-46	OUTFALL	-	-	4.41	803	18	RCP	18	0.25
SD-47	ROADWAY	-	-	0.00	-	-	-	-	-
SD-48	OUTFALL	-	-	3.00	-	-	-	-	-
SD-49	CURB INLET	8.19	-	4.48	22	18	RCP	18	0.25
SD-50	CURB INLET	8.18	4.41	4.41	148	18	RCP	18	0.25
SD-51	OUTFALL	-	-	1.85	-	-	-	-	-
SD-52	OUTFALL STRUCTURE DETAIL	-	-	8.00	200	18	RCP	18	0.25
SD-53	OUTFALL	-	-	4.30	-	-	-	-	-



0:\P\985920\980 -15-99 45832.DWG

DHEC000229



EMC EMC ENGINEERING SERVICES, INC. Post Office Box 8101 23 East Charlton Street Savannah, Georgia 31411 Phone (912) 232-0515 Fax (912) 232-2510	CAT ISLAND "J" TRACT prepared for: S.C. NATIONAL GROUP, L.L.C. 201 TARPON BOULEVARD FRIPP ISLAND, SOUTH CAROLINA 29920	PAVING, GRADING AND DRAINAGE PLAN																								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 10%;">REVISIONS</th> <th style="width: 10%;">NUMBER</th> <th style="width: 10%;">DATE</th> <th style="width: 10%;">BY</th> <th style="width: 10%;">CHECKED</th> <th style="width: 10%;">DATE</th> <th style="width: 10%;">BY</th> <th style="width: 10%;">CHECKED</th> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </table>			REVISIONS	NUMBER	DATE	BY	CHECKED	DATE	BY	CHECKED																
REVISIONS	NUMBER	DATE	BY	CHECKED	DATE	BY	CHECKED																			
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 10%;">DESIGN</td> <td style="width: 10%;">ATA</td> <td style="width: 10%;">DRAWN</td> <td style="width: 10%;">ATA</td> <td style="width: 10%;">DATE</td> <td style="width: 10%;">JAN 2000</td> <td style="width: 10%;">SCALE</td> <td style="width: 10%;">1" = 50'</td> <td style="width: 10%;">PROJECT</td> <td style="width: 10%;">99-0000</td> </tr> </table>			DESIGN	ATA	DRAWN	ATA	DATE	JAN 2000	SCALE	1" = 50'	PROJECT	99-0000														
DESIGN	ATA	DRAWN	ATA	DATE	JAN 2000	SCALE	1" = 50'	PROJECT	99-0000																	
SHEET 8 OF 11																										

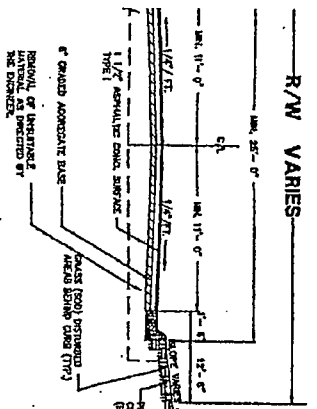
EXHIBIT A2

DHEC000230

MATCHLINE STA. 8+57.89 (SHEET 8)

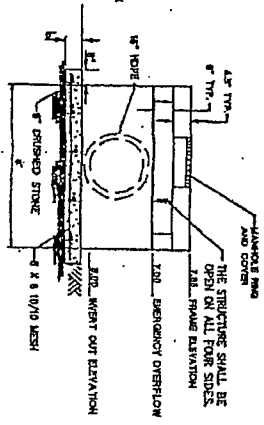
242

R/W VARIES



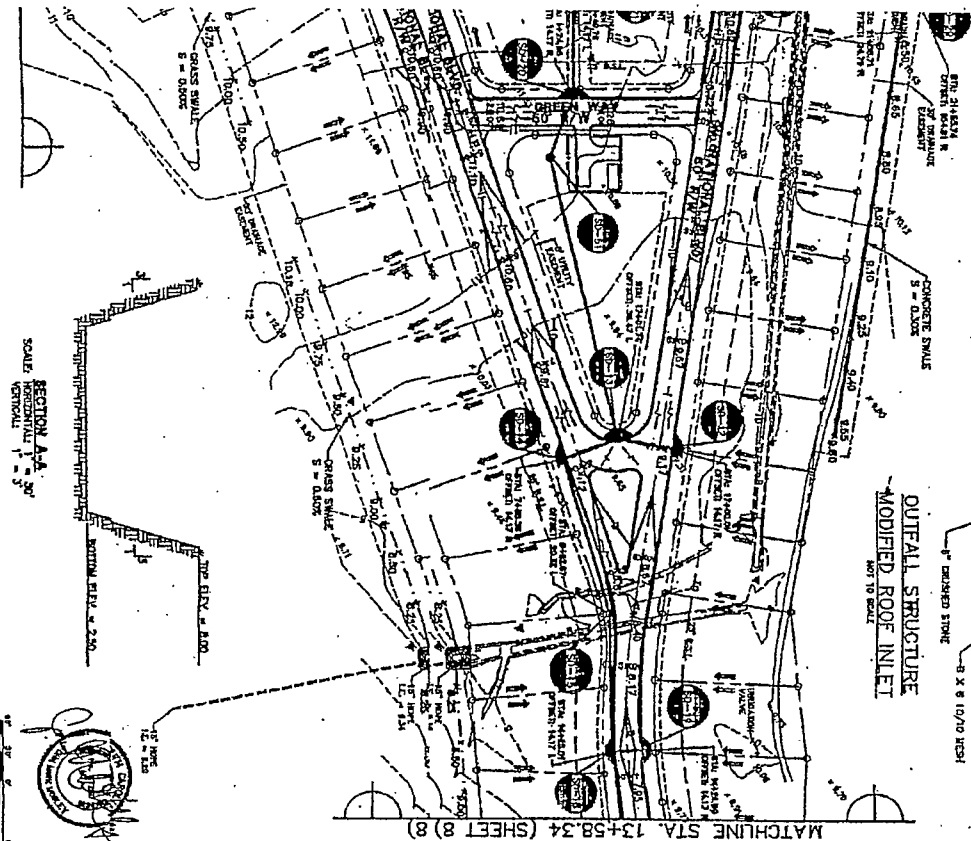
TYPICAL ROADWAY SECTION

NOTE:
SEE SHEET 8 FOR STORM DRAINAGE SCHEDULE

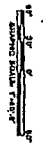


NOTE:
CONTRACTOR TO SUBMIT SHOP DRAWINGS OF
OUTFALL STRUCTURE TO ENGINEER FOR REVIEW.

OUTFALL STRUCTURE
MODIFIED ROOF INLET



SECTION A-A
SCALE: HORIZONTAL 1\"/>



**EMC ENGINEERING
SERVICES, INC.**

Post Office Box 8101
23 East Chatham Street
Savannah, Georgia 31402
Phone: (912) 232-6333
Fax: (912) 232-2020

CAT ISLAND "J" TRACT
prepared for:
S.C. NATIONAL GROUP, L.L.C.
201 TARPON BOULEVARD
FRIPP ISLAND, SOUTH CAROLINA 29920

**PAVING, GRADING AND
DRAINAGE PLAN**

REVISIONS	
NUMBER	DATE
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	

DESIGNED BY	AKA
CHECKED BY	AKA
DATE	JAN 1998
SCALE	1" = 10'
PROJECT	98-04020

Sheet	7	of	11

EXHIBIT A1

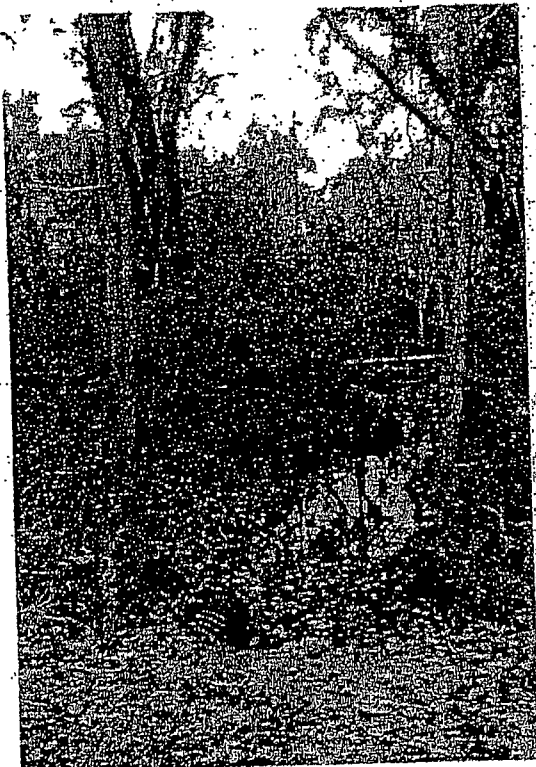
DHEC000232



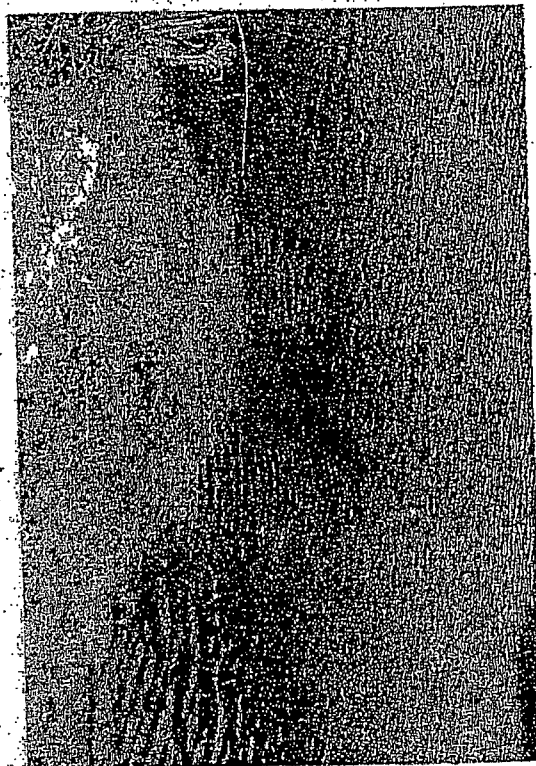
1



2



3



4

EXHIBIT B

DHEC000233



JOB NAME CAT ISLAND "J" TRACT		JOB NUMBER 98-599	PAGE NO. 1/2
JOB DESCRIPTION DETENTION POND SIZING		BY ATA	DATE 3/3/99

LAGOON #2

GIVEN: POST DEVELOPMENT DISCHARGE INTO LAGOON = 42.02 cfs.

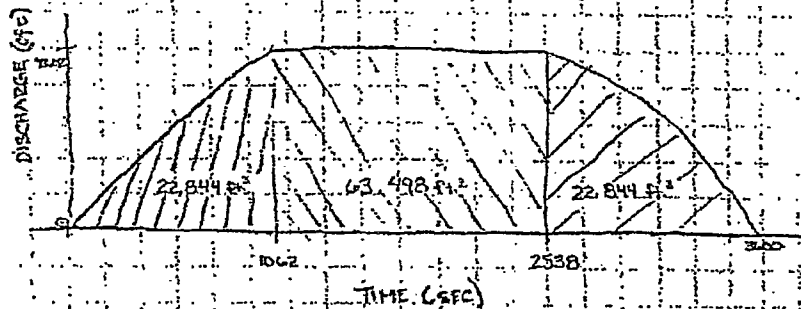
T_p = 11.7 min

STORM WATER WILL BE DISCHARGED INTO A PROPOSED LAGOON,
WHICH WILL BE CONNECTED TO THE EXISTING LAGOON.

VOLUME OF PROPOSED POND = 112,474 ft³

REQUIRED: DETERMINE THE REQUIRED VOLUME IN THE PROPOSED
LAGOON TO ACCOMMODATE THE INCREASE IN
STORM WATER RUNOFF FOR A 25 YEAR STORM EVENT,
LASTING 1 HOUR.

SOLUTION:



TOTAL VOLUME REQUIRED = 109,186 ft³

112,474 ft³ > 109,186 ft³

∴ THERE WILL BE SUFFICIENT CAPACITY IN THE
LAGOON SYSTEM.

EXHIBIT C

DHEC000234

EMC ENGINEERING SERVICES INC.



JOB NAME CAT ISLAND 'J' TRACT		JOB NUMBER 98-599	PAGE NO. 3/2
JOB DESCRIPTION RETENTION POND SIZING		BY ATA	DATE 3/3/99

LAGOON #1

GIVEN:

AREA = 99,783 ft^2

APPROXIMATE FLEBOARD = 2 ft

STORAGE VOLUME AVAILABLE = $99,783 \text{ ft}^2 \times 2 \text{ ft} = 199,566 \text{ ft}^3$

POST-DEVELOPMENT DISCHARGE INTO LAGOON = 26.77 cfs

$T_c = 13.3 \text{ min}$

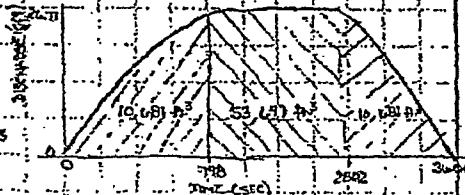
REQUIRED: DETERMINE THE VOLUME OF STORMWATER DISCHARGE FOR A 100-YEAR STORM EVENT, LASTING 1 HOUR.

SOLUTION:

TOTAL DISCHARGE = 75,010 ft^3

$199,566 \text{ ft}^3 > 75,010 \text{ ft}^3$

∴ THE EXISTING LAGOON HAS SUFFICIENT CAPACITY.



NOTE: THE PROPOSED DEVELOPMENT IS LOCATED IN ZONE A9 (BASE FLOOD ELEVATION = 13.0 M.S.L.). THEREFORE, THE LOWEST SUPPORTING MEMBER OF ANY STRUCTURE SHALL BE AT OR ABOVE ELEVATION 14.0 M.S.L. DUE TO ALL STRUCTURES BEING LOCATED AT OR ABOVE 14.0 M.S.L., NO FLOODING WOULD OCCUR IN ANY STRUCTURE IF THE POND WERE TO OVER-TOP.

DHEC000235



JOB NAME	JOB NUMBER	PAGE NO.
CAT ISLAND "J" TRACT	98-559	1/1
JOB DESCRIPTION	BY	DATE
BEAUFORT COUNTY BMP ANALYSIS	ATA	3/26/99

GIVEN: TOTAL LAND AREA OF SUBDIVISION 25.82 ACRES

TOTAL IMPERVIOUS AREA:

- ROADS = 14,749 S.F. / 3.25 AC

- HOUSES = 87 x 1800 S.F. = 156,600 S.F. / 3.60 AC

- DRIVEWAYS = 87 x 600 S.F. = 52,200 S.F. / 1.20 AC

TOTAL = 8.05 AC

FIND: % IMPERVIOUS AREA ON SITE

BMP CLASSIFICATION

SOLUTION: % IMPERVIOUS AREA ON SITE

$$8.05 \text{ AC} / 25.82 \text{ AC} = 0.3117$$

$$0.3117 \times 100\% = 31.17\%$$

APPLICABLE REGULATORY REQUIREMENTS

P. 72-205; P. 72-307; SCR 100000

PER TABLE 3-11 [BMP TECH CRITERIA MATRIX]

IMPERVIOUS COVER 21-50% + 10 ACRES OR GREATER

REQUIRED BMP'S ARE WET DETENTION OR MODIFIED EXTENDED DR. DETENTION

→ WET DETENTION IS PROVIDED

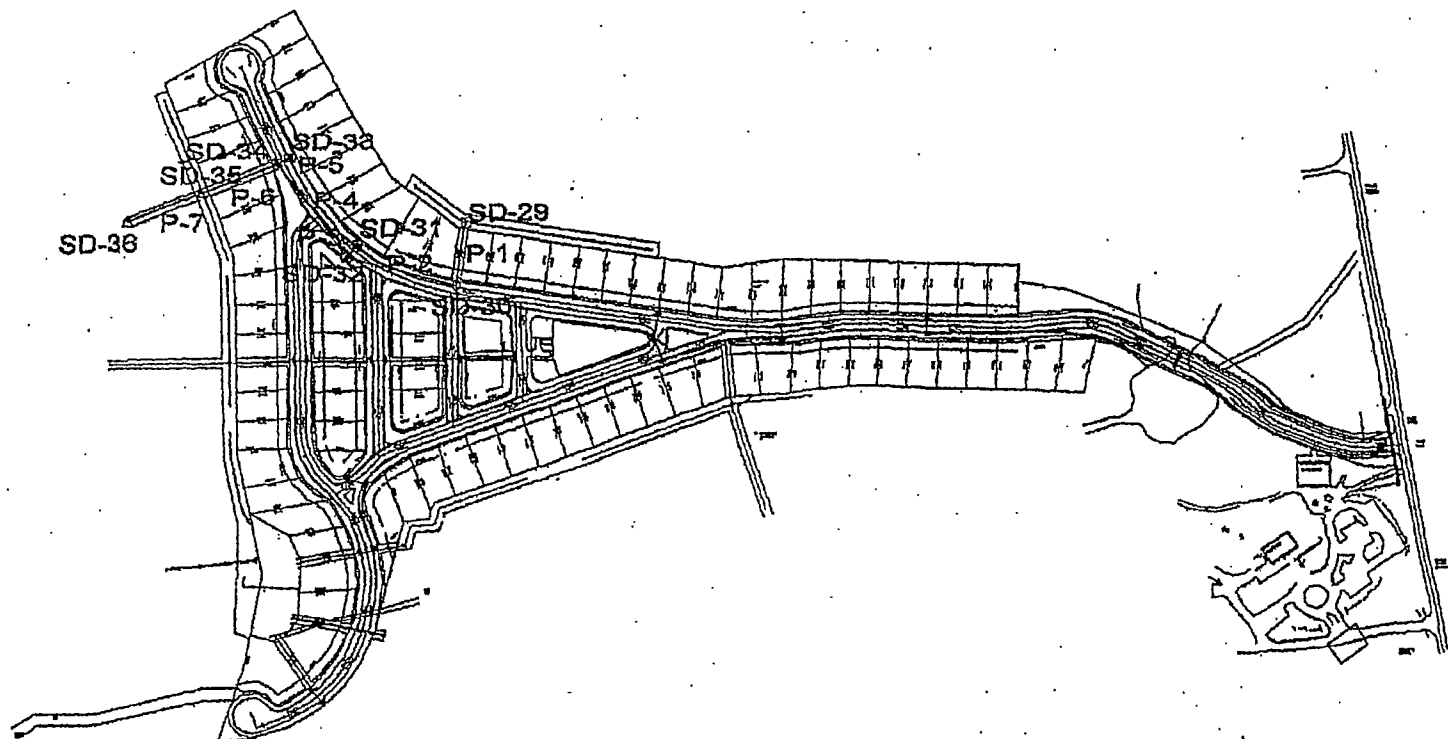
DHEC000236

EMC ENGINEERING SERVICES INC.

STORM DRAINAGE COMPUTATIONS

SD-29 TO SD-36

DHEC000237



Project Title: Cat Island "J" Tract
 or the site of the old island
 03/16/89 10:32:15 AM

EMC ENGINEERING SERVICES, INC
 © Heestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1668

Project Engineer: Tom Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000238

----- Beginning Calculation Cycle -----

Discharge: 8.56 cfs at node SD-29
 Discharge: 8.36 cfs at node SD-30
 Discharge: 0.73 cfs at node SD-31
 Discharge: 9.23 cfs at node SD-32
 Discharge: 4.56 cfs at node SD-33
 Discharge: 13.61 cfs at node SD-34
 Discharge: 19.60 cfs at node SD-35
 Discharge: 19.31 cfs at node SD-36

Beginning iteration 1
 Discharge: 8.56 cfs at node SD-29
 Discharge: 8.36 cfs at node SD-30
 Discharge: 0.73 cfs at node SD-31
 Discharge: 8.88 cfs at node SD-32
 Discharge: 4.56 cfs at node SD-33
 Discharge: 13.06 cfs at node SD-34
 Discharge: 18.70 cfs at node SD-35
 Discharge: 18.40 cfs at node SD-36

Completed iteration 1
 Current discharge convergence relative error: 0.49632712e-1
 Target discharge convergence relative error: 0.001

Beginning iteration 2
 Discharge: 8.56 cfs at node SD-29
 Discharge: 8.36 cfs at node SD-30
 Discharge: 0.73 cfs at node SD-31
 Discharge: 8.88 cfs at node SD-32
 Discharge: 4.56 cfs at node SD-33
 Discharge: 13.06 cfs at node SD-34
 Discharge: 18.70 cfs at node SD-35
 Discharge: 18.40 cfs at node SD-36

Discharge Convergence Achieved in 2 iterations: relative error: 0.0
 ** Warning: Design constraints not met.
 Information: P-7 Surcharged condition
 Violation: P-7 does not meet minimum cover constraint at downstream end.
 Information: P-6 Surcharged condition
 Information: P-4 Surcharged condition
 Violation: P-4 does not meet minimum slope constraint.
 Information: P-5 Surcharged condition
 Information: P-2 Surcharged condition
 Violation: P-2 does not meet minimum slope constraint.
 Information: P-3 Surcharged condition
 Violation: P-3 does not meet minimum velocity constraint.
 Information: P-1 Surcharged condition
 Violation: P-1 does not meet minimum slope constraint.

----- Calculations Complete -----

** Analysis Options **
 Friction method: Manning's Formula
 HGL Convergence Test: 0.001000
 Maximum Network Traversals: 5
 Number of Flow Profile Steps: 5
 Discharge Convergence Test: 0.001000
 Maximum Design Passes: 3

----- Network Quick View -----

Label	Length	Size	Discharge	Hydraulic Grade	
				Upstream	Downstream
P-1	128.00	18 inch	8.56	8.05	7.20
P-2	240.00	24 inch	8.36	7.20	6.87
P-3	28.00	18 inch	0.73	6.87	6.87
P-4	254.00	24 inch	8.88	6.87	6.48
P-5	28.00	18 inch	4.56	6.53	6.48

Project Title: Cat Island "J" Tract
 c:\haestad\stormcat\cat\cat\29-38.stm
 03/16/99 10:20:24 AM

EMC ENGINEERING SERVICES, INC
 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1885

Project Engineer: Toas Allen
 StormCAD v1.0
 Page 1 of 2

DHEC000239

P-6	176.00	24 inch	13.06	6.48	5.89
P-7	167.00	24 inch	18.70	5.89	4.75

Label	Discharge	Ground	Elevations	
			Upstream HGL	Downstream HGL
SD-29	8.56	8.35	8.05	8.05
SD-30	8.36	10.99	7.20	7.20
SD-31	0.73	9.77	6.87	6.87
SD-32	8.88	9.77	6.87	6.87
SD-33	4.56	8.65	6.53	6.53
SD-34	13.06	8.65	6.48	6.48
SD-35	18.70	7.80	5.89	5.89
SD-36	18.40	5.00	4.75	4.75

Elapsed: 0 minute(s) 1 second(s)

Pipe Report

Pipe	Upstream Node	Downstream Node	Inlet Area (acres)	Weighted Roughness Coefficient	Inlet CA (acres)	Total CA (acres)	System Intensity (in/hr)	Discharge (cfs)	Length (ft)	Constructed Slope (ft/ft)	Section Size	Roughness	Capacity (cfs)	Upstream Invert Elevation (ft)	Downstream Invert Elevation (ft)	Upstream Ground Elevation (ft)
P-5	SD-33	SD-34	1.12	0.40	0.45	0.45	10.11	4.58	28.00	0.002500	18 inch	0.013	5.25	3.40	3.33	8.65
P-3	SD-31	SD-32	0.18	0.40	0.07	0.07	10.11	0.73	28.00	0.002500	18 inch	0.013	5.25	4.03	3.88	9.77
P-1	SD-29	SD-30	2.10	0.40	0.84	0.84	10.11	8.56	128.00	0.002422	18 inch	0.013	5.17	4.87	4.66	8.35
P-2	SD-30	SD-32	N/A	N/A	N/A	0.84	9.87	8.38	240.00	0.002458	24 inch	0.013	11.22	4.55	3.98	10.98
P-4	SD-32	SD-34	0.15	0.40	0.06	0.87	9.08	8.88	254.00	0.002480	24 inch	0.013	11.27	3.95	3.33	9.77
P-6	SD-34	SD-35	0.21	0.40	0.06	1.50	8.62	13.06	178.00	0.002557	24 inch	0.013	11.44	3.33	2.88	8.65
P-7	SD-35	SD-36	1.75	0.40	0.70	2.20	8.42	18.70	167.00	0.002455	24 inch	0.013	11.21	2.88	2.47	7.80

Project Title: Cat Island "U" Tract
 c:\haestad\hsm\cat island\29-38.sbr
 03/18/99 10:28:27 AM

EMC ENGINEERING SERVICES, INC.
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1668

Project Engineer: Todd Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000241

Node Report

Node	Inlet Area (acres)	Weighted Roughness Coefficient	Inlet CA (acres)	External CA (acres)	Total CA (acres)	Inlet TC (min)	External TC (min)	Upstream Flow Time (min)	System Flow Time (min)	System Intensity (in/hr)	Total Watershed (CA) (cfs)	Additional Flow (cfs)	Carryover (cfs)	Known Flow (cfs)	Total Upstream Added (cfs)	Discharge (cfs)	Ground Elevation (ft)	Rim Elevation (ft)
SD-33	1.12	0.40	0.45	0.00	0.45	8.00	0.00	0.00	8.00	10.11	4.58	0.00	0.00	0.00	0.00	4.58	8.65	8.65
SD-31	0.18	0.40	0.07	0.00	0.07	8.00	0.00	0.00	8.00	10.11	0.73	0.00	0.00	0.00	0.00	0.73	8.77	8.77
SD-29	2.10	0.40	0.84	0.00	0.84	8.00	0.00	0.00	8.00	10.11	8.58	0.00	0.00	0.00	0.00	8.58	8.35	8.35
SD-30	N/A	N/A	N/A	N/A	0.84	N/A	0.00	8.44	8.44	9.87	8.35	N/A	N/A	N/A	0.00	8.35	10.89	10.89
SD-32	0.15	0.40	0.05	0.00	0.07	8.00	0.00	8.24	8.24	9.08	8.88	0.00	0.00	0.00	0.00	8.88	8.77	8.77
SD-34	0.21	0.40	0.08	0.00	1.50	0.00	0.00	11.44	11.44	8.62	13.06	0.00	0.00	0.00	0.00	13.06	8.85	8.65
SD-35	1.75	0.40	0.70	0.00	2.20	8.00	0.00	12.15	12.15	8.42	18.70	0.00	0.00	0.00	0.00	18.70	7.80	7.80
SD-36	N/A	N/A	N/A	N/A	2.20	N/A	0.00	12.62	12.62	8.28	18.40	N/A	N/A	N/A	0.00	N/A	5.00	5.00

Project Title: Cat Island "J" Trest
c:\haestad\storm\cat island\29-36.stm
03/18/99 10:29:55 AM

EMC ENGINEERING SERVICES, INC
© Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 765-1668

Project Engineer: Toss Allen
StormCAD v1.0
Page 1 of 1

DHEC000242

DOT Report

Pipe	Node- Upstream Downstream	Inlet Area (acres)	Inlet CA (acres)	Total CA (acres)	-Ground- Upstream Downstream (ft)	-HGL- Upstream Downstream (ft)	-Slope- Energy Constructed (ft/ft)	-Section- Discharge Capacity (cfs)	-Section- Shape Size	Length (ft)	Average Velocity (ft/s)	Description
P-8	SD-33	1.12	0.49	0.45	8.65	8.53	0.001888	4.56	Circular	28.00	2.58	
	SD-34				8.65	8.48	0.002500	5.25	18 inch			
P-3	SD-31	0.18	0.07	0.07	9.77	8.87	0.000049	0.73	Circular	28.00	0.42	
	SD-32				9.77	8.87	0.002500	5.25	18 inch			
P-1	SD-29	2.10	0.84	0.84	8.35	8.05	0.006837	8.58	Circular	128.00	4.84	
	SD-30				10.88	7.20	0.002422	5.17	18 inch			
P-2	SD-30	N/A	N/A	0.84	10.88	7.20	0.001365	8.36	Circular	240.00	2.66	
	SD-32				9.77	8.87	0.002458	11.22	24 inch			
P-4	SD-32	0.15	0.06	0.97	9.77	8.87	0.001540	8.88	Circular	254.00	2.83	
	SD-34				8.65	8.48	0.002480	11.27	24 inch			
P-6	SD-34	0.21	0.08	1.50	8.65	8.48	0.003335	13.06	Circular	176.00	4.16	
	SD-35				7.80	5.88	0.002557	11.44	24 inch			
P-7	SD-35	1.75	0.70	2.20	7.80	5.88	0.006831	18.70	Circular	167.00	5.95	
	SD-36				5.00	4.76	0.002455	11.21	24 inch			

Project Title: Cat Island "J" Tract
 c:\haestad\stormcad\catind\29-36.stm
 03/16/99 10:27:30 AM

EMC ENGINEERING SERVICES, INC
 Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1886

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000243



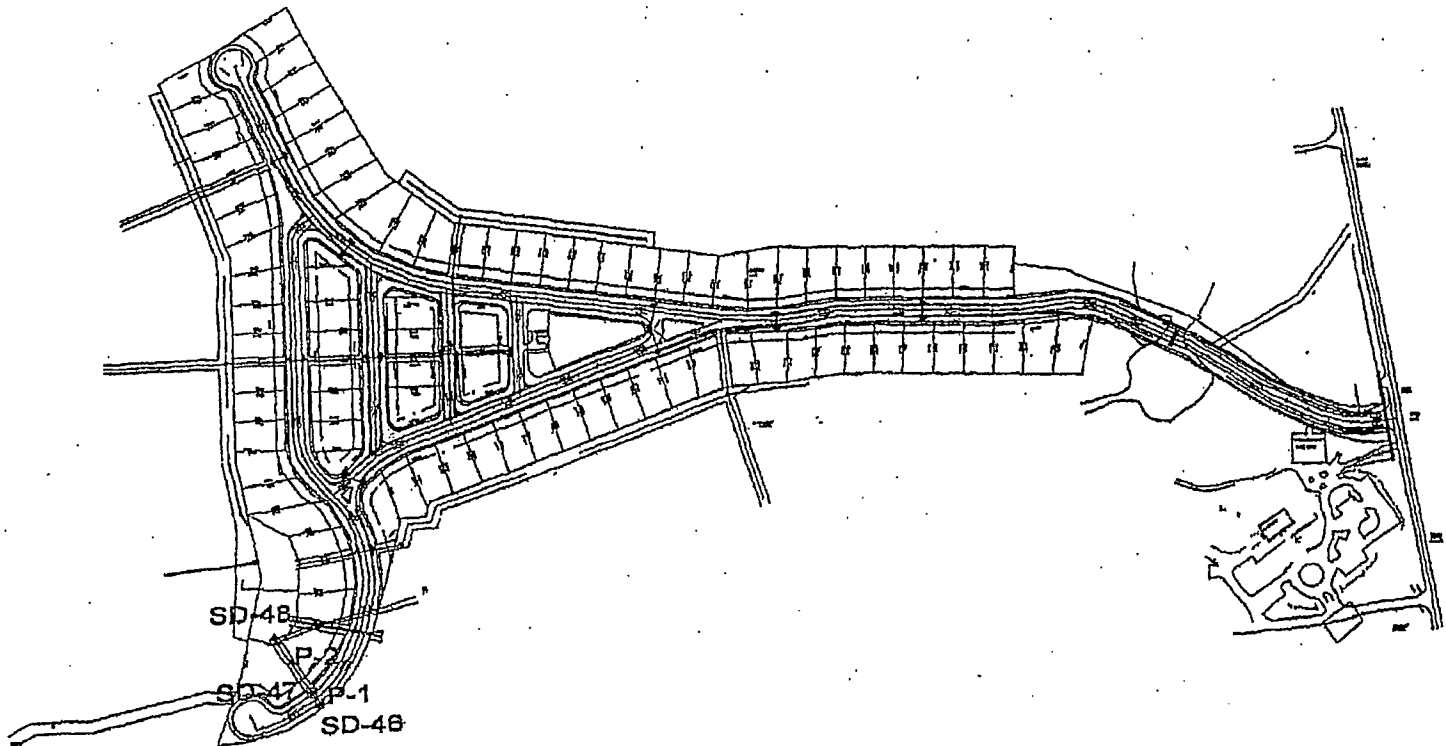
Project Engineer: Toss Allen
StormCAD v1.0
Page 1 of 1

DHEC000244

STORM DRAINAGE COMPUTATIONS

SD-46 TO SD-48

DHEC000245



Project Title: Cat Island "J" Tract
 c:\haestad\winobot\main\040-48.stn
 03/16/89 11:14:51 AM

EMC ENGINEERING SERVICES, INC
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06705 USA (203) 755-1668

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 1 of 1

```

----- Beginning Calculation Cycle -----
Discharge: 1.14 cfs at node SD-46
Discharge: 2.14 cfs at node SD-47
Discharge: 2.04 cfs at node SD-48
Beginning iteration 1
Discharge: 1.14 cfs at node SD-46
Discharge: 2.13 cfs at node SD-47
Discharge: 2.02 cfs at node SD-48
Completed iteration 1
Current discharge convergence relative error: 0.71818549e-2.
Target discharge convergence relative error: 0.001
Beginning iteration 2
Discharge: 1.14 cfs at node SD-46
Discharge: 2.13 cfs at node SD-47
Discharge: 2.02 cfs at node SD-48
Discharge Convergence Achieved in 2 iterations: relative error: 0.83654079e-4
** Warning: Design constraints not met.
Violation: P-2 does not meet minimum slope constraint.
Violation: P-1 does not meet minimum velocity constraint.
----- Calculations Complete -----

```

```

** Analysis Options **
Friction method: Manning's Formula
HGL Convergence Test: 0.001000
Maximum Network Traversals: 5
Number of Flow Profile Steps: 5
Discharge Convergence Test: 0.001000
Maximum Design Passes: 3

```

```

----- Network Quick View -----

```

Label	Length	Size	Discharge	Hydraulic Grade	
				Upstream	Downstream
P-1	28.00	18 inch	1.14	5.09	5.08
P-2	145.00	18 inch	2.13	5.08	4.75

Label	Discharge	Ground	Elevations	
			Upstream HGL	Downstream HGL
SD-46	1.14	8.35	5.09	5.09
SD-47	2.13	8.35	5.08	5.08
SD-48	2.02	8.00	4.75	4.75

Elapsed: 0 minute(s) 0 second(s)

Pipe Report

Pipe	Upstream Node	Downstream Node	Inlet Area (acres)	Weighted Roughness Coefficient	Inlet CA (acres)	Total CA (acres)	System Intensity (in/hr)	Discharge (cfs)	Length (ft)	Constructed Slope (ft/ft)	Section Size	Roughness	Capacity (cfs)	Upstream Invert Elevation (ft)	Downstream Invert Elevation (ft)	Upstream Ground Elevation (ft)
P-1	SD-46	SD-47	0.28	0.40	0.11	0.11	10.11	1.14	28.00	0.002500	18 inch	0.013	5.25	4.48	4.41	8.35
P-2	SD-47	SD-48	0.25	0.40	0.10	0.21	9.95	2.13	145.00	0.002483	18 inch	0.013	5.23	4.41	4.05	8.35

Project Title: Cnt Island "J" Tract
 c:\haestad\stormcad\island46-48.stm
 03/18/99 11:13:28 AM

EMC ENGINEERING SERVICES, INC
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 05708 USA (203) 755-1656

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000248

Node Report

Node	Inlet Area (acres)	Weighted Roughness Coefficient	Inlet CA (acres)	External CA (acres)	Total CA (acres)	Inlet TC (min)	External TC (min)	Upstream Flow Time (min)	System Flow Time (min)	System Intensity (in/hr)	Total Watershed (CIA) (cfs)	Additional Flow (cfs)	Carryover (cfs)	Known Flow (cfs)	Total Upstream Added (cfs)	Discharge (cfs)	Ground Elevation (ft)	Run Elevation (ft)
SD-46	0.28	0.40	0.11	0.00	0.11	8.00	0.00	0.00	8.00	10.11	1.14	0.00	0.00	0.00	0.00	1.14	8.35	8.35
SD-47	0.25	0.40	0.10	0.00	0.21	8.00	0.00	8.29	8.29	9.95	2.13	0.00	0.00	0.00	0.00	2.13	8.35	8.35
SD-48	N/A	N/A	N/A	N/A	0.21	N/A	0.00	8.18	8.18	8.47	2.02	N/A	N/A	N/A	0.00	N/A	8.00	8.00

Project Title: Cat Island "J" Tract
 o:\haestad\proj\cat_istad\46-48.stm
 03/16/09 11:13:30 AM

EMC ENGINEERING SERVICES, INC
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1888

Project Engineer: Tessa Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000249

DOT Report

Pipe	-Node- Upstream Downstream	Inlet Area (acres)	Inlet CA (acres)	Total CA (acres)	-Ground- Upstream Downstream (ft)	-HGL- Upstream Downstream (ft)	-Slope- Energy Constructed (ft/ft)	-Section- Discharge Capacity (cfs)	-Section- Shape Size	Length (ft)	Average Velocity (ft/s)	Description
P-1	SD-48	0.28	0.11	0.11	8.35	5.09	0.000840	1.14	Circular	25.00	1.80	
	SD-47				8.35	5.08	0.002500	5.25	18 inch			
P-2	SD-47	0.25	0.10	0.21	8.35	5.08	0.002351	2.13	Circular	145.00	2.72	
	SD-48				8.00	4.75	0.002483	5.23	18 inch			

Project Title: Cat Island "J" Tract
 c:\heesled\storm\cat island\46-48.stm
 03/18/99 11:13:53 AM

EMC ENGINEERING SERVICES, INC
 Heesled Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1666

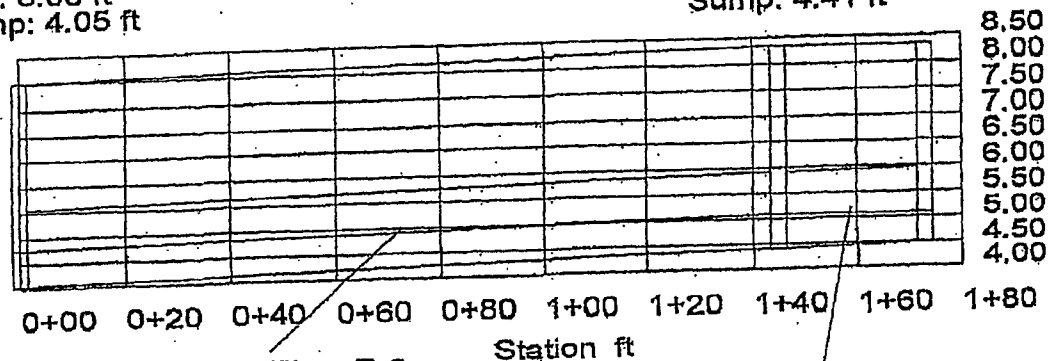
Project Engineer: Toss Allan
 StormCAD v1.0
 Page 1 of 1

DHEC000250

Outlet: SD-48
Rim: 8.00 ft
Sump: 4.05 ft

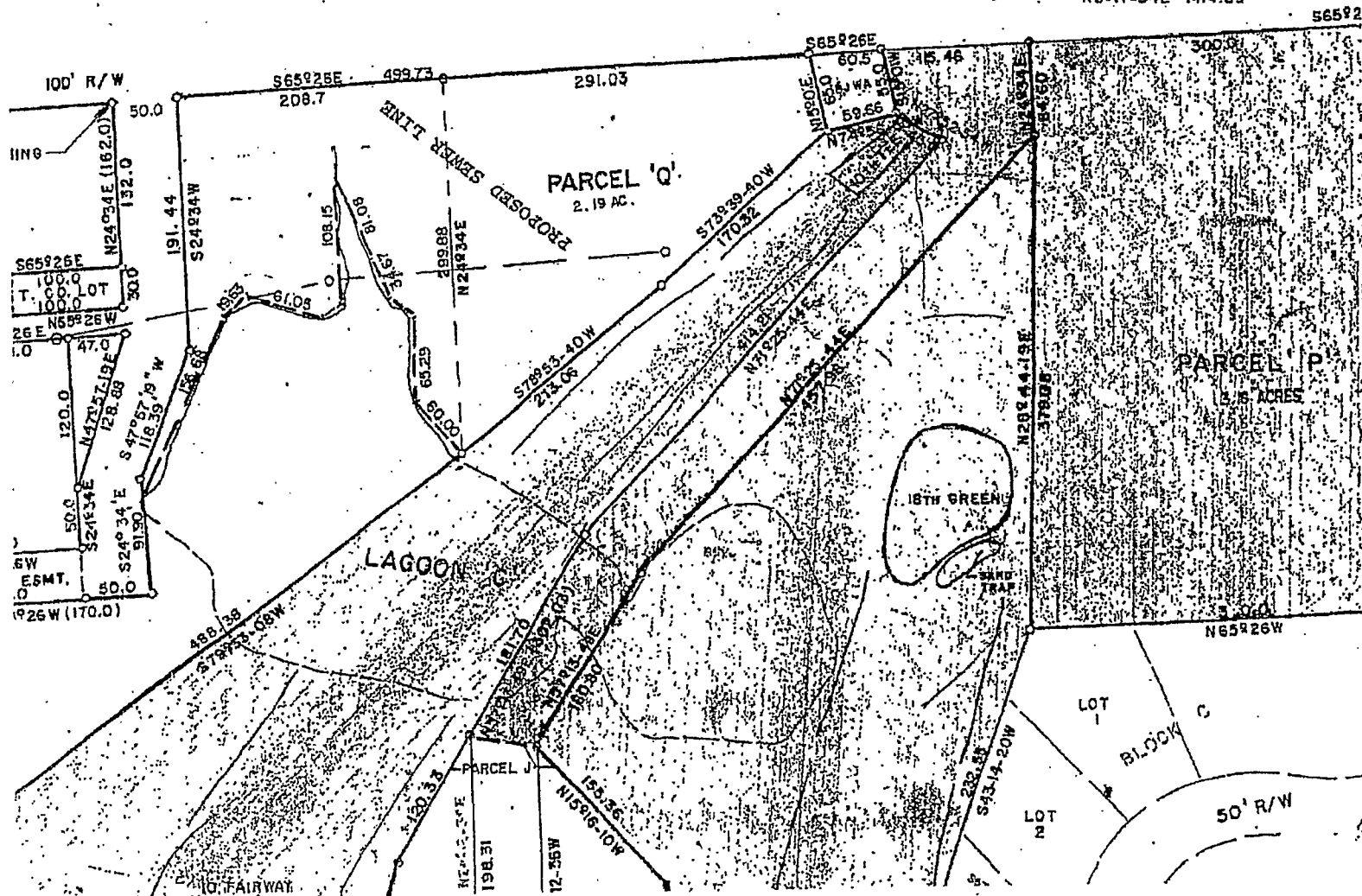
Inlet: SD-47
Rim: 8.35 ft
Sump: 4.41 ft

Inlet: SD-46
Rim: 8.35 ft
Sump: 4.48 ft



Pipe: P-2
Up Invert: 4.41 ft
Dn Invert: 4.05 ft
Length: 145.00 ft
Size: 18 inch

Pipe: P-1
Up Invert: 4.48 ft
Dn Invert: 4.41 ft
Length: 28.00 ft
Size: 18 inch



PIPE SIZING CALCULATIONS/RESULTS

FOR

CAT ISLAND "J" TRACT

EMC PROJECT NO: 98-599

PREPARED FOR:

**S.C. NATIONAL GROUP, L.L.C.
201 TARPOON BLVD.
FRIPP ISLAND, SOUTH CAROLINA 29920**

MARCH 16, 1999

DHEC000253

PIPE SIZING CALCULATIONS/RESULTS

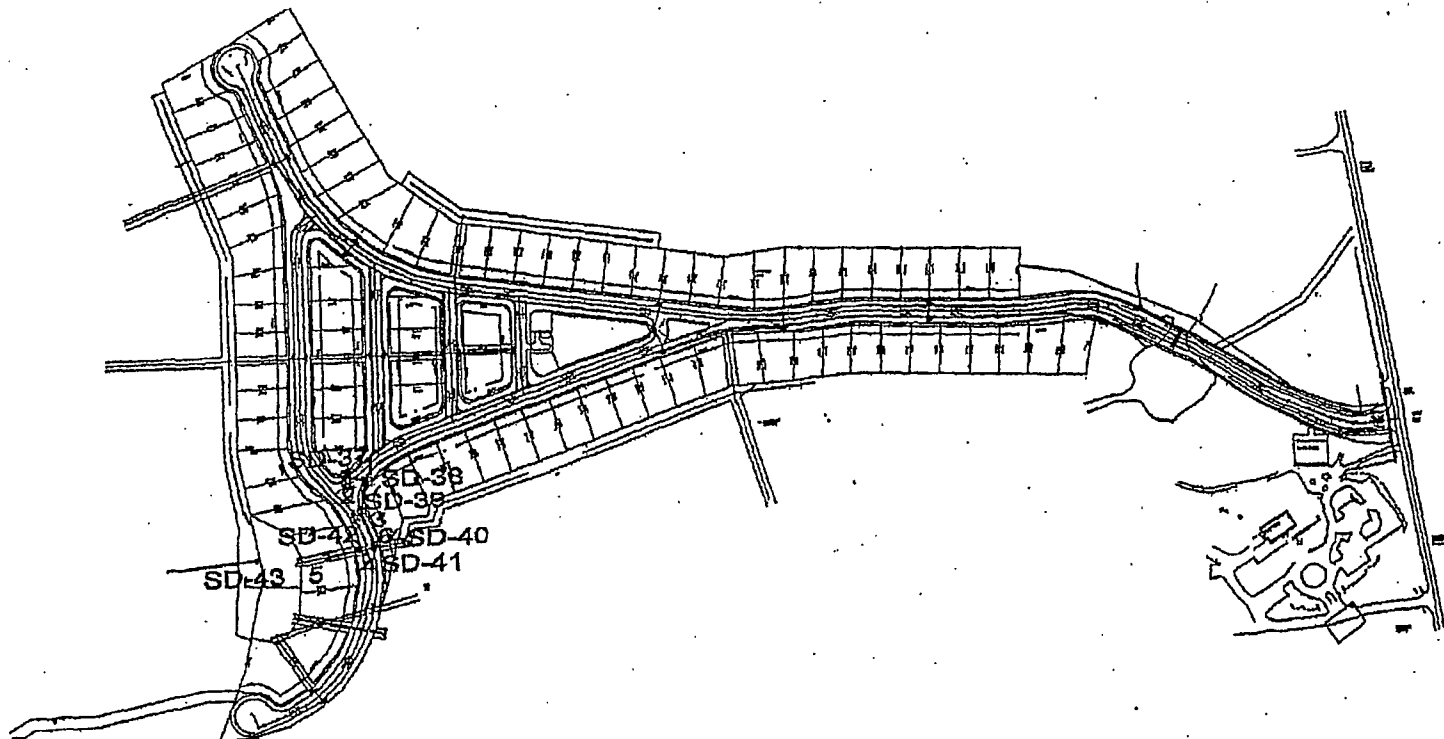
The storm drainage pipe network for the Cat Island "J" Tract residential subdivision site was input into a computer software program called StormCad by Haestad Methods. The software analyzes a network of storm pipes utilizing the hydraulic data for each inlet, pipe, junction, and outfall in the system. The program takes into account accumulated time of concentration, runoff coefficients, areas, pipe sizes, inlet/outlet control, friction loss, inlet head loss, pressure and varied flow situations including hydraulic jumps, backwater, and drawdown curves.

The storm event used in the pipe sizing calculations was the 25-yr 24 hour storm. The attached information shows the input data and the results from the executed program.

STORM DRAINAGE COMPUTATIONS

SD-37 TO SD-43

DHEC000256



Project Title: Cat Island "J" Tract
 c:\haestad\storm\cat island\37-43.sdm
 03/16/99 11:03:28 AM

EMC ENGINEERING SERVICES, INC
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1888

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 1 of 1


```

----- Beginning Calculation Cycle -----
Discharge: 1.10 cfs at node SD-37
Discharge: 3.02 cfs at node SD-38
Discharge: 2.97 cfs at node SD-39
Discharge: 4.89 cfs at node SD-40
Discharge: 8.95 cfs at node SD-41
Discharge: 9.72 cfs at node SD-42
Discharge: 9.50 cfs at node SD-43
Beginning iteration 1
Discharge: 1.10 cfs at node SD-37
Discharge: 2.88 cfs at node SD-38
Discharge: 2.77 cfs at node SD-39
Discharge: 4.89 cfs at node SD-40
Discharge: 8.25 cfs at node SD-41
Discharge: 8.97 cfs at node SD-42
Discharge: 8.84 cfs at node SD-43
Completed iteration 1
Current discharge convergence relative error: 0.7430639e-1
Target discharge convergence relative error: 0.001
Beginning iteration 2
Discharge: 1.10 cfs at node SD-37
Discharge: 2.88 cfs at node SD-38
Discharge: 2.77 cfs at node SD-39
Discharge: 4.89 cfs at node SD-40
Discharge: 8.25 cfs at node SD-41
Discharge: 8.97 cfs at node SD-42
Discharge: 8.84 cfs at node SD-43
Discharge Convergence Achieved in 2 iterations: relative error: 0.0
** Warning: Design constraints not met.
Violation: 5 does not meet minimum slope constraint.
Information: 4 Surcharged condition
Information: 3 Surcharged condition
Violation: 3 does not meet minimum velocity constraint.
Information: 6 Surcharged condition
Information: 2 Surcharged condition
Violation: 2 does not meet minimum slope constraint.
Information: 1 Surcharged condition
Violation: 1 does not meet minimum velocity constraint.
----- Calculations Complete -----

```

```

** Analysis Options **
Friction method: Manning's Formula
HGL Convergence Test: 0.001000
Maximum Network Traversals: 5
Number of Flow Profile Steps: 5
Discharge Convergence Test: 0.001000
Maximum Design Passes: 3

```

----- Network Quick View -----

Label	Length	Size	Discharge	Hydraulic Grade	
				Upstream	Downstream
1	40.00	18 inch	1.10	7.05	7.05
2	66.00	18 inch	2.88	7.05	7.00
3	94.00	18 inch	2.77	7.00	6.94
4	28.00	18 inch	8.25	6.94	6.76
5	142.00	18 inch	8.97	6.76	5.57
6	57.00	18 inch	4.89	7.08	6.94

Label	Discharge	Ground	Elevations	
			Upstream HGL	Downstream HGL
SD-37	1.10	9.15	7.05	7.05
SD-38	2.88	9.20	7.05	7.05

```

Project Title: Cot Island "I" Tract
c:\haestad\stormcad\island37-43.stm
03/18/99 11:01:00 AM
EMC ENGINEERING SERVICES, INC
37 Brookside Road Waterbury, CT 06708 USA (203) 755-1666

```

```

Project Engineer: Tessa Allen
StormCAD v1.0
Page 1 of 2

```

DHEC000258

SD-39	2.77	8.70	7.00	7.00
SD-41	8.25	8.32	6.94	6.94
SD-40	4.89	8.25	7.08	7.08
SD-42	8.97	8.32	6.76	6.76
SD-43	8.84	8.00	4.75	4.75

Elapsed: 0 minute(s) 1 second(s)

Project Title: Cat Island "J" Tract
 c:\haestad\emc\cat island\37-43.stm
 03/16/99 11:01:00 AM

EMC ENGINEERING SERVICES, INC.
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1666

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 2 of 2

DHEC000259

Pipe Report

Pipe	Upstream Node	Downstream Node	Inlet Area (acres)	Weighted Roughness Coefficient	Inlet CA (acres)	Total CA (acres)	System Intensity (in/hr)	Discharge (cfs)	Length (ft)	Constructed Slope (ft/ft)	Section Size	Roughness	Capacity (cfs)	Upstream Invert Elevation (ft)	Downstream Invert Elevation (ft)	Upstream Ground Elevation (ft)
6	SD-40	SD-41	1.20	0.40	0.48	0.48	10.11	4.89	67.00	0.002537	18 inch	0.013	5.28	5.00	4.83	8.25
1	SD-37	SD-38	0.27	0.40	0.11	0.11	10.11	1.10	40.00	0.002500	18 inch	0.013	5.25	5.23	5.23	9.15
2	SD-38	SD-39	0.48	0.40	0.19	0.30	8.53	2.88	66.00	0.002424	18 inch	0.013	5.17	5.23	5.07	9.20
3	SD-39	SD-41	N/A	N/A	N/A	0.30	9.17	2.77	84.00	0.002553	18 inch	0.013	5.31	5.07	4.83	8.70
4	SD-41	SD-42	0.37	0.40	0.15	0.83	8.82	8.25	28.00	0.002500	18 inch	0.013	5.25	4.83	4.76	8.32
5	SD-42	SD-43	0.21	0.40	0.08	1.01	8.78	8.97	142.00	0.002465	18 inch	0.013	5.21	4.78	4.41	8.32

Project Tiller Cat Island "J" Tract
 o:\nasstas\atmo\cat_island\97-43.stm
 03/16/99 11:01:23 AM

EMC ENGINEERING SERVICES, INC
 © Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06726 USA (203) 758-1666

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000260

Node Report

Node	Inlet Area (acres)	Weighted Roughness Coefficient	Inlet CA (acres)	External CA (acres)	Total CA (acres)	Inlet TC (min)	External TC (min)	Upstream Flow Time (min)	System Flow Time (min)	System Intensity (in/hr)	Total Watershed (CIA) (cfs)	Additional Flow (cfs)	Carryover (cfs)	Known Flow (cfs)	Total Upstream Added (cfs)	Discharge (cfs)	Ground Elevation (ft)	Rim Elevation (ft)
SD-40	1.20	0.40	0.48	0.00	0.48	8.00	0.00	0.00	8.00	10.11	4.89	0.00	0.00	0.00	0.00	4.89	8.25	8.25
SD-37	0.27	0.40	0.11	0.00	0.11	8.00	0.00	0.00	8.00	10.11	1.10	0.00	0.00	0.00	0.00	1.10	8.15	8.15
SD-38	0.48	0.40	0.19	0.00	0.30	8.00	0.00	8.07	8.07	9.53	2.88	0.00	0.00	0.00	0.00	2.88	8.20	8.20
SD-39	N/A	N/A	N/A	N/A	0.30	N/A	0.00	8.75	8.75	9.17	2.77	N/A	N/A	N/A	0.00	2.77	8.70	8.70
SD-41	0.37	0.40	0.15	0.00	0.53	8.00	0.00	10.74	10.74	8.82	6.25	0.00	0.00	0.00	0.00	8.87	8.32	8.32
SD-42	0.21	0.40	0.08	0.00	1.01	8.00	0.00	10.84	10.84	8.79	8.97	0.00	0.00	0.00	0.00	8.87	8.32	8.32
SD-43	N/A	N/A	N/A	N/A	1.01	N/A	0.00	11.27	11.27	8.67	6.84	N/A	N/A	N/A	0.00	N/A	8.00	8.00

Project Title: Cal Island "J" Tract
 o:\Users\jdm\Documents\Island\37-43.stm
 03/16/99 11:01:40 AM

EMC ENGINEERING SERVICES, INC
 © Heated Methods, Inc. 37 Brookside Road Waterbury, CT 05708 USA (203) 765-1888

Project Engineer: Toss Allen
 StormCAD v1.0
 Page 1 of 1

DHEC000261

DOT Report

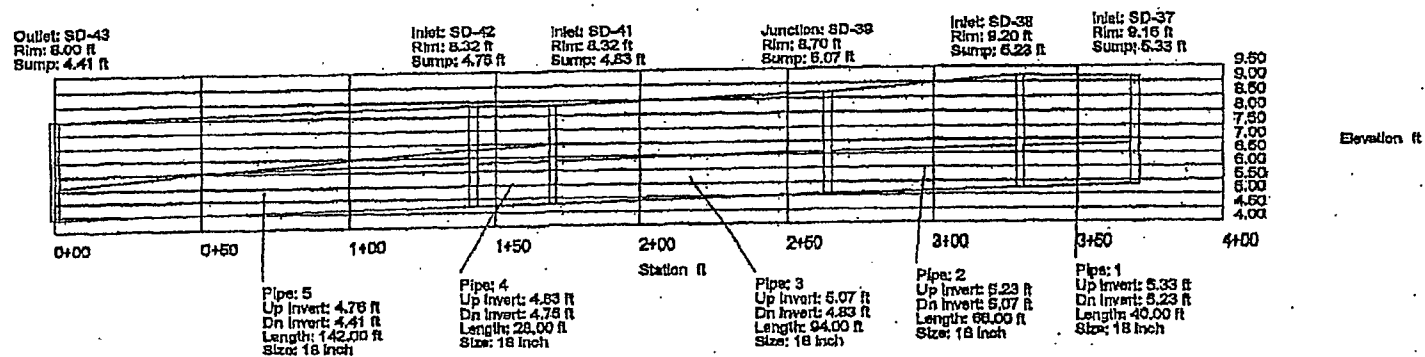
Pipe	-Node- Upstream Downstream	Inlet Area (acres)	Inlet CA (acres)	Total CA (acres)	-Ground- Upstream Downstream (ft)	-HGL- Upstream Downstream (ft)	-Slope- Energy Constructed (ft/ft)	-Section- Discharge Capacity (cfs)	-Section- Shape Size	Length (ft)	Average Velocity (ft/s)	Description
6	SD-40	1.20	0.48	0.48	8.25	7.08	0.002167	4.89	Circular	67.00	2.77	
	SD-41				8.32	6.94	0.002537	5.29	18 inch			
1	SD-37	0.27	0.11	0.11	9.15	7.05	0.000110	1.10	Circular	40.00	0.62	
	SD-38				9.20	7.05	0.002500	5.25	18 inch			
2	SD-38	0.48	0.19	0.30	9.20	7.05	0.000753	2.88	Circular	66.00	1.53	
	SD-39				8.70	7.00	0.002424	5.17	18 inch			
3	SD-39	N/A	N/A	0.30	8.70	7.00	0.000697	2.77	Circular	94.00	1.57	
	SD-41				8.32	6.94	0.002553	5.31	18 inch			
4	SD-41	0.37	0.15	0.63	8.32	6.94	0.006166	8.26	Circular	28.00	4.67	
	SD-42				8.32	6.76	0.002500	5.25	18 inch			
5	SD-42	0.21	0.08	1.01	8.32	6.76	0.007123	8.87	Circular	142.00	5.60	
	SD-43				8.00	5.57	0.002466	5.21	18 inch			

Project Title: Cat Island "J" Tract
o:\haestad\stormcat\cat iselnd37-43.stm
03/16/99 11:01:58 AM

EMC ENGINEERING SERVICES, INC
© Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06706 USA (203) 755-1555

Project Engineer: Toes Allen
StormCAD v1.0
Page 1 of 1

DHEC000262



Project Title: Cat Island "J" Tract
c:\haestad\cat\cat island\37-43.slm
03/16/99 11:02:49 AM

EMC ENGINEERING SERVICES, INC.
© Haestad Methods, Inc. 37 Brookside Road Waterbury, CT 06708 USA (203) 755-1666

Project Engineer: Todd Allen
StormCAD v1.0
Page 1 of 1

DHEC000263

Stormwater Management and Sediment and Erosion Control Plan Review Checklist For Design Professionals

Please indicate the location and page number(s) where each item below can be found in your SWPPP or supporting calculations. If an item is not applicable, put N/A. The Department reserves the right to modify this checklist at any time. The Coastal Zone consists of the following counties: Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry, and Jasper.

Checklist Completed by:

Printed name: _____ Signature: _____ Date: _____

1. CURRENT COMPLETED APPLICATION FORM

- Original signatures
- Signatory authority
- All items completed and answered
- Fee Schedule
- *Note: State and local government projects are not exempt from the plan review fee of \$100 per disturbed acre.*

2. COPIES OF PLANS AND CALCULATIONS

- Plans stapled together
- For projects that disturb more than 2 acres, less than or equal to 2 acres but are part of a larger common plan of development or sale (LCP), or more than 0.5 acre and within ½ mile of a receiving waterbody (RWB) in the Coastal Zone, ONE set of plans and supporting documentation (report, calculations, maps, etc.)
- For projects that disturb less than or equal to 2 acres (not part of LCP and not within ½ mile of RWB in the Coastal Zone), THREE sets of plans and one set of supporting documentation [*Note: You may submit up to 2 additional sets of plans to be stamped for approval.*]
- Supporting documentation tabbed (e.g., Maps, Pre-Development calculations) and pages numbered [no loose pages]

3. LOCATION MAP

- North arrow and scale
- Outlined project location
- Labeled road names

4. PROJECT NARRATIVE

- Scope of project outlined, including a brief description of pre- and post-development conditions
- Summary table of pre- and post-development flows (at least 2- and 10-year, 24-hour storm events)
- Existing flooding problems in the surrounding area described
- Disturbed area calculations included for subdivision projects or LCP disturbing 1 or more acres
 - For subdivisions if the site is not to be mass-graded, the following formula should be used to determine the amount of disturbance:

Amount of Disturbance = 2(Max Restricted Building Size)(Number of Lots) + Right of Way (ROW) areas (ROW areas include clearing for roads, utilities, easements etc.)

- If this equation is used, include a note on the plans stating: "The site is not to be mass-graded. Only 2 times the footprint is to be cleared as the lots are developed. The assumed disturbance on each lot is ____ sq. ft."

5. USGS TOPOGRAPHIC MAP

- Project boundary outlined
- Route of runoff from site to nearest waterbody shown
- Road names adjacent to site labeled

6. SOILS INFORMATION

- Project boundary outlined
- Predominate soil types found at the site identified on the plans or on a separate map
- *Note: Soils information is available from the Natural Resource Conservation Service through their website: <http://websoilsurvey.nrcs.usda.gov/app/>*

7. FLOODWAY MAPS/FEMA FLOOD INSURANCE MAP

- Project boundary outlined, if in close proximity to floodplain/ floodway
- *Note: The Department does not regulate the placement of fill in floodplains. Please see your local city or county official.*

Updated 10/3/06

DHEC000264

EXHIBIT D

8. WATERS OF THE STATE, INCLUDING WETLANDS

- Delineation of all waters of the State (WoS), including wetlands, shown and labeled on plans (delineation not required if a 100-ft undisturbed buffer can be maintained between the WoS and all land-disturbing activities)
- Additional, separate plan sheet that shows all WoS on the site and the impacted areas with a description of the activity(s), whether it is permanent or temporary, and any other relevant information.
- If impacts to WoS, outlined areas of impacts and labeled that no work can begin in this area until all necessary USACOE permits and SCDHEC 401 certifications have been obtained.
- Double row of silt fence provided in all areas where a 50' undisturbed buffer cannot be maintained between the disturbed area and the WoS
- Minimum 10' maintenance buffer provided between last row of silt fence and WoS; or, if buffer not provided, then statement from P.E. on plans indicating how silt fence will be installed and maintained without impacts to WoS
- *Note: If there are proposed impacts to WoS, then it is advised that you contact USACOE (866-329-8187) and/ or S.C. DHEC Water Quality Certification, Standards & Wetlands Programs Section (803-898-4300) to determine additional requirements before submitting the Notice of Intent (NOI).*
- *Note: If WoS are to be impacted, work cannot be performed in these designated areas until all necessary permits have been acquired*
- *Note: If a USACOE permit is required for construction of or access to a temporary or permanent stormwater management structure, NPDES permit coverage cannot be granted until the USACOE permits and S.C. DHEC 401 Section certifications are obtained.*
- *Note: The Department recommends a minimum 20-foot buffer between a sediment trap/basin and WoS.*

9. HYDROLOGIC ANALYSIS

- Pre- and post-developed hydrologic analysis calculations for the 2- and 10-year, 24-hour storm events at each outfall point
- Drainage area maps that clearly correspond to the calculations (pre- and post-development)
- Analysis points for comparing runoff rates and the total drainage area analyzed do not change from pre- to post-development, although the immediate drainage areas contributing to each analysis point might shift.
- Post-development discharges less than pre-development discharges for each outfall point (if not, then see "Detention Waiver" section below)
- Analysis performed using SCS 24-hour storm (Rational method is not acceptable)
- Rainfall data from South Carolina DHEC Storm Water Management BMP Handbook (BMP Handbook) used in all calculations
- *Note: The curve number for open water, marshes, etc. should be 98 to 100.*

10. DETENTION ANALYSIS/DESIGN

- Analysis
 - Pond routing using a volume-based hydrograph for the 2- and 10-year, SCS 24-hour storm event (Drain:Edge, ICPR, HEC-1, SedCAD, HYDRAFLOW, etc. perform full pond routings; TR55 does not perform a full pond routing; rational method cannot be used)
 - Hydrologic and hydraulic calculations necessary to determine the impact of hydrograph timing modifications of the proposed land-disturbing activity, with and without the detention structure (results of analysis will determine the need to modify the detention design or eliminate the detention requirement—see note 2 below)
 - Inputs and outputs from analysis program
 - Summary table of the peak inflows, peak outflows, discharge velocities, and maximum water surface elevations (WSE) for the 2- and 10-year, 24-hour storm events for each detention structure
 - Stage-storage-discharge relationship for the outlet structure of each detention structure
 - If a rating curve for the outlet structure must be generated externally from the analysis program (Drain:Edge, HEC-1, etc.), data and equations used to rate the outlet structure
 - As-built of existing detention pond if the site drains to an existing detention pond (see below)
 - *Note: SedCAD users please refer to the memo regarding the input of outlet structures.*
 - *Note: The Department recommends using the 10% rule in performing analysis. The hydrologic analysis should be conducted for the larger drainage area, where the site in question encompasses 10% of the total drainage area. For example, if your site is 10 acres, then the hydrologic analysis should be performed at the point downstream where the contributing drainage area, including your 10-acre site, is approximately 100 acres.*
- Design
 - Detail of outlet structure and cross-section of the dam/ berm or pond bank, including elevations and dimensions that correspond to the calculations
 - Orifice constructability considered (do not specify orifice diameters with increments of less than ¼")

Updated 10/3/06

DHEC000265

- Maximum WSE for the 10-year storm event below the emergency spillway with 0.5-ft of freeboard between maximum WSE for the 10-year storm and the emergency spillway
- Maximum WSE for the 100-year storm event below the embankment with 0.5-ft of freeboard between maximum WSE for the 100-year storm and the embankment
- Dewatering time calculations for the 10-year storm event (dry ponds must drain completely within 72 hours)
- Bottom of all detention and retention ponds graded to have a slope of not less than 0.5%
- If the pond is to be used for sediment control during construction, temporary horseshoe-shaped riprap berm in front of any low level outlets provided during construction and shown on the pond detail
- Permanent maintenance access to all permanent detention structures (easements may be needed for structures surrounded by lots)
- Infiltration systems designed in accordance with S.C. Reg. 72-307.C(1.1) [specify how items a-j have been addressed]
- *Note: Emergency spillways should not be built on fill slopes.*
- *Note: The Department recommends installation of a trash rack or other debris-screening device on all pond risers.*
- *Note: The Department recommends a maximum slope of 3:1 on pond embankments to allow for ease of maintenance.*
- *Note: The Department recommends installation of sediment forebays at each outfall into the detention/ sediment basin.*

11. AS-BUILTS

- Provided for all previously approved detention ponds that will receive flows from new drainage areas
- Prepared by a South Carolina Licensed Land Surveyor
- Grades/ contours/ depths for pond
- Elevations and dimensions of all outlet structures, including:
 - Pipe and orifice inverts and diameters
 - Weir elevations and dimensions
 - Riser dimensions and elevations
 - Emergency spillway dimensions and elevations
 - Locations and inverts for all pipes discharging into the pond
- If the elevations or dimensions of the structures listed above do not match those used in the approved plans, certification statement signed by the project's Registered Engineer indicating that the pond, as built, will function within all applicable standards provided [new analysis of the pond (routing) may be necessary]
- For projects located in the eight coastal counties: For any construction project permitted after September 1, 2006, as-built/record drawings will be required by DHEC-OCRM prior to stormwater permit closeout. Prior to the contractor requesting a final site inspection, one as-built drawing hard copy and 1 digital (scanned plan sheets as .tif or .pdf document) copy must be provided to OCRM staff.
- *Note: As-built survey and/or analysis must be submitted and accepted by the Department before Notice of Termination (NOT) is submitted.*

12. PERMANENT STORMWATER MANAGEMENT STRUCTURE MAINTENANCE

- Signed agreement from the responsible party accepting ownership and maintenance of the structure
- Description of maintenance plan to be used
- Schedule of maintenance procedures (e.g., every 6 months)
- Detailed or manufacturer-specific maintenance items for proprietary control devices (oil-water separators, etc.), underground detention structures, exfiltration systems and non-traditional stormwater controls (constructed wetlands, bioretention, etc.)
- Typical maintenance items to be addressed
 - Grass to be mowed
 - Trees to be removed from within the pond and on the embankment
 - Trash and sediment to be removed from inside of and around the pond outlet structure
 - Orifices to be cleaned and unclogged
 - Outlet pipe to be cleaned, inspected, and repaired
 - Sediment accumulation to be removed from pond
 - Pond bottom to be regraded to provide proper drainage towards the outlet discharge point
 - Energy dissipator to be cleaned and repaired
 - Emergency spillway, if applicable, to be inspected and repaired
 - Erosion on side slopes, if present, to be addressed
 - The Department must be notified in writing of any changes in maintenance responsibility for the stormwater devices at the site (include this statement in agreement).

Updated 10/3/06

DHEC000266

- *Note: The Department recommends that the county, city, or other governing utility, which has the authority to accept the ownership and maintenance of a storm drainage system also accept the permanent stormwater management structure.*
- *Note: If the entity or person with maintenance responsibility changes, then a new maintenance agreement, signed by the new person responsible for maintenance, must be provided to the Department. If a new, signed maintenance agreement is not provided to the Department, then the entity/ person who signed the most recent maintenance agreement on file with the Department will be considered the responsible entity.*

13. DISCHARGE POINTS

- Storm drainage or pond outfalls carried to an existing drainage outfall such as a pipe, ditch, etc.
- No new point discharges onto adjacent property where there was not a point discharge previously, unless written permission from the adjacent property owner is provided
- Level spreaders, plunge pools, etc. provided when the proposed outlet is near the property line and not directed to an existing outfall, such as a creek or ditch
- Twenty (20)-foot minimum buffer is provided between the property line and the discharge point
- Outlets shall not discharge on fill slopes

14. DETENTION WAIVER

- *Note: If the 2- and 10-year, 24-hour post-developed flow rates exceed the pre-developed rates, waivers from detention may be granted in accordance with regulation 72-302(B) on a case-by-case basis*
- Justification and a written request, including the following statement: "the increased flows will not have a significant adverse impact on the downstream/adjacent properties"
- A project may be eligible for a waiver or variance of stormwater management for water quantity control if the applicant can demonstrate that:
 - The proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties; or
 - The imposition of peak control requirements for rates of stormwater runoff would aggravate downstream flooding
- Waiver signed by the project's Professional Engineer
- *Note: See note in checklist item 10 regarding the 10% rule.*

15. PERMANENT WATER QUALITY REQUIREMENTS

- Permanent water quality addressed (all projects or LCP that disturb 5 or more acres)
 - Wet ponds designed to catch the first 1/4" of runoff from the entire area draining to the pond and release it over at least a 24-hour period
 - Dry ponds designed to catch the first 1" of runoff from the entire area draining to the pond and release it over at least a 24-hour period
 - *For areas not draining to a pond, show how permanent water quality requirements were addressed*
- Projects disturbing less than five (5) acres but within one-half (1/2) mile of a receiving water body in the Coastal Zone must meet Section III C-3.XIII.A of the Coastal Zone Management Program Reimbursements. Designs must show that the first 1/4 inch of runoff from the entire site or the first one (1) inch of runoff from the built upon area, whichever is greater, can be stored onsite.
- Waters of the U.S./State are not used for permanent water quality control (alternative means of treatment must be used if an existing pond is to be used for water quantity control).
- *Note: Other non-traditional stormwater controls such as Bioretention areas, constructed wetlands, etc. may be used. Consult the BMP Handbook for information on the design of these devices.*
- *Note: Pre-fabricated or proprietary treatment devices are approved on a case-by-case basis if adequate removal efficiency can be demonstrated. Provide pollutant removal efficiency data, preferably from a third-party testing company. Type of system selected should be based on the ability to remove the pollutants of concern in that area/situation (bacteria, hydrocarbons, etc.).*

16. SEDIMENTOLOGY

- Trapping efficiency calculations showing that all sediment basins/ traps are capable of achieving a sediment trapping efficiency of at least 80% for the 10-year, 24-hour storm event, if more than 10 disturbed acres drain to a common point (stream, lake, etc.)
- Sediment basins provide storage for the 10-year, 24-hour storm event for disturbed conditions or 3600 ft³/ acre draining to the basin, if more than 10 disturbed acres drain to a common point (stream, lake, property line, etc.)
- Sediment traps only used for drainage areas of less than 5 acres
- Sediment trap storage calculations, showing that 1800 ft³/ total acre draining to each trap is provided below the spillway
- If trapping efficiency calculations are required for sediment traps, then provide peak outflow, Q_{po} , calculations; the 10-year, 24-hour storm event for construction conditions cannot overtop the trap's spillway

- Sediment basins and traps designed for total area draining to them
- Drainage area map outlining the area draining to each basin/ trap
- Copies of figures used to determine V_{15} (SV-1) and trapping efficiency (ST-1, SB-1, SB-2), if Design Aids from BMP manual are used to determine trapping efficiencies
- Silt fence only used in areas with drainage areas of less than ¼ acre per 100 LF of fence and not used in areas with concentrated flows
- Clean-out stake, marked at ½ the designed sediment storage depth, provided in all sediment basins/ sediment traps
- *Note: Consult the BMP Handbook for information on the design of these and other devices.*
- *Note: The Design Aids in the BMP Handbook cannot be used to determine trapping efficiencies for structures in series. If the flow for the 10-year, 24-hour storm for construction conditions overtops the structure or the structure's spillway, then the Design Aids cannot be used. If multiple soil types are in the area draining to the structure, then the soil type with the smallest D_{15} for the appropriate depth should be used to determine the settling velocity, V_{15} ; an average D_{15} should not be used.*
- *Note: SedCAD users please refer to the memo regarding the input of outlet structures.*

17. STABLE CHANNEL CALCULATIONS

- All channels and diversion ditches able to handle the 10-year storm event with non-erosive velocities of less than 5 feet per second during construction (use appropriate CN for disturbed areas) and post-construction (if velocity exceeds 5 ft/s, then permanent measures to reduce the velocity to a non-erosive rate must be provided)
- Rock check dams provided in temporary diversions
- Installation detail for erosion control blanket (ECB) or turf reinforcement matting (TRM) if ECBs or TRMs to be used

18. INLET PROTECTION

- Provided at all inlets
- Hay bales not used
- Steel posts and buried fabric shown for filter fabric inlet protection
- Inlet protection details provided for pre-paving and after roadways have been paved
- *Note: The Department recommends that an inlet not have more than one (1) acre draining to it.*

19. ENERGY DISSIPATORS/ OUTLET PROTECTION

- All outlets stabilized
- Riprap aprons sized appropriately
- Riprap detail shows apron dimensions and stone sizes for each pad or each pipe diameter
- Filter fabric installed beneath all riprap

20. FILL SLOPES AND/ OR EMBANKMENTS

- All slopes stabilized
- Slope drains designed in accordance with the BMP Handbook
- Slope drains provided where concentrated flows discharge onto a fill slope
- For all slopes steeper than 1.5:1, identification of stabilization practice (e.g., ECB, TRM)
- *Note: Measures, in addition to grassing or hydroseeding, include synthetic or vegetative matting, diversion berms, temporary slope drains, etc.*
- *Note: If retaining walls or fill slopes are to be constructed at the downstream property line, the Department recommends a 10' buffer to allow for construction and maintenance. If a 10' buffer is not provided, then provide permission from the adjacent property owner for possible land-disturbing activities on his property.*

21. UTILITY LINES

- Limits of disturbance include areas disturbed for water and sewer line installation
- Inlet protection provided at all existing inlets that receive flows from the disturbed areas; also add this as a note on the plans
- For all utility lines crossing WoS, narrative and detail showing sediment and erosion control measures provided on plans
- Note for construction entrances to be provided at all locations where construction traffic accesses a paved roadway

22. TMDL/ 303d IMPAIRED WATERBODIES

- List the nearest S.C.DHEC Water Quality Monitoring Station (WQMS) that the site's stormwater discharges drain to and the waterbody on which it is located: _____

- Qualitative and quantitative assessment (described in Section 3.4C of SCR100000), if nearest WQMS listed on the 2004 303(d) List of Impaired Waters and if site's stormwater construction discharges contain the pollutant of impairment and if site disturbs 25 or more acres
- Evaluation of selected BMPs if nearest WQMS listed on the 2004 303(d) List of Impaired Waters and if site's stormwater construction discharges contain the pollutant of impairment and if site disturbs less than 25 acres
- If Approved TMDL developed for nearest WQMS and if site's stormwater construction discharges contain the pollutant of impairment, showed that measures and controls on SWPPP met assumptions and requirements of TMDL (may need to contact Watershed Manager for assistance)
- *Note: Contact Department staff for guidance on selection of BMPs based on pollutant of impairment.*

23. NAVIGABLE WATERS

- Extra plan sheet showing impacts to navigable water and description of activity included if S.C. Navigable Waters (SCNW) crossing and separate SCNW permit has not been obtained for all activities
- *Note: For NOIs initially submitted to delegated entities, if project has SCNW crossing and if separate SCNW permit has not been obtained for this crossing, then this item will be reviewed by S.C. DHEC before NPDES coverage will be granted.*

24. OCRM REQUIREMENTS

- *Note: The following items only apply to those projects in the eight coastal counties.*
- If a project is within a half-mile of a receiving water body (RWB) or is one (1) or more acre in size, a digital project boundary must be submitted and approved by the OCRM GIS department. If OCRM's review of the project location indicates potential impacts to Coastal Resources on projects disturbing less than or equal to 0.5 acre but within ½ mile of a RWB, then OCRM staff will notify the applicant to submit an NOI. For projects which will disturb more than 0.5 acre and are located within ½ mile of a RWB, the NOI and other pertinent information must be submitted with the digital boundary. Please include the completed digital submittal form along with the electronic boundary. Go to <http://www.scdhec.gov/environment/ocrm/permit/stormwater.htm> for instructions.
- Any freshwater wetlands on the site must be identified and verified by the US Army Corps of Engineers (USACOE). A Corps wetland verification letter and corresponding signed, sealed and dated wetland plat must accompany the application package. The dates on the plat and verification letter must correspond. The Corp verification letter must reference the plat as an "accurate depiction" and not preliminary or approximation. The plat needs to identify whether or not the wetlands are jurisdictional or non-jurisdictional. Include USACOE permit number on the permit application if applicable.

If non-jurisdictional wetlands are being impacted, a wetland impact statement as shown below must be completed along with an 8.5 x 11 inch map indicating the wetland acreages, amount and type of impacts. A USGS topographic map should also be submitted indicating the location of the project.

"This project is proposed to impact ____ acres of Federally non-jurisdictional freshwater wetlands. These proposed impacts require approval under the SCCZM program. This plan will (fill, excavate, otherwise impact) (give individual wetland size by acres) for a total impact of (total acreage). Mitigation will be provided for these proposed impacts by (describe mitigation, giving acreages of preserved wetlands and/or buffers/credits)." If no mitigation is proposed, the notice needs to state as such.

- If saltwater/critical areas are located on the site, an OCRM approved delineation and plat must be included with the submittal package.
- If the proposed project is adjacent to saltwater/critical areas then a dock master plan will need to be submitted (if applicable) with the permit application package.
- Water and Sewer Certification requests if applicable.
- See item #15, 4th bullet of this checklist for additional water quality requirements in the Coastal Zone.

25. SITE PLANS CHECKLIST:

- *Note: The Department may require phased sediment and erosion control plans for large or complicated projects.*
- Location map with site outlined on first plan sheet (map should have enough detail to identify Surface Waters of the State within 1 mile of the site)
- North arrow and scale
- Property lines and adjacent landowners' names
- Legend
- Registered engineer's signed and dated seal

- Engineering Firm's Certificate of Authorization seal
 - Existing and proposed contours for entire disturbed area
 - Limits of disturbed area
 - Locations of off-site material, waste, borrow, or construction equipment storage areas, excluding roll-off containers (*Note: Some off-site disturbed areas may require a separate application for NPDES coverage*)
 - Location and identification of any stormwater discharges associated with industrial activity (not construction)
 - Delineation of WoS, including wetlands (see checklist item 8)
 - Easements
 - Road profiles with existing and proposed ground elevations (if no contours are shown on the plans)
 - Grassing and stabilization specifications (temporary and permanent)
 - Construction sequence (implementation of all stormwater and sediment controls in the first phase of construction; ensure that basins, traps, ponds, etc. can be installed before the area draining to them is cleared and grubbed)
 - Standard notes (see following page)
 - Temporary and permanent control measures (provide details of all sediment and erosion control measures used; make sure the label or legend on the plans matches the name on the detail)
- Note: Maintenance requirements for each BMP should be listed on the detail.*
- Note: If details from the BMP Handbook are used, then the inspection frequency must be changed to be in accordance with the new CGP (see Standard note 3).*

Standard Notes

1. If necessary, slopes, which exceed eight (8) vertical feet should be stabilized with synthetic or vegetative mats, in addition to hydroseeding. It may be necessary to install temporary slope drains during construction. Temporary berms may be needed until the slope is brought to grade.
2. Stabilization measures shall be initiated as soon as practicable in portions of the site where construction activities have temporarily or permanently ceased, but in no case more than fourteen (14) days after work has ceased, except as stated below.
 - Where stabilization by the 14th day is precluded by snow cover or frozen ground conditions stabilization measures must be initiated as soon as practicable.
 - Where construction activity on a portion of the Site is temporarily ceased, and earth-disturbing activities will be resumed within 14 days, temporary stabilization measures do not have to be initiated on that portion of the Site.

3. All sediment and erosion control devices shall be inspected every seven (7) days. If site inspections identify BMPs that are damaged or are not operating effectively, maintenance must be performed as soon as practical or as reasonably possible and before the next storm event whenever practicable.

OR

All sediment and erosion control devices shall be inspected at least once every fourteen (14) calendar days and within 24 hours of the end of a storm event of 0.5 inches or greater. If site inspections identify BMPs that are damaged or are not operating effectively, maintenance must be performed as soon as practical or as reasonably possible and before the next storm event whenever practicable.

4. Provide silt fence and/or other control devices, as may be required, to control soil erosion during utility construction. All disturbed areas shall be cleaned, graded, and stabilized with grassing immediately after the utility installation. Fill, cover, and temporary seeding at the end of each day are recommended. If water is encountered while trenching, the water should be filtered to remove any sediments before being pumped back into any waters of the State.
5. All erosion control devices shall be properly maintained during all phases of construction until the completion of all construction activities and all disturbed areas have been stabilized. Additional control devices may be required during construction in order to control erosion and/or offsite sedimentation. All temporary control devices shall be removed once construction is complete and the site is stabilized.
6. The contractor must take necessary action to minimize the tracking of mud onto paved roadway(s) from construction areas and the generation of dust. The contractor shall daily remove mud/soil from pavement, as may be required.
7. Residential subdivisions require erosion control features for infrastructure as well as for individual lot construction. Individual property owners shall follow these plans during construction or obtain approval of an individual plan in accordance with S.C Reg. 72-300 et seq. and SCR100000.
8. Temporary diversion berms and/or ditches will be provided as needed during construction to protect work areas from upslope runoff and/or to divert sediment-laden water to appropriate traps or stable outlets.
9. All waters of the State (WoS), including wetlands, are to be flagged or otherwise clearly marked in the field. A double row of silt fence is to be installed in all areas where a 50-foot buffer can't be maintained between the disturbed area and all WoS. A 10-foot buffer should be maintained between the last row of silt fence and all WoS.
10. Litter, construction debris, oils, fuels, and building products with significant potential for impact (such as stockpiles of freshly treated lumber) and construction chemicals that could be exposed to storm water must be prevented from becoming a pollutant source in storm water discharges.

Policies and Procedures

of the South Carolina Coastal Management Program

- An excerpt of the South Carolina Coastal Management Program Document -

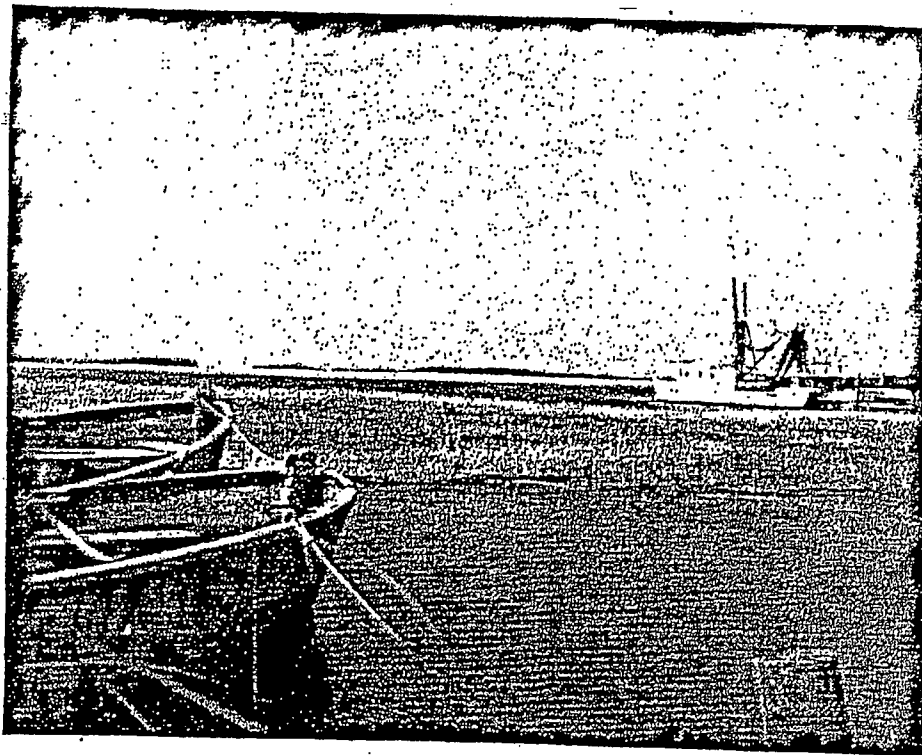
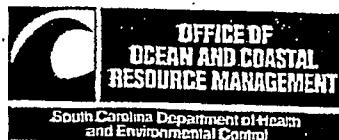


EXHIBIT E



Updated July 1995

DHEC000272

XIII. STORMWATER MANAGEMENT GUIDELINES

Most land disturbing activities in South Carolina must comply with the requirements and applicable regulations of the Erosion and Sediment Reduction Act of 1983 (48-18-10, et. seq.), or the Stormwater Management and Sediment Reduction Act of 1991 (48-14-10, et. seq.). The final regulations, effective on June 26, 1992, pursuant to the Storm Water Management and Sediment Reduction Act of 1991, establish the procedure and minimum standards for a statewide stormwater program. Section R.72-304F of the regulations states that "OCRM, in coordination with the Commission, will serve as the implementing agency for these regulations in the jurisdictions of the local governments which do not seek delegation of program elements in the counties of Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Horry and Jasper." In addition, Section R.72-307C(5)(g) states that "For activities in the eight coastal counties, additional water quality requirements may be imposed to comply with the OCRM Stormwater Management Guidelines. If conflicting requirements exist for activities in the eight coastal counties, OCRM guidelines will apply."

Pursuant to the Coastal Zone Management Act, OCRM is responsible for protecting the environmentally sensitive areas of our coast. While the regulations of the Stormwater Management and Sediment Reduction Act adequately address most nonpoint-source pollution problems, the need exists for establishing additional criteria to protect sensitive coastal waters.

A. STORMWATER RUNOFF STORAGE REQUIREMENTS

The regulations of the Stormwater Management and Sediment Reduction Act require that "permanent water quality ponds having a permanent pool shall be designed to store and release the first 1/2 inch of runoff from the site over a 24-hour period. The storage volume shall be designed to accommodate, at least, 1/2 inch of runoff from the entire site." For all projects, regardless of size, which are located within one-half (1/2) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first 1/2 inch of runoff from the entire site or storage of the first one (1) inch of runoff from the built-upon portion of the property, whichever is greater. Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site. In addition, for those projects which are located within 1,000 (one thousand) feet of shellfish beds, the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property must be retained on-site.

Receiving water bodies include all regularly tidally influenced salt and freshwater marsh areas, all lakes or ponds which are used primarily for public recreation or a public drinking water supply, and other water bodies within the coastal zone, excluding wetlands, swamps, ditches and stormwater management ponds which are not contiguous via an outfall or similar structure with a tidal water body.

B. PROJECT SIZE REQUIRING STORMWATER MANAGEMENT PERMITS

Section R.72-305B(1) states that "for land disturbing activities involving two (2) acres or less of actual land disturbance which are not part of a larger common plan of development or

sale, the person responsible for the land disturbing activity shall submit a simplified stormwater management and sediment control plan meeting the requirements of R.72-307H. This plan does not require preparation or certification by the designers specified in R.72-305H and R.72-305I.* Due to the potentially damaging effect of certain projects of less than two (2) acres of land disturbance, stormwater management and sediment reduction plan submittal and regulatory approval shall be required for those smaller projects located within 1/2 mile of a receiving water body. Single family homes that are not part of a subdivision development are exempt from this requirement.

C. STORMWATER MANAGEMENT REQUIREMENTS FOR BRIDGE RUNOFF

The following is the criteria used to address stormwater management for bridges traversing saltwater and/or critical areas.

- 1) No treatment is necessary for runoff from bridge surfaces spanning SB or SA waters. This runoff can be discharged through scupper drains directly into surface waters. However, the use of scupper drains should be limited as much as feasibly possible.
- 2) If the receiving water is either ORW or SFH then the stormwater management requirements shall be based on projected traffic volumes and the presence of any nearby shellfish beds. The following matrix lists the necessary treatment practices over the different classes of receiving waters.
- 3) The Average Daily Traffic Volume (ADT) is based upon the design carrying capacity of the bridge.

D. GOLF COURSES ADJACENT TO RECEIVING WATER BODIES

Golf course construction and maintenance practices result in the potential for significant negative impacts from the runoff of sediments, pesticides, herbicides and other pollutants. For this reason, when golf courses are constructed adjacent to receiving water bodies then the following practices are to be incorporated:

- 1) Minimum setbacks from the receiving water body of 20 feet for all manicured portions of the golf course (fairways, greens and tees) are required unless other acceptable management techniques are approved and implemented to mitigate any adverse impacts.
- 2) All drainage from greens and tees must be routed to interior lagoons or an equivalent stormwater management system.
- 3) To prevent the conversion of the stormwater system to critical area and to maintain positive drainage at high tides, all outfalls from the lagoon system must be located at an elevation above the critical area (if the discharge is to critical area) ~~AND above the normal water elevation a distance to allow for storage of the first one inch of runoff.~~ The volume which must be stored shall be calculated by multiplying the area of all the greens and tees by one inch. (Previously constructed stormwater management systems which meet all current and future storage requirements will not be required to modify outfalls.)
- 4) No greens or tees shall be located on marsh hummocks or islands unless all drainage can be conveyed to the interior lagoon system or to an equivalent onsite stormwater management system.
- 5) Stormwater impacts to freshwater wetlands shall be limited by providing minimum 20 foot buffers, or an accepted alternative, between manicured areas (fairways, greens and tees) and the wetlands. This minimum buffer must be increased if land application of treated effluent is utilized in the area.
- 6) An integrated pest management system designed in accordance with current best technology practices must be employed on the course to limit the application of chemicals which, if over applied, may leach into the ground and adjacent surface waters.
- 7) In accordance with S.C. Department of Health and Environmental Control requirements, a two (2) foot separation must be maintained between the surface of the golf course and the ground water table where spray effluent is applied.
- 8) The normal ground water elevation must be established by a registered engineer or soil scientist.
- 9) All projects which are within 1000 feet of shellfish beds must retain the first 1 1/2 inches of runoff as otherwise described in c above.

- 10) If spray effluent or chemicals are applied to the turf via the irrigation system, all spray heads must be located and set so as to prevent any aerosols from reaching adjacent critical areas.

E. MINES AND LANDFILLS

Due to the significant amount of land disturbance involved in the construction of mines and landfills, these types of operations need to strictly adhere to sediment/erosion control requirements particularly when they are located near coastal waterways. When mining or landfill projects are located within 1/2 mile of receiving water bodies, pumping of ground water from sediment basins must be done with floating intakes only. Pumping of these basins must cease whenever the water levels come to within two (2) feet of the pond bottom. In addition, landfill planning must be designed on a comprehensive site basis for storm water management and sediment/erosion control; to include management practices for each separate cell as it is phased into the landfill.

F. NOTICE OF APPROVAL

All notices of approval must be in written form.



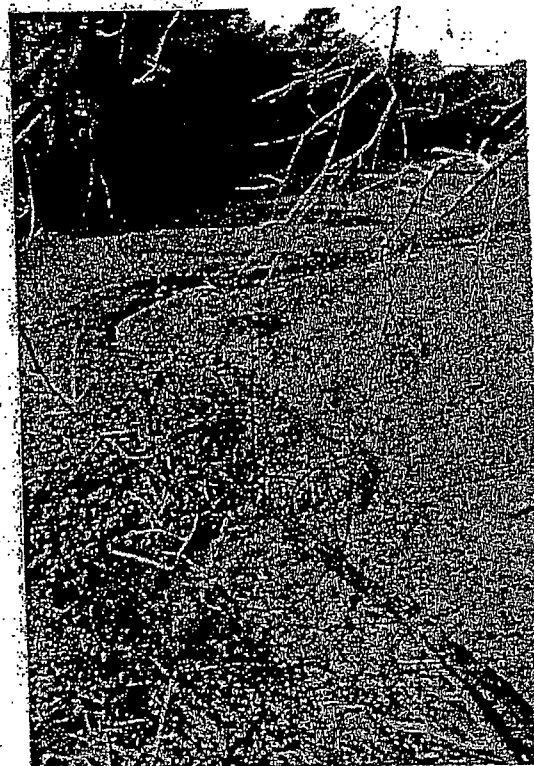
1



2



2



1

EXHIBIT F

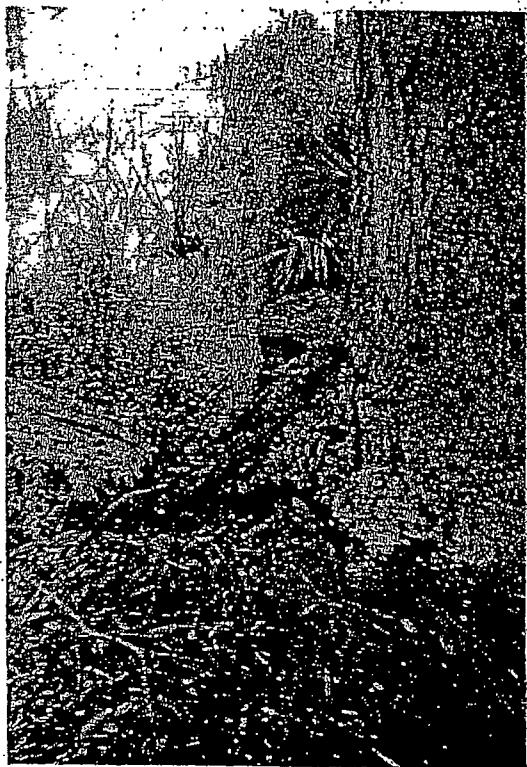
DHEC000277



1



2



3



4

EXHIBIT G

DHEC000278

DHEC000279



5



6

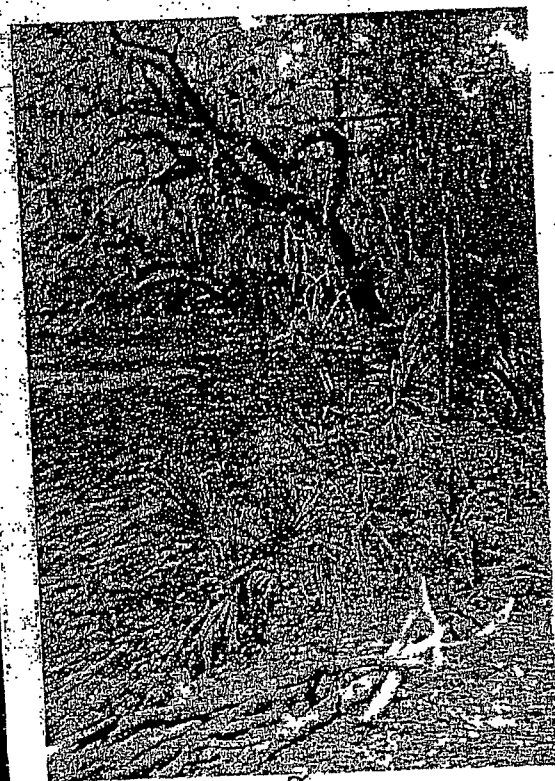


EXHIBIT 6 (CONT.)

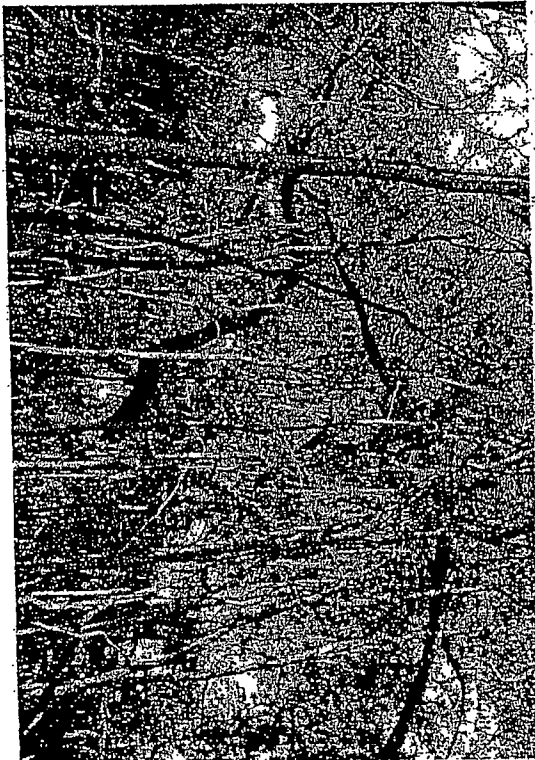


EXHIBIT 6 (CONT.)

DHEC000280

CHAPTER 30.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL-- COASTAL DIVISION

(Statutory Authority: S.C. Code Section 48-39-10 et seq.)

30-1. Statement of Policy.

A. South Carolina Coastal Zone Management Act.

(1) The South Carolina Coastal Zone Management Act was passed by the 1977 General Assembly of South Carolina to provide for the protection and enhancement of the State's coastal resources. This legislation creates the South Carolina Coastal Council which is given the task of promoting the economic and social welfare of the citizens of this State while protecting the sensitive and fragile areas in the coastal counties and promoting sound development of coastal resources. The South Carolina Coastal Zone Management Act was amended by Act 181 of 1993 which merged South Carolina Coastal Council with the South Carolina Department of Health and Environmental Control. South Carolina Coastal Council became the Office of Ocean and Coastal Resource Management (OCRM).

(2) Through the efforts of an overall coastal zone management program and permitting process, the Department seeks to guide the wise preservation and utilization of coastal resources. These rules and regulations are intended to:

- (a) aid developers and others in taking advantage of state-of-the-art techniques in developing projects compatible with the natural environment;
- (b) insure consistent permit evaluations by the Department; and
- (c) serve as a stimulus for implementation of better and more consistent management efforts for the coastal zone.

(3) These regulations are the Department statements of general public applicability that implement and prescribe policy and practice requirements of the Department. They are to be read as part of, and to be construed with, the policies set forth in the South Carolina Coastal Management Program.

B. The Value of Tidelands and Coastal Waters.

(1) The tidelands and coastal waters of the South Carolina coast are a very dynamic ecosystem and a valuable natural resource for the people of the State. The tides regularly ebb and flood through the coastal inlets, bays and marshes which constitute a fragile area, vulnerable to the impacts of many human activities. Tidelands and coastal waters are identified as "critical areas" over which the Department has direct permitting authority.

(2) The saline marshes are highly productive components of the marine food web of coastal waters and estuaries. Decaying organic material, called detritus, serves as the basis of the food web and is the major biological contribution of the saline marshes. Many commercially and recreationally important fish and shellfish species depend on the marshlands and estuaries for all or part of their life cycle. In addition, many birds and other forms of wildlife utilize wetlands as habitat as well as a source of food. Tidelands and coastal waters also have become increasingly important in recent years for the purposes of aquaculture.

(3) Among the important functions of the salt and brackish marshes is their role in protecting adjacent highlands from erosion and storm damage. Marsh vegetation absorbs and dissipates wave energy and establishes a root system which stabilizes the soils. Its effectiveness as a buffer depends on the surface area available which, combined with the composition of the underlying substrate, allows tidelands to act as "sponges," absorbing and releasing waters during storms or times of heavy riverine discharge.

(4) Marshes also perform a valuable waste treatment function since the dense vegetation acts as a filter, trapping sediments and pollutants which enter as run-off from the upland areas. The trapping of sediments helps maintain water clarity, a factor important to clam, oyster, and phytoplankton productivity. The marshes also assimilate pollutants and recycle nutrients through various biochemical processes.

(5) Coastal waters and the adjacent marshes are also significant as aesthetic, recreational and educational resources. Much of the expenditure for recreation and tourism in the South Carolina coastal zone is for

EXHIBIT H

DHEC000281

30-11. General Guidelines for All Critical Areas.

A. Preface: The critical areas are of vital importance to the State, and there is strong and growing pressure for the development of these areas. The Department has established these rules and regulations for permit applications in an effort to reduce the irreversible loss of productive tidelands, coastal waters, beaches, and dunes while meeting long-range State development needs.

B. General Considerations: In assessing the potential impacts of projects in critical areas, the Department will be guided by the policy statements in Sections 48-39-20 and 48-39-30 and the following ten considerations in Section 48-39-150:

- (1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water;
- (2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors, or in a waterway used for commercial navigation and shipping, or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring that the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Department prior to issuing a permit;
- (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs, or clams or any marine life or wildlife, or other natural resources in a particular area, including but not limited to water and oxygen supply;
- (4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water;
- (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources;
- (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone;
- (7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state;
- (8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards;
- (9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project;
- (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

C. Further Guidelines: In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following:

- (1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area.
- (2) Where applicable, the extent to which the overall plans and designs of a project can be submitted together and evaluated as a whole, rather than submitted piecemeal and in a fragmented fashion which limits comprehensive evaluation.
- (3) The extent and significance of negative impacts on Geographic Areas of Particular Concern (GAPC). The determination of negative impacts will be made by the Department in each case with reference to the priorities of use for the particular GAPC. The priorities of use are found in Chapter IV of the Coastal Management Program.

D. General Guidelines for Beaches and the Beach/Dune System: In addition to the provisions of the South Carolina Coastal Management Act of 1977, the policies of the South Carolina Coastal Management Program, and applicable rules and regulations, the Department shall base its decisions on activities in the beach/dune system on the findings and policies specified in Section 48-39-250 and Section 48-39-260 of the 1977 Coastal Zone Management Act, as amended, and the following:

- (1) The Department shall discourage new construction in the beach/dune system and encourage those who have erected structures within the system to retreat.

DHEC000282

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
STAFF STATEMENT OF POSITION
DOCKET NO. 12-RFR-33

Requestors: John North, Ken Bruning, Janet Bruning, David Feron, Mary Feron, Byrnal Haley,
Sally Haley, Martha James, Don Haarmeyer and Pamela North

Permittee: Cat Island POA
Project: Garfield Park Phase 3 - Drainage System Retrofit
Permit #: Stormwater Discharges from Large and Small Construction Activities,
NPDES General Permit SCR100000 (2006 NPDES CGP) coverage- SCR10N463

Submitted by: Richard Geer and Shannon Hicks

SUMMARY

This request challenges a decision issued on June 18, 2012, by DHEC's Bureau of Water (BOW) and Office of Ocean and Coastal Resource Management ("OCRM") granting coverage under a general permit allowing the Permittee to install water quality filters in storm drain inlets instead of replacing a previously existing dike and outlet control structure. The Permittee's Notice of Intent ("NOI") also includes a request for a waiver from the storm water quantity control requirements allowed for in South Carolina Regulation 72-300 et. seq. The impounded area that was formed by the dike and outlet control was built in the 1960's well before the creation of the State stormwater management regulations that became effective in 1992. This impoundment was used to address State storm water quantity and quality control requirements for the Garfield Park Phase 3 residential subdivision that was permitted by the Department on June 9, 2004. The dike and outlet control structure have since washed out and after one failed attempt at restoring the dike, the Permittee decided to employ a new technology rather than rebuild the impoundment.

The project area is located on the southeast side of Cat Island in Beaufort County, SC and is directly adjacent to Cowen Creek (also known as Cowan or Chowan Creek). Cowen Creek is a large tidally influenced water body that flows into the Beaufort River, also part of the Intracoastal Waterway. Gary Meyer with Chowan Creek Partners was the applicant for the Garfield Park Phase 3 permit. The Cat Island Property Owners Association is the permittee for the Garfield Park Phase 3 - Drainage System Retrofit and Mr. Meyer signed for the Cat Island POA as Chairman.

BACKGROUND

Department staff met with Mr. Meyer onsite on May 20, 2010 to investigate the complaint that the outfall structure and dike for the impoundment at Cat Island had washed out. Staff discussed with Mr. Meyer possible options to meet applicable permit requirements. After review of Department files for existing permits in the area staff followed up with Mr. Meyer via telephone

1



AndrewsEngineering000464

and email on June 3, 2010 to make sure Mr. Meyer understood the stormwater management requirements that would have to be addressed. On July 6, 2010, staff sent a formal letter to Mr. Meyer notifying him of the permit requirements and indicating an application must be submitted within 60 days. Mr. Meyer subsequently submitted an NOI for installing water quality filters in existing storm drains in Garfield Park Phase 3.

The NOI was received on September 28, 2010 and placed on Public Notice by the Department on October 1, 2010. Staff reviewed the above referenced application under the applicable policies of the Coastal Zone Management Program Document, the provisions in the Water Pollution Control Permits Regulations, S.C. Code Reg. § 61-9, and the Department's Stormwater Management and Sediment Reduction Regulations, S.C. Code Reg. § 72-300 et. seq. After following the required procedures set forth in these policies and regulations, and carefully considering comments and concerns raised by adjacent property owners during the review, the Department issued the above referenced permit on June 18, 2012.

During the Public Comment period and review process, the Department received many comments from adjacent property owners suggesting that the impoundment should be re-established and objecting to allowing alternative means of stormwater management. The majority of the comments raised the following concerns:

- The former impoundment provided stormwater management for many developments
- Not re-establishing the impoundment would cause adverse impact with regard to storm water quantity control
- The proposed water quality treatment mechanism is inappropriate
- Not re-establishing the impoundment would impact threatened and endangered species
- Not re-establishing the impoundment would impact water quality and freshwater wetlands
- Not re-establishing the impoundment would impact adjacent property value.

On June 26, 2012, several property owners residing on the former impoundment filed their request for review ("RFR"). The requestors also provided additional correspondence on July 10, 2012. The RFR and additional correspondence stated the objections listed above as well as other concerns. Staff has attempted to summarize these concerns and respectfully submits the following in response.

STAFF RESPONSE TO REQUESTORS' CONCERNS

- **The former impoundment provided stormwater management for many developments**

The requestors suggest that the Cat Island Lake was relied on by another development on the island, Tabby Park, for stormwater management. Staff reviewed DHEC permit files in depth throughout the process. Garfield Park Phase 3 project has been determined to be the only development that relies on the Cat Island Lake to meet the requirements of the SC stormwater management regulations.

To identify all developments that may have relied on the previous impoundment to meet the requirements of the SC stormwater management regulations (SC Reg. 72-300 et seq.) staff reviewed DHEC permit files, county records and documents submitted by the adjacent property owners. Staff also visited the site to document the stormwater management controls. Staff found that most developments in the Cat Island Lake watershed were constructed before the effective date (1992) of SC Reg. 72-300 and of those few developments permitted and constructed after the effective date of these regulations, Garfield Park Phase 3 was the only project with any mention or reference to Cat Island Lake.

Department records show that the golf course lagoon and pond within Tabby Park were the only ponds intended to provide stormwater management for Tabby Park. The referenced golf course lagoon is a 2.3 acre pond that is bisected by a road where connection is maintained via two 36-inch culverts. The outlet of this 2.3 acre pond is controlled by a 12 inch pipe which drains to another golf course lagoon. No reference is given to Cat Island Lake in Department permitting records for Tabby Park. Staff also found during a site visit that the outflow from the pond is controlled by an earthen spillway, which discharges to a vegetated swale. That swale then flows through a series of depressions, ditches and culverts that ultimately lead to the previously impounded area. Staff confirmed that Cat Island Lake was not a part of the stormwater system for Tabby Park as permitted by the State nor does it function as such now.

- **Not re-establishing the impoundment would cause adverse impact with regard to storm water quantity control**

SC Reg. 72-307.C(4) addresses storm water quantity control. Per this regulation the post-development rate of flow of stormwater leaving a project site cannot exceed that of the pre-development for the 2 and 10 year, 24-hour return storm events. However Reg. 72-302.B(2)(a) allows professional engineers to request a waiver from this design requirement provided that they can show the project will have no significant adverse impact on the receiving natural waterway or downstream properties. The Permittee's engineer made this request and provided appropriate supporting analysis.

For this analysis, the Department requested modeling of a 10 year/24 hour storm event during a Mean Higher High Water (MHHW) tidal event showing the impacts of the water surface elevation and discharge to Cowen Creek with and without replacing the dike and lake outlet control structure. Although stormwater management regulations do not contain specific requirements for evaluating tidal impacts, a MHHW tidal event was used to evaluate water surface elevations and the extent of tidal influence. Mean Higher High Water is the average of the higher high water height of each tidal day. This analysis supported the statement of the permittee's consulting engineer that the increased discharge rates would not have significant adverse impact on the downstream/adjacent properties. It also showed that the maximum water level would be lower without the dike and outlet control structure during this event than it would be with a dike and outlet structure and therefore the risk of flooding would actually be lower without the dike for the 10- year, 24 hour design storm event required in State Stormwater Management Regulations.

- **The proposed water quality treatment mechanism is inappropriate**

SC Reg. 72-300 provides design requirements for several storm water quality treatment practices, but engineers are not prevented from using other treatment mechanisms that provide a similar level of treatment. The regulations also provide for staff modifying the design requirements for a specific type of project. SC Reg. 72-305.B(3) actually recommends measures other than ponds to achieve water quality improvement for sites disturbing less than 10 acres.

To treat stormwater, the Permittee elected to install water quality filters in pertinent storm drain inlets. These inlet filters provide a comparable level of treatment to a pond. Design requirements for wet ponds include treating the first ½ inch of stormwater runoff. The filters proposed for this storm drainage retrofit have actually been designed to treat the first 1.5 inches of stormwater runoff. The specified In-line Filters are designed with media to absorb hydrocarbons, oil and grease. The inserts are also designed to filter and trap pollutants such as sediment, nitrogen, phosphorous, litter and debris, which are similar pollutants that a pond would be collecting by storing the first flush volume. The filters proposed by the permittee's engineer are designed with an overflow system to prevent clogging, which could cause flooding. They are also designed to minimize failure, which would result in the pollutants that were previously trapped being carried downstream. This design also considers that the majority of pollutants are washed off the ground surface by frequent small storm events and are washed off early on in the larger storm events. Therefore the design allows the relatively clean runoff to bypass the filters instead of re-suspending the previously trapped pollutants. Furthermore, the permittee was required to sign a maintenance responsibility agreement to make sure the filters are maintained and provided a maintenance plan.

- **Not re-establishing the impoundment would impact threatened and endangered species**

The policies in the Coastal Zone Management Program Document guide staff to coordinate with SCDNR to determine if an activity may cause impacts to threatened or endangered species habitat. DNR responded they had no records of threatened or endangered species, including bald eagles or wood storks, nesting in the area. DNR also did not indicate that the permanent removal of the impoundment would significantly affect threatened or endangered species. Additionally according to OCRM Wetland Section staff, who are tasked with implementing the Critical Area Permitting Program, the previously impounded area is currently showing signs of naturalizing and returning to its historical state. With continued tidal cycles the general character of the area will return to its natural state, a tidally flushed marsh meadow, attracting a more diverse group of animals. Such a process is not a violation of state regulations.

- **Not re-establishing the impoundment would impact water quality and freshwater wetlands.**

The Requestors suggest OCRM is not protecting a unique habitat that had been in place since the 1960s. The impoundment was not installed to address regulatory requirements, but was able to satisfy regulatory requirements for a project constructed years later. After the failure of the dike, the Permittee proposed alternate storm water quality treatment to meet the requirements of Reg

72-300 that will result in the previously impounded area returning to a natural tidally influenced marsh with a diverse habitat. The Department reviewed the proposal and found it met the requirements of the aforementioned regulations and policies.

The freshwater wetlands in the area in question are subject to the jurisdiction of the US Army Corps of Engineers. OCRM Wetland Staff did request the Mean Higher High Water level be modeled to show the extent of tidal influence in the freshwater wetland area and found no violations of OCRM wetland requirements. Staff has communicated with the US Army Corps of Engineers regarding the property owners' concerns and found that the return of the area to its natural state is consistent with current Corps permits and policies.

The Requestors also suggest that the survey provided shows that the development is within 1000 feet of shellfish beds and should therefore trigger more stringent water quality controls under the CZMA policies. The Requestors survey appears to use direct line of site to measure the distance instead of following the drainage path as the Permittee's engineer did. During the review, Department staff assessed the distance of the development to shellfish beds through several means. Staff reviewed the 2004 development plans, and also used aerial photographs and GIS applications to check and measure the drainage path. The current submittal by the Permittee's engineer also verifies this distance. In each instance, the distance was found to be more than 1000 feet.

Staff's review found that the drainage path from the Garfield Park Phase 3 Development to the nearest shellfish bed is approximately 1040 feet; therefore the heightened water quality treatment requirement of the CZMA policies associated with a project's proximity to shellfish beds is not applicable. Based on these considerations staff determined that the water quality treatment requirements set forth in the SC Reg 72-300 and the CZMP Policies are appropriate and will be met.

- Not re-establishing the impoundment would impact adjacent property value.

The Requestors suggest that the Department did not consider the project's impact to property owners and seem to rely on SC Code 48-39-150 and the Critical Area Permitting Regulations, R. 30-11. One of the many considerations included in those provisions is a balance of economic interests; however, it should be noted that those provisions involve activities requiring a critical area permit and not activities requiring coverage under the 2006 NPDES CGP and associated Coastal Zone Consistency determination. At this time, no critical area permit has been issued. A condition of the NPDES permit at issue here does state that any alteration of Critical Area will require separate authorization by OCRM. Additionally, the requestor references SC Code 48-39-20 and 30 which apply to Coastal Zone Consistency determinations. The construction of the former Cat Island Lake was not subject to the Coastal Zone Management Act. Only the construction of the Garfield Park Phase 3 development (roads, homes, etc.) was subject to the Coastal Zone Management Act. Construction of Garfield Park Phase 3 is complete, and the application at issue here only involves a retrofit to the stormwater management system serving Garfield Park Phase 3.

CONCLUSION

The Requestors are obviously concerned about the fate of the previous impoundment that was located near their homes and believe that ponds are the best method to treat stormwater. While Department staff recognizes these concerns, they are obligated to act on applications as submitted by permittees and staff must analyze those applications within the context and authority of the applicable regulations. As indicated above, the stormwater regulations allow for alternative treatment mechanisms and recommend measures other than ponds to achieve water quality improvement for smaller sites. Not only is the Garfield Park Phase 3 area less than 10 acres but the drainage area to each in-line filter is even smaller. Staff analysis indicated the In-Line filters proposed by the applicant would meet all regulatory requirements for controlling water quality. Staff analysis also indicated that proper justification was provided by the professional engineer of record for a waiver from the water quantity requirements. The staff decision was based on the applicable stormwater management regulations and coastal management policies written as a result of the Coastal Zone Management Act. Based on the foregoing, DHEC staff requests that the Board affirm the staff's decision to issue the permit as conditioned.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Petitioners,

v.

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

Respondent.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control and Garfield Park
Phase 3,

Respondents.

Docket No.: 12-ALJ-07-0434-CC

**PETITIONER CAT ISLAND POA C/O
GARY MEYER'S MOTION TO
DISQUALIFY PETITIONERS'
COUNSEL**

Petitioner Cat Island POA, c/o Gary Meyer ("Cat Island POA") respectfully moves this Court pursuant to Rule 3.7 of the South Carolina Rules of Professional Conduct to disqualify John E. North, Esq., counsel for Petitioners Bruning, Feron, Haley, James, Haarmeyer and

NPCHAR1:1255358.1-PG-(MSHAHID) 052058-00001

Pamela North on the grounds that John E. North is a necessary witness at the contested case hearing scheduled for January 14-17, 2014.

This Motion is based on the following. On or about December 5, 2013, the undersigned learned that John E. North and Pamela North listed their home with Lowcountry Real Estate for sale. A subpoena was issued to Lowcountry Real Estate, and the undersigned received and reviewed the requested documents on January 6, 2014. These documents include a Disclosure Statement executed by John North and Pamela North. This Disclosure Statement contradicts arguments proffered by John North and deposition testimony of Pamela North.

The Norths' home which is the subject of the listing agreement with Lowcountry Real Estate is identified as #2 Rush Street and is located on Cat Island. Alleged injuries to this property are part of the basis for Pamela North's initiation of this contested case. Pamela North testified in her deposition that she is concerned that her property is threatened by tidal waters from the adjoining tidal marsh. This portion of Mrs. North's deposition testimony is attached to this Motion as Exhibit A.

In addition, John E. North argued before this Court, in opposition to Summary Judgment, that the injury suffered by all Petitioners include "[e]ncroachment of tidal waters onto their residential property" and "[d]estruction of their landscaping by the exposure to tidal salt water." These arguments were embodied in the Court's Order Denying Summary Judgment which was drafted by Mr. North, attached as Exhibit B.

The attached Disclosure Statement, Exhibit C to this Motion, contradicts the arguments made by Mr. North and Mrs. North's deposition testimony at least as relates to #2 Rush Street, and renders Mr. North a witness. Part V. of the Disclosure Statement, (Bates label 15) includes the following statements:

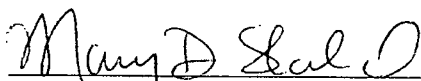
19. Problems caused by fire, smoke, or **water** to the property during your ownership.
20. Drainage, **soil stability**, atmosphere, or underground problems affecting the property.
21. **Erosion or erosion control** affecting the property.
22. **Flood hazards, wetlands**, or flood hazard designations affecting the property.

After each statement John E. North and Pamela North indicated “No” with an “X” in the box under “No.” This form was executed on November 18, 2013, by the Norths, following Pamela North’s deposition in August and John North’s statements to the Court in opposition to Summary Judgment on October 23, 2013.

Rule 3.7 of the Rules of Professional Conduct provides, in part, as follows: “(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” See BB&T of S. C. v. Fleming, 601 S. E. 2d 540, 541 n. 2 (S. C. 2004) (“Rule 3.7 of the Rules of Professional Conduct, Rule 407, SCACR provides that an attorney may not participate in a case if that attorney is likely to be a ‘necessary witness.’”) An opposing party may invoke Rule 3.7 “where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.” (Comment Rule 3.7) Here, John North has argued, and will likely argue, that Petitioners’ properties have and will suffer from flooding as a consequence of the detention waiver granted by the Department. Yet these arguments are contradicted by the Disclosure Statement, and the statements contained in the Disclosure Statement are critically important to Cat Island POA and the undersigned in persuading the Court that the detention waiver is appropriately issued in this case.

This Court is required to balance the interest of the parties in resolving this Motion. Mr. North's disclosures made in the context of listing his property for sale constitute important evidence that support Cat Island POA's position in this contested case and can only be presented by calling Mr. North as a witness. The undersigned is also aware of the potential for prejudice to the other Petitioners. This prejudice can be addressed by allowing sufficient time for the Petitioners to substitute counsel. The impoundment which contained Cat Island Lake failed in June of 2009, four and ½ years ago. Given the amount of time that has passed since failure of the impoundment an additional delay in resolution of this matter occasioned by allowing Petitioners the opportunity to obtain new counsel is not likely to cause any additional prejudice to Petitioners.

Respectfully submitted,



Mary D. Shahid
Angelica M. Colwell
NEXSEN PRUET, LLC
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29401
PHONE: 843.577.9440
FACSIMILE: 843.414.8242
MSahid@nexsenpruet.com
AColwell@nexsenpruet.com

Attorneys for Cat Island POA

1 SHAHID - NORTH (DIRECT EXAMINATION)

2 understand the question. Could you

3 repeat it for us?

4 MS. NORTH: Yeah.

5 BY MS. SHAHID:

6 Q Okay. Can you tell me the distance
7 from the area where you've lost vegetation to
8 the closest corner or part of your structure?

9 A Well, first of all where we've lost
10 vegetation is along the driveway.

11 Q Uh-huh.

12 A And the structure doesn't start until
13 much further to the river.

14 Q Okay.

15 A I don't -- I can't give you those
16 distances, I'm sorry.

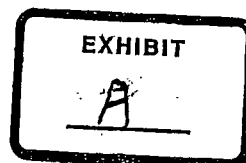
17 Q Do you think your house is threatened
18 from the action of the water coming in and out
19 of the lake?

20 A It concerns me.

21 Q Okay. Why does it concern you?

22 A Because at spring tides the water is
23 within three or four feet of the corner of our
24 house.

25 Q Okay.



FILED

NOV 05 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

Ken Bruning, et al.,

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No.: 12-ALJ-07-0434-CC

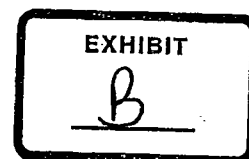
**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

Docket No.: 12-ALJ-07-0436-CC

This matter came on for hearing on October 23, 2013, on the Motion for Summary Judgment filed by the Respondent, Cat Island POA, c/o Gary Meyer ("Cat Island POA"). Present on behalf of Cat Island POA was Gary Meyer, as well as its counsel, Mary D. Shahid and Angelica M. Colwell. South Carolina Department of Health and Control ("DHEC") appeared through its counsel, Nathan Haber. The Petitioners, Martha James, Donald Haarmeyer, Salley Haley, Ken Bruning, and Pamela North, appeared in person and through counsel for all Petitioners, John E. North, Jr.

The Court, having reviewed the evidence offered by the parties, and having considered the written and oral arguments of counsel, finds as follows:

1. The Petitioners are owners of lakefront residential lots platted around a 7-acre lake that has been previously permitted and used as the approved detention basin for stormwater



treatment pursuant to a stormwater permit issued by DHEC in 2004.

2. After the dike that created the lake failed and subsequent efforts to repair the dike also failed, Cat Island POA sought authorization from DHEC to change the manner of treating stormwater from the previously approved detention provided by the lake to treatment by in-line filters.

3. In its Motion Cat Island POA requested that the Court grant summary judgment in Cat Island POA's favor and against the Petitioners on the ground that there is no case or controversy because the Petitioners failed to establish standing to challenge the rescission of the coastal zone consistency certification for the Drainage System Retrofit project and the issuance of NPDES General Permit SCR100000 (2006 NPDES CGP) SCR 10N463 for Storm Water Discharge from Large and Small Construction Activities ("General Permit"). In essence, Cat Island POA argues that none of the Petitioners are claiming that they have been or would be injured by installation of the water quality filters, and that the Petitioners' concerns are more about restoration of the detention basin called Cat Island Lake.

4. Under *Sea Pines Assn. for the Prot. of Wildlife, Inc. v. S. C. Department of Natural Resources*, 345 S.C. 594 (2001), the Petitioners have standing if they can demonstrate an injury-in-fact that is causally related to issuance of the General Permit and that the injury is likely to be redressed by a favorable decision of this Court. The Petitioners argue that, in order to evaluate the standing of the Petitioners, it is necessary to consider the totality of the agency action to which they object, as well as the consequences to Petitioners of that agency action.

5. The Court finds that the agency action in question involves more than permission for the installation of water quality filters. DHEC's approval of the General Permit grants Cat Island POA approval to retrofit the previously approved and permitted stormwater treatment system for Garfield Park, Phase 3. Implicit in such a retrofit is the abandonment of the previously approved system of treatment by the detention provided by the lake that abuts the residential property of the Petitioners. Cat Island POA's Motion concedes at page 18 that "because installation of the filters is intended to be an alternative to any repair, the breach in the dike would be allowed to remain if the General Permit was declared final and complete."

6. The Petitioners allege that, should the General Permit coverage become final and the dike and lake abandoned, the consequences to them include the following:

a. Encroachment of tidal waters onto their residential property.

- b. Destruction of their landscaping by the exposure to tidal salt water.
- c. Loss of the value of the lakefront property of Petitioners.
- d. Loss of the aesthetics of the lake and its wildlife.

7. In addition to the economic impact to them if the General Permit coverage becomes final, Petitioners relied upon *Sea Pines, supra*, to establish that deprivation of their aesthetic and recreational interests in enjoying and observing wildlife is a "judicially cognizable legal injury in fact" which also provides them standing in this matter. 345 S.C., at 600-601.

8. This Court finds that, when considering the totality of the agency action, which not only allows use of in-line filters but further allows for the abandonment of the lake as the detention basin and permits the dike to remain unrepaired, the Petitioners have demonstrated that there is the possibility the Petitioners may suffer some injury resulting from the agency action.

9. Cat Island POA further argues that Petitioners lack standing because the injuries to Petitioners are not likely to be redressed by a favorable decision of this Court. In support of its position, Cat Island POA argues that this Court cannot order the repair of the dike and restoration of the lake because other federal and state regulatory action may be required before any such repair could be made.

10. Whether this Court can or should order the dike repaired need not be decided at this juncture of the proceedings. What is clear is that, if the Petitioners are able to carry their burden to show at trial that DHEC's approval of the General Permit violates numerous laws and regulations, this Court has the power to set aside the issuance of the Permit. If that were to happen, the permission of DHEC to change the stormwater system from detention by the lake to filters will have been rescinded. That would leave the original stormwater permit in place and any injuries to the Petitioners arising from DHEC permanently authorizing the use of filters and the abandonment of the lake as the detention basin will be redressed.

11. Cat Island POA contends on page 5 of its Motion that, "The fate of the dike would be in the hands of multiple state and federal permitting and resource agencies. It is unknown whether the outcome of that process would be successful..." However, the fact that other agency action might be required before an actual repair to the dike is commenced does not deprive the Petitioners of their standing to object to the DHEC's approval of the General Permit.

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by the Respondent, Cat Island POA, is hereby **DENIED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
South Carolina Administrative Law Court Judge

November 5th, 2013
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 5 day of November 2013
By Georjia Henderson
Judicial Clerk



STATE OF SOUTH CAROLINA
RESIDENTIAL PROPERTY CONDITION
DISCLOSURE STATEMENT



The South Carolina Code of Laws (Title 27, Chapter 50, Article 1) requires that an owner of residential real property (single family dwelling unit or a single transaction involving transfer of four dwelling units or less) shall provide to a purchaser this completed and signed disclosure statement prior to forming a real estate contract. This disclosure must be provided in connection with any sale, exchange, installment land sale, and lease with an option to purchase contract. This disclosure statement is not required in connection with transactions listed and exempted by South Carolina Code Section § 27-50-30.

Owners should answer the questions fully, honestly, and appropriately by attaching documents, checking a box for each check box question, and writing in the blanks on this disclosure statement.

If a question is answered "yes" or asks for a description, then owner must explain or describe the issue or attach a descriptive report from an engineer, contractor, pest control operator, expert, or public agency. If owner attaches a report, owner shall not be liable for inaccurate or incomplete information in the report unless owner was grossly negligent in obtaining or transmitting the information. If owner fails to check "yes" or make a disclosure and owner knows there is a problem, owner may be liable for making an intentional or negligent misrepresentation and may owe the purchaser actual damages, court costs, and attorney fees. If a question is answered "no" for any question, the owner is stating that owner has no actual knowledge of any problem.

If a question is answered "no representation" for any question, owner is stating that owner is making no representation regarding the conditions or characteristics of the property, but owner still may have a duty to disclose information that is known or should have been known.

If a question is answered and subsequently new information is obtained or something changes to render the owner's answer incorrect, inaccurate, or misleading (example: roof begins to leak), owner must promptly correct the disclosure. In some situations, the owner may notify the purchaser of the correction. In some situations, the owner may correct or repair the issue.

If owner is assisted in the sale of property by a real estate licensee, owner remains solely responsible for completing and delivering this disclosure statement to the purchaser. The real estate licensee must disclose material facts about the property if the real estate licensee knows or reasonably should have known about the issue, regardless of owner responses on this disclosure. Owner is solely responsible to complete this disclosure as truthfully and fully as possible. Owner and purchasers are solely responsible to consult with their attorneys regarding any disclosure issues. By signing below, owners acknowledge their duties and that failure to disclose known material information about the property may result in owner liability.

Owner must provide the completed disclosure statement to the purchaser prior to the time the owner and purchaser sign a real estate contract unless the real estate contract states otherwise. Owner should provide a signed copy to the purchaser and keep a copy signed by the purchaser.

A real estate contract, not this disclosure, controls what property transfers from owner to purchaser.

Property Address (including unit # or identifier) 2 Rush Street, Beaufort, 29907

Owner: (S) (P) Purchaser: () () acknowledge receipt of a copy of this page which is page 1 of 5.

REV: 7/2013

EXHIBIT

C

Lowcountry Real Estate - Corporate, 820 Bay St Beaufort, SC 29902
Phone: 843-521-4200

Fax: 843-521-4203

Edward Dukes

Produced with zipForm® by ziplogix 18070 Fifteen Mile Road, Fraser, Michigan 48066 www.ziplogix.com

LowcountryRealEstate0013

Apply this question below and the three answer choices to the numbered issues (1-14) on this disclosure.
 As owner, do you have any actual knowledge of any problem(s)* concerning?
 *Problem includes present defects, malfunctions, damages, conditions, or characteristics.

I. WATER SUPPLY AND SANITARY SEWAGE DISPOSAL SYSTEM

	Yes	No	No Representation
1. Water supply	☐	☒	☐
2. Water quality	☐	☒	☐
3. Water pressure	☐	☒	☐
4. Sanitary sewage disposal system for any waste water	☐	☒	☐

A. Describe water supply ☐ County ☐ City ☐ Private ☐ Corporate ☐ Community ☐ Well ☒ Other BJWSA

B. Describe water disposal ☐ Septic ☒ Sewer ☐ Private ☐ Corporate ☐ Government ☐ Other _____

C. Describe water pipes ☒ PEX ☐ Copper ☐ PVC/CPVC ☐ Polybutylene ☐ Steel ☐ Other/Unknown _____

II. ROOF, CHIMNEYS, FLOORS, FOUNDATION, BASEMENT, AND OTHER STRUCTURAL COMPONENTS AND MODIFICATIONS OF THESE STRUCTURAL COMPONENTS

	Yes	No	No Representation
5. Roof system	☐	☒	☐
6. Gutter system	☐	☐	☒
7. Foundation, slab, fireplaces, chimneys, wood stoves, floors, basement, windows, driveway, storm windows/screens, doors, ceilings, interior walls, exterior walls, sheds, attached garage, carport, patio, deck, walkways, fencing, or other structural components including modifications	☐	☐	☐

A. Approximate year that current roof covering was installed or modified: 2003. Approximate year structure was built: 1989, Rebuilt 200

B. During your ownership, describe any known roof system leaks and repairs: None

III. PLUMBING, ELECTRICAL, HEATING, COOLING, AND OTHER MECHANICAL SYSTEMS

	Yes	No	No Representation
8. Plumbing system (pipes, fixtures, water heater, disposal, softener, plumbing components)	☐	☒	☐
9. Electrical system (wiring, panel, fixtures, A/V wiring, outlets, switches, electrical components)	☐	☒	☐
10. Appliances (range, stove, ovens, dishwasher, refrigerator, washer, dryer, other appliances)	☐	☒	☐
11. Built-in systems and fixtures (fans, irrigation, pool, security, lighting, A/V, other)	☐	☒	☐
12. Mechanical systems (pumps, garage door opener, filtration, energy equipment, safety, other)	☐	☒	☐
13. Heating system(s) (HVAC components)	☐	☒	☐
14. Cooling system(s) (HVAC components)	☐	☒	☐

Owner: (2N) (PN) Purchaser: (____) (____) acknowledge receipt of a copy of this page which is page 2 of 5.

- A. Describe Cooling System ☐ Central ☐ Ductless ☒ Heat Pump ☐ Window ☐ Other _____
- B. Describe Heating System ☐ Central ☐ Ductless ☒ Heat Pump ☐ Furnace ☐ Other _____
- C. Describe HVAC Power ☐ Oil ☐ Gas ☒ Electric ☐ Solar ☐ Other _____
- D. Describe HVAC system approximate age and any other HVAC system(s): 2002

IV. PRESENT OR PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS OR DRY ROT OR FUNGUS, THE DAMAGE FROM WHICH HAS NOT BEEN REPAIRED

A. Describe any known present wood problems caused by termites, insects, wood destroying organisms, dry rot or fungus:

None

B. Describe any termite/pest treatment, coverage to property, name of provider, and termite bond (if any):

Expired

C. Describe any known present pest infestations:

None

V. THE ZONING LAWS, RESTRICTIVE COVENANTS, BUILDING CODES, AND OTHER LAND USE RESTRICTIONS AFFECTING THE REAL PROPERTY, ANY ENCHROACHMENTS OF THE REAL PROPERTY FROM OR TO ADJACENT REAL PROPERTY, AND NOTICE FROM A GOVERNMENTAL AGENCY AFFECTING THIS REAL PROPERTY

Apply this question below and the three answer choices to the numbered issues (15-23) on this disclosure.
As owner, do you have any actual knowledge or notice concerning the following:

	Yes	No	No Representation
15. Violations or variances of the following: zoning laws, restrictive covenants, building codes, permits or other land use restrictions affecting the real property	☐	☒	☐
16. Easements (access, conservation, utility, other), party walls, shared private driveway, private roads, released mineral rights, or encroachments from or to adjacent real property	☐	☒	☐
17. Legal actions, claims, foreclosures, bankruptcies, tenancies, judgments, tax liens, other liens, insurance issues, or governmental actions that could affect title to the property	☐	☒	☐
18. Room additions or structural changes to the property during your ownership	☐	☒	☐
19. Problems caused by fire, smoke, or water to the property during your ownership	☐	☒	☐
20. Drainage, soil stability, atmosphere, or underground problems affecting the property	☐	☒	☐
21. Erosion or erosion control affecting the property	☐	☒	☐
22. Flood hazards, wetlands, or flood hazard designations affecting the property	☐	☒	☐
23. Flood Insurance covering the property	☒	☒	☐

A. Describe any green energy, recycling, sustainability or disability features for the property: n/a

B. Describe any Department of Motor Vehicles titled manufactured housing on the property: n/a

Owner: (PN) (PN) Purchaser: () () acknowledge receipt of a copy of this page which is page 3 of 5.

VI. BURIED, UNBURIED, OR COVERED PRESENCE OF THE FOLLOWING: LEAD BASED PAINT, LEAD HAZARDS, ASBESTOS, RADON GAS, METHANE GAS, STORAGE TANKS, HAZARDOUS MATERIALS, TOXIC MATERIALS, OR ENVIRONMENTAL CONTAMINATION

A. Describe any known property environmental contamination problems from construction, repair, cleaning, furnishing, intrusion, operating, toxic mold, methamphetamine production, lead based paint, lead hazards, asbestos, radon gas, methane gas, formaldehyde, corrosion-causing sheetrock, storage tanks, hazardous materials, toxic materials, environmental contamination, or other: n/a

VII. EXISTENCE OF A RENTAL, RENTAL MANAGEMENT, VACATION RENTAL, OR OTHER LEASE CONTRACT ANTICIPATED TO BE IN PLACE ON THE PROPERTY AT THE TIME OF CLOSING

A. Describe the lease terms and any leasing problems, if any: n/a

B. State the name and contact information for any property management company involved (if any): n/a

C. Describe known outstanding charges owed by tenant for gas, electric, water, sewer, and garbage: n/a

VIII. THE EXISTENCE OF A METER CONSERVATION CHARGE, AS PERMITTED BY SECTION 58-37-50 THAT APPLIES TO ELECTRICITY OR NATURAL GAS SERVICE TO THE PROPERTY

A. Describe any utility company financed or leased property on the real property: n/a

B. Describe known delinquent charges for real property's gas, electric, water, sewer, and garbage: n/a

IX. PLEASE USE THE SPACE BELOW FOR "YES" ANSWER EXPLANATIONS AND ATTACH ANY ADDITIONAL SHEETS OR RELEVANT DOCUMENTS AS NEEDED

Owner: (JN) (PN) Purchaser: (_____) (_____) acknowledge receipt of a copy of this page which is page 4 of 5.

This disclosure does not limit the obligation of the purchaser to inspect the property and improvements which are the subject of the real estate contract. Purchaser is solely responsible for conducting their own off site conditions and psychologically affected property inspections prior to entering into a real estate contract. The real estate licensees (acting as listing or selling agents, or other) have no duty to inspect the on site or off site conditions of the property and improvements. Purchasers should review all applicable documents (covenants, conditions, restrictions, bylaws, deeds, and similar documents) prior to entering into any legal agreements including any contract. The South Carolina Code of Laws describes the Residential Property Condition Disclosure Statement requirements and exemptions at § 27-50-10 (and following) which can be read online (www.sccodehouse.gov or other websites).

Current status of property or factors which may affect the closing:

☒ Owner occupied ☐ Short sale ☐ Bankruptcy ☐ Vacant (How long vacant?) _____
☐ Leased ☐ Foreclosure ☐ Estate ☐ Other: _____

A Residential Property Condition Disclosure Statement Addendum ☒ is ☒ is not completed and attached. This addendum should be attached if the property is subject to covenants, conditions, restrictions, bylaws, rules, or is a condominium.

Owner acknowledges having read, completed, and received a copy of this Residential Property Condition Disclosure Statement before signing and that all information is true and correct as of the date signed.

Owner Signature: John E. North, Jr. Date: 11-18-13 Time: 1:40 pm

Owner Printed Name: John E. North, Jr.

Owner Signature: Pamela K. North Date: _____ Time: _____

Owner Printed Name: Pamela K. North, JTROS

Purchaser acknowledges prior to signing this disclosure:

- Receipt of a copy of this disclosure
- Purchaser has examined disclosure
- Purchaser had time and opportunity for legal counsel
- This disclosure is not a warranty by the real estate licensees
- This disclosure is not a substitute for obtaining inspections of on site and off site conditions
- This disclosure is not a warranty by the owner
- Representations are made by the owner and not by the owner's agents or subagents
- Purchasers have sole responsibility for obtaining inspection reports from licensed home inspectors, surveyors, engineers, or other qualified professionals

Purchaser Signature: _____ Date: _____ Time: _____

Purchaser Printed Name: _____

Purchaser Signature: _____ Date: _____ Time: _____

Purchaser Printed Name: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Kenneth Bruning, Janet Bruning, David Feron,
Individually and as Trustee, Mary Feron,
Individually and as Trustee, Byrnal Haley,
Individually and as Trustee, Martha James and
Don Haarmeyer, Individually and as Co-
Trustees, and Pamela North,

Petitioners,

vs.

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

Respondents.

In re: Garfield Park Phase 3

Cat Island POA c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

In re: Garfield Park Phase 3

Case No. 12-ALJ-07-0434-CC

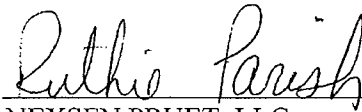
CERTIFICATE OF SERVICE

This is to certify that a copy Cat Island POA c/o Gary Meyer's Motion to Disqualify
Petitioner's Counsel has been served upon the following counsel of record by mail, addressed to
the following as shown below this 7th day of January, 2014.

NPCHAR1:1217396.1-TBF-(MSHAHID) 052058-00001

John E. North, Jr.
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902

Nathan Haber, Esquire
1362 McMillan Avenue
Suite 400
Charleston, SC 29405

A handwritten signature in cursive script, reading "Ruthie Parsh", written over a horizontal line.

NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Telephone: 843.577.9440

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Ken Bruning, et. al,

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

Docket No.: 12-ALJ-07-0434-CC

MOTION FOR RECONSIDERATION
OF FINAL ORDER

Docket No.: 12-ALJ-07-0436-CC

Come now the Petitioners and move the Court for a reconsideration of the findings and rulings contained within its Final Order, dated July 23, 2014, and ask that the Court alter and amend said Final Order pursuant to Rule 59(e) for the following reasons:

1. Stormwater Treatment in the Coastal Zone: Despite the fact that S.C. Code Reg. Ann. 72-307 and the Coastal Zone Management Program ("CMP")¹ have

¹ Petitioners' Ex. 19.

mandatory requirements for “permanent water quality ponds” that “shall” have storage volume to accommodate at least ½ inch of stormwater runoff, this Court has found that the mandatory requirements are “permissive, not mandatory”. (Final Order, p. 11) The Court confused both the fact that “storage” is mandatory and the fact that the required storage may only be accomplished by “retention, detention or infiltration systems, as appropriate for the specific site”. Instead of requiring “storage” of stormwater that is within one-half mile of the coastal zone, the Court approved the use of filters for quality control, which is a clear violation of the CMP.²

The interpretation of the CMP that ignores the mandatory “storage” requirement and that finds that the requirements are merely permissive is not a factual finding. It is a misinterpretation of the applicable law, which is subject to correction and reversal by the Court of Appeals. This Court should correct its error in interpreting the CMP.

The Final Order ignores “the additional criteria to protect sensitive coastal waters” that are set forth in the clear language of the regulations. The CMP requires that “For all projects, regardless of size, which are located within one-half (1/2) mile of a receiving water body in the coastal zone, this criteria shall be storage of the first ½ inch of runoff from the entire site or storage of the first one (1) inch of runoff from the built-upon portion of the property, whichever is greater. Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site.” (Petitioners’ Ex. 19, p. III-60).

The evidence was clear that the proposed in-line filters to not “store”

² Paragraph 36 of the Final Order notes that developments that predate the effective date of the Regulations are exempt. This exemption has no application to this case since Garfield Park, Phase 3 was developed in 2004, long after the effective date of the Regulations.

stormwater. (178:9-13). They are not a form of "infiltration". (225:2-10). They obviously are not "permanent water quality ponds having a permanent pool" that are designed to "store" stormwater runoff. Under the CMP, the storage is mandatory and the method of storage is permissive, but limited to one of three types of storage. There is no factual or legal basis to find that the language of the CMP that mandates "storage" is somehow "permissive" or somehow gives discretion to OCRM to consider other forms of stormwater treatment within one-half mile of the coastal zone other than the three types of "storage" described in the CMP.³

Based upon this erroneous application of the clear language of the relevant statutes and regulations, the Final Order erroneously approves of stormwater treatment that does not comply with the heightened requirements of the CMP that apply to the coastal zone and which cannot be approved as a replacement for the detention of stormwater that has historically been provided by the Cat Island Lake ("Lake"). As such, the Final Order erroneously approves of the decision of DHEC to grant coverage under the National Pollutant Discharge Elimination System (NPDES) permit program "(General Permit)" and erroneously finds that the proposed project is consistent with the CMP.

2. Waiver of Water Quantity Standards: The Final Order makes an error of law in the manner in which it interprets the Stormwater Regulations. S.C. Reg. 72-302(B)(2) clearly states that a project is only eligible for a waiver if the applicant can demonstrate that "THE PROPOSED PROJECT" (emphasis added) will have no adverse impact on the receiving natural waterway or downstream properties..."

³ The finding in paragraph 32 of the Final Order is inappropriate in this case for two reasons. First, the "BMPs" other than detention, retention, and infiltration are not allowed within one-half mile of the coastal zone. Second, Garfield Park was a phase of a much larger development that far exceeds 10 acres in size.

Notwithstanding this clear language, this Court has ruled that the adverse impacts to be considered were only those resulting from stormwater flows. There is absolutely no legal basis for any such limitation of the types of adverse impacts “from the proposed project” that the Regulations require be considered.

S.C. Reg. 72-301 (1) defines adverse impacts and provides that they include increased risk of flooding as well as negative impacts on wildlife and other resources. (Petitioners’ Ex. 3, p. 2). Obviously, negative impacts on wildlife are not limited to the effects of stormwater flows.

In *Murphy v. DHEC*, 396 S.C. 633 (2012), the Court stated:

“When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced constructions to limit or expand the regulation’s operation”. 696 S.C., at 640.

The clear language of the regulation speaks in terms of the “proposed project” and requires a showing that the “proposed project” will have no significant adverse consequences. (Petitioners’ Ex. 3, p. 10). There is no basis in the clear wording of the regulation that allows for any limitation of the adverse consequences analysis to only those resulting from stormwater flows.

This very issue was already presented to this Court in ruling on the Motion for Summary Judgment filed by Cat Island POA. In denying that Motion, the Court noted that “in essence, Cat Island POA argues that none of the Petitioners are claiming that they have been or would be injured by installation of the water quality filters, and that the Petitioners’ concerns are more about restoration of the detention basin called Cat Island Lake.” (Order, November 5, 2013, p. 2). This Court correctly ruled as follows:

“The Court finds that the agency action in question involves more than

Motion for Reconsideration, Page 4

permission for the installation of water quality filters. DHEC's approval of the General Permit grants Cat Island POA approval to retrofit the previously approved and permitted stormwater treatment system for Garfield Park, Phase 3. Implicit in such a retrofit is the abandonment of the previously approved system of treatment by the detention provided by the lake that abuts the residential property of the Petitioners. Cat Island POA's Motion concedes at page 18 that "because installation of the filters is intended to be an alternative to any repair, the breach in the dike would be allowed to remain if the General Permit was declared final and complete". (Order, November 5, 2013, p. 2).

This Court then noted that, pursuant to the ruling in *Sea Pines Assn. for the Prot. of Wildlife, Inc. v. S. C. Department of Natural Resources*, 345 S.C. 594 (2001), the deprivation of Petitioners' aesthetic and recreational interests in enjoying and observing wildlife is a "judicially cognizable legal injury in fact" which also provides them standing in this matter. 345 S.C., at 600-601.

After making those findings, this Court then ruled that, "when considering the totality of the agency action, which not only allows use of in-line filters but further allows for the abandonment of the lake as the detention basin and permits the dike to remain unrepaired, the Petitioners have demonstrated that there is the possibility that the Petitioners may suffer some injury resulting from the agency action." (Order, November 5, 2013, p. 2).

In its Final Order, this Court completely reversed its own logic and its previous findings and, instead of evaluating the impacts to Petitioners resulting from the entirety of the agency action in approving "the project", limited the analysis to only the impacts from stormwater flows. That error is one of law, not fact. The law is clear that the consequences to be evaluated are those resulting from the entirety of the agency action.

By limiting the analysis to only stormwater impacts instead of the impacts of the entire project, the Final Order erroneously avoids any consideration of the adverse consequences of the project to the Petitioners that are described on the Petitioners'

Proposed Order, pages 19-21, with citations to the record.⁴ Those impacts include tidal encroachment onto five of the six lots owned by the Petitioners, the loss of the Lake views that each Petitioner claimed to be so significant to them, and the loss of the habitat for nesting and wading birds, including wood storks, herons, alligators, and other species of animals that Mr. Madlinger of OCRM confirmed would find other places to inhabit without water in the Lake. (748:19-749:17). The impacts would also include the loss of value to the property of the Petitioners resulting from living on a rutted mudflat, which is confirmed both by the appraisals produced by Mr. Feron and by the testimony of the Cat Island Developer, who conceded that most buyers would prefer the Lake view depicted on Petitioners' Ex. 1, p. 25, to the mud view depicted on Exhibit 1, p. 26. (65:20-66:22).

The encroachment of tidal water onto the residential lots of the Petitioners and the loss of the Lake and its wildlife around which their lots were platted and sold are significant negative impacts to land, water, and associated resources resulting from the proposed change in the manner of treating stormwater. Accordingly, to sanction the grant of a waiver of the water quantity requirements under S.C. Reg. 72-302 (B)(2) was error.

S.C. Reg. 72-302 (B) further precludes any waiver of water quantity requirements if the proposed project has an adverse impact on the "receiving waterbody". The Final Order fails to find that the Retrofit Project would result in three separate adverse impacts to Chowan Creek, the receiving waterbody, that are described in detail in Petitioners' Proposed Order, pages 21-22, with citations to the

⁴ The findings of the Court in paragraph 52 of the Final Order ignore the evidence reference herein and are wrong.

record.

The Final Order should have found that (a) a proposed project that provides for a less effective removal of pollutants and that does not fully comply with the BPM Manual of OCRM has an adverse impact on the critical area into which the stormwater is discharged, (b) a project that allows for previously detained stormwater to discharge without any stormwater treatment has an adverse impact on the critical area into which the stormwater is discharged, and (c) as Mr. Madlinger acknowledges, a project that exposes the bottom of the Lake, which has functioned as a detention basin for over 50 years, to tidal flows has an adverse impact on the critical area.

Since the adverse impacts described above preclude the grant of any waiver under the Stormwater Regulations, the Final Order that approves of such a waiver is error. The failure to properly apply the unambiguous language of the Regulations is an error of law that should be corrected by this Court. Additionally, there is no basis in the CMP that allows DHEC to waive the stormwater storage requirements imposed by the CMP and to do so was in violation of the CMP. The approval of any waiver under the facts of this case or with regard to the storage of stormwater within one-half mile of the coastal zone was error.

3. Antidegradation Rules of S.C. Reg. 61-68: In addition to failing to find the foregoing adverse impacts on the "receiving waterbody", the Final Order also fails to find that those impacts are a violation of S.C. Reg. 61-68, Water Classifications and Standards ("Water Standards"). The Antidegradation Rules provide that "...water quality shall be maintained and protected unless the Department finds, after intergovernmental coordination and public participation, that allowing lower water

quality is necessary to important economic or social development in the areas where the waters are located.” (Petitioners’ Ex. 81, p.12).

OCRM acknowledged that S.C. Reg. 61-68 would preclude a project that had the result of degrading the quality of the waters. (275:1-4). Mr. Geer agreed that the Retrofit Project would result in areas of the Lake’s drainage basin that would forever discharge without any detention. (275:21-276:7).⁵ Cat Island’s engineer conceded that the detention provided by the Lake provided a higher quality of stormwater treatment than the proposed filters. (501:13-21). He testified that the proposed filters allow heavy flows of stormwater to bypass the filter and discharge without any treatment. (503:20-25). He acknowledged that, if the stormwater treatment of the filters is inferior to the treatment provided by the Lake, then the water quality of the stormwater discharge would be degraded to some degree based on the percentage of the removal efficiency, and that the proposed filters do treat the stormwater, but are perceived as a lesser treatment. (504:7-21).

The Petitioner’ engineer testified that there were multiple aspects of the Retrofit Project that violated the Antidegradation Rules, including that runoff would continue to erode the 50 years of sediment from the lakebed and would then flow into the critical area of Chowan Creek, that fertilizers, pesticides, and other chemicals would flow untreated from the adjoining golf course into Chowan Creek, and that the proposed filters overflow with high volume and provide no treatment at all of the overflow stormwater. (849:20-853:22).

⁵ Mr. Geer testified that he had no information one way or the other as to whether the proposed filters would degrade water quality or negatively impact adjacent shellfish beds and that he was not saying that the water was not degraded. (377:7-378:10).

None of the parties presented evidence of water quality degradation based upon testing or samples. However, the evidence presented included the testimony of OCRM with regard to negative impacts to the critical areas of Chowan Creek, OCRM's concession that the proposed Retrofit Project would result in the discharge of 20% more sediment than the detention provided by the Lake, and OCRM's concession that stormwater that was previously detained and treated will in the future discharge without treatment. That evidence supports this Court's finding that the proposed Retrofit Project will result in the degradation of water quality in Chowan Creek in violation of S.C. Reg. 61-68. There was no evidence that would support any finding that water quality would be "maintained and protected" by the Retrofit Project. Accordingly, neither the General Permit nor the CZCD should have been approved. The Final Order that approves of a change to the stormwater treatment that is lesser in effectiveness in removing pollutants from stormwater on its face violates the Antidegradation Rules and is error.

4. Coastal Management Program Requirements: The CMP provides guidelines for the evaluation of all projects. (Petitioners' Ex. 19, p. III-3). In reviewing a permit application in the coastal zone, OCRM is to be guided by general considerations that include the extent to which the project will have adverse impacts on the critical areas, the extent to which the project will maintain or improve water quality, particularly in areas that include oyster beds, the extent to which the project will meet state requirements for the protection of inland wetlands, and the extent and significance of negative impacts on "Geographic Areas of Particular Concern" ("GAPC"). (Petitioners' Ex. 19, p. III-4).

OCRM has acknowledged that leaving the dike open to tidal flows across the lake bottom of the Lake would have a negative effect on the critical area. (755:23-757:1). OCRM has acknowledged that the level of treatment proposed in the Retrofit Project would be less effective than the Lake in removing sediment from the stormwater discharges. (183:4-185:4). This less effective level of treatment, together with allowing areas that were previously detained by the Lake to discharge stormwater without any treatment and allowing tidal waters to flood freshwater wetlands, will not “maintain or improve water quality” and will have adverse effects on the critical area. The flooding of freshwater wetlands with tidal waters does not protect inland wetlands. The testimony of Mr. Madlinger is sufficient for the Court to find that there is at least some negative impact to the shellfish beds of Chowan Creek, which are a GAPC.⁶

These general considerations for all permits all show that the Retrofit Project is not “consistent to the maximum extent practicable” with the policies of the CMP. Because the Retrofit Project does not comply with the CMP, the Final Order is in error when it approves the General Permit and the CZCD.

5. Coastal Tidelands and Wetlands Act: S.C. Code § 48-39-10, *et. seq.* contains the Coastal Tidelands and Wetlands Act (the “Act”). S.C. Code § 48-39-130 of the Act provides that no person shall “...in any way alter any critical area without first obtaining a permit...”.

The Final Order finds that the Retrofit of the Garfield Park stormwater treatment that changes the mode of treatment from detention of the freshwater storm runoff to a filter system that leaves the lakebed of the former detention basin open to tidal flows

⁶ The findings of the Court in paragraph 54 of the Final Order ignore the evidence cited herein and are wrong.

for the first time since the 1960s does not alter the critical area. (Final Order, p. 9)

This finding is made despite the following undisputed evidence:

a. Contrary to the finding in the Final Order, the Plans for the Retrofit Project depict the required stabilization of the dike by installation of turf reinforcement mat that extends well below the mean high tide level of 4.1 feet which, by definition in Section 48-39-10 (G) and (J), is within the critical area. (Petitioners' Ex. 64, Sheet 4).

b. The Cat Island engineer acknowledged that the Retrofit Project exposed the lakebed of the Lake to tidal flows and added the acreage of the Lake to the critical area. (505:2-9).

c. Mr. Madlinger of OCRM testified that adding 4-8 acres of Lake bottom to the tidal zone would have an effect on the critical area (755:23-756:3). He further testified that leaving the dike unrepaired and allowing the entire drainage basin of the Lake to flow out to Chowan Creek would have an effect on the critical area and that allowing the lakebed to be tidally influenced would have a negative effect on the critical area. (756:4-8; 756:14-757:1).

d. The Cat Island engineer acknowledging that the work involved stabilization of areas that might be covered at high tide and that such areas were, by definition, an effect on the critical area. (508:24-509:7).

The finding that the Retrofit project did not have an effect on the critical area is also completely inconsistent with the finding of the Court that the lakebed is "naturalizing". (Final Order, p. 9) The Court in its Final Order acknowledges that the conditions in the lakebed had substantially changed between December, 2011, and December, 2013, and that the changes demonstrate that the lake bed is naturalizing as a tidal salt marsh habitat. (Final Order, p. 8)

When the written plans of the Retrofit project show work below the mean high tide level (in the critical zone) and when OCRM acknowledges that adding 4-8 acres of Lake bottom to the tidal zone would have an effect on the critical area, that leaving the dike unrepaired and allowing the entire drainage basin of the Lake to flow out to Chowan Creek would have an effect on the critical area, and that allowing the lakebed to be tidally influenced would have a negative effect on the critical area, a finding of this Court that there is no effect on the critical area is a finding that is simply unsupported by the record, inconsistent with the admissions of the OCRM staff, and completely at odds with the evidence.

The Court has found as a fact that leaving the dike open has resulted in the area "naturalizing". That is a significant part of the "alteration" of the critical area that brings into play the application of the Act. Any alteration of a critical area requires the consideration of the factors set forth in the Act, which the Court failed to do. The failure to consider the Act is an error of law. The Final Order should have found that the Retrofit Project does involve the alteration of the critical area because, as Mr. Madlinger testified, it results in the addition of 4-8 acres of lakebed to the critical area and has a negative effect on the critical area. The Retrofit Project also requires a critical area permit because the Project clearly provides for work below the mean high tide level, which is in the critical area as defined in S.C. Code § 48-39-10 of the Act.

DHEC should have required that the Retrofit Project be reviewed under the Act and should not have approved of the Retrofit Project unless a critical area permit was applied for and approved. The relevant considerations under the Act and the CMP are the same and include the extent to which the project could impact the habitats of endangered species of wildlife, the extent to which adverse environmental impacts

cannot be avoided by reasonable safeguards, and the extent to which the proposed use could affect the value and enjoyment of adjacent owners. The finding that these considerations are inapplicable to the Retrofit project and the failure of the Court to apply those considerations was error.

The evidence adduced established that the Lake provided a habitat for wood storks and other wading birds. (386:5-387:2; 448:8-449:5; 461:17-4562:11; 463:22-464:9). The Petitioners presented photos of the wood storks and the views of the many birds that inhabited the Lake. (Petitioners' Ex. 1, p. 31, 32, 33, and 34). Mr. Madlinger acknowledged that he had been familiar with the Lake for over 25 years and had observed wood storks, egrets, and blue herons in the trees around the Lake. (747:4-748:6). He testified that the photos in Petitioners' Exhibit 1, pgs. 31 through 34 were consistent with his observations over the years of the bird population of the Lake, that many of those pictures showed wood storks, and that, without water in the Lake, the birds would find other places to inhabit. (748:19-749:17).

There was an abundance of evidence with regard to the adverse impacts to the Petitioners that is set out in their Proposed Order.⁷ A review of the considerations that are required by the Act shows that there are no considerations that even favor a change in the manner of treating the stormwater of Garfield Park and there are a number of considerations that compel and favor the denial of the application to do so. The failure of the Court to consider all of the foregoing considerations in the context of the Retrofit project and its finding that these considerations are inapplicable to the permit was error.

⁷ The evidence of adverse impacts contained within the Petitioners' Proposed Order is incorporated by reference.

These same considerations are set forth in the CMP. In order to obtain the required CZCD, the Retrofit Project would have to be "consistent to the maximum extent practicable" with each of these considerations, which it is not. When these considerations are taken into account, it is error for the Final Order to approve the General Permit and the required "Consistency Determination" for the Retrofit Project, which requires the project to be "consistent to the maximum extent practicable" with the Policies of the CMP.

The Court also wrongly concluded that the application of the Act is exempt with regard to the Retrofit project pursuant to Section 48-39-130(D)(3). That exemption relates only to the discharge of treated effluent under an existing permit. It does not exempt the discharge of untreated stormwater from areas previously detained by the Lake, the addition of 4-8 acres of lakebed to the tidal zone, the stabilization of the dike below the mean high tide elevation, or any of the other consequences of the Retrofit project recited above.

6. Alterations to Freshwater Wetlands: In an attempt to avoid the consequences of violating the CMP by altering freshwater wetlands, Cat Island POA argued that the Lake was already saltwater. The Final Order incorporated verbatim the following findings proposed by Cat Island POA in its proposed Order with corresponding citations to the record that show the Final Order findings are in blatant conflict with the evidence:

- a. "Petitioners' attorney referred to Cat Island Lake as a freshwater lake. However, in reviewing Petitioners' Exhibit 63, which includes photographs of the Lake, Madlinger noted the presence of smooth cord grass, which thrives on good tidal exchange. P. 733:15-25." (Final Order, p. 9).

Petitioners' Exhibit 63 consists of photos that were taken on January 10, 2014, more than 4 ½ years after the dike failed. The fact that cord grass is starting to grow in portions of the lakebed after 4 ½ years does not prove that the Lake was saltwater prior to the break in the dike. It proves the opposite. If the Lake were tidal or saltwater prior to the break in the dike, the saltwater vegetation that Cat Island tried so hard to show was "naturalizing" the site would have been there since the 1960s when the Lake was formed. Saltwater vegetation would not have first started to appear in the photos more than two years after the break in the dike.

b. "Prior to the breach, Madlinger testified that the Lake was tidally influenced in and around the dike, but more brackish away from the dike. P. 733:22-25." (Final Order, p. 9).

This finding is a misstatement of the testimony of Mr. Madlinger. His observations of tidal influence and a more brackish environment further away was not based on conditions prior to the breach. He specifically was describing his observations on or about January 12, 2012, more than 2 ½ years after the breach. (729:17-733:25).

c. "To further clarify the nature of the Lake, prior to the breach, Department witness Blair Williams testified that Cat Island Lake "had some tidal influence and it still had a degree of salinity where there is saltwater vegetation." P. 804:3-6." (Final Order, p. 9).

This finding is a misstatement of the testimony of Mr. Williams. Mr. Williams testified that he first saw the Lake when it was already "an exposed mudflat" (779:1-5), and that the Lake had been receiving a constant flow of saltwater since the dike washed out (779:14-17). He also acknowledged that he was proceeding on the understanding that, prior to the breach, "the water inside the dike had enough saline in it to support a critical area of vegetation....That would be classified as critical area waters within the dike." (805:9-16). However, he had not been aware that the U.S.

Army Corp of Engineers ("Corp") had delineated the four wetlands along the south side of the Lake, had determined that all four were freshwater wetlands, and had determined that the only area that had critical area vegetation was immediately beside Chowan Creek and outside of the dike. (805:17-806:19 and Petitioners' Ex. 73 and 84). When told that there had been a formal determination by the Corp, Mr. Williams requested to see it. (806:13-20). When asked if he would accept a determination by the Corp that the wetlands were freshwater wetlands, he said that he would. (808:8-19).

The evidence adduced by the Petitioners demonstrated that the U.S. Army Corps of Engineers (Corps) determined that areas abutting the fringes of the Lake on its south side were freshwater wetlands. (Petitioners' Ex. 84). The CMP notes that Federal law mandates that the Corps delineate wetlands and, that once delineated by the Corps, OCRM manages the wetlands. (Petitioners' Ex. 19, p. III-58 and III-59). The delineation of the Corp specifically found that the only "salt marsh and/or open water tidal 'critical area' was the 0.657 acres immediately beside Chowan Creek and outside of the dike. (Cat Island Ex. 11, p.1).

The Petitioners' evidence established that an outfall device with three boards inserted into the spillway of the flashboard riser controlled the level of the Lake. Mr. Meyer testified that all three of the boards were left in the spillway to maximize the depth of the lake. (44:7-24 and 93:17-95:4). He testified that he encountered problems with algae in the Lake (43:2-5), and that many times during drought the level of the Lake dropped and the Lake was low and muddy (45:25-46:2). He even admitted that he had considered removing boards in the flashboard riser to let more saltwater into the Lake in order to get rid of the algae. (78:8-79:5).

Cat Island's engineers established that the spillway elevation with all three boards in place was 4.66 feet and that the mean high tide elevation at the dike is 4.1 feet. (Petitioners' Ex. 56; 96:12-97:13; 523:13-25). Accordingly, salt water did not enter the Lake unless the tide was higher than six inches above an average high tide.

The engineering drawings of the area created by Cat Island's engineer show freshwater wetlands along the south side of the Lake, consistent with the Corps designation, and the Lake extending into a .201 acre area that the Corps designated as a freshwater wetland area (Petitioners' Ex. 58). Cat Island's engineer testified that all of the stormwater, which is freshwater, from the entire drainage basin of the Lake was stored in the Lake (530:16-25), that fixing the dike would provide a freshwater boundary around the Developer's land (Homeowner Ex. 18), and that the freshwater in the four wetlands on the south side of the Lake were part of the water system of the Lake. He further testified that the freshwater wetland closest to the dike that the Corps had established was freshwater is actually water that is a part of the Lake and could be kayaked into from the Lake (485:5-487:19).

The Petitioners testified that their freshwater vegetation along the Lake died when exposed to the saltwater tides (412:9-22), and that prior to the dike failure alligators resided in the Lake (448:8-21) and deer drank from it. (462:12-15).

Mr. Geer acknowledged that allowing the Lake to become tidal would change the nature of the vegetation and transform a freshwater lagoon to a saltwater marsh. (219:21-220:1). Cat Island's engineer confirmed that all of the delineated freshwater wetlands would be regularly saturated during spring tides. (545:18-546:6). Similarly, Mr. Madlinger acknowledged that the area was transforming from an open water

environment to a tidally influenced environment (741:5-13), that when saltwater enters freshwater wetlands, there is a change in the nature of the vegetation from freshwater vegetation to saltwater vegetation (753:5-18), and that he observed a large number of dead Chinese Tallow trees that are freshwater vegetation in the protected freshwater wetlands (751:1-10).

The evidence shows that the area was in fact altered in the 1960s when a salt marsh was impounded and the Lake was created. The evidence shows that the Lake detained the freshwater stormwater of its entire drainage basin for over 50 years and that the nature of the area changed. To suggest that undoing the effects of 50 years is not altering the area but is only "naturalizing" the area is not sensible.

Cat Island adduced evidence that the Lake was in the process of "naturalizing" and that saltwater vegetation such as cord grass was growing around the boundary of the Lake. If the Lake were already saltwater in nature, saltwater vegetation would have already existed in or around the Lake. The photos of the Lake taken within the first two years after the break in the dike show no such vegetation. Even Cat Island's counsel, in examining Mr. Geer, helped establish that the Lake was freshwater:

Q: Wouldn't you agree that when this impoundment was constructed, it eliminated a natural tidal area and converted it to an artificial freshwater area?

A: I think that's --I think that's likely, just I don't know that as an absolute fact. (338:7-12).

The weight of the evidence is that the Lake and its wetlands were freshwater in nature. Even if saltwater briefly entered the lake on the occasions when the tides were more than 6 inches higher than an average high tide, the evidence shows that the amount of saltwater was not sufficient to make the Lake saltwater in nature. Even if

the Lake were somewhat brackish, the CMP also specifically provides that any permanent alteration of "brackish or freshwater wetlands will be prohibited, unless no feasible alternatives exist or an overriding public interest can be demonstrated...". (Petitioners' Ex. 19, p. III-6).

Mr. Madlinger confirmed that, if saltwater enters freshwater wetlands, a change in the nature of the vegetation from freshwater vegetation to saltwater vegetation will occur and that the change will take place if the freshwater wetland receives regular exposure to salt water tides. (753:5-18). The Cat Island engineer confirmed that all of the freshwater wetlands around the Lake would be fully saturated during a spring tide (545:6-546:8) and that spring tides occur periodically in relation to full and new moons each month (549:22-550:9).

Since the CMP prohibits any alteration of brackish or freshwater wetlands, any change to the existing stormwater treatment system that does not avoid the alteration of the wetlands is prohibited by the CMP except under circumstances that do not exist in this case. Because any such change cannot comply to "the maximum extent practicable" with the CMP, the Final Order that fails to set aside the General Permit and which approves of the CZCD is in error.

7. Dedicated Freshwater Wetland Covenants: The Final Order erroneously failed to even address the evidence and arguments of the Petitioners with regard to the violation of Covenants protecting the dedicated freshwater wetlands.

Petitioners' Ex. 64, Sheet 5, shows the survey elevations of the protected freshwater wetlands and the elevations of the pipes through which tidal waters reach the freshwater wetlands protected by the Covenants. The Cat Island engineer testified

that the elevations of all the pipes depicted on Exhibit 64 are at or below the elevation of the average high tide of 4.1 feet. (544:3-8 and 523:13-25). He further confirmed that a spring tide would fill the entirety of the dedicated freshwater wetlands with saltwater. (544:9-545:23). Mr. Madlinger confirmed that he observed a large number of dead freshwater trees in the dedicated wetland area. (751:1-10).

As noted previously, Mr. Madlinger confirmed that, if saltwater enters freshwater wetlands, a change in the nature of the vegetation from freshwater vegetation to saltwater vegetation will occur and that the change will take place if the freshwater wetland receives regular exposure to salt water tides. (753:5-18). The Cat Island engineer confirmed that all of the freshwater wetlands around the Lake, as well as the dedicated wetlands, would be fully saturated during a spring tide (545:6-546:8) and that spring tides occur periodically in relation to full and new moons each month (549:22-550:9).

The Final Order fails to address the evidence that shows that the protected wetlands are in fact saturated regularly with tidal waters and that the fresh water trees in the protected area have died. By choosing not to repair the dike, the Developer has caused the protected wetland area, as well as all of the wetlands adjacent to the Lake, to be flooded with tidal waters. As of 2012, OCRM is observing saltwater vegetation both in the Lakebed and even into the upper reaches of the Lake. The flooding of the dedicated freshwater wetlands violates the Covenants. The "naturalizing" of the wetlands that Cat Island repeatedly mentions is an alteration of freshwater wetlands that violates the CMP.

These facts establish both a violation of the Covenants as well as a violation of

the Regulations that bar changes to brackish or freshwater wetlands referenced above. The failure to make such findings and the approval the Retrofit project in the face of these facts was error.

Because the alteration of any of these wetlands violates the CMP, and because the flooding or alteration of the dedicated freshwater wetlands violates the Covenants, the Final Order erroneously fails to appropriately find that the Retrofit project violates the Covenants and the Regulations and it was error for the Court to approve it.

8. Proximity of Shellfish Beds: The Final Order fails to make a factual finding with regard to the actual distance from the Garfield Park development to the oyster beds. The Final Order simply makes observations and conclusions that the action of the DHEC Board in setting aside the Coastal Consistency Determination “may have been based on a misapprehension” of the nature of the measurements. The Final Order bases its analysis on whether the Petitioners proved that the method of measurement used by OCRM was inconsistent with the requirements rather than evaluate the evidence de novo and determine the actual distance. The Final Order further perpetuates the error of the OCRM staff in focusing on the “clear and defined drainage pathway” that the evidence and common sense establishes only reflects the path of water flow at low tide.

The Final Order erroneously treated the determination of the distance from the development to the shellfish beds as a matter where “this Court defers to an agency in interpreting its regulations.” (Final Order, p. 12) There was no issue with regard to interpreting the regulations. The issue was whether the distance was more or less than 1,000 feet. The reliance of the Court on the “agency’s experience, technical

competence and specialized knowledge" (Final Order, p. 12-13) was wholly inappropriate. Giving such deference to the finding of the agency staff who simply eyeballed an aerial photograph and to use that finding to rebut distances determined by a licensed surveyor whose "experience, technical competence and specialized knowledge" actually related directly to measuring distances is nonsensical.

The NOI for the Retrofit Project, which was signed by the Mr. Meyer on behalf of the Developer and certified by the Developer's engineers, stated that the project was 800 feet from Chowan Creek. (Petitioners' Ex. 2, p. 7) This document was signed by the Developer and its engineers before the shellfish bed issue was raised and certainly should have more credibility for that reason.

The fact that the surveyor and the Petitioners' engineers observed the Lake at low tide did not prevent them from having the same rational conclusion that was made by the DHEC Board ("Board"). There is no logical reason for anyone to believe that the water in the Lake would follow the serpentine path along the Lakebed once the elevation of the water in the Lake exceeded the elevation of the path. Ignoring the opinions of the surveyor and the engineer who testified and setting aside the finding of the Board that the OCRM staff had failed "to survey the site or conduct a field inspection to measure the distance, and did not consider tidal cycles" was error. Relying on the measurement of Mr. Geer and ignoring the evidence cited herein was error.

Specifically, the DHEC Board ("Board") found that the required Coastal Zone Consistency Determination ("CZCD") should be set aside because OCRM staff failed to "consider tidal cycles in determining the most direct drainage path" between Garfield Park and the shellfish beds. (Petitioners' Request for Contested Case Hearing, Ex. D,

p. 2). Mr. Geer admitted at trial that the position of OCRM is that the direction of water flow at higher tides would be the appropriate way to measure the distance. (237:1-15). Accordingly, the finding of this Court that following the path of the water cut into the bottom of the Lake at low tide was appropriate for the measurement of the distance conflicts the very testimony of OCRM as to the proper manner of measurement.

The Final Order finds in paragraph 45 that the testimony of Ryan Lyle regarding the measurement was more persuasive than the testimony of the Petitioners' surveyor and the Petitioners' engineer. However, the evidence produced by Mr. Lyle also established that the distance to the oyster beds was less than 1,000 feet.

Subsequent to the Board hearing, Lyle prepared a drawing of the Stormwater Route that showed the distances from a storm sewer inlet within Garfield Park to the shellfish beds of Chowan Creek with both a "High Tide" measurement and a "Low Tide" measurement. (Petitioners' Ex. 72). The High Tide measurement was shown to be 1,005 feet and the Low Tide measurement was shown to be 1,275 feet. Both measurements started with the location of a stormwater inlet that was well inside the boundaries of Garfield Park (Petitioners' Ex. 72), whereas Mr. Geer confirmed that the proper starting point for any such measurement was the stormwater outfall for Garfield Park, the location of which he initialed on Petitioners' Ex. 52. (238:17-239:24).

Lyle's "High Tide" measurement had a more direct flow of the stormwater both inside and outside of the dike. The "Low Tide" measurement followed the shallow rutted route along the bottom of the lakebed and a serpentine route outside of the dike. That exhibit indicated that the starting point for the measurement would be "the closest stormwater quality treatment device".

However, the Cat Island engineer acknowledged at trial that the starting point of the measurement on Petitioners' Ex. 72 was not in fact the closest stormwater quality treatment device and that, immediately across Sheridan street from the outfall pipe designated by Mr. Geer, there was a catch basin for stormwater that was an inlet that would require a treatment filter. (536:1-537:19; Petitioners' Ex. 64, Sheet 3). The Petitioners established that the distance from the end of the pipe to this inlet was 40 feet. (404:5-405:20; Petitioners' Ex. 6, p. 3-5).

Mr. Geer confirmed that, if the Cat Island engineer had started his measurements at the stormwater outfall, the measurements would have been 300 feet shorter than that promulgated by Cat Island's engineers and that the distance to the shellfish beds, as measured in the manner that OCRM considered to be correct, would be 705 feet. (246:9-248:3), which was almost identical to the measurement of the Petitioners' surveyor. (Petitioners' Ex. 53).

With that evidence before the Court, the Final Order does not even mention Petitioners' Ex. 72, which was the measurement done by Cat Island's own engineers. Instead, they rely on Cat Island Ex. 1(A), which follows an "arc measurement" through the Lakebed to arrive at a measurement of 1,002 feet, which was conveniently 24 inches beyond the distance that mandates retention of stormwater.⁸ That measurement gives lip service to a "High Tide" measurement inside of the dike by following an arc, but then switches methodology for the measurement outside of the dike and reverts back to following the serpentine route of a "Low Tide" measurement from the dike to the shellfish beds.

⁸ The Final Order also ignored the evidence of the Petitioners that showed that the measurements by string were less than 1,000 feet and the photographs presented that showed oysters well inside and nearer to Garfield Park than the points used by OCRM and Cat Island POA for their measurements.

In addition, the measurement only gets to 1,002 feet by measuring from the nearest filter device and not from the storm sewer outfall. Therefore, in order to find that the distance is more than 1,000 feet, the Court would have to ignore the testimony of OCRM that the proper location to start the measurement is the storm sewer discharge pipe (238:17-239:24). If the measurement were taken from the outfall of the Garfield Park storm sewer, it would measure less than 1,000 feet even with the serpentine route taken outside of the dike.

Every other measurement on Cat Island Ex. 1(A) follows the serpentine routes of a "Low Tide" measurement both inside and outside of the dike. Because every measurement on Cat Island Ex. 1(A) follows the serpentine route outside of the dike, every one of its measurements fails to "consider tidal cycles in determining the most direct drainage path" between Garfield Park and the shellfish beds.

A proper weighing of the evidence would have the Court find that the measurement is less than 1,000 feet based on the survey of the Petitioners (Petitioners' Ex. 53), based on the measurements of the Cat Island engineer on Petitioners' Ex. 72 when properly measured beginning at the storm sewer discharge pipe for Garfield Park, which is the location advocated by Mr. Geer (238:17-239:24), and based on the NOI for the Retrofit Project, which was signed by the Mr. Meyer on behalf of the Developer and certified by the Developer's engineers, stating that the project was 800 feet from Cowan Creek. (Petitioners' Ex. 2, p. 7).

Because the Final Order failed to determine that the distance from the project to the shellfish beds is less than 1,000 feet, it also failed to find that, pursuant to the CMP, p. III-60, any proposed change to the stormwater treatment for Garfield "must be

retained on site". These failings are error that should be corrected by this Court.

9. Tabby Park Stormwater Treatment: To support a finding that Tabby Park did not rely on the Lake for the detention of its stormwater, the Final Order relies on the fact that the Tabby Park file purportedly did not show a direct reference to the detention of the Lake.

OCRM confirmed that portions of the drainage basin were developed prior to the date of the regulations and did not have to have stormwater treatment when they were developed. (143:5-13; 267:10-18). However, Tabby Park was developed after the date of the regulations and was required to treat its stormwater in accordance with the regulations. (19-23). The Lake detained the stormwater of the entire drainage basin, whether it was developed before the regulations or not. (142:7-12; 144:2-8; 145:13-146:16).

DHEC contends that Tabby Park had stormwater treatment by detention provided by golf course lagoons. However, OCRM concedes that, if the golf course lagoons don't function as a detention basin, then Tabby Park would need some other form of stormwater treatment. (283:12-16).

Mr. Geer testified that the "definition of detention is to store the water and have a controlled release of that water". (134:8-17). He admitted that the controlled release comes from "Some kind of structure". (134:18-22). He acknowledged that the regulations require a design specification for a 24-hour release of the first flush volume" (134:232-135:14). S.C. Code Reg. Ann. § 72-301(11) provides that "a detention structure means a permanent stormwater management structure whose primary purpose is to temporarily store stormwater runoff and release the stored runoff at

controlled rates.”

The Cat Island engineer conceded that there was no detention structure in Tabby Park that is designed to detain and release at a controlled rate and that, in order to detain as defined in the regulations, it would need to be able to detain the stormwater of a 10-year storm event and slowly release it at a controlled rate over 24 hours. (584:2-20).

OCRM was unable to point to any “detention structure” within Tabby Park as that term is defined. The Final Order found that control structures are present, that piping provides detention, that control structures included earthen spillways, vegetation, matting or rock cover, and that the edges of ponds are vegetated and allow for controlled release of stormwater runoff. (Final Order, p. 15)

The Petitioners’ engineer confirmed that there is no detention structure with regard to the Tabby Park golf course lagoons and that the only detention structure was that of the Lake. (857:6-18). He confirmed that the pipes connecting the golf course lagoons were large and could not detain storm water and release it over 24 hours. (858:4-25). He confirmed that the edge of the lagoon depicted on Petitioners’ Ex. 79 is not a structure, that it is not a detention structure, and that there was nothing about the edge of the pond that would make it release water at a controlled rate. (860:10-19). He confirmed that, without freeboard, the golf course lagoon could not detain a storm event and slowly release it over 24 hours and he observed no freeboard. (860:20-861:9). He testified that, in his opinion, Tabby Park relied on the Lake for its stormwater detention (861:10-18) and that when he inspected the Tabby Park lagoon system, there was nothing other than the dike and its outfall structure that could detain

stormwater in accordance with the regulations. (900:11-16).

In addition to the stormwater that flowed into the golf course lagoons, Mr. Geer acknowledged that there existed a pipe that discharged Tabby Park stormwater under a golf course fairway and then along the ground into the Lake. (272:15-273:11), and that the only treatment that it receives is “the vegetation and the groundcover provides filtration” (273:1212-15).

These facts were unrebutted.⁹ They demonstrate a complete failure of Tabby Park to properly detain its stormwater without the dike of the Lake in place. The finding in the Final Order in paragraph 54 of the Final Order erroneously find that earthen spillways, vegetation, interconnected 36 inch pipes and the edges of ponds constitute a sufficient detention structure as that term is defined in the regulations and that such items can be used to provide stormwater treatment within one-half mile of the coastal zone.

OCRM concedes that Tabby Park was developed after the effective date of the regulations and must have treatment of its stormwater. (281:13-18). The evidence shows that the Tabby Park golf course lagoons do not have a detention structure that can store stormwater and release it over 24 hours and that the discharge of stormwater under the golf course fairway is only detained by the Lake. It was error to find that Garfield Park was the only development on Cat Island to rely on the Cat Island Lake to meet stormwater requirements when Tabby Park had no detention structure or other treatment means that was proper within the coastal zone. It was also error to fail to

⁹ The finding in paragraph 39 of the Final Order that Petitioners produced no evidence that Tabby Park relied on the Cat Island Lake for treatment is simply wrong. The evidence submitted included that cited in this Motion.

find that any change in the manner of treating the stormwater must include the stormwater treatment of both Garfield Park and Tabby Park.

10. Regulations Limiting Modification of Permits: Mr. Geer testified that, so long as the applicable regulations were met, he was obligated to approve any proposal by the Developer for stormwater treatment, even if the proposal involved a modification or termination of an existing permit. (153:153:7-17). He testified that, had the Developer decided to keep the existing stormwater detention system, he would be obligated to approve it. (169:10-14). He acquired no information with respect to the basis or justification for the change that would be effectuated by the Retrofit Project. (164:9-23).

S.C. Reg. 122.62 sets forth the limited circumstances in which OCRM has the power to consider modification of an existing permit. Subsection (d) of the regulation sets forth "Causes for modification", and the only one that is arguably applicable to this case is section (d)(1). That provision allows modification of an existing permit if there are "material and substantial alterations to the permitted facility....which justify the application of permit conditions that are different or absent in the existing permit". (Petitioners' Ex. 82).

In order for OCRM to consider the proposed Retrofit Project, Cat island POA would have had to establish that (a) the break in the dike is a material and substantial alteration of the permitted facility and (b) there are permit conditions that are "different or absent in the existing permit".

The Court should have found that the break in the dike is not a material and substantial alteration of the permitted facility. Under the 2004 permit issued to the Developer for Garfield Park, the permitted facility consists of the entirety of the storm

sewer system installed in and under the streets of Garfield Park as well as the detention facility provided by the Lake, including the dike that spans the entire width of the Lake and its outfall device. (Petitioners' Ex. 65). When OCRM issued the 2004 permit, it established that the detention provided by the Lake met all quality and quantity control requirements of the regulations then in effect. (140:22-141:5). As earlier set forth herein, the Developer, as a part of that 2004 permit, executed a maintenance and repair agreement pursuant to which it was to maintain the permitted system. (Petitioners' Ex. 20).

Mr. Meyer testified that, since the Developer acquired Cat Island in the early 1980s, the Developer had never done any work, any improvements, or "anything" to the dike other than replacing one of the three boards on the outfall. (42:11-25). The Developer did nothing to the pipe that provided the outfall of the dike. (78:5-7).

The Petitioners' engineer testified that, if no maintenance was performed for 35 years, it would not be surprising that the outlet structure failed since that is where there is weakness, where the water flow is concentrated, and where a higher amount of erosion occurs. (898:22-899:12).

The evidence established that the cost to repair the break in the dike was \$24,760.00. (Petitioners' Ex. 36). In the scheme of the multi-phase real estate development on Cat Island, the Court should have found that a break in the dike that can be repaired for \$24,760.00 is not a material and substantial alteration of the permitted facility, particularly when the failure of the dike may be the result of the Developer's failure to provide the routine maintenance as it was obligated to do.

The Court should have found that the permit conditions are not "different or

absent in the existing permit". The permit conditions involve the need to provide stormwater treatment for a development that has historically relied on the detention of the Lake. There is no evidence that the development has changed since 2004. There is no evidence of any change to the conditions, needs, or requirements of the stormwater system since the current permit was approved and issued in 2004 other than a break in the dike that can be repaired.

The Court should have found that there is not sufficient evidence to support a "cause for modification" of the existing 2004 permit under S.C. Reg. 122.62 and that it was error of OCRM to consider the Retrofit Project under the facts of this case. The failure of this Court to consider the limitations of the regulations on changes to permits and to make all of such findings was error.

11. Repair of the Dike: The Permit Extension Joint Resolution of 2010 suspended until December 31, 2012, any "Development approval", which was defined to include "an approval issued by the State, an agency or subdivision of the State, or a unit of local government, regardless of the form of the approval..." Accordingly, the approval of OCRM for the Developer's repair authorization and the two-year right to seek a repair authorization did not begin to run until December 31, 2012. Therefore, there was and is nothing stopping OCRM from enforcing its existing commitment from the Developer to maintain and repair the existing stormwater treatment system.

The Petitioners requested that the OCRM staff order the repair of the dike pursuant to the agreement of the Developer to keep the 2004 stormwater system in good maintenance and repair. (Petitioners' Ex. 20). When OCRM staff refused to do so, the Petitioners asked the DHEC Board to order the repair. (Petitioners' Ex. 24).

When the DHEC Board refused to do so, the Petitioners asked this Court to review that decision and to order the repair. (See Exhibit B, p. 2 to Petitioners' Request for Contested Case Hearing). The request for review of the refusal of DHEC to order the repair was before this Court for decision. Under the facts presented to the Court, the failure of the Court to order the repair was error.

OCRM acknowledges that the 2004 permit for stormwater treatment by use of the detention provided by the lake is still in effect. (165:22-25). OCRM also concedes that the Lake, even with the breach in the dike, still provides some level of stormwater detention, but whether it detains sufficiently to meet the regulations cannot be said. (219:17-20).

The Court should have found that any retrofit of the approved stormwater system that does not provide for the repair of the dike would have consequences that preclude issuance of the CZCD. The Court should also have found that the break in the dike is not a sufficient basis under the regulations to seek a modification of the existing 2004 stormwater permit for Garfield Park. Finally, the Court should have found that the continued discharge of untreated stormwater into Chowan Creek violates the S.C. Stormwater Management and Sediment Reduction Act and its regulations. The failure to make these findings is error.

Under the circumstances, it was error for the DHEC Board not to direct OCRM to order the immediate repair of the dike under the existing maintenance agreement so that the discharge of untreated stormwater would cease. The fact that some federal permit may be required before an actual repair is commenced does not mean that DHEC should not order a repair of the existing permitted stormwater treatment system

and end the violations of the Act that have occurred since June, 2009. The failure of this Court to direct OCRM to order the immediate repair of the dike under the existing maintenance agreement was error.

12. Cooperation with the Developer: Throughout the process of the Retrofit Project application, OCRM not only gave deference to the wishes of the Developer, it took the position that it had to approve anything that the Developer asked for, even a change to an existing permit, so long as it complied with the regulations (153:7-21).¹⁰ Mr. Geer confirmed that the developer can have whatever he wants as long as he submits an application and it meets the requirements of the regulations, even if that is a decision to just keep the existing stormwater treatment. (169:10-170:10).

Every one of the many grounds raised by the Petitioners was disregarded by OCRM even though the grounds had merit. Now, even before this Court, DHEC has signed off on a proposed Order that agrees that the ruling of its own Board setting aside the CZCD should be reversed in favor of the position advocated by the Developer.

A proper application of the regulations and the purposes and intent of the CMP cannot and should not be thwarted so that the Developer can have whatever it chooses. The statutes and regulations that are intended to protect the environment and the rights of adjacent property owners cannot be properly enforced when DHEC gives the Developer whatever it chooses. Both the environment and the property owners like the Petitioners suffer when the relevant statutes and regulations are not

¹⁰ This Court erroneously adopted the same position in paragraph 37 of the Final Order. Approval of a General Permit and the issuance of a CZCD require a balancing of interests and requirements pursuant to the applicable regulations. Permit applications can and should be denied when competing interests weigh in favor of denial even if the Permits technically comply with the regulations.

evenly applied and enforced when faced with a developer's contrary wishes. When ruling on this matter, this Court should have weighed the consequences to the Petitioners and the environment in ruling on the issues presented. The failure of the Court to do so and the giving of deference to the findings of OCRM was error.

13. Failure to Properly Rule on Pending Issues: As noted in Exhibit C to the Petitioners' Request for Contested Case Proceeding, this matter relates to the failure of a dike and outfall device that controlled the level of a lake that was the basis for the platting of residential lots by the Cat Island developer. The ruling of this Court sanctions a change in the approved method of treating stormwater despite the fact that the result of the change is that tidal waters encroach upon an existing, platted residential subdivision.

The Petitioners purchased their residences in reliance on the existence of the Lake and its dike. They have vested rights in the existing mode of treating stormwater and are adversely affected by the change that the Court has now approved. The failure of the Court to protect those vested rights and to favorably consider the facts and arguments of the Petitioners that were presented in their Request for Contested Case Proceeding and in the presentation during the trial of this matter is error.

Development permits were issued to the Developer on the basis of a site plan depicting the Lake and adjacent wetlands as part of the stormwater runoff system and subjected both the Lake and the wetlands to a drainage easement granted by the developer. It is wholly unreasonable to allow the Developer to now change the manner of treating the stormwater when the purchasers of these Lake-front properties have

paid for that amenity and when the economic and aesthetic impact that results from allowing the Lake to be left as an unsightly and smelly mud pit is significant.

These facts are extenuating circumstances that should preclude this Court from approving a change in the manner of treating stormwater. The permit granted by OCRM allows for the continued intrusion of salt-water tides onto land that the developer platted and sold to Petitioners. No stormwater system should be approved that allows the water levels to be higher than the former level of the Lake around which a residential subdivision was platted to the economic and aesthetic detriment of the Petitioners.

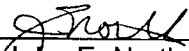
The Court also failed to address in its Final Order the evidence that showed that the OCRM Sediment and Erosion Control Checklist provides that sediment traps are only appropriate for developments of less than five acres. The Checklist also requires that such traps have 80% efficiency during a 10-hour, 24-hour storm event. The information provided to OCRM on the pollutant removal efficiency of the proposed filter devices shows that the relevant pollutants are only removed to the extent of between 37% and 57%, depending on the type of the pollutant. During times of high water volume, the design provides for bypassing the filtering device and directly discharging the stormwater into the critical area. Bypassing the filter mechanism certainly does not meet the requirement that 80% of the pollutants be contained during the 10-hour, 24-hour storm event. The standards required for an appropriate treatment system are far greater than the efficiency of the proposed filters. Accordingly, waiving detention in favor of ineffective filters that do not meet the conditions of OCRM's own requirements is not appropriate. The failure of the Court to so rule on this issue was error.

14. Conclusion: For all of the foregoing reasons, the Court erred in failing to find that a General Permit for the Retrofit Project should not have been approved, in

failing to find that DHEC/OCRM was in error when it did so, and in failing to find that the Board was in error when it approved the General Permit and failed to find that it violated the applicable statutes, regulations, and the CMP in the manner described herein. The Court further erred by not directing that the Developer be ordered by DHEC/OCRM to repair the dike in accordance with the 2004 repair and maintenance agreement and to remand this matter to DHEC for further proceedings to address the continuing violation by the Developer and the Cat Island POA of the S.C. Stormwater Management and Sediment Reduction Act.

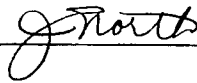
For all of the foregoing reasons, the Petitioners ask that the Court reconsider its Final Order and alter and amend the Final Order to correct the clear errors set forth herein and to make the findings and rulings proposed by the Petitioners in their proposed Order submitted to the Court.

Kenneth Bruning, Janet Bruning, David Feron, Individually and as Trustee, Mary Feron, Individually and as Trustee, Sally Saigmuller Haley, Individually and as Trustee, Terrell Page Haley, as Trustee, Martha James and Don Haarmeyer, Individually and as Co-Trustees, and Pamela North, Petitioners,

By: 
John E. North, Jr.,
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
north@northblack.com

Certificate of Service

The undersigned hereby certifies that on the 1st day of August, 2014, a true and correct copy of the foregoing was served upon Nathan Haber, 1362 McMillan Avenue, Suite 400, Charleston, SC 29405 and upon Mary Shahid, P.O. Box 486, Charleston, SC 29402 by U.S. Mail.

_____

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner.

v.

South Carolina Department of Health and
Environmental Control and Garfield Park
Phase 3,

Respondents.

Docket No.: 12-ALJ-07-0434-CC

**RESPONDENT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL'S RETURN
TO PETITIONERS' MOTION FOR
RECONSIDERATION**

The South Carolina Department of Health and Environmental Control ("DHEC" or "the Department") submits this Return to the Petitioners' Motion for Reconsideration, and respectfully asks this Court ("Court" or "ALC") to deny the Petitioners' Motion.

The Department's Authority within the Coastal Zone

In the coastal zone the Department has two distinct permitting authorities. The Department has direct permitting authority over the critical areas and an indirect management authority of the coastal resources in the eight coastal counties.¹ In regard to its direct permitting authority, the Department was required to “[p]rovide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas.”² The Department was also required to “[d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan.” S.C. Code Ann. §48-39-80(B)(11).

Pursuant to the South Carolina Coastal Management Act of 1977, the Department was required to develop a coastal management program. The Supreme Court in Spectre, held the coastal management program document (“CMP”) is valid and enforceable. Spectre, LLC v. S. Carolina Dep’t of Health & Envtl. Control, 386 S.C. 357, 688 S.E.2d 844 (2010). The Supreme Court analyzed the difference in providing a regulatory system for use of the critical areas and developing a system for reviewing state and federal permit applications in the coastal zone. The Supreme Court noted, “§48-39-80 supports DHEC’s view that the General Assembly meant the CMP policies themselves to be enforceable in the consistency review of state and federal permits.” Id. at 370, 688 S.E.2d at 851. “Though § 48–39–80 specifically requires DHEC to “[p]rovide a *regulatory system* which the department shall use in providing for the orderly and beneficial use of the critical areas,” it requires only that DHEC “[d]evelop a *system*” for

¹ “Direct permitting authority is specifically limited to these critical areas. Indirect management authority of coastal resources is granted to the Council in counties containing one or more of the critical areas.” Spectre, LLC v. SCDHEC, 386 S.C. 357, 364, 688 S.E.2d 844, 847 (2010); see South Carolina Coastal Zone Management Program Document, page 2.

² S.C. Code Ann. §48-39-80(A).

reviewing state and federal permit applications in the coastal zone for CMP consistency. S.C.Code Ann. § 48-39-80(A), (B)(11) (emphasis added).” *Id.* at 371, 688 S.E.2d at 851.

The purpose of a consistency determination is to evaluate the project’s compliance with the policies of the coastal management program. Within the system for reviewing state and federal permit applications and of import to this matter are the stormwater management guidelines. These guidelines are a portion of the Refinements of the Coastal Management Program Document which were incorporated in 1993.

Stormwater Management Guidelines

The Stormwater Management Guidelines provide direction primarily focused on water quality within the Coastal Zone. The Court correctly analyzed and concluded the stormwater management guidelines as drafted are permissive and are not limited to only retention, detention, or infiltration.

Petitioners assert “[t]he Court confused both the fact that “storage” is mandatory and the fact that the required storage may only be accomplished by “retention, detention or infiltration systems, as appropriate for the specific site.” (Motion for Reconsideration, p. 2). The term “storage” is neither plainly defined in the CMP nor in S.C. Code Ann. Regs. 72-300. Miriam Webster defines the term “storage” as a place to put things when they are not being used. “Storage” is simply a term used to describe a situation where something is in some form of custody prior to being used.³

Petitioners further assert the only option to store runoff is either by detention, retention, or infiltration. (Motion for Reconsideration, p.2). Petitioners fail to put any value towards the

³ A practical analogy could be patrons of attending a football game. Typically, right before kickoff a large group of people are attempting to enter the venue through a limited number of entrances. There inevitably is a backup of people stored outside of the stadium. Another example could be filtered water pitchers: the unfiltered water is stored in a compartment prior to passing through the filter.

words "may" or "as appropriate for the specific site." A detention structure is defined as "a permanent stormwater management structure whose primary purpose is to temporarily store stormwater runoff and release the stored runoff at controlled rates." S.C. Code Ann. Regs. 72-301(11) (emphasis added). A retention structure is defined as "a permanent structure whose primary purpose is to permanently store a given volume of stormwater runoff. Release of the given volume is by infiltration and/or evaporation." S.C. Code Ann. Regs. 72-301(35) (emphasis added). Infiltration is defined as "the passage or movement of water through the soil profile." S.C. Code Ann. Regs. 72-301(22). The term "storage" or any variation of the term is plainly absent from the regulatory definition of infiltration, though inevitably there will be water in some form of custody within the infiltration practice that waits in line to be filtered through the soil profile.⁴

Although the testimony is clear that the proposed treatment of stormwater for Garfield Park Phase 3 is not infiltration since the treatment of stormwater would be through a filter media as opposed to the soil profile, the two systems share many similar characteristics. Richard Geer, Engineer Associate with the Bureau of Water Coastal Stormwater Permitting Section, testified that although the proposed inline filters are a different mechanism than infiltration, it can still provide similar quality treatment. **EXHIBIT A.** In addition to the similarity in quality treatment, another parallel is the bypass ability of the inline filters and the requirement for an overflow system in an infiltration practice. S.C. Code Ann. Regs. 72-307(11)(g) provides, "[t]he design of an infiltration practice shall provide an overflow system with measure to provide a non-erosive flow along its length and at the outfall." Certainly it cannot be argued that if an infiltration

⁴ The CMP lacks specific guidance in regard to the rates of release for infiltration. However, S.C. Code Ann. Regs. 72-307(11) provides specific design criteria for infiltration practices. This regulation focuses on the amount of time the water must be infiltrated through the soil profile. S.C. Code Ann. 72-307(11)(c) requires the water to completely drain within 72 hours and 72-307(11)(d) requires an infiltration rate of at least 0.30 inches per hour. Both of these requirements focus on filtering to occur in an expedient fashion.

practice requires an overflow system the water that is pushed through such system is being filtered through the soil profile.

Petitioners' argument in footnote two of their motion presents an interesting quandary. In this footnote Petitioners assert the exemption language of S.C. Code Ann. Regs. 72-307(E) "has no application to this case since Garfield Park, Phase 3 was developed in 2004, long after the effective date of the regulations." (Motion to Reconsider, p. 2). A significant amount of time was spent by the Petitioners throughout this three and one-half day hearing arguing treatment should be applied for areas that were developed prior to 2004 in addition to tracts that were undeveloped.

This Court correctly determined the language of the CMP should be read in concert with S.C. Code Ann. Regs. 72-300 and does not limit the treatment mechanisms to only detention, retention, or infiltration.

One Thousand Foot Determination

This Court properly concluded the "Petitioners have failed to establish by a preponderance of the evidence that the method of measurement utilized by the Department to determine whether a project "is located within 1,000 feet of shellfish beds" is inconsistent with the requirement." (Final Order, p. 12). The Court's rationale in regard to the probative value of testimony is clearly reflected in the record.

"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). The moving party bears the burden of proof in a contested case hearing. S.C. Code Ann. § 44-7-21(e)(Supp. 2010); *see also* 2 Am Jr. 2d Administrative Law § 360 (1994); Alex Sanders, et al., South Carolina Trial Handbook § 9:3 Party With Burden, Civil Cases (1999) (In civil cases, generally, the burden of proof rests upon proving that the Department erred in its issuance of the Certification.).

When a witness provides inconsistent testimony, “the ALC is the ultimate fact finder.” Savannah Riverkeeper v. S.C. Dep’t of Health & Env’tl. Control, 400 S.C. 196, 205, 733 S.E.2d 903, 907 (2012). “[A]s the fact finder, the ALC...weigh[s] the evidence and assess[es] each witness’s testimony and credibility prior to ruling.” MRI at Belfair, LLC v. S.C. Dep’t of Health & Env’tl. Control, 394 S.C. 567, 577, 716 S.E.2d 111, 116 (Ct. App. 2011). As such, the ALC “has the prerogative to believe one part of a witness’s testimony while simultaneously disbelieving the other parts of the same witness’s testimony.” Tims v. J.D. Kitts Confs., 393 S.C. 496, 508, 713 S.E.2d 340, 346 (Ct. App. 2011). When “there is a conflict in the evidence, either of different witnesses or of the same witnesses, the findings of fact of the [ALC] as triers of the fact are conclusive.” Holcome v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985).

Petitioners made a conscious choice to introduce their surveyor, David Youman’s deposition into evidence as opposed to calling him as a witness. Inconsistencies are found Mr. Youman’s deposition. For example, Mr. Youmans answered in the affirmative when Mr. North asked “[a]nd did you use that to actually identify in your eyeglasses actually [sic] oysters in the oyster bed.” **EXHIBIT B, p. 1**. However, when asked by Ms. Shahid to explain where he was in relationship to the oyster to make such an observation, Mr. Youmans replied, “I think the crew was set up on the dike being a little bit higher and having a good view out there at low tide to see

where the edge of the oyster rake was." **EXHIBIT B, pp. 2-3.** When asked by Ms. Shahid if he was out there on the dike, Mr. Youmans replied "No, ma'am. I didn't go out there with them that day when they did that." **EXHIBIT B, p. 3.** Later in his deposition, when asked by Ms. Shahid if he ever physically stood on the dike and looked at the oysters, Mr. Youmans response was "No, I have not." **EXHIBIT B, p. 4.** This exchange clearly shows inconsistencies in Mr. Youmans' testimony. When questioned by Mr. North, Mr. Youmans states he identified in his eyeglass oysters in the oyster bed. However, it is later revealed that Mr. Youmans never stood on the dike and looked at the oysters himself.

Mr. Youmans, a surveyor, did not visit the site until after the date of the drawing (**EXHIBIT C, p. 1.**) never observed the flow of water (**EXHIBIT C, p. 2.**), whose crew utilized some aerials for measurements (**EXHIBIT C, p. 3.**), and only used his judgment of how he thought the water would flow. **EXHIBIT C, p. 4.**

Petitioners other expert, Chris Moore, visited the site one time in 2011 during low tide, did not observe the flow of water, and did not take any measurements at the time. (878:16-879:9). Upon further questioning it is revealed Mr. Moore had never taken measurements and the first time he attempted to endorse or provide a measurement of 1000 feet was the day he testified at trial. (888:20-889:4). Mr. Moore further agreed it might be helpful to observe the flow of water at high tide before assuming a high tide pathway of water, of which neither Mr. Moore nor Mr. Youmans did. (889:6-17). Mr. Moore further testified that much of the information submitted to the Department under his signature and letterhead was information which he did not verify submitted to him by his client, the Petitioners. (870:13-876:25).

With regard to expert testimony, it is generally recognized that "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence" and

that "the triers of the facts cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding 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).

Ryan Lyle is a licensed professional engineer and was offered as an expert witness by Petitioner/Respondent Cat Island POA's ("POA" or "developer"). Petitioners focus on a drawing prepared by Mr. Lyle, admitted into evidence as Petitioners' Exhibit 72, and argue "the evidence produced by Mr. Lyle, also established that the distance to the oyster beds was less than 1,000 feet." (Motion for Reconsideration, p. 23). However, Mr. Lyle's testimony clearly reflects this 'high tide' measurement placed upon this drawing was done because he was entertaining a Petitioners' theory of how they felt water flowed and was not his argument on how the water would flow. (674:11-676:13; 685:1-21).

The Stormwater Management Guidelines provide that "the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site" if the project is determined to be within 1,000 feet of shellfish beds.⁵ (Petitioners' Ex. 19. III-60). Mr.

⁵ Petitioners argue "[t]he Final Order fails to make a factual finding with regard to the actual distance from Garfield Park development to the oyster beds." (Motion for Reconsideration, p. 21). However, while the Petitioners find fault

Geer testified, though there is discretion in regard to the type of stormwater treatment for projects located within one-half mile of a receiving water body, there is not much discretion for the guidelines for projects located within 1,000 feet of shellfish beds. (312:16-315:10). The record is clear this former impoundment never provided retention. (186:4-18; 302:1-4). Since this former impoundment only provided detention and was utilized for stormwater treatment for Garfield Park Phase 3, the Department's determination in 2004 with the original permit was a measurement of over 1,000 feet. Further, if the Department's measurement of this site was within 1,000 feet the guidelines provide there would need to be retention on site. As Mr. Geer testified, the former impoundment is not located on site of Garfield Park Phase 3 and if this Court is to find the project is located within 1,000 feet of shellfish beds, the former impoundment would not be able to be utilized for such treatment because such treatment would be required within the boundaries of Garfield Park Phase 3. (312:16-315:10).

This Court, after the evaluation of evidence and testimony, correctly concluded not only that Petitioners failed to carry their burden, but also that the probative value of testimony by the Department and Mr. Lyle "is probative and persuasive, and of higher evidentiary value than the testimony of Petitioners' expert civil engineer, Chris Moore, and surveyor, David Youmans." (Final Order, p. 13).

Applicability of the Coastal Tidelands and Wetlands Act

Petitioners argue the Coastal Tidelands and Wetlands Act and the regulations promulgated there under are applicable to this matter. However, Petitioners' confuse the matter before this Court. Petitioners have challenged a stormwater permit and its associated coastal zone

in this Court for failing to make a determination on the actual distance, they make an accurate statement that "[t]he issue was whether the distance was more or less than 1,000 feet." (Motion for Reconsideration, p. 21). The guidelines require a determination of whether a project is within 1,000 feet, this Court correctly found the testimony of witnesses and other evidence support a finding the project was more than 1,000 feet (or not within 1,000 feet) of shellfish beds. Such a determination does not require an actual distance to be determined by this Court.

consistency determination, both of which require a permittee to obtain any other necessary state or federal permits. (Dept. Ex. 1, pp. 2 and 5). If it is determined by the Department the work encompassed in stabilizing the dike effects or alters the critical area, a critical area permit will be required prior to conducting such activity. As discussed in testimony, the POA's engineer is well aware of this requirement and is well aware of the repercussions if such requirements are ignored. **EXHIBIT D.**

Further, this Court correctly concluded "[i]f, as the Petitioners argue, the addition of the former lake bed to the critical area is an effect on the critical area as contemplated in S.C. Code Ann. §48-39-130, the project is exempt from the requirement for a critical area [sic] permit by virtue of S.C. Code Ann. §48-39-130(D)(3)." (Final Order, p. 9). This Court's ruling in this regard is supported by testimony of Blair Williams, manager of the Department's wetland permitting section. (775:18-778:14). Mr. Williams interprets S.C. Code Ann. §48-39-130(D)(3) to apply to stormwater applications that are to be permitted under the stormwater act within the Coastal Zone. (777:2-5).

Standards for Stormwater Management and Sediment Reduction

Modification

Petitioners argue "[t]he Court should have found that there is not sufficient evidence to support a 'cause for modification' of the existing 2004 permit under S.C. Reg. 122.62 and that it was error for OCRM to consider the Retrofit Project under the facts of this case." (Motion for Reconsideration, p. 31).

S.C. Code Ann. Regs. 61-9.122.62 provides for situations in which a permit may be modified. Specifically, 122.62(d)(1) allows for modifications if "[t]here are material and substantial alterations or additions to the permitted facility or activity (including a change or

changes in the permittee's sludge use or disposal practice) which occurred after permit issuance which justify the application or permit conditions that are different or absent in the existing permit." S.C. Code Ann. Regs. 61-9.122.62(d)(1) (emphasis added). Mr. Geer testified he felt a modification was proper because the "there are material and substantial alterations or additions to the permitted facility or activity after permit issuance which justify the application of permit conditions that are different or absent in the existing permit." (277:13-279:11). No other evidence was presented by the Petitioners to rebut Mr. Geer's interpretation that 61-9.122.62(d)(1) was applicable in this situation for a modification of the 2004 permit.⁶ Accordingly, this modification was appropriately issued since the failure of the dike and the subsequent inability of the former impoundment to provide detention for the stormwater of Garfield Park Phase 3 is clearly a material and substantial alteration to the stormwater treatment system as permitted in 2004.

Detention Waiver

This Court correctly found the Department's evaluation to determine whether the issuance of a detention waiver warranted is appropriately conducted in regard to stormwater flow.

The CMP guidelines provide guidance for the Department to determine whether the proposed project is consistent with the CMP. Petitioners argue that a waiver is not allowed because the CMP does not provide for it. The CMP is intended to be read in harmony with S.C. Code Ann. Regs. 72-300 and "[i]f *conflicting* requirements exist for activities in the eight coastal counties, the S.C. Coastal Council guidelines will apply."⁷ Plainly, if there is not conflict between the regulations set forth in 72-300 and the guidelines of the CMP, the requirements of

⁶ Costs of reestablishing the dike, even after one failed attempt is irrelevant as to whether the application of 61-9.122.62 is appropriate.

⁷ S.C. Code Ann. Regs. 72-307(C)(5)(g).

72-300 must apply.

Petitioners assert the issuance of a waiver is also improper because the scope of Department review should focus on effects of tidal events.⁸ This Court accurately found "a waiver of stormwater management for water quantity control is based on a consideration of whether an un-detained stormwater discharge or flow could adversely impact downstream properties and not whether a tidal event, unaffected by a storm event, adversely impacts downstream properties." (Final Order, p. 7).

Mr. Geer testified the waiver was only granted for quantity control and not for quality. (187:25-188:5). Quantitative control is defined as "a system of vegetative or structural measures, or both, that control the increased volume and rate of stormwater runoff caused by manmade changes to the land."⁹ S.C. Code Ann. Regs. 72-301(40)(b). This definition clearly further supports this Court's finding that the Department's consideration of this waiver was proper.¹⁰

Petitioners further argue a detention waiver was improper because there are adverse effects on the receiving waterbody. This Court accurately determined the Petitioners bear the burden of proof in this matter. In regard to Petitioners' argument that the receiving waterbody was being degraded, Petitioners admits in their Motion for Reconsideration "[n]one of the parties

⁸ In regard to tidal events, Petitioners also argue the Declaration of Restrictive Covenants is being violated. These Restrictive Covenants were entered into by the Developer in "consideration of the issuance of Department of the Army Permit No. SAC-26-94-1452-W." (SCDHEC Ex. 1, p.19). George Madlinger, senior wetland project manager for the Department's Beaufort office drafted a memorandum to Mr. Geer. As set forth in Mr. Madlinger's Memorandum the United States Army Corps of Engineers ("USACE") has the ability to enforce the conditions of the restrictive covenant in regard to the issued raised by Petitioners. (SCDHEC Ex. 5; see also Petitioners' Ex. 37, p. 2). Mr. Geer's reviewing documents provide that the "USACE indicated the dike breach does not pose a violation to the restrictive covenants." (SCDHEC Ex. 1, p. 10). Further, Mr. Madlinger testified he did not see this as an impact to freshwater wetlands that would be barred by the regulations. (751:21-752:3). Petitioners also state that Mr. Williams testified he would accept a determination that the area was freshwater. This is a true statement; however Mr. Williams explained at length the transitional nature of some areas from saline waters to fresh water. (803:23-809:2).

⁹ Mr. Geer testimony reflects this definition. "[q]uantity relates to the discharge rates from the site." (305:19-20).

¹⁰ Further, manmade changes in this area occurred in two instances: (1) the creation of the dike for duck hunting and (2) the development of Garfield Park Phase 3. Certainly, Petitioners are not insinuating the blowout of the dike was a manmade change to the land as contemplated under the regulatory definition.

presented evidence of water quality degradation based upon testing or sample.” (Motion for Reconsideration, p. 9). In fact Petitioners’ own expert, Chris Moore testified that he really did not know if the alleged, untreated pollutants that may be running through the lake are degrading those waters. **EXHIBIT E.**

This Court correctly held “[p]etitioner failed to demonstrate by a preponderance of the evidence that the proposed construction is inconsistent with the requirements of S.C. Code Ann. Regs. 61-9.122.26 and 72-300 and the policies of the Coastal Zone Management Program Refinements.” (Final Order p. 17).

Tabby Park

This Court correctly found “Garfield Park Phase 3 is the only development on Cat Island that relied on Cat Island Lake to meet stormwater quality treatment and storage requirements.” (Final Order, p. 12). Petitioners argue the former impoundment provided for the treatment of stormwater for Tabby Park.

Mr. Geer reviewed the file for Tabby Park and determined Tabby Park satisfied the stormwater requirements without relying on the former impoundment. (352:10-353:4). Mr. Geer testified that the piping system between the ponds in Tabby Park and the earthen spillway is a form of detention. (317:23-318:11). Petitioners’ expert, Mr. Moore, testified:

“Q: Okay. So, because of something you didn’t see in the Tabby Park area, you are assuming that they relied on the lake for detention?

A: That was the only outfall structure that I found – control structure.

Q: But, there was no direct reference in any of the Tabby Park documents that said we are modeling to this outfall, the lake, and the lake has the capacity to receive our storm water flows?

A: No. I did not.

Q: And that’s typically the language you would see or something similar, when somebody’s coming in for a permit and they would tell the agency where their flows are going to, correct?

A: Correct.” (892:1-16).

Thus, Mr. Moore admitted typically a direct reference would be made describing (1) the outfall in which modeling would be made and (2) that the area had the capacity to receive the amount of stormwater flows. Even though such information was not discovered during Mr. Moore's review of the Tabby Park documents, he still made the assumption the lake must have been utilized by Tabby Park for stormwater treatment. Mr. Moore also testified pipes connecting the golf course lagoons underground can be considered control structures. (857:19-22). Mr. Moore further testified that it could possibly have the capacity to detain a 10-year storm event, and release it in a controlled manner over 24 hours. (859:6-15).¹¹

Through the evaluation of testimony and evidence this Court correctly determined Tabby Park did not rely on the former impoundment for treatment of stormwater and that "[d]ischarges from the developed areas have the capacity to flow through the ponds and over vegetated areas before flowing into the lake." (Final Order, p. 15).

Reconstruction of Dike

Permit Extension Joint Resolution of 2010

Normal maintenance and repair is an exception to the requirement of obtaining a permit prior to conducting an activity in the critical area. This permitting exception covers "work on a structure which has been previously permitted or is grandfathered or exempted and is still generally intact and functional in its present condition." S.C. Code Ann. Regs 30-5(D). This regulation is clear that "work may only extend to the original dimensions of the structure, any expansion, additions, or major rebuilding will require either a Department permit or documentation to and written approval from the Department." *Id.* Unless the work involves

¹¹ Petitioners' line of questioning regarding the ability of the Tabby Park system to detain centered on its ability to detain 10-year storm event and release it in a manner over 24 hours. (859:8-11; 860:24-861:2). However, Mr. Moore admits this is not a proper regulatory evaluation. The proper evaluation is "the first either inch or half inch, or depending on its location, has to be leased over a 24 hour period." (864:13-865:5).

extending the original dimensions, expanding, or major rebuilding neither an approval nor permit is required by the Department.¹² The 2010 Joint Resolution contemplates 'development approval' and 'critical area permits', neither of which the normal maintenance and repair exception falls under.¹³

Reestablishing the Dike

Petitioners assert this Court should order the reestablishment of the dike. Mr. Williams testified that if someone wanted to reimpound this area a critical area permit would be required.¹⁴ In addition to the critical area permit, Mr. Williams also provided that a Section 404 permit would need to be issued by the United States Army Corps of Engineers ("Corps of Engineers") and that 404 permit would then trigger a Section 401 water quality permit.¹⁵ (786:13-20). Mr. Williams then continued to describe to this Court at length the applicable regulations that would be required for an evaluation as to whether a critical area permit could be issued. **EXHIBIT G.** Noting the regulatory requirements and evaluations for the issuance of a critical area permit, the regulatory requirements and evaluations required by the Corps of Engineers, and the regulatory

¹² In a practical sense, many persons submit information to the Department to insure these requirements are met and a permit is not required. If the requirements are met the Department responds with a Construction Authorization placard and a letter acknowledging the maintenance and repair work requests is compliant with the regulations. Two letters evidencing the same in the matter are included in Department's Exhibit 4 on page 0036 and 0041 and are attached as **EXHIBIT F.**

¹³ Mr. Williams explained the difference between maintenance repair and a permit during his testimony:
"maintenance and repair is not a permit. It's just an acknowledgement that the activity that they're doing conforms to our regulatory definition of maintenance and repair. And so if someone wants to do work, we make sure that it meets that regulatory definition of maintenance and repair and then we'll acknowledge that work." (815:16-23).

¹⁴ "If there's -- what triggers a critical area permit, if there's an alteration to that critical area, such as someone wanted to put a dock in there, if someone wants to re-impound it, put an earthen structure, some type of structure back into that critical area, yes. That would trigger a critical area permit, but there's nothing here that's triggered a critical area permit." (780:16-25; see also 785:25-786:5).

¹⁵ "The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006); Town of Arcadia Lakes v. S. Carolina Dep't of Health & Envtl. Control, 404 S.C. 515, 522, 745 S.E.2d 385, 388 (Ct. App. 2013).

requirements and evaluations for a 401 certification in order for this dike to be reestablished this Court was correct in not ordering the Department to require its reconstruction.

Cooperation with the Developer

Petitioners argue the Department has given deference to the Developer throughout the application process. Petitioners' assertion is flatly erroneous and violates the spirit of the Attorney's Oath he affirmed when he was admitted to the South Carolina Bar.¹⁶ Even so, the misapprehension of Mr. Geer's testimony should be addressed. "As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). The Department is a reviewing agency that receives certain permit applications, if those applications do not meet the regulatory requirements for that activity the Department denies the permit application. On the other hand, if the permit application meets the regulatory requirements for the specific activity the permit is issued. This line of thinking is clearly reflected in Mr. Geer's testimony. **EXHIBIT H, pp. 1-2.** Part of the regulatory process is the review and consideration of comments submitted to the Department by stakeholders¹⁷ in regard to the particular permit application. Mr. Geer not only considered and reviewed the comments submitted in this matter¹⁸, but also drove to the site and walked with Mr. North to further consider his comments. **EXHIBIT H, pp. 5-6.**

To somehow insinuate the Department, which receives thousands of permit applications throughout its different program areas, decided in reviewing this application a permit would be issued because that is what the Developer wants is meritless.

¹⁶ The South Carolina Supreme Court's Attorney's Oath provides: "I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."

¹⁷ These stakeholders include, but are not limited to the public as well as other resource agencies.

¹⁸ See **Exhibit H, pp. 3-5.**

2

Conclusion

Based on the foregoing arguments, the Department respectfully requests that the Court deny Petitioners' Motion to Reconsider.

Respectfully submitted,



Nathan M. Haber
S.C. Bar No. 100480
Counsel for DHEC/OCRM
South Carolina Department of Health and
Environmental Control
1362 McMillan Ave., Ste 400
North Charleston, SC 29405
Tel: (843) 953-0229
Fax: (843) 953-0201
haberm@dhc.sc.gov

Charleston, South Carolina
August 18, 2014

EXHIBIT A

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

182

1 would it tell you what soil type we're dealing
2 with?

3 A: Yes.

4 Q: Okay. Are you talking about 2004 or 2010 or
5 12? Would all of it show it?

6 A: Either one should show it yes Either

7 Q: Is it fair to say that soil type D is not good
8 for infiltration?

9 A: Typically it's -- it's not good for
10 infiltration.

11 Q: Okay. But then again, we're not dealing with
12 that type of infiltration in this retrofit; are
13 we?

14 A: Right.

15 Q: Okay. I mean, just to be perfectly clear, an
16 inline filter is completely different than
17 stormwater treatment by infiltration where it
18 soaks down into the ground to clean it; is that
19 correct?

20 A: From a stormwater flow standpoint, yes.

21 Q: Okay.

22 A: I mean, it can still provide similar quality
23 treatment.

24 Q: Yes, I understand that every type of stormwater
25 treatment may arguably have some sort of



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT A

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

137

1 there certain types of stormwater treatment
2 where the water is captured and then it gets
3 cleaned by going down through the earth?

4 A: Yes

5 Q: And is that what infiltration means?

6 A: Yes.

7 Q: Okay. Now, the retrofit application sought to
8 have inline filters installed in sewer inlets;
9 is that correct?

10 A: Yes.

11 Q: Would you agree that inserting inline filters
12 is completely different than treating
13 stormwater by infiltration?

14 A: I think that it provides a -- a means of
15 treatment just like infiltration does, but it
16 is a different mechanism.

17 Q: Would you agree that when the regulations talk
18 about treating stormwater within a half mile of
19 the coastal zone that there are only three
20 options and that is detention, retention and
21 infiltration?

22 A: I don't agree that those are the only options.

23 Q: Within the coastal zone?

24 A: There are other acceptable means depending on
25 the site.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT B

10

1 NORTH - YOUMANS (DIRECT EXAMINATION)

2 Q Okay. And did you use that to actually
3 identify in your eyeglass actually oysters in
4 the oyster bed?

5 A Yes.

6 Q And we're not talking about dead
7 oysters, we're talking about an actual --

8 MS. SHAHID: Object to the form.

9 BY MR. NORTH:

10 Q -- oyster bed?

11 A Right.

12 Q And do you know the difference?

13 A Oh yes.

14 Q Okay. And then I notice the distance
15 to the edge of the oysters is 200 feet, is that
16 correct?

17 A That's correct. On the northeastern
18 edge.

19 Q And then on the south edge, did the
20 edge of the oysters correspond with a creek -- a
21 plastic creek marker?

22 A It did.

23 Q Okay. And you measured that at 243
24 feet?

25 A That's correct.

PAGE 1

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT B

14

1 SHAHID - YOUMANS (CROSS-EXAMINATION)

2 you use some other method of measurement?

3 A We used our surveying equipment to
4 locate the end of the 24-inch pipe.

5 Q Right.

6 A And locate the center of the break in
7 the dike.

8 Q Okay.

9 A The lines that we show on the plat, the
10 153 feet, the 153 feet and the 190 feet came
11 from an aerial showing how -- generally how the
12 water flows.

13 Q Okay. And what about the 200-foot line
14 that goes out to what's called 'edge of
15 oysters'?

16 A That's to the nearest foot.

17 Q Is that also an aerial measurement?

18 A No, that's from an actual survey
19 measurement.

20 Q You established a point at the oysters?

21 A We did.

22 Q Okay. And explain, again, where you
23 were in relationship to the oysters so that you
24 had that observation that you described.

25 A I think the crew was set up on the dike

PAGE 2

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT B

15

1 SHAHID - YOUMANS (CROSS-EXAMINATION)

2 being a little bit higher and having a good view
3 out there at low tide to see where the edge of
4 the oyster rake was.

5 Q Okay. Were you out there on the dike?

6 A No, ma'am. I didn't go out there with
7 them that day when they did that.

8 Q What -- have you been out there?

9 A Oh yes.

10 Q Okay. What work did you do when you
11 were out there?

12 A I did some tie-in work over here on the
13 edge of Lot 5 and some of the -- verified some
14 of the tidal water intrusion and the pond edge.

15 Q Okay. Let me show you an exhibit that
16 I believe is in evidence. It's the big plat
17 that John provided of Steve Andrews'
18 measurements.

19 I'm going to show you what's been
20 marked as Exhibit 52 from a previous deposition.

21 Can you recognize, from this aerial
22 photograph, what was the pond and Mr. North's
23 property?

24 A Yes.

25 Q Okay. Does that look like the area

PAGE 3

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT B

17

1 SHAHID - YOUNG (CROSS-EXAMINATION)

2 Q Okay.

3 A So it wouldn't be fair to draw a
4 straight line from there to the end of the pipe
5 cutting across the hill, so to speak.

6 Q Okay.

7 A So we came around the edge.

8 Q Were you -- were you instructed to pick
9 a location, generally, in this area near the
10 shoreline or did you do that using your own
11 judgement?

12 A We do that using our own judgement.

13 Q Okay. And same down here at the
14 15-inch pipe, were you instructed to do, as the
15 crow flies, to the oyster bed from the 15-inch
16 pipe or did you do that out of your own
17 judgement?

18 A I don't recall.

19 Q Okay. Have you physically stood on the
20 dike and looked at the oysters? I know you said
21 your crew did.

22 A No, I have not.

23 Q Have you ever done that? Okay. If I
24 could just look in my folder for just a minute
25 and make sure I'm not missing anything.

PAGE 4

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT C

29

1 SHAHID - YOUMANS (RE CROSS-EXAMINATION)

2 A I can tell you when --

3 Q '12, 2012?

4 A The field crew was there. The field
5 crew was there on January 10th of 2012.

6 Q Okay. I have the same notes you have.

7 A Okay, yeah.

8 Q When were you there?

9 A Sometime after that but I don't
10 remember just when.

11 Q Okay. Would it have been from between
12 the time the crew was there and between the date
13 on this drawing?

14 A Probably after the date of the drawing.

15 Q Okay. Where did you go? Can you point
16 on Exhibit 53 where you were?

17 A Parked here. We walked up along the
18 edge of this lot out to the dike. Walked around
19 up to the -- I didn't go out, on the dock.
20 Walked around to the dock.

21 Q Okay. So you just described for me
22 that you parked at the end of Rush Street and
23 you entered Mr. North's property and you walked
24 around the eastern boundary of his property up
25 to the dock.

PAGE 1

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT C

30

1 HABER - YOUMANS (RECROSS-EXAMINATION)

2 A Correct.

3 Q Oh, wait a minute, that's not -- is
4 that east?

5 A Yeah, this is east.

6 Q Okay, okay.

7 A Or south side, southeast.

8 Q And what opportunity did you have to
9 observe the flow of water in the -- what you've
10 got labeled as 'old pond'?

11 A I did not observe the flow of water --

12 Q Okay.

13 A -- in the pond.

14 Q Okay.

15 MS. SHAHID: That's all I've got.

16 MR. HABER: One brief followup
17 question.

18 RECROSS-EXAMINATION

19 BY MR. HABER

20 Q And to understand the dates correctly,
21 your crew was out there around on June the 10th?

22 A Correct.

23 Q This was created January the 12th?

24 A 13th.

25 Q 13th. And you visited this site, and

PAGE 2

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT C

21

1 NORTH - YOUMANS (REDIRECT EXAMINATION)

2 follow that little cut or stream or whatever but
3 other than it's going to flow outward.

4 Q Okay.

5 A And we didn't -- there was no need to
6 try to pinpoint that down.

7 Q Okay.

8 A There was nothing to pinpoint.

9 Q But when you did the measurements and
10 you had those two angles, you went out into the
11 lake bed with the turns, did you not?

12 A We did not.

13 Q Are you saying you went along the edge
14 of the lake?

15 A By the aerial photograph.

16 Q By which aerial photograph?

17 A I'll have to ask the guy that does the
18 Auto-CAD work. Probably from the GIS, something
19 similar to this and we came out and around the
20 tree line.

21 Q Who is the person that actually shot
22 the measurements?

23 A We didn't shoot those measurements.

24 Q I'm talking about the 153 feet.

25 A Right. That was taken off an aerial

PAGE 3

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT C

17

1 SHAHID - YOUMANS (CROSS-EXAMINATION)

2 Q Okay.

3 A So it wouldn't be fair to draw a
4 straight line from there to the end of the pipe
5 cutting across the hill, so to speak

6 Q Okay.

7 A So we came around the edge.

8 Q Were you -- were you instructed to pick
9 a location, generally, in this area near the
10 shoreline or did you do that using your own
11 judgement?

12 A We do that using our own judgement.

13 Q Okay. And same down here at the
14 15-inch pipe, were you instructed to do, as the
15 crow flies, to the oyster bed from the 15-inch
16 pipe or did you do that out of your own
17 judgement?

18 A I don't recall.

19 Q Okay. Have you physically stood on the
20 dike and looked at the oysters? I know you said
21 your crew did.

22 A No, I have not.

23 Q Have you ever done that? Okay. If I
24 could just look in my folder for just a minute
25 and make sure I'm not missing anything.

PAGE 4

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SC 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 - FAX 843-785-5837 - 800-791-1100

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

159

1 Q: So that would be somebody else?

2 A: Right.

3 Q: Okay. Now the -- you said you didn't consider
4 these 10 factors. You see that the 10th one is
5 the extent to which the proposed use could
6 affect the value and enjoyment of adjacent
7 owners?

8 A: It's -- I mean, this is what I've said before.
9 This is a critical area permit issues that --

10 Q: Isn't it fair to say nobody ever asked for a
11 critical area permit?

12 A: I -- I mean, that's -- if -- if it required
13 one, they would have had to get one. I mean --

14 -

15 Q: Well, has the applicant, after four and a half
16 years, ever asked for one?

17 A: That's not my purview. I looked at the -- the
18 stormwater permit and the coastal zone
19 consistency issues and it, you know, that --
20 that critical area permit requirements -- I
21 mean, we -- I mean, I consulted with -- with
22 that division of OCRM and, you know, the
23 applicant was aware that if it required a
24 critical area permit that, you know, that's
25 what, I mean, he would have to apply for. I



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

160

1 made -- you know, I made that clear during the
2 review process but, you know, as far as
3 reviewing it or processing the application,
4 that was not -- not part of my purview.

5 Q: Okay. If you'll flip back one page to Section
6 48-39 130, do you see under subsection © a
7 state statute that says that after 1977 no
8 person shall in any way alter any critical area
9 without first obtaining a permit?

10 A: That's what it looks like.

11 Q: Would you agree that changing the stormwater
12 system to leave the dike open alters the
13 critical area by adding eight acres of mudflat
14 bottom to the critical area?

15 A: I -- I mean, that's -- that's not my area of
16 expertise. It seems to me it would enhance it.
17 It only expands the critical area out there.
18 I -- you know, I -- that's not my --

19 Q: Whether it enhances it or not, would you agree
20 it alters it?

21 A: I mean, that's not my call. No.

22 Q: Okay. Would you agree that -- well, was one of
23 your requirements for the retrofit that the
24 dike be stabilized?

25 A: Yes. I believe it was part of the permit. Yes.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

207

1 Q: Well, I guess that's one of the issues for the
2 Court. If this area does have an impact, if
3 this retrofit does have an impact on a critical
4 area, would you agree that all of those
5 considerations should have been taken into
6 account?

7 A: In -- in review of the critical area permit by
8 the OCRM wetlands section staff, yes.

9 Q: What aspect of the retrofit would you be trying
10 to pigeonhole into a critical area permit?

11 A: Whatever the -- I mean, whatever the critical
12 area staff deems would require a permit.

13 Q: Wouldn't they make that determination if
14 somebody filed an application for a permit?

15 A: They would but also we consulted with them on
16 a regular basis on this project to see what
17 would, you know, require -- require critical
18 area permit and if what was proposed would so,
19 I mean, we -- were in constant contact with the
20 OCRM wetlands section to see what would require
21 a permit and if -- and what -- what would
22 require a permit essentially, a critical area
23 permit.

24 Q: Are the oyster beds of Chowan Creek a geologic
25 area of particular concern?



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

296

1 Q. Do they have heightened requirements than would
2 be required under, say, 72-300?

3 A: Yes.

4 Q. And these requirements would not be applied if
5 the same permit was to be considered and
6 evaluated, say in Greenville or somewhere
7 outside of the coastal zone?

8 A: That's correct.

9 Q: Did you consider and apply these heightened
10 restrictions that are contained within the
11 policies and procedures of this program
12 document?

13 A: I did for this project, yeah.

14 Q: Now, you had testified that this -- you did not
15 believe this project was considered to be
16 altering the critical area, is that correct?

17 A: Correct.

18 Q: However, if this project did alter the critical
19 area, such as riprap being placed, say to
20 stabilize the former -- the former dike, and it
21 was determined that that altered the critical
22 area. Is there anywhere within your permit or
23 consistency determination that would require
24 the applicant to obtain the critical area
25 permit before conducting that work?



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

297

1 A: I yes, that's a condition of the Department
2 approval

3 Q: Now, I'm gonna move to 72-300, okay?

4 A: Okay.

5 Q: What is 72-300?

6 A: 72-300 is the State stormwater regulations

7 Q: So, if a standard that was located in 72-300 is
8 inconsistent with the policies and procedures
9 of the program document, the heightened -- the
10 heightened restrictions of the program
11 document, would you apply the restrictions set
12 forth in the program document? And if --
13 sorry, caveat -- if the permit was to occur in
14 the coastal zone.

15 A: If the permit was to occur in the coastal zone
16 -- I'm sorry, could you ask that again?

17 Q: Sure, I apologize. If there is a standard --

18 A: Uh-huh (affirmative response).

19 Q: --- that's located in 72-300, right?

20 A: Right.

21 Q: And it was inconsistent with the stormwater
22 management guidelines in -- for the coastal
23 zone, within the policies and procedures of the
24 program documents, you would apply the
25 heightened guidelines, is that correct?



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

320

1 of water treatment, as a vegetative buffer?

2 A: Yes.

3 Q: I'm gonna walk you through some of the exhibits
4 that's been admitted by the Department.

5 MR. HABER: And, Your Honor, I believe you have a
6 copy. And if I may approach the witness to
7 provide a copy ---

8 THE COURT: Yes

9 MR. HABER: --- of my exhibits. And I believe, for
10 the Court's record, that 1 through --
11 Department's exhibits are labeled 1 through 8,
12 all but 7 have been admitted to the Court. 7
13 is waiting on a foundation.

14 Q: If you could, just -- we're gonna walk through
15 these just a little bit. If you could, look at
16 Department's Exhibit Number 1. Let me know
17 when you have that.

18 A: All right.

19 Q: What is that first document?

20 A: That's the coverage letter for the Garfield
21 Park Phase 3 drainage system retrofit.

22 Q: Okay. And did you issue this, did you write
23 this letter?

24 A: Yes.

25 Q: Is that your signature on the last page?



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

321

1 A: Yes.

2 Q: If you could, look at that second page of this
3 document and read me one, two -- the first
4 sentence of -- I guess we'll call it the third
5 paragraph from the bottom. It starts with you
6 are responsible.

7 A: You are responsible for obtaining any other
8 federal, state or local permit that may be
9 required for this project.

10 Q: Okay. Now, let's keep going through these
11 exhibits. I have Department's Bates label
12 number 5. Under Bates stamp 5, what is that?
13 If it's easier, they're stapled together if you
14 have them in your binder.

15 A: Okay. That's a memorandum to me from Georgie
16 Madlinger.

17 Q: Is that Bates label number 5, Exhibit 1. Bates
18 stamp would be at the bottom.

19 A: Oh, it's -- okay, I'm sorry. We're still
20 looking at Exhibit 1. I'm sorry --

21 Q: Now, that's --

22 A: --- I was going through Exhibit 5.

23 Q: It's been a long day.

24 A: All right. Page ...

25 Q: Page 5 of Exhibit 1.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

322

- 1 A: Okay. All right, I see ---
- 2 Q: See that, 005 on the bottom?
- 3 A: Yes, I see that now.
- 4 Q: Would ---
- 5 A: Sorry. That is the coastal zone consistency
- 6 certification for the Garfield Park Phase 3
- 7 drainage system retrofit.
- 8 Q: If you could, read me what is labeled as
- 9 section E, what's that say on that?
- 10 A: No critical areas as determined by OCRM shall
- 11 be disturbed or altered without authorization
- 12 by the Department.
- 13 Q: Okay. Let's keep walking through this a little
- 14 bit. What is -- let's go to what's been Bates
- 15 stamped as 009. Could you identify that
- 16 document for me?
- 17 A: That is the consistency determination.
- 18 Q: And did you create this document?
- 19 A: Yes.
- 20 Q: Okay. Let's first look at the summary of
- 21 public and Agency comments.
- 22 A: Okay.
- 23 Q: I see first, there's comments by a Perrin
- 24 Dargan with Hagood and Kerr, representing
- 25 Kenneth Bruning, do you see that?



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

326

- 1 spend much time on it. But you did coordinate
2 with those outside agencies in regards to those
3 issues, is that correct?
- 4 A: I did.
- 5 Q: Okay. Now, there's a paragraph A under C -- SC
6 -- it's section 5, SCC2MP?
- 7 A: Yes.
- 8 Q: Okay. Under A, what is underlined there, what
9 does that say?
- 10 A: Alteration of critical area will require a
11 permit from OCRM prior to work in that area.
- 12 Q: Prior to work in that area, is that correct?
- 13 A: Yes.
- 14 Q: Okay. Now, on the next page, under E ---
- 15 A: Yes.
- 16 Q: --- it says is a critical area permit required?
- 17 A: Yes.
- 18 Q: Can you tell me what it says underlined in
19 there?
- 20 A: Yes, plans show alteration of critical area for
21 the stabilization of the dike, which will
22 require permit authorization prior to work
23 being initiated in that area.
- 24 Q: So, it's alteration critical area for the
25 stabilization of the dike, so that has to be --



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

625

1 Q: Flip through those pages in compare it to
2 Number 33, and please let me know if
3 Department's 4 is more of a complete reflection
4 of the exchange between you and the Department
5 regarding maintenance and repair work. Do you
6 recognize or see some pictures in Department's
7 4? Do you recognize those pictures?

8 A: The first -- I have not seen --

9 Q: Did you not submit those pictures with your
10 maintenance and repair request?

11 A: That would have been Oakland reconstruction.

12 Q: Okay. That would be on the first one. How
13 about the second one?

14 A: The second one? Yes. I submitted this
15 picture.

16 Q: Okay. So photographs are contained in
17 Department's Exhibit 4 are in regards to your
18 maintenance and repair request to the
19 Department?

20 A: Correct.

21 Q: Are those included in Petitioners 33?

22 A: They are not.

23 Q: Okay. Now and Mr. North amongst other
24 issues you went through, you spoke about work
25 in the critical area. Do you recall that?



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

625

- 1 A: I do.
- 2 Q: Talked about mean high water, work at the
- 3 bottom, stabilization, issues like that. Do
- 4 you recall?
- 5 A: I do.
- 6 Q: Now, if riprap was to be installed below the
- 7 mean high water, okay, is it your understanding
- 8 you would need a critical area permit for that?
- 9 A: Or maintenance and repair.
- 10 Q: Or -- okay.
- 11 A: Uh-huh (affirmative response).
- 12 Q: But, if maintenance -- if it wouldn't fit within
- 13 the definition of a maintenance and repair,
- 14 would you need to have a department permit?
- 15 A: To do work in the critical area, you would.
- 16 yeah.
- 17 Q: In fact, I'll posit to you that under the
- 18 maintenance and repair in the regulations, if
- 19 it exceeds it, you either have to get
- 20 department approval or a permit. Do you
- 21 recall if that was in the critical area
- 22 regulations?
- 23 A: No, sir. Not right off. I'm sorry.
- 24 Q: Say later, if it was determined that you put a
- 25 bunch of riprap in the critical area and you



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

627

1 didn't have a permit, potentially in your mind
2 do you think there'd be some sort of
3 repercussion?

4 A: It could be.

5 Q: Do you think maybe enforcement and compliance
6 would come after the contractor for doing the
7 work and perhaps against Mr. Meyer as well as
8 the -- for the owner?

9 A: It could, yes.

10 Q: Okay. And that would either require you to
11 perhaps get an after the fact permit --

12 A: Uh-huh (affirmative response).

13 Q: -- and perhaps pay a fine?

14 A: Right.

15 Q: Do you think that'd be right?

16 A: Yes.

17 Q: Okay. So the work that you and Mr. North had
18 talked about regarding the top of what used to
19 be the dike --

20 A: Uh-huh (affirmative response).

21 Q: -- would that be out -- in your mind, out of
22 the critical area? Would that be on top of the
23 dike?

24 A: Yes.

25 Q: Is that how you understand it?



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT D

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

628

1 A: Right.

2 Q: Okay. And if your work did go down to be
3 critical area, would it be your understanding
4 you would have to get a permit?

5 A: I believe I would.

6 Q: Or if you put rocks down there, you would
7 likely be fined to have to go through some
8 issues with that, correct?

9 A: Yes.

10 MR. HABER: No further questions, Your Honor.

11 MR. LYLE - CROSS EXAMINATION BY MS. SHAHID:

12 Q: Mr. Lyle?

13 A: Yes.

14 Q: Will you tell me a little bit about your work
15 experience after you graduated from Clemson?

16 A: I worked in -- on commercial, residential,
17 industrial projects in four or five coastal
18 counties.

19 Q: Okay. Maybe be a little more specific. Where
20 did you begin your employment?

21 A: Andrews and Burgess.

22 Q: Oh. You've been working at Andrews and Burgess
23 since graduating from Clemson?

24 A: Yes.

25 Q: And where is Andrews and Burgess?



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT E

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

893

1 Q: And is it your understanding, that if you meet
2 the -- those standards exist to maintain water
3 quality and degradation occurs when those
4 standards are exceeded?

5 A: Correct

6 Q: Okay. And, have you seen any evidence from any
7 water quality analysis or sampling that any
8 standards have been exceeded downstream --
9 immediately downstream of what was the Cat
10 Island Lake?

11 A: I have not seen that, no.

12 Q: So, you really do not know, sitting here today,
13 if the alleged, untreated pollutants, that
14 might be running through the lake are degrading
15 those waters?

16 A: Correct.

17 Q: Are you aware that the current condition of the
18 area -- are you aware of the definition of
19 normal maintenance and repair that OCRM
20 utilizes?

21 A: I am.

22 Q: Okay. Are you aware that the determination has
23 been made that given the current condition of
24 the area, it no longer qualifies for
25 maintenance and repair?



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT F



South Carolina Department of Health and Environmental Control

Preserving and protecting the health of the public through prevention

February 11, 2010

O'Quinn Marine Construction Inc
95 Sheppard Road
Lady's Island, SC 29907

Re: Maintenance and Repair Notification
Chowan Creek Partners

Dear O'Quinn Marine Construction Inc:

This is in response to your recent request to perform Maintenance & Repair to an existing structure on the causeway to Cat Island for Chowan Creek Partners. Specifically, you request to replace flash board riser on causeway and place rip-rap back when finished. This work conforms to our Normal Maintenance and Repair criteria as set forth in Regulation 30-5.A.D.

"Normal maintenance and repair applies only to work on a structure which has been previously permitted or is grandfathered or exempted and is still generally intact and functional in its present condition. The work may only extend to the original dimensions of the structure, and any expansion, additions, or major rebuilding will require either a Department permit or documentation to and written approval from the Department."

A construction placard identifying this activity under the maintenance and repair notification is enclosed. The placard should be posted conspicuously on site during maintenance and repair activities.

Acknowledgement of this maintenance and repair request does not relieve you of your responsibility to obtain any local government permits that may be required for this work nor does it permit any activity that is not previously authorized by this agency. Please note that OCRM reserves the right to require a full permit if deemed necessary. If you have any further questions concerning this matter, please do not hesitate to contact me.

Please call me at 843-846-9400 if you have any questions.

Sincerely,

George J. Madliger, III
Senior Wetland Project Manager

CC:

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Ocean and Coastal Resource Management

Beaufort Office • 104 Parker Drive • Beaufort, SC 29906
Phone: 843-846-9400 • Fax: 843-846-9810 • www.scdhec.gov

0036



C. Earl Hunter, Commissioner
Promoting and protecting the health of the public and the environment

September 03, 2010

Mr. Gary Meyers
5 Sheffield Court
Beaufort SC 29907

Re: Maintenance and Repair Notification
Chowan Creek Partners

Dear Mr. Meyers:

This is in response to your recent request to perform Maintenance & Repair to an existing water control structure on an existing tidal impoundment on Cat Island for Chowan Creek Partners. Specifically, you request to replace a flashboard riser, repair the dike breach and stabilize with rip-rap. This work conforms to our Normal Maintenance and Repair criteria as set forth in Regulation 30-5.A.D.

"Normal maintenance and repair applies only to work on a structure which has been previously permitted or is grandfathered or exempted and is still generally intact and functional in its present condition. The work may only extend to the original dimensions of the structure, and any expansion, additions, or major rebuilding will require either a Department permit or documentation to and written approval from the Department."

A construction placard identifying this activity under the maintenance and repair notification is enclosed. The placard should be posted conspicuously on site during maintenance and repair activities.

Acknowledgement of this maintenance and repair request does not relieve you of your responsibility to obtain any local government permits that may be required for this work nor does it permit any activity that is not previously authorized by this agency. Please note that OCRM reserves the right to require a full permit if deemed necessary. If you have any further questions concerning this matter, please do not hesitate to contact me.

Please call me at 843-846-9400 if you have any questions.

Sincerely,

George J. Madlinger, III
Senior Wetland Project Manager

CC: Blair William, Wetland Section Manager
Ryan Lyle, Andrews & Burgess

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management

Beaufort Office • 104 Parker Drive • Beaufort, SC 29906
Phone: 843-846-9400 • Fax: 843-846-9810 • www.scdhec.gov

0041

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

787

to the Court, but to your knowledge, the Court permit would also likely be required before any of this work could be conducted. Is that correct?

A: Yes.

Q: Now, I think it's to be reported to the Court. I'd like for you to provide some sort of a snapshot regarding some of the Department's requirements for this area to be re-imposed, okay? And to be clear, I'm not asking you, have you received any information to make a decision on a critical area permit in this case?

A: We have not received any critical area permit requests for anything associated with this project.

Q: Okay. To be clear

A: to this site.

Q: I'm sorry. Go ahead. To this site?

A: Yeah.

Q: Okay. And to be clear, I'm not asking you to make a decision. I simply want to walk through and see what you would consider in these regulations, okay?

A: Okay.

Q: Does the Department have any type of specific



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

788

project standards that you'd refer to if you received an application to re-impound an area?

A: Yes. There's specific project standards for impoundments. There's also specific project standards on dredging and filling activities.

Q: Well, let's take a look. To your knowledge, could regarding the impoundment for canal regulation 35-12?

A: Yes, 35-12-K.

Q: And that runs two pages, but I'm going to try to put for the Court the first page, okay. Does that appear to be in the specific project standard that you mentioned 35-12-K and again, this would be the first page of that regulation?

A: Yeah. This is specific project standards for marsh impoundments.

Q: Could you read the title of 35-12 K to the Court?

A: Marsh Impoundments for Recreational and Commercial Activities.

Q: Are you aware of the definition in the regulations or statutes of recreational and commercial activities?

A: No.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

CPB

Q: If I2 K12, do you see that or K12?

A: Yes. K12 or 2.

Q: K12.

A: K12.

Q: Yeah. It mentions recreational water fowl hunting; do you see that?

A: Yes.

Q: Wildlife sanctuaries?

A: Yes.

Q: And other commercial, agricultural, and preservation uses, do you see that?

A: Yes.

Q: Do you have any knowledge whether this area, which I believe previous testimony stated was created for water fowl hunting and it's still utilized for water fowl hunting?

A: From my understanding, it's not used for water fowl hunting.

Q: Do you have any knowledge as to whether this former impoundment was utilized for commercial activities when it was impounded or -

A: I have no knowledge of that, no.

Q: Do you believe this section would allow you to re-impound an area just to utilize that area for detention of stormwater.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

1 A: No.

2 Q: Well, let's make an assumption that these areas
3 going to be re-impounded for something other
4 than stormwater, so it's hypothetical. So
5 was this area previously impounded to your
6 knowledge?

7 A: Yes.

8 Q: So we wouldn't really apply (2)(a) if that
9 is correct?

10 A: That's correct.

11 Q: Would (2)(a) apply to areas that were
12 previously unimpounded?

13 A: Yes.

14 Q: Okay. So would you apply Section 2(a) and ©?

15 A: Yes.

16 Q: Then this would be (b) here?

17 A: Correct.

18 Q: Six on this side and © would go to the next
19 side?

20 A: Correct.

21 Q: Okay. Does (2)(b) provide you factors to
22 consider on whether you could permit an area to
23 be re-impounded?

24 A: Yes. I mean, we would have to consider all
25 those -- those items under (2)(b).



CREEL COURT REPORTING, INC.

1239 Richland Street / Columbia, SC 29201

(803) 252-3445 / (803) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

191

Q: And I'm going to flip this over to B.6 there does B.6 provide for requirements for detailed management plans?

A: Yes.

Q: And I'm going to flip this page over looking at B.7, would you be applying all of these factors?

A: Yes.

Q: Okay in an effort to save time, I'm just going to touch on a few of these factors. In B.10, can you read it on your screen?

A: Yes, I can read it.

Q: In B.12, what does it mean to consider the amount of wetlands proposed to be re-impounded?

A: It's exactly what it is, I mean, whether you're impounding, you know, 15 acres of a wetlands or if you're impounding, you know, 20 or 30 acres of wetlands.

Q: Would it be correct to say the larger the area, the more difficult it may be to re-impound it?

A: Yes.

Q: In B.11, what does it mean to consider the extent to which the project would block waters presently used for recreation and navigation by the public?



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

792

1 A: Would have to take into consideration of any
2 ways that that system offers today as it is
3 and whether or not if you know recreational
4 fishermen are going in there and fishing or not
5 or any of the public at the public's expense
6 using that area.

7 Q: Would it be safe to say, if an area is
8 demonstrated as a demonstrated use by the
9 pub. it'd be more difficult to receive the
10 permit?

11 A: This is a higher regulatory hurdle if there's a
12 demonstration, a demonstration of use.

13 Q: Now, you were not here during previous parts of
14 this hearing, previous days of this hearing, is
15 that correct?

16 A: Correct.

17 Q: Will posit to you that a Petitioner testified
18 that somebody was on a boat, I believe it was
19 a skiff, fly-fishing in the former impoundment,
20 is that a demonstrated use by the public for
21 recreation?

22 A: Yes.

23 Q: Now, he was also in a boat. So is that also a
24 demonstrated use in navigation?

25 A: Yes.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

703

1 Q: Looking at B(4), what does it mean to consider
2 the degree of salinity of waters impacted by
3 the proposed project?

4 A: We would look and see what the system is
5 mean the wetlands, you know, is it a tidal
6 area or wetlands or is it freshwater wetlands
7 and see what the impacts would be or the
8 change.

9 Q: Again, would it be safe to say the higher the
10 salinity level, the more difficult it would be
11 to obtain a permit?

12 A: Yes.

13 Q: Do you have knowledge as to whether or not
14 Chowan Creek which is providing tidal water
15 into the former impoundment has a high salinity
16 level?

17 A: Say that again.

18 Q: Do you know whether or not Chowan Creek has a
19 high degree of salinity?

20 A: I mean, yeah, there's a little a fairly high
21 I don't know what the exact salinity level is
22 but it's a direct connection. It goes into
23 Chowan Creek then it hits the Beaufort River,
24 then it hits the Port Royal Sound, then it hits
25 out to the Atlantic Ocean. So it's not



CREEL COURT REPORTING, INC.
1236 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

104

1 directly adjacent or connected to the Atlantic
2 Ocean, but this is a very high tidal flow
3 exchange back and forth, which there is a certain
4 degree of salinity in the water.

5 Q: You provided kind of an idea of where that
6 creek went. It's been referred to as near
7 water. Did you consider this to be near
8 water?

9 A: No.

10 Q: Now, lastly I want to look at B(6). What does
11 it mean to consider the primary purpose of the
12 impoundment?

13 A: Well, we would look to see what the primary
14 I mean the primary itself essentially
15 translates to what is it going to be used for.
16 Why is someone wanting to impound this wetland.
17 What we typically see is, you know, folks that
18 are impounding a majority of impounded wetlands
19 are managed for water fowl, water fowl hunting.

20 Q: Now, I know I told you that forget about it
21 being for stormwater permit but if it would
22 the re-impoundment of the area to act as a
23 stormwater detention basin, would that come
24 into this evaluation?

25 A: Yes, if that was the purpose to re-impound this



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

79

1 independent that would come into the -- that
2 would come into the evaluation. ye.

3 Q: Okay. That's just part of the evaluation. You
4 had said that there'd be -- also you'd have to
5 apply regulations in regard to filling. Is that
6 correct?

7 A: Yes.

8 Q: I'm not going to spend time going through it
9 that as we -- but you would have to apply those
10 as well. correct?

11 A: Yes.

12 Q: Now, I'd like to direct you to 30-11-B; do you
13 recognize that document?

14 A: Yes.

15 Q: And what does 30-11-B provide you?

16 A: For every permit application that we do in, we
17 have to evaluate a permit application on
18 general considerations. So it will go through
19 general considerations for the guidelines and
20 then specific project standards. This is one
21 of the general guidelines that we have to apply
22 to all permit applications.

23 Q: And then also this down here you mentioned
24 further guidelines, is that under #?

25 A: Yes.



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

194

- 1 Q And then that goes from 1 through 10 is
2 that correct?
- 3 A: Correct.
- 4 Q: Okay. I'm going to go when you see the
5 critical area permit application those general
6 guidelines and further guidelines have to be
7 applied every time.
- 8 A: Yes.
- 9 Q: Okay. I'm not going to walk through all of
10 them but could you take a look at B-2; can you
11 see that?
- 12 A: It's a little blurred. There you go.
- 13 Q: How's that?
- 14 A: That's good.
- 15 Q: Okay. What does it mean the extent to which an
16 activity would harmfully obstruct the natural
17 flow of navigable water?
- 18 A: Well, a scenario that you posed for re-
19 imbounding the dike, the wetlands there, the
20 actual activity would be placing the structure
21 in the critical area and then associated fill
22 and then we would look to that to see, you
23 know, if there's currently open water free, a
24 natural flow of navigable water which if
25 there's a demonstration of navigability, then



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

we would take that into consideration.

Q: And with that one, testified as I pointed out earlier in this trial, the boat going that area to go inside of the former impoundment, that would be a non-designated navigability of this area?

A: Yes.

Q: Okay. Would erecting a dike obstruct the natural flow?

A: Yes.

Q: And it would obstruct the navigability of a boat to get into that area.

A: Correct.

Q: But, could potentially placing a dike there obstruct the accessibility to crabs or other marine life?

A: Yes.

Q: I'm looking at (4). Could it affect existing public access to tidal and navigable waters?

A: Which one are you looking at.

Q: It's under B, no. I'm sorry. It's under (5), the extent to which in evaluating that, could it affect existing public access to tidal and navigable waters?

A: Yes.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

Q: Kind of the same reasons we talked about under number (1)?

A: Yes.

Q: In addition, we had gone through some things standards. We had talked about drawings or something being required or not, right?

A: Yes.

Q: In addition to that, does the ownership of the area also have to be demonstrated to you?

A: As part of a permit application, I read that thing for you about the permit requirements for a complete application and part of the application is a demonstration of ownership.

Q: As this area's been titled the influence for some four years now, would there be a question as to whether who owns that area?

A: I mean, I think they would have to demonstrate ownership and typically an area that is a critical area that's submerged land, if an individual doesn't have a King's grant demonstrating ownership, then it's assumed that the state owns the property, the Budget and Control Board.

Q: And that's something that would have to be proven even before the permit application is



CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

EXHIBIT G

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

199

considered?

A: Before we can even consider it, we'd have to have
out on public notice. We would have to have
that rectified.

Q: Now what we just went through, were those just
factors you would have to consider that we
went through, sorry, under the re-imposition
and the further guidelines and the general
guidelines?

A: Yes.

Q: So these are just factors you would have to
consider to issue ---

A: To be able to make a decision on a permit
application, yes. We'd have to consider those
factors.

Q: But would that application also have to go out
on public notice?

A: Yes.

Q: Would you also have to evaluate comments
received by the public and other agency
resources?

A: Yes.

Q: Or other resource agencies?

A: Yes.

Q: Is your permitting decision also appealable?



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT H

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

152

1 areas?

2 A: That's not really - it's not really my area of
3 expertise. Seems -- yeah, it sounds -- yeah,
4 tidal.

5 Q: So you don't know one way or not whether or not
6 it includes all tidal areas?

7 A: I mean, that sounds like a reasonable
8 definition of it.

9 Q: Tell me how much discretion you have, if any,
10 with regard to picking the type of stormwater
11 treatment that a development has.

12 A: I review what is -- is proposed by the
13 applicant. If it meets the requirements, I
14 approve it. I don't design or specify which
15 mechanism, you know, has to be used. As long
16 as it meets the requirements, you know, what is
17 proposed is up to the applicant and -- but it's
18 -- it does have to meet the requirements, but
19 as to what -- I mean, because there's several
20 mechanisms out there. We don't specify, you
21 know, what that is.

22 Q: In determining whether an applicant meets the
23 requirements, do you rely on representations
24 from the applicants' licensed engineers?

25 A: Yes.

PAGE 1



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT H

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

153

1 Q: Is it fair to say that the stormwater
2 department relies heavily on -- on the outside
3 engineers, the licensed engineers, to do the
4 studies, do the analyses and determine whether
5 or not it meets the requirements?

6 A: Yes.

7 Q: Is it your belief that you have got to approve
8 whatever a developer proposed if it meets the
9 regulations?

10 A: If it meets the regulations, yes.

11 Q: Okay. Now, is that true even if we're talking
12 about a change to a previously approved permit?

13 A: Yes, if it's a proposed alternative, they can
14 modify the permit as long as that proposed
15 modification meets the requirements. Yes, they
16 can modify it or terminate the old permit and
17 apply for something different.

18 Q: What's your basis for believing that an
19 applicant has a right to change an approved
20 stormwater system?

21 A: I mean, the regulations allow for it.

22 Q: Do they specifically allow for it? What's the
23 source of your belief that a developer has a
24 right to come in and change the system?

25 A: There are -- I'd have to consult the

PAGE 2



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT H

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

168

1 A: That -- what was the question about that?

2 Q: Do you recall testifying in your deposition
3 last summer that it did not bother you at all
4 that one effect of approving the retrofit was
5 that large areas that were previously treated
6 for stormwater would forever discharge
7 untreated?

8 A: Yes.

9 Q: Okay. I believe you testified that you do
10 agree that the retrofit application is governed
11 by the policies and procedures of the Coastal
12 Zone Management Program; is that correct?

13 A: It's -- it's one of the -- one of those, yes.

14 Q: And would you agree that this retrofit permit
15 cannot be issued unless it's in compliance with
16 that program?

17 A: Yes.

18 Q: Do you also agree that this retrofit permit is
19 governed by regulation 700 -- 72-300 et
20 sequence?

21 A: Yes.

22 Q: Is it also governed by the regulation 61-9?

23 A: Yes.

24 Q: Do you recall receiving a multitude of calls,
25 letters and emails from the Petitioners and

PAGE 3



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT H

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

169

1 their counsel over the three years that this
2 matter was pending?

3 A: Yes.

4 Q: Is it fair to say that you were repeatedly
5 bugged and pressured to act and to consider
6 various reasons why the permit should not be
7 granted?

8 A: I recall several emails, several phone calls,
9 letters, submittals, yes.

10 Q: In your view if the developer decided he wanted
11 to just keep the old system and made
12 application to do that, would you feel that you
13 should approve that also?

14 A: Yes.

15 Q: So basically the developer can have whatever he
16 wants as long as it complies with the regs: is
17 that your view?

18 A: As long as we approve it, yes.

19 Q: And as long as it complies with the regs?

20 A: Which if it complies with the regulations and
21 he's made an application to us and we've
22 approved it, yes.

23 Q: Okay.

24 A: He can't just do ---

25 Q: Let me make sure I have the chronology right.

PAGE 4



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT H

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

309

1 procedures section. Do you have that back out
2 in front of you?

3 A: Yes.

4 Q: First, did you coordinate with Critical Area
5 staff on some of the issues raised by the
6 petitioners, that was either out of your
7 purview or your area of expertise?

8 A: Yes.

9 Q: And in fact, you had testified earlier that Mr.
10 North asked you to come out, and you did and
11 you walked around with the petitioners to
12 evaluate their concerns further, is that
13 correct?

14 A: Yes.

15 Q: Now, these guidelines provide that for all
16 projects, regardless of size, which are located
17 half a mile of a receiving water body, and I
18 believe this was gone through at length during
19 Mr. North's direct exam of you. Now -- but the
20 guidelines continue after the requirements of
21 the first one-half inch of runoff for -- from
22 the entire site, or stored to the first one-
23 half runoff into runoff in the bilge pump
24 portion. The guidelines continue and say
25 storage may be accomplished through retention,

PAGE 5



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

EXHIBIT H

KEN BRUNING, ET AL. V. SC DHEC, ET AL.

266

- 1 receiving water bodies, then there's a whole
2 list of things that are required?
- 3 A: I see that.
- 4 Q: Okay. Now, there was a golf course immediately
5 adjacent to the Cat Island Lake, isn't there?
- 6 A: I wouldn't consider it immediately adjacent.
- 7 Q: Well, maybe not touching but you could throw a
8 baseball to it, couldn't you?
- 9 A: I don't know.
- 10 Q: Okay. On the very west end of the lake, there
11 are some wetlands, aren't there?
- 12 A: I don't -- I don't know what exactly is
13 wetlands in that area ---
- 14 Q: Okay.
- 15 A: --- and what isn't.
- 16 Q: Well, there's trees, aren't there?
- 17 A: There's a forested area, yes.
- 18 Q: Okay. And just immediate -- and you and I
19 walked through that forested area, didn't we?
- 20 A: Yes.
- 21 Q: Okay. And doesn't it connect to a golf course
22 lagoon?
- 23 A: There is a spillway, as I recall it, a spillway
24 from the -- from a golf course lagoon that's a
25 vegetated swale that leads into a low area and

PAGE 6



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

Petitioners,

v.

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

Respondents.

In Re: Garfield Park Phase 3.

Cat Island POA, c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control and Garfield Park
Phase 3,

Respondents.

Docket No.: 12-ALJ-07-0434-CC

**JOINT PROPOSED ORDER OF CAT
ISLAND POA C/O GARY MEYER AND
SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL
CONTROL**

Appearances:

Counsel for Petitioners:

John E. North, Esquire

Counsel for Respondent South Carolina Department of
Environmental Control:

Nathan M. Haber, Esquire

Counsel for Respondent/Petitioner Cat Island POA

Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (“ALC” or “the Court”) pursuant to consolidated requests filed by Petitioners Bruning et al. and Petitioner/Respondent Cat Island POA related to action taken by the Board of Health and Environmental Control (“the Board”). The Petitioners Bruning et al. (hereinafter “the Petitioners”) are all owners of property on Cat Island who purport to oppose installation of filters in storm drain inlets in the stormwater drainage system for a development on Cat Island known as Garfield Park Phase 3 (hereinafter “GPP3”). The stormwater drainage system on GPP3 formerly drained to an impounded water feature known as Cat Island Lake. Cat Island Lake existed before Cat Island was developed, having been impounded by construction of a dike at some point, likely the early 1960’s per review of historical aerial photography. The dike was breached in or around 2009 and presently Cat Island Lake is subject to the ebb and flow of the tide from Chowan Creek. The permit application and action that is the subject of this contested case is entitled “Garfield Park Phase 3 – Drainage System Retrofit, Beaufort County.” The project involves the stabilization of the breached dike and the installation of water quality filters in storm drain inlets within the drainage system at Garfield Park Phase 3 located on Cat Island, Beaufort County, S.C. The filters are proposed by the Petitioner/Respondent Cat Island POA (hereinafter “POA”) as an alternative for addressing water quality requirements associated with stormwater discharges from Garfield Park Phase 3. Prior to the breach of the dike Cat Island Lake detained stormwater from GPP3, which is adjacent to the lake.

The three and one-half day hearing was held January 14-17, 2014, before the Administrative Law Court in Columbia, South Carolina.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

GPP3 is one of several phased developments located on Cat Island in Beaufort County, S.C. P. 41:21–p. 42:2, *see also* pp. 73-76. Cat Island was purchased in 1982 by Gary Meyer, developer and POA representative. P. 41:13. Cat Island Lake was already established at the time of purchase. P. 76:25–p. 77:1. The lake was created by construction of a dike installed between 1960 and 1965. P. 509:8-15. The impounded lake was likely created as habitat for ducks and for water fowl hunting. P. 758:6-7.

The dike included a water control structure or outfall device that Meyer referred to as a “flashboard riser.” P. 44:11-13. This flashboard riser was comprised of three boards and an outfall pipe. P. 77:13-15. When it was functional, the flashboard riser maintained water levels within the lake through placement or removal of the boards. P. 77:7-12. Having all three boards in place maximized the depth of the lake. P. 44:22-25. However, the lake was subject to the ebb and flow of the tide through the pipe in the flashboard riser and over the riser itself. P. 77:20-21 and p. 510:21-22.

Having been constructed in the 1960’s, the dike and outfall device were built long before the promulgation of South Carolina’s stormwater management regulations (S.C. Code Ann. Reg. 72-300 *et seq.* and 61-9.122.26 *et seq.*) However the impoundment created by the dike, Cat Island Lake, was considered a stormwater management pond for purposes of development of GPP3 and the Lake satisfied state requirements for controlling the release of stormwater and for providing water quality treatment to stormwater. GPP3 obtained a stormwater permit from the Department on June 9, 2004.

At some point following construction of GPP3, the dike failed. It has been alleged by the Petitioners that this breach occurred in June 2009. Initially, the POA attempted repair of the

dike. After this attempt to repair the dike failed¹, the POA submitted an NOI (Notice of Intent to seek permit coverage) for authorization to retrofit the initial stormwater permit coverage for GPP3 by installing water quality filters. This “drainage system retrofit” application was submitted to the South Carolina Department of Health and Environmental Control (“SCDHEC” or “the Department”) on October 1, 2010. P. 375:20-22 and SCDHEC Ex. 2. Public Notice was provided of the request to retrofit the Stormwater Management System in GPP3. P. 339:3-24 and SCDHEC Ex. 1. During the Public Comment period, the Department acknowledged and carefully considered comments and concerns raised by Petitioners suggesting that the impoundment should be re-established and objecting to the proposed retrofit. After consideration of the public comment and in compliance with all required procedures set forth in the applicable State policies and regulations, SCDHEC granted a detention waiver, authorized installation of water quality filters, and issued General Permit coverage to the POA for the Stormwater Retrofit of GPP3 on June 18, 2012. SCDHEC Ex. 1.

Shortly thereafter, on June 26, 2012, the Petitioners challenged the authorization for the Stormwater Retrofit by submitting a Request for Final Review Conference to the Board of Health and Environmental Control. Petitioners’ Ex. 23. In response, the Department staff asserted that the applicable stormwater regulations and the General Permit allow for alternative treatment mechanisms and recommend measures other than ponds to achieve water quality improvement for smaller sites. Petitioners Ex. 25, p. 2. *See* S.C. Code Ann. Reg. 72-300 *et seq.*, specifically, S.C. Code Ann. Reg. 72-305(B)(3). Department staff noted that GPP3 is a “smaller site,” being less than ten acres with the drainage area to each in-line filter being even smaller. *Id.* Department staff further explained that its analysis indicated that the proposed filters would meet

¹ An authorization to perform Maintenance and Repair of the dike was issued February 18, 2010.

all regulatory requirements for controlling water quality and that proper justification was provided by the professional engineer of record for a waiver from the water quantity requirements. Id.

The Board granted the Petitioners' request for final review conference and a hearing was held August 9, 2012 before a three-member Committee of the Board appointed pursuant to S.C. Code Ann. § 44-1-60(F). Petitioners presented arguments before the Board that the proposed retrofit, which eliminated the need for detention of stormwater in Cat Island Lake, violated Chapter III(C)(3) of the South Carolina Coastal Zone Management Program Refinements (August 1993), in particular, the Stormwater Runoff Storage Requirements: "...for those projects which are located within 1000 (one thousand) feet of shellfish beds, the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site."²

At the conclusion of the hearing, the Committee announced that the Final Board Decision would be held in abeyance for one week and urged the parties to work on a voluntary resolution. The parties were unable to resolve the matter. The Board then reconvened on August 21, 2012, and issued its decision rescinding the coastal zone consistency determination for Cat Island's project.

In its Final Agency Decision the Board stated that the basis for the decision "related only to the Requestors' arguments surrounding the project's proximity to shellfish grounds." Cat Island Ex. 41, p. 2. Specifically, the three-member Committee found that no party had presented sufficient evidence to determine the exact distance of the project to shellfish beds.

It has been five years since the initial breach of the dike and four years since the attempt to repair it failed. The impoundment, formerly Cat Island Lake, is now a tidal marsh, inundated

² Chapter III(C)(3) of the South Carolina Coastal Zone Management Program Refinements (August 1993) refers to the Storm Water Management Guidelines as starting on p. III-74. The same guideline is stated on p. III-60 of the 1995 Update to the Program Refinements (Petitioners Ex. 19).

at high tide but dry in many areas at low tide. P. 390:3-14 and Petitioners Ex. 1, p. 24 -25. It is undisputed that Cat Island Lake has been naturalizing since the breach. P. 718:18-25, p. 719:10-18, SCDHEC Ex. 5. At this point, Cat Island POA no longer qualifies for maintenance and repair of the dike and would have to embark on a permitting process with the U.S. Army Corps of Engineers and the Department to re-impound the naturalized area. P. 692:16 – p. 694:9 and Cat Island Ex. 39, Specific Condition Number 4.

APPLICABLE REGULATORY REQUIREMENTS

The following statutory and regulatory requirements are significant for evaluation of this contested case and the decision to issue the permit allowing installation of the proposed filters.

1. 25A S.C. Code Ann. Reg. 61-9, Water Pollution Control Permits.
2. 25A S.C. Code Ann. Reg. 61-68, Water Classifications and Standards.
3. 25A S.C. Code Ann. Reg. 61-69, Classified Waters.
4. 25A S.C. Code Ann. Reg. 72-300 et seq., Standards for Stormwater Management and Sediment Reduction.
5. Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).
6. The South Carolina Storm Water Management and Sediment Reduction Act, §§ 48-14-10 et seq.
7. The South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-10 et seq.
8. The Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 – 1387 (including specifically 33 U.S.C. § 1344, Permits for dredged or fill material in Subchapter IV, Permits and Licenses).

SUMMARY OF TESTIMONY

Gary Meyer

Meyer is a member of Chowan Creek Partners, the developer of Cat Island. P. 49:12-19.³ Cat Island was developed in several phases and still contains undeveloped tracts that are planned for future development. P. 41-42 and Cat Island Ex. 6. The Rookery was the second phase of the development of Cat Island. P. 41:18-20. Garfield Park is the most recent area that was developed. P. 42:1-2. Tract G is an undeveloped tract of land. P. 85:11-12 and Petitioners Ex. 58.

The Rookery was chosen as the name for that particular subdivision based on the fact that birds were seen populating Cat Island Lake. P. 45:6-9. There is no official designation by any state or federal agency of the area as a rookery; rather, the name was chosen for marketing purposes. P. 74:22-25. Petitioners reside in the Rookery adjacent to the former impoundment.

Cat Island Lake was already established at the time of Mr. Meyer bought Cat Island (in 1982). P. 76:25-77:1. In fact, the dike and the lake were in place prior to the creation of the Coastal Tidelands and Wetlands Act which brought about the requirements for stormwater permitting. P. 71:6-11. The POA was issued authorization in 2004 under the General NPDES Stormwater Permit, for construction of GPP3 which relied upon the lake to provide stormwater treatment for GPP3 by detention. P. 50:1-5. The lake was created by construction of a dike having an outfall device also known as a “flashboard riser.” P. 44:11-13. The flashboard riser was comprised of three boards and an outfall pipe. P. 77:13-15. When it was functional, the flashboard riser maintained a level in the lake by maintaining water level within the lake that was set by the boards. P. 77:7-12. Having all three boards in place maximized the depth of the lake.

³ Chowan Creek Partners is named as Defendant in an action brought by Petitioners, as Plaintiffs, in the Court of Common Pleas for Beaufort County, Civil Action No.: 2010-CP-07-3113, in which Petitioners seek damages for alleged property damage arising from the loss of Petitioners’ lake view and alleged diminution in value of Petitioners’ homes. P. 90-91.

P. 44:22-25. However, it was known that tidal water flowed in and out of the lake through the pipe in the flashboard riser. P. 77:20-21. There was not any “control” of the rate of flow in either direction. P. 77:24-25.

Chowan Creek Partners did no work to the flashboard riser or dike other than to replace a board for maintenance. P. 42:11-25. They had looked at the dike in response to complaints about algae growth on the lake, which occurred in the summer. P. 43:1-12. At one time, elimination of the dike to return the lake to a tidal marsh was contemplated to deal with the complaints. P. 46:5-8. This was never undertaken. Eventually, the dike failed due to unknown causes in the summer of 2009. P. 68:18-21 and P. 62:17 – p. 63:6.

Initially, after the failure, Mr. Meyer, on behalf of Cat Island POA, requested an authorization for maintenance and repair of the dike from SCDHEC-OCRM. P. 70:10-14 and SCDHEC Ex. 4. An attempt was made to repair the dike by a local marine contractor, Duncan O’Quinn. P. 51:11-14 and Petitioners Ex. 36, who accessed the dike by way of barge. After the attempt failed, the POA considered a second attempt to repair the dike using land access to the area. Id. Mr. Meyer discussed other options to repair the dike with SCDHEC-OCRM and was told that he would have to apply for a permit to do anything. P. 87:3-25. The most recent estimate obtained by the POA for repair of the dike was in the hundreds of thousands of dollars. P. 91:2 – p. 92:1. The POA chose not to undertake the proposed repairs due to concerns about access to the dike for making the repairs and having to provide continuing maintenance. P. 84:15-21.

Pamela North

Mrs. North resides at 2 Rush Street on Cat Island, which is in the Rookery. P. 382:5-6. She is an attorney but stopped actively practicing about five or six years ago. P. 382:6-8. Her

property fronts Chowan Creek and Cat Island Lake and is the closest to the dike of all the Petitioners. P. 382:14-16 and Cat Island Ex. 2A. The property forms a point in the direction of Port Royal Sound with almost 450 feet of water frontage on Chowan Creek and the lake. P. 383:1-11 and Cat Island Ex. 2A. The Norths were initially drawn to the property because they needed deep water access for a boat they owned at the time. P. 382:21-24. Mrs. North never used the lake for recreation such as boating, swimming or fishing. P. 415:14 – p. 416:5.

Mrs. North testified that prior to the failure of the dike, there was a lake view from her house where she would see several species of wildlife including birds, alligators, otter, and turtles. P. 385-386. She no longer sees the same wildlife in the tidal area. P. 390:15-18. She acknowledged that the lake exhibits growth of marsh grass and fills with water with the tidal cycle. P. 390:3-14 and Petitioners Ex. 1, p. 24-25. She further acknowledged that the lake remains a natural environment that attracts birds and potentially other wildlife. P. 417:12 - p. 418:3.

Since the failure of the dike, Mrs. North claims to have tidal water encroaching beyond her property boundary at high tide. P. 397:15-17. However, she also confirmed that she has recently listed her house for sale and that she and her husband did not indicate on the required disclosure form awareness of any problems caused by fire, smoke, or water during their ownership, or any drainage, soil stability, atmosphere or underground problems during their ownership, any erosion or erosion control affecting the property or any flood hazard, wetlands or flood hazard designations affecting the property. P. 428-429 and Cat Island Ex. 43. Mr. and Mrs. North checked “NO” when answering all these questions. Id. Mrs. North confirmed that she and her husband have advertised their property at a listing price of \$1,550,000. P. 426:25 - p. 427:1. They purchased the property for \$740,000 in 2001. P. 414:11-15. Mrs. North had

knowledge that the property was being advertised by her real estate agent on the internet and she acknowledged that her agent describes the house as located on a "beautiful tidal marsh." P. 438:11-18 and SCDHEC Ex. 7.

Mrs. North confirmed that she is a plaintiff in another lawsuit filed against Chowan Creek Partners in the Beaufort County Court of Common Pleas. P. 430:10-16. As a plaintiff in that civil action North confirmed that she is seeking compensation for the loss of Cat Island Lake. P. 430:24.

David Feron

Mr. Feron is the owner of 7 Sheridan Road on Cat Island, a lakefront property in the Rookery subdivision. P. 446:19-22 and Cat Island Ex. 2D. He also owns the adjacent lot at 5 Sheridan Road. Cat Island Ex. 2C. He considers his property special due to the lake view. P. 447:22 – p. 448:7. He confirmed that his concern regarding the Stormwater Retrofit permit authorization is only about the loss of his lake view. P. 459:17-19. He never used the lake for recreational purposes. P. 459:3-16. However, he stated that he has seen someone fishing from a skiff on the lake that he believes came in through the breach in the dike at high tide. P. 457:1-14. No boats could enter the lake from the creek when the dike was functional. P. 457:11-18.

Mr. Feron confirmed that Cat Island Lake fills with water at high tide. P. 453:1-13. He no longer observes wildlife on the lake. P. 453:13. However, he has allowed vegetation on the back of his property to grow which now blocks his view of the lake. P. 451:3-25. Mr. Feron could not confirm that the tidal waters have damaged or killed any trees on his property. P. 456:14-22.

Mr. Feron is the only Petitioner with a written appraisal of the value of his property. P. 449:6-9. He has obtained two appraisals – first in 2006 before the failure of the dike and again in

2010. These appraisals reflect a decrease in value between 2006 and 2010. P. 458:6-18 and Petitioners Ex. 14 and 15. However Mr. Feron confirmed that the first appraisal was obtained before the recession negatively impacted the real estate market. P. 458:19 – p. 459:2.

Sally Haley

Sally Haley resides on a lake front lot on Cat Island that she purchased with her husband in 1994. P. 461:10-16. She considered her property special due to the lake view. P. 462:2-4. She confirmed that her objection to the permit issued to Cat Island POA was that it doesn't result in restoration of the lake. P. 469:25 – p. 470:3. She characterized her injury in this action as loss of the lake view. P. 470:12-20. She cannot confirm that she has experienced any property damage due to the failure of the dike. P. 469:1-10. Her property has not suffered any erosion since the failure from tidal action in the lake. P. 469:11-24.

Ken Bruning

Mr. Bruning resides at 4 Rush Street in Cat Island, which is not a lakefront lot. P. 471:19-22. Bruning relocated to Beaufort in order to purchase a home on the water. P. 475:20-23. His house is actually located on Chowan Creek, where he has a dock. P. 475:20 – p. 476:2 and Cat Island Ex. 44. He has experienced a loss of lake view as a result of the failure of the dike. P. 472:8-11 and Cat Island Ex. 44. However, his property still has water views of Chowan Creek. P. 472:20-21.

Ryan Lyle

Mr. Lyle is a licensed professional engineer employed at Andrews and Burgess, Inc., a full service engineering and surveying firm in Beaufort, South Carolina that served as design consultant for the developer of Cat Island. P. 479:17-22. Mr. Lyle indicated that he has been engaged as an engineering consultant for approximately 100 commercial and/or residential

projects during his current employment. P. 632:15-23. Mr. Lyle was involved in the design of stormwater management systems and obtaining stormwater permit coverage in more than half of these projects. P. 633:1-8. Mr. Lyle was qualified as an expert witness in engineering in the state of South Carolina with an emphasis on civil engineering. P. 634:19-24.

After the first failed attempt to repair the dike, Mr. Meyer asked Andrews and Burgess to obtain a second maintenance and repair authorization. P. 489:12-17 and Petitioners Ex. 33, SCDHEC Ex. 4.⁴ Andrews and Burgess requested a new authorization and began planning for a second attempt at repair of the dike. P. 490 and Petitioners Ex. 33. Mr. Lyle testified regarding impediments to a second attempt to fix the dike, including: the need for access to the dike by land,⁵ significant increase in costs from the first attempt, and potential permitting requirements to re-impound the lake. P. 492:1-17, P. 641:2-17. Moreover, once the dike was repaired access would be required for continued maintenance of the dike. P. 642:4-22. An improved road capable of accommodating construction trucks would have to be built through Tract G which would require additional permitting. P. 643:15-22. Mr. Lyle confirmed knowledge of the United States Army Corps of Engineers having been asked about the breached dike and proposed retrofit and having no objection with the retrofit, given that the breach was “essentially restoring the intertidal nature of the system.” P. 638:19-639:3 and SCDHEC Ex. 1.

In the face of these impediments, Mr. Meyer asked Mr. Lyle to look into other options that would meet the stormwater requirements other than repair of the dike. P. 491:1-20. Specifically, Mr. Meyer asked Mr. Lyle to review another mechanism for treating the stormwater

⁴ The first M&R authorization for the dike was issued to [O’Quinn] Marine Construction on February 18, 2010, expiring August 18, 2010. The second M&R authorization, applied for by Andrews and Burgess, was issued September 3, 2010 expiring March 3, 2011. P. 494:5-9 and Petitioners Ex. 33. SCDHEC Ex. 4.

⁵ In the initial attempt to repair the dike the contractor accessed the dike by water, using a barge. The failure of these repairs is partially attributable to this method of access. P. 47:4-20.

before it ever gets to the lake, to avoid having to depend upon the lake to provide the treatment. P. 495:10-17. In response, Mr. Lyle proposed inlet filters for installation in the catch basin for GPP3. P. 495:12-17.⁶

Mr. Lyle confirmed that he reviewed the pollutant removal efficiencies of the filters. P. 495:22-23. He understood the filters to target the pollutants contained in the first flush of stormwater. P. 496:10-15, p. 498:1-3. Mr. Lyle explained that the first flush is a volume of water gauged in inches of rainfall as soon as it starts raining, which is when pollutants sitting on an impervious surface, such as oils, greases and other sediments, get washed away. P. 645:19 – p. 646:1. This is stated as a “design criteria” in S.C. Code Ann. Reg. 72-307(5)(d) and (e) and the Stormwater Management Guidelines of the Policies and Procedures of the South Carolina Coastal Management Program, which require storage and release of the first ½ inch of runoff over a 24-hour period from a site with a permanent water quality pond having a permanent pool or of the first inch of runoff over a 24-hour period from a site with a permanent water quality pond not having a permanent pool. P. 614:4-20 and p. 646:6-15, Petitioners Ex. 3, p. 28, and Petitioners Ex. 19, p. III-60. The controlled release of a certain volume of stored water generally defines a “detention structure.” P. 576:12-16. Further, Mr. Lyle stated that any device having the potential to allow a vertical stage increase allows for detention of water because it backs up the water which can then only flow out as fast as the device might allow. P. 583:5-21.

The pollutant removal efficiency for the proposed inlet filters was 74 % of the total suspended solids (“TSS”) or sediments. P. 502:5-7 and p. 649:17-23. Mr. Lyle testified that this removal efficiency was adequate to treat water quality post-construction. P. 650:4-7. He confirmed that an 80% trapping efficiency, as suggested by Petitioners in reference to an OCRM

⁶ The proposed filters are referred to in marketing literature as curb inlet baskets. They are referred to as inlet filters or in-line filters in other documents that are exhibits. For simplicity, this Order will use “inlet filters” in all references.

checklist, was not the applicable requirement because there was no ongoing construction. P. 652:23 – p. 653:5 and Petitioners Ex. 1. The requirement for an 80% trapping efficiency is applicable to an active construction site not a finished development. P. 653:15-19 and p. 653:20-24.⁷

Lyle proposed the inlet filters as an acceptable alternative to detention, retention or infiltration, based on the fact that the inlet filters would filter the pollutant load in the first flush runoff volume. P. 616:13-19. In a stabilized, well-kept development the filters would serve the same function as a wet detention pond and were an adequate replacement. P. 616:21- p. 617:3.

With respect to water quantity controls Mr. Lyle reviewed stormwater runoff rates and volumes for a ten-year storm event, as required by SCDHEC-OCRM. P. 514:5-13. Regarding the stage, or water level in the lake, Lyle concluded that with the dike in place there was stormwater storage in the pipes that created an increased stage in the lake. P. 516:7-10. Without the dike in place, Mr. Lyle did not find much difference in the elevation of the lake because the volume of water in the river is much greater than the volume of stormwater runoff. P. 516:10-15. Regarding the rate of water flowing from GPP3 without the water control structure and dike Andrews and Burgess calculated a velocity of just under four feet per second which is less than the velocity deemed by OCRM to be erosive of five feet per second. P. 519:14-21. Mr. Lyle confirmed that OCRM had first requested these calculations to be modeled against a mean high water elevation and then subsequently against a mean high high water elevation with the intent of reviewing the entirety of the dike breach flowing full. P. 527:14 – p. 528:1.⁸

⁷ The term “Best Management Practices” is defined in S.C. Code Ann. Reg. 72-301(5) as “a wide range of management procedures, schedules of activities, prohibitions on practices and other management practices which have been demonstrated to effectively control the quality and/or quantity of storm water runoff and which are compatible with the planned land use. P. 304:7-13.

⁸ The mean high water level used for these calculations was 4.10 feet and mean high high was 4.48 feet. P. 523:13-18. These elevations were provided to Andrews and Burgess by a surveyor. P. 524:21-13.

The Stormwater Retrofit as proposed by Andrews and Burgess included stabilization of the dike to eliminate the perpetual maintenance that would be required if the dike continued to erode. P. 506:16-18. The stabilization included re-shaping the banks of the dike and applying stabilizing materials to the bank area exposed by the tidal flows, to the water line. P. 506:16 – 508:3. Mr. Lyle believed that the breach itself had naturalized over the years it had been open to the tide and would not widen further. P. 507:12-19. The top bank still had a potential to erode underneath some of the overhanging trees. P. 659:8-21. Mr. Lyle suggested further work be done to stabilize the top bank. P. 660:10 – p. 661:1. OCRM confirmed that work done on the top of the dike was outside of the critical area and did not require a permit. P. 508:12-23.

Mr. Lyle's personal observation of the dike a few months before the hearing showed that marsh grass had started growing back near the breach. P. 661:14-18. Existing wetlands or marshes are not incorporated into stormwater management plans or used as BMPs, but natural wetlands are the model for man-made wetlands that are sometimes incorporated. P. 662:2-24. Marsh grass filters stormwater. P. 663:15-18.

When the flashboard riser was in place, Cat Island Lake effectively acted as a detention basin for any water that flowed into it. P. 512:9-19. However, no areas of the drainage basin other than GPP3 were dependent upon detention provided by Cat Island Lake for stormwater treatment. P. 532:10-14. The other areas of the subdivision were developed prior to the effective date of the stormwater regulations and were not designed nor permitted to the same standards as GPP3. P. 533:1-4. Tract G, as an undeveloped, untouched, wooded area, has no requirement for any stormwater treatment. P. 534:9-10.

In determining the path of stormwater discharges for purposes of measuring the distance to oysters beds, Mr. Lyle concluded that the flow of stormwater will seek its lowest point and

follow the channel that is evident in the lakebed. P. 594:1 – p. 595:3 and Petitioners Ex. 72. Lyle did not agree that Petitioners' surveyor's measurements, which were presented to the Board, reflected the distance or path that stormwater flowed from the discharge point in Cat Island Lake. P. 674:20 – p. 675:10 and Petitioners Ex. 72. Petitioners' surveyor projected a hypothetical path for stormwater without any direct observation of the flow. P. 675:19-24 and Petitioners Ex. 72.

In preparation for this contested case the Department staff provided the parties the data it had used to verify whether the discharge from GPP3 was more than 1000 feet from shellfish beds. Lyle prepared exhibits depicting measurements from the outfall, through the channel evident in Cat Island Lake, and to the boundaries of shellfish beds that were identified and located by DHEC. P. 679:12 – p. 680:5 and Cat Island Ex. 1A. Mr. Lyle illustrated the path that that stormwater would take through the existing lakebed channel. P. 682:16-19. Mr. Lyle measured from the discharge pipe in the lake bed, through the existing drainage pathway, to the boundaries of the oyster beds, for a total of 1,100 feet which exceeded the requirement of Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993). P. 683:6-12 and Cat Island Ex. 1A, 1B, and 1C.

S.C. Code Ann. Reg. 72-302(B)(2) provides for waivers from stormwater management for water quantity control if the applicant can demonstrate that the proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties. P. 603:10-17 and Petitioners Ex. 3, p. 10. Waivers are appropriate if the project is in close proximity to a downstream water body that is capable of accepting stormwater increased rates and volume. P. 604:19-23.

Chowan Creek is classified as shellfish harvesting waters (“SFH”) and is monitored to insure that the standards necessary to support shellfish harvesting are maintained as required by S.C. Code Ann. Reg. 61-68. P. 656:23 – p. 657:8 and Petitioners Ex. 81. Water quality monitoring stations are located downstream of Cat Island in Chowan Creek and there have been no reports of water quality samples that exceed or violate the standards since the breach of the dike. P. 657:16 – p. 658:10, p. 659:1-7, and p. 703:13-17.

Richard Geer

Mr. Geer is an engineer associate at SCDHEC. P. 124:9. He is currently assigned to the Bureau of Water, Coastal Stormwater Permitting Section, where he has been since April of 2012. P. 123:24 and p. 124:2. He has been employed with SCDHEC since February of 1999. P. 124:22. Mr. Geer took over the responsibilities for reviewing and approving the application submitted by the Cat Island POA for the retrofit. P. 126:16-23. He also issued the coastal zone consistency certification for the application. P. 131:1-5. Mr. Geer also reviewed and approved the 2004 application and issued the 2004 permit. P. 132:21-24.

Mr. Geer consulted with the critical area permitting division of OCRM during the review of the application as to whether the POA would have to apply for a separate permit for work on the dike. P. 159:21 – p. 160:4. Mr. Geer stated that it is common in the coastal zone for treated stormwater to flow out to a critical area. P. 292:3-12.

Geer acknowledged that the drainage basin for Cat Island Lake was illustrated on a drawing submitted as part of the GPP3 retrofit application. P. 145:13-21 and Petitioners Ex. 80. There are areas outside of GPP3, such as the golf course, that are part of the drainage basin and ultimately drain into Cat Island Lake. P. 267-268. There are identifiable areas near the lake that Mr. Geer conceded may drain to the lake. P. 269:8-9. While Geer agreed that stormwater flows

from other projects surrounding the lake may have been detained by the former lake, the stormwater regulations did not apply to projects built before enactment of S.C. Code Ann. Reg. 72-300 et seq. P. 142:13 – p. 143:4. Geer did not have any calculations or requirements to review the pre-1992 development projects that may drain into the Lake, nor did he require any such calculations to be submitted. P. 144:19-21 and 145:11-12. S.C. Code Ann. Reg. 72-307(E)(3) specifically exempts developments existing prior to the effective date of the regulation from any stormwater management requirements.

In 2004, stormwater quality control for GPP3 was addressed by the existing lake. P. 133:1-7. With the dike in place the lake detained the water with controlled outflow. P. 133:12-15. Detention is defined as storage of water with controlled release. P. 134:15-18. Detention differs from retention, which is defined as the storage of stormwater runoff that can only exit the system through infiltration into the ground or evaporation into the air. P. 135:21- p. 136:4. Sometimes there may be a 24-hour release period requirement for certain types of ponds, but it is not a general detention requirement. P. 284:6-12. S.C. Code Ann. Reg. 72-300 et seq. provide design criteria and state that the 24-hour requirement depends upon the size of the project. P. 284:16-18. S.C. Code Ann. Reg. 72-301(11) and 72-301(35) provide definitions of detention and retention structures. P. 299:1-16.

With respect to Petitioners' claims that following the breach of the dike uncontrolled and untreated stormwater is flowing into Chowan Creek, Geer believes that all of the golf course ponds have a control structure in the form of the pipes that provide a pathway for water to exit the pond. P. 287:21 – p. 288:3. Piping stormwater provides detention by controlling the amount of water flow. P. 318:5-7. Other examples of control structures in and around GPP3 and on Cat Island include earthen spillways, vegetation, and matting or rock cover. P. 288:3-11. The golf

course ponds within the drainage basin for the lake overflow their banks through vegetated spillways that provide filtration. P. 288:18-23 and Petitioners Ex. 1, p. 46. Geer indicated that the edges of the ponds were likely intentionally constructed with a vegetated spillway to allow for controlled release of stormwater runoff. P. 289:3-7. Geer agreed that the inlet filters proposed for the Cat Island project are catch basin inserts which are a category of a pre-fabricated control device according to DHEC's BMP manual. P. 221:2 – p. 222:14.

In Geer's opinion, the retrofit application proposed an alternative water quality treatment mechanism (to the former lake) that meets the state stormwater requirements. P. 151:6-8. He considers the inlet filters proposed by Lyle as providing a method of treatment for stormwater, albeit by a different mechanism than detention. P. 137:11-16. Per the proposal for this project, several filters were to be installed in curb inlets on the side of the road and in grate inlets that are installed flush with the ground in the street or some other ground surface. P. 333:12-22. These inlets are where the stormwater leaves the surface of the ground to enter the stormwater treatment system. P. 334:2-7. The filters would capture pollutants before the stormwater flows downstream. P. 334:9-12. The filters would be accessible for regular routine maintenance and cleaning as would be expected and is required with all types of BMPs in stormwater treatment systems. P. 335:6-19. Maintenance agreements are contractual agreements that DHEC requires to be made by the party responsible for the stormwater system for permanent or long-term BMP structures, before a permit is issued. P. 335:19-336:1. The agreements are included as permit conditions enforceable by SCDHEC. P. 336:6-9, SCDHEC Ex. 1 pg. 21.

According to Geer, South Carolina's stormwater regulations do not limit available types of treatment only to detention, retention and infiltration, but rather, allow for other means that may be acceptable depending on the site. P. 137:17-25 and p. 179:1-10. Geer is familiar with

the type of inlet filters proposed for this project because he has seen them used in other projects as BMPs for water quality treatment. P. 332:14-23. Moreover, the proposed retrofit is consistent with S.C. Code Ann. Reg. 72-305(B)(3) which recommends the use of measures other than ponds in projects less than ten acres in size to achieve water quality treatment. P. 367:19-23.

Geer does not believe that tidal encroachment and vegetation loss as complained of by the homeowners are adverse consequences caused by stormwater. P. 170:11-25. He concluded that the water quality filters will have no adverse impact on the downstream properties from stormwater. P. 189:7-11. In reaching this conclusion Geer considered the effect of stormwater runoff in combination with a mean high high water tidal event on the downstream properties. P. 189:15-20. After consultation with other divisions of SCDHEC, Mr. Geer requested that the calculations be done using mean high high water elevation, which presents the "worst case scenario" for stormwater runoff analysis since it would be the highest level of water outside the dike. P. 172:7-15. The analysis showed very little effect of the stormwater on the water level in the former lake at mean high high tide, meaning that the stormwater presented very little potential for flooding properties located around the lake bed. P. 173:5-9 and Cat Island Ex. 37. Mr. Geer granted a waiver for water quantity control requirements based on the lack of any adverse impacts being shown by this analysis. P. 188:3-5. Waivers can be granted pursuant to S.C. Code Ann. Reg. 72-302. P. 302:5-12.

Mr. Geer understands that South Carolina stormwater regulations required that this project retain the first inch and one-half of runoff on site if it was determined to be within 1,000 feet of shellfish beds. P. 212:5-8. Chowan Creek is classified as shellfish harvesting waters ("SFH") and there are active shellfish beds in the Creek. P. 211:18-21 and Cat Island Ex. 7A. This retention requirement cannot be waived. P. 212:9-10. Geer also noted that this requirement

was not imposed in 2004 when GPP3 was first considered and that Cat Island Lake has never served as a retention pond for GPP3. P. 133:8-15, p. 186:7-18, p. 313:5-9, and p. 511:13-21.

Mr. Geer measured the distance from the project to the oyster beds in Chowan Creek during his analysis of the permit application. P. 212:19-22. His measurement was made from the limits of the disturbed area for GPP3 along the drainage path to the mapped shellfish beds. P. 213:2-5. The location of the shellfish beds derives from data Mr. Geer obtained from the Department of Natural Resources ("DNR"). P. 248:15-18 and SCDHEC Ex. 8, p. 2. Mr. Geer confirmed that SCDHEC routinely relies on data from the DNR for identifying shellfish bed locations, which is determined through infrared photography. P. 250:19-20 and p. 251:10. Mr. Geer testified that the "limits" of the disturbed area is the end or outfall of the pipe that collects stormwater from GPP3 for discharge to the lake. P. 231:1-6 and SCDHEC Ex. 8.

Geer explained that he used aerial photographs to measure the distance along the drainage pathway. P. 228:3-7. The extent of drainage pathway of stormwater is the applicable measurement. P. 228:12-19, p. 228:22, p. 232:8-18 and SCDHEC Ex. 8. The distance as initially calculated by DHEC between the discharge and the shellfish beds is 1,040 feet. P. 212:23-25. In Geer's opinion the stormwater flow would stay in the area of the channel even when the water level of the lake is higher than the upper reaches of the channel. P. 233:3-9. Geer did not consider the survey provided by the Petitioners during the review process, which depicted a hypothetical drainage path, to be an accurate or reliable method of measuring the distance between the discharge point and the shellfish beds. P. 236:22-25 and Petitioners Ex. 53.

Geer confirmed that he consulted with DNR regarding the extent to which the project might affect the habitats of wood storks and other water fowl. P. 254:21-255:9. DNR had no objection to the retrofit and to the decision to leave the lake bed to naturalize. SCDHEC Ex. 1, p.

10 and p. 13-15. He considered DNR's response before deciding to approve the permit. P. 255:11-14.

Mr. Geer further confirmed that there was consultation between the Wetlands Section of OCRM and the United States Army Corps of Engineers, for the determination of whether or not freshwater wetlands would be negatively impacted by the proposed project. P. 257:16-19, SCDHEC Ex. 1, pg 10 and pg. 16. The Corps of Engineers voiced no objection to the decision to leave the lake bed to naturalize rather than re-impounding the tidal marsh.

The consultations were sought by Mr. Geer in response to several comments from the Petitioners. P. 325:14-21. Mr. Geer confirmed that he considered all of the comments that were received when evaluating the permit at issue and went to other agencies as needed to obtain information regarding the comments. P. 323:17-25. All of this information was analyzed by Mr. Geer before he made his permitting decision. P. 324:1-3.

Geer also reviewed a report submitted by an engineer retained by the Petitioners and considered all of the alleged inadequacies that were raised by Petitioners' engineer, Christopher Moore from Jon Guerry Taylor and Associates, Inc. P. 279:12 – p. 280:12 and Petitioners Ex. 38. He reviewed the file for the Tabby Park subdivision and confirmed that Tabby Park did not rely on Cat Island Lake to provide detention for stormwater treatment as claimed by Petitioners' engineer. P. 352:10-25. With regard to Petitioners' engineer's opinions that the filters could be unreliable and may fail, Mr. Geer requested additional information from Mr. Lyle related to the function of the proposed filter. Mr. Lyle demonstrated that the filters are designed with an overflow to prevent backup and could adequately treat 1 and ½ inches of run-off, so long as the filters were properly sized. P. 356:1-21. Moreover, despite Petitioners' engineers' concerns regarding the impact of the discharge on shellfish beds, Mr. Geer has measured the distance

between shellfish beds and proposed projects many times during his tenure at SCDHEC, using the same methodology of measuring the channel of the drainage pathway. P. 357:1 - p. 358:11.

The Department's efforts to review and address the concerns of Petitioners and the alleged deficiencies of the proposed retrofit are reflected in the amount of time between receipt of the request for permit coverage and the issuance of permit coverage. P. 340:10-18. The Notice of Intent ("NOI")⁹ for this permit was received in the fall of 2010, within one year of the failure of the dike. P. 339:3-24. Permit coverage was granted on June 18, 2012. Geer confirmed that Meyer and Cat Island POA were cooperative in providing any additional analysis and information requested to complete review of the NOI. P. 340:7-9.

Contrary to Petitioners' claims that Cat Island Lake must be restored pursuant to requirements for on-site storage stated in Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), Mr. Geer confirmed that Cat Island Lake never served as a retention structure. P. 313:5-9. GPP3 could not use the restored lake to meet the regulatory requirement for retention under a new permit. P. 313:17-20. Moreover the lake is also not "on site" as required by the Stormwater Runoff Storage Requirements stated in Chapter III(C)(3) of the Storm water Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993): "...for those projects which are located within 1000 (one thousand) feet of shellfish beds the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site." It is undisputed that the lake is a separate tract from GPP3. P. 314:1-21.

George Madlinger

⁹ The Department's NPDES permitting procedures require submittal of a NOI indicating the applicant's intent to obtain coverage under the General Permit.

Mr. Madlinger received his BS degree in Marine Science from College of Charleston in 1978. P. 713:21-25. He has been working for DHEC (previously the South Carolina Coastal Council) for almost twenty-five (25) years. P. 714:1-9. Currently Mr. Madlinger holds the position of Senior Project Manager in the Beaufort office and reviews critical areas permits, performs "consistency review for some federal licenses and permits, establishment of critical lines, and beachfront activities." P. 714:10-19. Mr. Madlinger has lived in Beaufort for 57 years and is familiar with the tides from frequent recreational boating in the area. P. 715:15-24. Mr. Madlinger testified he has gone out on the boat in Beaufort hundreds of times. P. 715:13-19. Additionally, Mr. Madlinger is familiar with the location and tidal waters of Chowan Creek. P. 716:3-9.

Mr. Madlinger granted two maintenance and repair authorizations in regard to the dike, one to O'Quinn Marine Construction and another to Andrews and Burgess to attempt a repair on the dike. P. 717:1-21 and SCDHEC Ex. 4. Two maintenance and repair authorizations were issued because work was attempted under the first authorization and failed. P. 717:22 – p. 718:1.

Mr. Madlinger is familiar with the site and has visited this site on numerous occasions, including a site visit just a couple of days prior to testifying. P. 719:21 – p. 720:5.

In a memo regarding this site done at the request of Richard Geer, Mr. Madlinger concluded that the area in question was naturalizing. P. 718:18-25, p. 719:10-18, and SCDHEC Ex. 5. Specifically, he stated that "in absence of the water control structure, the lake system appears to be naturalizing and returning to its historical state and uses." P. 719:10-13. Mr. Madlinger defined "naturalizing" as transitioning from an open water environment to a tidally influenced environment. P. 741:8-10. He testified that propagation of grass is evidence that an

area is naturalizing. P. 728:3-5. Mr. Madlinger states that in this particular area, marsh grass has been spreading uniformly around the center and perimeter of the lake. P. 744:23-25.

Mr. Madlinger photographed the site in 2011 and 2013. P. 720:6-13 and SCDHEC Ex. 6. Utilizing reference points in comparing pictures taken in 2011 and in 2013, Mr. Madlinger testified that the difference between the photographs taken in 2011 and 2013 is the propagation or significant increase in the amount of spartina grass, or cord grass. P. 722:15 – p. 727:2 and SCDHEC Ex. 6. When asked to review Petitioners Ex. 63, which included a series of photographs of the area taken near the time of the hearing, Mr. Madlinger repeatedly stated the similar characteristic between each photograph was the evidence of smooth cord grass. P. 762:11 – p. 766:4 and Petitioners Ex. 63. Mr. Madlinger testified the propagation of marsh grass is evidence this area is naturalizing, thereby supporting his memorandum submitted to Richard Geer. P. 727:20 – p. 728:5 and SCDHEC Ex. 5. It is Mr. Madlinger's opinion this area will continue to naturalize. P. 728:6 – 9. Mr. Madlinger also testified to the presence of wading birds in one of the pictures taken after the dike failure. P. 727:12-18 and SCDHEC Ex. 6. Mr. Madlinger testified that an almost endless list of species utilize salt marsh including benthic organisms and microorganisms that "feed nursery stock of fin fish and shell fish and crabs and then on top of that wading birds, diving birds, all sorts of animals." P. 736:4-17. Mr. Madlinger has observed wading birds and diving birds in critical area marsh habitat frequently as reflected in the white ibis a photograph taken by Mr. Madlinger. P. 736:18 – p. 737:4 and SCDHEC Ex. 6.

Mr. Madlinger testified that one of the results of marsh grass growing is the accumulation of sediment around that marsh grass. P. 759:9-24. He further stated that some areas that may

not have proper elevation to support marsh grass in the area now could become more susceptible to growing marsh grass with such sediment accumulation. Id.

Mr. Madlinger also noted that freshwater wetlands support vegetation that is different from saltwater wetlands. T P. 732:6-13. Mr. Madlinger stated that when an area changes in character and nature, one would observe “a change in type of vegetation.” P. 732:1-2.

When reviewing an area for a critical area permit, Mr. Madlinger stated that he focuses on salt and brackish water. P. 752:12-24. However, in conducting a site visit and observing the freshwater wetland area at high tide, Mr. Madlinger did not observe any change in the vegetation, which would indicate their nature and character changing. P. 729:17 – p. 730:10 and P. 731:23 – p. 731:13. Mr. Madlinger further testified that he did not observe anything of concern with regard to the health of the freshwater wetlands. P. 730:12-22. The Army Corps of Engineers has the responsibility of enforcing the conditions of the restrictive covenant in regard to the freshwater wetland issues raised by Petitioners. P. 753:1-4, P. 762:6-10 and SCDHEC Ex. 5. To determine the tidal influence in the wetland area, Mr. Madlinger testified that he recommended mean high high tide elevations be surveyed and recorded. P. 753:22-25 – p. 754:1-2. This was done by Andrews and Burgess and subsequently used to reference the mean high high water. P. 754:6-13.

Blair Williams

Mr. Williams received his Bachelor of Science in 2000 and Masters of Forest Resource in 2001 from Clemson University. P. 773:25 – p. 774:1-3. He has worked for the Department for about eight and a half years and holds the position of Manager for the Wetland Permitting section. P. 774:4-11. Mr. Williams oversees staff that administers requests for authorization to

umpact critical area. P. 774:12-14. His section also reviews beachfront modifications, maintenance and repair requests as well as certifications for state and federal permits that may involve freshwater wetlands impacts. P. 774:14-18. Mr. Williams has visited the site in question numerous times. P. 778:15-22. Mr. Williams testified the site has gone from primarily an exposed mudflat to more of a heavily vegetated combination of a mudflat and spartina grass. P. 779:1-5. Mr. Williams agreed with Mr. Madlinger's description regarding the naturalization and growth of marsh grass at this site. P. 779:6-13. Mr. Williams testified this area has received a constant tidal flow of saltwater since the dike washed out about four years prior to the hearing. P. 779:14-20.

When reviewing the Coastal Tidelands and Wetlands Act, Mr. Williams testified there are certain activities that could potentially have some effect on a critical area, but a critical area permit itself is not required. Mr. William's testified activities which alter the critical area, like building a dock or creating an earthen structure to re-impound trigger a critical area permit, but nothing here triggered a critical area permit. P. 780:17-25.

S.C. Code Ann. § 48-39-130 sections A, B, and C generally provide that a permit is required in order to utilize a critical area. P. 775:2 – p. 776:5. Section (D) of 48-39-130 lists a set of activities within the critical area which are exempt and do not require a critical area permit. P. 776:6-14. Mr. Williams testified that there are certain activities that could potentially have an effect on the critical area where a critical area permit is not required. P. 776:14-19.

Mr. Williams also testified that in accordance with section (D)(3) of the statute SCDHEC has the authority to review and comment on proposed permits regarding potential discharge of treated effluent. P. 776:20-25. He interpreted this section to apply to stormwater applications which would be permitted under the Stormwater Management and Sediment Reduction Act

within the coastal zone. P. 777:2-5. He further stated that the critical area section of the Department has the ability to review and comment on any state or federal permit which triggers review by his section. P. 778:3-10. Mr. Williams testified there was nothing in this situation which triggered a critical area permit. P. 780:23-25. Additionally, the Department has not received a critical area permit application for this area. P. 782:13-16.

Mr. Williams testified that work done to fix the dike would constitute putting a structure in the critical area and thus require a critical area permit. P. 785:25 – p. 786:9. Mr. Williams also testified to the possibility of other permits being required if work was done to reimpond this area, including a section 404 permit by the Army Corps of Engineers due to the filling of waters of the United States, which would then trigger a 401 water quality permit through SCDHEC's Bureau of Water. P. 786:13-20.

Mr. Williams testified maintenance and repair is not a permit, it is an acknowledgement that the activity they are doing conforms to SCDHEC's regulatory definition of maintenance and repair. P. 815:16-19. Unlike an individual permit application, a maintenance and repair request does not go out on public notice and comment period. P. 815:23 – p. 816:10. Further, Mr. Williams testified that SCDHEC does not consider maintenance and repair authorizations to be included under extension bills passed by the State legislature. P. 816:11-17.

During a review of a critical area permit application to re-impound this area the Department would apply specific project standards for re-impoundment under S. C. Code Ann. Reg. 30-12(K). P. 787:25 – p. 788:9. Mr. Williams testified as to the applicability of the factors set forth in R. 30-12(K)(2)(b). P. 791:5-8. For instance, Mr. Williams states that SCDHEC would consider the primary purpose of the impoundment, P. 794:10-19, and the extent to which the structure would harmfully obstruct the natural flow of navigable water. P. 796:15 – p. 797:1.

Mr. Williams explained 30-12(K)(2)(b)(iii) requires the Department to take into consideration any uses the system offers today, such as recreational activities of the public. P. 791:22 – p. 792:6. Mr. Williams testified there is a higher regulatory hurdle if there is a demonstration of use and a person fishing in the area from a boat is an example of a demonstrated use by the public for recreation and navigation. P. 792:11-25. Mr. Williams believes Chowan Creek likely has a higher degree of salinity and also explained in considering the degree salinity levels required under 30-12(K)(2)(b)(iv), the higher the salinity level the more difficult it would be to obtain a permit. P. 793:1-4. In addition to the requirements under 30-12(K), Mr. Williams also testified that SDCHEC would also have to evaluate their regulations regarding filling as well as the general and further guidelines for all critical areas in 30-11. P. 795:3 – p. 796:8. Moreover, to submit a completed critical area permit application, Mr. Williams testified that the applicant would have to demonstrate ownership of the submerged land, typically by a King's grant. P. 798:8-21. If not, there is a presumption that the State owns the property, via the Budget and Control Board. P. 798:19-23. Further, the permit application would have to go out on public notice allowing for the public as well as other resource agencies to provide comments, comments which would have to be evaluated by SCDHEC prior to making a decision on the permit application. P. 799:16-24.

Although there are freshwater wetlands adjacent to the lakebed, this is not dispositive to the lakebed itself being freshwater. P. 809:14-21. In fact, Mr. Williams stated he believed the area "still had some tidal influence and it still had a degree of salinity." P. 804:3-11. Mr. Williams testified the water inside the dike has enough saline to support critical area vegetation. P. 805:9-12.

In regards to Petitioner's arguments regarding the freshwater wetlands, Mr. Williams testified as to unique areas that transitional from saltwater to freshwater, "[s]o there are incidents that you will have a saltwater system and then it slowly transitions into a freshwater system." P. 807:17 – p. 808:7. Mr. Williams testified the adjacent freshwater wetlands is not an indication that the former impoundment was freshwater as evidenced by the Army Corps of Engineers freshwater wetlands determination not including the entire area of the former impoundment. P. 809:15 – p. 810:3. This is due to transitional areas which go from salt to brackish to freshwater. P. 809:22-15.

Chris Moore

Christopher Moore is a licensed civil engineer. P. 817:15-19. He is an owner of an engineering firm, Jon Guerry Taylor and Associates, Inc. ("JGT"). P. 818:3-7. He was employed with two other engineering firms prior to JGT. P. 818:21-22. He currently does all the drainage and civil projects for JGT and has designed 75–100+ stormwater systems. P. 819:6. However, that work at JGT, which Mr. Moore has pursued since 2000, has been primarily on marine and coastal waterfront engineering projects and not in subdivision design. P. 823:9 – p. 824:12. Mr. Moore was qualified as an expert in civil engineering by virtue of his professional license but limited to the area of stormwater system design and management. P. 828:7-14.

Mr. Moore authored a report of various findings he made regarding the proposed retrofit project. P. 829:17-20 and Petitioners Ex. 38. All of the information used to create the report was received from Mr. Moore's client, John North, and the Petitioners. P. 872:11-18 and p. 873:10-14. Mr. Moore confirmed that he did little research when preparing the report, whether it was to verify information he was provided or to investigate something himself. P. 874:2-9. For example, he admitted that he did not verify the date when the dike may have been built. P.

873:2-15. He also admitted that he has no experience or training in some of the subject area he included in his report, specifically, evaluating home and property values and the care and maintenance of trees. P. 873:23 – p. 874:16. Finally, he admitted that he used incorrect terminology in his report that appears only in the Petitioners' pleadings and information. P. 876:2-13.

Mr. Moore does not believe that the proposed filters are a type of stormwater treatment that is allowed within a half a mile of the coastal zone in South Carolina. P. 833:13-16. His opinion is based on the policy set forth in Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993) that references only retention, detention and infiltration. P. 833:17-20.¹⁰ Moore never attempted to personally measure the distance from GPP3 to the identified shellfish beds before commenting upon this case. P. 888:16-19. His testimony at the hearing was his first attempt to endorse the 1,000 foot measurement that is the subject of this case. P. 888:20-24. Moore reviewed the survey prepared by Petitioners' surveyor David Youmans before giving his opinion, but did not review Youmans' deposition and admitted that he did not know that Youmans had used only his judgment to project the path of flow – not direct observation. P. 889:1-5. Moore has not personally observed the flow of stormwater during or after a storm event although he confirmed that doing so would have been helpful before assuming a pathway for this case. P. 889:11-17. Mr. Moore stated that the 1,000 foot measurement directly depends upon the flow patterns of the stormwater. P. 835:23-24. And, he would only use a straight line measurement if the flow followed such a direct path. P. 836:13-14.

¹⁰ "Storage may be accomplished through retention, detention, or infiltration systems, as appropriate for the specific site." Chapter III(C)(3) of the South Carolina Coastal Zone Management Program Refinements (August 1993) refers to the Storm Water Management Guidelines as starting on p. III-74. This is also stated on p. III-60 of the 1995 Update to the Program Refinements (Petitioners Ex. 19).

In Moore's opinion the stormwater discharged from GPP3 would follow a more direct path toward the dike just after high tide than that proposed by Cat Island POA's engineers. P. 839:13-22 and Petitioners Ex. 72. And the stormwater would flow in more of a straight line from the discharge point to the dike at high tide. P. 842:18-23. Moore believes that the flow of stormwater would remain in the drainage pathway only when the waters in the lake were below the depth of the channel. P. 844:1-13. The channel has minimal effect on the direction of flow of water on the surface of the lake when the water exceeds the depth of the channel. P. 844:14-20. He does not know the depth of the channel and never observed the channel nor attempted to measure it. P. 880:7-9.

Mr. Moore is critical of the proposed plan for stabilization of the dike because he believes that limiting the stabilization to areas above the high tide mark could allow further erosion and undermining of the bank. P. 845:5-14. He stated that he had concerns about the dynamic nature of the environment presenting a possibility for continued erosive conditions. P. 845:22-25. His recommendation would be to lay matting down to the very bottom of the cut and to wrap the entire break. P. 847:1-18. He has not seen the site since his only inspection in 2011 and he couldn't comment on the current condition of the dike. P. 878:16-21.

Moore believes that the retrofit project may degrade the surrounding waters. P. 849:23-25. Specifically, he voiced a concern about erosion of sediment on the lake bottom to the coastal zone through the breach in the dike and contaminated sediment being deposited in the lakebed from the golf course runoff. P. 850:3-19. He also questions the efficacy of the proposed filters in high flow periods, if regular maintenance is not done. P. 851:1-10. The filters will simply overflow stormwater in high flow periods which eliminates any treatment. P. 851:11-24.

Moore assumed that the Tabby Park development was also relying on Cat Island Lake for detention, even though he saw no direct reference in any of the Tabby Park documents supporting such reliance. P. 892:1-11 and p. 900:1-10.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact by a preponderance of the evidence:

General

1. Notice of the time, date, place and subject matter of the hearing was given to the Petitioners and Respondents. All parties were present at the scheduled hearing which commenced on January 14, 2014, and were represented by counsel.

2. Cat Island POA c/o Gary Meyer timely filed a Request for Contested Case hearing with the Court on or about October 8, 2012. Petitioners filed a timely Request for Contested Case resulting in the initiation of two challenges to the Board's decision which were consolidated.

3. All parties timely filed Prehearing Statements on or about June 6, 2013 identifying the issues before the Court.

4. All parties participated in full discovery prior to commencement of this hearing.

5. Cat Island POA c/o Gary Meyer filed a Motion for Summary Judgment on September 18, 2013 on the issue of the standing of the Petitioners to seek resolution through a proceeding before this Court. A Response to the Motion and supporting depositions were filed by the Petitioners on October 16, 2013. Oral arguments were conducted on the Motion on October 23, 2013. The Court's Order denying the Motion was issued November 5, 2013.

6. Cat Island POA filed a Motion to Disqualify Petitioners' Counsel on or about January 7, 2014, based on Petitioners' Counsel and his wife Petitioner Pamela North listing of their residence for sale and making statements in the listing and accompanying disclosure that contradicted the Petitioners' positions in this case.¹¹ All parties participated by phone in a hearing before the Court. The Court's decision denying the Motion was issued that same day.

7. Since the breach occurred in the dike, the area formerly impounded as Cat Island Lake has been naturalizing back into the tidally influenced marsh that it was prior to being impounded in the 1960's.

Summary of Petitioners' Objections and Position

8. Petitioners raised the following objections before the Board and the ALC:
- a. The detention wavier was improper.
 - b. The discharge is within 1,000 feet of shellfish beds.
 - c. The Board erred in failing to order repair of the dike.
 - d. The Board erred in failing to enforce the Maintenance Agreement with the developer.
 - e. The Lake provides detention for surrounding developments, not just GPP3.
 - f. The stormwater retrofit causes adverse impacts to surrounding property owners.
 - g. The existing tidal pond that has replaced the lake is negatively impacting freshwater wetlands adjacent to the lake bed.

9. Petitioners argued that Cat Island Lake provided habitat for "colonial birds, including ibis, egrets, herons, night herons, mergansers, and wood storks. ... In addition to

¹¹ The residential data form signed by Mr. and Mrs. North as owners of the listed property, also called a disclosure form (Cat Island Ex. 43), specifically asks the property owners to indicate whether or not they are aware of any problems caused by fire, smoke, or water during the ownership, or any drainage, soil stability, atmosphere or underground problems during the ownership, any erosion or erosion control affecting the property or any flood hazard, wetlands or flood hazard designations affecting the property. Mr. and Mrs. North checked "NO" when answering all these questions. Yet, Mrs. North contradicted this information with her claims in this case that her property has regularly been "encroached" by waters and even illustrated for the Court the areas on her property that she claims have been affected, claiming that the waters came within a few feet of her house. P. 421-424.

birds, the lake was a prime habitat for alligators, otters, and other mammals and reptiles.” Now, the Petitioners no longer see and enjoy the wildlife drawn to the lake, and the lake itself is a “huge, smelly mud pit.” *See* Petitioners’ Prehearing Statement dated June 6, 2013 (hereinafter “Pet. Prehearing Statement”).

10. Petitioners claim that their properties are damaged by “tidal ocean waters” that “have reached as close as three feet from one residence and the electrical lines of the property owner are submerged by ocean waters during full and new moon tides.” Petitioners’ properties are “at risk of flooding and erosion.” “During periods of heavy rain, the free flowing stormwaters erode the bed of the former lake and the property of the owners surrounding it.” Pet. Prehearing Statement.

11. The adverse impacts identified by the Petitioners associated with leaving the lake bed in its current condition include: a loss of aesthetic enjoyment because Petitioners consider the lake bed at low tide to be unsightly. With regards to property damage resulting from leaving the lake bed in its current condition, Petitioner Pamela North identified photographs of tidal waters encroaching into her yard during an extreme high tide event and a loss of landscaping at the lake’s edge. Petitioner David Feron testified to a difference in appraisals, before the loss of the dike and after, of \$190,000.00¹² and a loss of aesthetic enjoyment of the lake. Feron provided no testimony regarding property damage and confirmed that his objection was based on loss of his view of the lake. Petitioner Sally Haley testified that she hadn’t suffered from erosion, but had lost the view of the lake and wildlife. Petitioner Ken Bruning does not own property on the lake but testified regarding the loss of view.

12. S. C. Code Ann. Reg. 72-302(B)(2) provides that “A project may be eligible for a waiver or variance of stormwater management for water quantity control if the applicant can

¹² The higher appraisal was in 2006 and the lower appraisal was in 2010.

demonstrate that: (a) The proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties" Here, Cat Island POA's engineer, at the request of the Department, was required to calculate the effect of mean high high tide¹³ on Petitioners' properties. Mr. Lyle's analysis demonstrated that the effect of stormwater at mean high high tide on Petitioners' properties without the dike was not measurably different from the effect of stormwater at mean high tide without the dike. Petitioners' testimony confirms Mr. Lyle's analysis, since the dike has been breached for approximately five years. The only testimony regarding loss of property, from Pamela North, was associated with a tidal event but not a storm-driven tidal event.

13. The Department considers "significant adverse impact" as referenced in S. C. Code Ann. Reg. 72-302(B)(2) as applicable to an adverse impact associated with stormwater discharges and a storm event. I find that a waiver of stormwater management for water quantity control is based on a consideration of whether an un-detained stormwater discharge or flow could adversely impact downstream properties and not whether a tidal event, unaffected by a storm event, adversely impacts downstream properties.

Action of the Board of Health and Environmental Control

14. The Board issued its Final Agency Action, Cat Island Ex. 41, in which it concluded that that the Requestors met their burden of proof in showing that the staff analysis was insufficient in this case to support the finding that the distance to shellfish beds was greater than 1,000 feet.

15. The Board's conclusion was based on a finding that the staff "did not survey the site or conduct a field inspection to measure the distance, and did not consider tidal cycles." Cat Island Ex. 41.

¹³ Mean high high tide represents the average of the higher high water height of each tidal day.

16. The Board was provided a copy of a drawing prepared by a surveyor, David S. Youmans. (Drawing included in Petitioner's Exhibit 1 – "DHEC Board Review Conference.") However, the Board did not have the benefit of Mr. Youmans' testimony, which was presented to this Court through introduction of his *de bene esse* deposition. Petitioners Ex. 76. This deposition was taken several months after the Board conducted its review.

17. Importantly, Mr. Youmans used the same method of measurement that the Department staff employed – by measuring distances from an aerial image. Petitioners Ex. 76, p. 12:24-25 and p. 14:9-12. The points that the lines connected, the discharge pipe, the dike and the oyster beds, were established, recoverable points in the field, but the measurement of distance was based on aerial imagery. Additionally, the points were established when the surveying crew was out at the lake bed at low tide, not at high tide. Petitioners Ex. 76, p. 15. Youmans did not physically observe the flow of water at high tide and merely drew the lines connecting the points by using his judgment. Petitioners Ex. 76, p. 18:2-7 and p. 17:8-12.

18. Consequently, the basis for the Board's conclusion, that Petitioners had carried their burden of proving that the staff analysis was insufficient, may have been based on a misapprehension of the nature of Mr. Youmans' measurements.

19. In preparation for trial the POA's engineers produced an aerial image, overlain with Youmans' drawings, and provided measurements. Consequently, all parties utilizing this exhibit produced by the POA's engineers, Cat Island Exhibit 1A, were utilizing the points established by Youmans as the location of the drainage pipe and outfall, the dike, and the oyster beds for measurement purposes. There was no inconsistency in the methods of measurements or disagreement as to the location of critical features between Youmans' drawing, Cat Island Ex. 1A, and the measurements undertaken by Richard Geer as part of the Department's analysis.

The only inconsistency was in the analysis, with the measurements made by Geer and the POA's engineers using a clearly defined drainage pathway, and Youmans using judgment, not observation, to predict a straight-line drainage path at high tide.

20. The Board did not have the benefit of Cat Island Ex. 1A or of the parties' agreement and adoption of Youmans' recoverable points representing the location of the dike, the discharge point, and the oyster beds. Moreover, based on the Board's rejection of the Department's measurements it may have misapprehended the Youmans' drawing, which represents application of the same method of measurement – aerial imagery – that the Department relied upon.

Tidal Nature of Cat Island Lake

21. SCDHEC provided a series of photographs, SCDHEC Ex. 6, that compared the conditions in the lake bed between December of 2011 and September of 2013. There is substantially more marsh grass in the lake bed in the more recent photos. According to the Department's biologist, George Madlinger, the changes reflected in the photographs demonstrate that the lake bed is naturalizing as a tidal salt marsh habitat. P. 728:3-9. A salt marsh habitat will support a variety of wildlife, including "wading birds ... and all sorts of animals." P. 736:10-17. In fact, the photographs taken in September of 2013 indicate the presence of numerous birds in and around the lake bed. Madlinger testified that marsh grass is "spreading around the perimeter and in the center pretty much uniformly." P. 744:22-25.

22. Petitioners' attorney referred to Cat Island Lake as a freshwater lake. However, in reviewing Petitioners' Exhibit 63, which includes photographs of the Lake, Madlinger noted the presence of smooth cord grass, which thrives on good tidal exchange. P. 733:15-25. Prior to

the breach, Madlinger testified that the Lake was tidally influenced in and around the dike, but more brackish away from the dike. P. 733:22-25.

23. To further clarify the nature of the Lake, prior to the breach, Department witness Blair Williams testified that Cat Island Lake “had some tidal influence and it still had a degree of salinity where there is saltwater vegetation.” P. 804:3-6.

24. Because of the naturalization that has occurred in the lake bed, the POA cannot repair the dike without obtaining a critical area permit and a permit from the Corps of Engineers. Mr. Williams testified that at least three different authorizations would be required in order to repair the dike and restore Cat Island Lake. P. 789-793.

Applicability of Critical Area Regulations

25. Petitioners claim that S.C. Code Ann. § 48-39-10 et seq., the Coastal Tidelands and Wetlands Act, is applicable to resolution of this case. *See* Pet. Prehearing Statement. In particular, Petitioners claim that the Department failed to consider the effect of the permit on adjoining property owners as is required under S.C. Code Ann. § 48-39-150.

26. The work proposed by the POA is proposed in uplands, not in critical areas. S. C. Code Ann. § 48-39-150 sets for the general considerations applicable to review of critical area permit applications.

27. Petitioners claim that the authorized work will impact critical areas since the failure to restore the dike will allow the lake bed to naturalize as a tidal salt marsh. Petitioners further claim that the critical area regulations are applicable because stabilization of the dike constitutes an activity in the critical area.

28. I find that the S.C. Code Ann. § 48-39-130 requires permits for alteration of critical area. With regard to the lake bed, no alteration is occurring. The alteration occurred in

the 1960s, when the dike was installed and a tidal, salt marsh became an open water pond. Now the area is naturalizing.

29. If, as the Petitioners argue, the addition of the former lake bed to the critical are is an effect on the critical are as contemplated in S.C. Code Ann. § 48-39-130, the project is exempt from the requirement for a critical are permit by virtue of S.C. Ann. Sec. 48-39-130(D)(3).

30. With regard to the stabilization of the dike, POA engineer Ryan Lyle confirmed that the work proposed did not include working on the lower portions of the dike that are subject to tidal flows. Instead, the POA was planning to reinforce the top portions of the dike. P. 507:12-19.

31. S.C. Code Ann. § 48-39-150(A)(10) imposes a requirement on the Department staff to consider whether an activity proposed in critical areas could affect the value and enjoyment of adjacent owners. Petitioners have testified that their property values and their enjoyment of their property have been negatively impacted by the loss of Cat Island Lake. However, this consideration is inapplicable in the context of the stormwater permit issued to the POA. There is no similar provision in S.C. Code Ann. Reg. 61-9.122.26 or 72-300 and Petitioners' loss of view and possible loss of value are not redressable under the applicable regulations.

Installation of Water Quality Filters

31. The POA proposes to install a product known as a "Curb Inlet Basket." The product information indicates that it is easy to clean an install. "The curb inlet basket provides full coverage of inlets such that all catch basin influent, as rated flows, is conveyed to the filter. The filter will retain all windblown and swept debris entering the drain." The filters have "an

expected service life of 10 to 15 years.” “The filter basket is readily removable from the mounting/support frames for maintenance or replacement.” Cat Island Ex. 37, Appendix C.

32. The “first flush” or highest concentration of pollutants will be captured by the filters. P. 654:23-25. The POA proposed to install seven filters in a combination of grate inlet filters and curb inlet filters. P. 670:22-25 and p. 671:1-4.

33. When GPP3 was permitted, the first flush was stored in Cat Island Lake to allow pollutants to settle out before the stormwater discharged into Chowan Creek. As was represented in the stormwater calculations provided to the Department to support the permit application for GPP3, “The South Carolina Department of Health and Environmental Control’s Office of Ocean and Coastal Resource Management requires that the first half (1/2) inch of run-off over the entire site or the first one (1) inch of run-off over the built upon portion of the site depending on which is greater be stored and released over a twenty-four (24) hour period. The outlet control structure of the existing pond will be used to control the release of the required first flush.”¹⁴ Cat Island Ex. 8.

34. S.C. Code Ann. Reg. 72-301(5) defines “Best Management Practices” (“BMPs”) as “a wide range of management procedures, schedules of activities, prohibitions on practices and other management practices which have been demonstrated to effectively control the quality and /or quantity of stormwater runoff and which are compatible with the planned land use.” I find that the inlet filters are BMPs as defined herein. For sites less than ten acres, “the use of measures other than ponds to achieve water quality improvements are recommended.” S.C.

¹⁴ This requirement originates in Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), Storm Water Runoff Storage Requirements at p. III-74. It is also stated on p. III-60 of the 1995 Update to the Program Refinements (Petitioners Ex. 19).

Code Ann. Reg. 72-305(B)(3). The applicable regulations endorse the use of BMPs, such as inlet filters, on smaller sites.

35. Petitioners claim that the language of the Coastal Zone Management Program Refinements limit the options available to the POA to "retention, detention or infiltration systems." I find that the language is permissive, not mandatory: "Storage may be accomplished through retention, detention or infiltration systems, as appropriate for the specific site." (emphasis added.) Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).

Coastal Zone Consistency Certification/Measurement of Distance to Shellfish Beds

36. A coastal zone consistency certification is required to complete the permit application for this project as it is required for all state and federal permit applications in the coastal counties. P. 127:24 – p. 128:8.

37. S.C. Code Ann. Reg. 72-307(5)(d) and (e) and Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993) state a "design criteria" requiring storage and release of the first ½ inch of runoff over a 24-hour period from a site with a permanent water quality pond having a permanent pool or of the first inch of runoff over a 24-hour period from a site with a permanent water quality pond not having a permanent pool. P. 614:4-20, p. 646:6-15, Petitioners Ex. 3, p. 28, and Petitioners Ex. 19, p. III-60.

38. The Coastal Zone Management Program Refinements further requires the first one and one half (1 1/2) inches of runoff from the built-upon portion of the property to be retained on site of those projects which are located within 1,000 (one thousand) feet of shellfish

beds. Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).

39. S.C. Code Ann. Reg. 72-307(E) specifically exempts residential subdivisions “which were approved prior to the effective date of these regulations.” This requirement prevents the Department from retroactively applying stormwater regulatory requirements to developments that existed prior to June 6, 1992, the effective date of the regulations.

40. In reviewing NOI and submittals supporting request for permit coverage under the NPDES General Permit for Stormwater Discharges from Construction Activities the Department shall approve proposals that are consistent with the applicable regulatory requirements. P. 152:12-14 and 164:21-23.

41. Garfield Park Phase 3 is the only development on Cat Island that relied on Cat Island Lake to meet stormwater quality treatment and storage requirements.

42. Petitioners produced no evidence to refute the Department’s staff’s conclusion that none of the other developments in Cat Island relied on Cat Island Lake for stormwater treatment. Petitioners’ engineer confirmed that there was no information in the permitting file for Tabby Park, the only other area that was developed after the enactment of the South Carolina stormwater regulation requirements, indicating that Tabby Park relied on the lake for stormwater treatment.

43. The Department staff, specifically Richard Geer, appropriately consulted with other divisions within SCDHEC and outside agencies when evaluating the permit application for the retrofit submitted by Cat Island POA.

44. For purposes of the coastal zone consistency review that was triggered by submittal of the NOI, Geer consulted with the Department of Natural Resources (“DNR”) to

identify the location of the shellfish beds in Chowan Creek in order to measure the distance to the beds from the retrofit project area.

45. Petitioners have failed to establish by a preponderance of the evidence that the method of measurement utilized by the Department to determine whether a project "is located within 1,000 feet of shellfish beds"¹⁵ is inconsistent with the requirement. It is well-settled that this court defers to an agency in interpreting its regulations. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74 716 S. E. 2d 877, 881 (2011). Moreover, "[t]he agency's experience, technical competence and specialized knowledge may be utilize in the evaluation of the evidence." S.C. Code Ann. § 1-23-330. Here the method of measurement is subject to construction because the applicable statutes, regulations, and policies do not provide for a specific method of measurement.

46. Petitioners' surveyor's measurements reflect a straight line path of the stormwater flow from GPP3 with no regard to the clear and defined drainage pathway that the stormwater flow from the outfall has created over the past several years. Petitioners have failed to demonstrate by a preponderance of the evidence that their surveyor's measurements are more reliable than the measurements made by Geer. The surveyor never observed the flow of water at high tide or low tide and merely justified the depicted straight line path as "judgment."

47. Moreover the opinions of Petitioners' engineer are not sufficient to rebut SCDHEC's method of measurement. Petitioners' engineer Moore has only observed the lake bed on one occasion in 2011 for half a day. His observations were at low tide. He has

¹⁵ Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993).

performed no measurements of the depth of the stormwater drainage channel. His deposition was taken shortly before this contested case convened for trial, on December 23, 2013, and at that time he had not considered the appropriate methods of measurement of the distance between the discharge outfall and the oyster beds. Moore acknowledged that direct observation of the flow of water at high tide “would be helpful before assuming a high tide pathway of water.” Yet neither Moore nor Petitioners’ surveyor, who prepared measurements for the Board, had made such observations. Petitioners have the burden of not merely casting doubt on the propriety of the Department’s measurements, but of also demonstrating beyond a preponderance of the evidence that their purported measurement is more reliable. Petitioners have failed to carry that burden here.

48. The testimony provided by SCDHEC and Cat Island’s engineer Ryan Lyle regarding the measurement of the distance to the shellfish beds is probative and persuasive, and of higher evidentiary value than the testimony of Petitioners’ expert civil engineer, Chris Moore, and surveyor, David Youmans.

Detention Waiver

49. Detention and retention structures control the quantity of water released after a storm event. P. 299:1-16. A detention structure means a permanent stormwater management structure whose primary purpose is to temporarily store storm water runoff and release the stored runoff at controlled rates. S.C. Code Ann. Reg. 72-301(11). Retention structure means a permanent structure whose primary purpose is to permanently store a given volume of stormwater runoff. Release of the given volume is by infiltration and/or evaporation. S.C. Code Ann. Reg. 72-305(35). These regulatory definitions of detention and retention structures apply to the permit application submitted by the POA.

50. Cat Island Lake met the definition of a detention structure when the outfall structure was in place because the flashboard riser allowed water to flow into and out of the former Cat Island Lake.

51. Cat Island Lake did not meet the definition of a retention structure because the design of the flashboard riser outfall structure always allowed water to flow between Chowan Creek and the lake. While there is no transcription of the Board's proceedings regarding this retrofit permit, if the Board was operating under the assumption that the impoundment was providing retention, that assumption was flawed.

52. S.C. Code Ann. Reg. 72-302(B)(2) provides for waivers from stormwater management for water quantity control if the applicant can demonstrate that the proposed project will have no significant adverse impact on the receiving natural waterway or downstream properties. If an applicant obtains a waiver for water quantity control then detention is unnecessary.

53. "Adverse impact," as used in S.C. Code Ann. Reg. 72-300, et seq., means an impact resulting from a land disturbing activity. P. 668:2-17. SCDHEC correctly limited its considerations of adverse impact, when evaluating Cat Island POA's request for a waiver to impacts associated with stormwater flow.

54. Petitioners failed to establish by a preponderance of the evidence that their properties have suffered significant adverse impacts due to stormwater flow from GPP3. As described by Petitioners, encroachment that has occurred on their properties has resulted from the tidal flow through breach in the dike.

55. Petitioners failed to produce evidence sufficient to establish that the proposed retrofit project would cause significant adverse impacts on the receiving natural waterway or downstream properties.

56. Petitioners failed to produce any evidence showing that the receiving natural waterway, Chowan Creek, has been degraded or that its designation as shellfish harvesting waters has been negatively impacted by the exchange of tidal flow into and out of the former Cat Island Lake.

57. SCDHEC required the POA's engineers to calculate the elevation of Cat Island Lake with and without the dike in place and to calculate the velocity of water exiting the breach in the dike to determine whether any adverse impacts on downstream properties might result from the retrofit project. P. 171:11-14. SCDHEC required that the calculations be done using mean high high water elevation, which presents the "worst case scenario" for stormwater runoff analysis since it would be the highest level of water outside the dike. P. 172:7-15. Mr. Lyle confirmed that OCRM had first requested these calculations to be modeled against a mean high water elevation and then subsequently against a mean high high water elevation with the intent of reviewing the entirety of the dike breach flowing full. P. 527:14 – p. 528:1.¹⁶ The analysis showed very little effect of the stormwater on the water level in the former lake at mean high high tide, meaning that the storm water presented very little potential for flooding properties located on the borders. P. 173:5-9 and Cat Island Ex. 37. Petitioners presented no evidence to rebut these findings of the POA's engineers.

58. As relates to Petitioners' allegations that Chowan Creek is being degraded by the condition of the lake, and degradation will continue if the dike isn't restored, there is water

¹⁶ The mean high water level used for these calculations was 4.10 feet and mean high high was 4.48 feet. P. 523:13-18. These elevations were provided to Andrews and Burgess by a surveyor. P. 524:21-13.

quality data available for segments of Chowan Creek adjacent to the lake and outfall, and Petitioners provided no data or evidence to support their claims of degradation. While Petitioners' engineer testified that stormwater from surrounding developments was being discharged untreated, I find that control structures are present on these properties and provide water treatment. Discharges from the developed areas have the capacity to flow through the ponds and over vegetated areas before flowing into the lake. P. 533:16-25. All of the golf course ponds have been built with pipes that provide exit pathways for the pond water. P. 287:21 – p. 288:3. Piping provides detention by controlling the amount of water flow. P. 318:5-7. Other examples of control structures present at the GPP3 site and on Cat Island include earthen spillways, vegetation, matting or rock cover. P. 288:3-11. The golf course ponds within the drainage basin for the lake overflow their banks through vegetated spillways that provide filtration. P. 288:18-23 and Petitioners Ex. 1, p. 46. The edges of the ponds are vegetated and allow for controlled release of stormwater runoff. P. 289:3-7.

Drainage Area and Regulatory Reliance on Cat Island Lake

59. While there are areas outside of GPP3, such as the golf course, that are part of the drainage basin and ultimately drain into Cat Island Lake, SCDHEC had no requirement under South Carolina law to include these areas in its analysis for compliance with stormwater management requirements when evaluating the POA's application for the retrofit project permit. S.C. Code Ann. Reg. 72-305(A). P. 267-268. South Carolina law imposes no storm water treatment requirements on wholly undeveloped and untouched areas such as Tract G. P. 534:9-10.

60. SCDHEC performed an appropriate investigation - thorough review of its files relating to the Cat Island developments and consideration of when the developments were built -

to conclude that no area other than GPP3 relied on Cat Island Lake for detention. Although Petitioners' expert opined that Tabby Park area might have relied on Cat Island Lake to meet the applicable stormwater requirements, the lack of any documentation confirming this in the Tabby Park permitting file is reliable evidence to support SCDHEC's conclusion that it did not.

61. Contrary to Petitioners' claims that Cat Island Lake must be restored under Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), Cat Island Lake never served as a retention structure. P. 313:5-9. GPP3 could not use the restored lake to meet the regulatory requirement for retention under a new permit. P. 313:17-20. Moreover the lake is also not "on site" as required by the Stormwater Runoff Storage Requirements stated in Chapter III(C)(3) of the Storm water Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993): "...for those projects which are located within 1000 (one thousand) feet of shellfish beds the first one and one half (1 ½) inches of runoff from the built-upon portion of the property must be retained on site." It is undisputed that the lake is a separate tract from GPPE. P. 314:1-21.

62. Even if Cat Island Lake was restored to its former condition, Petitioners presented no evidence to demonstrate how the lake could be used to meet the regulatory requirement for retention under a new permit. P. 313:17-20. Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993). Mr. Geer confirmed that Cat Island Lake never served as a retention structure. P. 313:5-9. And, as referenced in paragraph 61 above, the lake is not on the GPP3 site.

CONCLUSIONS OF LAW

The Court concludes the following as a matter of law:

1. The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600 et seq. (APA), the South Carolina Pollution Control Act, S.C. Code Ann. § 48-1-10 et seq. (Rev. 2008 and Supp. 2011) and its regulations, 25A S.C. Code Ann. Reg. 61-101, and the South Carolina Storm Water Management and Sediment Reduction Act, §§ 48-14-10 et seq.

2. In reviewing this matter, the Court serves as the finder of fact and makes a de novo determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(B) (Supp. 2010); Brown v S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 595 S.E.2d 851 (2004).

3. The proper standard of proof to be applied in a contested case before the ALC is a "preponderance of the evidence" standard. Anonymous (M-156-90) v. State Bd. Of Medical Examiners, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998).

4. "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). The moving party bears the burden of proof in a contested case hearing. S.C. Code Ann. § 44-7-21(e)(Supp. 2010); see also 2 Am Jr. 2d Administrative Law § 360 (1994); Alex Sanders, et al., South Carolina Trial Handbook § 9:3 Party With Burden, Civil Cases (1999) (In civil cases, generally, the burden of proof rests upon

burden of proving that the Department erred in its issuance of the Certification. Here, Petitioner failed to demonstrate by a preponderance of the evidence that the proposed construction is inconsistent with the requirements of S.C. Code Ann. Regs. 61-9.122.26 and 72-300 and the policies of the Coastal Zone Management Program Refinements.

5. 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).

6. In South Carolina, scientific evidence is considered admissible only where the trial judge finds that such evidence will (1) assist the trier of fact, (2) the expert witness is qualified and (3) the underlying science is reliable. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508 (1999). When examining the third factor, “reliability”, a court is to determine, “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or

disproof in court and not even generally accepted outside the courtroom.” Id. at 19 quoting State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

7. South Carolina’s stormwater management regulations (S.C. Code Ann. Reg. 72-300 et seq.), S.C. Code Ann. Reg. 61-9.122.26 and policies and procedures of the Coastal Zone Management Program Document and 1993 Refinements, which are enforceable like regulations in the consistency review of state and federal permits, *i.e.*, Chapter III(C)(3) of the Stormwater Management Guidelines of the South Carolina Coastal Zone Management Program Refinements (August 1993), are applicable to this retrofit project and the permit application submitted by Cat Island POA. Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (S.C. 2010).

8. The formerly impounded lake bed, described as a “mud pit” by Petitioners, is tidelands critical area as defined in S. C. Code Ann. Sec. 48-39-10(G). As such, any effort to restore the dike constitutes an alteration of the critical area and is subject to the permitting procedures set forth in S. C. Code Ann. Sec. 48-39-130 through Sec. 48-39-150. In addition, the formerly impounded lake bed is a water of the United States, as defined in 33 CFR 328.3, and subject to the permitting jurisdiction of the Environmental Protection Agency and the U. S. Army Corps of Engineers. Consequently, neither this Court nor the Department can order that the dike be restored.

CONCLUSION

Based on the Findings of Fact set forth herein and the applicable legal requirement discussed above, I find that Cat Island POA has demonstrated that its request to retrofit the storm drainage system in Garfield Park Phase 3 is consistent with the applicable requirements of S.C.

Code Reg. Ann. 72-300 et seq, S.C. Code Reg. Ann. 61-9.122.26, and the Coastal Zone Management Program Refinements referenced herein.

IT IS, THEREFORE, ORDERED, that the action of the Board in rescinding the coastal zone consistency determination related to the installation of water quality filters in storm drain inlets located in the Garfield Park Phase 3 subdivision on Cat Island in Beaufort County is hereby reversed, and the previous decision by SCDHEC-OCRM staff that the project is consistent with the Coastal Zone Management Program is reinstated. In addition, the authorization to stabilize the breached dike and install water quality filters in storm drain inlets is affirmed and the Petitioners' contested case is hereby dismissed.

AND IT IS SO ORDERED.

The Honorable Shirley C. Robinson
SC Administrative Law Court

March 27, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Kenneth Bruning, Janet Bruning, David Feron,
Individually and as Trustee, Mary Feron,
Individually and as Trustee, Byrnl Haley,
Individually and as Trustee, Martha James and
Don Haarmeyer, Individually and as Co-
Trustees, and Pamela North,

Petitioners,

vs.

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

Respondents.

In re: Garfield Park Phase 3

Cat Island POA c/o Gary Meyer,

Petitioner,

v.

South Carolina Department of Health and
Environmental Control,

Respondent.

In re: Garfield Park Phase 3

Case No. 12-ALJ-07-0434-CC

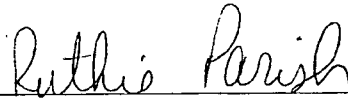
CERTIFICATE OF SERVICE

This is to certify that a copy of a **Joint Proposed Order of Cat Island POA c/o Gary Meyer and South Carolina Department of Health and Environmental Control** has been served upon the following counsel of record by mail, addressed to the following as shown below this 27th day of March, 2014.

NPCHAR1:1217396.1-TBF-(MSHAHID) 052058-00001

John E. North, Jr.
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902

Nathan Haber, Esquire
1362 McMillan Avenue
Suite 400
Charleston, SC 29405



NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Telephone: 843.577.9440

RECEIVED

JUN 23 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SC Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT
Honorable Shirley C. Robinson, Presiding Judge

Case No. 12 ALJ-07-0434-CC

Ken Bruning, Janet Bruning, David Feron, individually and as Trustee,
Mary Feron, individually and as Trustee, Sally Saegmuller Haley and
Terrell Page Haley, individually and as Co-Trustees, Martha James
and Don Haarmeyer, individually and as Co-Trustees, and
Pamela S. North.....Appellants,

v.

SCDHEC and Cat Island POA, c/o Gary Meyer.....
Respondents.

Case No. 12 ALJ-07-0436-CC

In Re: Garfield Park, Phase 3

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

v.

SCDHEC.....Respondent.

PROOF OF SERVICE

John E. North, Jr., # 06570
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Appellants

The undersigned hereby certifies that the Appellants' Brief, Appellants' Reply Brief and the Record on Appeal were served upon the attorney for Cat Island POA, Mary Shahid, P.O. Box 486, Charleston, SC 29402 and the attorney for DHEC, Nathan Haber, 1362 McMillan Avenue, Suite 400, Charleston, SC 29405 by United States Mail, postage prepaid on the 22 day of June, 2015.

John E. Northrup