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SC Court of Appeals

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

BRIEF OF THE APPELLANTS

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STATEMENT OF THE ISSUES

1. Did the Administrative Law Court (“ALC”) err when it found that the requirements of the S.C. Coastal Management Program (“CMP”)¹ with respect to storage of stormwater runoff within one-half mile of the coastal zone were permissive rather than mandatory?
2. Did the ALC err in approving DHEC’s modification of an existing stormwater permit without any evidence that the conditions for modification imposed by S.C. Code Reg. 122.62 were met?
3. Did the ALC err in approving DHEC’s waiver of the water quantity requirements imposed by S.C. Code Reg. 72-302 (B)(2)?
4. Did the ALC erred in finding that the proposed project did not alter the critical area and was not subject to the analysis of considerations prescribed by the CMP and § 48-39-150 of the Coastal Tidelands Act?
5. Did the ALC err in failing to find that the Retrofit Project was within 1,000 feet of shellfish beds?
6. Did the ALC err in approving a proposed project that was not “consistent to the maximum extent practicable” with the policies of the CMP?
7. Did the ALC err in approving the proposed project despite the evidence that the project resulted in the alteration of freshwater wetlands in violation of the CMP and applicable Covenants?
8. Did the ALC err in approving a project that would result in eliminating stormwater treatment for an adjacent residential subdivision in violation of the CMP?
9. Did the ALC err in failing to order the repair of the existing, approved stormwater treatment system?

STATEMENT OF THE CASE

This is an appeal from the decision of the ALC in a contested case proceeding. It arises from the application of Respondent Cat Island POA (“Cat Island”) for a permit to abandon an existing and permitted stormwater

¹ Pursuant to *Spectre, LLC v. South Carolina Department of Health and Environmental Control*, 386 S.C. 357, 688 S. E. 2 844 (2010), the policies and procedures of the CMP have the force of a regulation. Both Cat Island and DHEC agree. (R. p. 496, line 2–5; R. p. 1085, lines 3-15).

treatment system, which used a 7 acre lake ("Lake") for stormwater detention and treatment, and to retrofit the approved stormwater treatment system by installing "in-line filters" as a substitute means of stormwater treatment (the "Retrofit Project").² The Appellants, Ken Bruning, Janet Bruning, David Feron, Mary Feron, Sally Saegmuller Haley, Martha James, Don Haarmeyer, and Pamela S. North ("Homeowners") own real estate adjacent to the Lake. (R. p. 1679; R. pp.1707 – 1712).

In order to approve the Retrofit Project, DHEC was required to grant coverage under the National Pollutant Discharge Elimination System general permit ("General Permit"). DHEC was also required find that the Retrofit Project complied with the Stormwater Management and Sediment Reduction Act, S.C. Code § 48-14-10 *et seq.* ("Stormwater Act"), and its implementing regulations, S.C. Code Reg. 72-300 *et seq.* Because the project site was within Beaufort County, one of the eight counties within the "coastal zone" as defined under the CMP, DHEC was further required to determine that the Retrofit Project was consistent with all of the policies and requirements of the CMP and to issue a Coastal Zone Consistency Determination ("Consistency Determination") in addition to coverage of the General Permit. (R. p. 43; R. p. 1522).

After the Ocean and Coastal Resource Management division of DHEC ("OCRM") granted coverage under the General Permit and issued its CMP Consistency Determination, the Homeowners requested a DHEC Board review

² As set forth hereinafter, the dike separating the Lake from adjacent coastal waters had developed a leak at its outfall device and the Developer chose not to repair it.

of that action. (R. p. 1617). Following a hearing, the DHEC Board approved the Retrofit Project, but set aside the Consistency Determination. (R. p. 42).

Pursuant to the CMP, p. III-60, "for those projects which are located within 1,000 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". (R. p. 1543). Because the in-line filters proposed for the Retrofit Project did not "retain" stormwater, under the CMP, they could not be used if the project was within 1,000 feet of shellfish beds.

The Board found that the Consistency Determination should be set aside on the basis that the DHEC staff had failed to "consider tidal cycles in determining the most direct drainage path" between the project site and the adjoining shellfish beds and 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". (R. p. 44).

The Homeowners appealed the decision of the Board on numerous grounds, including (a) that the General Permit was approved by DHEC in violation of specific and applicable statutes and regulations, (b) that there were other grounds presented by Homeowners which precluded issuance of both the General Permit and Consistency Determination, and (c) that the Board failed to order the repair of the previously permitted stormwater system. (R. pp. 28 - 29).

On July 23, 20014, after a multiday trial, the ALC entered its Final Order approving coverage for the Retrofit Project by the General Permit, finding that

the requirements of the CMP had been met, and reversing the action of the DHEC Board that set aside the Consistency Determination. (R. p.1). The Homeowners timely filed their Motion to Reconsider (R. p. 316), which was summarily denied on August 27, 2014. (R. p. 24). This appeal followed.

STATEMENT OF FACTS

The Homeowners are the owners of lakefront residential lots in Beaufort County platted around a 7-acre lake ("Lake") in an area of Cat Island known as the Rookery. (R. p. 1679; R. pp. 1707 – 1712). Beaufort County is one of the eight South Carolina counties defined in the CMP as the "Coastal Zone". (R. p. 1528).

The Lake is separated from the coastal waters of Chowan Creek by an earthen dike. (R. p. 1961). The area immediately outside the dike is a designated shellfish harvesting area. (R. p. 1680; R. pp. 1713 - 1715; R. p. 1442). The Lake and the dike had been in existence since the early 1960s. (R. p. 979, lines 8-23). The Rookery subdivision, where the Homeowners reside, was platted into lots in the mid 1980s. (R. p. 543, lines 1- 8). Since the time that the dike was constructed, the Lake captured all of the stormwater for the Lake's entire drainage basin and effectively acted as a wet detention basin for those stormwaters. (R. p. 979, line 8 - p. 982, line13). Within the drainage basin of the Lake is golf course property. (R. p. 616, lines 8-21).

In 2004, DHEC approved the Lake for use as the detention basin for stormwater treatment required for an additional phase of development on Cat Island, Garfield Park, Phase III, pursuant to a permit issued to Chowan Creek

Partners, LLC ("Developer"). (R. p. 1657; R.p. 601, line 21- p. 602, line 9; R. p. 634, lines 22-25). The Developer, as the permittee under that 2004 stormwater permit, was responsible to DHEC to keep the stormwater treatment system comprised of the Lake and dike maintained and in good repair. (R. p. 1567; R. p. 519, lines 1-25).

Gary Meyer, as its managing partner, controls the Developer and the Developer has sole control of Cat Island. (R. p. 1722; R. p. 531, lines 3 - 16). The Developer developed both the Rookery, where the Homeowners reside, and Garfield Park, which is the area addressed by the 2004 stormwater permit. (R. p. 510, line18 - p. 511, line 2).

In June, 2009, a leak developed at the outfall structure of the dike, causing the Lake to drain. (R. p. 866, lines10-12; R. p. 1368, lines 19-21). After the dike was breached, OCRM granted two authorizations for the repair of the dike. (R. p. 1650). However, rather than repairing the dike, the Developer elected to abandon the Lake as a stormwater treatment method and to pursue a permit for the Retrofit Project. (R. p. 519, lines 14-17; R. p. 1442). Mr. Meyer testified that he alone made the decision to have Cat Island seek the change in the permitted stormwater treatment system for Garfield Park. (R. p. 531, lines 9-16).

Subsequent to the breach of the dike in 2009, the Developer was cited three times by OCRM for non-compliance with the South Carolina Stormwater Management and Sediment Reduction Act, S.C. Code § 48-14-10 *et. seq* ("Stormwater Act"), and its implementing regulations found at S.C. Code R. 72-

300 *et seq.* (R. pp. 1646 - 1649). The citation on March 11, 2011, stated that OCRM had determined that off-site damages in the form of sediment deposition continued to occur in the critical area and directed the Developer to take remedial measures. (R. p. 1648). No remedial actions were ever taken by the Developer and no enforcement action was ever commenced by DHEC.³

The process initiated by the Developer⁴ for permitting the Retrofit Project as a substitute for the existing treatment system continued from 2010 until shortly before June 18, 2012, when it received DHEC staff approval and coverage of the General Permit and Consistency Determination were issued. (R. p. 845 line13-p. 846, line 6). As approved by DHEC, the Retrofit Project allowed the breach in the dike to remain open and for the lakebed of the Lake to be exposed to tidal flows from Chowan Creek. (R. p. 620, lines 9-12; R. p. 660, lines 9-12; R. p. 975, lines 2-9).

STANDARD OF REVIEW

Pursuant to the Administrative Procedures Act, the ALC serves as the finder of fact. If the Order appealed violates constitutional or statutory provisions, is clearly erroneous in view of the probative, substantial, and reliable evidence in the record, or is controlled by an error of law, or the agency action is in excess of its authority, this Court may reverse or modify the Order, or remand the case for further proceedings. (S.C. Code § 1-23-610(B)).

³ In the five years since the breach of the dike, the Developer and Cat Island have been in violation of the applicable stormwater regulations and its maintenance and repair agreement.

⁴ At some later point in the process, the name of the proposed permittee was changed to Cat Island.

In this case, the Homeowners contend that the Final Order was in violation of the applicable statutes and regulations, demonstrates multiple errors of law, and was clearly erroneous in view of the substantial evidence in the record.

SUMMARY OF THE ARGUMENT

This case involves the application of the Stormwater Act, its implementing regulations (R. pp. 1444 - 1486), the CMP (R. pp. 1522 - 1566), and S.C. Code § 48-39-10, *et. seq.*, which is the Coastal Tidelands and Wetlands Act (the "Coastal Tidelands Act").

The Retrofit Project, as approved by the ALC, allowed the Developer to abandon the existing, permitted stormwater management system and to change the method of treating stormwater to one that violated the specific requirements of the applicable statutes and regulations, which was admittedly less efficient for pollution control, and which resulted in adverse consequences to the Homeowners, the critical area, and the environment in the coastal zone.

Although DHEC and the ALC chose to view the Retrofit Project myopically, as only an application for stormwater treatment by in-line filters, that view is not consistent with the actual permit issued or the scope of analysis required under the applicable law. As acknowledged by the ALC in ruling on Cat Island's Motion for Summary Judgment, "the agency action in question involves more than permission for the installation of water quality filters. . . . 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.” (R. p. 20, ¶ 5). As stated by the ALC, it is the “totality of agency action” which must be evaluated under the applicable statutes and regulations. (R. p. 20, ¶ 8).

The coverage of the General Permit described the “project” as both the installation of “water quality filters” and stabilization of the breached dike, and specifically noted that a Critical Area Permit would be required.⁵ (Homeowners’ Exhibit 2). Because the Retrofit Project encompassed leaving the breach in the dike open, the direct result of issuance of the permit would be continuous exposure of the Homeowners’ property to tidal inflows, transformation of fresh water wetlands and habitat into a tidal mud flat, and the addition of seven acres of detention basin lakebed and its pollutants to the critical area.

Rather than simply requiring the Developer to repair the dike, as was its obligation under its maintenance agreement with DHEC, and to restore a functioning stormwater treatment facility, DHEC and the ALC sanctioned a project that results in the destruction of a pristine, freshwater habitat for colonial birds and other animal species, endangers the shellfish beds adjacent to the area, degrades overall water quality, and adversely impacts both the economic and aesthetic interests of the adjacent Homeowners.

In order to effectuate the objectives of the Developer and Cat Island, DHEC ignored clear, specific, and stringent requirements with respect to

⁵ As of the time of trial, Cat Island had made no effort to obtain the necessary Critical Area Permit.

stormwater discharges within the coastal zone. DHEC further granted Cat Island a waiver of the even the less restrictive stormwater discharge quantity requirements applicable in inland areas because the Retrofit Project could not meet even those more lax requirements. DHEC failed to even engage in the statutorily mandated analysis of the limited conditions that would allow for modifying the existing permit, and completely ignored many of the requirements of the CMP that have to be met before approving the required Consistency Determination.

In approving DHEC's approval of the Retrofit Permit, and in reversing DHEC's denial of the Consistency Determination, the ALC relied upon factual findings not supported by the record and rubber stamped, without analysis, DHEC's failure to apply the clear language of the applicable statutes and regulations.

For all of the reasons set forth herein, the Final Order should be reversed and the Retrofit Project found not to be in compliance with the CMP, with the Stormwater Act, and with the other applicable laws and implementing regulations concerning projects within the sensitive coastal zone.

ARGUMENT

1. The ALC erroneously found that the requirements of the CMP with respect to containment of stormwater runoff within one-half mile of the coastal zone were "permissive, not mandatory".

The parties agreed that the CMP has the force of law and is applicable to the issues raised in this matter. (R. p. 1085, lines 3-15). Under the CMP, XIII, A, "Stormwater Runoff Storage Requirements", the manner of treatment of

stormwater with proximity to the coast requires that the stormwaters be “stored” by one of three methods.

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. (emphasis supplied)

(R. p. 1543)

Each of the methods of “storage” is defined in S.C. Code Reg. 72-301.

(R. pp. 1445 - 1451). Pursuant to that definitional regulation, “detention structure” is “a permanent stormwater management structure whose primary purpose is to temporarily store stormwater runoff and release the stored runoff at controlled rates”. “Retention structure” is “a permanent structure whose primary purpose is to permanently store a given volume of stormwater runoff and release of the given volume is by infiltration and/or evaporation”. , “Infiltration” “means the passage or movement of water through the soil profile”. All of these methods contemplate “storage” of stormwater.

There was no dispute that the Retrofit Project was within the coastal zone and within one-half mile of Chowan Creek, the receiving water body. (R. p. 1442; R. p.1962). There was further no question that the proposed filters do not “store” stormwater. Richard Geer, the DHEC engineer associate who issued the Retrofit Project, conceded that in-line filters had no capacity to “store” stormwater. (R. p. 647, lines 9-13). Mr. Geer further agreed that the proposed in-line filters were not a means of “infiltration”. (R. p. 694, lines2-10).

The Cat Island engineer, Ryan Lyle, testified that the filters do not

provide “retention, detention or infiltration” and in times of heavy rains, the filters would be overtopped and the stormwater released into Chowan Creek with no treatment at all. (R. p. 1087, lines 4-11; R. p. 973, lines 20–25).

S.C. Code Reg. 72-307 and the CMP have mandatory requirements for “permanent water quality ponds” that “shall” have storage volume to accommodate at least ½ inch of stormwater runoff.⁶ Instead of realizing that the storage of stormwater is mandatory, and that the method used to accomplish that required storage is discretionary between the three types of treatment methods specified by the CMP, the ALC misinterpreted the requirement and found that “..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’”. (R. p. 11). The only thing that is permissive under the CMP is the selection of one of three specified methods for storing the stormwater. The storage itself is mandatory. Instead of requiring “storage” of stormwater that is within one-half mile of the coastal zone, the ALC approved the use of filters for quality control, which is a clear violation of the CMP.⁷

The ALC was obligated to apply the clear language of the CMP.

“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”.

⁶ R. p. 1545.

⁷ Paragraph 36 of the Final Order (R. p. 12) 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.

Murphy v. DHEC, 396 S.C. 633, 640, 723 S.E. 2d 191, 195 (2012).

The interpretation of the CMP that ignores the mandatory “storage” requirement and finds that the requirements are merely permissive is not a factual finding. It is a blatant misinterpretation of the applicable law, which is subject to correction and reversal by the Court of Appeals. 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 forms of stormwater treatment within one-half mile of the coastal zone other than the three types of “storage” described in the CMP.

To support its conclusion that the in-line filters were a suitable stormwater treatment method, the ALC cites S.C. Code Reg. 72-301(5) and S. C. Code Reg. 72-305(B)(3). Those regulations provide no basis for the ALC to construe the storage requirements of the CMP imposed for the coastal zone as “permissive”.

Reg. 72-301(5) is simply the generalized definition of what “best management practices” are. Reg. 72-305(B)(3) suggests that for small inland sites, which the project site at issue is not, stormwater treatment can be accomplished by means other than ponds.⁸

Not only are the regulations relied upon by the ALC inapplicable, but neither supports reading the storage requirements of the CMP as “permissive”

⁸ The finding in paragraph 32 of the Final Order (R. p. 11) 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, a fact that is stated by OCRM in the Retrofit Project approval (R. p. 1436), and not entitled to use methods of treating stormwater that may be allowed for smaller sites outside of the coastal zone.

instead of mandatory. The ALC erred when it failed to recognize or acknowledge that the regulations it relied on deal only with the generalized directives and minimum requirements for stormwater management. As to coastal waters, the CMP imposes more stringent standards that cannot reasonably be read as only “permissive”.

Even if there was a conflict between the regulations cited by the ALC and the specific stormwater requirements imposed by the CMP, the CMP governs. (R. p. 1543).

S.C. Code Reg. 72-307(5)(g) specifically provides that, for activities in the coastal counties, “additional water quality requirements may be imposed to comply with the OCRM Stormwater Management Guidelines.” (R. p. 1543) The CMP further provides: “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.” Immediately following that prefatory language, the CMP imposes the “storage” requirement for projects within one-half mile of the receiving water body.⁹

Mr. Geer admitted that the proposed in-line filters did not meet even the minimum standard of pollution removal mandated by the stormwater regulations for non-coastal sites. Under the regulations, filtering devices such as those proposed for the Retrofit Project are required to remove 80% of

⁹ That section also imposes more stringent requirements for even small projects near a receiving waterbody.

pollutants. It was undisputed that the in-line filters Cat Island proposed to use do not meet that requirement. (R. pp. 692, line 23 – 693, line 19; R. p. 969, lines 18-21).

The means of stormwater treatment in the coastal zone is not a matter of opinion. It is a matter of statutory and regulatory interpretation. The legislature has determined what is appropriate for stormwater treatment within the coastal zone and DHEC had no authority to make its own determination that some method other than the “storage” described by the CMP is “acceptable”. It was error for the ALC to condone that departure from the law.

The proposed Retrofit Project did not comply with the mandatory requirements of the CMP and was not entitled to coverage under the General Permit or to the issuance of a Consistency Determination. As such, the Final Order erroneously approved of the decision of DHEC to grant coverage under the General Permit and erroneously found that the proposed project is consistent with the CMP. Accordingly, the Final Order should be reversed by this Court.

2. The ALC erred in approving DHEC’s modification of an existing stormwater permit without any evidence that the conditions for modification imposed by S.C. Code Reg. 122.62 were met.

Pursuant to the original stormwater permit issued to the Developer in 2004, the detention provided by the Lake and dike was the approved stormwater treatment system for the project site. (R. p.1953). Pursuant to that permit, the Developer had an ongoing obligation to maintain that system.

Implicit in the proposed Retrofit Project was modification of the existing

permit to substitute a different stormwater treatment method for the existing one. Mr. Lyle, Cat Island's engineer, and DHEC's Mr. Geer agreed that the Retrofit Project was a modification of the existing 2004 permit and that the 2004 permit would remain in effect until the Retrofit Project was approved and the permit modified. (R. pp. 622 line11– 663, line 17; R. p. 1081, lines 10–25).

Reg. 122.62 narrowly limits the circumstances in which DHEC has the power to consider modification of an existing permit.

(a) When the Department receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see section 122.41), receives a request for modification or revocation and reissuance under section 124.5, or conducts a review of the permit file), it may determine whether or not one or more of the causes listed in paragraph (d) and (e) of this section for modification or revocation and reissuance or both exist.

Subsection (d) of that 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. (R. p. 1703).

Although the impact of this regulation was raised to the ALC, it was not addressed in the Final Order. The evidence in the record, however, makes it clear that there were no "material and substantial" alterations of the stormwater detention facility in place which would justify modifying the existing 2004 permit.

Under the 2004 permit, 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. (R. p. 1953). When the 2004 permit was issued by DHEC for the development of Garfield Park, the detention provided by the Lake met all quality and quantity control requirements of the regulations then in effect. (R. pp. 609, line 22- 610, line 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.

To the extent that there was a “change in condition”, ie, a leak in the dike, that change was the result of the Developer’s violation of its maintenance and repair obligations and could have been repaired for \$24,760.00. (R. p. 1663). The Developer testified that, since the Developer acquired Cat Island in the early 1980s, the Developer had never done any work, made any improvements, or done “anything” to the dike or pipe providing the outfall other than replacing one of the three boards on the outfall device. (R. p. 511, lines 11-25; R. p. 547, lines 5-7).

The Homeowners’ engineer, Christopher Moore, testified that, if no maintenance were performed for 35 years, it would not be surprising that the outfall structure failed since that is where there is weakness, where the water flow is concentrated, and where a higher amount of erosion occurs. (R. pp. 1368, line 22 - 1369, line 12). When the Developer fails to do any maintenance on the dike for 35 years and fails to abide by his maintenance and repair obligations, DHEC should not reward that conduct by allowing a

change that is both unnecessary and less effective for purposes of stormwater treatment.

The evidence showed that the only motivating factor for the attempt of Cat Island and the Developer to change the existing system of stormwater treatment was the financial interests of the Developer. The Developer's own engineer recommended repair of the dike rather than any substitute method of stormwater treatment and estimated it would be less costly for the Developer.

Repairing the dike in accordance with the existing maintenance permit is the cleanest, easiest and more efficient option relative to engineering and permitting. (R. p. 1520).

The only explanation offered by Mr. Meyer for failing to heed the advice of his engineer and repair the dike was that he "disagreed". (R. p. 521, lines 10-19). There was another factor, however. Mr. Lyle testified that he informed Mr. Meyer that, if the dike was abandoned and the area transformed from a fresh water impoundment into tidal salt marsh, the Developer could sell the resulting wetlands mitigation credits. (R. pp. 1039 line 1 – 1040, line 21).

In the scheme of the multi-phase real estate development on Cat Island, the ALC should have found that a leak in the dike that can be repaired for \$24,760.00 is immaterial and not a substantial alteration of the entire stormwater system installed and permitted for the Garfield Park subdivision. Such a finding is particularly appropriate when the "change" was the result of the Developer's failure to perform the routine maintenance that was its obligation and where the proposed substitute stormwater treatment system was less effective than the existing, permitted one.

Even if the leak in the dike were to be considered a “material and substantial” alteration of the existing stormwater facility, before the regulation allows for a change in the permit, there must additionally be proof of “permit conditions that are different or absent in the existing permit”. There was no change in any of the permit conditions and certainly no factual basis in the record to show compliance with the limitations on modifications imposed by the regulation.

The permit conditions involved the need to provide stormwater treatment for Garfield Park. There is no evidence that the development had 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 easily repaired.

The original stormwater system was constructed and permitted on the basis of the detention provided by the Lake. The Homeowners had constructed lake-front residences around the Lake that, without the leak in the dike being repaired, allowed tidal waters to encroach on their approved and platted subdivision. (R. p. 1075, lines 7-15). There is simply no different permit condition that could justify the abandonment of the existing treatment system in favor of some new system so that the developer could attempt to recover some financial gain to the detriment of the Homeowners.

DHEC made no attempt to perform the analysis required by Reg. 122.62. Mr. Geer testified that, so long as the Retrofit Project met the applicable

stormwater regulations, he was obligated to approve it, even if the proposal involved a modification or termination of an existing permit. (R. p. 622, lines 7-17). He testified that, had the Developer decided to keep the existing stormwater detention system, he would be obligated to approve it. (R. p. 638, lines 10-14). He was unaware of the requirements imposed by Reg. 122.62 for modifying an existing permit and he neither acquired nor considered any information with respect to the basis or justification for the changing the existing means of stormwater treatment. (R. pp. 622, line 18 – 623, line 17; R. p. 633, lines 9-23).

Approving the Retrofit Project without any evidence to support the findings required under Reg 122.62 was error. Approving the Retrofit Project when the only “material and substantial” alteration to the stormwater system could be immediately and inexpensively repaired was error. Approving the Retrofit Project when there was no change in the “permit conditions” was error.

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 Cat Island engineer acknowledged that any change from the currently permitted Lake and dike for the treatment of stormwater, whether by in-line filters or any other method that did not include repair of the dike, would result in saltwater tides reaching the Homeowners’ property. (R. p. 1075, lines 7-15). He acknowledged that spring tides would encroach on the Homeowners’ property all the way to the 6 foot contour

depicted on Homeowners' Exhibit 64, Sheet 5, which would be equal to the 7 foot elevation of spring tides. (R. pp. 1011, line 20 - 1020, line 8). This encroachment would occur to the property of each Homeowner other than Ken and Janet Bruning. (R. p. 1950). The Cat Island engineer further agreed that the Homeowners' properties were downstream of Garfield Park and that having tidal flows over their properties would be an adverse impact to the Homeowners. (R. pp. 1073, line 18 – 1074, line 1; R. p. 1041, lines 19-24).

It is wholly unreasonable to allow the Developer to change the manner of treating the stormwater when the purchasers of these Lake-front properties have paid for that amenity and when their economic and aesthetic impacts to the Homeowners. The Homeowners have vested rights in the existing mode of treating stormwater and are adversely affected by the change that the ALC has now approved. The failure of the ALC to consider these permit conditions, to take into account those vested rights, and to favorably consider the facts and arguments of the Homeowners that were presented in their Request for Contested Case Proceeding and in the presentation during the trial of this matter is error.

The Final Order, which ignores the very limited situations in which issued permits may be modified, which ignores the clear requirements of the applicable regulations, and which ignores the vested rights of the Homeowners, should be reversed.

3. The ALC erred in approving DHEC's waiver of the water quantity requirements imposed by S.C. Code Reg. 72-302 (B)(2).

In order for the Retrofit Project to proceed, Cat Island had to have a

waiver of otherwise applicable water quantity control standards. Without that waiver, the project could not be approved. Mr. Geer testified that he granted that waiver. (R. p. 657, lines 3-5).

Pursuant to Reg. 72-302 (B)(2):

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 receiving natural waterway or downstream properties; (emphasis supplied)

The term "adverse impact is defined in S.C. Code Reg. 72-301(1):

"Adverse Impact" means a significant negative impact to land, water and associated resources resulting from a land disturbing activity. The negative impact includes increased risk of flooding; degradation of water quality; increased sedimentation; reduced groundwater recharge; negative impacts on aquatic organisms; negative impacts on wildlife and other resources; and threatened public health.

Mr. Geer justified his grant of the necessary waiver by reading the statute narrowly to consider only adverse impacts from *stormwater*, and not adverse impacts from "*the project*", which is the term actually used in S.C. Code Reg. 72--302 (B)(2). (R. p. 659, lines 20-23). DHEC's analysis is wrong on two counts. First, the evidence clearly established adverse impacts from stormwater. Second, there were multiple adverse impacts from "the project" unrelated to stormwater.

Even if Mr. Geer was correct in considering only negative impacts from stormwater and not from the project as a whole, there is no dispute in the evidence that the proposed in-line filters were a less effective means of controlling pollution from stormwater. The result is degradation of water

quality, increased sedimentation, negative impacts on aquatic organisms, and negative impacts on wildlife and other resources, all of which are defined “adverse impacts” under the Regulation.

As to Chowan Creek, the “receiving waterbody”, the record reflects multiple adverse impacts to it. First, the detention provided by the Lake removed 94% of sediment from stormwater before it reached Chowan Creek, while the removal efficiency of the proposed in-line filters was only 74%. (R. pp. 652 line 4 -653, line 4; R. pp. 665, line 15 – 666, line 6). This established that the efficiency of the proposed in-line filters is inferior to that provided by the detention of the Lake. Reducing the effectiveness of the stormwater treatment system inherently results in a degrading of water quality, which is a defined adverse consequence that precludes the grant of any waiver.

In addition, Mr. Lyle testified that the proposed filters allowed heavy stormwater flows to bypass the filters altogether and pass through the system and into Cowan Creek without any treatment at all. (R. pp. 972, line 21- 973, line 23). The discharge of untreated stormwater clearly results in “degradation of water quality” and “increased sedimentation”, both of which are defined adverse impacts from stormwater.

The evidence also established that the Best Management Practices Manual (“BMP Manual”) of OCRM requires pre-fabricated control devices¹⁰ to remove 80% of the sediment in the stormwater to be treated and can only be

¹⁰ Mr. Geer confirmed that the proposed in-line filters are such devices. (R. pp. 690, line 2 -691, line 14 and R. p. 694 lines 2-6).

used for drainage areas of less than 5 acres. (R. p. 693, lines 7-15; R. p. 1421). Cat Island's engineer testified that the proposed filters allowed heavy stormwater flows to bypass the filter and pass through the system without any treatment at all. (R. pp. 972, line 21 – 973, line 23). 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 ALC to so rule on this issue was error.

An additional impact from stormwater is that the Lake provided detention for the entire drainage basin of the Lake, including phases of development that predated current stormwater regulations. (R. pp. 611, line 7- 613, line 8). Mr. Geer conceded that the Retrofit Project would result in large areas that had previously had stormwater detention, even though not required at the time they were developed, would thereafter forever discharge untreated stormwater through the lakebed and into Chowan Creek. (R. p. 637, lines 2-8). Mr. Lyle agreed that the Retrofit Project provided stormwater treatment only for Garfield Park and that other areas of the drainage basin served by the Lake would in the future flow untreated into Chowan Creek, including sediment from presently undeveloped G tract. (R. p. 1001, lines 8-17; R. pp. 1004, line 4 – 1005, line 16). Again, this results in "degradation of water quality" and "increased sedimentation", both of which are defined adverse impacts from stormwater that preclude the grant of any waiver.

These facts are unrebutted in the record. Accordingly, even if the ALC limited its consideration just to adverse impacts from stormwater, the waiver

could not properly have been granted by DHEC and approved by the ALC.

The ALC further erred when it limited its analysis to adverse impacts from stormwater and not from “the project” as the clear language of the regulation required. Mr. Geer acknowledged that the Retrofit Project contemplated leaving the dike unrepaired and allowing the lakebed to become tidal and part of the critical area. (R. pp. 619, line 25 – 620, line 18) Thus, “the project” encompassed much more than the installation of in-line filters.

Mr. Madlinger testified that, when the Lake performed the function of a detention basin, pollutants settled to the bottom of the lakebed. (R. pp. 1213, line 21 – 1214, line 14). He testified that the Retrofit Project would result in the pollutants of the last 50 years previously captured by the Lake flowing back and forth in the critical area with the tides. (R. pp. 1225, line 23 – 1226, line 20). The result is degradation of water quality, increased sedimentation, negative impacts on aquatic organisms, and negative impacts on wildlife and other resources, all of which are defined “adverse impacts” of the “project” under the Regulation.

There is no question that the Homeowners, as downstream property owners, were adversely impacted by “the project” and that those impacts were significant. Ryan Lyle, the Cat Island engineer, acknowledged that, without the dike, spring tides would encroach on the Homeowners’ property all the way to the 6-foot contour depicted on Homeowners’ Exhibit 64.¹¹ (R. pp. 1011, line 20

¹¹ Mr. Lyle confirmed that Lidar contours are measured based on 88 datum, that survey elevations are based on 29 datum, and that in order to convert Lidar elevations to survey

- 1020, line 8). This encroachment would occur to the property of each Homeowner other than the Brunings. (R. p. 1950).

The Developer's engineer further admitted that the Homeowners' properties were downstream of the project site and that having tidal flows over their properties would be an adverse impact to the Homeowners. (R. pp. 1073 1073, line 18 – 1074, line1; R. p. 1041, lines 19-24). He testified that any change from the currently permitted Lake and dike for the treatment of stormwater, whether by in-line filters or any other method that did not include repair of the dike, would result in saltwater tides reaching the Homeowners' property. (R. p. 1075, lines 7-15).

The Homeowners provided evidence that the Lake was a habitat for nesting and wading birds, including woodstorks, an endangered species, herons, alligators, and other species of animals. (R. pp. 853, line 4 – 856, line 2; R. pp. 1414 – 1417). As the Homeowners testified, with the dike unrepaired, the wildlife is gone and the Lake is a rutted mudflat referred to by the residents as the "mud pit". (R. pp. 859, line 1 – 860, line1; R. p. 869, line 20 – 871, line 4). Mrs. North produced a photograph of the Lake from her deck with water in the Lake and the same view with the mud, which she characterized as "ugly". (R. pp. 1408 -1409; R. pp. 869, line 20 – 871, line 4). The other Homeowners voices similar claims with regard to the loss of the beauty of the Lake and the wildlife. (R. pp. 917, line 22- 918, line 5; R. p. 930, lines 17-23; R. p. 945, lines

elevations, one must add .93 feet to the Lidar elevation. (R. p. 1018, lines 5-17). Therefore, he stated that the water level of a spring tide of 7 feet would get to the 6 foot Lidar elevation on Homeowners' Ex. 64, Sheet 5. (R. pp. 992, line 24 – 993, line 6; R. p. 1018, lines 5-23).

1-11).¹²

Photographs from the residences of the Homeowners taken the week before the trial demonstrate expanses of mud flat consistent with the Homeowners' descriptions (R. pp.1681 – 1688), as well as dead trees around the Lake (R. p. 1406) and tree roots that had become exposed along the edge of the Lake (R. p. 1404). Mrs. North testified to the loss of many species of freshwater vegetation after her property was exposed to the saltwater tides. (R. p. 881, lines 9-22).

George Madlinger, the senior wetland project manager in the Beaufort office of OCRM, acknowledged that the photos of wildlife, including wood storks, depicted in Homeowners' Ex. 1, pages 31-34, were consistent with his observations of the Lake and surrounding areas over the years and that, without water in the Lake, the birds would find other places to inhabit. (R. pp. 1414 – 1417; R. pp. 1218 line 19 -1219, line17).

Homeowner David Feron testified that his property had lost value when the Lake was lost and adduced appraisals supporting his contention. (R. pp. 918, line 6 – 920, line 2; R. pp. 1510 – 1515; R. pp. 1516 - 1519).

Homeowner North testified that, in her opinion, the value of her property decreased from the loss of the Lake when her water view was replaced by mud. (R. pp. 880, line18-881, line 3). Even the Cat Island developer conceded

¹² There was substantial testimony adduced by Cat Island that the former lake may eventually "naturalize" and become a tidal, saltwater marsh. Whether that eventually occurs or not does not detract from the testimony of the Homeowners concerning their aesthetic and economic loss resulting from the Retrofit Project.

that most buyers would prefer the Lake view depicted on Homeowners' Ex. 1, p. 25 to the mud view depicted on Exhibit 1, p. 26. (R. pp. 534, line 20- 535, line 22).

Loss of the aesthetics of enjoying and observing wildlife is a legally cognizable injury and certainly an adverse impact of the Retrofit Project on the Homeowners. *Sea Pines Assn. for the Prot. Of Wildlife, Inc. v. S. C. Department of Natural Resources*, 345 S.C. 594, 600-601 (2001).

In granting the necessary waiver, OCRM did not consider the Homeowners' complaints of tidal encroachment onto their residential property because, in the view of Mr. Geer, that impact was not caused directly by the discharge of stormwater. (R. pp. 659, line 3- 660, line 22). He further testified that he did not consider the complaints of the Homeowners concerning loss of value to their homes, concerning destruction of the Lake habitat, or concerning loss of the enjoyment of the Lake because those impacts were not related to stormwater discharges and thus not within his purview. (R. p. 660, lines 23-25; R. pp. 724, line 15 – 726, line12).

Just as DHEC "interpreted" the CMP mandated methods of stormwater treatment in the coast zone as "permissive", not mandatory, DHEC's "interpretation" of 72-302 (B)(2) is contrary to the clear language employed in the regulation. The language employed by the drafters of the regulation requires analysis of any adverse impacts to the downstream property owners and the receiving water body from the "proposed project" before waiving water quality requirements. There is no ambiguity and no basis to apply it in the

restrictive manner employed by DHEC and approved by the ALC.

It was error for the ALC to ignore the un rebutted evidence with regard to adverse impacts resulting from stormwater. The ALC further erred by misinterpreting the clear language of the regulation that requires the consideration of adverse impacts resulting from “the project” and by failing to properly consider and rule upon the un rebutted evidence of those adverse impacts. Had the ALC considered the impacts of the project as a whole, including the testimony of both the engineer for the Developer and the DHEC personnel as to the adverse consequences resulting from the Retrofit Project, the un rebutted evidence clearly established multiple adverse impacts, any one of which would have precluded the waiver of the water quantity requirements of the regulations and the approval of the Retrofit Project.

Waiver of stormwater requirements is particularly inappropriate within the coastal zone. The CMP contains no provision authorizing any waiver. The opposite is the case. In the coastal zone, projects must be “consistent to the maximum extent practicable” with the CMP policies. (R. p. 1528). Those policies include the requirement that “drainage plans... shall be designed so as to control erosion and sedimentation, water quality degradation, and other negative impacts on adjacent water and wetlands.” (R. p. 1537). DHEC cannot find that the Retrofit Project controls erosion and sedimentation and water quality degradation “to the maximum extent practicable” when it is authorizing replacement of the more efficient dike and Lake system with a stormwater treatment mechanism that is so much less efficient that it requires a waiver of

otherwise applicable standards.

The Homeowners evidence fully demonstrates that the Retrofit Project results in adverse impacts to the environment and to downstream properties. These facts were un rebutted. It cannot be found to be consistent “to the maximum extent possible” with the policies of the CMP. Accordingly, the Retrofit Project was not entitled to a waiver of the minimum water quantity standards and, by authorizing such a waiver and the issuance of a Consistency Determination, the ALC erred and should be reversed.

4. The ALC erred in finding that the proposed project did not alter the critical area and was not subject to the analysis required by the CMP and S.C. Code § 48-39-150.

Pursuant to the CMP, DHEC was required to consider whether the Retrofit Project would have adverse impacts on critical areas and whether it would protect, maintain or improve water quality. (R. p. 1534).

S.C. Code § 48-39-10, *et. seq.* contains the Coastal Tidelands and Wetlands Act (the “Coastal Tidelands Act”). Pursuant to §48-39-130 of the Act, no person shall “...in any way alter any critical area¹³ without first obtaining a permit...”.

In its Order, the ALC concludes that the Retrofit Project does not alter the critical area, or if it does, the activity is exempt under § 48-39-130(D)(3) of

¹³ Pursuant to § 48-39-10, (J) a “critical area”, includes “coastal waters” and “tidelands”. “Tidelands” are defined as all areas at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters”. § 48-39-10(G).

the Coastal Tidelands Act and no critical area permit was required for the Retrofit Project.

In making this finding, the ALC is just plain wrong. § 48-39-130(D)(3) addresses the discharge of treated effluent, which is covered by other regulations. The section specifically states that DHEC retains authority with regard to any permit that affects a critical area. The Consistency Determination itself that was issued by DHEC and signed by Mr. Geer specifically states:

Alteration of Critical Area will require a permit from OCRM prior to work in that area. (R. p. 1825).

The Consistency Determination further states in response to the question of whether a critical area permit is required:

Yes, Plans show alteration of the critical area for the stabilization of the dike, which will require permit authorization prior to work being initiated in that area. (R. p. 1826).

Mr. Lyle, the Cat Island engineer, acknowledged that the Retrofit Project involved stabilization of areas that might be covered at high tide and that such areas were, by definition, an effect on the critical area. (R. pp. 978, line 24-979, line 7). He also confirmed that, by leaving the breach of the dike open, the acreage of the lakebed would be added to the critical area. (R. p. 975, lines 2-9).

Because a critical area permit was necessary for the Retrofit Project, DHEC and the ALC should have reviewed it under § 48-39-150 of the Coastal Tidelands Act, as well as the CMP Guidelines pertaining to activities in the critical area. (R. p. 1535).

The relevant considerations under the Coastal Tidelands Act and the CMP are the same and include the extent to which the Retrofit Project could impact the habitats of endangered species of wildlife, the extent to which all feasible safeguards are taken to avoid adverse environmental impacts, and the extent to which the proposed use could affect the value and enjoyment of adjacent owners.

All of the record evidence previously described herein fully demonstrates that the Retrofit project will result in disastrous consequences to the environment and to the Homeowners. That evidence is unrebutted.

Even DHEC personnel agreed that the Retrofit Project would adversely impact the environment. Mr. Madlinger testified that allowing the dike to remain open as contemplated by the Retrofit Project would have three effects on the critical area: 1) the addition of 4 to 8 acres of freshwater lake bottom to it; 2) the entire drainage basin of the Lake would flow out; and 3) the pollutants from the last fifty years which had settled to the bottom of the Lake would be tidally influenced and wash back and forth in the critical area. Mr. Madlinger characterized these effects as negative effects. (R. pp. 1225, line 23– 1227, line1). Even the Cat Island engineer confirmed that, by leaving the breach of the dike open, the acreage of the lakebed would be added to the critical area. (R. p. 975, lines 2-9).

The ALC erred when it failed to recognize that a critical area permit was required for the Retrofit Project, as even DHEC admitted in its Consistency Determination. The ALC further erred when it found that the Retrofit Project

did not affect the critical area even though both Cat Island' engineer and the DHEC personnel admitted that there were numerous impacts and that those impacts were negative. The ALC further erred by its approval of the Retrofit Project without consideration of the factors identified in the Coastal Tidelands Act and the CMP, including the negative effects on the critical area and the negative impacts to adjacent property owners. Had the ALC properly reviewed those factors, the un rebutted evidence demonstrated that the critical area permit should not and could not be granted nor the Consistency Determination made.

5. The ALC erred in failing to find that the Retrofit Project was within 1,000 feet of shellfish harvesting beds.

It was undisputed that there are identified shellfish harvesting beds in very close proximity to the Retrofit Project. Under the CMP, if a project is within 1,000 feet of those beds, all stormwater had to be retained on site rather than discharged through the proposed in-line filters. (R. p. 1543). OCRM agrees that this requirement cannot be waived and that, if the Retrofit Project is within 1,000 feet of the shellfish beds, the Retrofit Project would have to be set aside. (R. p. 681, lines 2-18).

In 2010, Cat Island submitted a Notice of Intent ("NOI") to DHEC in support of Cat Island's request for a permit for the Retrofit Project. (R. pp. 1844 - 1845). In that document, signed and certified as correct by the developer and its engineer, Chowan Creek is designated as the nearest "receiving waterbody" to the project with a shellfish harvesting classification and that the distance from the Retrofit Project to Chowan Creek is 800 feet.

When the Homeowners objected to the Retrofit Project based on this proximity, Mr. Geer determined that the Retrofit Project was in fact 1,040 feet away from the shellfish beds. In making this determination, he used aerial photographs of the lakebed and measured the serpentine “defined drainage pathway” cut into the bottom of the lakebed and visible at low tide from the outfall pipe on the project site through the former lakebed and out to Chowan Creek. (R. pp. 696, line 25 – 700, line10).

When challenged by the Homeowners, the DHEC Board set aside the necessary Consistency Determination on the basis that Mr. Geer’s calculation failed to take into consideration that, during periods of tides higher than dead low, stormwater would not be confined to the winding drainage path of his measurement, but would flow more directly to Chowan Creek. The Board further found that Mr. Geer had failed “to survey the site or conduct a field inspection to measure the distance”. (R. p. 44).

Nowhere in the CMP is there any description of a distance based on some alleged winding drainage pathway. The language simply and clearly refers to projects “which are located” within 1,000 feet of shellfish beds. The ALC erred when it failed to simply determine that distance without regard to some winding pathway for the stormwater.

The Homeowners presented a survey prepared by a licensed surveyor that established that the distance to the shellfish beds from the stormwater discharge pipe for Garfield Park was slightly less than 700 feet. (R. p. 1937).

After the DHEC Board set aside the Consistency Determination, the Cat Island engineer prepared a measurement that depicted the route of stormwater from a storm sewer inlet located in the middle of the Garfield Park subdivision to the shellfish beds of Chowan Creek with both a “High Tide” measurement and a “Low Tide” measurement. (R. p.1961). The High Tide measurement was shown to be 1,005 feet, which was conveniently five feet beyond the distance that mandates retention of stormwater.¹⁴ The measurement only got to 1,005 feet by measuring from a filtering device located in the middle of the development and not from the storm sewer outfall at the boundary of the development.

In its Order, the ALC apparently did not even accept the certification of distance of the permit applicant and his engineer as true. The ALC ignored the issues raised by the Board’s decision and merely remarked that the Board conclusion “may have been based on a misapprehension” of the nature of the measurements. The ALC also found persuasive Cat Island’s method of measurement that followed an arcing path through the lakebed.

The finding of the ALC becomes even more unsupportable when viewed in the light of the admissions of the Cat Island engineer, whose measurement the ALC found so persuasive, and the admissions of DHEC. Mr. Lyle admitted at trial that the actual starting point of the measurement on Homeowners’ Ex. 72 was not, in fact, the closest stormwater quality treatment device to the

¹⁴ The Final Order also ignored the evidence of the Homeowners 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.

shellfish beds. (R. pp. 1006, line 1- 1007, line19; R. p.1948). Mr. Geer testified that the proper starting point for any such measurement was the stormwater outfall for Garfield Park, the location of which he initialed on Homeowners' Ex. 52. (R. pp. 707, line 17- 708, line 24; R. p. 1936). He also agreed that the direction of water flow at higher tides would be the appropriate way to measure the distance that the drainage path cut into the lakebed. (R. p. 706, lines 1-15). Mr. Geer confirmed that, if Mr. Lyle had started his measurements at the correct starting point determined by DHEC, the distance to the shellfish beds, as measured in the manner that DHEC considered to be correct, would be 705 feet. (R. pp. 715, line 9 – 717, line 3). That measurement was almost identical to the measurement of the Homeowners' surveyor and within one hundred feet of the distance on the NOI signed by Mr. Meyer and his engineers. (R. pp.1844 - 1845).

After it was established that the filtering device in the middle of the development was not the closest filtering device to the shellfish beds, Cat Island presented a new measurement. (R. p.1964). The new measurement, like Exhibit 72, 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. That measurement gives lip service to a "High Tide" measurement that was determined by the DHEC Board to be appropriate by following an arching flow of stormwater at high tide inside of the dike, 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.

In addition, the measurement only gets to 1,002 feet by measuring from a filter device inside of the development and not from the development's storm sewer outfall. In order to find that the distance is 24 inches more than 1,000 feet, the ALC ignored the testimony of OCRM that the proper location to start the measurement is the storm sewer discharge pipe (R. pp. 707, line 17- 708, line 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. 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 Homeowners (R. p. 1937), based on the measurements of the Cat Island engineer on Homeowners' 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), based on Cat Island Exhibit 1(A) when measured either from the stormwater discharge pipe or measured without some serpentine route outside of the dike, 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. (R. pp. 1844 - 1845).

The ALC also erred by treated the determination of the distance from the

project site to the shellfish beds as a matter where “this Court defers to an agency in interpreting its regulations.” (R. 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. Ignoring a survey of a licensed surveyor and relying on the measurement of the Cat Island engineer that has a start point for the measurement that is not at the edge of the development and which is contrary to the correct start point designated by DHEC was error. The ALC’s finding on this point is particularly without support in the record when Mr. Geer himself, using the documents prepared by Cat Island, testified that under the method of measurement he thought appropriate, the distance was 705 feet.

Based upon Cat Island’s own NOI, the Homeowners’ survey, and the measurements of Mr. Lyle from the proper point as identified by DHEC (238:17-239:24), the ALC should have found that the Retrofit Project was 800 feet or less from the shellfish beds of Chowan Creek and that, under current regulations, retention of stormwater on site was required by the CMP. Because the Retrofit Project did not provide for retention of stormwater on site, it could not be approved and it was error of the ALC to do so.

6. The ALC erred in approving the Retrofit Project when it was not “consistent to the maximum extent practicable” with the policies of the CMP.

The CMP provides guidelines for the evaluation of all projects. (R. p. 1533) In reviewing a permit application in the coastal zone, DHEC 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”) such as shellfish beds. (R. p. 1534).

A “consistency determination” under the CMP is defined as “consistent to the maximum extent practicable” with the CMP policies. (R. p. 1528).

As previously set forth, DHEC itself has acknowledged that the Retrofit Project results in negative effects on the critical area and that treatment of stormwater by in-line filters would be less effective than the Lake and dike that they were to replace. (R. pp. 652, line 4 – 654, line 4; R. pp. 1225, line 23 - 1227, line 1). This less effective level of stormwater treatment, together with allowing areas that were previously detained by the Lake to discharge stormwater into Chowan Creek without any treatment at all, clearly does not “maintain or improve” water quality. Waiving applicable stormwater requirements does not “maintain or improve” water quality.

The evidence cited previously and the admissions of the DHEC staff and the Cat Island engineer establish that the Retrofit Project is not “consistent to the maximum extent practicable” with the policies of the CMP and is in fact completely contrary to those policies. It was error for the ALC to reverse the DHEC Board’s denial of the Consistency Determination.

7. The ALC erroneously approved the Retrofit Project despite the evidence that the project resulted in the alteration of freshwater or brackish wetlands in violation of the CMP and applicable Covenants.

Pursuant to the CMP Policies, III-59:

Project proposals which would require fill or other significant permanent alteration of a productive fresh water marsh will not be approved unless no feasible alternative exists, or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized.

Similarly, CMP Policies, III-6, provide:

Residential development which would require filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited unless no feasible alternatives exist . . . These marshes are valuable habitat for wildlife and plant species . . .

The Retrofit Project encompassed leaving the breached dike open and the Lake subjected to tidal flows from Chowan Creek. Thus, the relevant inquiry is whether the wetlands surrounding the Lake prior to the breach of the dike will be permanently altered as a result of the Retrofit Project.

The CMP notes that Federal law mandates that the U.S. Army Corps of Engineers delineate wetlands and, that once delineated by the Corps, DHEC manages them. (R. pp. 1541 -1542). The delineation of the area surrounding the Lake made by the Corps 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. The areas abutting the fringes of the Lake were designated by the Corps as freshwater wetlands. (R. p. 1753; R. p. 1963).

The engineering drawings of the area created by Cat Island's engineer, Mr. Lyle, show freshwater wetlands along the Lake, consistent with the Corps designation, and the water of the Lake extending into a .201 acre area that the Corps designated as a freshwater wetland area (R. p. 1945).

Mr. Lyle testified that all of the stormwater, which is freshwater, from the entire drainage basin of the Lake was stored in the Lake (R. p. 1000, lines 16-25) when the dike was in place, that fixing the dike would provide a freshwater boundary around the Developer's land (R. p. 1520), 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 finger of freshwater wetland closest to the dike that the Corps had identified is actually water that is a part of the Lake and could be kayaked into from the Lake (R. pp. 955, lines 5 – 957, line 19).

Mr. Lyle further confirmed that, in the absence of the dike, the property delineated by the Corps as freshwater wetlands would be regularly saturated with saltwater during spring tides. (R. pp 1015, line 18 – 1016, line 6).

In 1995, the Developer executed a Declaration of Restrictive Covenants for Wetlands Preservation ("Covenants") agreeing with the Corps not to alter certain wetlands adjacent to the Lake and the project site. (R. p. 1664). The developer testified that those wetlands were freshwater in nature. (R. p. 525, lines 15-17). Those wetlands were in addition to those identified by the Corps on the southern end of the Lake.

Homeowners' Ex. 64, Sheet 5, shows the survey elevations of the freshwater wetlands and the elevations of the pipes through which tidal waters entering the Lake through the breach of the dike 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. (R. p. 1950 R. p. 1014, lines 3-8; R. p.

993, lines 13-25). He further confirmed that a spring tide would fill the entirety of the dedicated freshwater wetlands with saltwater. (R. pp. 1014, line 9- 1015, line 23).

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. (R. pp. 688, line 21- 689, line 1). Similarly, Mr. Madlinger acknowledged that the area was transforming from an open water environment to a tidally influenced environment (R. p. 1211, lines 5-13), that when saltwater enters freshwater wetlands, there is a change in the nature of the vegetation from freshwater vegetation to saltwater vegetation (R. p. 1223, lines 5-18), and that he observed a large number of Chinese Tallow trees which live in fresh water wetlands which had died. (R. p. 1221, lines 1-10).

The Homeowners testified that the freshwater vegetation on their property along the boundaries of the Lake died when exposed to the saltwater tides after the dike was breached. (R. p. 881, lines 9-22; R. p. 938, lines 3-14; R. p. 921, lines 6-22). The Homeowners' testimony previously discussed concerning the loss of the birds and other wildlife, as well as a comparison of the photographs of the area prior to the breach of the dike and after, fully demonstrate the "alteration" which will result if the Retrofit Project is approved. In Homeowners Exhibit 1, pages 31 – 34, (R. pp.1414 - 1417) the extent to which the wetlands and trees on the southern boundary of the Lake provided a valuable habitat for woodstorks and other wading birds is evident. Homeowners Exhibit 5, p. 8-21 (R. pp. 1488 – 1501) demonstrates the

encroachment of saltwater tides on the North property. In Homeowners Exhibit 63, photographs taken 4 ½ years after the breach of the dike, fully demonstrate the “alteration” of the area from a freshwater habitat to a mud flat. (R. p. 1681 – 1688)

DHEC adduced evidence that the area was Lake was in the process of “naturalizing” and that saltwater vegetation such as cord grass was growing in and around the boundary of the Lake. (R. pp. 1190, line 6– 1193, line 13; R. p. 1889; R. p. 1197, line 20– 1198, line 5). 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 prior to the break in the dike show no such vegetation. (R. pp. 1414 - 1417).

The ALC incorporated verbatim into its Final Order certain findings of fact proposed by Cat Island and found that the Lake was actually a salt marsh prior to the break in the dike and that no alteration would result from the Retrofit Project. This ALC finding conflicts with the formal designation of the wetlands by the Corps of Engineers, which is mandated by Federal law to delineate wetlands. The finding also conflicts with Cat Island’s engineer’s testimony and the admissions of DHEC personnel cited above.

To substantiate its finding that the Lake was a salt marsh prior to the break in the dike, the ALC noted that Mr. Madlinger testified that Homeowners’ Exhibit 63 (R. p. 1681 – 1688) showed the presence of smooth cord grass, which is salt marsh vegetation. However, the photographs in Exhibit 63 were taken on January 10, 2014, more than 4 ½ years after the dike failed and the

lakebed was daily inundated with saltwater.

The ALC further relied upon the testimony of Blair Williams that the Lake had a “degree of salinity where there is saltwater vegetation”. However, the record is clear that Mr. Williams saw the Lake when it was already “an exposed mudflat” (R. p. 1249, lines 1-5), and that the Lake had been receiving a constant flow of saltwater since the dike washed out (R. p. 1249, lines 14-17).

Mr. Williams had not been aware that the Corps had delineated the four wetlands along 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. (R. pp. 1275, lines 17- 1276, line 19; R. p.1962; R. p.1963). When told that there had been a formal determination by the Corps, Mr. Williams requested to see it. (R. p.1276, lines 13-20). When asked if he would accept a determination by the Corps that the wetlands were freshwater wetlands, he said that he would. (R. p.1278, lines 8-19).

Cat Island suggested that, because the area was presumably a salt marsh before the creation of the Lake more than fifty years ago, that returning it to that state is not an “alteration”. Despite what it was or was not in the 1960s, the fact remains that for over 50 years the Lake and surrounding wetlands have been freshwater in nature and that the habitat it created for vegetation and wildlife existing in and around it will be permanently altered as the result of the Retrofit Project in violation of the CMP.

By choosing not to repair the dike, the Developer has caused the

freshwater wetlands protected by the 1995 Covenants, as well as all of the freshwater wetlands identified by the Corps adjacent to the Lake, to be flooded with tidal waters.

The “naturalizing” of the wetlands that Cat Island adduced evidence at trial to establish is, accordingly, an alteration of freshwater wetlands. Whether this “naturalization” is a positive or negative event, depending on one’s point of view, there is no question that it violates the CMP’s policies that no wetlands, whether fresh, salt or brackish, should be “altered”.

It is undisputed that the Retrofit Project will result in alteration of those freshwater wetlands identified by the Corps and by those specifically protected by the 1995 Covenants. Accordingly, the project violates the requirements of the CMP and it was erroneous for the ALC to approve coverage by the General Permit and to approve the issuance of a Consistency Determination.

8. The ALC erred in approving the Retrofit Project when it would result in eliminating proper stormwater treatment for an adjacent site in violation of the CMP.

It was undisputed by DHEC that Tabby Park subdivision, an area adjacent to the site of the Retrofit Project, was required to meet the stormwater treatment regulations currently in effect. (R. p. 750, lines 13-22). It was further undisputed by DHEC that, prior to the breach of the dike, the Lake detained the stormwater of Tabby Park, which was within the drainage basin of the Lake. (R. p. 612, lines 19–23).

As set forth in the CMP, in the coastal zone “storage” and gradual release of stormwater is required. Mr. Geer testified that the “definition of

detention is to store the water and have a controlled release of that water". (R. p. 603, lines 8-17). He testified that the required controlled release comes from "some kind of structure". (R. p. 603, lines 18-22). Although Mr. Geer viewed the lagoons on the golf course adjacent to Tabby Park as sufficient, he agreed that, if they did not detain, then Tabby Park would need some other form of stormwater treatment. (R. p. 752, lines 12-16).

The Homeowners' engineer, Mr. Moore, testified that there is no structure detaining the Tabby Park stormwater other than the Lake with the dike in place. (R. p. 1327, lines 6-18; R. p. 1370, lines 11-16). The Cat Island engineer conceded that there was no detention structure which would detain and release the Tabby Park stormwater at a controlled rate and that, in order to detain as defined in the regulations, any such structure 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. (R. p. 1054, lines 2-20).

Although the ALC found that pipes, earthen spillways, vegetation, matting or rock cover, serve as detention structures and allow for controlled release of stormwater runoff, that finding is completely contrary to the expert testimony of both Cat Island's engineer and the Homeowners' engineer and wholly inconsistent with the applicable regulations, including the definition in S.C. Code Reg. 72-301 of a "detention structure". (R. p. 15).

Tabby Park was within the coastal zone and it was agreed by all parties that its stormwater had to be treated through storage and gradual release. Without the Lake and dike that had previously served that function, there was

no other “detention structure” that could serve that purpose. For the ALC to approve the Retrofit Permit and the Consistency Determination, which would leave Tabby Park without any effective stormwater treatment at all, was error and contrary to the both the stormwater regulations and the Policies of the CMP.

9. The ALC erred in failing to order the 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.

OCRM acknowledges that the 2004 permit for stormwater treatment by use of the detention provided by the lake is still in effect. (R. p. 634, lines 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. (R. p. 688, lines 17-20). The Homeowners 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. (R. p. 1567). When OCRM staff

failed to do so, the Homeowners asked the DHEC Board to order the repair. (R. p. 1628). When the DHEC Board failed to do so, the Homeowners asked the ALC to review that decision and to order the repair. (R. p. 41). That issue was before the ALC for decision. Under the facts presented, the failure of the ALC to order the repair was error.

The ALC 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 Consistency Determination. The ALC 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 Stormwater Act and its regulations. The failure to make these findings and to direct DHEC to order the immediate repair of the dike under the existing maintenance agreement was error.

CONCLUSION

In order to effectuate the financially motivated objectives of the Developer and Cat Island, DHEC took a myopic view of the scope of the Retrofit Project, tortured the language of relevant regulations, and completely ignored others. Rather than require the Developer to maintain and repair a permitted stormwater treatment system in accordance with its maintenance agreement, DHEC dithered and the Developer delayed. It has now been almost five years since the dike failed and the pristine waters and shellfish beds within the

coastal zone have received untreated stormwater from a large drainage basin, including portions of a golf course. The property of the Homeowners has been subjected to saltwater tides and their economic and aesthetic interests harmed.

The overriding policy of the Coastal Management Plan is clear: “to protect and conserve coastal land and water areas”. Stormwater runoff in the coastal zone is to be strictly managed. The value and enjoyment of property owners is to be a legitimate concern. Environmental impacts are to be minimized.

Instead of observing these policies, DHEC found and the ALC condoned reading the clear requirements of the CPM with respect to the mandatory “storage” of stormwater in the coastal zone as merely “permissive”. DHEC approved and the ALC condoned modification of an existing stormwater permit without any evidence that the regulatory requirements to modify it had been met. In order to approve the Retrofit Project, DHEC had to waive even the more lax water quality standards applicable outside the coastal zone and the ALC affirmed that action as appropriate. The ALC found that the proposed Retrofit Project did not trigger a critical area analysis under § 48-39-150 as well as the CMP when the Consistency Determination signed by Mr. Geer stated in two places that a critical area permit was required. The damage to the Homeowners was not factored into DHEC’s analysis or that of the ALC. They chose to limit the consideration of adverse consequences to those arising from stormwater, rather than the Retrofit Project as whole, in spite of clear regulatory language otherwise.

The ALC approved the treatment of stormwater within 1,000 feet of shellfish beds by inline filters instead of the retention required by the CMP and approved the Retrofit Project even though DHEC and the Cat Island engineer acknowledged that areas designated by the Corp of Engineers as freshwater wetlands and those protected by specific Covenants would be inundated with tidal waters in violation of the CMP and the Covenants. The ALC's Order sanctioned leaving Tabby Park subdivision without a detention structure to treat its stormwater.

Under the applicable statutes and regulations, DHEC is charged with exercising independent judgment with respect to whether or not a proposed project meets the requirements imposed. In this case, DHEC simply abdicated that responsibility and rubber-stamped what the Developer and Cat Island chose to do, without regard to the oversight it is intended to exercise. The statutory and regulatory mechanism put into place by the legislature to protect the environment and the interests of other property owners achieves nothing if DHEC does not fulfill its mandate.

In approving DHEC's action, the ALC relied upon findings of fact not supported by the record, accepted DHEC's flawed interpretation of specifically imposed requirements and failed to apply those which would preclude approval of the Retrofit Project.

For all of the reasons set forth above, the Homeowners respectfully request that the Court reverse the Order of the ALC and find, on the basis of the clear facts in the record and the applicable law and regulations that (a)

there is no sufficient basis to authorize a change in the current stormwater treatment system to one less efficient and more damaging to the environment and to the Homeowners, (b) under the facts and the law, the Retrofit Project cannot comply with the mandatory requirements of the Stormwater Act and the CMP and is not entitled to the issuance of the necessary Consistency Determination, and (c) DHEC should have ordered the Developer to repair the approved stormwater treatment system for Garfield Park.

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, Appellants,

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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,

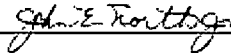
v.

SCDHEC.....Respondent.

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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.

A handwritten signature in cursive script, appearing to read "John E. Fortberg", is written above a solid horizontal line.