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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control ..... Appellants,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control..... Respondents.

RECORD ON APPEAL
VOLUME II OF VII

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- Stating "[w]e are for developing all 65 acres [of UPT] for non-maritime use" and that "our proposal is better than" the Ports Authority's redevelopment plan.
    - Ex. 17, Margot Rose E-Mail, Cruise Opponents 005685 (emphasis in original).
- Stating that "[b]ottom line, ***using [UPT] for a cruise terminal***, keeping 27 acres off the tax rolls, in surface parking ... ***is a gross misuse of state assets***."
    - Ex. 18, Dana Beach E-Mail, Cruise Opponents 006848 (emphasis added).
- Stating that "redevelopment of [UPT] is Charleston's BIG opportunity to make a huge change for the better ... We shouldn't squander it for a cruise terminal."
    - Ex. 19, Katie Zimmerman E-Mail, Cruise Opponents 008026.
- Stating that "[w]e are particularly interested in the potential for **redeveloping the entire tract privately**, instead of simply the lower 35 acres".
    - Ex. 21, Dana Beach E-Mail, Cruise Opponents 008502 (emphasis added).

Thus, Cruise Opponents—by their own words—make clear that they are using the ALC as a proxy to wage a larger challenge to the policy and business decisions made by the Ports Authority.[25] Trying to first force DHEC, and now this Court (and subsequently the appellate courts), into a position where they are second-guessing the policy and business decisions of the Ports Authority is exactly the reason the political question doctrine exists. See Segars-Andrews, 387 S.C. at 121-22, 691 S.E.2d at 460.

[25] But see S.C. Code Ann. §§ 54-3-110 ("Through the [Ports] [A]uthority the State may engage in promoting, developing ... and operating the harbors and seaports within the State, namely Charleston ... and works of internal improvement incident thereto."); -120 (stating that the jurisdiction of the Ports Authority "extend[s] over the waters and shores" of any harbor or seaport within the State); -130 ("The Authority is created as an instrumentality of the State for the accomplishment of ... develop[ing] and improv[ing] the harbors or seaports of Charleston [and] foster[ing] and stimulat[ing] ... commerce through such ports.").

At bottom, this contested case has *never* been about the merits of a permitting decision. Instead, this contested case is a stall tactic that the Cruise Opponents are using to try and address and leverage the political question of the appropriate use and development of the Ports Authority's UPT. See, e.g., Ex. 22, Kirkland Grant E-Mail, Cruise Opponents 003661 (declaring that "if SPA interested [sic] in not affecting cargo operations, then maybe they will settle for regulation ... of cruise business"); Ex. 23, Katie Zimmerman E-Mail, Cruise Opponents 005280 (stating "[w]e will get regulation.... At some point, too, the SPA is going to realize that they would get a lot of us out of their hair if they just compromised ... we all keep the pressure up, it WILL happen"); Ex. 24, Jay Williams E-Mail, Cruise Opponents 008473 (stating that the goal of litigation is to get Carnival and the Ports Authority to the "negotiating table"); Ex. 25, Katie Zimmerman E-Mail, Cruise Opponents 009231-32 (opining that litigation surrounding the former North Charleston Naval Base terminal successfully caused Jim Newsome, Ports Authority president, to acquiesce to their demands and that the situation with the UPT is analogous). In other words, Cruise Opponents acknowledge that this Court is not in a position to supply a judicial solution to their political question, and thus this case is not justiciable.

CONCLUSION

Cruise Opponents have failed to meet their burden of proving standing to challenge the DHEC Permit. All three elements of standing are lacking, as Cruise Opponents have failed to allege an actual or imminent injury-in-fact, the harm alleged is not traceable to the permitted activity giving rise to this contested case, and the "injuries" sustained by Cruise Opponents are not redressable by a decision of this Court. Further,

Cruise Opponents have failed to clear the additional justiciability hurdle imposed on organizations wishing to bring causes of action on behalf of their memberships. Finally, even if this Court decides Cruise Opponents have standing to bring this contested case, the Court should dismiss the action on the ground that the issues presented amount to a non-justiciable political question that have been vetted and decided by the appropriate branch of government and are therefore inappropriate for judicial review. Cruise Opponents' Response charts no new territory and falls woefully short of establishing standing to bring this action. Accordingly, this Court should dismiss this case for lack of standing or, alternatively, dismiss this case as a non-justiciable political question.

Respectfully submitted,

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August 19, 2013

Honorable Ralph King Anderson, III
Chief Judge, S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, SC 29211

Re: Preservation Society of Charleston, et al. v. S.C. State Ports Authority & SCDHEC; Docket No. 13-ALC-07-056-CC

Dear Judge Anderson:

Enclosed for filing please find the Petitioners' Sur-Reply to Motion for Sanctions, along with my Certificate of Service and filing fee. Due to timeliness, Petitioners attached copies of the affidavits and will file the originals with this Court upon receipt.

Please return a clocked-in copy in the self-addressed, stamped envelope provided.

Thank you very much for your kind cooperation and assistance.

Yours very truly,

Jessie A. White

cc: Brad Churdar, Esquire
Randolph Lowell, Esquire
Jefferson Leath, Esquire
Philip L. Lawrence, Esquire
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' SUR-REPLY TO MOTION FOR SANCTIONS**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

Petitioners hereby submit this Sur-Reply to the South Carolina State Ports Authority's ("SPA") Reply to the Response to the Motion for Sanctions.

INTRODUCTION

Following the DHEC staff decision granting a critical area permit and coastal zone consistency certification to SPA for the construction at Union Pier at issue in this case, the Petitioners requested that the DHEC Board conduct a final review conference. On January 10, 2013 the DHEC Board declined to hold a final review conference. In response, on February 11, 2013, the Petitioners filed a request for contested case before this Court. Also in response, and due to the significant lack of evidentiary background and inadequate conclusory findings contained in

the DHEC staff decision, the Petitioners filed a motion for remand to the full DHEC Board for review. SPA filed a response on March 14, 2013 and by Order dated May 3, 2013, this Court denied the Petitioners' motion for remand. On July 1, 2013, SPA filed this motion for sanctions. The Petitioners' filed a response on July 26, 2013 and SPA filed a reply on August 6, 2013.

I. SPA MISUNDERSTANDS THE PURPOSE OF THE PETITIONERS' MOTION FOR REMAND

The purpose of the motion to remand was to encourage DHEC to utilize its technical expertise under S.C. Code Ann. Section 44-1-60(F)(2) to more thoroughly investigate the impacts of the SPA's proposal for construction of a new cruise terminal at Union Pier. As stated in the introduction of Petitioners' response: "Petitioners are and were concerned about the effect of the [DHEC] staff's inadequate investigation and conclusory findings, lacking in evidentiary background and support." Response, 5. Contrary to SPA's arguments, what Petitioners sought in filing the motion to remand, and what Petitioners have been requesting since initiation of this permitting process, was for SPA and DHEC to truly take the time to consider the concerns raised by the residents, businesses and tourists of Charleston and to fully evaluate feasible alternatives which could avoid or mitigate these concerns.

As SPA continues to point out, this Court denied the motion for remand by Order dated May 3, 2013. However, simply because the motion was denied, it does not follow that the motion was filed frivolously as suggested by SPA. This Court ruled on Petitioners' motion for remand and that this Court did not rule in Petitioners' favor does not support SPA's theory that the motion was filed frivolously or for purposes of delay. The Petitioners point to the fact that this Court issued a detailed six page Order denying remand wherein this Court took the time to analyse the competing

sections of the statutory language, demonstrating an implicit recognition of the ambiguities in the statutory sections dealing with DHEC board review. In its reply, SPA condescendingly dismisses the time and effort this Court put into ruling on Petitioners' motion and trudges forward continuing to insist upon sanctions. Reply, 5.

SPA argues that Petitioners' quotation of *Kiawah Development Partners v. DHEC,* Op. No. 27065 (filed Feb. 27, 2013) (Shearouse Adv. Sh. No. 9) (rehearing granted, pending), affirming that if DHEC declines to conduct a final review conference then the 'staff decision [becomes] the agency decision' undercuts any basis that the Cruise Opponents could argue that a failure to conduct a final review conference is unlawful." Reply, 8. First, the Petitioners' response references *Kiawah Development* in support of its argument that remand to the full DHEC Board is reasonable in light of the deferential treatment an agency decision receives by the courts. Response, 4-5. Second, the Petitioners' have not argued that it was unlawful for this Court to deny remand. As explained further below, the Petitioners filed the motion for remand due to the fact that DHEC's staff decision lacked consideration of cumulative impacts and an evaluation of alternatives to minimize impacts; that the agency decision will receive deferential treatment by the courts; and that ambiguity exists in the interpretation of the statutory sections concerning review by the DHEC Board. SPA completely misunderstands the Petitioners' goal in seeking remand—it was not sought to receive information from DHEC, but for the agency to consider and apply the information that was presented during the public permitting process regarding impacts and feasible alternatives to this project and for the agency and the public to receive information from SPA related to those issues.

The Petitioners filed the motion to remand shortly after requesting a contested case because

DHEC is the agency charged with the authority to review impacts on environmental quality and public health from a proposed project. See S.C. Code Ann. §§ 48-1-100, 48-39-50. It is true this Court conducts contested cases *de novo*, but DHEC is the sole agency authorized by the General Assembly to make permit decisions, and the General Assembly specifically recognizes DHEC's "specialized knowledge," S.C. Code Ann. § 44-1-60(F)(2), and its "technical competence," S.C. Code Ann. § 1-23-330(4). The point of remand is for DHEC to use its specialized and technical expertise in considering information that it did not adequately consider in the first place, not for the Petitioners to receive new information from DHEC as SPA claims.[1] The Petitioners argue that DHEC failed to fully exercise its specialized knowledge and technical expertise before issuing a decision on the proposal, and it was unable to do so in part because SPA did not provide information requested by DHEC. Therefore, it was reasonable and appropriate for Petitioners to ask that DHEC be given the opportunity to fully assess the far-reaching impacts of this project and to, subsequently, provide this Court with a properly evaluated permit for its own review.

It is correct that this Court renders a decision *de novo* based on the facts and law presented. But the Petitioners assert that SPA has not been forthcoming in presenting the facts, that DHEC and SPA have not fully evaluated the facts, and that, accordingly, DHEC should undertake the cumulative impacts assessment and review that is required, but which it failed to undertake. The Petitioners' motion for remand was merely one out of many attempts to have DHEC follow the law and consider the numerous concerns raised by members of Petitioner groups and the public

[1] In any case, information sought by Petitioners would not be from DHEC, but from SPA. There is a significant lack of data supporting SPA's conclusion that Union Pier is the best, and the only feasible, option for construction of a new cruise terminal; that there are no less damaging methods and practices available at Union Pier; and that mitigation is not warranted because the potential impacts from construction of this new cruise terminal are minimal. This evidence is precisely what DHEC is required by law to consider in making a decision on a permit, yet failed to do in this case. And this is at the very heart of Petitioners argument in bringing this contested case—Petitioners will support their position with evidence and testimony at the hearing on the merits.

who will be experiencing the impacts of this project first hand.

In sum, SPA points to nothing that actually shows the motion to remand was intended solely to "delay" or "harass." The motion was filed at the very start of this case with the purpose of having the DHEC Board directly assess the cumulative impacts outside the critical area, as directed twice by the South Carolina Supreme Court in *Kiawah Development Partners v. DHEC & SCCCL*, Op. No. 2705 (filed Nov. 11, 2011) (Shearouse Adv. Sh. No. 41) (rehearing granted); Op. No. 27065 (filed Feb. 27, 2013) (Shearouse Adv. Sh. No. 9) (rehearing granted, pending).

II. SPA'S REPLY MISCHARACTERIZES THE GOALS AND OBJECTIVES OF PETITIONERS

The isolated statements quoted in SPA's reply mischaracterize the ultimate message that was intended and misrepresent the position that the Petitioners have advocated since SPA initiated this permitting process. Moreover, these statements are entirely irrelevant to the legal merits of the Petitioners' motion for remand. Most of these statements were made prior to initiation of this contested case and the motion for remand and, thus, could not possibly speak to the Petitioners' intentions as to the motion to remand. It is simply not possible that these statements were part of a "litigation strategy" one to two years before there was a permit decision, much less any litigation. See Exhibit A, Affidavit of Dana Beach, 2. In 2011 and 2012, Petitioners were still hopeful that a thorough study and analysis with alternatives to minimizing or mitigating environmental harms would be conducted and the appropriate conditions incorporated into the permit. Id. And even the two statements which were made after initiation of this case are factually sound and nothing more than informational updates provided to members of Petitioner groups. See Exhibit B, Affidavit of Carrie Agnew, 2.

SPA accuses the Petitioners of "selective reading" of statutory law, yet asks this Court to selectively consider new evidence in the form of email snippets plucked from their full context and without meeting the evidentiary standard. Petitioners have moved to have the email exhibits and references thereto contained in SPA's reply stricken to prevent these hearsay statements from becoming part of the record in this case; however, in the event this Court allows this evidence, Petitioners will clarify the misconceptions asserted by SPA.

SPA seeks to have this Court impose sanctions because the Petitioners' motion for remand was supposedly one of the pawns in Petitioners' overall strategy to "delay" and "harass" SPA.[2] In its reply, SPA then launches into a calculated list of statements gathered from various individuals with varying connections to the Petitioner groups. At no point does SPA introduce who these individuals are, to whom they are making these statements, why they are making these statements, and their authority to represent the positions of the Petitioner groups. Upon looking at the context in which these statements exist and reading their entirety, it is clear that they are irrelevant to the matter before this Court. These email snippets are cited by SPA to intentionally threaten and intimidate Petitioners for having a spirited dialogue surrounding a large-scale project with substantial ramifications and for raising serious questions about how the impacts from this proposal for a new cruise terminal will be effectively managed. SPA intentionally mischaracterizes the goals and objectives of Petitioners in its reply.

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[2] Petitioners assert that when it comes to harassment, a close look at who is doing the harassing is warranted. Here we have a state agency that is attacking citizens for desiring to protect the quality of their neighborhoods and their health. This motion for sanctions is an obvious attempt to chill litigation and discourage concerned citizens from participating in a decision-making process that directly affects them. Further, in its reply, SPA claims that it is clear that the Petitioners are just "angry Cruise Opponents" with a motivation other than the proper adjudication of this case. Reply, 5 FN 2. The only thing that is clear in this case is that SPA is the one who is angry at concerned citizens for challenging its proposal for a new cruise terminal. SPA's language is telling: anyone who dares challenge a state agency's decision is undoubtedly an "obstructionist." Reply, 13.

The Petitioners have continuously asked SPA to demonstrate that it considered alternatives to its proposal for Union Pier that would mitigate and address the legitimate concerns of the public, including, without limitation, evaluation of alternative locations, the use of shore side power and the feasibility of off-site parking. See Exhibit B, Affidavit of Carrie Agnew, 2. However, SPA has consistently refused to provide any such information or conduct any such review, evading the questions posed by DHEC during the permitting process and thumbing their noses at the pleas of members of Petitioner groups and members of the public for seeking an honest discussion, let alone an actual response. Id. The Petitioners have tried to engage SPA in an open forum on numerous occasions in an effort to ensure SPA is taking their concerns into consideration and to obtain studies or any evidence at all that SPA has conducted a long-term impact assessment and feasibility analysis as required by law. See Exhibit A, Affidavit of Dana Beach, 2. The emails attached to SPA's reply are the result of SPA's refusal to conduct a full, thorough study of impacts and alternatives—something that, to this day, has still not been done.[3] Rather than address public concern, undertake an impact analysis, including feasible alternatives, and provide documents supporting Union Pier as the best, and the only, option for future cruise operations out of Charleston, SPA continues to bully the Petitioners for trying to protect their community and quality of life by threatening and then filing this motion for sanctions.

Members of Petitioner groups living and working in Charleston have expressed serious health and quality of life concerns throughout the permitting process. They have publicly put forth their

[3] If there has been delay here, it has been as a consequence of SPA's own actions, or inactions. Had SPA gone forward with its proposal for a new cruise terminal by engaging DHEC and the public in the full impacts and alternatives analysis as required by law, then this "delay" never would have happened. But instead, SPA has remained bent on constructing the new terminal at Union Pier as-proposed, notwithstanding the serious concerns raised by the members of the public who will be most impacted by this project.

personal experiences and the impacts they have felt from cruise operations in Charleston, giving DHEC and SPA indisputable proof that their concerns are real and that, if they are to be mitigated or minimized, a full analysis of impacts and alternatives is necessary. The Petitioners have consistently stated that construction at Union Pier should only follow proper evaluation of all impacts and alternatives, going as far as providing some possible mitigation measures. This is far from opposing all cruise operations in Charleston as SPA relentlessly asserts.

SPA argues that Petitioners "condemn themselves with their own words" by quoting such statements as: "Unless the terminal is put on hold, any study, biased or not, is irrelevant", and, "No 'breaking news this time.....but we have helped slow down the process and this is having an impact!!" Reply, 4-5. Not only do these statements fail to support SPA's theory of "delay" and "harassment" when put into context, but also they further the Petitioners' argument that they have been advocating for a thorough, unbiased impacts and alternatives analysis all along and that they are merely hopeful that any such "delay" would lead to the undertaking of an analysis and a consideration of their concerns rather than having this terminal forcefully imposed upon them. See Exhibits A and B, Affidavits of Dana Beach and Carrie Agnew. Every day that the terminal is not constructed is another day when SPA could actually take a hard look at alternatives to minimize and mitigate the significant impacts flowing from this massive project, and implement measures to protect the citizens and resources of historic Charleston that it will affect.

The Petitioners believe that SPA's introduction of this new evidence in its reply is improper and therefore unworthy of much further comment. Nevertheless, the Petitioners will address a few of these statements to demonstrate to this Court how SPA has misconstrued them.

SPA's reply attributes three statements to Dana Beach. Reply, 4. As an initial matter,

Petitioners would point out again that each of these statements were made in 2011—very early on in this process and well before initiation of the relevant legal proceedings. Further, one of these statements—regarding lawsuits being put on hold in exchange for SPA engaging in a comprehensive planning process—was incorrectly attributed to Dana Beach. Reply, 4; see Exhibit A, Affidavit of Dana Beach, 3. These hearsay statements are wholly unrelated to Petitioners' motion for remand. SPA quotes Dana Beach stating that "it would be great" to bring a nuisance action based on the soot deposits from cruise ship emissions. Reply, 4. Looking at the larger context in which this statement was made, it is clear that it was part of a general discussion between concerned citizens who had personally experienced soot being deposited on their properties and who were interested in understanding the risks this posed to their health and the integrity of their historic community. See Exhibit A, Affidavit of Dana Beach, 3. Dana Beach's statement about a nuisance suit was the result of brainstorming between individuals facing the real consequences of unregulated cruise operations in downtown Charleston upon learning of a new study demonstrating the correlation between smog and brain inflammation and Alzheimer's Disease.

As previously stated, the second statement attributed to Dana Beach was actually not his statement at all. Dana Beach explains that the statement comes from a draft op-ed written by Hugh C. Lane, Jr. and published in the Post and Courier on July 24, 2011. Id. He had simply copied the text of this draft op-ed into an email, which he then sent to fellow staff members of the Coastal Conservation League ("CCL") because Mr. Lane desired third-party proof-readers before submitting his work to the public newspaper. Id. Put into context, it is ridiculous that SPA attempted to use this as evidence in its reply. And SPA's quotation of the third statement by Dana Beach in its reply is equally perplexing. Dana Beach is quoted saying that: "Unless the terminal is

put on hold, any study, biased or not, is irrelevant." Reply, 4. One hardly even needs the context to understand this statement for the plain words are obvious on their own. CCL, along with the other Petitioner groups, desire that an impact analysis and feasible alternatives evaluation be conducted with regard to construction of a new cruise ship terminal in Charleston. However, an impact analysis and feasible alternatives evaluation would be futile if the new cruise ship terminal is already built. See Exhibit A, Affidavit of Dana Beach, 3. This is a simple fact and has no bearing whatsoever on the merits of Petitioners' motion for remand.

SPA also pulls statements that Carrie Agnew made in email updates to the membership of Petitioner group Charleston Communities for Cruise Control ("C4"). Reply, 4; see Exhibit B, Affidavit of Carrie Agnew, 2. Carrie Agnew explains that she regularly sends informational updates including statements such as those quoted by SPA and that these statements possess no hidden messages. See Exhibit B, Affidavit of Carrie Agnew, 2. That construction of the new cruise ship terminal at Union Pier is stalled due to pending litigation is an obvious result and Carrie Agnew's statements of these factual truths is less than noteworthy. Again, C4 is among the other Petitioner groups seeking an impact analysis and feasible alternatives evaluation. The Petitioners goal is not delay—their goal is a true consideration of impacts and assessment of alternatives and one method utilized by C4 in particular toward achieving that goal is raises public awareness and encouraging public involvement through its members. Id. It is true that a delay in construction of the new cruise ship terminal at Union Pier has been a consequence of the pending litigation, but to accuse Petitioners of scheming to intentional delay the process as a means to "harass" SPA and to "prevent cruise ship operations in Charleston" is a blatant mischaracterization of the Petitioners' objectives and is completely unsupported.

III. SPA'S REPLY IS AN ATTEMPT TO DISTRACT THE COURT

SPA's attack on the attorney affidavits attached as exhibits to the Petitioners' response is an attempt to distract this Court. SPA claims that the affiants "purport to tell the Court what the result of the motion should be" in an effort to undercut the legitimate purpose in which the affidavits serve. Reply, 10; *see Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). The affiants hardly tell this Court how it should rule, rather, they affirm that they are reasonable, experienced attorneys who have reviewed the statute and the subject motion to remand and who believe there was a basis for the motion. SPA even goes so far as to categorize the affidavits as "just another, unauthorized, petitioners' brief." If so, the Petitioners would ask how SPA categorizes its own motion for sanctions and reply wherein it introduced new evidence and essentially sought adjudication on the merits.

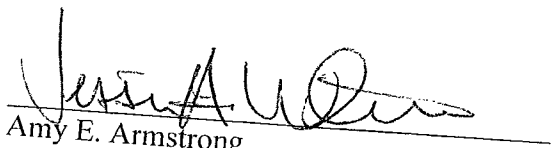
The *Dawkins* argument is simply not relevant to the question of whether Petitioners had a reasonable basis for filing the motion to remand. Setting aside *Dawkins*, here the attorneys Linton and Bouch reviewed the relevant statute, reviewed the motion, and as experienced attorneys testified as to their belief that the motion to remand was reasonable. The attorneys' opinion that there is patent ambiguity in the statute may be a legal opinion, but this Court already decided the motion to remand and the attorneys are not offering these opinions to re-argue the merits of the motion. The affiants merely offer that in each of their opinions as practicing attorneys, an ambiguity exists in the statute and that bringing the motion on that basis was reasonable.

CONCLUSION

The Petitioners maintain that no sanctions are warranted. SPA has used this motion for sanctions to threaten and intimidate the Petitioners for trying to protect their community and

quality of lives. SPA fails to provide any evidence that Petitioners' motion for remand was filed frivolously and, instead, floods its motion with excessive exhibits, evidence that is irrelevant to the matter currently before this Court, and baseless accusations that the Petitioners are harassing SPA and plotting delays. The Petitioners' motion for remand was a reasonable attempt to try to get DHEC to review, once and for all, the cumulative impacts and feasible alternatives to the SPA's proposal for a new cruise ship terminal. Therefore, Petitioners' respectfully request that this Court deny SPA's motion for sanctions.

Respectfully submitted,



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August 19, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing Petitioners' Sur-Reply to SPA's Reply to the Response to the Motion for Sanctions in the U.S. Mail addressed to:

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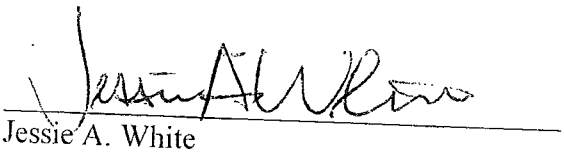

Jessie A. White

Georgetown, South Carolina

August 19, 2013

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-0056-CC **AFFIDAVIT OF DANA BEACH**

PERSONALLY APPEARED before me Dana Beach who being duly sworn deposes and says:

I am a property owner and resident of the City of Charleston, South Carolina. My home is located at 26 Gibbes Street, Charleston, South Carolina 29401.

I am also the Executive Director of the South Carolina Coastal Conservation League ("CCL"). Our office is located at 328 East Bay Street, Charleston, South Carolina 29401.

I am personally familiar with the facts and circumstances surrounding this case and I have personally reviewed the SC State Ports Authority's ("SPA") reply to the Petitioners' response to the motion for sanctions.

SPA took informal statements that I made and quoted them out of context in its reply. I have personal knowledge of these statements and I am competent to provide clarifying testimony as to their import.

Since the permitting process for expansion of Union Pier began, CCL has repeatedly and publicly requested that SPA conduct a long-term comprehensive analysis of the potential impacts of the project, including an assessment of feasible alternatives. However, SPA has consistently refused to do so.

CCL has been one voice among many expressing concern for the health and welfare of residents, businesses and tourists of Charleston without SPA demonstrating that it has carefully and thoroughly planned for mitigating the harms associated with expanded cruise operations. We have tried on numerous occasions to bring SPA to the table to openly and honestly discuss its proposal for Union Pier and to, hopefully, have our concerns taken into serious consideration. But SPA's unwillingness to cooperate and so much as acknowledge the reality of the concerns we raise has left CCL with little choice other than to join Petitioners in bringing the lawsuit before this court.

SPA pulled statements I made in emails between myself and other CCL members and Petitioner group members where we were generally discussing matters related to cruise operations and the port expansion in Charleston. It is clear by merely looking at the date of these emails that they have nothing to do with this lawsuit. A decision had not even been made on the permit yet, so my statements were obviously not made as part of some strategic lawsuit plan. Rather, the context of my statements and these emails involved a broad discussion between concerned residents and members of the public who would be affected by the permit, if issued, and who were focused on ensuring the permitting process properly served its purpose and produced the right result.

I am first quoted stating that I believed a nuisance suit based on soot deposition would be great. This statement was plucked from a series of emails discussing a recent study by the University of Southern California linking brain inflammation and disease to air emission pollutants. The public

permitting process was still underway and we were seeking additional information about the impacts of air emissions from cruise ships and the resulting soot deposits we had been experiencing on our homes and businesses. This study provided more evidence from around the country that medical problems are in fact associated with air emissions. While I believe the permitting process serves an important role, I also feel that the emissions and soot deposits from cruise ships create discrete impacts that rise to the level of nuisance. I brought up this idea of a nuisance suit because, in my opinion, such a course of action could be more effective in representing and redressing the specific injuries that individuals were suffering as a result of the cruise ship emissions and soot deposits. It is completely irrelevant to this lawsuit.

I am next quoted stating that lawsuits should be dropped in exchange for SPA waiting to go forward with the new cruise terminal until coming up with a long-term comprehensive plan. In fact, this is not even my statement at all. It comes from an op-ed by Hugh C. Lane Jr., published in the Post and Courier on July 24, 2011. I had emailed the draft to a few CCL staff members because we offered to look it over for Hugh before he submitted it to the newspaper. Therefore this statement is not only irrelevant to this lawsuit, but also incorrectly attributed to me.

Finally I am quoted stating that any study is irrelevant unless the terminal is put on hold. This statement is representative of the position I have publicly held during the entirety of the permitting process. We want SPA to conduct studies evaluating the impacts of expanded cruise operations at Union Pier and exploring the feasibility of alternatives and mitigating factors. Any such study will only be useful before the proposed work begins because they are meant to assist the applicant in formulating a comprehensive plan for the project that will accomplish the objective with the least adverse consequences possible. Obviously these studies would be meaningless if SPA has already completed the new terminal at Union Pier.

SPA, like any other applicant, has a responsibility to conduct a full analysis of the potential impacts associated with its proposal for an activity in the coastal zone affecting critical area. This means assessment of short-term impacts, long-term impacts, direct impacts, indirect impacts, cumulative impacts and all the feasible alternatives in order to identify adverse consequences and effectively mitigate or avoid as much harm as possible. SPA has never taken the time to conduct any studies or evaluations of impacts, let alone taken the time to explore the feasibility of alternatives. Instead it has insisted upon cramming its proposal for expansion of Union Pier "as is" down the throats of the residents, business and tourists who use and enjoy the city of Charleston and who will be most affected by the adverse consequences it will entail. We have been raising our concerns and personal experiences with SPA publicly for at least two years. We have repeatedly requested that SPA demonstrate that it has a comprehensive plan for its project based on an actual analysis of impacts and alternatives. But SPA has continued to ignore the concerns we raise and brushed off our requests for information, all the while pushing harder, more intently and more aggressively toward constructing its new terminal as proposed at Union Pier, and only at Union Pier.

Dana Beach

Dana Beach

SWORN TO before me this

19 day of Aug, 2013.

Notary Public for South Carolina (SEAL)

My Commission Expires: Aug. 21, 2016

Exhibit B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-0056-CC **AFFIDAVIT OF CARRIE AGNEW**

PERSONALLY APPEARED before me Carrie Agnew who being duly sworn deposes and says:

I am a resident of the City of Charleston, South Carolina. I am also the Executive Director of the Charleston Communities for Cruise Control ("C4").

I am personally familiar with the facts and circumstances surrounding this case and I have personally reviewed the SC State Ports Authority's ("SPA") reply to the Petitioners' response to the motion for sanctions.

SPA took statements that I made and quoted them out of context in its reply. I have personal knowledge of these statements and I am competent to provide clarifying testimony as to their import.

Since C4's initiation over two years ago, we have always sought evidentiary data and asked the SPA for details regarding their evaluation of impacts and alternatives to construction of a new cruise ship terminal. Specifically, we have requested that SPA make public any consideration given

to alternative site locations, the use of shore power by home port vessels, studies conducted showing potential impacts of the new terminal on the historic integrity of Charleston and how the new terminal will affect the lives of residents and destination tourists of the city.

We were exceedingly frustrated that even when SPA was directly asked these and other questions by OCRM following the initial public hearing, SPA continued to not provide any answers or even acknowledge the questions. They were granted the permit regardless. Hence C4's participation in this lawsuit.

C4's goal is to have the cruise industry in Charleston adhere to legally binding regulations. We would like to see the new terminal located in a more appropriate location given the small, congested and exceedingly historic nature of downtown Charleston.

Ultimately C4 wants cruise tourism to be a positive experience for everyone and not cause damage to Charleston's current status as a destination city. That does not help anyone. Charleston and the cruise industry both need to have positive benefits without losing the grace, charm and ambiance for which Charleston has received such renown.

SPA lifts single sentences from a larger message that I made in emails to C4 membership where I was providing informative updates on the status of the cruise ship project and the pending litigation associated with it. I regularly send our membership factual updates such as these and they serve no ulterior purpose other than to help our members stay current on what they believe to be an important issue, and the outcome of which will substantially affect them.

C4 believes that by virtue of this lawsuit, we may finally get answers to the questions we have been asking the SPA during this whole permitting process. It is our sincere hope that these questions will be addressed during the discovery process or at least the final hearing.

DA
fig 6

Our use of the phrase "Keep on keeping on" represents our ongoing effort to encourage members to continue to write letters to the editor, carry signs, etc. One of chief objectives is to keep this issue in the media and generate greater widespread awareness.

Yes, another lawsuit obviously means more delays. And we have made it expressly clear from the beginning that we want the SPA to provide answers and evidence demonstrating that it conducted a comprehensive analysis of the impacts and alternatives of its project, so why not just respond to our requests? We can only hope that these delays might make the SPA more willing to provide information.

This is all we have ever desired. If the information had been forthcoming two-plus years ago, it is doubtful we would be in this situation now and perhaps the new terminal would be under construction, either at the proposed site, or in our preference, at a different, more appropriate location.

Carrie Agnew

SWORN TO before me this

8 day of August, 2013.

Notary Public for South Carolina (SEAL)
Commonwealth of Massachusetts
My Commission Expires: County of Berk
Marcia M. Schlesinger
05-25-2018

ALC Form #110a

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Soc'y of Charleston, et al.

Petitioner

vs.

S.C. Dep't of Health and Envtl. Control and S.C. State Ports Authority

Respondent

SUBPOENA

Case No. 13 -ALJ- 07 -0056- CC

To: H. Brown Hamrick
Registered Agent, Disher, Hamrick & Myers Residential, Inc.
Name of witness being served

30 Broad Street
Address of witness

Charleston, S.C. 29401
City, State, zip

YOU ARE COMMANDED TO (check all applicable):

____ Appear and testify in the above-captioned case at the place, date and time shown below; and/or

X Produce the following items, at the place, date and time shown below:

See attached Exhibit A. Place: Willoughby & Hoefer, P.A., 930 Richland St., Columbia, S.C. 29201

Date/Time: 08/28/2013, 5:00 PM

Date and Location of Hearing:	Party Requesting Subpoena:
Date	Name
Location	Address
Time of appearance	Telephone

I CERTIFY THAT THIS SUBPOENA IS ISSUED IN COMPLIANCE WITH ALC RULE 22(A).

ISSUING ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER:

Randolph R. Lowell, Esq., 930 Richland St., Columbia, S.C. 29201, 803-252-3300

ISSUING ATTORNEY'S SIGNATURE AND TITLE (INDICATE WHETHER ATTORNEY FOR PETITIONER, RESPONDENT OR OTHER):

Randolph R. Lowell ____ Petitioner X Respondent ____ Other (specify)_____

S.C. Bar #: 16145 Date of issue: August 19, 2013

Exhibit A

1. All communications, documents, emails, letters, agreements, memoranda, notes, consultations, or correspondence related to the sale and conveyance of real property being known and designated as Unit B of 35 Hasell Street, Charleston, S.C. 29401 by and from
Franklin F. Labelle and Peggy J. Labelle
and pertaining to the condition of said real property, including, but not limited to, the State of South Carolina Residential Property Condition Disclosure Statement.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' REPLY IN SUPPORT OF MOTION TO STRIKE EXHIBITS ATTACHED TO SPA'S MOTION TO DISMISS FOR LACK OF STANDING**

The Petitioners submit the following reply in support of the motion to strike exhibits to the South Carolina State Ports Authority's ("SPA") motion to dismiss for lack of standing.

The majority of the twenty (20) exhibits attached to SPA's motion to dismiss do nothing to address standing. Instead these exhibits are used as a vehicle for SPA to present its view of contested facts and thus argue the merits of this case. SPA's motion to dismiss reply continues this trend by attaching an additional twenty-five (25) exhibits.[1] A total of 45 (forty-five) exhibits have now been supplied by the party challenging standing – none of them disproving the personal injuries alleged by the Petitioners, but rather doing nothing more than point to factual issues in dispute.

[1] The Petitioners intend for their motion to strike exhibits to incorporate exhibits attached to both SPA's motion to dismiss for lack of standing, as well as its reply. Filing an additional motion, when the arguments are the same, would unnecessarily prolong what should be a fairly straight forward question.

Tellingly, SPA fails to make reference to many of these exhibits in its motion or reply, and the exhibits that are referenced lack explanation of how they disprove standing, instead giving background information or arguing the contested facts of this case.

Standard in considering exhibits on a motion to dismiss for lack of standing

SPA puts forth a new standard for when exhibits should be included on a motion to dismiss for lack of standing: if they "tend to make the existence" of standing "less probable." (Response, p. 5). SPA cites no legal authority for this proclamation and the Petitioners have found none. SPA's suggestion that, on a motion to dismiss for standing, it can dispute sworn testimony from the Petitioners and thereby make standing "less probable" demonstrates its misapprehension of this Court's inquiry.

The "law is well-settled that at the pre-trial stage only a prima facie showing is required." Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993). "Courts will take as true the allegations of the nonmoving party and resolve all factual disputes in its favor." 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1351 (Supp.1995). Though allegations in the complaint are normally sufficient to determine whether jurisdiction exists, affidavits may be submitted to show jurisdiction. Springmasters, Inc. v. D & M Mfg., 402 S.E.2d 192 (Ct.App.1991). For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint,[2] and must construe the complaint in favor of the

[2] While the Administrative Law Court Rules differ from the Rules of Civil Procedure, for purposes of this motion, the Request for Contested Case Hearing is analogous to a complaint and initiates a proceeding in which the rights of the parties will be determined.

complaining party. Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975). "While a plaintiff must . . . ultimately support any contested facts with evidence adduced at trial, '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" Bennett v. Spear, 520 U.S. 154, 168, 117 S. Ct. 1154, 1164, 137 L. Ed. 2d 281 (1997) (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990)).

Thus, as the non-moving party, the affidavits of members of the Petitioner groups must be taken in the light most favourable to the Petitioners and any factual disputes – of which there are clearly many – must be resolved in favour of the Petitioners. Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996). SPA makes the mistake of thinking this is a contest of proof on the elements of standing, when in reality that contest is pre-decided in favor of the Petitioners. SPA simply cannot **disprove** the Petitioners' allegations and testimony at this stage. The exhibits are primarily aimed at the merits, yet "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 2206, 45 L. Ed. 2d 343 (1975).

The South Carolina Supreme Court issued an Opinion which is directly on point, yet conveniently excluded from SPA's filings. In Smiley v. DHEC, 374 S.C. 326, 649 S.E.2d 31 (2007), DHEC filed a motion to dismiss based on lack of standing. In response Smiley filed an affidavit setting forth standing allegations. The Supreme Court held that "Smiley's affidavit demonstrates that he has a direct stake in the permitting decision, and therefore he sufficiently alleges standing." Id. at 333. In other

words, an affidavit containing the necessary allegations is sufficient to withstand a motion to dismiss for lack of standing. The case before the Court is procedurally identical to Smiley. And identical to Mr. Smiley, the Petitioners in this case submitted affidavits demonstrating their personal stake in the permitting decision. See Exhibits A-E attached to Petitioners' Response. At this stage of the litigation, with a motion to dismiss pending, Petitioners, in addition to providing "pleadings,"[3] have also supplied the Court with affidavits to support their standing.

What SPA has done by attaching forty-five (45) is inject its view of the merits of the case into the standing argument. Many of SPA's assertions, by way of its exhibits, are in dispute and contradictory evidence will be presented at the hearing. Setting aside the fact that SPA fails to explain how these exhibits "tend to prove" anything, as the non-moving party the sworn statements in the affidavits must be taken in the light most favourable to the Petitioners. At this stage, as long as the Petitioners have made sufficient allegations of injury-in-fact resulting from the actions of SPA and DHEC, SPA cannot prevail on a motion to dismiss simply by disputing those allegations through exhibits. Smiley v. DHEC, 374 S.C. 326, 649 S.E.2d 31 (2007). As such, the exhibits are irrelevant and should be stricken.

Contrary to SPA's assertion, the Petitioners "real complaint" is that the exhibits relate to the merits of the case – not the question of standing – unnecessarily burdening this Court with contested facts that will be fully vetted at the hearing of this matter when the Petitioners will disprove many of SPA's assertions. SPA cites to Town of Arcadia Lakes v. DHEC, 2013 WL 2560529, Opinion No. 5095 (Ct. App. June 12, 2013) (cert. pending) that "each element must be supported in the same way

[3] Petitioners use this term to refer to the Request for Contested Case Hearing and Pre-hearing Statement that have been filed in this matter.

as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation." But then SPA ignores that the parties are still in the discovery phase and many months from a hearing and that the decision in Town of Arcadia Lakeswas issued **after** a hearing on the merits.[4] At this point, the Petitioners sufficiently alleged standing with affidavits from membership. SPA's exhibits cannot refute the assertions in those affidavits.

Source of exhibits is irrelevant and exhibits cannot be used to argue merits on a motion to dismiss

SPA believes that because its exhibits include documents from the DHEC file and documents from the federal administrative record in a federal suit pursuant to the National Environmental Policy Act, National Historic Preservation Act and the Rivers and Harbors Act, they must be admissible and considered by this Court. (Response, p. 2). The problems with this claim are twofold. First, none of the documents prove that Petitioners do not have standing, as none of the exhibits can disprove any of the sworn testimony presented by the Petitioners related to standing.

SPA's citation to "relevant evidence" is misplaced. Simply because evidence may be "relevant" under SCRE does not mean that it is admissible in this context. And just because it is relevant does not mean that it proves anything. Here, where the exhibits are used simply to dispute allegations made in the Petitioners' pleadings and affidavits (as opposed to proving an undisputed fact), they must be rejected because

[4] Similarly, the case of Bailey v. S. Carolina Dep't of Health, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), upon which SPA relies heavily, was decided after a hearing on the merits where the ALJ conducted a full vetting of the facts in dispute. Here, SPA asks this Court to skip over its fact-finding function of hearing and weighing the evidence and adopt without question the moving party's version of the facts.

those allegations must be taken in the light most favourable to the Petitioners.

Second, and more important, SPA, at this early stage, is arguing the merits of the case – the breadth and depth of this project and its impacts on members of the Petitioner groups will be fully developed at the merits hearing. At this stage, it is sufficient for the Petitioners to make allegations which are supported by affidavits. See Smiley v. DHEC, 374 S.C. 326, 649 S.E.2d 31 (2007).

Despite the fact that factual disputes must be resolved in favour of the non-moving party, none of the exhibits attached to SPA's motion refute the injuries alleged by the Petitioners, which go well beyond the "identifiable trifle" standard in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973).[5] And none of the exhibits refute the fact that but-for the permit at issue none of the Petitioners' injuries would occur. See Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (but-for analysis is all that is need to establish a causal connection).

In fact, some of SPA's exhibits support the Petitioners' asserted injuries. SPA is currently operating the terminal under a Memorandum of Agreement with U.S. Customs and Border Protection ("CBP"). (Exhibit 7 to SPA's motion). SPA makes contradictory statements about the permit at issue and its connection to continued cruise operations. The Affidavit of Peter Lehman (Exhibit 1 to Reply) asserts that cruise operations will continue regardless of whether this permit is affirmed or denied

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[5]Despite SPA's argument that SCRAP is inapplicable, the South Carolina Supreme Court cited SCRAP with approval in Smiley v. DHEC. **Error! Main Document Only.**The "identifiable trifle" standard was also re-affirmed by the Fourth Circuit. Friends of the Earth, Inc. v. Gaston Copper, 204 F.3d 149 (4th Cir. 2000): "the claimed injury 'need not be large, an identifiable trifle will suffice.'" 204 F.3d 149, 156, quoting Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). See also, Conservation Council of North Carolina v. Costanzo, 505 F.2d 498, 501 (4th Cir. 1974).

and that cruise operations "will not be affected by the location." See Exhibit 1 to Reply. Yet, SPA attached an exhibit to its initial motion in which it recognizes that the new terminal construction is necessary so that Union Pier terminal can comply with Federal Regulations and security requirements enacted after September 11, 2001. See Exhibit 1 to Motion, Ports Authority Joint Application. That exhibit contains SPA's statement that the "need for a new facility has become critical." Id. It explains that

> To address the requirements of new Federal regulations, in 2007 the SCSPA entered into a Memorandum of Understanding with US Customs and Border Protection (CBP) for the conditional approval of ongoing cruise operations on a trial basis. That conditional approval has been renewed on an annual basis with the understanding that an improved facility would be needed for continued operations.[6]

Id. at Bates # SCPA 000004.

Clearly, where there are factual disputes even among SPA's own exhibits, those exhibits should be stricken and this Court allowed to perform its fact-finding function at the merits hearing.

Contrary to SPA's assertion, Rules of Evidence, Rule 401 is not the only rule applicable in determining admissibility. Simply because documents may have some relevance to the issues on appeal does not mean they are automatically admissible. Rule 802 provides the important limitation that hearsay ("a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted") is not admissible, unless an exception applies. SPA asserts that the public records and admission against a party-opponents apply, but never explains what the admission is and mistakenly assumes that every document

[6] Given SPA's own statements in application, it is disingenuous for SPA to say that it could continue to accommodate and berth cruise vessels in its current location at Union Pier. It is not currently meeting federal regulations and security requirements. Petitioners contend as much and must be given the opportunity to prove that issue on the merits.

in an agency file automatically falls under the public records exceptions.

Based on SPA's course of conduct thus far, Petitioners are wary that SPA is attempting to have these exhibits made part of a record on appeal so as to cite those exhibits in appellate briefing, even though they have not yet gone through the proper procedures for admitting evidence by the Court.

SPA lists the exhibits from the DHEC file and then concludes that because those documents "were before DHEC staff while considering the Permit application" they will be admissible at the hearing of this matter.[7] In the eleven years that counsel for Petitioners has practiced before the Administrative Law Court, the parties have never been able to admit documents simply because they were in the DHEC file or considered by the agency in making a permitting decision. Those documents must still comply with the Rules of Evidence. Similarly, merely by being in the DHEC file does not mean they fall within either the regularly conducted activity or public records exceptions. SCRE, Rule 803(6) & (8). Letters sent to DHEC, a magazine article, maps of the project site and other documents that were not even prepared DHEC cannot possibly fall within those exceptions. See Motion Exhibits 9, 10, 17, 18, 20; Reply Exhibits 3, 8, 9, 12. Moreover, SPA's position about the "record" is contrary to its own view that this hearing is de novo.

SPA continues that because Petitioners attached exhibits to their request for contested case hearing, there is no reason for Petitioners to complain about the now 45 exhibits that SPA has put forth. SPA overlooks ALC Rule 11.D.(3)'s requirement that Petitioners' request for contested case hearing include a "copy of the written agency decision, order, letter or determination, if any, which gave rise to the request."

[7] Petitioners note that this statement is inaccurate because the OCRM Technical Review, Exhibit 9, was a document the DHEC created, not one that it considered in making its determination.

The attachments to Petitioners request were nothing more than a copy of the agency's decision, which they were required to file. Petitioners agree that there are documents from the DHEC file that "are relevant to the issues before the Court," i.e., whether the DHEC decision is in violation of the applicable laws, but that does not mean that they are properly included in a motion to dismiss for lack of standing.

SPA's argument is even more tenuous as to the U.S. Army Corps of Engineers' ("Corps") Administrative Record. While the exhibits from the Corps are at issue in a federal case initiated by some of the Petitioner groups involved in this contested case, that does not mean that those documents are automatically relevant or admissible in this proceeding. Those exhibits must also meet the requirements to be considered by the Court. But more importantly, at best all the exhibits do is indicate that there are factual disputes in this case. In sum, SPA is attempting to convert this motion to dismiss into a motion for summary judgment, despite major factual disputes that will be presented at the merits hearing of this case.

Actions in other courts, under separate statutes, regulations and/or common law theories, are irrelevant

SPA makes much of a filing in state court based on common law theories, attaching a complaint filed in federal court to its reply. It is true that some of the Petitioners are involved in one or more other case related to cruise ship operations and/or the construction of the proposed new terminal.[8] But each case has different laws or theories under which the parties are seeking remedies, and the groups are different in these cases. SPA apparently finds fault with some of the groups' willingness to try to protect themselves from an obstinate state agency's decision, in

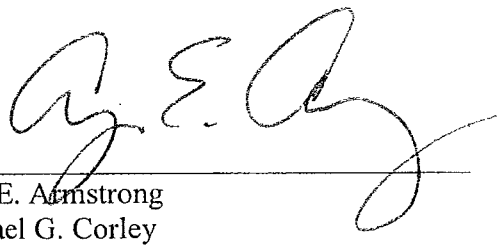
[8] In the state complaint, only Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, the Coastal Conservation League and the Preservation Society of Charleston are parties.

addition to seeking redress directly against the cruise operators. SPA got one thing right: there is a "recurring theme," but it is a consistent theme of citizens trying to protect their businesses, neighborhoods, health, use and enjoyment of the historic district of Charleston that is directly impacted by cruise operations at Union Pier terminal. Simply because some of the Petitioners are engaged in legal actions relating to other aspects of the activities occurring at Union Pier terminal does not foreclose their standing in an administrative challenge to a permit authorizing the construction of a new, expanded facility. And SPA's broader theory – that Petitioners lack standing to challenge an agency approval because any injury would be done by the party taking actions under color of that approval – is contrary to controlling law and common sense. If SPA were correct, no DHEC approval could ever be challenged. But see S.C. Code Ann. § 44-1-60.

CONCLUSION

Petitioners renew their request that this Court strike the merits-based exhibits that related to facts in dispute in this contested case proceeding and allow this Court the full opportunity to hear and decide the issues in dispute.

Respectfully submitted,



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Attorneys for the Petitioners

Georgetown, South Carolina

August 26, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' MOTION TO QUASH SUBPOENA**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

PLEASE TAKE NOTICE that the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control hereby move this honorable Court, pursuant to ALC Rules 19, 21 and 22.C and SCRCP Rules 26(c) of the South Carolina Rules of Civil Procedure, for an Order Quashing the Subpoena issued to H. Brown Hamrick, Registered Agent, Disher, Hamrick & Myers Residential, Inc., in the above case.

Respondent South Carolina State Ports Authority ("SPA") served a Subpoena on H. Brown Hamrick, Registered Agent, Disher, Hamrick & Myers Residential, Inc., on August 19, 2013, commanding production of documents. Specifically, SPA has requested communications

"related to the sale and conveyance of real property being known and designated as Unit B of 35 Hasell Street, Charleston, S.C. 29401 by and from Franklin F. Labelle and Peggy J. Labelle and pertaining to the condition of said real property . . ." A copy of the subpoena is attached. H. Brown Hamrick, Franklin F. Labelle and Peggy J. Labelle are not parties to this action and have not been named as witnesses by the Petitioners in this action.

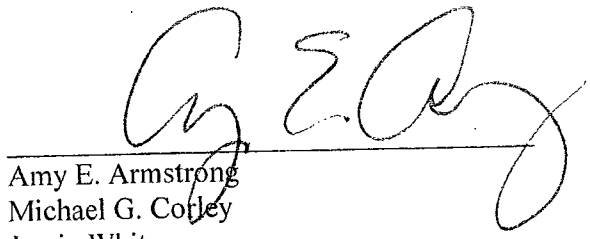
SCRCP Rule 26(b) limits discovery to matters "relevant to the subject matter involved in the pending action." When discovery would cause "annoyance, embarrassment, oppression or undue burden by expense" the Court may order that discovery not be had or that discovery be had only by a method of discovery other than selected by the party seeking discovery. SCRCP Rule 26(c). ALC Rule 22.C authorizes this Court to quash a subpoena. In the instant case, the subpoena should be quashed because (1) the information sought is not relevant to the subject matter involved and is not likely to lead to discovery of admissible evidence and (2) any relevant information can be sought through other methods, specifically through the requests for production, depositions of the named parties to this action or depositions of witnesses identified by the Petitioners.

The Petitioners can fathom no reason why a real estate agent's records related to the condition of a property is relevant to the subject matter involved or how that information could possibly lead to the discovery of admissible evidence. The subpoena is unduly burdensome and is clearly meant to annoy, oppress and harass the Petitioners. Such practices in ALC cases were recently rejected by the South Carolina Supreme Court in Oncology & Hematology Associates of S.C., LLC v. S. Carolina Dep't of Health & Envtl. Control, 387 S.C. 380, 692 S.E.2d 920 (2010). In Oncology & Hematology Associates the Petitioners filed motions to quash

subpoenas on the basis that the subpoenas sought material not relevant to the issues before the court and not likely to lead to admissible evidence. The Administrative Law Judge denied motions to quash. The Supreme Court noted that "[w]hile discovery serves as an important tool in the truth-seeking function of our legal system, we are concerned that 'discovery practice' has become a cottage industry and the merits of a claim are being relegated to a secondary status. 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (overturning Orders allowing discovery because the discovery was "abusive and beyond the pale"). The Supreme Court explained that "[a]lthough the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters." 387 S.C. 380, 388, 692 S.E.2d 920, 924-25 (2010).

The subpoena at issue will not lead to information that will aid in the resolution of this case and is not "reasonably tailored" to include only relevant matters. As such, the Petitioners respectfully request that this Court issue and Order Quashing the Subpoena issued to H. Brown Hamrick. The Petitioners further request that the Subpoena be stayed pending this Court's ruling on the motion.

Respectfully submitted,



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Attorneys for the Petitioners

Georgetown, South Carolina

August 28, 2013

ALC Form #110a

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Soc'y of Charleston, et al.

Petitioner

vs.

S.C. Dep't of Health and Envtl. Control and S.C. State Ports Authority

Respondent

SUBPOENA

Case No. 13 -ALJ- 07 -0056- CC

To: H. Brown Hamrick
Registered Agent, Disher, Hamrick & Myers Residential, Inc.
Name of witness being served

30 Broad Street
Address of witness

Charleston, S.C. 29401
City, State, zip

YOU ARE COMMANDED TO (check all applicable):

____ Appear and testify in the above-captioned case at the place, date and time shown below; and/or

X Produce the following items, at the place, date and time shown below:

See attached Exhibit A. Place: Willoughby & Hoefer, P.A., 930 Richland St., Columbia, S.C. 29201

Date/Time: 08/28/2013, 5:00 PM

Date and Location of Hearing:	Party Requesting Subpoena:
Date	Name
Location	Address
Time of appearance	Telephone

I CERTIFY THAT THIS SUBPOENA IS ISSUED IN COMPLIANCE WITH ALC RULE 22(A).

ISSUING ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER:

Randolph R. Lowell, Esq., 930 Richland St., Columbia, S.C. 29201, 803-252-3300

ISSUING ATTORNEY'S SIGNATURE AND TITLE (INDICATE WHETHER ATTORNEY FOR PETITIONER, RESPONDENT OR OTHER):

Randolph R Lowell ____Petitioner X Respondent ____Other (specify)_____

S.C. Bar #: 16145 Date of issue: August 19, 2013

Exhibit A

1. All communications, documents, emails, letters, agreements, memoranda, notes, consultations, or correspondence related to the sale and conveyance of real property being known and designated as Unit B of 35 Hasell Street, Charleston, S.C. 29401 by and from
Franklin F. Labelle and Peggy J. Labelle
and pertaining to the condition of said real property, including, but not limited to, the State of South Carolina Residential Property Condition Disclosure Statement.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the Petitioners' Motion to Quash Subpoena on Respondents SC State Ports Authority and SCDHEC by placing copies of same in the U.S. Mail addressed to:

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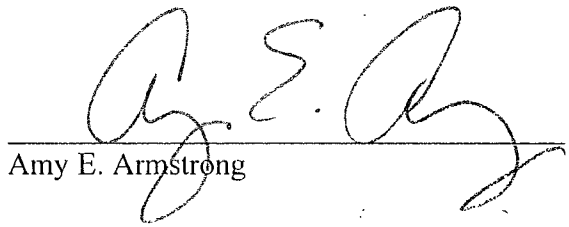


Amy E. Armstrong

Georgetown, South Carolina

August 28, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' MOTION FOR LEAVE TO FILE SUR-REPLY**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

The Petitioners hereby move this honorable Court for an Order granting leave to file the Petitioners' Sur-Reply to SPA's Reply to the Response to the Motion to Dismiss for Lack of Standing.

I. SPA'S REPLY GOES BEYOND THE SCOPE OF PETITIONERS' RESPONSE AND INTRODUCES NEW ARGUMENTS TO WHICH PETITIONERS SHOULD BE AFFORDED AN OPPORTUNITY TO RESPOND

SPA filed a motion to dismiss for lack of standing. Petitioners filed a response addressing the claims set forth in SPA's motion and put forth evidence demonstrating that the Petitioners have standing. SPA then filed a reply reply not limited to responding to the arguments raised by Petitioners' response, but raising entirely new arguments.

Administrative Law Court Rule 19 establishes the rules for motions practice in the ALC. That rule allows for a response and a reply to a motion. However, in this case, the reply of SPA introduces entirely new evidence and new arguments, going beyond being merely responsive to Petitioners' response. That is a clear violation of the rules governing motions practice and presents the potential for manifest injustices. See Eng'g & Mfg Servs. V. Ashoton, 387 F. App'x 575, 583 (10th Cir. 2010) (holding that court abused its discretion in not allowing a surreply brief to address new arguments presented in movant's reply brief); Baloch v. Norton, 517 F. Supp. 2d 345, 349 (D.D.C. 2007) aff'd sub nom. Baloch v. Kempthorne, 550 F.3d 1191 (D.C. Cir. 2008) ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply."); Palmetto Alliance, Inc. v. S.C. Public Service Com'n, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) ("The Commission properly limited the rebuttal evidence strictly to a reply to [the respondent's] evidence . . ."); see also State v. Huckabee, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010) ("Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief.").

SPA takes 38 pages – not including the attached exhibits – to discredit a handful of long-standing opinions that remain good and binding law in the courts of this state, as well as introducing new theories in support of its motion, thereby placing the Petitioners in an unfair position. The reply merely dismisses the affiants' testimony and the evidence put forth in Petitioners' response as "mere conjecture and speculation." Rather than reply to the Petitioners' demonstration they have standing under the legal tests applicable to and included in SPA's motion,

SPA seeks to present a new and more restrictive standing standard than any court has ever required and which wholly ignores the governing standard adopted by the South Carolina Supreme Court in Smiley v. S.C. Dep't of Health & Envtl. Control for establishing the elements of standing on a motion to dismiss, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007), relying instead on less-developed opinions such as Bailey, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010), and Town of Arcadia Lakes, Opinion No. 5095, which were decided after merits hearings.

In support of its newly presented legal theory, SPA introduces at least three new cases, which are strikingly distinguishable from the facts and circumstances of this case, in an attempt to reframe its arguments. Due to the serious inapplicability of these cases to the matter before this Court, Petitioners assert that a sur-reply is warranted.

For instance, SPA cites to Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1975), to claim that Petitioners lack standing because the challenged action is superseded by the actions of a third party not before this Court. Reply, 12. Under this new theory, SPA likens the construction authorized under the permit to a revenue ruling issued by the IRS affording certain favorable tax treatment to non-profit hospitals. Id.[1] The plaintiffs in Simon claimed that this revenue ruling resulted in hospitals restricting services and denying treatment for indigents, but the court found that the causal link between the revenue ruling being issued and the indigents being denied treatment was interrupted by the independent actions of the hospitals. There, the "government action" was issuance of the revenue ruling, the "third party action" was the hospitals denying treatment, and it was unclear whether the hospitals would afford treatment to these indigents but

[1] Not only is this comparison far-stretched, but it also encourages adopting SPA's narrow interpretation of the impacts from its proposed action, or rather the lack thereof, which it continues to assert and which goes to the merits of this case.

for the revenue ruling or whether the hospitals' decisions were based on factors other than the revenue ruling.

Here, the "government action" is DHEC's issuance of a permit authorizing the construction of a new terminal designed to allow cruise operations to continue and facilitate expanded cruise ship home base operations in Charleston. Even putting aside the fact that this case involves DHEC's authorization of permit to another state agency to construct a new cruise terminal as part of a $35 million project as opposed to a government policy determination, in this case, DHEC's permit authorizing construction it is the necessary link in the causal chain. SPA has requested permission to take affirmative action, to construct a new cruise ship terminal in order to maintain and expand cruise operations out of Union Pier and the Petitioners have alleged actual, particularized, and imminent injuries which would not occur but for the permit at issue. Unlike in Simon, here, the permit was sought explicitly to sustain and expand cruise operations; whether or not cruise operations continue and expand at Union Pier is not subject to the whim of independent "third party action"—**cruise operations would not be possible at Union Pier without the DHEC permit** – as evidenced by SPA's own permit application stating that "an improved facility would be needed for continued operations." (Exhibit 1 to SPA's motion). It is not unclear whether the construction authorized by DHEC permit will cause the injuries alleged by the Petitioners - that result is certain to follow.

Additionally, SPA cites to Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996), and Doe v. Obama, 631 F.3d 157 (2011), in support of its new theory of superseded action. Just like Simon, these cases are completely inapplicable and further demonstrate that a sur-reply is appropriate in this instance. These cases are dealing with government policies that have tenuous

impacts, which are then determined to be more fairly traceable to some third party action down the line rather than issuance of the actual policy. Here, by contrast, we are dealing with a state agency which has actively injected itself into this process by applying for a permit to carry out an activity having an impact on critical area. SPA's action under the permit—installation of pile clusters—is fundamental to the continued use of Union Pier for cruise operations. SPA repeatedly and falsely threatens that cruise operations can continue at Union Pier regardless of whether its permit is denied. However, by SPA's own application, the construction of a new terminal, and thus the installation of pile clusters, is ***critical*** for cruise operations to continue at Union Pier at all.[2] (Exhibit 1 to SPA's motion).

These are just some of the basic distinctions between the matter before this Court and the new cases SPA introduces in its reply that Petitioners have offered to demonstrate why they believe a sur-reply is appropriate. Petitioners ultimately desire the opportunity to fully argue to this Court, in a sur-reply, how SPA's reply goes beyond the scope of Petitioners' response and to respond to the new theories and arguments SPA threw in at the last second.

II. SPA'S REPLY CONTAINS MISSTATEMENTS THAT WILL SUBSTANTIALLY PREJUDICE PETITIONERS UNLESS AFFORDED AN OPPORTUNITY TO RESPOND

SPA has the burden of demonstrating the basis for its motion. As the non-moving party, Petitioners are entitled to have the evidence viewed in the light most favorable to them. However, it would be inherently unfair to allow SPA to surprise Petitioners by introducing new evidence and legal arguments in its reply without also allowing the Petitioners a fair opportunity to respond.

[2] Current cruise operations are only existing at Union Pier by virtue of a MOU that SPA and the City of Charleston and Customs and Border Control entered into wherein operations may temporarily continue but the future of cruise operations are contingent upon SPA constructing a new terminal that complies with federal law.

McGaha v. Mosley, 283 S.C. 268, 276, 322 S.E.2d 461, 466 (Ct. App. 1984) ("Since reply testimony is limited to issues raised by the defense, the element of surprise is eliminated when reply is properly restricted.").

Should this Court permit Petitioners to file a sur-reply, Petitioners will fully address the numerous misstatements and inaccuracies of SPA's reply. For example, SPA claims: that none of the Petitioners are adjacent landowners to the Union Pier property, Reply, 8; that the affiants' testimony in Petitioners' response failed "to provide any real claim of reasonable injury that is not mere conjecture." Reply, 9; and, that because Union Pier is a fully-operational marine terminal, soot deposition is attributable to a number of factors ranging from the cruise ships to cargo ships, and that "[t]o lay blame exclusively on cruise operations . . . willfully disregards the multitude of other sources." Reply, 10-11.

In fact, the affiants' testimony in Petitioners' response clearly and succinctly describes their very real, and reasonably expected, injuries based on personal knowledge and experience. Moreover, the affiants' testimony affirms that members of Petitioner groups *are* adjacent landowners to the Union Pier property, that soot deposition is traceable to cruise operations and that, if SPA constructs the new cruise terminal as-proposed under the permit, then the impacts Petitioners are currently experiencing will continue and will be exacerbated.

Tommie Robertson, who is a member of multiple Petitioner groups, testified by affidavit that she is an adjacent landowner to the Union Pier property "within a few hundred feet of the proposed cruise ship's smokestacks," and that:

> On more than one occasion, I have been on my terrace while the Carnival *Fantasy* was docked and departing and I have experienced the negative effects of the thick smoke being emitted from the ship's smokestacks firsthand. ***I saw the thick smoke move from the cruise***

> ***ship toward my home and within seconds of breathing the emissions, my throat immediately began to hurt and I was forced to retreat indoors.***

Petitioners' Response, Exhibit C, Aff. of Tommie Robertson, 2-3 (emphasis added).

Mrs. Robertson further testifies to the thick emissions, which she witnessed coming from the cruise ships, accumulating as dirty soot on her terrace, as well as the fact that she has never experienced these impacts when a cruise ship was not docked at UPT. Id.

Stephen Gates and Christina Dodd, who are also members of multiple Petitioner groups and residents of downtown Charleston, testified by affidavit that they have personally experienced the impacts of soot deposition, among many of the other impacts from cruise operations. See Response, Exhibits A & D, Aff. of Christina Dodd and Stephen Gates. Mr. Gates states that "**[b]eginning in 2010, *when the Carnival Fantasy began home port operations in Charleston* ... I experienced heavy and oily soot deposits on my piazza and my windows**" and that "[t]he soot on my property is ***heavier and more oily than anything I had seen on my property prior to 2010*** when Carnival began its cruise ship operations at Union Pier." Response, Exhibit D, Aff. Stephen Gates, 2-3 (emphasis added). Similarly, Ms. Dodd explains that:

> ***for the past two years, I have been finding soot on the window sills*** inside my 1843 historic home, despite the fact that I have exterior storm windows. Additionally, this oily soot is now prominently found on our piazzas and outdoor furniture. It is very difficult to clean, and cleaning must be done much more frequently. ***I did not experience this problem before the influx of nearby cruise ships at Union Pier.***

Response, Exhibit A, Aff. Christina Dodd, 2 (emphasis added).

SPA's reply is not merely non-responsive to the Petitioners' affidavits, it is flatly dismissive of them. Reply, 25. SPA attempts to brush these affidavits aside, painting the specific, articulable experiences – not to mention ***sworn testimony*** – of these members of Petitioner groups as "a stew of conclusory statements, opinion, speculation, and rambling exposition against cruise

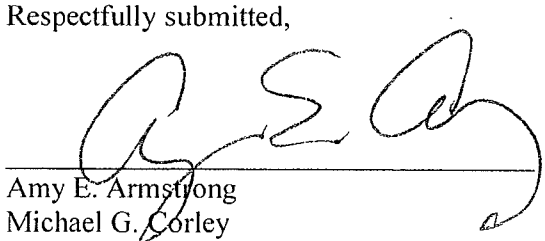
in a clear attempt to manufacture enough allegations to continue the litigation strategy of delay and harassment through a continuation of this suit." Id.

SPA accuses Petitioners of harbouring ill motives in bringing this action and plotting to destroy the cruise industry, while simultaneously, SPA seeks to quell the concerned voices of the public by holding them to an unprecedented and unattainable standing standard. Under the theory argued by SPA, affected persons would have to prove the merits of their case in order to establish causation. No court has ever held such a high threshold in order to get in the courtroom door. Under SPA's proposed standard no one would have standing, for if the citizens and residents neighboring the Union Pier property – who live, work and breathe in the midst of cruise operations and its consequences on a daily basis – do not have standing to raise issue with the serious impacts of this significant project, then who would?

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that this Court grant them leave to file a sur-reply responding to the new arguments raised by SPA and clarifying the Petitioners' position.

Respectfully submitted,



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Attorneys for the Petitioners

Georgetown, South Carolina

August 30, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served the Petitioners' Motion for Leave to File Sur-Reply on SPA's Motion to Dismiss for Lack of Standing on Respondents SC State Ports Authority and SCDHEC by placing copies of same in the U.S. Mail addressed to:

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	**SOUTH CAROLINA PORTS AUTHORITY'S RESPONSE IN SUPPORT OF THE SUBPOENA AND OPPOSITION TO THE MOTION TO QUASH** Docket No. 13-ALJ-07-0056-CC

Respondent South Carolina State Ports Authority (Ports Authority), by and through its counsel, submits this response in opposition to Petitioners' Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control (collectively "Cruise Opponents") Motion to Quash Subpoena issued by the Ports Authority on August 19, 2013, to Disher, Hamrick and Myers Residential, Inc. for production and inspection of certain documents and objects in its possession, custody, or control. For the foregoing reasons, the Ports Authority requests that this Court deny Cruise Opponents Motion to Quash Subpoena.

Cruise Opponents instituted the above-captioned action in which they assert various injuries and harms as a result of on-going cruise operations at Union Pier Terminal (UPT). Carolyn W. Agnew (Ms. Agnew), Executive Director for Cruise Opponent Charleston

Communities for Cruise Control (C4), has been at the forefront of the cruise controversy in Charleston and a leader in opposing cruise operations. See, e.g., Ex. 1, Matt Tomsic, *Groups Sue Carnival Over Charleston Operations*, CHARLESTON REG'L BUSINESS J., June 13, 2011 (describing a press conference held by Carrie Angew and Dana Beach, founder and Executive Director of the South Carolina Coastal Conservation League, describing cruise operations as an intolerable nuisance); Ports Auth. Reply in Supp. of Mot. for Sanctions, Exs. 7-9 (emails authored by Ms. Agnew). C4, along with other organizations, seeks to permanently enjoin cruise operations at UPT and halt UPT redevelopment through an action pending before the South Carolina Supreme Court and challenges before this Court and the Federal District Court, respectively. See Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012); see also Cruise Opponents' First Am. Compl., Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012) (arguing, *inter alia*, that cruise operations should be permanently enjoined at UPT on grounds that they pose a nuisance to members of C4 and other Cruise Opponent groups); Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs, No. 2:12-cv-2942-RMG (D.S.C. filed July 2, 2012).

The Cruise Opponents' make allegations of significant, widespread harm as a result of on-going cruise operations at UPT, which they claim will be exacerbated by the issuance of the challenged pilings permit. Consistent with these allegations, Ms. Agnew has made numerous public affirmations and submitted a sworn affidavit to the South Carolina Supreme Court attesting to alleged injuries she has suffered to person and property, including excessive noise and soot deposition, from cruise operations as a result of living in the Historic Ansonborough

Neighborhood[1] near UPT at 35 Hasell Street, Charleston, South Carolina 29401. Ex. 2, Aff. of Carrie Agnew ¶¶6-9, Jan. 24, 2012, Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012).

In or about June 2013, Agnew finalized the sale of her home at 35-B Hasell Street.[2] Disher, Hamrick and Myers Residential, Inc. (DHM Residential) served as Ms. Agnew's listing agent for the property at 35-B Hasell Street. See Ex. 3, DHM Residential Listing of 35-B Hasell Street. On August 19, 2013, the Ports Authority issued a subpoena to Brown Hamrick, a real estate agent and registered agent for DHM Residential, the listing agent for Ms. Agnew's residence at 35-B Hasell Street. Ex. 4, Ports Authority Subpoena to DHM Residential, Ex. A (Subpoena). The Subpoena requests:

> All communications, documents, emails, letters, agreements, memoranda, notes, consultations, or correspondence related to the sale and conveyance of real property being known and designated as Unit B of 35 Hasell Street, Charleston, S.C. 29401 by and from Carolyn W. Agnew ("Grantor") to Franklin F. Labelle and Peggy J. Labelle ("Grantees") in or about June 2013 and pertaining to the condition of said real property, including, but not limited to, the State of South Carolina Residential Property Condition Disclosure Statement.

On August 28, 2013, Cruise Opponents filed a Motion to Quash Subpoena (Motion). The Motion is meritless and lacks any foundation in law or fact. The Motion should be denied because the Cruise Opponents lack standing to challenge a third-party subpoena. Alternatively, even if standing existed, the information sought is directly relevant to issues raised by and regarding witnesses named by the Cruise Opponents.

---

[1] In addition to being the Executive Director for Cruise Opponent C4, Ms. Agnew was also a member of Cruise Opponent Historic Ansonborough Neighborhood Association (HANA).

[2] See Ex. 5, Title to Real Estate, Unit B, 35 Hasell Street, Listing Agnew as Grantor, June 5, 2013 (sale of 35-B Hasell Street by Agnew to a third-party purchaser).

I. CRUISE OPPONENTS LACK STANDING TO QUASH A SUBPOENA SERVED ON A THIRD PARTY.

As a threshold matter, Cruise Opponents lack standing to challenge a subpoena issued to a third party. The ALC Rules are dispositive of the issue: "***[a] person to whom a subpoena has been issued*** may move before the administrative law judge for an order quashing or modifying the subpoena." Rule 22(C), RPALC (emphasis added). In this instance, the subpoena was served on DHM Residential not Cruise Opponents. Accordingly, Cruise Opponents have no standing to challenge the Ports Authority's subpoena because they are ***not*** "[a] person to whom a subpoena has been issued." Rule 22(C), RPALC (emphasis added); see, e.g., Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995) (stating that where "a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning" and "[w]here the terms of the statute are clear, the court must apply those terms according to their literal meaning") (internal citations omitted).

Further, the Federal District Court, following Fourth Circuit precedent and black letter law, has ruled that parties have no standing to challenge a third-party subpoena absent a claim of privilege (which has not been alleged in this case).

> [A] party does not have standing to challenge a subpoena issued to a non-party unless the party claims some privilege in the information sought by the subpoena. [Where the Plaintiff] does not challenge the subpoenas issued by Defendants based upon any privilege ... [but rather] argues that the subpoenas are too broad in time and that they invade his privacy interests ... [the] Plaintiff lacks standing to challenge the subpoenas at issue, which were served upon third-parties.

Watty v. Sheriff of Clarendon Cnty.,4:10-CV-2056-JMC-TER, 2012 WL 269363 (D.S.C. Jan. 30, 2012) (citing United States v. Idema, 118 Fed. App'x 740, 744 (4th Cir. 2005)); see also

Wright & Miller, 9A FED. PRAC. & PROC. CIV. § 2459, *Subpoena for the Production of Documents and Things—Quashing or Modifying a Subpoena* (3d ed.).

II. THE PORTS AUTHORITY'S REQUEST IS NARROWLY TAILORED AND RELEVANT.

Even if Cruise Opponents have standing to challenge the subpoena, the Motion to Quash must be denied because the Ports Authority subpoena is narrowly tailored and relevant to the subject matter in this Contested Case. Cruise Opponents cite Oncology & Hematology Associates of S.C., LLC v. South Carolina Department of Health & Environmental Control, 387 S.C. 380, 692 S.E.2d 920 (2010) in support of their argument that the Ports Authority's request is abusive, not reasonably tailored to relevant matters or to admissible evidence, and should be quashed. A cursory reading of that opinion reveals that it is inapposite and inapplicable to this matter.[3] Further, Cruise Opponents aver that they "can fathom no reason why a real estate agent's records related to the condition of a property is relevant to the subject matter involved or how that information could possibly lead to the discovery of admissible evidence." Motion at 2. The Cruise Opponents are referred to their own filings and representations to the South Carolina Supreme Court and to this Court.

Carrie Agnew, as an executive of at least one of the Cruise Opponents, has been named as a witness. Ex. 6, Cruise Opponent CNAs' Resp. to First Set of Interrog., dated April 22, 2013. The Cruise Opponents further claim that cruise operations at UPT create "a public and private nuisance because of the ... soot" and "adversely affect property value." Cruise Opponents'

[3] In Oncology & Hematology, Respondent Spartanburg Regional Healthcare System made blanket demand for years' worth of business records, physician and patient data, communications of strategic plans, *etc.* even though the case turned on a decidedly narrow issue. See Oncology & Hematology, 387 S.C. at 383-85, 388, 692 S.E.2d at 922-23, 925. There, the Court found the discovery request "not remotely relevant" to the controversy and a "scorched-earth approach." Oncology & Hematology, 387 S.C. at 389, 692 S.E.2d at 925. The Cruise Opponents make no attempt to apply the law of that case to these facts nor to analogize those facts to the present case.

Request for Contested Case ¶24, dated Feb. 11, 2013; see Cruise Opponents' Preh'rg Statement at 4 (alleging injury through "harmful air emissions of particulate matter" and "decreased property values"). Specifically, Ms. Agnew has been named as a witness to testify specifically on "air pollution" and a "decrease in property values" resulting from cruise operations at UPT. Ex. 6, Cruise Opponent CNAs' Resp. to First Set of Interrog., dated April 22, 2013. Listed as a C4 witness living at 35-B Hasell Street, Ms. Agnew has been identified to testify to "airborne pollutants intruding into her home...." Ex. 7, Cruise Opponent C4s' Resp. to First Set of Interrog., dated April 22, 2013. Her organization—C4—specifically "asserts a loss of value to its members' properties." Id. Moreover, they have named Brown Hamrick—a real estate agent, principal, and registered agent for DHM—as a fact witness in this case. Ex. 8, Cruise Opponent CNAs' Supplemental Resp. to First Set of Interrog., dated April 23, 2013.

In other words, the Cruise Opponents have directly placed property values and alleged nuisances at these witnesses' residential properties at issue. Here, the Ports Authority requests production of documents from DHM Residential—the *principal of whom has been named by the Cruise Opponents as a potential witness*—arising from a real estate transaction pertaining to 35-B Hasell Street. As Ms. Agnew has been named to testify on diminished property values, the Ports Authority is entitled to review the sales information for the property of which she makes such nuisance claims, as on the face of the transaction it appears Ms. Agnew made a significant profit.[4]

Pursuant to S.C. Code Ann. §§ 27-50-10 *et seq.*, sellers of residential property are required to complete a State of South Carolina Residential Property Condition Disclosure

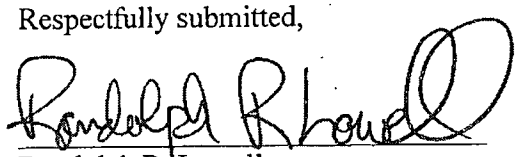
[4] According to public records, Ms. Agnew purchased the property for $469,000 in November 2000 and then sold the property for $745,000 in June 2013. Ex. 9, Charleston County Property Records.

Statement (Seller's Disclosure Statement) as part of the real estate transaction. S.C. Code Ann. §§ 27-50-30, -40. At all relevant times, the Seller's Disclosure Statement required, among other things, that residential property owners disclose any ***nuisances—noise***, ***odor*** or ***smoke***—affecting the property on or about the time of sale. See Ex. 10, South Carolina Residential Property Condition Disclosure Form ¶16 (effective January 1, 2013) (superseded August 1, 2013) (requiring the seller of residential property to affirm or deny whether the property to be sold is affected by a nuisance, to include noise, odor or smoke, *etc.*).

Documents in the possession or control of DHM Residential pertaining to the condition of 35-B Hasell Street may shed further light on Cruise Opponents' allegations, especially given the allegations made by Ms. Agnew and the Cruise Opponents regarding alleged nuisances at the property location and property values. The information requested was narrowly tailored to request only the relevant information. The Cruise Opponents' Motion is without merit or reason and appears to be one more example of the strategy to hinder and delay a permitted project that enjoys the support of elected officials and the vast majority of the citizens.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Randolph R. Lowell
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Post Office Box 8416
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rlowell@willoughbyhoefer.com
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General Counsel
S.C. STATE PORTS AUTHORITY
Post Office Box 22287
Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

September 3, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

This is to certify that I, an paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **South Carolina Ports Authority's Response in Support of the Subpoena and Opposition to the Motion to Quash** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Breanna M. Karns

Columbia, South Carolina
This 3rd day of September 2013.

Exhibit 1

CHARLESTON REGIONAL BUSINESS JOURNAL

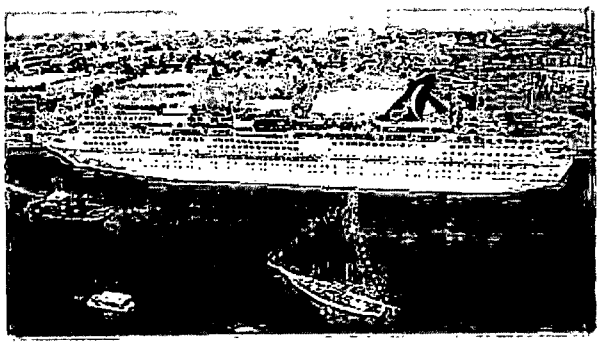
Friday, August 16, 2013

FRANCIS MARION HOTEL
Charleston's Grand Hotel since 1924

Groups sue Carnival over Charleston operations

By Matt Tomsic
mtomsic@scbiznews.com
Published June 13, 2011

Environmental, preservation and neighborhood groups filed a lawsuit this morning seeking regulations for Carnival Cruise Line's operations in Charleston.

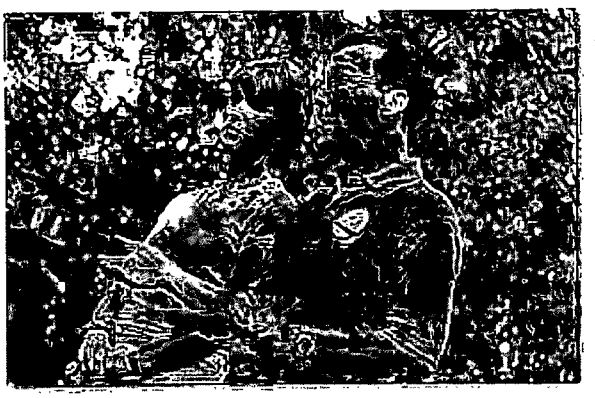


The Southern Environmental Law Center is representing the Historic Ansonborough Neighborhood Association, the Charlestowne Neighborhood Association, the Coastal Conservation League, and the Preservation Society of Charleston in the case. Carnival is the only named defendant.

The groups announced the lawsuit during a news conference this morning.

"The point of this is to get some clarity," said Blan Holman, an attorney with the Southern Environmental Law Center. "This business is like any other business. We've got to have standards that keep things in balance."

Holman said the lawsuit alleges Carnival is breaking local zoning, nuisance and environmental permitting laws. The legal complaint has 12 counts and wants Carnival to go through the processes required of other Charleston tourism businesses.



Carrie Agnew of the Ansonborough Neighborhood Association (left) and Coastal Conservation League Executive Director Dana Beach announce the lawsuit against Carnival Cruise Lines. (Photos/Leslie Burden)

Carrie Agnew, a member of the Ansonborough association, said neighborhood, historic and environmental groups have spent months asking the city for cruise regulations.

"In return, we've gotten more soot, traffic jams, closed streets," Agnew said.

During the news conference, she held a white napkin that she said was stained with black soot from a cruise ship.

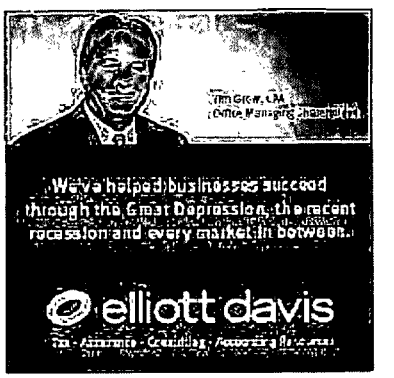
"We want and need some limits to protect our families ... our neighborhoods," she said.

Dana Beach, executive director of the Coastal Conservation League, also spoke during the conference. Beach said cruise ships have been compared to floating cities.

"And the waste they produce is comparable," Beach said, adding the ships produce 21,000 gallons of sewage every day.

Beach said the lawsuit is not an attempt to force Carnival out of Charleston Harbor.

"Cruising is fine as long as they meet standards that are reasonable," Beach said.



Charleston Mayor Joe Riley (left) and ILA President Ken Riley vowed they would fight the lawsuit against Carnival Cruise Lines' operations in Charleston.

Carrie Agnew of the Ansonborough Neighborhood Association held up a napkin that she said showed soot from a cruise ship.

ShareThis

An hour and 45 minutes later, the S.C. State Ports Authority hosted a news conference in response to the lawsuit and announced the city of Charleston, the ports authority and the local chapter of the International Longshoremen's Association, and the Charleston Metro Chamber of Commerce will try to intervene in the case.

Charleston Mayor Joe Riley called the lawsuit "outrageous and abusive."

"We will do everything we can to make sure this lawsuit fails," Riley said.

Riley said the redevelopment of Union Pier is at stake and the project won't happen if Carnival leaves. But John Hassell, a member of the ports authority board, said the port will continue with the project despite the lawsuit, which he called a "desperate act."

Charleston's cruise industry is regulated by the federal government, which controls where and when the ships can dump wastewater, among other things, Riley said.

"If we aren't resolute and if we don't work hard, something very important to a community will be lost," Riley said.

Exhibit 2

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Carnival Corporation d/b/a Carnival Cruise Lines; South Carolina State Ports Authority; and City of Charleston ..... Petitioners, Defendants

v.

Historic Ansonborough Neighborhood Association, Charlestowne Neighborhood Association, the Coastal Conservation League, and Preservation Society of Charleston ..... Respondents, Plaintiffs.

AFFIDAVIT OF CARRIE AGNEW

PERSONALLY APPEARED BEFORE me Carrie Agnew, who, after being duly sworn, deposes and says that:

1. I am a property owner, resident, citizen, and taxpayer of the City of Charleston, Charleston County, South Carolina. I own my home, which is located at 35 Hasell Street, Charleston, South Carolina 29401, and I have lived there since January, 2001. I currently am self-employed and work out of my home. I have personal knowledge of the matters herein.

2. My home is not at street level. It is located on the second and third stories of 35 Hasell Street. It is located approximately two blocks from the Union Pier Terminal and within eyesight and earshot of the Carnival *Fantasy* operation there.

3. I have been a member of the Historic Ansonborough Neighborhood Association (HANA) for ten years or so. HANA is a non-profit corporation that represents approximately 240 members in the Ansonborough neighborhood, just west of the Union Pier Terminal. Its role and position in this litigation was authorized by its membership, is consistent with its mission,

and vindicates the interests of the members it represents, including me.

4. Before 2009, when Charleston became a cruise ship home port, there was no traffic, congestion or noise from cruise ships in my neighborhood.

5. Beginning in 2010, the *Fantasy* begin the first year-round home port cruise operation in Charleston. I can see the Fantasy from my house and its trademark funnel emitting dark soot into the air.

6. Since 2010 I have noticed black soot continuously being deposited on the exterior of my house and porch. I believe that the *Fantasy* causes or contributes to this soot. The soot detracts from my use and enjoyment of my residence and increases maintenance and cleaning costs. Prior to that time, pollen was the only airborne issue I had to contend with. Soot also accumulates in my bedroom, which is the only room in the house with windows that open. Having read about the harms caused by diesel soot emissions – including cancer and cardiopulmonary disease – I am concerned that the soot entering and covering my home poses risks to my health.

7. I have heard public address announcements from the *Fantasy* as well as music from the ship as passengers embark. After two hours of salsa music during one docking in late 2010, I called the police regarding a violation of the noise ordinance. The police investigated and also told me to call the Mayor's office. I called the Mayor's office and notified them of the complaint. In fact, I held the phone out of my door so the person who answered could hear the music – and they could. New Year's Day 2011 I heard public address announcements from the *Fantasy* around 6:30 a.m. That was not the way I wanted to start my New Year. I have heard announcements in the past month including occasional morning but always afternoon announcements. My understanding is that, per international law, these announcements and

safety drills can be made after the ship leaves the dock, as long as they occur within 24 hours. One day I had to conduct a business call from a bathroom at the other end of my home in order to not have the noise come through the phone. Friends who have telephoned me during the announcements and been astounded at the excessive level of volume. The ship also sounds a very loud horn multiple times before it departs. These noises are loud, distracting and annoying.

8. The Fantasy home base operations cause serious traffic problems in my neighborhood. The closing of two public streets and the influx of thousands of passengers and crew adds significant congestion in a small downtown area already challenged by too much traffic. A friend who was coming to take me to a doctor's appointment late this spring sat through five lights at the corner of Hasell and East Bay before she could take a right turn off of East Bay onto Hasell Street to get me. Pedestrian traffic also greatly increases on cruise days as cruise passengers seek supplies such as liquor, which I understand is not covered by the cruise ticket price, before getting on board the ships. Everyone knows that cruise days cause serious traffic in this area and people avoid my area on those days and times. The traffic is a major inconvenience and annoyance and interferes with my use and enjoyment of my home and ability to conduct business in my home and over the phone.

9. I can see the Carnival Fantasy from my house and walking around my neighborhood and in the Historic District generally. The site of the *Fantasy's* funnel belching smoke, visible from my house, diminishes my use and enjoyment of my home. Several real estate agents have told residents who want to sell homes that they must disclose that their home is adjacent to a home porting cruise operation because of the negative impacts of the cruise operation on the property. I have heard that cruise operations have interfered with the sales of homes in the area and locating businesses here, and I am concerned that ongoing unregulated

operations by Carnival are impacting the value of my home.

10. I chose to live in Charleston because of the strong history of historical protection and because Ansonborough is a quiet residential area. The historical atmosphere, local business, quiet streets, and view of harbor are assets that I enjoy and that are being negatively impacted by the home porting of the Carnival cruise operation.

11. I am not opposed to cruise operations in Charleston, and neither is anyone I know in Ansonborough. What we would like to see is compliance by Carnival with local and state laws. We have no desire to limit cargo ship operations at Union Pier or elsewhere.

12. Because of Carnival's home port operation, I suffer individualized injury that injures my interests as a citizen, resident, property owner, and taxpayer in the City of Charleston. This injury in fact is fairly traceable to Carnival's operations challenged in this action. These injuries would be redressed by a favorable decision in this case.

FURTHER AFFIANT SAYETH NOT.

Carrie Agnew

SWORN and subscribed to before me
this 24th day of January 2012.

Notary Public for South Carolina

Notary Public for the State of South Carolina
My Commission expires January 20th, 2019

Charleston, South Carolina

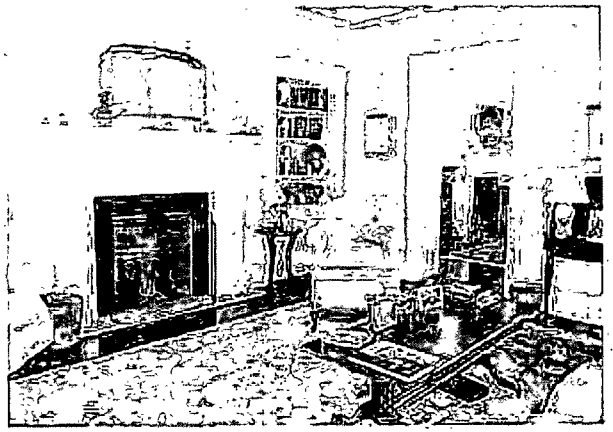
Exhibit 3

35 HASELL STREET - UNIT B

ANSONBOROUGH - DOWNTOWN

er exclusive listing if

Dish amrick & Myers



This handsome solid brick single house condominium features the top two floors for sunny and spacious living. The grand piazza provides over 600 square feet of private outdoor space and is assessable from both the entrance hall and the dining room. The ceilings on the main floor are 11 feet tall and are 9 feet on the top floor. Huge windows let in bountiful light. There are five fireplaces; two woodburning, two with gas logs, and one for coal or a duraflame log. The house stands on a high brick foundation so it affords a lot of under-house storage.

There are two deeded off-street parking spaces for this unit. The security system has cellular backup.
The standing-seam metal roof over the piazza is treated with a factory- baked on enamel finish called Galvalum and the main roof has been treated with a Seal-O-Flex system. The house has been very well-maintained and offers an exceptional space in a very desirable neighborhood.

The property has three condominiums: 35A is on the first floor of the building with 40% responsibility for maintenance; 35B, with 60% responsibility. The separate outbuilding, 35 C, at the rear of the property, has 100% ownership with its own maintenance.

3 Bedrooms, 3 Baths
1,848 Square Feet (Buyer to verify)
2012 Taxes: $1,904.25
Tax Map #: 458-05-01-143
Offered at $769,000

Jane M. Ries
843.224.9912
janer@dhmrealestate.com

LEADING REAL ESTATE COMPANIES™ OF THE WORLD

Disher, Hamrick & Myers

Material based upon information that we consider reliable, but because it has been supplied by third parties, we cannot represent that it is accurate or complete, and it should not be relied upon as such. This offering is subject to errors, omissions, changes, including price, or withdrawal without notice.
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Exhibit 4

ALC Form #110a

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Soc'y of Charleston, et al.

Petitioner

vs.

S.C. Dep't of Health and Envtl. Control and S.C. State Ports Authority

Respondent

SUBPOENA

Case No. 13 -ALJ- 07 -0056- CC

To: H. Brown Hamrick
Registered Agent, Disher, Hamrick & Myers Residential, Inc.
Name of witness being served

30 Broad Street
Address of witness

Charleston, S.C. 29401
City, State, zip

YOU ARE COMMANDED TO (check all applicable):

____ Appear and testify in the above-captioned case at the place, date and time shown below; and/or

X Produce the following items, at the place, date and time shown below:

See attached Exhibit A. Place: Willoughby & Hoefer, P.A., 930 Richland St., Columbia, S.C. 29201

Date/Time: 08/28/2013, 5:00 PM

Date and Location of Hearing:	Party Requesting Subpoena:
Date	Name
Location	Address
Time of appearance	Telephone

I CERTIFY THAT THIS SUBPOENA IS ISSUED IN COMPLIANCE WITH ALC RULE 22(A).

ISSUING ATTORNEY'S NAME, ADDRESS, AND PHONE NUMBER:

Randolph R. Lowell, Esq., 930 Richland St., Columbia, S.C. 29201, 803-252-3300

ISSUING ATTORNEY'S SIGNATURE AND TITLE (INDICATE WHETHER ATTORNEY FOR PETITIONER, RESPONDENT OR OTHER):

Randolph R Lowell ____Petitioner X Respondent ____Other (specify)_____

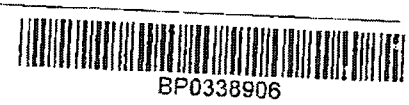
S.C. Bar #: 16145 Date of issue: August 19, 2013

Exhibit A

1. All communications, documents, emails, letters, agreements, memoranda, notes, consultations, or correspondence related to the sale and conveyance of real property being known and designated as Unit B of 35 Hasell Street, Charleston, S.C. 29401 by and from
Franklin F. Labelle and Peggy J. Labelle
and pertaining to the condition of said real property, including, but not limited to, the State of South Carolina Residential Property Condition Disclosure Statement.

Exhibit 5

RMC Bk 0338 Pg 906 : Pg 1 *



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS that **I, CAROLYN W. AGNEW** (hereinafter referred to as "Grantor"), in the State aforesaid, for/and in consideration of the sum of SEVEN HUNDRED FORTY-FIVE THOUSAND AND NO/100 ($745,000.00), the receipt and sufficiency of which is hereby acknowledged, by, at and before the sealing of these presents by **FRANKLIN F. LABELLE AND PEGGY J. LABELLE** (hereinafter referred to as "Grantees"), in the State aforesaid, the receipt whereof is hereby acknowledged, and subject to the easements, restrictions, reservations and conditions set forth on the attached Exhibit "A" ("Exceptions"), have granted, bargained, sold and released, and by these Presents do hereby grant, bargain, sell and release unto the said Grantees, as joint tenants with rights of survivorship (not as tenants in common), in the following described real property, to-wit:

SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF BY EXPRESS REFERENCE.

THE property described herein may be subject to taxation during the next tax year at a value that reflects its fair market value.

BEING the same property conveyed to the Grantor herein by deed of James K. Kuyk dated November 10, 2000 and recorded in Book P-358, Page 304 in the Charleston County RMC Office.

TOGETHER with, all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned, subject to the Exceptions, unto the said Grantees, as joint tenants with rights of survivorship (not as tenants in common), their Heirs and Assigns forever.

TMS #458-05-01-143

GRANTEES' ADDRESS:

35 Hasell unit B
Charleston S.C. 29401

AND I do hereby bind myself and my Heirs and Assigns, to warrant and forever defend, all and singular, the said Premises before mentioned, unto the said Grantees, as joint tenants with rights of survivorship (not as tenants in common), their Heirs and Assigns forever, against myself and my Heirs and Assigns and against every person whomsoever lawfully claiming, or to claim the same or any part hereof.

WITNESS my Hand and Seal this 5 day of June, in the year of our Lord, two thousand thirteen, and in the two hundred and thirty-seventh year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Witness # 1

Witness # 2

(SEAL)
CAROLYN W. AGNEW

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

The foregoing instrument was acknowledged before me this 5 day of June, 2013, by **CAROLYN W. AGNEW.**

(SEAL)
NOTARY PUBLIC FOR: SC
MY COMMISSION EXPIRES: 5/14/19.

RMC BK 0338 Pg 906 : pg 3 *

EXHIBIT "A"

All that certain piece, parcel or units, situate, lying and being in the State South Carolina, County of Charleston, City of Charleston, being known and designated as Unit B of 35 Hasell Street Horizontal Property Regime as more fully described in Master Deed dated July 28, 1986 and recorded in the RMC Office for Charleston County, South Carolina in Deed Book D-156, Page 511, including Exhibits A through D.

THIS CONVEYANCE IS SUBJECT TO:

1. Terms and conditions of the Master Deed of 35 Hasell Street Horizontal Property Regime recorded in Book D-156, Page 511, as amended by instrument recorded in Book P-358, Page 444 in the Charleston County RMC Office.

2. Conservation Easement to Historic Charleston Foundation, Inc. recorded in Book S-150, page 853 in the Charleston County RMC Office.

RMC Bk 0338 Pg 906 : pg 4 *

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. The property is being transferred by Carolyn W. Agnew to Franklin F. Labelle and Peggy J. Labelle on June 14, 2013.

3. The Deed is: (check one)
(a) X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b)_____subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c)_____EXEMPT from the deed recording fee because (exemptions 1-12) ____ (If exempt, please skip Items 4-6, and go to Item 7 of this Affidavit.)

4. Check one of the following if either Item 3(a) or 3(b) above has been checked.
(a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the Amount of $745,000.00
(b)_____The fee is computed on the fair market value of the realty which is $_____.
(c)_____The fee is computed on the fair market value of the realty as established for property tax purposes which is $_____.

5. Check YES_____ or NO X to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is $_____.

6. The DEED Recording Fee is computed as follows:
(a) $745,000.00 the amount listed in Item 4 above
(b)_____ the amount listed in Item 5 above (if no amount, place zero)
(c) $745,000.00 Subtract Line 6(b) from Line 6(a) and place the result.

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Attorney.

8. Check if Property other than Real Property is being transferred on this Deed.
(A)_____ Mobile Home (B)_____ Other

9. _____DEED OF DISTRIBUTION-ATTORNEY'S AFFIDAVIT: Estate of_____Deceased CASE NUMBER_____. Personally appeared before me the undersigned attorney who, being duly sworn, certified that (s)he is licensed to practice law in the State of South Carolina; that (s)he has prepared the Deed of Distribution for the Personal Representative in the Estate of Deceased and that the grantee(s) therein are correct and conform to the estate file for the above named decedent.

10. I further understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

SWORN to before me this 14 day of June, 2013.

NOTARY PUBLIC FOR: SC
MY COMMISSION EXPIRES: 4/12/23

Grantor, Grantee, or Legal Representative

Leonard Krawcheck
Print name here

RECORDER'S PAGE

NOTE: This page MUST remain with the original document

Filed By:
KRAWCHECK & DAVIDSON

PO BOX 1018
CHARLESTON SC 29402 (BOX)

RECORDED

Date:	June 17, 2013
Time:	3:19:07 PM

Book	Page	DocType
0338	906	Deed

Charlie Lybrand, Register
Charleston County, SC

MAKER:
AGNEW CAROLYN W

RECIPIENT:
LABELLE FRANKLIN F AL

Original Book:

Original Page:

Note:

# of Pages:		5
Recording Fee	$	10.00
State Fee	$	1,937.00
County Fee	$	819.50
Extra Pages	$	-
Postage	$	-
Chattel	$	-
TOTAL	$	2,766.50

DRAWER	Drawer 1
CLERK	KLH

AUDITOR STAMP HERE
RECEIVED FROM RMC
JUN 19 2013
PEGGY A. MOSELEY
CHARLESTON COUNTY AUDITOR

UPDATED
PID VERIFIED BY ASSESSOR
REP JUN 19 2013
DATE ASTRJB
4

0338	906	06/17/2013	5
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RMC Bk 0338 Pg 906 : Pg 5 *

Exhibit 6

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **PETITIONERS' RESPONSES TO RESPONDENT SOUTH CAROLINA PORTS AUTHORITY'S FIRST SET OF INTERROGATORIES TO PETITIONER CHARLESTOWNE NEIGHBORHOOD ASSOCIATION**

General Objection:

The Petitioner Charlestowne Neighborhood objects to the Interrogatories to the extent that they go beyond the standard interrogatories authorized under ALC Rule 21. ("Discovery shall be conducted according to the procedures in Rules 26-37, SCRCP, except that only the standard interrogatories provided by SCRCP 33(b), as applicable to the pending contested case, are permitted; . . .").

1. **Give the names and addresses of persons known to the Petitioner or its counsel to be witnesses concerning the facts of the case, set forth either a summary sufficient to inform the other parties of the important facts known to or observed by such witnesses, and provide a copy of any written or recorded statements that have been taken from the witnesses along with any information regarding all persons with possession of such statements:**

RESPONSE:

The Petitioner objects to this request inasmuch as it goes beyond the standard interrogatories allowed under ALC Rule 21(A).

J. Randolph Pelzer
59 Meeting Street

Charleston, SC 29401-2508

Steve Gates
59 Meeting Street
Charleston, SC 29401-2508

Carrie Agnew
35 Hasell Street
Charleston, SC 29401-1634

Dana Beach
328 East Bay Street
Post Office Box 1765
Charleston, SC 29402

Jay Williams
81 King Street
Charleston 29401

Margot Rose
19 Church Street
Charleston, SC 29401-2743

Evan Thompson
Post Office Box 521
Charleston, SC 29402

Rick Reed, MD
65 Lenwood Blvd.
Charleston, SC 29401

Billy Prioleau
2361 Spruill Ave
North Charleston, SC 29405

Elizabeth Bradham
64 South Battery
Charleston, SC 29401-2326

Laura Gates
59 Meeting Street
Charleston, SC 29401-2508

Lois K Lane
28 Lamboll St
Charleston, SC 29401

Charles Duell
4300 Ashley River Road
Charleston, SC 29414-7200

Tommy L Bennett
1839 Wedgefield Rd
Charleston, SC 29407

Henry Fishburne
13 Broad St
Charleston, SC 29401

John Thompson
57 East Bay Street
Charleston, SC 29401-2546

J. Elizabeth Bradham
64 South Battery
Charleston, S.C. 29401

These witnesses are familiar with the air pollution; noise pollution; pedestrian and vehicular congestion; health impacts; decrease in aesthetic and recreational values; and decrease in property values resulting from ongoing and future cruise ship operations at Union Pier Terminal.

J. Randolph Pelzer, Steve Gates, Carrie Agnew, Dana Beach, Jay Williams, Margot Rose and Evan Thompson have given written or recorded statements to OCRM.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Petitioner that relate to any claim or defense in the case.

RESPONSE:

Letter from Randolph Pelzer, Margot Rose and Stephen Gates to OCRM, dated October 10, 2012.
Letters submitted by Dana Beach, Carrie Agnew, Jay Williams and Evan Thompson to DHEC/OCRM.

3. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

RESPONSE:

The Petitioner Charlestowne Neighborhood Association is not seeking monetary damages through this suit. Petitioner asserts loss of value to its members' property, as well as loss of health, aesthetic and recreational values.

4. List the names and addresses of any expert witnesses whom the Petitioner proposes to use as a witness at the trial of the case.

RESPONSE:

In addition to any expert witnesses listed by a co-Petitioner, the Charlestown Neighborhood Association proposes to use:

Evan Thompson
Post Office Box 521
Charleston, SC 29402

Petitioner is in the process of identifying additional expert witnesses, and will disclose those witnesses as they become known.

5. For each person known to the Petitioner or its counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE:

Petitioner can discern no material difference between this request and request #1. Petitioner therefore incorporates the response to request #1 into this response.

Respectfully submitted,

Amy E. Armstrong
Michael G. Corley
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380 Pawleys Island, SC 29585
Office address: 430 Highmarket Street Georgetown,

SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
(843) 937-881

Attorneys for the Petitioners, Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of Surfrider and Charleston Communities for Cruise Control

Georgetown, South Carolina

April 22, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing **PETITIONERS' RESPONSES TO RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY'S FIRST SET OF INTERROGATORIES TO PETITIONER CHARLESTOWN NEIGHBORHOOD ASSOCIATION** in the U.S. Mail addressed to:

Randolph R. Lowell, Esquire
Chad N. Johnston
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Amy E. Armstrong

Georgetown, South Carolina

April 22, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **PETITIONERS' RESPONSES TO RESPONDENT SOUTH CAROLINA PORTS AUTHORITY'S FIRST SET OF INTERROGATORIES TO PETITIONER CHARLESTON COMMUNITIES FOR CRUISE CONTROL**

General Objection:

The Petitioner Charleston Communities for Cruise Control objects to the Interrogatories to the extent that they go beyond the standard interrogatories authorized under ALC Rule 21. ("Discovery shall be conducted according to the procedures in Rules 26-37, SCRCP, except that only the standard interrogatories provided by SCRCP 33(b), as applicable to the pending contested case, are permitted; . . .").

1. Give the names and addresses of persons known to the Petitioner or its counsel to be witnesses concerning the facts of the case, set forth either a summary sufficient to inform the other parties of the important facts known to or observed by such witnesses, and provide a copy of any written or recorded statements that have been taken from the witnesses along with any information regarding all persons with possession of such statements:

RESPONSE:

The Petitioner objects to this request inasmuch as it goes beyond the standard interrogatories allowed under ALC Rule 21(A).

Carrie Agnew
35 Hasell Street

Charleston, SC 29401

Ms. Agnew has knowledge regarding airborne pollutants intruding into her home; noise; adverse impact on her quality of life; and loss of historic atmosphere in her historic neighborhood. She has also investigated the agencies failure to explore alternate locations for new cruise ship operations.

Chip & Sue Limehouse
22 Menotti Street
Charleston, SC 29401

Mr. & Mrs. Limehouse are familiar with the car traffic and exhaust from cars that have resulted from cruise ship operations. The are also familiar with the small area that is the proposed home to cruise ship operations.

Harold & LouAnn Pratt-Thomas
144 Wentworth Street
Charleston, SC 29401

Mr. & Mrs. Pratt-Thomas have knowledge regarding the congestion; pollution/soot; and negative impacts on historic Charleston resulting from the existing cruise ship terminal.

Bill & Penny Agnew
4472 Spring Island
Okatie, SC 29909

Mr. & Mrs. Agnew are familiar with the loss of a positive tourist experience in historic Charleston and the negative impacts on historic homes resulting from cruise ship operations.

Jim D'Arcangelo
23 Decision Way W
Washington Crossing, PA 18977

Mr. D'Arcangelo is familiar with the loss of positive tourist experience; congestion; and pollution resulting from cruise ship operations.

Pat Sullivan
1002 Plantation Court
Mount Pleasant, SC 29464

Ms. Sullivan is familiar with the negative impacts on historic neighborhoods and the traffic and congestion resulting from cruise ship operations.

Charles Duell
Middleton Place
21 East Battery Street
Charleston, SC 29401

Mr. Duell has knowledge of the congestion; soot; and loss of historic character associated with cruise ship operations.

Leslie Scanlan
49 Smith Street
Charleston, SC 29401

Ms. Scanlan has knowledge of the air emissions and congestion resulting from cruise ship operations.

Jackie Fleet
25 Rutledge Avenue
Chaleston, SC 29401

Jackie Fleet has knowledge regarding the congestion and impacts on quality of life resulting from cruise ship operations.

Beth Anne Crane
13 Elizabeth Street; Unit A
Charleston, SC 29401
82 Society Street/Muse Restaurant & Wine Bar (Owner/Proprietor)
Charleston, SC 29401

Ms. Crane has information regarding her business' inability to take deliveries due to congestion and the discouragement of local patronage due to heavy pedestrian traffic.

Gretchen Barbatsis
18 Elizabeth Street
Charleston, SC 29401

Ms. Barbatsis is familiar with the congestion and decrease in her quality of life resulting from cruise ship operations.

Rick Reed
65 Lenwood Boulevard
Charleston, SC 29401

Mr. Reed has information regarding the well established background of excess pollutants in the air and water that has been documented with ports and busy cities that adversely impact health from: 1) Port shipping impact; 2) Port transportation and heavy equipment impact; 3) City traffic and tourism traffic; and 4) Excess runoff and storm water issues.

Starr Osbourne
304-West Willow Grove Ave
Philadelphia, PA 19118

Starr Osbourne is a regular tourist to historic Charleston whose enjoyment of the area has decreased because of cruise ship operations.

Harriet Smartt
42 Fairway Oaks Lane
Isle of Palms, SC 29451

Ms. Smart has knowledge of the pollution, soot, congestion, and negative impacts on the Historic District of Charleston resulting from cruise ship operations.

Jo Summerall
16 Wentworth Street
Charleston, SC 29401

Ms. Summerall has knowledge of the noise, congestion and adverse impact on property values resulting from cruise ship operations.

Debbie Peretsman
1612 Teal Marsh
Charleston, SC 29412

Ms. Peretsman has knowledge of the congestion, soot and pollution impacting Charleston's historic values.

Daphne Long
8 Queen Street
Charleston, SC 29401

Ms. Long has knowledge of the impacts that the cruise ship industry has had on her quality of life, including noise impacts and the loss of the Charleston "Brand."

Kirk Grant
24 Wentworth
Charleston, SC 29401

Mr. Grant has knowledge regarding the congestion, noise and pollution flowing from cruise ship operations.

Bruce Smith
8 George Street
Charleston, SC 29401

Mr. Smith is familiar with the location of the cruise ship terminal, and the impacts that flow from hosting a home port for cruise ships.

Doug & Tommie Robertson
2 Laurens Street; Unit 2-C
Charleston, SC 29401

The Robertsons have knowledge of the noise, pollution and congestion resulting from cruise ship operations at Union Pier Terminal.

Kirk Grant
24 Wentworth Street
Charleston, SC 29401

Mr. Grant has knowledge of the soot, pollution, congestion and impacts to property values resulting from cruise ship operations at Union Pier Terminal.

Timothy S. Agnew
406 La Costa Ave.
Encinitas, CA 92024

Mr. Agnew has knowledge of the decrease in tourist experience as a result of the cruise ship operations at Union Pier Terminal.

Robert Falk, Jr.
1025 Marietta Ave.
Lancaster, PA 17603

Mr. Falk has knowledge of the decrease in tourist experience as a result of the cruise ship operations at Union Pier Terminal, and specifically the negative impacts on tourists due to pollution and congestion.

Kent & Gail Bosworth
668 Shortwood Street
Charleston, SC 29412

The Bosworths have knowledge of the pollution and congestion overwhelming historic Charleston as a result of the cruise ship operations at Union Pier Terminal.

Margot Rose
19 Church Street
Charleston, SC 29401

Ms. Rose has knowledge of the pollution and congestion resulting fomr the cruise ship operations at Union Pier Terminal.

Tom & Lynn Blagden
44 Society Street
Charleston, SC 29401

The Blagdens have knowledge of the soot, congestion, and destruction of an historic city as a result of the cruise ship operations at Union Pier Terminal.

Merrill Benfield
213 Ashley Avenue
Charleston, SC 29401

Mr. Benfield has knowledge of the congestion and adverse impacts to his business because customers were not able to get to his office at 28 Hassell Street as a result of the cruise ship operations at Union Pier Terminal.

Karla Newsome/Bob Zimmer
16 Elliot Street
Charleston, SC 29401

Ms. Newsome and Mr. Zimmer have knowledge of the soot, congestion, and destruction of an historic city as a result of the cruise ship operations at Union Pier Terminal.

Tunky Summerall
42 Wentworth Street
Charleston, SC 29401

Tunky Summerall has knowledge of the decrease in property values and loss of historic character of the City of Charleston as a result of the cruise ship operations at Union Pier Terminal.

Sara Ann and Jack Murray
Fantasia Bed & Breakfast
11 George Street
Charleston, SC 29401

The Murrays have knowledge of the soot and congestion, as a result of the cruise ship operations at Union Pier Terminal, and have received negative feedback from guests (tourist experience less enjoyable) resulting from cruise ship operations.

John Thompson
57 East Bay Street
Charleston, SC 29401

Mr. Thompson has knowledge of the pollution, congestion, and the negative impacts on quality of life and historic nature of Downtown Charleston resulting from the cruise ship operations at Union Pier Terminal.

Gil & Connie Baldwin
29 Hasell Street
Charleston, SC 29401

The Baldwins have knowledge of the air emissions and the negative impacts on quality of life resulting from the cruise ship operations at Union Pier Terminal.

Mrs. Roger P. Hanahan
32 Society Street
PO Box 1294
Charleston, SC 29402

Mrs. Hanahan has knowledge of the pollution and the negative impacts on quality of life and historic nature of Downtown Charleston resulting from the cruise ship operations at Union Pier Terminal.

Corie Hipp
209 Wentworth Street
Charleston, SC 29401

Corie Hipp has knowledge of the air pollution and the impacts of congestion, which make it difficult to conduct daily business, resulting from the cruise ship operations at Union Pier Terminal.

Ann Holland
108 Rutledge Avenue
Charleston, SC 29401

Ms. Holland has knowledge of the congestion and negative impacts on the historic district of Charleston resulting from the cruise ship operations at Union Pier Terminal.

Courtenay Daniels
165 East 66th Street, 2-A
New York, NY 10065

Ms. Daniels has knowledge of the pollution, congestion and negative impacts on the historic district of Charleston resulting from the cruise ship operations at Union Pier Terminal.

Laura Ball
1862 Norton Street
Charleston, SC 29414

Ms. Ball has knowledge of the pollution, congestion and negative impacts on the historic district of Charleston resulting from the cruise ship operations at Union Pier Terminal.

Ann Apple
2902 Brownell Ave
Sullivans Island, SC 29482

Ms. Apple has knowledge of the soot and congestion resulting from the cruise ship operations at Union Pier Terminal.

Pat Sullivan
1002 Plantation Ct.
Mt. Pleasant, SC 29464

Ms. Sullivan has knowledge of the air and noise pollution, degradation of quality of life, harm to health. decrease in property values, and the degradation of the historic waterfront profile resulting from the cruise ship operations at Union Pier Terminal.
air & noise pollution

Carolyn Dietrich
6 Alexander Street
Charleston, SC 29401

Ms. Dietrich has knowledge of the soot, congestion, and destruction of an historic city as a result of the cruise ship operations at Union Pier Terminal.

Any and all written statements from these individuals have been submitted to DHEC and are in DHEC/OCRM's possession.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Petitioner that relate to any claim or defense in the case.

RESPONSE:

Comment letters submitted by the Petitioner to DHEC/OCRM related to the permit at issue.
Newspaper articles and editorials related to the proposed new cruise ship terminal at Union Pier.
Letters sent from Carrie Agnew to various employees and representatives of Carnival Cruise Lines.
Letter from Carrie Agnew to Mayor Joe Riley dated March 6, 2012.
Documents on the website www.charlestoncruisecontrol.org.

3. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

RESPONSE:

The Petitioner C4 is not seeking monetary damages through this suit. Petitioner asserts loss of value to its members' properties, and loss of health, aesthetic and recreational values.

4. List the names and addresses of any expert witnesses whom the Petitioner proposes to use as a witness at the trial of the case.

RESPONSE:

In addition to any expert witnesses listed by a co-Petitioner, Charleston Communities for Cruise Control proposes to use:

J. Gilbert Baldwin, Jr., MD
29 Hasell Street
Charleston, SC 29401

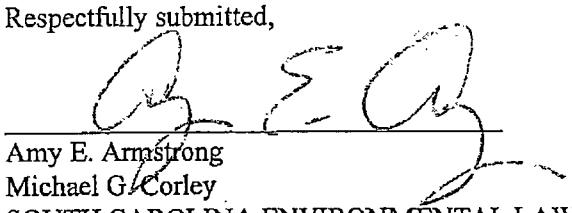
Petitioner is in the process of identifying additional expert witnesses, and will disclose those witnesses as they become known.

5. For each person known to the Petitioner or its counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

RESPONSE:

Petitioner can discern no material difference between this request and request #1. Petitioner therefore incorporates the response to request #1 into this response.

Respectfully submitted,



Amy E. Armstrong
Michael G. Corley
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380 Pawleys Island, SC 29585
Office address: 430 Highmarket Street Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
(843) 937-881

Attorneys for the Petitioners, Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of Surfrider and Charleston Communities for Cruise Control

Georgetown, South Carolina

April 22, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing **PETITIONER CHARLESTOWN COMMUNITIES FOR CRUISE CONTROL'S RESPONSE TO RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY'S FIRST SET OF INTERROGATORIES** in the U.S. Mail addressed to:

Randolph R. Lowell, Esquire
Chad N. Johnston
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Amy E. Armstrong

Georgetown, South Carolina

April 22, 2013

Exhibit 8

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **PETITIONERS' SUPPLEMENTAL RESPONSES TO RESPONDENT SOUTH CAROLINA PORTS AUTHORITY'S FIRST SET OF INTERROGATORIES TO PETITIONER CHARLESTOWNE NEIGHBORHOOD ASSOCIATION**

TO: THE RESPONDENTS AND THEIR ATTORNEYS:

1. **Give the names and addresses of persons known to the Petitioner or its counsel to be witnesses concerning the facts of the case, set forth either a summary sufficient to inform the other parties of the important facts known to or observed by such witnesses, and provide a copy of any written or recorded statements that have been taken from the witnesses along with any information regarding all persons with possession of such statements:**

RESPONSE:

Browne Hamrick
55 King Street
Charleston, SC 29401

J. Randolph Pelzer
68 South Battery
Charleston, SC 20401

Respectfully submitted,

Amy E. Armstrong
Michael G. Corley
Jessie A. White
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380 Pawleys Island, SC 29585
Office address: 430 Highmarket Street Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
(843) 937-881

Attorneys for the Petitioners, Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of Surfrider and Charleston Communities for Cruise Control

Georgetown, South Carolina

April 23, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing **PETITIONERS' SUPPLEMENTAL RESPONSES TO RESPONDENT SOUTH CAROLINA STATE PORTS AUTHORITY'S FIRST SET OF INTERROGATORIES TO PETITIONER CHARLESTOWN NEIGHBORHOOD ASSOCIATION** in the U.S. Mail addressed to:

Randolph R. Lowell, Esquire
Chad N. Johnston
Willoughby & Hoefer, PA
Post Office Box 8416
Columbia, SC 29202

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Amy E. Armstrong

Georgetown, South Carolina

April 23, 2013

Exhibit 9

BK P 358PG304

STATE OF SOUTH CAROLINA)
) TITLE TO REAL ESTATE
COUNTY OF CHARLESTON)

KNOW ALL MEN BY THESE PRESENTS, THAT **JAMES K. KUYK** ("the Grantor"), for and in consideration of the sum of FOUR HUNDRED SIXTY-NINE THOUSAND AND 00/100 ($469,000.00) Dollars, to him in hand paid at and before the sealing of these presents by **CAROLYN W. AGNEW** in the State aforesaid, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said **CAROLYN W. AGNEW** (the "Grantee"), the following described property, to wit:

All that certain piece, parcel or units, situate, lying and being in the State of South Carolina, County of Charleston, City of Charleston, being known and designated as Unit B of 35 Hasell Street Horizontal Property Regime as is more fully described in Master Deed dated July 28, 1986, and recorded in the RMC Office for Charleston County, South Carolina in Deed Book D-156, page 511, including Exhibits A through D.

Being the same property as conveyed to James K. Kuyk by deed from SPQ Partners, recorded June 2, 1993 in Deed Book R227, page 756, in the Charleston County RMC Office.

TMS No. 458-05-01-143

Grantee's Mailing Address:
35-B Hasell Street
Charleston, SC 29401

TOGETHER with, all and singular, the rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said Grantee, her heirs and assigns, forever.

AND subject to any and all Restrictive Covenants, Easements, Rights-of-Way and Conditions above, the said Grantor does hereby bind himself and his heirs and assigns, to warrant and forever defend, all and singular, the said Premises unto the said Grantee, her heirs and assigns, against himself and his heirs and assigns, and all persons whomsoever lawfully claiming or to claim the same or any part thereof.

104274.1-PL (FHB) 900000-432

IN WITNESS WHEREOF, JAMES K. KUYK has caused these presents to be executed in his name this 10th day of November, 2000.

SIGNED, SEALED AND
DELIVERED IN THE
PRESENCE OF:

(Signature of 1st Witness)

(Signature of 2nd Witness\
Notary Public)

James K. Kuyk

STATE OF SOUTH CAROLINA)

ACKNOWLEDGMENT

COUNTY OF CHARLESTON)

The foregoing instrument was acknowledged before me this 10th day of November, 2000 by James K. Kuyk.

(SEAL)
Notary Public for South Carolina
My Commission Expires: 7/13/2008

104274.1-PL (PHD) 900000-432

STATE OF SCUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT

BK P 358PG306

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.

2. The property being transferred by James K. Kuyk to Carolyn W. Agnew on November 10, 2000.

3. Check one of the following: ***The DEED is***
   (a) _X_ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
   (b) ____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
   (c) ____ EXEMPT from the deed recording fee because (exemption # _____)
   Explanation if required _____
   (If exempt, please skip items 4-6, and go to item 7 of this affidavit.)

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.
   (a) _X_ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of $ 469,000.00 .
   (b) ____ The fee is computed on the fair market value of the realty which is $ _____.
   (c) ____ The fee is computed on the fair market value of the realty as established for property tax purposes which is $ _____.

5. Check YES_____ or NO_____ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES", the amount of the outstanding balance of this lien or encumbrance is $_____.

6. The DEED Recording Fee is computed as follows:
   (a) 469,000.00 the amount listed in item 4 above
   (b) _____ the amount listed in item 5 above (no amount place zero)
   (c) 469,000.00 subtract line 6(b) from Line 6(a) and place the result.

7. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: _____.

8. I understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

_____
Grantor, Grantee or Legal Representative connected with this transaction

Sworn to before me this 10 day of November 2000

_____
Notary Public for South Carolina
My Commission Expires: 7/13/2008

104274.1-PL (EHB) 900000-432

BK P 358PG307

Nexsen Pruet Jacobs Pollard & Robinson
POST OFFICE BOX 486
CHARLESTON, SOUTH CAROLINA 29402

MHL

FILED
P358-304
2000 NOV 15 PM 3:42
CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

Recording Fee	10.00
State Fee	1219.40
County Fee	515.90
Postage	
TOTAL	1745.30

A

DTD 11-20-00

RECEIVED FROM RMC
NOV 20 2000
PEGGY A. MOSELEY
COUNTY AUDITOR

Exhibit 10

STATE OF SOUTH CAROLINA
RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT
INSTRUCTIONS TO PROPERTY OWNERS

1. South Carolina Code of Laws Ann., Title 27, Chapter 50, Article 1 requires that an owner of residential real estate (single-family homes and buildings with up to four dwelling units) shall provide to a purchaser this property condition disclosure statement, which must be completed prior to signing a contract of sale. This disclosure statement must be provided in connection with the sale, exchange, option and sale under a lease with an option to purchase. This disclosure statement is not required for some transactions. A complete list of exemptions may be found in S.C. Code Ann., Section 27-50-30.

2. You must check one of the boxes for each of the questions on this form.

   a. If you check "Yes" for any question, you must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator, or other expert or public agency. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in the report as long as you were not grossly negligent in obtaining or transmitting the information.

   b. If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misrepresentation.

   c. If you check "No Representation" for any question, you are stating that you are making no representation regarding the conditions or characteristics of the property, but you may have a duty to disclose even if you know, or should have known, of them. Please consult with an attorney to determine any potential liability you may have for checking this answer.

   d. If you check "Yes" or "No" for any question and, subsequently, something happens to the property to render your statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly provide the purchaser a corrected statement or you may correct the problem.

3. If you are assisted in the sale of your property by a licensed real estate broker or salesperson, you remain solely responsible for completing and delivering this statement to the purchaser. The broker or salesperson must disclose any material facts about your property which he/she knows, or reasonably should know, regardless of your responses on this statement. You are to complete this form yourself and answer all questions truthfully and as fully as possible. Please consult with your attorney if you have any questions. By signing below, you acknowledge that the failure to disclose known material information about the property may result in liability.

4. You must provide the completed statement to the purchaser prior to the time you and the purchaser sign a contract to purchase your property or as the contract otherwise provides. You should provide the purchaser a copy of this statement containing your signature and keep a copy signed by the purchaser for your records.

Property Address: _____

Tax Map Number: _____

Initials/Date: Seller(s) _____ Buyer(s) _____

AS SELLER OF THE PROPERTY IDENTIFIED HEREIN, DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) OR CONDITION/CHARACTERISTIC WITH ANY OF THE FOLLOWING:

	Yes	No	No Representation
1. Foundation, slab, fireplaces/chimneys, floors, windows (including storm windows and screens), doors, ceilings, interior and exterior walls, attached garage, patio, deck, walkways, or other structural components, including any modifications?	☐	☐	☐
a. Siding: masonry ___ wood___ composition/hardwood___ vinyl ___ synthetic stucco ___ stucco ___ aluminum ____ masonite ___ cement-plank ___ other _____			
b. Approximate age of structure _____			
2. Roof and gutters (leakage or other problem)?	☐	☐	☐
a. Approximate age of roof covering _____			
b. Are you aware of any leaks during your ownership (or within the past 3 years, if your ownership exceeds 3 years)?	☐	☐	☐
3. Water seepage, leakage, dampness or standing water or water intrusion from any source in any area of the structure?	☐	☐	☐
4. Electrical system (outlets, wiring, panel, switches, fuses, circuit breakers, fixtures, etc)?	☐	☐	☐
5. Plumbing system (pipes, fixtures, water heater, etc.)?	☐	☐	☐
6. Heating and/or air conditioning? Approximate age _____	☐	☐	☐
a. Heat source: furnace___ heat pump___ baseboard ___ solar ___ other _____			
b. Cooling source: central ___ wall/window unit(s) ___ other _____			
c. Fuel source: electricity ___ natural gas___ propane ___ oil ___ solar ____ other _____			
If there is more than one system, please answer questions again on a separate page			
7. Water supply (water quality, quantity, water pressure)?	☐	☐	☐
a. water supply is: city/county__ community system__ private well__ other _____			
b. water pipes are: copper__galvanized__PVC/CPVC__polybutelene__ combination ___ other _____			
8. Sewer/septic system?	☐	☐	☐
a. Type system: septic tank__community system__ other _____ connected to city/county system__ city/county system available ___ other _____			
b. Does the system require a sewage lift pump? Yes __ No __			
c. Has the septic system been serviced/pumped during your ownership? Yes __ No __			
9. Appliances (range/oven, attached microwave, hood/fan, dishwasher, disposal, icemaker, etc- contract may control what transfers)	☐	☐	☐
10. Present infestation, or damage, **WHICH HAS NOT BEEN REPAIRED** from past infestation of wood-destroying insects or organisms or dry rot or fungus?	☐	☐	☐
Is there a termite bond or warranty? Yes ___ No____			
Name of organization that treats property for organisms: _____			
If there is a termite bond or warranty, please provide/describe: expiration date _____, transferable_____, amount of transfer fee _____. What does bond/warrant cover?_____ Is it a repair bond? _____ Is it a retreatment bond only (i.e. no repair)? ____ Other info: _____			

	Yes*	No	No Representation
11. Drainage, grading or stability of soil or retaining structure?	☐	☐	☐
a. Are you aware of any underground tanks or voids?	☐	☐	☐
b. Are you aware of any soil drains on the property?	☐	☐	☐
c. Are you aware of any sump pumps on the property?	☐	☐	☐
d. Are you aware of significant fill material on or below ground?	☐	☐	☐

If yes, describe tanks/voids or drains or pumps or material/amount: _____

12. Other built-in systems and fixtures ☐ ☐ ☐
Mark below for any systems that have malfunctions or defects.
See contract to determine if any systems below convey to new owner.
central vacuum __ pool__ hot tub __ spa __ attic fan __ exhaust fan __ ceiling fan__ sump pump __
irrigation system __ cable tv wiring or satellite dish ___ security system __ fountain ___ storage building
___water filtration _____ solar panels ___ or other systems _____

13. During your ownership, or within the past five (5) years, if ownership exceeds five (5) years, have there been any individual repairs in excess of $500 (five hundred dollars) to any item checked in Questions 1-12?

Explain:_____

REGARDING THE PROPERTY IDENTIFIED HEREIN, INCLUDING THE LOT, OTHER IMPROVEMENTS, AND FIXTURES LOCATED THEREON, DO YOU HAVE KNOWLEDGE OF ANY:

	Yes*	No	No Representation
14. Room additions or other structural changes made during your ownership?	☐	☐	☐
15. Environmental hazards (substances, materials or products), including asbestos, formaldehyde, radon gas, methane gas, lead-based paint, underground storage tank, fuel oil, paint, PCBs, lead hazards, toxic mold, methamphetamine, methamphetamine byproducts, or other hazardous or toxic material (whether encapsulated or buried or covered), any contaminated soil or water, or other environmental contamination of property?	☐	☐	☐
16. Nuisances. (noise, odor, smoke, etc.) affecting the property?	☐	☐	☐
Explain:_____			
17. Previous damage caused by fire or smoke or water?	☐	☐	☐
18. Violations or variances of building codes, restrictive covenants, other land use restrictions or zoning ordinances that are applicable to the property?	☐	☐	☐
Explain:_____			
19. Restrictions to property use? (covenants, conditions, or deed)	☐	☐	☐
If yes, are copies attached? _____			
If there is a regime fee or similar fee, who do you pay?_____			
Explain:_____			

	Yes*	No	No Representation
20. Utility or other easements, shared driveways, party walls, erosion control (seawalls, rip-rap, etc.), or encroachments from or on adjacent property?	☐	☐	☐
21. Lawsuits, foreclosures, bankruptcy, tenancies, judgments, tax or other liens, proposed assessments or insurance issues, notice from any governmental agency, individual(s), or organization(s) that could affect title to the property?	☐	☐	☐

If you choose to volunteer information about nearby issues that may or may not be in the public record yet, please report here: _____

22. If there is a dock, dam, retaining wall, or other structure requiring inspections, permits, etc., have such requirements been complied with in full? Are the documents attached? _____	☐	☐	☐
23. If property includes a manufactured home, has it been legally converted to real property and the DMV title retired? Are the documents attached? ____ Explain: _____	☐	☐	☐
24. Are there flood hazards or is the property in a federally-designated flood plain? If there is flood insurance for the property, what is the amount, time period, and coverage? _____	☐	☐	☐
Please describe any erosion and erosion-control measures. _____			
25. Are there rental, rental management, vacation rental or other lease contracts in place on the property at the time of closing? If there is a management company, please provide name and contact information: _____	☐	☐	☐
26. Are there any outstanding charges owed by for gas, electric, water, sewerage, or garbage services provided to the property that are delinquent? Explain: _____	☐	☐	☐

Answer any of the questions #27-40 that are applicable to this property.

	Yes*	No	No Representation	N/A
27. Owners Association fees or common area expenses/assessments?	☐	☐	☐	☐
28. Are there any resale or rental restrictions?	☐	☐	☐	☐
29. Is Owners Association involved in current or anticipated litigation?	☐	☐	☐	☐
30. Has Owners Association levied special or insurance assessments?	☐	☐	☐	☐
31. Are there any guest, visitor, or animal restrictions?	☐	☐	☐	☐
32. Does the property include assigned parking space(s)?	☐	☐	☐	☐
33. Are keys required to access common or recreational areas?	☐	☐	☐	☐
34. Is a copy of the Master Deed and Bylaws attached?	☐	☐	☐	☐
35. Is a copy of the covenants, conditions, and restrictions attached?	☐	☐	☐	☐
36. Is there a transfer fee levied to transfer the property?	☐	☐	☐	☐

37. What are the Ownership Association dues? $_____ per _____ (month/year/etc.)
38. What do the dues cover? _____ Is insurance included? _____
39. What is the name and contact information for the Owners Association? _____
40. Will any memberships transfer with the property? _____ Documentation attached? _____
Explain: _____

IF YOU ANSWERED "YES" TO ANY OF THE PREVIOUS QUESTIONS, PLEASE USE THE FOLLOWING SPACE FOR YOUR EXPLANATION AND ATTACH ANY RELEVANT PROFESSIONAL REPORTS OR ADDITIONAL INFORMATION.

Property Address: _____

Initials/Date: Seller(s): _____ Buyer(s): _____

To read the South Carolina Residential Property Condition Disclosure Act, (S.C. Code Ann. § 27-50-10 *et seq.*) please visit: http://www.scstatehouse.gov/code/t27c050.php

This disclosure does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a sales agreement. The real estate licensee, whether acting as listing agent or selling agent, has no duty to inspect the onsite or offsite conditions of the property and any improvements.

Owner(s) Acknowledgement

Property Address: _____

The property is currently: owner-occupied ____leased ____in an estate ____ in foreclosure ____ vacant ____(If vacant, how long?) _____

Owner's Name(s): _____

Owner(s) acknowledge having examined this statement before signing and that all information is true and correct as of the date signed.

Owner Signature: _____ Date: _____ Time: _____

Owner Signature: _____ Date: _____ Time: _____

Purchaser(s) Acknowledgement

Purchaser(s) acknowledge receipt of a copy of this disclosure statement; that he/she has examined it before signing; that he/she understands that this is not a warranty by owner or owner's agent; that it is not a substitute for any inspections he/she may wish to obtain; and that the representations are made by the owner and not the owner's agent(s) or subagent(s). Purchaser(s) are encouraged to obtain his/her own inspection by a licensed home inspector or other professional.

Purchaser Signature: _____ Date: _____ Time: _____

Purchaser Signature: _____ Date: _____ Time: _____

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	**SOUTH CAROLINA PORTS AUTHORITY'S RESPONSE IN OPPOSITION TO THE CRUISE OPPONENTS' MOTION/SURREPLY** Docket No. 13-ALJ-07-0056-CC

Respondent South Carolina State Ports Authority (Ports Authority) hereby submits this response to yet another meritless motion.[1] *See* Cruise Opponents' Mot. for Leave to File a Surreply (Motion or Surreply), dated Aug. 30, 2013. Having had a request to file a surreply denied by this Court on August 20, the Cruise Opponents are back.[2] Undaunted by rules, the Cruise Opponents decided not to ask permission and have included their substantive arguments in the so-called Motion, and by virtue of having the Motion read simultaneously have the substantive arguments read. Thus, this is not a motion seeking leave from the Court, but rather an unauthorized surreply filed in the guise of a motion. These types of obstructionist groups and

[1] Couched as a "motion" to file a surreply, the motion should be taken for what it is—an unauthorized surreply targeted at giving the Cruise Opponents the last word. *See, e.g., Breakwater Trading, LLC v. Maslin*, C/A No. 06-C-4242, 2008 WL 619329 at *2 n.4 (N.D. Ill. March 3, 2008).

[2] The Cruise Opponents previously filed a motion to strike and request for leave to file a surreply on Friday, August 16, and then filed the surreply on Monday, August 19. By email dated Tuesday, August 20, this Court declined to accept the surreply.

their counsel have a history of violating the rules with this surreply (and motion to strike) tactic in their ends-justifies-the-means approach to litigation.[3]

ARGUMENT

I. NO SURREPLY IS ALLOWED AND NONE IS JUSTIFIED.

Initially, the ALC Rules provide that any motion must be filed no later than 30 days prior to the hearing. Rule 19.A, RPALC. This is, in part, to provide adequate time for responses and replies. As the Motion/Surreply was filed a mere seven days prior to the hearing on the underlying motion to dismiss for lack of standing, the Motion/Surreply is inappropriate and should be stricken.

Further, this sort of briefing has no place in these proceedings.[4] The Surreply offers no argument on any "new" issue. The Ports Authority filed a motion, the Cruise Opponents responded, and the Ports Authority replied. The Cruise Opponents do not appreciate having their own documents and statements being used to undercut the current position of convenience and do not like the caselaw responsive to their arguments, so they try to get the last word by filing a motion to file a Surreply. This is entirely inappropriate and contrary to the rules.[5] "The rule does

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[3] Opposing counsel files motions to strike and motions for surreply improperly to make substantive arguments. In this matter, the Cruise Opponents have filed three motions to strike and two motions for surreplies and two surreplies (absent court order) (with one motion serving as a surreply). In the parallel proceeding at the South Carolina Supreme Court, Cruise Opponents' counsel has utilized these same improper tactics.

[4] A surreply "may be permitted when the moving party would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Khoury v. Meserve*, 268 F.Supp.2d 600, 605 (D. Md. 2003); *see Hall v. Whitacre*, No. 06-1240-JTM, 2007 WL 1585960 at *1 (D. Kan. May 31, 2007) (unpublished) ("Surreplies are heavily disfavored, and are allowed only in the most extraordinary circumstances."). Here, the Court has noticed a hearing on the motions, so even assuming arguendo that new arguments were made the Cruise Opponents would have an opportunity to argue those matters.

[5] The Cruise Opponents claim a need to clear up supposed misstatements of fact and law as a justification for the Surreply. However, this exact argument has been rejected as grounds to justify a surreply. *Meserve,* 268 F.Supp.2d at 606 ("Plaintiff contends that her surreply corrects

not provide for briefs in response to replies.... [A]t some point, briefing must end." *Archdiocese of Milwaukee v. Underwriters at Lloyd's, London*, 955 F. Supp. 1066, 1070 (E.D. Wis. 1997) (denying leave to file a surreply); *see Sierra v. LaManna*, C/A No. 0:08-3222-CMC-PJG, 2009 WL 1884492 at *3 n.3 (D.S.C. June 30, 2009) (noting the District of South Carolina Local Rules "make no provision whatsoever for sur-replies").

The Cruise Opponents offer only a cursory excuse to file the Surreply. They claim that a new legal theory is being offered for standing. However, the law of standing, as argued by the Ports Authority, is that found in the United States Supreme Court's *Lujan* opinion as adopted by the South Carolina Supreme Court in the *Sea Pines* case and as discussed in *Smiley. Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan* and citing *Sea Pines*); *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) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The only misapprehension of law is by the Cruise Opponents who rely on two outdated Supreme Court cases (*Duke Power* and *SCRAP*) for their arguments and advocate the functional elimination of what the United States and South Carolina Supreme Courts have termed the "**irreducible** constitutional minimum of standing." The filing of the Surreply seeks to merely respond to the Reply, as the Reply effectively eviscerates the opposition offered in the Response and affirmatively demonstrates that the Cruise Opponents lack standing and this matter must be dismissed.

Defendant's misrepresentation of the record of Plaintiff's administrative proceeding and standard of review of the decisions of Administrative Judges. Nevertheless, this contention also does not address a new matter.").

Indeed, while the Ports Authority could have sought leave to file a "surreply" to correct legal and factual misstatements in the replies regarding the motions to strike, the Ports Authority and its counsel opted to follow the rules. All parties should be required to follow the same rules.

II. THE CRUISE OPPONENTS MISUNDERSTAND THE APPLICABLE STANDARD AND CONFUSE WHAT THEY BELIEVE THE LAW SHOULD BE WITH WHAT THE LAW IS.

The Cruise Opponents ignore the black letter law that ***the burden lies with the Cruise Opponents to establish standing***. *Sea Pines*, 550 S.E.2d at 291 ("The party seeking to establish standing carries the burden of demonstrating each of the three elements.") (citing *Lujan*, 504 U.S. at 561); *see Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385, 392-93 (Ct. App. 2013) ("Elements of standing, however, 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case'; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation.'"). They rely on affidavits, but the proffered affidavits contain some unsupportable and unreasonable averments (such as being chased inside by a smoke cloud).[6] *See* Aff. of Tommie Robertson, dated July 17, 2013. Indeed, one Charleston resident and organization member—a medical doctor who lives closer to UPT than the affiants—dismissed the same claims found in the affidavits submitted by the Cruise Opponents as "utter nonsense." Ex. 1, Ltr. of Dr. S.D. Thomas, dated April 23, 2012, DHEC-SCPA 00731-32.

And yet the Cruise Opponents argue that this Court must accept "utter nonsense" as truth just because they put it on paper. In fact, they would render the "irreducible constitutional

[6] The Cruise Opponents complain that the averments in the affidavits are dismissed out of hand. But "[n]one of these affiants state that the averments are based on personal knowledge or on information and belief nor offer any semblance of a basis for qualification as an expert, so none of the opinions espoused in these affidavits are admissible or proper for consideration." Ports Authority, Reply in Supp. at 26. Moreover, "the affidavits instead only demonstrate that all of the alleged harms ***are already occurring*** and in no way show that the permitted installation of five pile clusters or even that relocation of the existing cruise operations will increase or exacerbate or intensify the alleged injuries from the existing cruise operations." Ports Authority, Reply in Supp. at 26

minimum of standing" to a mere word game, with constitutional standing dependent upon the right words without any reference to context, fact, or substance. Cruise Opponents' Reply in Supp. of Mot. to Strike Exh., dated Aug. 26, 2013. But the law is clear—they "must come forward with 'competent proof'—that is a showing by a preponderance of the evidence—that standing exists." *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003); *see Public Citizen, Inc. v. Nat'l Hwy. Traffic Safety Admin.*, 489 F.3d 1279 (D.C. Cir. 2007). Once the basis for standing has been challenged, "the trial court is free to weigh the evidence and satisfy itself as to the evidence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of a disputed material fact will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *see Evers v. Astrue,* 536 F.3d 651, 656–57 (7th Cir. 2008) (quoting *St. John's United Church of Christ v. City of Chicago,* 502 F.3d 616, 625 (7th Cir. 2007)) ("The district court may properly look beyond the jurisdictional allegations of the complaint and ***view whatever evidence has been submitted on the issue*** to determine whether in fact subject matter jurisdiction exists.'") (emphasis added); *see also Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) (evidence outside the pleadings may be considered when reviewing a motion to dismiss for lack of standing and that reliance on *Lujan* for the proposition that general factual allegations are sufficient is misplaced when evidence calls standing into question); *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) ("When a defendant raises standing as the basis for a motion under Rule 12(b)(1) to dismiss ... the district court may consider evidence outside the pleadings....") (internal citations omitted) (internal quotations omitted); *Benefield v. Int'l Paper Co.*, 270 F.R.D. 640, 646 (M.D. Ala. 2010) ("[O]nce a defendant proffers evidence which calls a plaintiff's standing into question, the

presumption of correctness that we accord to a complaint's allegations falls away and the plaintiff bears the burden of coming forward with competent proof that standing exists....") (internal citations omitted) (internal quotations omitted).

Further, the affidavits complain of alleged injuries that are existing injuries rather than future injuries that will be sustained by the installation of five pile clusters. They complain of current cruise operations and emissions from a third-party—specifically Carnival Cruise Lines. But there is no allegation tied to the permitted activity of the installation of five pile clusters, and in fact the Cruise Opponents have affirmatively stated that "[t]his thing is not about five pilings." Ex. 2, David Slade, *Charleston Cruise-Ship Opponents Seize Opportunity to Battle New Passenger Terminal*, CHARLESTON POST & COURIER, April 19, 2012, at 2. At bottom, the Cruise Opponents complain about today's cruise operations. Indeed, Ms. Robertson could not have been chased by a smoke cloud unless it existed today. No allegation has been made of any injury related to the permitted activity of the installation of five pile clusters, and none of the existing complaints of traffic and air emissions can be traceable to the permitted activity.

In fact, the League's and the Cruise Opponents' counsel have acknowledged that traceability is absent. As reflected in the DHEC administrative record:

> ***Blan Holman of the [SELC]*** (and acting for the plaintiffs in a lawsuit against Carnival) attended the May 2011 Historic Ansonborough Neighborhood Association (HANA) meeting and ***when asked if his organization had any proof or evidence linking Carnival ships to water or air-pollution, answered "no."***

Ex. 3, Ltr. of Pat Jones, dated April 16, 2012, DHEC-SCPA 00721-22 (emphasis added). And yet, despite lacking any connection or evidence that any pollution or health effects will be worsened by continued cruise operations, on June 13, 2011, the Cruise Opponents instituted the first of their three legal actions as part of the larger anti-cruise strategy.

Moreover, in March 2013, after this matter was filed, the League acknowledged that it had tried to connect air particulate samples to cruise but were unable to do so, stating that "we really don't know at this point what types of fuel are being burned by cargo or by cruise," referring to prior samples "from buildings all the way across the peninsula to the west ... but we weren't able to narrow it down to cruise ships...." Ex. 4, Email of Katie Zimmerman, dated March 4, 2013, Cruise Opponents 09233, and Email of Katie Zimmerman, dated Nov. 26, 2012, Cruise Opponents 09334.

The Cruise Opponents believe that prevailing in this matter stops all cruise operation at UPT, which is why they are opposing this permit. *See* Surreply at 4. However, the Cruise Opponents fail to understand that cruise will continue in the absence of this permit. *See* Ports Authority Reply in Supp. Ex. 1, Aff. of Peter Lehman. While they hope to stop all cruise operations, the choice is whether cruise operations continue on the south end or the north end of UPT. The Ports Authority can rehabilitate and renovate the existing passenger terminal, and may do so without any permit from DHEC. *See* S.C. Code Ann. § 48-39-130(C); *S.C. State Ports Auth. v. S.C. Coastal Council*, 270 S.C. 320, 322-23, 242 S.E.2d 225 (1978); 1989 S.C. Op. Att'y Gen. 254, No. 89-94 (Sept. 20, 1989). But that option leaves cargo, rail, and truck operations ongoing and is not the most environmentally beneficial option nor does that option provide a better benefit to the public than the Ports Authority's plan. Alternatively, the five pile clusters under Building 322 allow the north end of UPT to be used for cruise operations while the south end can be redeveloped as green space, mixed use, and provide waterfront access for the public. This would reduce air emissions, reduce traffic congestion, and mitigate all of the environmental impacts that the Cruise Opponents complain of from the existing operations. In

other words, the Cruise Opponents are trying to stop a redevelopment plan that benefits them, the citizens of Charleston, and the State.[7]

As Chief Justice Toal noted in a recent oral argument involving the League and Cruise Opponents' counsel:

> CHIEF JUSTICE TOAL: What, what we found in, in the decision that we rendered is that the administrative law judge was correct in his interpretation based on our other case law and, therefore, had a compelling reason to make the decisions he made. And, again, we used *Murphy* and other cases for the proposition that you don't simply

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[7] As summarized in the administrative record:

> There are only two options for Union Pier:
>
> • It will continue to be used exclusively for maritime purposes, including cargo and cruise ships.
>
> • Or the passenger terminal will be relocated to the northern portion of the property, and more than half of Union Pier will become available for both public and private uses.

Ports Authority Reply in Supp. Ex. 5, What Kind of Future Do You Want?, SCPA 002630-40. The Cruise Opponents' goal is the removal of cruise from Charleston altogether. However, there are only two options—renovate under a plan that mitigates for impacts and opens up waterfront access to the citizens or maintain the *status quo*. *See id.* Indeed, the concept plan for the renovated UPT includes:

- Removal of 200 cargo ships, trains, tracks, and trucks;
- Extends Market Street to the waterfront;
- Restores a natural shoreline;
- Creates green spaces and view corridors;
- Stabilizes Bennett's Rice Mill;
- Provides public and private uses; and
- Creates jobs and economic vitality.

Ports Authority Reply in Supp. Ex. 6, UPT Presentation of Riley and Newsome, SCPA 001218-225; *see* Ports Authority Reply in Supp. Ex. 7, Existing v. Proposed Drawing Comparison, SCPA 001217; *see also* Ports Authority Reply in Supp. Ex.1, Lehman Aff. Ex. B SCPA 001253-366 (Concept Plan for Union Pier Waterfront dated Sept. 2010) (discussing renovation and restoration initiatives at the UPT).

> make a value judgment about whether you want a piece of property developed. Are you -- that's not incompatible with taking into account cumulative impact. But it doesn't mean that, if you're going to develop the land, that trumps any ability to ever get a permit, which is **essentially what Coastal Conservation League and others argue, is that it's a black-and-white proposition: This is a bad development; therefore, you can't ever put any kind of revetment or bulkhead there.**

Ex. 5, *Kiawah Development Partners II v. S.C. Dep't of Health & Envtl. Control*, Reh'g Trans. 11:9-25 (June 5, 2013) (emphasis added).[8] Here, the Cruise Opponents believe, without any credible support, that their opinion that any cruise operations at UPT are "a bad development" should trump the experts, the landowner, and the elected officials and representatives in making what amounts to a policy decision about land use (which is a political question). *See, e.g.*, Ex. 6, Margot Rose Email, dated April 28, 2011, Cruise Opponents 05685 (stating "[w]e are for developing all 65 acres [of UPT] for non-maritime use" and that "our proposal is <u>better</u> than" the Ports Authority's redevelopment plan).

Further, the League affirmatively discouraged a researcher from interviewing residents about the cruise terminal issue because the "overwhelming response from folks off the peninsula" is that the cruise issue is not about public health but about Cruise Opponents being "whiny." Ex. 7, Email of Katie Zimmerman, dated May 11, 2012, Cruise Opponents 04484-85; *see also* Cruise Opponents' Mot. to Strike Inflammatory References, filed Aug. 16, 2013. Indeed, the overwhelming majority is correct, as even the Cruise Opponents acknowledge this is neither about public health or environmental impacts nor, in the words of Dana Beach, "about

[8] The oral argument at the rehearing of the *Kiawah Development* case also included the Chief Justice's comment that "what we get into so many times, **folks who really oppose any development, and they use this process to delay, if they can, a decision that they are not in favor of**." Ex. 5, *Kiawah Development Partners II v. S.C. Dep't of Health & Envtl. Control*, Reh'g Trans. 6:14-17 (June 5, 2013) (emphasis added).

five pilings," but instead this is about rendering policy decisions to redevelop the *entire* UPT for their purposes. *See* Ports Authority Reply in Supp. at 34-37 (detailing numerous admissions from the Cruise Opponents regarding the political question).

Moreover, for the League, opposition to the cruise terminal is a fundraising opportunity. The League saw its contributions and grants diminish by over 1/3 between 2008 and 2011. *See* Ex. 8, Form 990s filed by the League with the IRS, SCPA 001822-001946. In 2008, contributions and grants topped $3 million, while in 2011 contributions and grants dropped below $2 million. But opposing cruise is a way to reach funding. The League solicited funds by letter dated December 31, 2012, stating that its "[cruise] strategy is ... to ultimately encourage local and state decision makers to wield the power to protect the quality of life in coastal South Carolina.... [Litigation] is a costly project.... It is our hope that you will make a special gift to CCL...." Ex. 9, League Solicitation Ltr. dated Dec. 31, 2012, SCPA 001074-77. The South Carolina Maritime Association responded with an open letter in the Charleston Regional Business Journal declining to contribute to the "anti-cruise campaign" due in part to the fact that "32 years['] worth of data [on] ... Charleston's dockworkers shows no trends ... indicative of airborne or chemical exposure...." Ex. 10, S.C. Maritime Ass'n, Ltr. of Jan. 2013, SCPA 001079.

Notably, the elected officials and representatives who are accountable to the citizens support the cruise terminal. This handful of opponents does not represent the vast majority of the citizens and do not appear to represent the majority of the neighborhood organizations. *See* Ex. 2, Ltr. of Dr. S.D. Thomas, dated April 23, 2012, DHEC-SCPA 00731-32 (characterizing Cruise Opponents as a "small but tightly knit group of miscreants determined to have its way" and noted that "so-called neighborhood associations" were passing anti-cruise resolutions at meetings with

only a minority of the membership attending); Ports Authority Reply in Supp. Ex. 8, Ltr. of Sarah Christopher, dated April 19, 2012, DHEC-SCPA 000727 ("Most people I know are supportive of the new terminal and we need to make our positions more vocal. The opposing groups just make more noise. There are not more of them."); Ports Authority Mot. to Dismiss for Lack of Standing Ex. 18, S.968 Concurrent Resolution (voicing support for cruise in Charleston), Ex. 19, Charleston City Council resolution, dated Sept. 14, 2010 (stating the City's support for Carnival Cruise Lines and UPT redevelopment).

CONCLUSION

The Cruise Opponents have no right or reason to file a Surreply, and the Motion, such as it is, should be denied.

Respectfully submitted,

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September 4, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

This is to certify that I, an paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **South Carolina Ports Authority's Response in Opposition to the Cruise Opponents' Motion/Surreply** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
South Carolina Environmental Law Project
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Charleston, SC 29401

Breanna M. Karns

Columbia, South Carolina
This 4th day of September 2013.

Exhibit 2

The Post and Courier

Charleston cruise-ship opponents seize opportunity to battle new passenger terminal

By David Slade
dslade@postandcourier.com

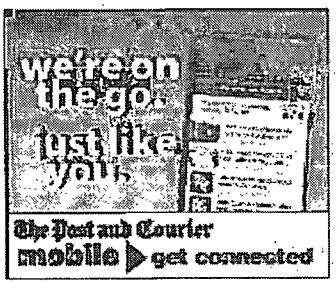
Posted: Thursday, April 19, 2012 12:30 a.m.

File/Staff This undated photograph, taken before cargo operations were moved from Union Pier in 2011, show the location of the current and proposed cruise ship passenger terminals Buy this photo

Opponents of Charleston's cruise-ship industry believe the State Ports Authority's need for a permit to build a $35 million passenger terminal presents an opportunity to stop the plan.

About 200 people, with a clear majority opposed to the new terminal, turned out Wednesday night for a hearing in North Charleston on the Office of Ocean and Coastal Resource Management permit.

The permit would allow the SPA to install five additional pilings under Union Pier on the Cooper River. The pilings would support



elevators and escalators that would be installed in an existing warehouse slated for conversion to the new passenger terminal.

Cruise opponents said the state must consider every impact cruise ships are having in Charleston before deciding on the pilings permit.

"Simply put, if this project goes through, it could mean the end of the Ansonborough neighborhood and many others," said Kathleen Summerall, a neighborhood resident.

Several downtown neighborhood associations have joined with environmental, health and preservation groups to oppose the cruise terminal and call for limits on the existing cruise business. A lawsuit is pending before the state Supreme Court.

Cruise terminal supporters, including Mayor Joe Riley and a number of people with port-related jobs and businesses, spoke in favor of the plan. Existing cruise-ship operations would move from the south end of union pier, near Market Street, to the north end, near Laurens Street.

"It is the same business, the same cruise activity, that is currently going on in Charleston," Riley said.

He said the plan has the "overwhelming support" of most residents, would reduce the current impact of the cruise business, and would open 35 acres of SPA property to beneficial redevelopment.

Opponents say cruise ships pollute the air as they run their engines while in port, disturb city residents with their horns and passenger announcements, and cause traffic problems when thousands of passengers arrive and depart by car.

Coastal Conservation League Director Dana Beach said having a cruise ship in port is like putting a dirty power plant on the edge of a residential neighborhood.

"This thing is not about five pilings," he said. "It's about the broader impacts of the terminal project."

The new passenger terminal would be far larger than the current one, which Beach and other opponents fear could lead to more and larger cruise ships. The city and SPA have agreed to cap cruise-ship visits at an average of two per week, and 84 are planned this year.

SPA President and CEO Jim Newsome did not speak at the OCRM permit hearing, but in comments after an SPA board meeting Tuesday, he said his pledges about the cruise business can be relied upon.

"I'm not going to be made a liar over something that accounts for five percent of our business," he said.

The Ansonborough and Charlestowne neighborhood associations want the new passenger terminal relocated, possibly to the SPA's Columbus Street terminal outside the downtown area. Newsome and other SPA officials have said that idea's a non-starter, partially because Columbus Street is busy and growing port used to ship BMW vehicles and other non-container cargo.

Port worker James Pinkney Jr., vice president of the dockworker's union, said the project should move forward. He said opponents are hypocritical, because when he was growing up in an Ansonborough housing project, he heard no objections to projects that environmentally harmed the area.

Downtown resident Courtenay McDowell said cruise-ship operations have approached a tipping point in the livability of the area.

"I speak of what's happening today in fear of what will happen tomorrow, with more cruise ships," she said.

There is no deadline for a decision on the permit from the Office of Ocean and Coastal Resource Management.

Reach David Slade at 937-5552 or Twitter @DSladeNews.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **SUPPLEMENTAL MEMORANDUM RE: MOTION TO DISMISS FOR LACK OF STANDING**

At the September 6, 2013 hearing addressing, *inter alia*, the South Carolina Ports Authority's ("SPA") Motion to Dismiss for Lack of Standing, this Court requested supplemental briefing concerning its power to consider exhibits outside of the pleadings in resolving the question of Community Groups' standing in a motion to dismiss. Since the Court's hearing on this issue, a federal court has resolved SPA's challenge to parties seeking to challenge approvals for its proposed new cruise terminal. SPA is collaterally estopped from seeking to relitigate the same question in this forum, now that it has been resolved against it in federal court. Should this Court find that SPA is not collaterally estopped from challenging Plaintiffs' standing in this matter, however, it is clear that the Court should not consider the exhibits offered by SPA in support of their argument that Plaintiffs lack standing.

While courts can resolve certain factual issues related to subject matter jurisdiction before proceeding with a case, the challenge to the Community Groups' standing in this case does not go to this tribunal's subject matter jurisdiction. The South Carolina Administrative Law Court is an administrative tribunal established by the South Carolina General Assembly; its jurisdiction is not established Article III of the federal Constitution, and standing to pursue a claim in such South Carolina tribunals is a matter of justiciability, rather than jurisdiction. To the extent that the federal law of standing applies to this case, it informs statutory standing, and does not affect this court's subject matter jurisdiction. Because SPA's motion does not concern this Court's jurisdiction to hear this contested case, there is no justification for allowing consideration of the factual materials submitted by SPA, and certainly no basis for "resolving" the numerous factual disputes raised by them on a motion to dismiss.

Finally, SPA's exhibits go to the heart of the Community Groups' claims on the merits. Consideration of fact-based arguments going to the merits at the motion to dismiss phase, before discovery is complete, is not permitted and would be so patently unfair as to violate due process. Should the court choose to consider those materials and the assertions based on them, it should proceed to resolution on the merits via proper summary judgment procedure after the close of discovery.

I. SPA's Standing Argument is Precluded

As this Court is aware, SPA is party to a parallel case concerning the federal permit for its proposed cruise terminal in federal court. That matter was instigated before this contested case began and involves issues that overlap heavily with the present matter, as it concerns the same proposed terminal and most of the same parties and issues. Most importantly for present purposes, SPA moved for summary judgment in that case on grounds that the plaintiffs lacked

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standing, asserting the same factual and legal arguments pressed here. *See* SPA, Mot. Sum. J. and Memo in Support, *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs and S.C. State Ports Auth.*, No. 2:12-cv-02942-RMG (D.S.C. July 15, 2013), ECF No. 57 and 57-1; SPA Reply to Plaintiffs' Opp. to Defs.' Mot. for Summ. J. (Aug. 5, 2012). SPA argued that Plaintiffs challenging permits for SPA's proposed new cruise terminal at Union Pier could not demonstrate injury or redressability because cruise operations will continue with or without a new terminal. *Id.*, Dkt. #73 at 12-13. The same argument was made by SPA in this forum. SPA Reply in Supp. of Mot. to Dismiss for Lack of Standing, 3 (Aug. 5, 2013).

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy,* 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App. 2009). On September 18, 2013, U.S. District Judge Richard Gergel rejected SPA's standing argument and entered summary judgment against it. *See* Order (Sept. 18, 2013) [Ex. A]

A party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe,* 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189–90 n.1 (S.C. Ct. App. 1984). All the factors for collateral estoppel are present here. The plaintiffs' standing to challenge the new terminal's permit was actually litigated in the federal proceeding – SPA moved for summary judgment for lack of standing, Plaintiffs opposed that motion, and the Court has effectively resolved it against SPA. The issue of standing was directly determined and necessarily resolved. The judgment of the federal court is entitled to the same conclusiveness as is accorded the judgment of a state tribunal. *Smith v. Volunteer State Life Ins. Co.,* 201 S.C. 291, 22 S.E.2d 885 (1942).

II. The Court May Not Consider SPA's Exhibits in Support of its Motion to Dismiss.

A. Standing is Not a Question of Subject Matter Jurisdiction in the South Carolina ALC.

Whether or not the Court may consider evidence outside the pleadings in support of a motion to dismiss depends, in part, upon whether the motion is based on lack of subject matter jurisdiction. *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("For instance, when the allegations of the complaint are factually sufficient under Rule 8(a)(1), SCRCP, but do not affirmatively show subject matter jurisdiction, the motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving lack of jurisdiction.") (citing *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (S.C. Ct. App. 1993), *vacated on other grounds by* 319 S.C. 240, 460 S.E.2d 392 (1995)).

In South Carolina Courts, standing is not a question of subject matter jurisdiction. *Baird v. Charleston Cnty.*, 333 S.C. 519, 530 n.7, 511 S.E.2d 69, 75 (1999) ("The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, goes, in reality, to the right of the plaintiff to relief rather than the jurisdiction of the court to afford it.") (citing *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997)). Not all mandatory requirements, such as standing, are a question of subject matter jurisdiction. *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67, 81 (2009). In fact, the South Carolina Supreme Court has held that not all "jurisdictional" requirements implicate the courts' "subject matter jurisdiction," or their power to hear cases in the first instance. *State v. Campbell*, 376 S.C. 212, 213-17, 656 S.E.2d 371, 372-74 (S.C. 2008); *Sabb v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (S.C. 2002).

Nor does a standing dispute create a jurisdictional question in the South Carolina ALC. Jurisdiction in this tribunal is established by the South Carolina Administrative Procedures Act

(SCAPA). The APA states that "[a]n administrative law judge shall preside over all hearings of contested cases," and it broadly defines a "contested case" as "a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law . . . to be determined by an agency or the Administrative Law Court after an opportunity for hearing." S.C. Code Ann. 1-23-600(A); S.C. Code Ann. 1-23-505(3). Accordingly, in *Amisub of South Carolina, Inc. v. SCDHEC* the South Carolina Supreme Court said "in a contested case, *all* parties must be afforded an opportunity for a hearing after proper notice." 403 S.C. 576, 585-586, 743 S.E. 2d 786, 791(2013) (citing S.C. Code Ann. § 1-23-320(A)) (emphasis added); *see Berry v. SCDHEC*, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013). SC Code 44-1-60(F) further provides that where the DHEC Board does not conduct a Final Review Conference, an "affected person" is entitled to request a contested case hearing before the Administrative Law Court, with reference to 44-1-60(G), which specifically provides that an "affected person may file a request with the Administrative Law Court for a contested case hearing." Thus, the statute provides contested case standing to a person "affected" by a DHEC permitting decision.

This is in contrast to standing in federal court, where standing derives from the Article III requirement that courts only have subject matter jurisdiction over "cases or controversies." The South Carolina Supreme Court has held that an "affected person" must satisfy the "injury" requirement of Article III standing, i.e., the injury must be concrete and particularized, and actual or imminent. *Smiley v. SCDHEC*, 374 S.C. 326, 649 S.E.2d 31 (2007). However, the Court in that case had no occasion to reach the extent to which an party must also show causation or redressability to qualify as an "affected party," and the language used in the statute indicates that party status turns on whether a party is affected (injured) by a DHEC permitting decision. Indeed, by providing statutory standing to a contested case on a DHEC permit decision

to any affected person, the General Assembly implicitly found that access to such procedure would satisfy redressability and causation. Even if *Smiley*'s adoption of the federal injury-in-fact requirement were extended to include all of federal standing law, however, it would not go to this Court's jurisdiction as explained above. *Baird v. Charleston Cnty.*, 333 S.C. 519, 530 n.7, 511 S.E.2d 69, 75 (1999). Thus, South Carolina's limited adoption of a federal standing requirement does not supplant South Carolina law establishing the ALC's broad jurisdiction over contested cases.[1]

Because standing is not a jurisdictional question here, the Court may not consider evidence outside the pleadings in resolving a motion to dismiss based on lack of standing.

B. Even if Standing Were Jurisdictional in this Forum, SPA May Not Use Contested Evidence Outside the Pleadings in Support of a Motion to Dismiss.

Should the Court determine that Plaintiffs' standing goes to its power to hear the case, it should still refuse to consider SPA's exhibits in resolving the motion to dismiss. SPA relies on these exhibits primarily to argue that the court can order no relief that would redress plaintiffs' injuries, contending they show that cruise operations would be the same whether or not defendants ultimately obtain the contested permit. This presents a contested issue of fact that is inextricably bound up in the merits of the Community Groups' claims in this contested case. It would be entirely inappropriate to resolve those issues on the basis of a contested affidavit where discovery is still underway, and key steps – e.g., deposition of the affiant – have yet to occur. Federal case law is clear that such evidence should not be considered at the motion to dismiss

[1] Standing in South Carolina is broader than federal standing. In addition to constitutional standing, standing to pursue a claim in South Carolina courts "may exist by statute . . . or through the public importance exception." *Youngblood v. S. Carolina Dep't of Soc. Servs.*, 402 S.C. 311, 317-18, 741 S.E.2d 515, 518 (2013) (citing *Freemantle v. Preston,* 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). "Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Id.*

phase, where all allegations must be construed in the plaintiffs' favor. Moreover, SPA's exhibits raise factual disputes relevant not to standing, but to the merits of Plaintiffs' claims. SPA's exhibits are also irrelevant to standing because a special redressability standard applies in cases alleging procedural injury. Even if the Court finds that these merits-based inquiries touch upon its jurisdiction, ample case law supports proceeding to a final determination of the case on its merits to resolve them.

1. Courts must take plaintiffs' allegations as true at the motion to dismiss phase.

All parties in this case agree that the nature of a plaintiff's burden to show standing depends upon the stage of litigation in which the issue is raised. "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (quoting *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," whereas at summary judgment, "the plaintiff can no longer rest on such 'mere allegations,' [and] must 'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561; *see Moss v. Spartanburg Cnty. Sch. Dist. No. 7*, 676 F. Supp. 2d 452, 456 (D.S.C. 2009) ("For purposes of ruling on a motion to dismiss for want of standing, the trial . . . court[ ] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.") (quoting *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

Accordingly, where considering evidence outside of the pleadings, courts usually only consider exhibits attached to the complaint or otherwise provided by plaintiffs, *supporting* standing. *Warth,* 422 U.S. at 501 ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavit, further particularized

allegations of fact deemed supportive of plaintiff's standing."). *See Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir.2011); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir.1991); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013); *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013). Thus, on a motion to dismiss for lack of standing, the Court should at most consider facts provided by the Community Groups to bolster standing, should the Court deem allegations in the pleading not "particularized" enough.

2. Courts consider evidence offered by *defendants* challenging standing in very limited circumstances not applicable here.

Even if standing went to subject matter jurisdiction, South Carolina courts have held that evidence outside the pleadings offered by defendants may be considered to resolve "factual" challenges to subject matter jurisdiction, as opposed to "facial" challenges. "A motion to dismiss for lack of jurisdiction may attack the allegations of the complaint on its face or may be made as a 'speaking' motion attacking the existence of jurisdiction in fact. When the issue is the existence of jurisdiction in fact, the court is not confined to the allegations of the complaint, but may resort to affidavits or other evidence to determine its jurisdiction." *Graham v. Lloyd's of London*, 296 S.C. 249, 252, 371 S.E.2d 801, 802 (S.C. Ct. App. 1988) (citing *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Thornhill Publishing Co., Inc. v. General Telephone and Electronics Corp.*, 594 F.2d 730 (9th Cir.1979)).

The federal Seventh Circuit has adopted a similar distinction in the standing area, which it considers an issue of subject matter jurisdiction. In facial challenge, a defendant claims that plaintiff's allegations, taken as true, are insufficient to establish standing. In a factual challenge, defendants show that there is a basic factual impediment depriving plaintiffs of the required interest in the case. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-45 (7th Cir.

2009) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir.2003)). In the latter, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* (quoting *Evers v. Astrue*, 536 F.3d 651, 656–57 (7th Cir. 2008)). "[I]f the facts place the district court on notice that the jurisdictional allegation probably is false, the court is duty-bound to demand proof of its truth." *Id.* at 445 (citing *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir. 1986)).

SPA's attempt to introduce exhibits raising a "factual" challenge to plaintiffs' standing in this case would be rejected under federal precedent, even if the subject matter jurisdiction rubric applied here. SPA seeks to establish that plaintiffs cannot show redressability because the same result would obtain with or without the contested OCRM permit. This contention is far afield from those that courts have entertained in the context of factual challenges to standing. It does not "place the [ALC] on notice that [plaintiffs'] jurisdictional allegation probably is false." *Id.* By contrast, in *Apex v. Sears*, Sears produced a letter indicating that Apex had sold and assigned all of its rights in the accounts receivable at issue in the case, and Apex failed to produce *any* evidence to rebut this. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444-45 (7th Cir. 2009). *See also Benefield v. Int'l Paper Co.*, 270 F.R.D. 640, 646 (M.D. Ala. 2010) (class representative found to lack standing because defendants produced evidence showing that he had no interest in the real property at issue); *Biagro W. Sales Inc. v. Helena Chem. Co.*, 160 F. Supp. 2d 1136, 1141 (E.D. Cal. 2001) (court resolved factual challenge to standing where defendant showed that plaintiff was not a patentee and thus could not bring an infringement suit); *U.S. ex*

rel. Budike v. PECO Energy, 897 F. Supp. 2d 300, 325 (E.D. Pa. 2012) (finding no standing based on fact that plaintiff was not an employee).

Unlike the exhibits offered by SPA here, all of the above cases allowed defendants to offer evidence that plaintiffs did not, in fact, own the property interest that gave them a stake in the outcome in the case. These "factual" challenges went to the core purpose of the standing analysis: whether a plaintiff is the real party in interest. "'The fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated.'" *Allen v. Wright*, 468 U.S. 737, 791 (1984) (citing *United States v. Richardson*, 418 U.S. 166, 174 (1974). *See also Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) ("Doctrines like standing [and] . . . ripeness are simply subsets of Article III's command that the courts resolve disputes, rather than emit random advice."). By contrast, SPA's challenge does not call into question whether plaintiffs are the "real party in interest," or whether a real dispute exists between Plaintiffs and Defendants; rather, it alludes to a complicated factual dispute bound up in the merits of the Community Groups' case.

3. Defendants' exhibits are irrelevant to standing, instead going to the merits of plaintiffs' claims.

At bottom, the exhibits offered by SPA are irrelevant to the standing analysis, because they improperly "veer from a standing analysis to a merits inquiry." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460 (4th Cir. 2005). In *White Tail Park*, the Fourth Circuit held that the defendant's argument – regarding the degree of harm inflicted upon plaintiffs' First Amendment rights by the contested statute – went to the merits of the case rather than the threshold issue of standing. Similarly, the Fourth Circuit held in *Pitt County v. Hotels.com, LP*, that "[t]he district court's analysis improperly conflated the threshold standing inquiry with the merits of the County's claim." 553 F.3d 308, 312 (4th Cir. 2009) (holding that defendant's argument - that the

County was not injured by its failure to remit occupancy taxes because the defendant's business did not fall into the relevant statutory definition – was a merits argument).

Consideration of the exhibits proffered by the Defendants in support of their standing argument would similarly "reduce all merits inquiries in cases of this type into standing inquiries." *Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 312 (4th Cir. 2009). SPA would have the Court decide, on the basis of these exhibits, what effect the proposed terminal as permitted by OCRM would have on Plaintiffs, and what effects would obtain were the Court to resolve the merits of the Community Groups claims. For example, the Community Groups allege that OCRM violated applicable South Carolina law by failing to consider the impacts of the terminal on the environment and historical resources in their neighborhood, and further allege that OCRM failed to consider alternatives to the project that would ameliorate those impacts – failures that if remedied could lead to different permitting outcomes that would mitigate impacts from the increased cruise operations facilitated by a new terminal. Pet'rs Resp. to Mot. to Dismiss for Lack of Standing 24 – 25. Yet SPA argues that the Community Groups lack standing because their merits case could not lead to a different permitting outcome because the new terminal will not increase impacts. Whether Plaintiffs are likely to succeed on those claims "is, of course, irrelevant to the standing analysis." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *Meese v. Keene*, 481 U.S. 465, 473 (1987). Just as the Fourth Circuit rejected a defendant's standing argument that plaintiffs' interests were insufficiently harmed by the statute in *White Tail*, this Court should reject SPA's premature inquiry into the extent to which the new

terminal as permitted by OCRM increases the harm to plaintiffs relative to the current terminal or a differently-permitted new terminal.[2]

Ultimately, SPA's arguments relying on its exhibits concern redressability. But this case is subject to the special redressability standard applicable in cases where procedural violations are alleged. If a petitioner "is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA,* 549 U.S. 497, 518 (2007); *S. Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 330 (4th Cir. 2008); *Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001).

Here, petitioners availed themselves of their right to participate in the permitting process conducted by OCRM, and have alleged that the process was flawed because, *inter alia*, OCRM failed to consider legally-relevant impacts and project alternatives. *See Lujan,* 504 U.S. at 572 n. 7, 112 S.Ct. 2130 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Sugar Cane Growers Coop. of Fla. v. Veneman,* 289 F.3d 89, 95 (D.C. Cir. 2002) ("If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter."). *See also City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1040 (2d Cir. 1976) ("Plaintiffs here are asserting a specific violation of a statute, not a generalized claim that a law

[2] As noted in Plaintiffs' brief opposing Defendant's Motion to Dismiss for Lack of Standing, plaintiff's injury need be no more than "an identifiable trifle." *Friends of the Earth v. Gaston Copper*, 204 F.3d 149, 156 (4th Cir. 2000) (quoting *Sierra club v. Cedar Point Oil*, 73 F.3d 546, 557 (5th Cir. 1996)); *see United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Moreover, no nexus between the merits and plaintiffs' injury is required. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78 (1978); *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001).

is unconstitutional, a factor of substantial importance in view of the Warth Court's recognition that "(t)he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'") (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Thus, because the factual materials go to redressability, they should be excluded even if the motion concerned subject matter jurisdiction.

4. In the alternative, issues that touch on both jurisdiction and the merits should be resolved by proceeding to the merits.

As discussed at the hearing concerning SPA's motion to dismiss, "[w]hen a defendant raises standing as the basis for a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction . . . the district court 'may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991)). As discussed above, and as conceded by all parties before the Court at the recent hearing and in their briefs, SPA's motion to dismiss does not implicate this Court's subject matter jurisdiction to conduct an administrative contested case hearing arising out of DHEC permitting action.

However, should the court find that the factual dispute raised by SPA's exhibits does affect its jurisdiction, it should nevertheless proceed to a decision on the merits. Where a court determines that an issue is both jurisdictional and merits-based, it "has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Land v. Dollar*, 330 U.S. 731, 739, 67 S. Ct. 1009, 1013, 91 L. Ed. 1209 (1947). "[W]here the jurisdictional facts are intertwined with the facts central to the merits of the dispute . . . the entire factual dispute is appropriately resolved only by a proceeding on the merits." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see McBeath v. Inter-Am. Citizens for Decency Comm.*, 374 F.2d 359, 363 (5th Cir.

1967); *Int'l Ass'n of Machinists & Aerospace Workers v. Nw. Airlines, Inc.*, 673 F.2d 700, 710 (3d Cir. 1982); *Crowley v. Montgomery Ward & Co., Inc.*, 570 F.2d 877, 879 (10th Cir. 1978); *Thornhill Publishing Co. v. General Telephone & Electronics,* 594 F.2d 730, 734 (9th Cir.1979); *Eastern Kentucky Welfare Rights Org. v. Simon,* 506 F.2d 1278, 1283 (D.C.Cir.1974), *vacated on other grounds,* 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Spaeth v. U.S. Sec'y of Interior*, 757 F.2d 937, 947 (8th Cir. 1985).

Consideration of the exhibits offered by SPA in support of the instant motion would effectively resolve contested issues of fact before discovery, violating Plaintiffs' due process rights. For example, the affidavit relied upon by SPA contends that cruise impacts will not change at all with or without a new 100,000 square-foot, $35 million cruise terminal designed to accommodate vessels with up to 3,500 passengers (almost twice as many as on board the Carnival Fantasy based at SPA's much smaller existing terminal). That contention defies common sense. *See Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 866-67 (9th Cir. 2005) ("Common sense suggests that [project proponent] may have hoped that its sizable investment in the dock would facilitate its ability to handle a greater number" ships and thus increase ship "traffic to the facility."). It is also contradicted by the Community Groups' assertions and evidence, which state that a new, bigger terminal can be expected to lead to increased cruise operations and impacts. *See* Pet'rs Resp. to Mot. to Dismiss.

It would be an improper deprivation of Plaintiffs' due process rights to "resolve" this central factual dispute – bound up with the merits of this case – on a motion to dismiss without allowing discovery to take place. *Huellmantel v. Greenville Hosp. Sys.*, 303 S.C. 549, 402 S.E.2d 489 (S.C. Ct. Appl. 1991); *Anon. Nurse v. S.C. Dep't of Labor, Licensing, and Reg.*, Dkt. No. 00-ALJ-11-0270-IJ (June 2, 2000). *See* S.C. R. Civ. Procedure 12(b) (where Court does not

exclude materials outside the pleadings on a motion to dismiss for failure to state a claim, it must treat the motion as one for summary judgment, "and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("Summary judgment is an adjudication on the merits of the case, whereas dismissal for lack of subject matter jurisdiction is not an adjudication on the merits.").

Respectfully submitted,

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September 18, 2013
Charleston, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

I certify that on this, the 18th day of September, 2013, I served the foregoing supplemental brief on the following parties by U.S. mail as indicated below:

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ADMIN. LAW COURT

Exhibit A

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

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

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

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

Legal Standards

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

analysis."

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

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

Charleston, South Carolina
September 18, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	**SOUTH CAROLINA PORTS AUTHORITY'S SUPPLEMENTAL BRIEF TO MOTION TO DISMISS FOR LACK OF STANDING** Docket No. 13-ALJ-07-0056-CC

Pursuant to the Court's request during the hearing held on September 6, 2013, Respondent South Carolina State Ports Authority (Ports Authority) hereby submits this supplemental brief on the issue of the Court's standard of review in evaluating a motion to dismiss for lack of standing and in further support of its pending motion.

DISCUSSION

"The party seeking to establish standing carries the burden of demonstrating each of the three elements [of standing]." *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) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Elements of standing ... 'are ***not mere pleading requirements*** but rather an indispensable part of the plaintiff's case'; therefore, '***each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof***, *i.e.*, with the manner and degree of evidence required at the successive stage of the

litigation.'" *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385, 392-93 (Ct. App. 2013) (emphasis added).

The crux of the issue before the Court is that standing is described as an "irreducible constitutional minimum" and is required of a petitioner at all stages of litigation. Cruise Opponents, however, have expressed the notion that this Court may not consider contrary evidence and must accept as true conclusory allegations set forth in the contested case request, prehearing statement, and affidavits of the individual petitioners. This notion would improperly reduce the "irreducible" standing from a considered evidentiary proceeding involving judgment to a mere thoughtless acknowledgment of conclusory allegations contrary to federal and state law.

Despite bearing the burden to prove all elements of standing, Cruise Opponents have submitted evidence only on the injury-in-fact prong. The instant case, however, differs from a run-of-the-mill permit application seeking approval of a *new* project where it may be self-evident that injuries alleged will necessarily be redressed by a decision forbidding or severely restricting the proposed new project. This case, however, deals with an existing, operating marine terminal, where passenger and cargo ships already call, and have been calling for decades, with the attendant impacts. The injuries alleged in the Cruise Opponents' affidavits, even if taken as true, are not redressable by a decision by this Court, because regardless of whether the cruise operations occur on the north or south end of the existing wharf, the activities on which the alleged injuries-in-fact are based, including the potential for a change in the size of ships and frequency, will continue to exist and are not dependent upon cruise operations at any particular location on the existing wharf.[1]

[1] The only competent evidence submitted on this point was provided by the Ports Authority through the sworn testimony of Peter Lehman. *See* Reply to Mot. to Dismiss, Ex. 1, Aff. of Peter

Regarding the proper review for the pending motion, the Ports Authority has made a factual challenge to the Cruise Opponents' standing. While a "facial" challenge to standing provides a plaintiff/petitioner with certain presumptions and generally limits a court's review to the pleadings,[2] a defendant may make a "factual" challenge through the presentation of evidence requiring the plaintiff to introduce additional evidence and prove standing by a preponderance of the evidence. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)).

By contrast, a factual challenge exists when, as here, the defendant/respondent contends that there is, *in fact*, no jurisdiction[3] over the matter. "The defendants make a factual attack ... by

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Lehman. The Cruise Opponents, who bear the burden, have failed to offer any evidence to prove by a preponderance of the evidence that redressability exists.

[2] In a facial challenge, the defendant/respondent is simply contending that the complaint fails to allege facts upon which subject matter jurisdiction can be based. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). "When a defendant makes a facial challenge to subject matter jurisdiction, 'the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.' In that situation, the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Id.* (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)); *see also Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009) (stating that "facial challenges require only that the court look to the complaint and see if the plaintiff has sufficiently *alleged* a basis of subject matter jurisdiction" and noting that the challenge in *Lujan* was a facial challenge).

[3] Federal courts discuss factual challenges to standing in the context of whether the court has "subject matter jurisdiction" over the case as those challenges are typically brought under a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *See, e.g., Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) ("Article III of the United States Constitution limits federal courts' jurisdiction to "cases" and "controversies." In order to give meaning to Article III's case-or-controversy requirement, the courts have developed justiciability doctrines, such as the standing and ripeness doctrines. Since standing and ripeness are essential components of federal subject-matter jurisdiction, the lack of either can be raised at any time by a party or by the court.") (internal citations omitted).

The South Carolina Supreme Court has taken a more limited approach to the use and application of the term "subject matter jurisdiction." *See Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000) ("Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong.") (citations omitted). Clearly, this Court has "subject matter" jurisdiction over permit challenges from DHEC. South Carolina's standing jurisprudence focuses on the determination of justiciability and

providing affidavits, testimony, or other evidentiary materials challenging the jurisdiction of the court." *Seastrunk v. Darwell Integrated Tech., Inc.*, Civil Action No. 3:05-CV-0531-G, 2006 WL 1932342 at *1 (N.D. Texas July 10, 2006) (unpublished); *see Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) (internal citations omitted) ("A 'factual attack,' however, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered. Moreover, a 'factual attack' under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist.").

Where a factual challenge has been made, the plaintiff/petitioner is afforded less procedural protections. First, the **burden is upon the plaintiff/petitioner to demonstrate standing by a preponderance of the evidence**. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003) (internal citation omitted) (in a factual challenge, the plaintiff "must come forward with 'competent proof'—that is a showing by a preponderance of the evidence—that standing exists"); *Seastrunk v. Darwell Integrated Tech., Inc.*, Civil Action No. 3:05-CV-0531-G, 2006 WL 1932342 at *1 (N.D. Texas July 10, 2006) (unpublished) ("In a factual attack, **the plaintiff** is also required to submit facts in support of jurisdiction and **has the burden of proving, by a preponderance of the evidence**, that the trial court has subject matter jurisdiction over the claims.") (emphasis added); *American Tissue, Inc. v. Arthur Andersen, LLP*, 275 F.Supp.2d 398, 404 (S.D.N.Y. 2003) (citing *Luckett v. Bure*, 290 F.3d 493, 496–97 (2d Cir. 2002)) ("Thus, '[i]n

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limitation placed on courts to hear only active cases or controversies. *See, e.g., Jackson v. State*, 331 S.C. 486, 490 n. 2, 489 S.E.2d 915, 917 n. 2 (1997); *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 498 S.E.2d 906 (Ct. App. 1998).

However, regardless of the terminology or whether one couches the question as justiciability or subject matter jurisdiction, the analytical framework to determine standing under a factual challenge is the same—has the plaintiff/petitioner demonstrated by a preponderance of the evidence that each of the elements of standing exist?

resolving the question of jurisdiction, the district court can refer to evidence outside the pleadings and **the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence** that it exists.'") (emphasis added).

Second, "the presumption of truthfulness normally accorded a complaint's allegations does not apply, and the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction." *Kerns*, 585 F.3d at 192; *see Benefield v. Int'l Paper Co.*, 270 F.R.D. 640, 646 (M.D. Ala. 2010) ("[O]nce a defendant proffers evidence which calls a plaintiff's standing into question, the presumption of correctness that we accord to a complaint's allegations falls away and the plaintiff bears the burden of coming forward with competent proof that standing exists...") (internal citations and quotations omitted); *Marotta v. Board of Appeals of Revere,* 336 Mass. 199, 204, 143 N.E.2d 270 (1957) (when a defendant challenges standing and supports that challenge with evidence, the jurisdictional issue must be decided on the basis of the evidence without reference to any presumption in favor of the plaintiff).

In a factual challenge to the standing, "[a] trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Kerns*, 585 F.3d at 192 (quoting *Adams*, 697 F.2d at 1219). "In determining whether jurisdiction exists, the district **court is to regard the pleadings' allegations as mere evidence on the issue,** and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg, & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (internal citations omitted) (emphasis added); *Gregory v. Citimortgage, Inc.*, 890 F.Supp.2d 791, 796 (E.D. Mich. 2012) (internal citations omitted) (a court may consider documents that are "matters of public record"

and documents which "govern plaintiff's rights" without converting the motion to dismiss to a motion for summary judgment).

Once standing has been challenged, "the trial court is free to weigh the evidence and satisfy itself as to the evidence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of a disputed material fact will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *Apex Digital*, 572 F.3d at 443 (evidence outside the pleadings may be considered when reviewing a motion to dismiss for lack of standing and that reliance on *Lujan* for the proposition that general factual allegations are sufficient is misplaced when evidence calls standing into question); *Evers v. Astrue*, 536 F.3d 651, 656–57 (7th Cir. 2008) (internal quotations omitted) ("The district court may properly look beyond the jurisdictional allegations of the complaint and *view whatever evidence has been submitted on the issue* to determine whether in fact subject matter jurisdiction exists.'") (emphasis added); *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) ("When a defendant raises standing as the basis for a motion ... to dismiss ... the district court may consider evidence outside the pleadings....") (internal citations omitted) (internal quotations omitted); *Robinson v. Government of Malaysia*, 269 F.3d 133, 140 (2d Cir. 2001) ("But where evidence relevant to the jurisdictional question is before the court, 'the district court ... may refer to [that] evidence.'") (internal citations omitted). The Northern District of Texas has explained the proper standard.

> A party can ... make a **factual attack** on subject matter jurisdiction **by submitting evidence, such as affidavits or testimony**. "A factual attack on the subject matter jurisdiction of the court, however, challenges the facts on which jurisdiction depends and matters outside of the pleadings, such as affidavits and testimony, are considered." The "court is **free to weigh the**

> **evidence** and satisfy itself as to the existence of its power to hear the case." "**No presumptive truthfulness attaches to plaintiff's allegations**, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." The **plaintiff** in a factual challenge, as the party seeking to invoke jurisdiction, **must "submit facts through some evidentiary method and ... prov[e] by a preponderance of the evidence** that the trial court does have subject matter jurisdiction."

Hunter v. Branch Banking & Trust Co., Civil Action No. 3:12-CV-2437-D, 2013 WL 607151 at *2 (N.D. Texas Feb. 19, 2013) (unpublished) (internal citations omitted) (emphasis added).

South Carolina has recognized this distinction between facial and factual challenges in the context of motions to dismiss. *Graham v. Lloyd's of London*, 296 S.C. 249, 251 n.1, 371 S.E.2d 801, 802 n.1 (Ct. App. 1988) (on preliminary motions contesting jurisdiction, a movant "may attack the allegations of the complaint on its face or may be made as a 'speaking' motion attacking the existence of jurisdiction in fact. When the issue is the existence of jurisdiction in fact, the court is not confined to the allegations of the complaint, but may resort to affidavits or other evidence to determine its jurisdiction.") (internal citations omitted); *see Woodard v. Westvaco Corp.*, 315 S.C. 329, 332, 433 S.E.2d 890, 892 (Ct. App. 1993), *vacated on other grounds*, 319 S.C. 240, 460 S.E.2d 392 (1995); *see, e.g., Estate of Callahan ex rel. Foster v. United States*, Civ. Action No. 3:13-cv-0905-JFA, 2013 WL 3929850 (D.S.C. July 29, 2013).

Indeed, the South Carolina Supreme Court has expressly held that "***affidavits and other evidence*** outside the pleadings may, in certain circumstances, be considered ***in support of a motion to dismiss*** for lack of jurisdiction." *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (stating that "the motion to dismiss may be supported by, and the court may consider, affidavits or other evidence proving ***lack*** of jurisdiction" and explaining that a motion to dismiss for lack of standing will not be converted into a motion for summary judgment if the

parties submit, and the Court considers, affidavits and other evidence outside the pleadings) (emphasis added) (citing *Woodard*, 315 S.C. 329, 433 S.E.2d 890); *see also The Charleston Endoscopy Ctr., LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 03-ALJ-07-0133-CC, Order Granting Mot. to Dismiss for Lack of Standing (July 24, 2003), Order Denying Mot. for Reconsideration (Aug. 23, 2007) (when standing is challenged the Court may examine disputed facts and reach a determination on standing from the evidence).

Moreover, the case of *Smiley v. South Carolina Department of Health & Environmental Control*, on which Cruise Opponents rely, does not support the proposition that the mere filing of an affidavit is sufficient to satisfy a petitioner's burden in proving standing. 374 S.C. 326 649 S.E.2d 31 (2007). To the contrary, in *Smiley*, this Court found that the petitioner failed to sufficiently allege injury-in-fact. The finding of no injury-in-fact was affirmed by the Court of Appeals. The discrete issue before the Supreme Court was only whether the petitioner's affidavit satisfied the burden in meeting the first prong of the standing test. The traceability and redressability prongs of the *Lujan* were not at issue in *Smiley*; therefore, the Supreme Court's finding that the affidavit satisfied the injury-in-fact prong ended the standing inquiry in that case.[4] In fact, the *Smiley* Court expressly recognized that evidence contrary to the assertions put forward by a petitioner is appropriate and expected. The Supreme Court noted that the petitioner's allegations of injury went unrefuted by OCRM: "Moreover, OCRM presented no evidence in opposition to Smiley's affidavit." *Smiley*, 374 S.C. at 332, 649 S.E.2d at 34 (implying that evidence by a movant in a motion to dismiss is not only appropriate, but can be used to refute factual assertions put forward by the petitioner). Thus, the Supreme Court has

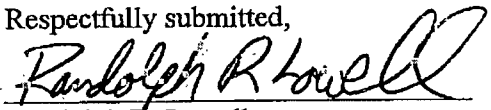
[4] Cruise Opponents' contention that *Smiley* stands for the proposition that the filing of affidavits by the petitioners is automatically and irrefutably sufficient to satisfy standing is not supported by the court's opinion.

recognized that a defendant/respondent may submit and the court may consider evidence demonstrating a lack of standing.

CONCLUSION

For the foregoing reasons, the Court may consider the affidavits and evidence submitted by the parties on the issue of standing without converting the motion to dismiss into a motion for summary judgment.[5] The burden of proving standing lies solely on Cruise Opponents in this case. Because they have neither met their burden in the first instance nor refuted the competent evidence put forward by the Ports Authority, they have failed to meet their burden and this Court should dismiss this contested case request for lack of standing.

Respectfully submitted,



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September 18, 2013
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[5] To the extent the Court determines the Cruise Opponents' analogy of a "prehearing statement" to a pleading and the Court should only consider pleadings is accepted, the Ports Authority has filed an amended prehearing statement that includes all the relevant information.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **South Carolina Ports Supplemental Brief to Motion to Dismiss for Lack of Standing** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Breanna M. Karns

Columbia, South Carolina
This 18th day of September 2013.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **FIRST AMENDED PREHEARING STATEMENT OF THE SOUTH CAROLINA PORTS AUTHORITY**

Pursuant to the Court's Order dated May 6, 2013, South Carolina State Ports Authority (Ports Authority) files its First Amended Prehearing Statement.

1. **The nature of the proceeding:**

This is a *de novo*, contested case proceeding brought by Petitioners Preservation Society of Charleston (PSC), Charleston Communities for Cruise Control (C4), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (CCL), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Historic Charleston Foundation (HCF) (collectively, Cruise Opponents) challenging a decision by the South Carolina Department of Health and Environmental Control (DHEC) to authorize and permit a portion of a capital improvement project at the Union Pier Terminal (UPT) in Charleston, South Carolina by the Ports Authority.

The overall planned improvements to the UPT involve renovations to existing buildings on the terminal footprint, relocating certain port operations to other Ports Authority terminals and shifting passenger cruise operations to the northern end of UPT. The purpose of the planned improvements is multi-faceted, including, but not limited to: upgrading existing cruise facilities in order to comply with both current terminal security requirements mandated by federal law under the oversight of the United States Customs and Border Protection (CBP), as well as the Americans with Disabilities Act (ADA);[1] relocation of existing cargo facilities from the northern end of the UPT footprint[2] to other Ports Authority-owned terminals, allowing the cessation of existing rail operations to UPT; relocation of existing cruise facilities from the southern end of the UPT footprint to the newly-vacated area on the northern end; implementation of an overall traffic management plan that will result in a net neutral traffic impact on the UPT; restoration of the southern end of UPT through the demolition of older structures; and the proposed subsequent redevelopment of much of the existing terminal acreage on the southern end for mixed use, green spaces, and restoration of the natural waterfront for public access.

To that end, on January 27, 2012,[3] the Ports Authority submitted a joint Federal (to the United States Army Corps of Engineers (Corps)) and State (to DHEC's Division of Ocean and Coastal Resource Management's (OCRM)) application for activities affecting the waters of the United States and critical areas of South Carolina. Ex. 1, Ports Authority Joint Application (Jan. 27, 2012). The actions implicating OCRM's permitting jurisdiction for this project are the

[1] 42 U.S.C.A. §§ 12101 et seq.

[2] Cruise Opponents' claims that cruise ships are significantly larger in scale than those ships that have historically called on UPT is simply inaccurate and not supported by any facts. See Ex. 2, Ports Authority Ltr. dated Jan. 7, 2013 to DHEC Bd. at 7 (showing parity in size and scale of a cargo ship at the northern berth of UPT, near Building #322, and cruise ship at the southern berth of UPT at the present cruise terminal facility).

[3] The application was subsequently resubmitted on February 27, 2012.

installation of five pile clusters driven into the marl to support the construction of three elevators and two escalators in a renovated warehouse located on the northern end of the UPT footprint, Building #322, which will house the relocated cruise passenger operations.[4] The pile clusters—an additional five to the thousands of piles under the existing wharf and terminal—will provide further support for the structure of Building #322, within the existing footprint of the already-developed marine terminal. See Ex. 3, Map of Pile Clusters; see also, Ex. 2 Ports Authority Ltr. dated Jan. 7, 2013 to DHEC Bd. at 3 (providing the Court with a perspective of the current concentration of support pilings currently under Building #322).

On or about August 3, 2012, OCRM published the permit application public notice for the project, requesting comments be received by September 2, 2012. On or about December 18, 2012, OCRM issued notice that it was authorizing construction of five pilings under Building #322. Thereafter, on January 2, 2013, Petitioners filed Requests for a Final Review Conference of the OCRM Staff Decision by the DHEC Board. On January 10, 2013,[5] the DHEC Board voted unanimously to decline to hear the matter in a Final Review Conference.[6]

2. The statutory provision(s) conferring subject matter jurisdiction to the agency and other applicable statutes and regulations:

The request for a contested case was filed by the Cruise Opponents pursuant to S.C. Code Ann. §§ 1-23-600, 44-1-60, and the Rules of Procedure of the Administrative Law Court (RPALC).

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[4] As most of the capital improvement project does not trigger permitting requirements, it may be undertaken without the DHEC permit. Indeed, an argument exists that no OCRM permit is needed to undertake the project.

[5] OCRM Staff also filed responses to the requests of Petitioners on January 10, 2013, recommending that the DHEC Board affirm OCRM's decision to issue the permit.

[6] See Ex. 4, DHEC Board Ltr. Declining to Conduct a Final Review Conference, Jan. 11, 2013; see also Ex. 5, DHEC Board Record, BHEC 1-145, and Affidavit of Lisa Lucas Longshore.

The specific substantive statutory and regulatory provisions applicable to this controversy include, but are not limited to, S.C. Code Ann. §§ 48-39-10 et seq.; 23A S.C. Code Ann. Regs. 30-1 et seq.; and the Coastal Management Program.

3. The issues presented for determination:

(a) Does the Ports Authority's permitted portion of a capital improvement project comply with applicable law?

(b) Did OCRM err in issuing permit OCRM-12-054-B?

4. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations:

The Ports Authority requests this Court to:

(a) Dismiss this contested case for the Cruise Opponents' lack of standing; or, alternatively,

(b) affirm the terms, conditions, approval and issuance of permit OCRM-12-054-B by OCRM for the placement of the five UPT pile clusters; and

(c) grant such other relief as the Court may deem just and proper.

The Cruise Opponents have failed to satisfy the requisite burden under South Carolina 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, 550 S.E.2d 287 (2001); see Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

DHEC and OCRM met their burden in issuing OCRM-12-054-B and that determination will be borne out through this *de novo* contested case hearing. This includes compliance with the criteria set forth in S.C. Code Ann. §§ 48-39-10 et seq.; 23A S.C. Code Ann. Regs. 30-1 et seq.; and the Coastal Management Program.

Further, the Ports Authority specifically reserves and does not waive any claim that no permit is required under South Carolina law for the project.

5. A brief summary of the facts to be presented at the hearing:

The UPT is a 63-acre property located along the Cooper River near the downtown portion of the Charleston peninsula. UPT is owned and operated by the Ports Authority as a fully operational marine terminal and, as currently configured, accommodates upwards of 200 cargo ships annually, in addition to the requisite trains and trucks necessary to service those cargo ships, as well as the designated cruise passenger terminal on the southern end of the property. UPT accommodates significant roll-on/roll-off cargo facilities used for automobiles, trucks and heavy equipment, and UPT has accommodated passenger vessel calls for almost 100 years, including cruise vessels, which have called on the UPT cruise passenger facility every year since 1973, the date of dedication for the existing cruise passenger terminal facility. Ex. 6, Aff. of James I. Newsome, III ¶7 (Aug. 22, 2011). Pursuant to its statutory obligations under, *inter alia*, S.C. Code Ann. § 53-3-130, the Ports Authority has sought to foster, stimulate, and increase water-borne commerce through cruise ship calls at UPT, including through the capital development plan at issue here.[7]

In order to accommodate the cruise passenger demand, the Ports Authority undertook a capital improvement plan for UPT that involves the relocation of certain operations to other Ports Authority terminals, and the renovation of facilities and relocation of the passenger cruise operations to the northern end of UPT. See Ex. 8, Map of Union Pier Terminal footprint (March

[7] Charleston is a popular tourist destination and, by consequence, the City has seen its popularity with the cruising public increase over the years. This increase in cruise vessel calls (and thus the increase in maritime commerce) has benefited the City of Charleston and the State of South Carolina in numerous ways, including increased local revenue. See Ex. 7, Aff. of Joseph P. Riley, Jr. ¶4 (Aug. 22, 2011) (noting that the cruise industry has generated approximately $35 million and over 400 jobs).

2012). The planned improvements to the UPT involve renovations to existing buildings on the terminal footprint, demolition of older structures, the proposed dedication of much of the existing terminal acreage to redevelopment, including public green spaces, restoration of the natural waterfront and other private development undertakings, and the improvements will all be done in both an economically efficient and environmentally sustainable way. See Ex. 9, UPT Presentation of Riley and Newsome, SCPA 001281-225; Ex. 10, Existing v. Proposed Drawing Comparison, SCPA 001217; Ex. 11, Aff. of Peter O. Lehman (Lehman Aff.) Ex. B, SCPA 001253-366 (Concept Plan for Union Pier Waterfront dated Sep. 2010).

Further, the planned renovations to the UPT cruise facilities are necessary in order to bring the facilities into compliance with current terminal security requirements mandated by federal law under the oversight of the CBP.[8] In 2007, the Ports Authority entered into a Memorandum of Understanding with the CBP for the conditional approval of ongoing cruise operations on a continuing trial basis, which has since been renewed with the understanding that a passenger terminal facility with improved security would be needed for continued operations, which currently expires in 2015. Ex. 12, Ports Authority-CBP MOU (June 20, 2006), as amended. In addition, the relocation of existing cargo facilities from the northern end of the UPT footprint will permit the cessation of existing rail operations to UPT and the accompanying traffic impediments, as a part of an overall traffic management plan that will result in a net neutral traffic impact on the UPT and surrounding areas. See Ex. 2, Ports Authority Ltr. to DHEC Bd., Jan. 7, 2013, Ex. G (traffic diagram comparison). In short, the Ports Authority's capital improvement plan will aid the economic development and environment of Charleston.

[8] See Ex. 13, U.S. Army Corps of Engineers, Mem. for Record, SAC-2003-13026 (April 20, 2012) (stating the "proposed renovations to Building 322 are considered minor deviations in the existing structure's configuration that are required to comply with Federal Regulations and current terminal security requirements that were established after September 11, 2001").

See Ex. 2, Ports Authority Ltr. to DHEC Bd., Jan. 7, 2013 at 4 (comparing impacts between the status quo and planned redevelopment of UPT); see also Ex. 14, Voluntary Cruise Management Plan (agreeing, *inter alia*, to limits on the size and frequency of cruise operations at UPT).

Currently, the UPT cruise passenger operations are located on the southern end of the terminal footprint. The Ports Authority's proposed capital improvement plan involves renovating Building #322 on the northern end of the UPT footprint and relocating the cruise passenger operations, in their entirety, to the renovated Building #322. The installation of five additional pile clusters driven into the marl to support the construction of three elevators and two escalators in the renovated Building #322 will provide additional support for the existing structure of Building #322.

The renovations to Building #322 also include other activities which do not affect the waters of the United States, including remodeling of the mezzanine with ADA-compliant elevators and escalators, renovations to the interior and exterior of Building #322, canopies over pedestrian areas, and a loading area on the existing wharf for transferring ship stores from delivery trucks to the cruise ship. The entirety of the effect of this project is that current cruise operations will be moved to a location less than 600 yards to the north in a renovated warehouse, still within the existing boundary of the Union Pier Terminal footprint. In anticipation of the successful completion of the capital improvement project and relocation of cruise operations less than 600 yards to the north, existing berth facilities which were used for cargo operations, and which handled upwards of 200 cargo vessel calls a year, have begun relocation to a different Ports Authority terminal facility.[9] As a result of this relocation and the voluntary traffic

[9] In addition to the relocation of the cargo operations, the Ports Authority adopted the Voluntary Cruise Management Plan that limits the number of cruise vessel calls to 104 per calendar year. Ex. 14, Voluntary Cruise Management Plan. Consequently, there will be a dramatic net

management plan, emissions at the UPT, and thus also in the surrounding historic neighborhoods represented by the Cruise Opponents, will decrease.[10] See Ex. 15, OCRM Technical Review at 8; Ex. 16, Trinity Consultants Study: Historical, Current and Future Criteria Pollutant Emissions at Union Pier Terminal (Dec. 6, 2012); Ex. 2, Ports Authority Ltr. to DHEC Bd., Jan. 7, 2013 at 4. However, should the renovated northern end of the UPT not be utilized for cruise operations, it will continue to be used for cargo operations, along with the accompanying continuation of air emissions and truck and rail traffic necessary to a vigorous and productive waterfront commerce for Charleston and the State. See Ex. 11, Lehman Aff. ¶¶ 8-11 (noting that cruise operations at UPT will continue—with greater or lesser size and frequency—regardless of the permitting decision in this contested case); see also Ex. 23, What Kind of Future Do you Want?, SCPA 002630 (describing the two options for UPT—cruise and cargo operations on the north and south ends or cruise operations only on the north end).

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reduction in the amount of large, ocean-going vessel traffic at UPT if the proposed plan is realized.

[10] Cruise Opponent member affidavits attest to grievous harms and intolerable nuisance caused by current cruise emissions and operations. For instance, Carrie Agnew, Executive Director Charleston Communities for Cruise Control (C4), expressed concerns that her residential property value would decline as a result of the intolerable nuisance posed by cruise operations and that soot from cruise accumulated in her bedroom. See Ex. 17, Aff. of Carrie Agnew, Jan. 24, 2012, Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012). Yet, Ms. Agnew recently sold her home, and on the face of the transaction, appears to have profited from the home's appreciation. See Ex. 18, Title to Real Estate, Unit B, 35 Hasell Street, Listing Agnew as Grantor, Jun. 5, 2013; Ex. 19, Charleston County Property Records; see also, Ex. 20, Zillow.com Listing of 35-B Hasell Street (describing the property as "extremely livable"); Ex. 21, Investigative Report by Dan Riccio, Director of Livablity, City of Charleston, Nov. 2011 (concluding that Ms. Agnew's allegations of noise ordinance violations by cruise were unfounded); cf. Ex. 22, S.C. Residential Property Disclosure Form (requiring property seller's to disclose any nuisance affecting the property).

Standing in the way of the Ports Authority's capital improvement plan are the Cruise Opponents.[11] In fact, this contested case represents the third legal action filed on behalf of these same parties in their longstanding and continuing efforts to prevent any cruise ship vessels from calling on the Port of Charleston.[12] The lengths to which the Cruise Opponents will go to reach their true goal–the shutdown of the cruise industry at UPT–evidenced by their request for this contested case.[13]

A contested case request challenging a permit issued by OCRM must necessarily take issue with the environmental impacts caused by the **permitted** activity. Yet, a review of the contested case request demonstrates that Cruise Opponents instead complain about the existence

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[11] Despite purporting to speak on behalf of the community, it appears Cruise Opponents are actually a small but well-funded vocal minority intent on using the judicial process to derail a widely embraced redevelopment plan for UPT. See, e.g., Ex. 24, Ltr. of Sarah Christopher to DHEC, DHEC-SCPA 000727 (downtown resident describing Cruise Opponents as a small but vocal minority); Ex. 25, Minutes of May 9 CNA Mtg., Cruise Opponents 001729-001733 (describing the ascendance of the anti-cruise agenda in the CNA as a "hostile takeover" and "a blitzkrieg"); Ex. 26, Ltr. of S.D. Thomas, M.D. to DHEC, DHEC-SCPA 000731-32 (downtown resident describing Cruise Opponents at a "small but tightly knit group of miscreants determined to have its way"); Ex. 27, Ltr. of Theodore D. Stoney, Jr., DHEC-SCPA 001085-87; Ex. 28, Randy Pelzer E-Mail, Feb. 25, 2010, Cruise Opponents 008806 (describing the inability of Cruise Opponents to secure support from residential landowners near UPT); Ex. 29, Katie Zimmerman Email, May 11, 2012, Cruise Opponents 004484-85 (discouraging a researcher from interviewing Charleston residents about the cruise controversy for fear of negative feedback about Cruise Opponents).

[12] The Cruise Opponents already have actions pending before the South Carolina Supreme Court, Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012), and the federal district court attacking the cruise industry in Charleston. Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs., No. 2:12-cv-2942-RMG (D.S.C. filed July 2, 2012). Cruise Opponents' argue before the South Carolina Supreme Court that cruise operations at UPT should be permanently enjoined on the basis of alleged injuries to person and property arising from actions of Carnival Cruise, while simultaneously arguing in this contested case that those very same injuries arise from the permitted activities. Compare Ex. 30, First Am. Compl., Carnival Corp. v. Historic Ansonborough, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Gratned Jan. 11, 2012) with Pet'rs' Prehearing Statement.

[13] A letter from Pat Jones, former president of HANA, to DHEC captures, among other things, the "by any means necessary" approach Cruise Opponents have employed to defeat cruise in Charleston. See Ex. 31, Pat Jones ltr. to DHEC, Apr. 16, 2012, DHEC-SCPA 000721.

of on-going cruise operations rather than the propriety of the permitting process.[14] The Cruise Opponents are simply using the Administrative Law Court as another forum to expound their "anti-cruise" views and delay[15] the Ports Authority's approved and strongly supported project.[16]

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[14] See Pet'rs' Request at 6, ¶15; see also Ex. 32, Aff. of Katie Zimmerman at ¶11 (April 19, 2013) (Coastal Conservation League Program Director stating that "[o]going and increase **cruise ship operations** injure the CCL and its members") (emphasis added); Ex. 33, Aff. of Evan R. Thompson at ¶17 (April 19, 2013) (Preservation Society Executive Director stating that "**cruise operations** are widely recognized around the world...as threatening...the cities where they located") (emphasis added). Further, despite assertions to the contrary, Cruise Opponents have been unable to affirmatively link alleged soot deposition on their property to cruise operations at UPT. See Ex. 34, Katie Zimmerman E-Mail, Mar. 4, 2013, Cruise Opponents 09233; Ex. 35, Katie Zimmerman E-Mail, Nov. 26, 2012, Cruise Opponents 009334; see generally, Ex. 36, Ltr. of Nancy Infinger to DHEC, DHEC-SCPA 000088-89 (questioning whether Cruise Opponents linked soot deposition to cruise or whether soot deposition was the result of frequent container ship calls).

[15] For example, Chief Justice Toal chastised the S.C. Coastal Conservation League and Cruise Opponents' counsel in a recent oral argument, stating "what we get into so many times, folks who really oppose any development, and they ***use this process to delay***, if they can, a decision that they are not in favor of" and "***you don't simply make a value judgment about whether you want a piece of property developed.***" Ex. 37, Kiawah Development, Reh'g Trans. 6:14-17, 11:9-25 (June 5, 2013) (emphasis added). In fact, Cruise Opponents openly embrace employing the judicial process as an instrument of delay. See e.g., Ex. 38, Stephen F. Gates, Minutes from CNA Board Mtg., May 3, 2011, Cruise Opponents 001747 ("One of the things that is percolating around is ***litigation to slow this process down***") (emphasis added); see also, Ex. 39, Harold Pratt-Thomas E-Mail; May 19, 2011, Cruise Opponents 004156; Ex. 40, Dana Beach E-Mail, May 22, 2011, Cruise Opponents 006832; Ex. 41, Dana Beach E-Mail, July 25, 2011, Cruise Opponents 005255; Ex. 42, Carrie Agnew E-mail, July 3, 2012, Cruise Opponents 001447-48; Ex. 43, Carrie Agnew E-Mail, April 13, 2013, Cruise Opponents 001509; Ex. 44, Carrie Agnew E-Mail, May 5, 2013, Cruise Opponents 001511; Ex. 45, Jay Williams E-Mail, Mar. 17, 2011, Cruise Opponents 008042; Ex. 46, Kirkland Grant E-Mail, May 17, 2011, Cruise Opponents 003661; Ex. 47, Katie Zimmerman E-Mail, May 12, 2011, Cruise Opponents 005280; Ex. 48, Jay Williams E-Mail, Jun. 1, 2011, Cruise Opponents 008473; Ex. 34, Katie Zimmerman E-Mail, Mar. 4, 2013, Cruise Opponents 009231-32.

[16] See Ex. 51, S.968 Concurrent Resolution, 119th Session (2011) (General Assembly's declaration of support for the cruise industry and its appreciation for the positive impact Carnival and others bring to the State of South Carolina); Ex. 52, Charleston City Council Resolution (Sept. 14, 2010) ("I, Joseph P. Riley, Jr., Mayor, City of Charleston, and Charleston City Council pledge our support to the [Ports Authority] in their vital role to our City and State's continued economic development which includes 1) plans to redevelop [UPT] including a new passenger cruise terminal...and 2) management of a cruise business.").

CCL Executive Director Dana Beach, in describing the true nature of the controversy giving rise to this contested case, as well as litigation in other adjudicative forums, stated

> ***The larger issue is not whether we should have 104 cruise ships a year ... it is nothing less than a decision of what legacy we will leave for generations of Charlestonians*** ... Union Pier is, simply put, the most important transitional urban place in South Carolina. So far, the city and the SPA have treated it as if this were a debate over a proposal for a new hotel or shopping mall.... ***Now is the time to shelve the SPA's proposal*** ... to make big plans, to chart a future great enough to be worthy of our unique and historic city.

Ex. 49, Dana Beach E-Mail, May 11, 2011, Cruise Opponents 002292-93 (emphasis added). Dana Beach concluded that Charleston must either decide to be "a destination of culture and heritage or a hub for discount travelers," but it cannot "brand [itself] to be Myrtle Beach and Northeast Harbor, Maine at the same time."[17] Ex. 50, Dana Beach E-Mail, Sep. 7, 2010, Cruise Opponents 002801. In other words, this controversy is about the Cruise Opponents' push to implement their policy views of the UPT's land use and their vision for Charleston's future.[18]

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[17] The contempt the Cruise Opponents have for Carnival cruise passengers is palpable. For example, when discussing the withdrawal of the Carnival cruise business from Mobile, Alabama, Cruise Opponents' Evan Thompson stated that the result would be that "a few T-shirt shops will be closing in Mobile, and there will be some vacancies in the Econolodge." Ex. 53, Evan Thompson E-Mail, Mar. 11, 2011, Cruise Opponents 003498. Randy Pelzer went so far as stating

> [Cruise] is a very unfortunate development ... [p]articularly a budget cruise line ... [Carnival] is the lowest category of cruise line ... ***The people that come here to enjoy this ... we don't need to be the site for it***.... [T]he residents downtown do not welcome this type of thing ... ***[Cruise] will damage the brand*** ... [W]e will ***not attract the type of tourist that we're presently set up to attract***, that are drawn to our beautiful city and that was built, not on a budget, but on a luxurious scale.

Ex. 54, Remarks of J. Randolph Pelzer, Sep. 14, 2010, Charleston City Council Mtg. Minutes (emphasis added).

[18] This contention is in accord with Cruise Opponents' *own words*. See, Ex. 55, Dana Beach E-Mail, Mar. 28, 2011, Cruise Opponents 008502 (stating that "[w]e are particularly interested in the potential for ***redeveloping the entire tract privately***, instead of simply the lower 35 acres")

However, this contested case can only be about the five pilings, and the Administrative Law Court is not the proper venue for a debate about the suitability of the cruise industry in Charleston.

Because of the Cruise Opponents' efforts to do through litigation what they were unsuccessful at doing through proper means (i.e., obtaining public or legislative support),[19] the Ports Authority's proposed capital improvement and redevelopment plan has been put in jeopardy. Of course, this delay and uncertainty is exactly what the Cruise Opponents want.[20] See, e.g., Email of Jay Williams, Apr. 19, 2012, Cruise Opponents 10056 ("[UPT] as a location for the future is not acceptable ... ***the terminal site at [UPT] must be defeated***" with Dana Beach and J. Randolph Pelzer concurring) (emphasis added).

Ironically, for Cruise Opponents, successfully denying the challenged permit will fail to materially hinder or halt cruise operations at the UPT, ultimately resulting in more ships, more pollution, more traffic and less green space at the UPT. The Ports Authority initially considered merely refurbishing existing cruise facilities to improve efficiency and operations, but decided

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(emphasis added); Ex. 56, *A Case for the Redevelopment of Union Pier*, presented by the S.C. Coastal Conservation League with Dover Kohl and Partners and Urban Advisors Ltd (May 2011) (depicting Cruise Opponents desired end-state—a "cruise-less" UPT); see also, Ex. 45, Jay Williams E-Mail, Mar. 17, 2011, Cruise Opponents 008042; Ex. 57, Margot Rose E-Mail, Apr. 28, 2011, Cruise Opponents 005685; Ex. 58, Dana Beach E-Mail, Apr. 11, 2011, Cruise Opponents 006848; Ex. 59, Jay Williams E-Mail, Jun. 6, 2011, Cruise Opponents 003313; Ex. 60, Katie Zimmerman E-Mail, May 5, 2011, Cruise Opponents 008026.

[19] See, e.g., Ex. 61, Email of Carrie Agnew, Nov. 23, 2011, Cruise Opponents 001407 (stating that "despite election set-backs," Cruise Opponents were "undeterred" and "even more determined").

[20] Additionally, for the S.C. Coastal Conservation League, opposition to the cruise terminal is a fundraising opportunity. See Ex. 62, League Solicitation Ltr., Dec. 31, 2012, SCPA 001074-77. The League saw its contributions and grants diminish by over a 1/3 between 2008 and 2011. See Ex. 63, Form 990s field by the League with the IRS, SCPA 001822-001946. The S.C. Maritime Association, a recipient of the League's solicitation, responded with an open letter to the public. See Ex. 64, S.C. Maritime Ass'n Ltr., Jan. 2013, SCPA 001079.

against the option after receiving substantial community input, and in favor of the current plan relocating terminal facilitates to Building #322, moving cargo operations to the CST and shrinking the UPT foot print to facilitate the restoration of the natural waterfront and other public and private development. See Ex. 65, UPT Concept Plan – Background and Benefits, Aug. 30, 2011. Critically, renovating and refurbishing the existing cruise terminal facility requires no additional DHEC approvals, depriving Cruise Opponents of the ability to employ the permitting process for delay and as leverage to effectuate, as Dana Beach put it, Cruise Opponents' "big plans" for the UPT. See Ex. 49, Dana Beach E-Mail, May 11, 2011, Cruise Opponents 002292-93; Ex. 56, *A Case for the Redevelopment of Union Pier*, presented by the S.C. Coastal Conservation League with Dover Kohl and Partners and Urban Advisors Ltd (May 2011) (depicting Cruise Opponents desired end-state—a "cruise-less" UPT).

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion:

The Ports Authority expects to file a motion to dismiss for lack of standing. If such motion is denied, then the Ports Authority expects to file a motion to lift the automatic stay pursuant to S.C. Code Ann. § 1-23-600(H)(4). The Ports Authority may also file a motion or motions to dismiss and/or for partial or complete summary judgment on the issues presented, as appropriate. The Ports Authority may file motions related to discovery, evidentiary issues, or the conduct of the hearing should the Ports Authority deem such motions necessary. Additionally, the Ports Authority reserves the right to file any appropriate motion under the appropriate rule.

7. A list of proposed witnesses and exhibits:

At this time, the proposed witnesses on behalf of the Ports Authority include fact and expert witnesses as may be identified during discover, including but not limited to Robert Mitchell, Derrick Bellamy, Peter Lehman and James Newsome. Expert witnesses from Parsons

Brinckerhoff, Inc., ARCADIS US, Inc., Trinity Consultants and others may be called to testify. The Ports Authority may also call witnesses from other state and federal agencies. The Ports Authority reserves the right to call any witness listed, named, or offered by any party and any other such witness whose testimony may be relevant to the subject matter of this dispute. There may be additional third-party witnesses that are identified through the course of discovery.

Exhibits may include the DHEC project file;[21] submissions made by any party to any governmental entity and other government records; expert reports and analysis; technical and professional documents; correspondence; publicly available records and documents; any such documents or material as may be discovered; and any documents, materials, or evidence relevant to the subject matter of this dispute.

8. A statement regarding the necessity for discovery, if any:

Discovery may take between six to nine months to complete. Interrogatories, requests for production, requests to admit, and an expanded number of depositions are appropriate for this matter. The large number of witnesses already listed by Petitioners in discovery demonstrates that the case will require the scope of discovery as to depositions should be expanded beyond the limitations set forth in Rule 21, RPALC, and discovery should be allowed to proceed in accordance with the Rules 26-37, SCRCP.

9. The estimated length of the hearing:

The estimated length of a hearing on the merits on all issues is one week.

10. Any dates in the next ninety (90) days when you will not be available for a hearing:

As of the date of this filing, the following are dates known to be unavailable for lead counsel for the Ports Authority: October 7, 14, 24, and 25; November 11, 15, 19, and 27-29;

[21] Ex. 66, DHEC File, DHEC-SCPA 000001-002277, and Affidavit of Steven Brooks.

December 4, 9, 13, and 23-31; January 1-3, and 23-24. Counsel for the Ports Authority also is involved in a number of matters in state and federal court at the trial and appellate levels that may not have scheduled argument on various matters and that may preclude availability on additional dates.

Counsel for the Ports Authority will endeavor to meet any hearing date or deadline established by the Court, but respectfully reserves the right to request a continuance depending on the circumstances at that point in time.

11. An email address where you can be reached:

Below is a table of counsel of record with email addresses. Communications and service may be directed to Randy Lowell and Philip Lawrence in lieu of all listed counsel.

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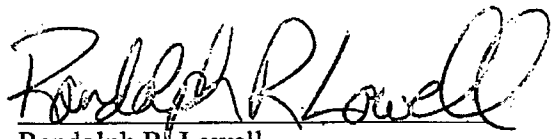
Randolph R. Lowell Willoughby & Hoefer, P.A.	rlowell@willoughbyhoefer.com
Chad N. Johnston Willoughby & Hoefer, P.A.	cjohnston@willoughbyhoefer.com

The Ports Authority reserves the right to supplement or amend this Prehearing Statement as it deems appropriate or necessary.

[Signature Page Follows]

Respectfully submitted,



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Attorneys for the Respondent
South Carolina State Ports Authority

September 18, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,	)	Docket No. 13-ALJ-07-0056-CC
Petitioners,	)	**CERTIFICATE OF SERVICE**
v.	)	
South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control,	)	
Respondents.	)	

This is to certify that I, an paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **South Carolina Ports Authority's First Amended Pre-hearing Statement** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

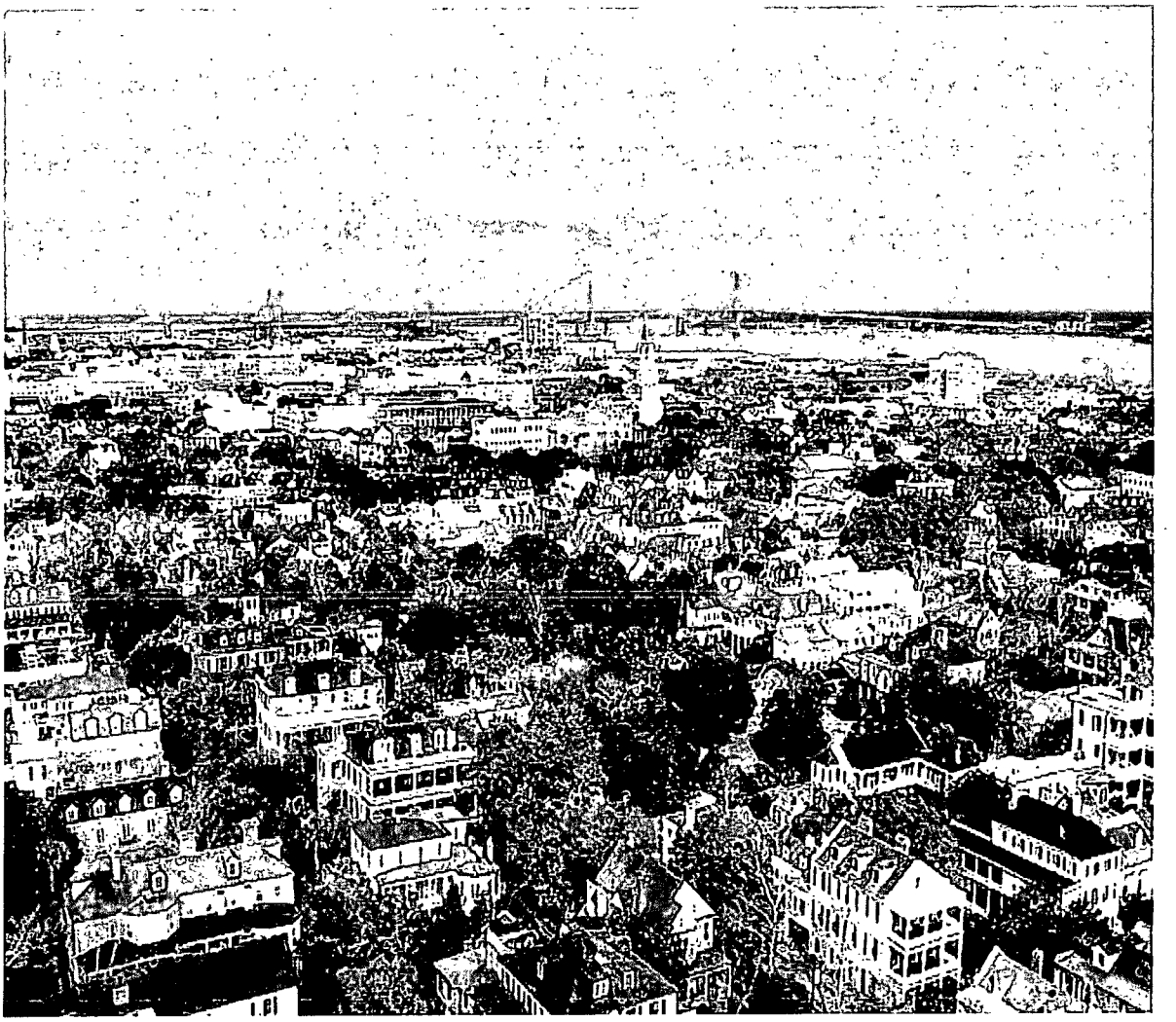
J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Breanna M. Karns
Breanna M. Karns

Columbia, South Carolina
This 18th day of September 2013.

Exhibit 21

Cruise Ship Noise Overview



Dan Riccio
Director of Livability

Table of Contents

1. CRUISE SHIP NOISE OVERVIEW 1
2. INTERVIEWS 2
3. ATTACHMENTS 1-16 ..... 2.1
4. INVESTIGATION 3
4. FINDINGS 4
5. EXHIBITS A-C 5.1

Cruise Ship Noise Complaint Overview

On October 16, 2011 at approximately 0750 hours, Carrie Agnew of 35-B Hasell Street filed an e-mail complaint with Byron Miller, the South Carolina States Port Authority public information officer (PIO). The complaint stated that a cruise ship was arriving in port and that the announcement via the ship's public address system was very loud. Byron responded to the complainant informing her that the cruise ship COLUMBUS had not arrived at the port until 8:15 a.m. and therefore this complaint was unsubstantiated. Byron Miller e-mailed the complaint to Dan Riccio, Director of Livability for the City of Charleston. Prior to this e-mail communication, the Livability Division has never received any complaints from the community regarding cruise ship noise emanating from the public address system aboard any cruise ships. Nor has Carrie Agnew ever notified the Livability Division regarding cruise ship noise complaints. Up to this point, normal protocol was for residents to file cruise ship noise complaints with Byron Miller (State Ports Authority's PIO).

According to Byron Miller, since 2010 Carrie Agnew has been the only complainant regarding the announcements emanating from the ship's PA system since 2010, and the only complaints filed are primarily concerning the Carnival cruise ship Fantasy. Ms. Agnew did, for the first time, lodge a formal complaint via the City of Charleston online complaint module, GOV-QA on October 17, 2011 at 3:15 p.m. I contacted Ms. Agnew and she agreed to meet with me to discuss her complaint. I conducted an interview with Ms. Agnew at her residence on Friday October 21, 2011. Ms. Agnew stated that the PA messages on Sunday, October 16, 2011, were loud, and that she also had her windows open. She stated that she would like the volume on the PA system aboard the cruise ships regulated.

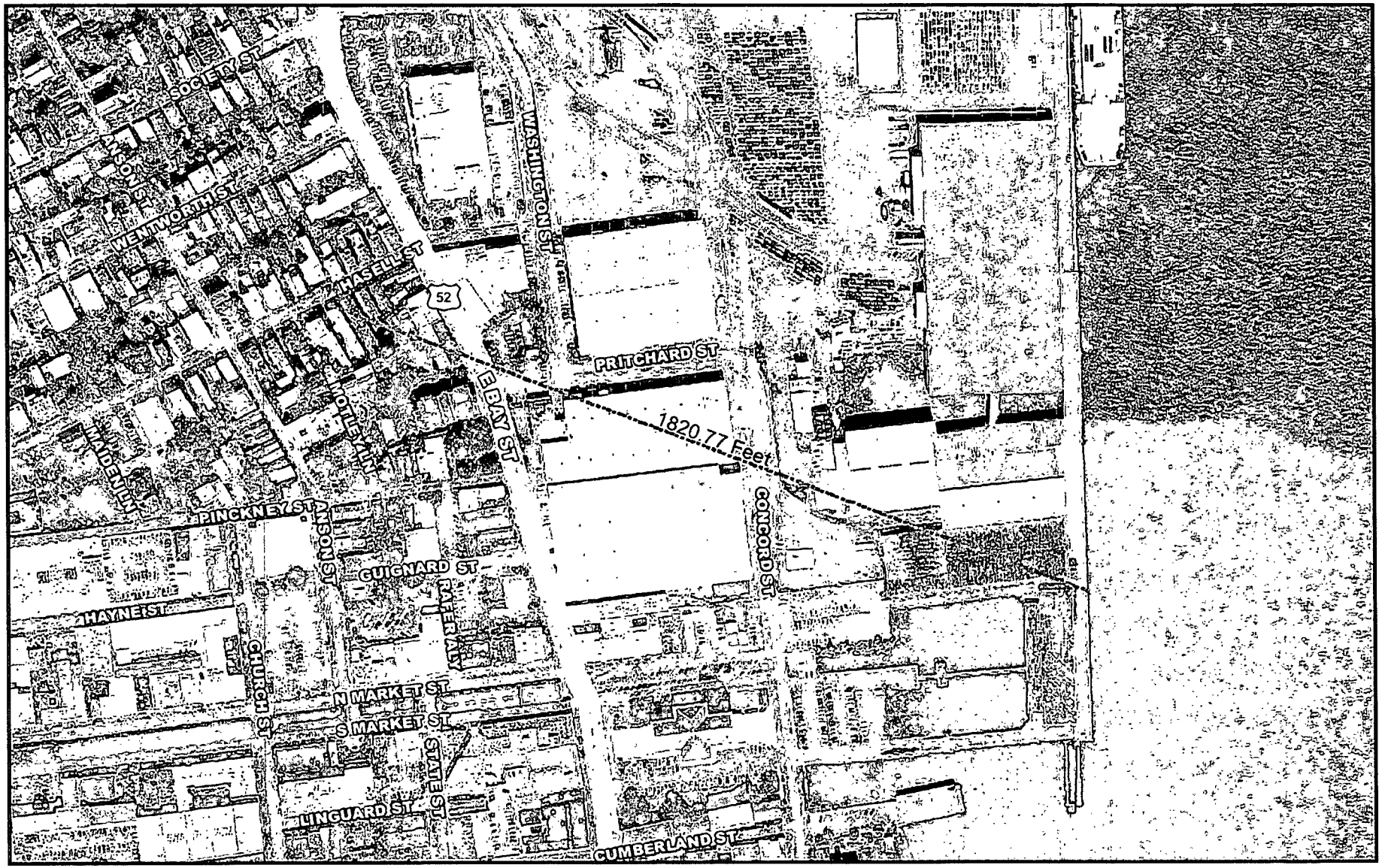
Brian Miller responded by providing information that the messages delivered by a ship's PA system are required for muster drills on embarking ships by the International Convention for the Safety of Life at Sea (SOLAS), an international maritime safety treaty under the auspices of the International Maritime Organization. Byron Miller also provided the Charleston port cruise terminal noise standard which states:
"**All amplified external public address announcements and music are prohibited at the South Carolina State Ports Authority's passenger terminal, with the exception of announcements, horns and signals that are associated with mandated USCG/SOLAS activities, such as muster drills, or other announcements and signals necessary for the safety of the ship, crew and passengers.**"

Based on the information provided by Byron Miller and the complainant, Carrie Agnew, Dan Riccio began conducting random interviews with individuals who reside in the area of Hasell Street who may be affected by messages emanating from cruise ships berthed at the cruise terminal. Additionally, Carrie Agnew provided Dan Riccio with a list of residents who allege that they are negatively affected by messages emanating from the Fantasy's public address system, while berthed at the cruise terminal.

Interviews

The following interviews were conducted by Dan Riccio, who is currently the Director of Livability for the City of Charleston, and a retired Lieutenant from the Charleston Police Department. Each map contains the location and name of the resident being interviewed, the distance of the residence from the cruise terminal, and a brief overview of the comments made by the resident (See attachments 1-16).

ATTACHMENTS



Legend

Distance Line

1820 Feet
0.345 Miles
554.7 Meters

35 Hasell St

35-A Hasell- (October 21, 2011) Ms. Agnew's downstairs neighbor, Paul Koenig, states that he does not hear any cruise ship noise.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/20/2011

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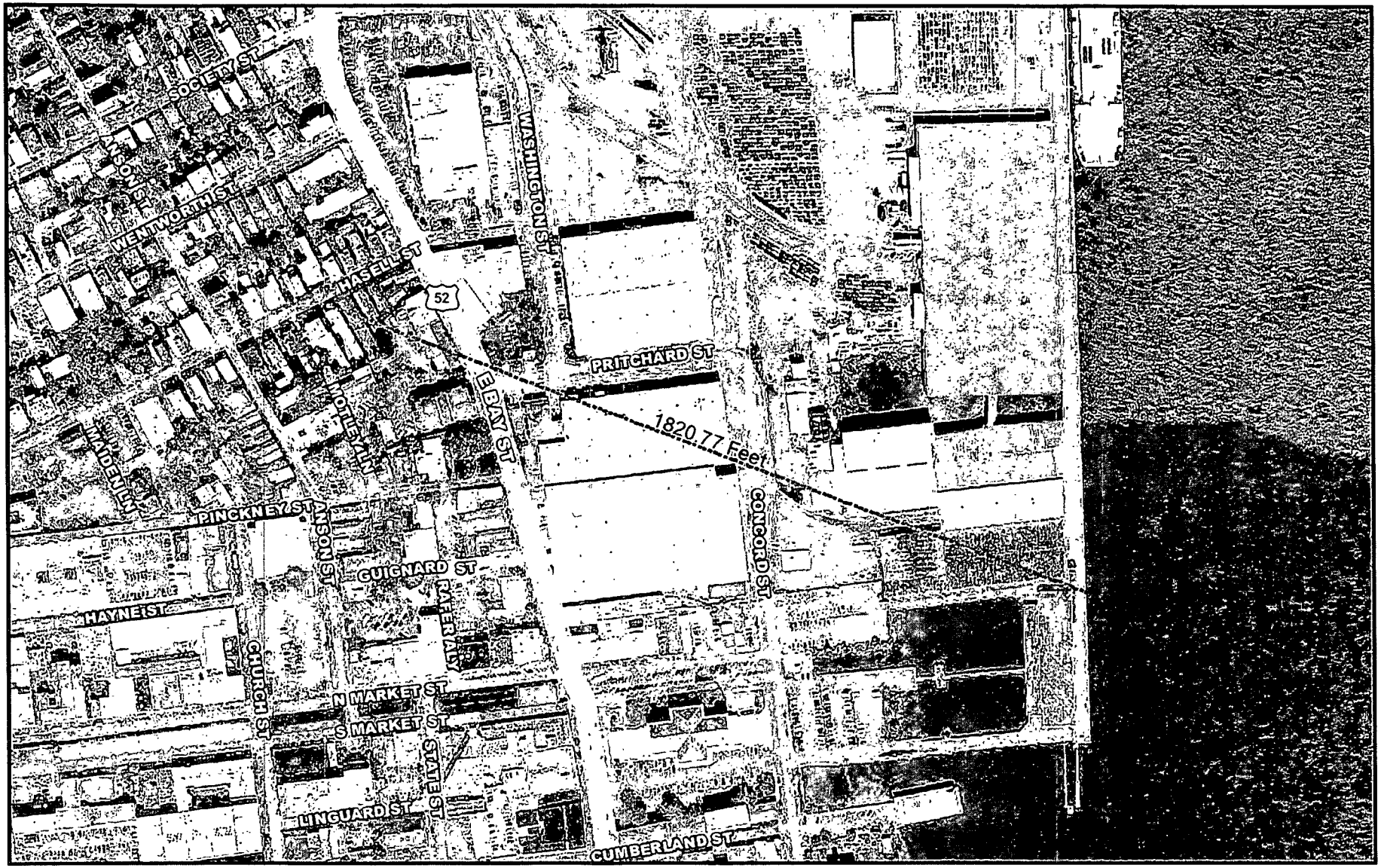
R.000717



Legend

Distance Line

1820 Feet
0.345 Miles
554.7 Meters

35 Hasell St

35-B Hasell- (October 21, 2011) Ms. Agnew stated that the PA messages are loud when her windows are open. She would like the volume on the PA system aboard the cruise ships regulated.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/20/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuracies in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.

Distance Line

2580 Feet
.489 Miles
786.3 Meters

5 Alexander St

5 Alexander - (October 31, 2011) Georgia Meagher states she hears the announcements in the afternoon with windows closed.

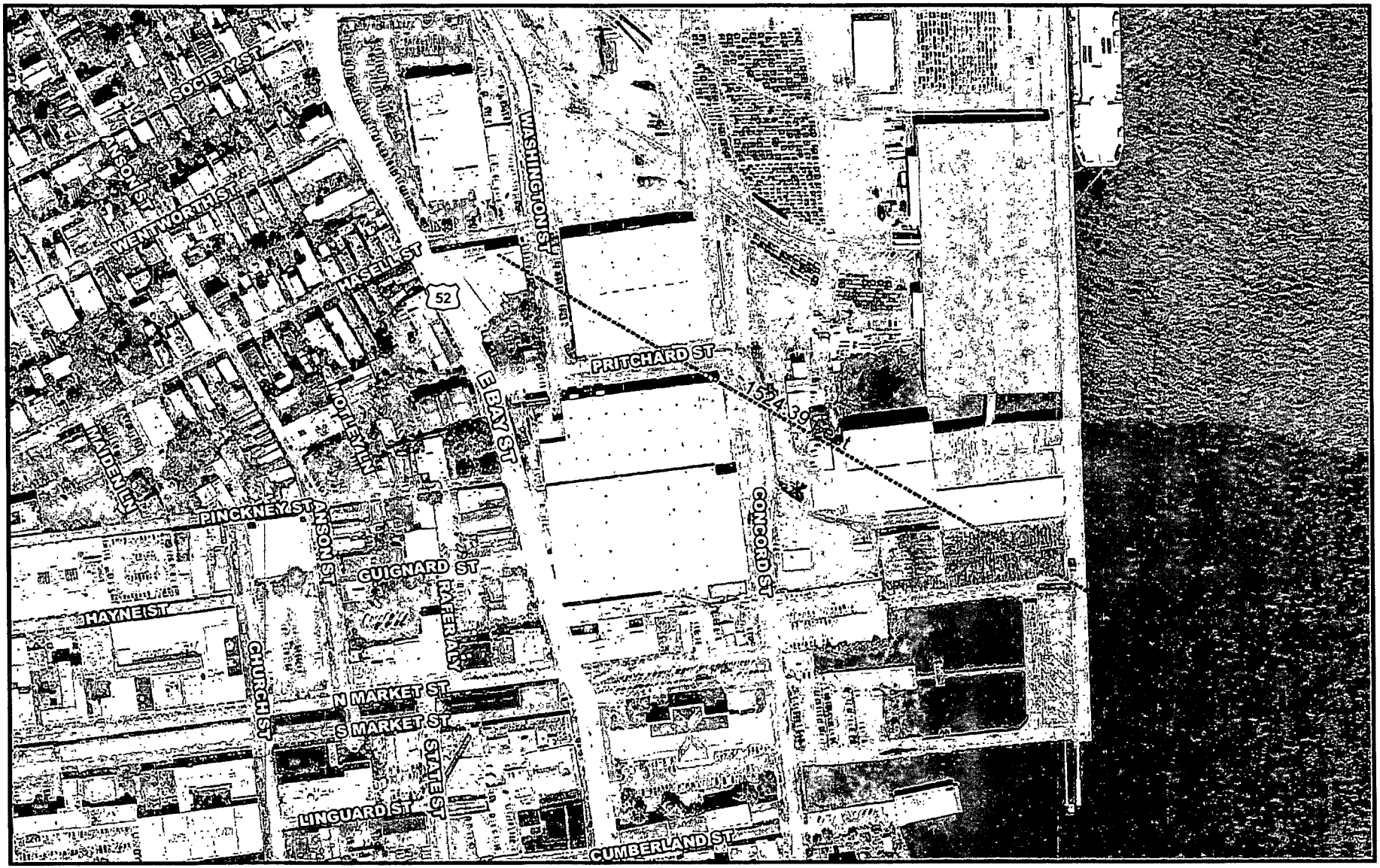
0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuracies in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.

R.000719



Distance Line

1524.39 Feet
0.29 Miles
464.64 Meters

21 Hasell St

21 Hasell - (October 24, 2011) Angela Spallviero, the manager of the Ansonborough Inn, states that no guests have ever complained about any cruise ship noise.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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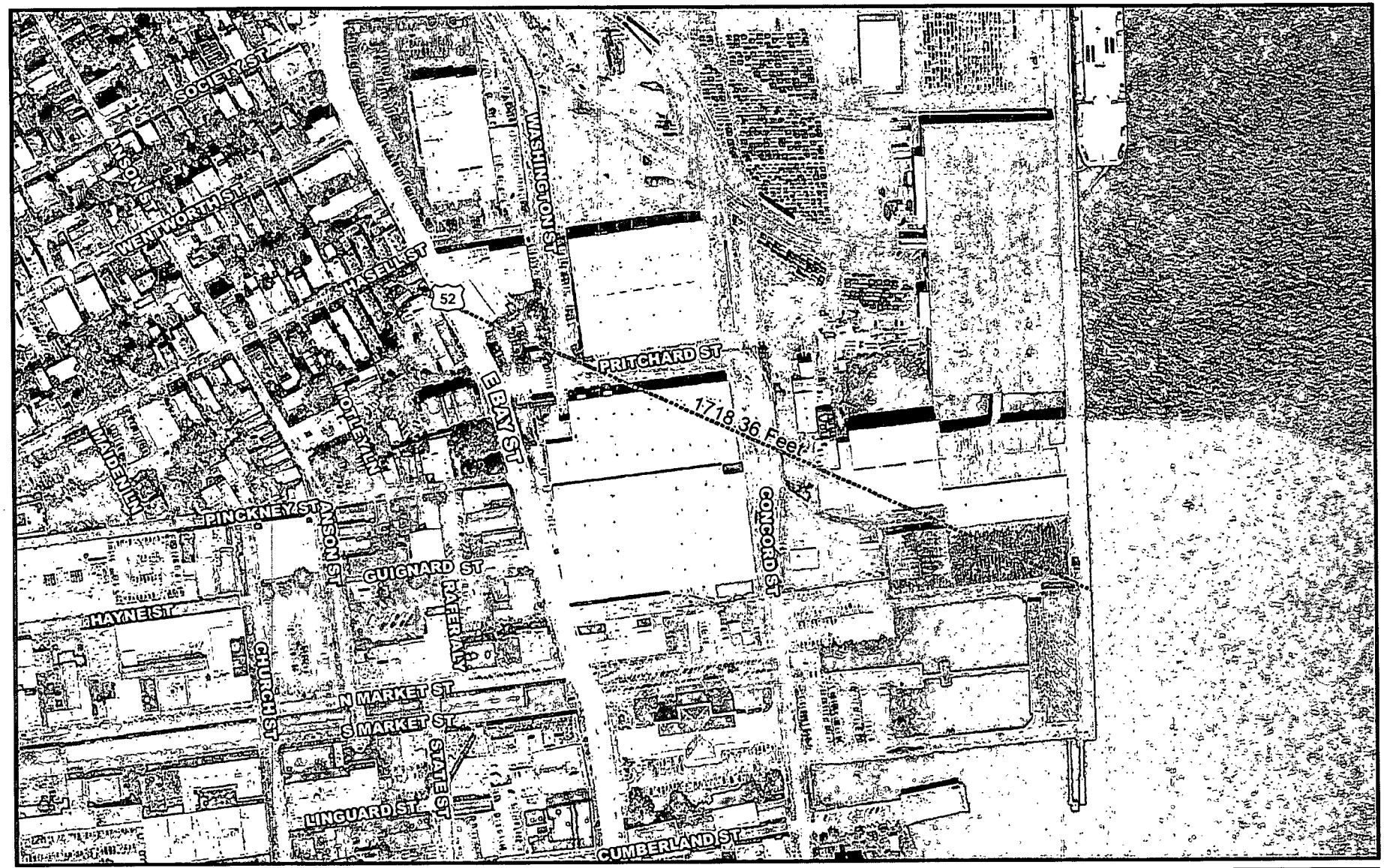
R.000720



Distance Line

1718.36 Feet
0.33 Miles
523.76 Meters

27 Hasell St

27 Hasell - (October 24, 2011) Kaitlin Streets states she never hears any cruise ship noise.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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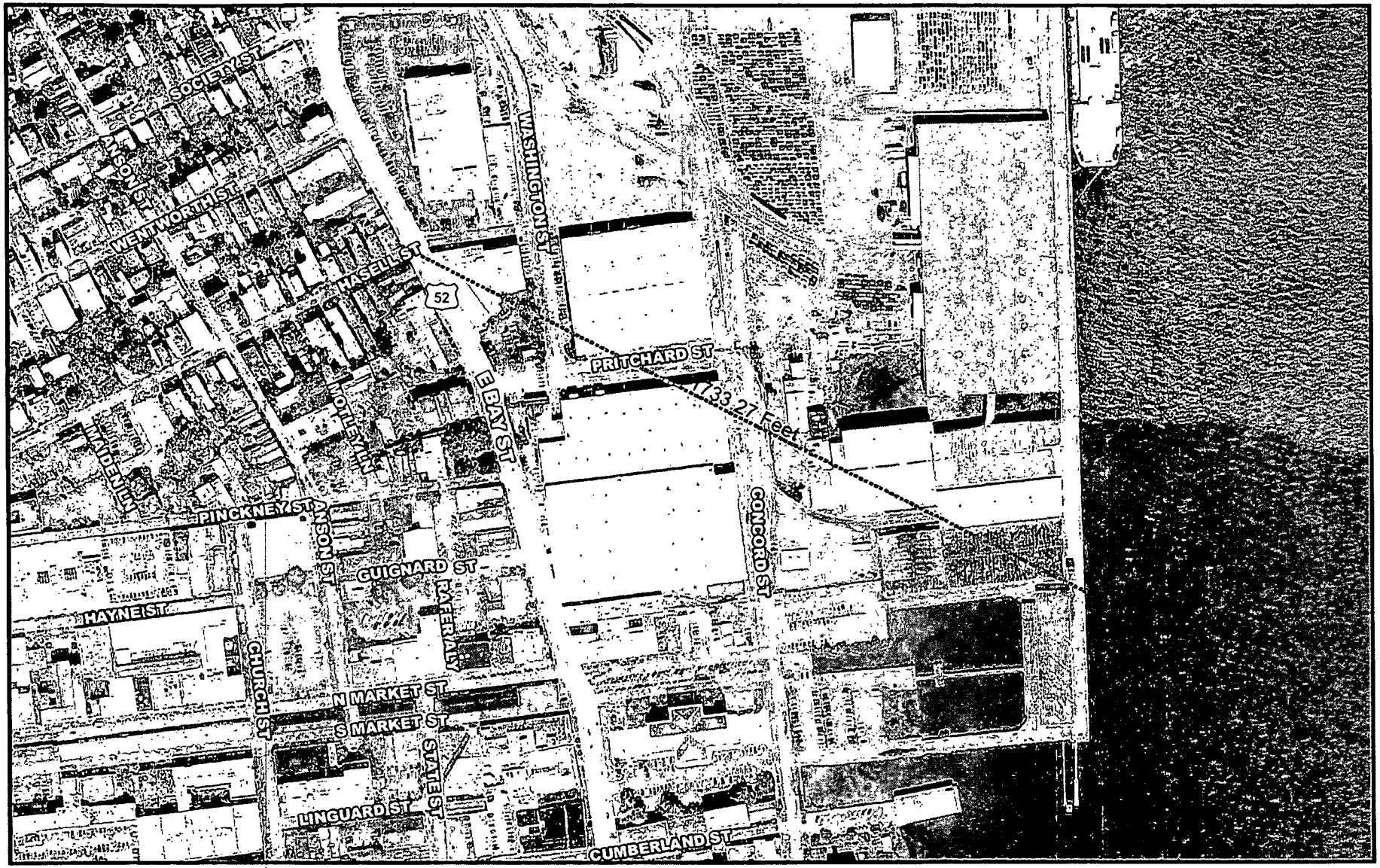
R.000721



Distance Line

1733.27 Feet
0.33 Miles
528.30 Meters

28 Hasell St

28 Hasell - (October 24, 2011) Merrill Benfield does hear the PA messages, but tolerates them. He feels that the volume aboard the ships could be lowered.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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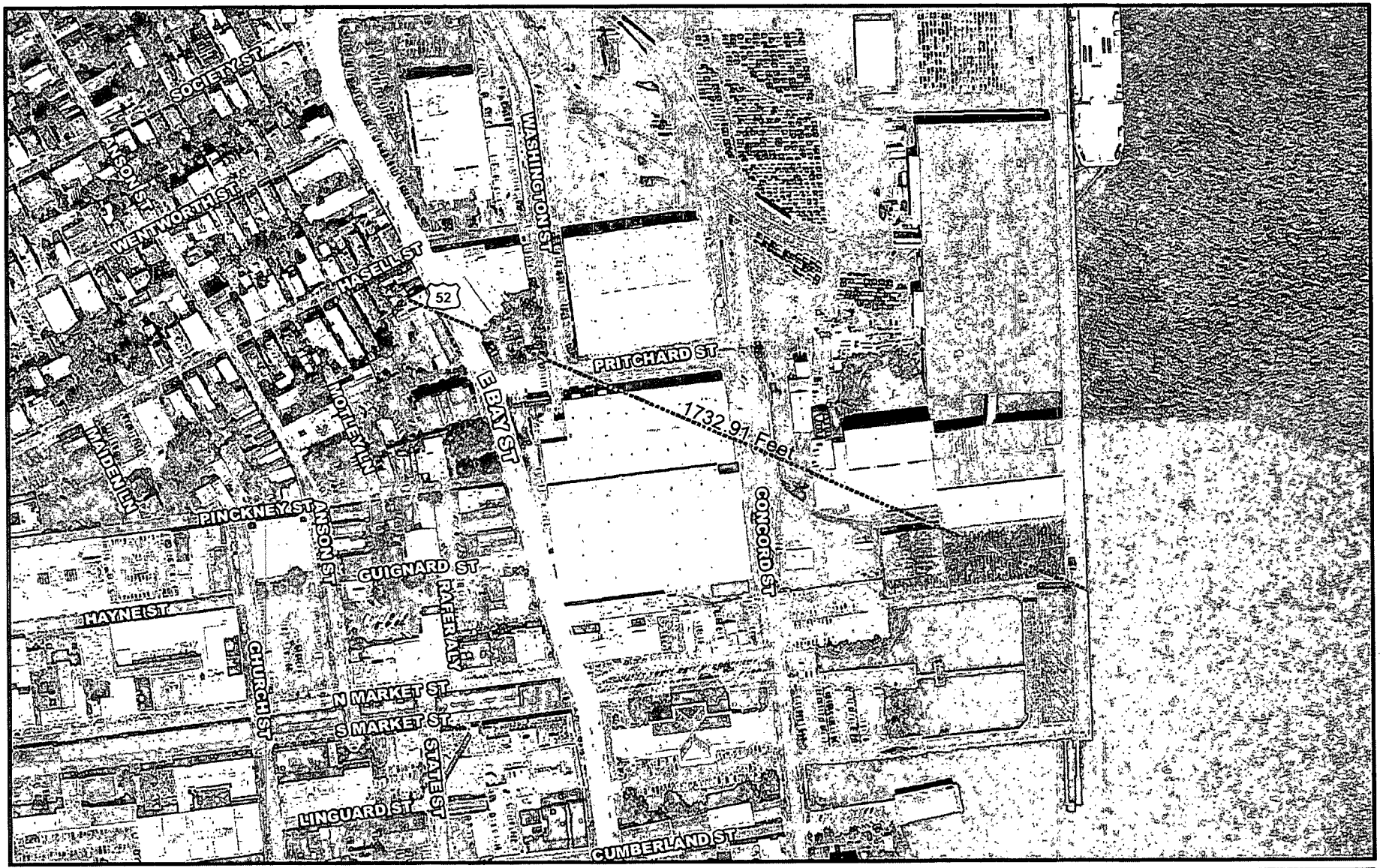
R.000722



R.000723

Distance Line

1732.91 Feet
0.33 Miles
528.19 Meters

29 Hasell St

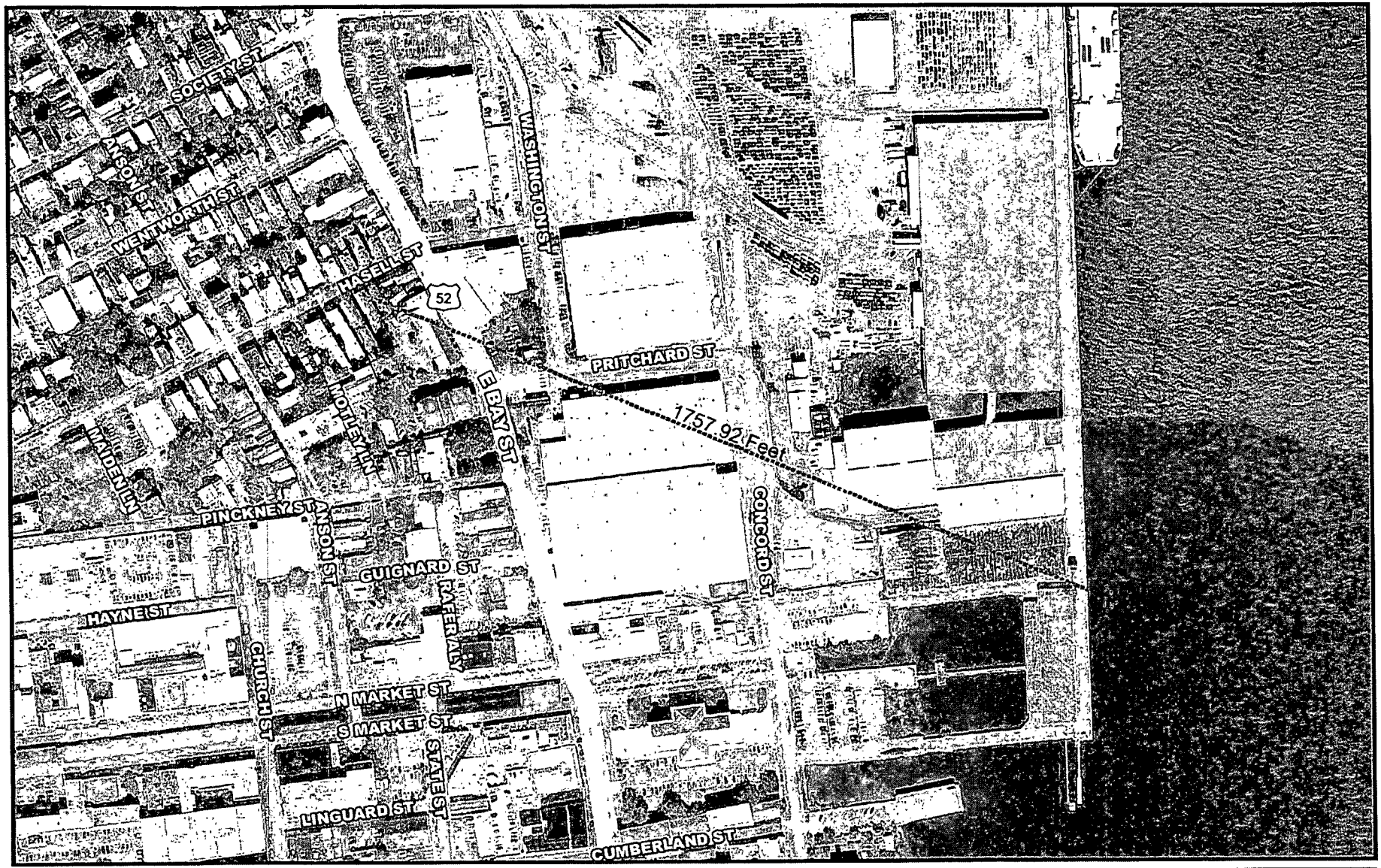
29 Hasell - (October 24, 2011) Dr. Gilbert Baldwyn does hear PA messages when he is outside, but he tolerates them.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuries in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.



Distance Line

1757.92 Feet
0.33 Miles
535.81 Meters

31 Hasell St

31 Hasell - (October 24, 2011) Gary Connoly states that he never hears any cruise ship noise.

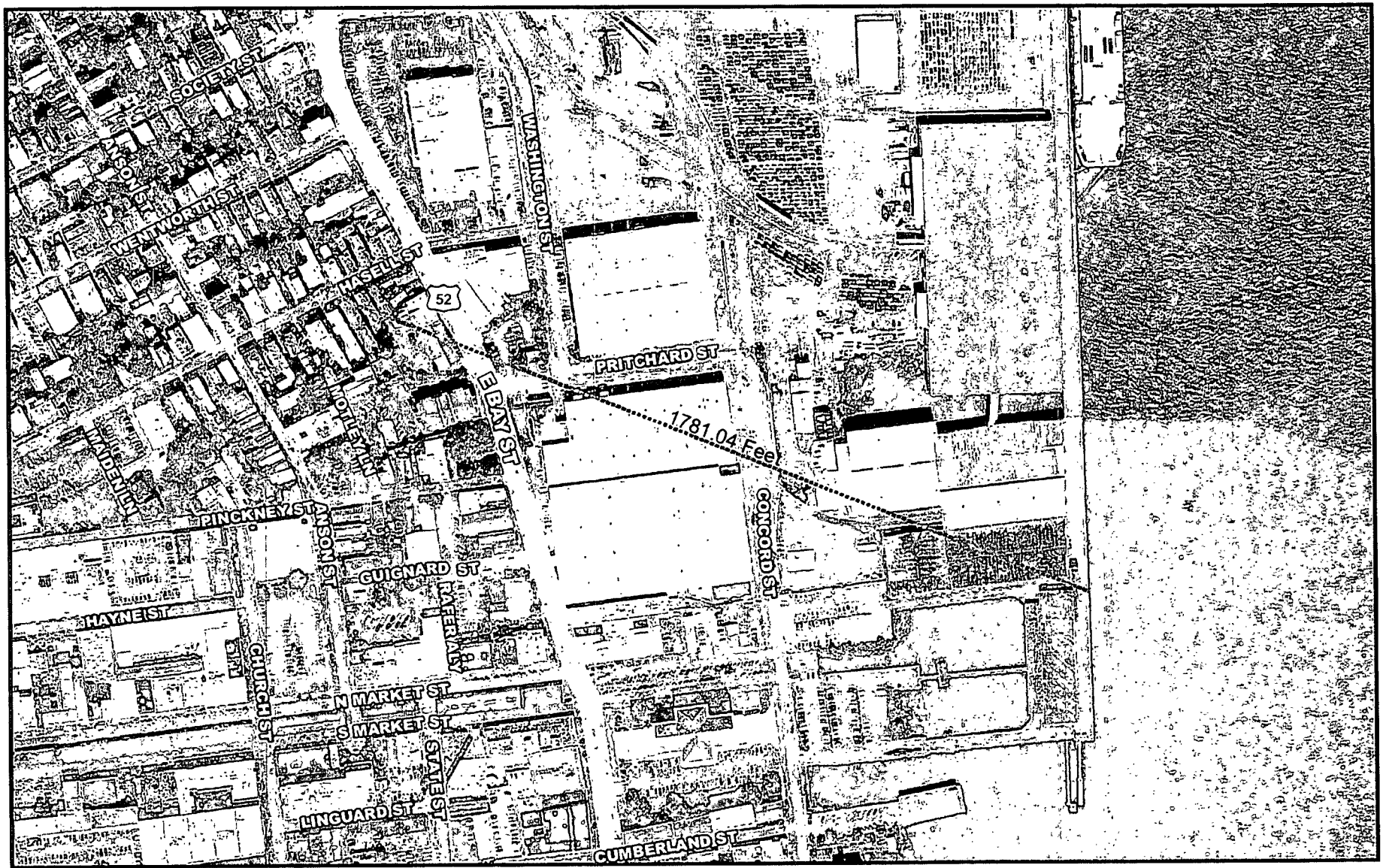
0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuracies in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.

R.000724



Distance Line

1781.04 Feet
0.34 Miles
542.86 Meters

33 Hasell St

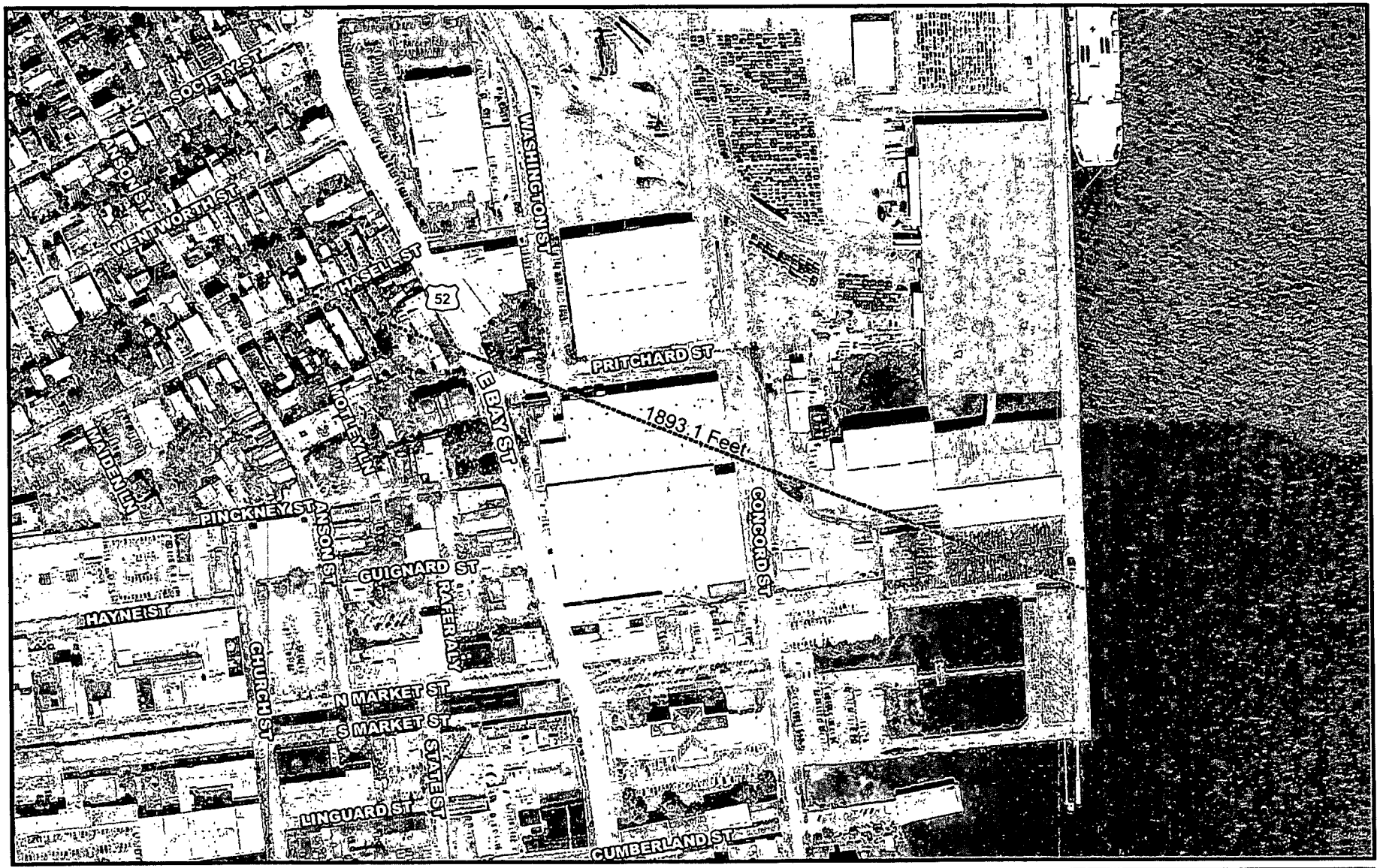
33 Hasell - (October 25, 2011) Mr. and Mrs. Prewitt feel that the PA systems aboard the Fantasy are too loud and they experience the noise while sitting outside.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuracies in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.



Distance Line

1893.1 Feet
0.36 Miles
577.02 Meters

40 Hasell St

40 Hasell – (October 24, 2011) Christen Kelly states that she never hears any cruise ship noise.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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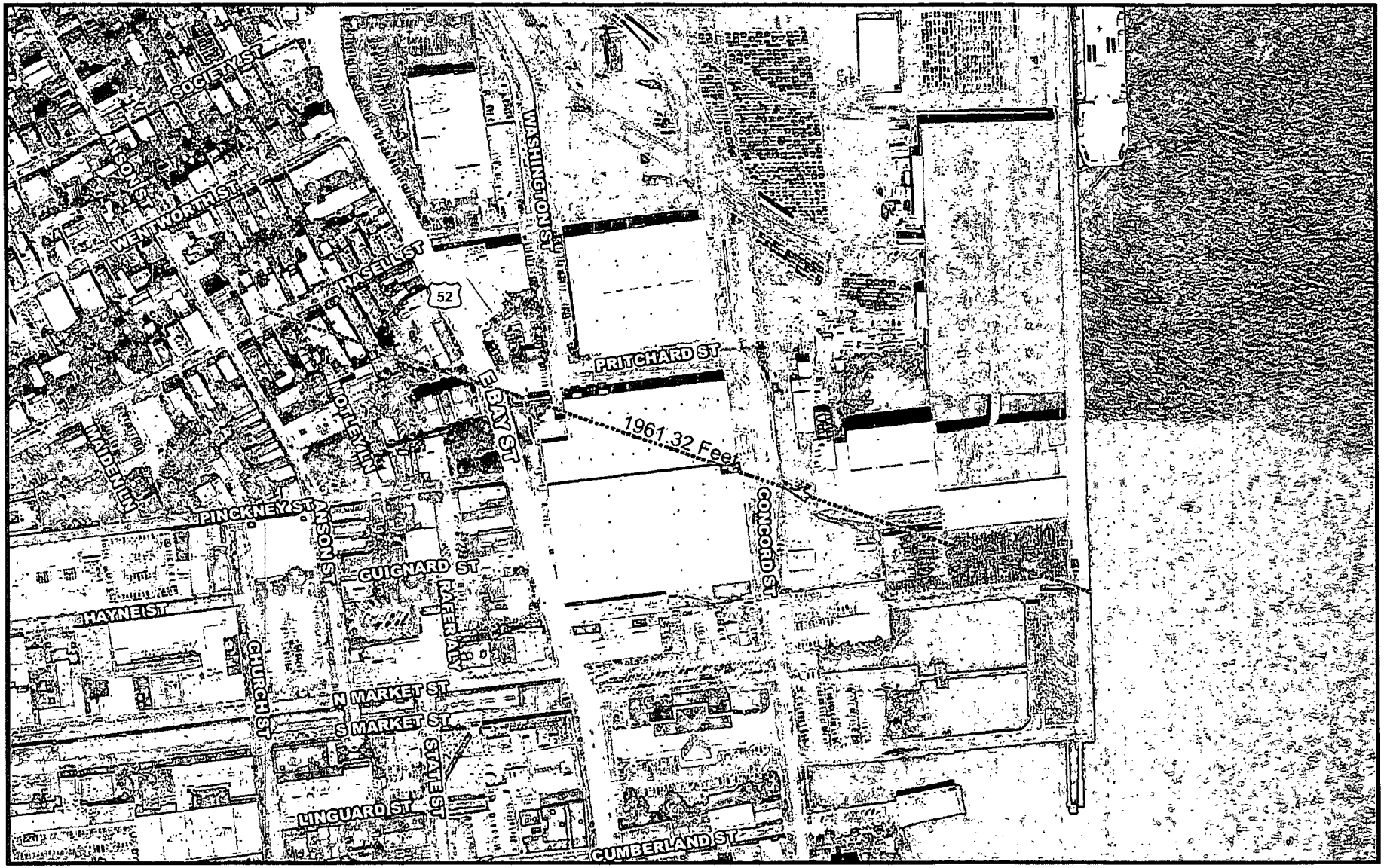
R.000726



R.000727

Distance Line

1961.32 Feet
0.37 Miles
597.81 Meters

44 Hasell St

44 Hasell - (October 21, 2011) Mrs. Mendelsohn states that she never hears any cruise ship noise.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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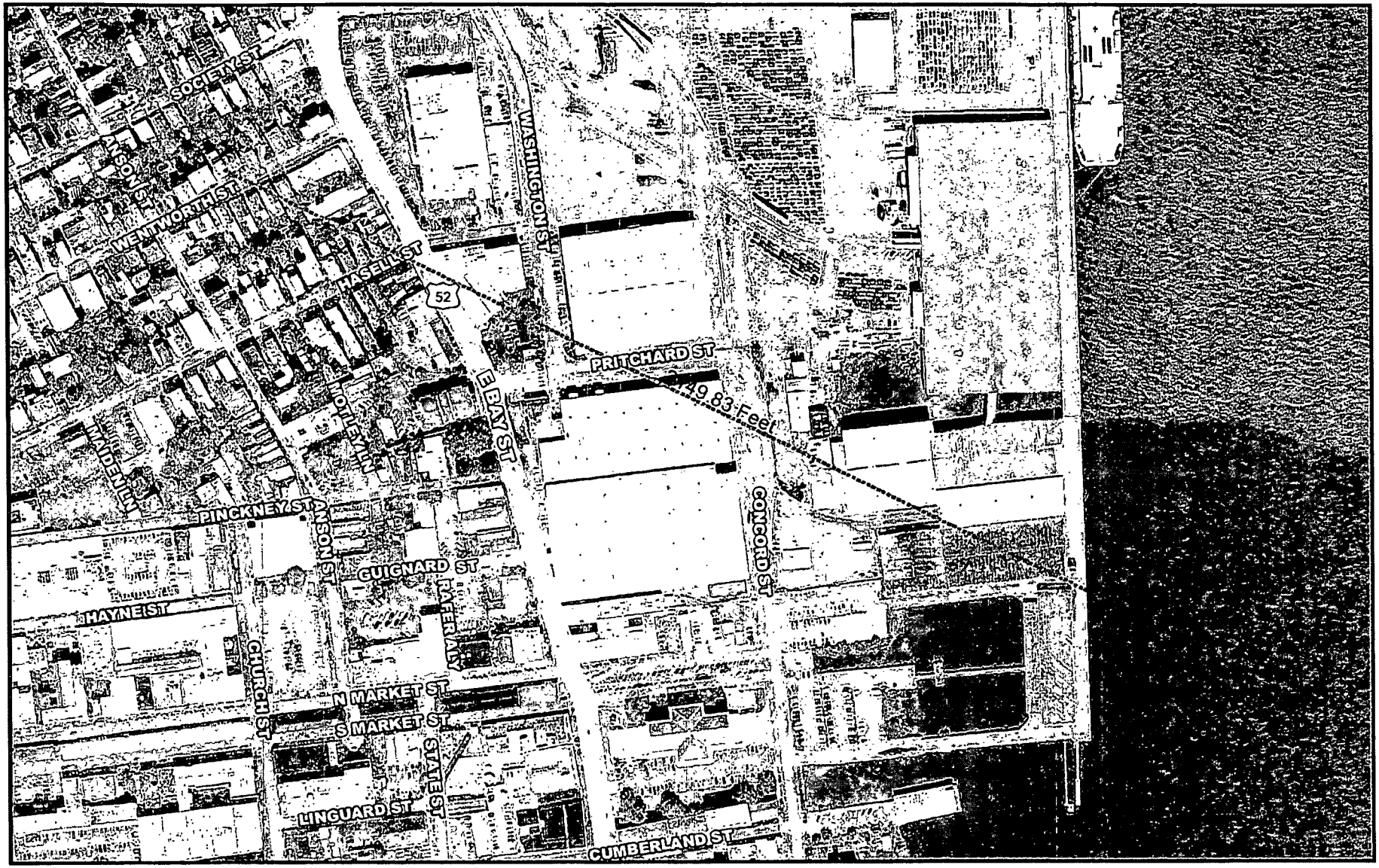

R.000728

Distance Line

2149.83 Feet
0.41 Miles
655.27 Meters

16 Wentworth St

16 Wentworth - (October 27, 2011) Jo Sommerall states that she does not hear the PA announcements at her residence, but can hear the ships horn.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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Distance Line

2195.58 Feet
0.42 Miles
669.21 Meters

24 Wentworth St

24 Wentworth -(October 26, 2011) Peter Grant states he can hear the PA messages only when he has his windows open and that he is not bothered by the messages.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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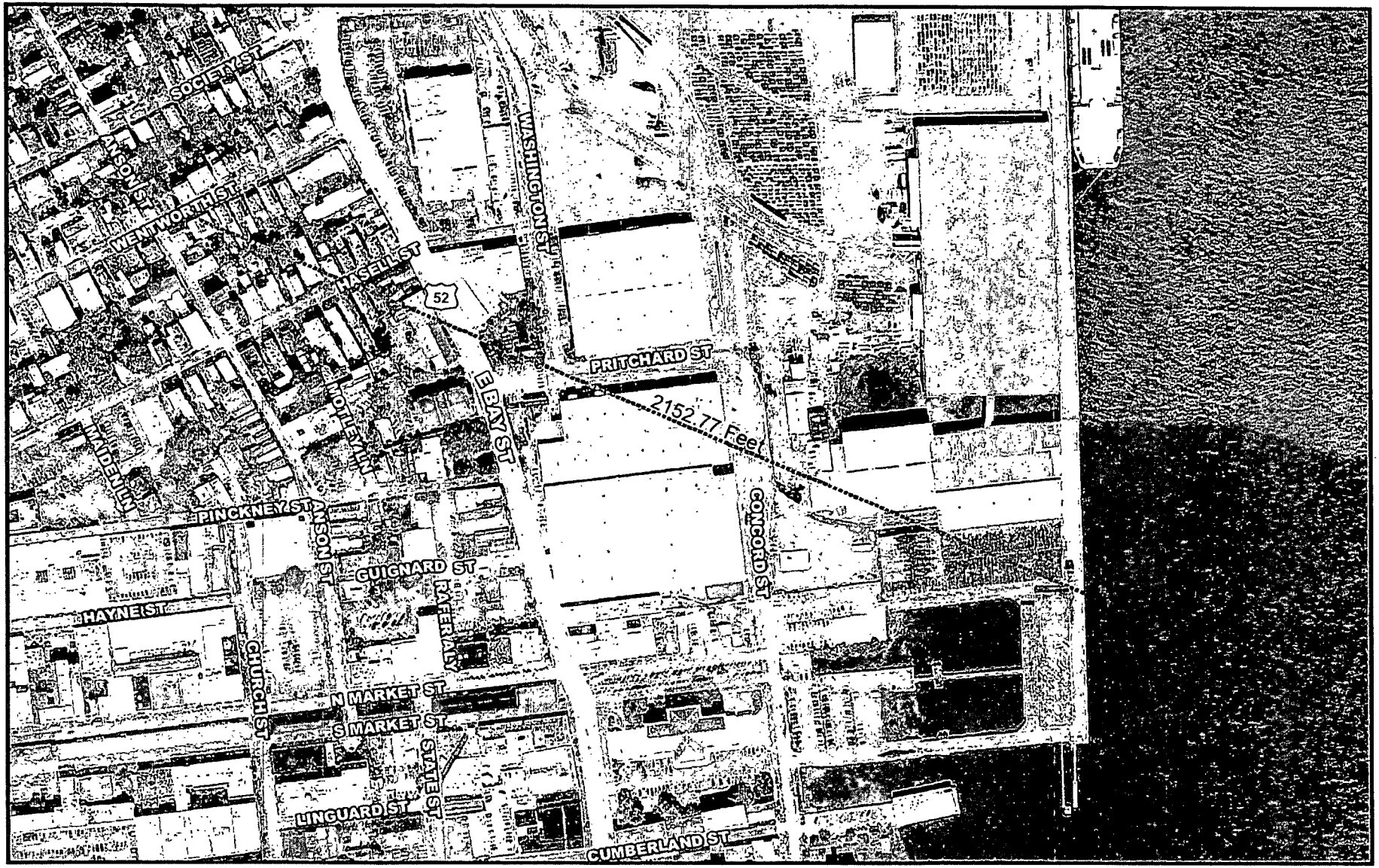
R.000729



Distance Line

2152.77 Feet
0.41 Miles
656.17 Meters

27 Wentworth St

27 Wentworth- (October 26, 2011) Lisa Willets states that she usually hears the PA system aboard the ship while outside in her yard.

0 125 250 500 Feet

1 inch = 300 feet

Date: 10/27/2011

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R.000730

R.000731

Distance Line

5243 Feet
0.993 Miles
1598.16 Meters

68 S. Battery

68 S. Battery -(October 27, 2011) Randy Pelzer states that he does not hear any cruise ship PA messages, but he hears the horn at debarkation, which is required by U.S. Coast Guard and SOLAS regulations.

0 250 500 1,000 Feet

1 inch = 700 feet

Date: 10/27/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuracies in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.

Distance Line

5193.01 Feet
.984 Miles
1582.83 Meters

64 S. Battery

64S. Battery-(October 26, 2011) Attempted to contact Elizabeth Bradham, but there was no answer at her residence. A business card was left in the door, but she never contacted me.

0 250 500 1,000 Feet

1 inch = 700 feet

Date: 10/27/2011

The City of Charleston shall assume no liability for any errors, omissions, or inaccuracies in the information provided. Data represented herein reflect varying stages of development, and varying dates of acquisition.

R.000732

Investigation

On Friday, October 28, 2011 at 5:30a.m., Dan Riccio conducted an onsite investigation at the Port of Charleston cruise terminal to determine if the Carnival cruise ship, Fantasy, was violating the City of Charleston noise ordinance. My investigation revealed that no announcements were broadcasted via the ship's public address system until approximately 3:15 p.m. A preparation safety briefing announcement was broadcasted that continued for approximately 20 seconds. Additional announcements followed until the ship began to leave port. The only messages broadcasted were that of safety briefings to the passengers, which are required by the International Convention for the Safety of Life at Sea (SOLAS). I relocated to area of Hasell Street at approximately 3:55 p.m. and could faintly hear the safety briefings being broadcasted via the Fantasy's public address system.

On Saturday, November 12, 2011, at approximately 3:15 p.m., Dan Riccio conducted an onsite investigation at 35-B Hasell Street, Carrie Agnew's residence, to determine if the Carnival cruise ship, Fantasy, was violating the City of Charleston noise ordinance. Several neighbors were at the residence to act as witnesses regarding loud noise allegedly emanating from the Fantasy. Between 3:15p.m.and 5:00p.m., there were no messages or music heard emanating from the ship while everyone was in attendance. Dan Riccio left the residence at approximately 5:00 p.m. and relocated to the cruise terminal. It was determined that the Fantasy would not be leaving the cruise terminal until 6:00 p.m. A preparation safety briefing announcement was broadcasted at approximately 5:40 p.m. that continued for approximately 20 seconds. Additional announcements followed until the ship began to leave port. The only messages broadcasted were that of safety briefings to the passengers, which are required by the International Convention for the Safety of Life at Sea (SOLAS). Dan Riccio then relocated to area of Hasell Street at approximately 5:55 p.m. and could faintly hear the safety briefings being broadcasted via the Fantasy's public address system.

On Friday, November 18, 2011, at approximately 1:15 p.m., Dan Riccio conducted an onsite investigation at the Port of Charleston cruise terminal to determine if the Carnival cruise ship, Fantasy, was violating the City of Charleston noise ordinance. While conducting the investigation, Carrie Agnew telephoned Dan Riccio on his Blackberry device and complained that she was hearing Reggae music emanating from the Fantasy. At this point, Dan Riccio asked Ms. Agnew if he could respond to her residence to see if he too could hear music emanating from the Fantasy. Ms. Agnew agreed, and Dan Riccio responded to her residence located at 35-B Hasell Street at approximately 1:20 p.m. Both Dan Riccio and Carrie Agnew stood on her porch to determine if the music was emanating from the Fantasy. It was evident to Dan Riccio and Carrie Agnew that the music being heard was not from the Fantasy, but from an unknown location in proximity of the City Market. Ms. Agnew confirmed that the music was not emanating from the Fantasy.

Findings

At the conclusion of this investigation, I find that there are no violations of the City of Charleston's noise ordinance (21-16) regarding announcements being broadcasted from cruise ships via the public address system while berthed at the Port of Charleston cruise terminal. My findings are based on the following facts:

1. The Carnival Cruise Lines have implemented "silent debark" procedures. Under normal circumstances, there are no external amplified announcements prior to the mandatory muster drill horns and announcements around 3:30 p.m. on embarkation. These announcements are required by international regulations (Safety of Life at Sea, or SOLAS, an international maritime safety treaty) for embarking ships on cruises longer than 24 hours so all passengers know the procedures for where to report during ship emergencies, evacuations, etc.(See Exhibit A).

2. The South Carolina State Ports Authority has implemented noise standard at the cruise terminal which states that all amplified external public address announcements and music are prohibited at the South Carolina State Ports Authority's terminal, with the exception of announcements, horns and signals that are associated with mandated United States Coast Guard/ International Convention for the Safety of Life at Sea (SOLAS) activities, such as muster drills, or other announcements and signals necessary for the safety of the ship, crew and passengers.

3. During my investigation at the cruise terminal and on Hasell Street on October 28, 2011, there were no messages broadcasted from the Fantasy via the public announcement system until after 3:00 p.m. The only messages broadcasted pertained to emergency muster drills, which are required by the International Convention for the Safety of Life at Sea (SOLAS). The messages were broadcasted intermittently and each message did not last for more than thirty (30) seconds. Additionally, the messages are broadcasted in accordance with the City of Charleston noise ordinance, 21-16(f), whereas the mandatory messages were broadcasted after 7:00 a.m. and before 11:00 p.m. (See Exhibit B).

4. The City of Charleston noise ordinance, 21-16(f) states that "It shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated, any radio, amplified musical instrument including but not limited to brass or drum instruments or the amplified device or apparatus making or reproducing musical or other sounds within a privately owned or controlled courtyard or outdoor area after 11:00 p.m. and before 7:00 a.m. in such a manner as to be audible in any public street or right-of-way" (See Exhibit B).

5. The outcome of the fifteen (15) interviews indicated that eight (8) residents do not hear any noise emanating from the cruise ships while berthed at the terminal; six (6) residents hear the public announcement messages emanating from the

Carnival Fantasy at brief intervals normally after 3:00 p.m. while sitting outside their residence or with the windows to their residence open; and only one resident states that she hears the public announcement messages from the Carnival Fantasy while inside her residence with the windows closed (See attachments 1-16).

6. On Saturday, November 12, 2011, at approximately 3:15 p.m., Dan Riccio conducted an onsite investigation at 35-B Hasell Street to determine if the Carnival cruise-ship, Fantasy, was violating the City of Charleston noise ordinance. Several neighbors, along with Carrie Agnew, were at the residence to act as witnesses regarding loud noise allegedly emanating from the Fantasy. Between 3:15p.m.and 5:00p.m., there were no messages or music heard emanating from the ship while everyone was in attendance.

7. Carrie Agnew, who resides at 35-B Hasell Street, complained that she was hearing reggae music emanating from the Carnival cruise ship Fantasy on November 18, 2011 at approximately 1:15 p.m. Dan Riccio responded to Ms. Agnew's residence and both he and Ms. Agnew determined that the music was not emanating from the Fantasy, but from an unknown location in proximity of the Market area (See Exhibit C).

EXHIBITS

5.1

Exhibit A

From: Miller, Byron [mailto:BMiller@SCSPA.com]
Sent: Monday, November 21, 2011 9:51 AM
To: Carrie Agnew <cwagnew@bellsouth.net> (cwagnew@bellsouth.net)
Subject: Safety of Life at Sea

Below are requirements for muster drills on embarking ships, taken from the International Convention for the Safety of Life at Sea (SOLAS), which is an international maritime safety treaty under the auspices of the International Maritime Organization.

SOLAS CHAPTER III REGULATION 19
SOLAS chapter III – Life-saving appliances and arrangements
Part B – Requirements for ships and life-saving appliances (Section 1 – Passenger Ships and Cargo Ships)
Regulation 19 – Emergency training and drills
1 This regulation applies to all ships.
2 Familiarity with safety installations and practice musters.
2.1 Every crew member with assigned emergency duties shall be familiar with these duties before the voyage begins.
2.2 On a ship engaged on a voyage where passengers are scheduled to be on board for more than 24 h, musters of the passengers shall take place within 24 h after their embarkation. Passengers shall be instructed in the use of the lifejackets and the action to take in an emergency.
2.3 Whenever new passengers embark, a passenger safety briefing shall be given immediately before sailing, or immediately after sailing. The briefing shall include the instructions required by regulations 8.2 and 8.4, and shall be made by means of an announcement, in one or more languages likely to be understood by the passengers. The announcement shall be made on the ship's public address system, or by other equivalent means likely to be heard at least by the passengers who have not yet heard it during the voyage. The briefing may be included in the muster required by paragraph 2.2 if the muster is held immediately upon departure. Information cards or posters or video programmes displayed on ships video displays may be used to supplement the briefing, but may not be used to replace the announcement.

SOLAS CHAPTER III REGULATION 8
SOLAS chapter III – Life-saving appliances and arrangements
Part B - Requirements for ships
Regulation 8 – Muster list and emergency instructions
1 This regulation applies to all ships.
2 Clear instructions to be followed in the event of an emergency shall be provided for every person on board. In the case of passenger ships these instructions shall be drawn up in the language or languages required by the ship's flag State and in the English language.
3 Muster lists and emergency instructions complying with the requirements of regulation 37 shall be exhibited in conspicuous places throughout the ship including the navigation bridge, engine-room and crew accommodation spaces.
4 Illustrations and instructions in appropriate languages shall be posted in passenger cabins and be conspicuously displayed at muster stations and other passenger spaces to inform passengers of:
.1 their muster station;
.2 the essential actions they must take in an emergency; and
.3 the method of donning lifejackets.

* * *

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The contents of this e-mail are confidential to the ordinary user of the e-mail address to which it was addressed and may also be privileged. If you are not the addressee of this e-mail you should not copy, forward, disclose or otherwise use it or any part of it in any form whatsoever. If you have received this e-mail in error, please notify us by telephone or e-mail the sender by replying to this message, and then delete this e-mail and other copies of it from your computer system. We reserve the right to monitor all e-mail communications through our network.
The contents of this e-mail are confidential to the ordinary user of the e-mail address to which it was addressed and may also be privileged. If you are not the addressee of this e-mail you should not copy, forward, disclose or otherwise use it or any part of it in any form whatsoever. If you have received this e-mail in error, please notify us by telephone or e-mail the sender by replying to this message, and then delete this e-mail and other copies of it from your computer system. We reserve the right to monitor all e-mail communications through our network.

Exhibit B

Sec. 21-16. - Loud and unnecessary noises restricted.

(a) Findings of fact: City council finds and declares that excessive noise is a serious hazard to the public health, welfare, peace and safety and the quality of life of its residents and visitors; that a substantial body of science and technology exists by which excessive noise may be substantially abated; that people have a right to and should be insured an environment free from excessive sound that may jeopardize their public health, welfare, peace and safety or degrade the quality of life or diminish property values; and therefore, city council finds that it is the policy of the city to prevent such excessive sound.

(b) It shall be unlawful for any person, entity, or establishment to make, continue, or allow to be made or continued, any clamorous singing, yelling, shouting, whooping, bellowing, hollering, or other loud, obstreperous, wanton and unnecessary noises, or to make, continue, or allow to be made or continued, any loud gatherings, either in the day time or at night, which disturb the peace and quiet of the city, whether in the public street, on privately owned or controlled property, or within enclosures, public or private.

(c) It shall be unlawful for any person to ride, drive, propel or otherwise operate a motorized vehicle in a manner which emits loud and unnecessary noise or long continued noise, either in the day time or at night, which disturbs the peace and quiet of the city, whether in the public street or on private property, or within enclosures, public or private. The prohibitions of this subsection shall include operating a motorized vehicle by rapid throttle advancing (revving) of an internal combustion engine resulting in increased noise from the engine.

(d) For purposes of this section, motorized vehicle includes but is not limited to cars, trucks, vans, buses, motorcycles, motor scooters, motorized skateboards, mopeds, and low speed neighborhood electric vehicles.

(e) Nothing in this section shall be construed to extend to the blowing of a motorized vehicle horn or other signal device by the operator of either a public or private motorized vehicle for the purpose of notifying passengers or other persons of the presence of such motorized vehicle or as a safety precaution in the actual operation of the motorized vehicle.

(f) It shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated, any radio, amplified musical instrument including but not limited to brass or drum instruments or the amplified device or apparatus making or reproducing musical or other sounds within a privately owned or controlled courtyard or outdoor area after 11:00 p.m. and before 7:00 a.m. in such a manner as to be audible in any public street or right-of-way.

(g) It shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated any musical instrument or other device or apparatus making or reproducing musical or other sounds without amplification within a privately owned or controlled courtyard or outdoor area after midnight and before 7:00 a.m. in such a manner as to be audible in any public street or right-of-way.

This subsection expressly prohibits the playing of brass or drum instruments in privately owned or controlled courtyards or outdoor areas after 11:00 p.m. and before 7:00 a.m.

(h) Notwithstanding subsection (a) and (f) herein, it shall be unlawful for any person, entity or

establishment to play, operate or cause to be played or operated, any radio, amplified musical instrument including but not limited to brass or drum instruments, or other amplified device or apparatus making or reproducing musical or other sounds after 11:00 p.m. and before 7:00 a.m. when the said sounds emanate from an open window or door opening of a structure in such a manner as to be audible in any public street or right-of-way.

(i) Except as provided in subsection (f) it shall be unlawful for any person, entity or establishment to play, operate or cause to be played or operated, any radio, amplified musical instrument including but not limited to brass or drum instruments, or other amplified device or apparatus making or reproducing musical or other sounds when the said sounds are transmitted through a speaker which is mounted on an exterior wall or surface of the structure in such a manner as to be audible in any public street or right-of-way.

(j) This section shall not be construed to apply to sound trucks as defined in section 21-26 of the Code of the City of Charleston.

(k) Nothing herein shall be construed to prevent the mayor or his designee from issuing temporary permits for outdoor events sponsored by public, non-profit, educational or religious entities on such terms and conditions as are in the public interest.

(Code 1975, §§ 36-1, 36-3; Ord. No. 1993-51, § 1, 3-23-93; Ord. No. 1993-52, § 1, 3-23-93; Ord. No. 1994-120, § 1, 4-26-94; Ord. No. 2003-36, § 1, 4-8-03; Ord. No. 2004-60, § 1, 6-15-04; Ord. No. 2011-44, § 1, 6-21-11)

Note—See the editor's note to § 21-17

Exhibit C

Riccio, Daniel

From: Carrie Agnew [cwagnew@bellsouth.net]
Sent: Friday, November 18, 2011 5:14 PM
To: 'J. Randolph Pelzer'; Riccio, Daniel
Cc: 'Steve Gates'; 'Kirk Grant'; meagherg3@comcast.net; Blan Holman
Subject: RE: Cruise Ship Noise

Hey Randy—

I know the horns are required under Federal law for ships starting a voyage. That's why we don't hear them for the POC ships, and also why Bar Harbor has been able to ban announcements and horns when ships are there.

What the mandate does NOT say, and I pointed out to Byron on a number of occasions, is anything about volume—which is our current debate, especially regarding the announcements. I can understand not being able to control the horn blasts, but the PA announcements are another matter entirely.

It is terribly disruptive and annoying to a large number of us in Ansonborough (Dan actually took time out of his Saturday to come "listen" with a number of us last weekend. Unfortunately, the ship departed two hours late, and no one stayed til 5:30 to hear them—having been assembled since 3:15!)

The point is, and I discussed this with Dan this afternoon, that none of us need to go get our life jackets and assemble at our assigned life boat. There is no way to escape/avoid hearing them....even with all doors and windows closed. To me and the others that is a "quality of life" issue, but because the SPA is not part of the City, the City says they can't enforce the ordinance.

We now have an additional problem which may require the Noise Ordinance to be revised. Currently, businesses are allowed to use exterior speakers until 11:00PM. With the increased cruise ship activity, many establishments are now playing music to attract tourists. That is why Dan came by my house today. Initially we thought it was the ship, but it was not.

Carrie

From: J. Randolph Pelzer [mailto:jrandolphpelzer@hotmail.com]
Sent: Friday, November 18, 2011 3:09 PM
To: ricciod@charleston-sc.gov
Subject: RE:

I checked the link and could not find anything about ship horns in port. Since the SPA claims that the cruise ships are required to blow horns upon arrival and departure and thereby disturb the quiet of the historic downtown, it should be required to provide specific legal authority mandating such action.

Thank you for your response and I look forward to the receipt of specific legal authority.

From: RICCIOD@charleston-sc.gov

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	**ORDER GRANTING SANCTIONS** Docket No. 13-ALJ-07-0056-CC

This matter is before the Administrative Law Court (ALC or Court) pursuant to Respondent South Carolina State Ports Authority's (Ports Authority) July 1, 2013, Motion to Dismiss and for Sanctions (Motion for Sanctions). Respondent Ports Authority argues that sanctions are warranted because Petitioners'[1] February 27, 2013, Motion to Remand (Motion to Remand) was frivolous, unsupported by any reasonable legal theory, and was filed solely for purposes of delay. On July 26, 2013, Petitioners filed their Memorandum in Opposition and the Ports Authority filed a Reply on August 2, 2013.[2] Oral argument was held before this Court on

[1] Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities for Cruise Control (Cruise Control) (collectively, Petitioners).

[2] On August 19, the Petitioners filed a sur-reply to the Respondent Ports Authority's reply. However, the Rules of Procedure of the ALC do not permit sur-replies and no leave of the Court was granted. *Archdiocese of Milwaukee v. Underwriters at Lloyd's, London*, 955 F.Supp. 1066,

September 6, 2013. As more fully discussed herein the Ports Authority's Motion for Sanctions is granted.

BACKGROUND

On December 18, 2012, DHEC, through its Division of Ocean and Coastal Resource Management (OCRM), issued a staff decision granting a critical area permit and coastal zone consistency certification to the Ports Authority authorizing construction of five pilings to facilitate the relocation of cruise operations within Union Pier Terminal (UPT) in the City of Charleston. Permit (OCRM-12-054-B) (Dec. 18, 2012). On January 2, 2013, Petitioners filed a request for a final review conference by the DHEC Board of the OCRM staff decision. The Ports Authority and DHEC staff submitted responses to the request to the DHEC Board. Thereafter, on January 10, 2013, the DHEC Board voted unanimously to decline to conduct a final review conference and issued a written notice of its decision not to conduct a final review conference the next day. On February 11, 2013, Petitioners filed a request for contested case challenging the merits of DHEC's decision.

On February 27, 2013, Petitioners filed "Motion to Remand to DHEC Board." After reviewing Petitioners' filing, on March 6, 2013, counsel for Respondent Ports Authority consulted with Petitioners' counsel and advised Petitioners' counsel of the Ports Authority's belief that the motion was frivolous, and expressed the Ports Authority's intention to seek sanctions if Petitioners did not withdraw the motion. Petitioners elected to pursue the Motion.

1070 (E.D. Wis. 1997) ("The rule does not provide for briefs in response to replies.... [A]t some point, briefing must end."); *see Sierra v. LaManna*, C/A No. 0:08-3222-CMC-PJG, 2009 WL 1884492 at *3 n.3 (D.S.C. June 30, 2009) (noting the District of South Carolina Local Rules "make no provision whatsoever for sur-replies"). Thus, on August 20, this Court informed the parties that the unauthorized sur-reply would not be considered.

The Ports Authority filed a response to the Motion for Remand on March 14, 2013, and this Court issued an order denying the Motion on May 3, 2013 (May 3 Order).

STANDARD

Rule 72 of the Rules of Procedure for the Administrative Law Court provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, RPALC. Furthermore, the 2009 Revised Notes to Rule 72, RPALC provide that "in determining whether a case is frivolous, the administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." Rule 72, RPALC, 2009 Revised Notes; *see* Final Order and Decision, *Oconee County Assessor v. Douglas Chirillo*, No. 09-ALJ-17-0079-CC, 2010 WL 6782538 (Nov. 23, 2011) (McLeod, J.) (summarizing the authority under which an administrative law judge may award sanctions, including Rule 72 and noting the permitted sanctions under the Sanctions Act). The purpose of sanctions should be to discourage similar conduct in the future and the determination of whether sanctions are warranted, as well as the amount and type of sanction, is committed to this Court's discretion. *See* Rule 72, RPALC, 2009 Revised Notes.

The Sanctions Act provides, in relevant part, that "[a]n attorney ... participating in a civil or administrative action or defense" may be sanctioned for:

> (a) filing a frivolous pleading, motion, or document if:
>
> ....
>
> (i) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good

faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(ii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iii) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

S.C. Code Ann. § 15-36-10(A)(4)(a). Further, Section 15-36-10(B)(2) provides that "if ... an attorney ... has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances." Thus, the Sanctions Act applies a "reasonable attorney" standard for evaluating sanctionable conduct. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011).

Therefore, this Court is authorized to impose appropriate sanctions by Rule 72, RPALC, in conjunction with the Sanctions Act, against a party or its counsel upon a finding that a filing was frivolous.

DISCUSSION

The Motion filed by Petitioners represents the type of filing contemplated by Rule 72, RPALC. The Sanctions Act provides:

> In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:
> (1) the number of parties;
> (2) the complexity of the claims and defenses;
> (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);

> (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
> (5) previous violations of the provisions of this section;
> (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
> (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10. In this case, the issue of a remand to the DHEC Board was a legal one requiring no case-specific factual development. Moreover, Respondent Ports Authority contacted Petitioners' counsel by letter after the filing of the Motion to Remand, set forth specific authority why they believed the motion was frivolous, and requested withdrawal of the motion and indicated that the Respondent Ports Authority would seek sanctions should the Petitioners press forward with the Motion to Remand. The Petitioners and their counsel refused to withdraw the motion.

This Court ruled in its May 3, 2013 Order, that the Motion had no basis in law and was contrary to the language and intent of the statute. As discussed in the May 3 Order, S.C. Code Ann. § 44-1-60(F) clearly sets forth a discretionary standard in the DHEC Board that permits it to choose whether or not to conduct a final review conference. May 3 Order at 3-4. The Petitioners' citation to and reliance upon a single word in a single sentence within S.C. Code Ann. § 44-1-60(F) while ignoring the remainder of subsection -60(F) illustrates that the Motion to Remand and underlying arguments were meritless and frivolous. As this Court noted, "[b]y stating that the Board can decline to consider a request, Section 44-1-60(F) obviously recognizes the existence of discretion.... When the statute is read as a whole, it is clear that the Board has the discretion to decline to conduct a final review conference...." *Id.*

The discretionary nature of conducting a review conference is well established and has been recognized repeatedly. *See, e.g., Trident Medical Center, LLC, v. S.C. Dep't of Health &*

Envtl. Control, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (McLeod, J.) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); *Wise v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (McLeod, J.) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), *rev'd on other grounds* Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); *Hill v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (Anderson, C.J.) ("The DHEC Board [ ] has sixty days within which to hold a review conference. [ ] The Board may (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [ ] If the Board either declines in writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(G).") (citing S.C. Code Ann. § 44-1-60(F)); *Pinckney Point, LLC v. S.C. Dep't of Health & Envtl. Control*, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (Anderson, C.J.) ("A staff review does not require the presentation of evidence in a hearing, and *the Board's review is discretionary, not a matter of right.*") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); *McNair v. S.C. Dep't of Health & Envtl. Control*, Docket No. 09-ALJ-07-0040-CC, 2009 WL 6527328, (Nov. 9, 2009) (Anderson, C.J.) (same);

Charles Sarrio v. S.C. Dep't of Health & Envtl. Control, Docket No. 08-ALJ-07-0381-CC, 2009 WL 8167917, (Oct. 23, 2009) (Anderson, C.J.) (same).

The DHEC Board's discretionary right to conduct a final review conference has also been recognized by appellate courts of this State. *See, e.g., Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision).

This statutory scheme and the DHEC Board's role in it have been in place since 2006, and have been recognized by Petitioner and counsel. Petitioner South Carolina Coastal Conservation League (League) and its counsel (including counsel representing Petitioners in the present case)[3] affirmatively represented to the South Carolina Supreme Court that a final review conference is optional and discretionary with the DHEC Board in a case challenging a DHEC permit issued to the Ports Authority. Specifically, the League stated: "*The Board has the option of conducting a conference or not after a request for review is made.* If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added). Thus, the League and Petitioners' counsel were aware that the DHEC Board has the discretion to conduct a final review conference, because they have previously acknowledged that final review by the Board is optional and made that representation to the Supreme Court.

[3] Counsel for the Petitioners in this case and the League in the referenced Supreme Court matter, which also involved a challenge to a DHEC permit granted to the Ports Authority, included Jefferson Leath and J. Blanding Holman, IV. The Motion to Remand was filed by Jefferson Leath, Amy Armstrong, and Michael Corley. Mr. Holman entered an appearance on behalf of all Petitioners on August 30, after the Motion to Remand was ruled upon but before the hearing on the Motion for Sanctions. Mr. Holman has been representing the Petitioners in their parallel federal and state court actions against the cruise terminal operations at UPT.

Petitioners contend that a contemporary finding of nefarious intent and bad faith is necessary for a sanction. However, this is not what the law requires. Instead, the law requires simply that the Court find the filing was "frivolous." Black's Law Dictionary defines frivolous as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful." *Black's Law Dictionary* 739 (9th ed. 2009). Similarly, Webster's New World Dictionary defines frivolous as something that is "of little value or importance" or "not properly serious or sensible." *Webster's New World Dictionary* 560 (2d College Ed. 1986). The Motion to Remand falls squarely within both of these definitions.

Petitioners also submitted two affidavits in opposition to a finding of frivolousness. However, one affidavit was submitted by a member of a law firm representing the Petitioners and the other by an attorney who has no demonstrable practice experience in the administrative arena before DHEC or this Court. Neither affidavit is persuasive.

Given the prevailing orders and opinions, including multiple orders from this Court directly recognizing the discretionary nature of DHEC Board review, the clear statutory language, and prior affirmations by Petitioners' counsel to the Supreme Court, a reasonable attorney under these circumstances would not have filed the Motion to Remand. The Motion to Remand was filed in violation of Rule 72, RPALC, and the Sanctions Act.

Having found a violation, the Court turns to the appropriate sanction. Pursuant to the Sanctions Act, sanctions may include:

> (1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;

(2) an order for the attorney to pay a reasonable fine to the court; or
(3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

S.C. Code Ann. § 15-36-10(G). The Court finds that award of reasonable attorneys' fees and costs would be an appropriate remedy. This sanction is specifically referenced in the statute and under the facts and circumstances of this case is appropriate. Therefore, this Court awards the Respondent Ports Authority its reasonable attorneys' fees and costs related to opposing the motion, including "the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the [Ports Authority] resulting from the frivolous proceeding" and incurred in litigating the Motion to Remand and the attorneys' fees and costs related to the filing of the Motion for Sanctions, which is a "reasonable consequential expense ... resulting from the frivolous" Motion to Remand, as a sanction (Sanction Award).

Counsel for Respondent Ports Authority submitted an affidavit attesting to the hours devoted to litigating the Motion to Remand and the Motion for Sanctions. Respondent Ports Authority seeks reimbursement for attorneys' fees in the amount of Nine Thousand Three Hundred and No/100 Dollars ($9,300.00) attributable to the Motion to Remand and in the amount of Eleven Thousand Six Hundred Seventy-two and 50/100 Dollars ($11,672.50) attributable to the Motion for Sanctions. It has not sought reimbursement for "hard" costs, contract attorney fees, or internal legal and senior management time devoted to addressing these motions. Respondent Ports Authority further submitted an affidavit from John S. Simmons, Esquire, attesting to the necessity and reasonableness of the time, rates, and effort expended by Ports Authority counsel on the Motion to Remand and Motion for Sanctions. Having reviewed the affidavits, the Court finds the attorneys' fees sought to be necessary and reasonable.

Therefore, the Sanction Award shall be Twenty Thousand Nine Hundred Seventy-two and 50/100 Dollars ($20,972.50).

Therefore, having fully considered the motion, the legal authorities submitted by the parties, and the arguments of counsel,

IT IS HEREBY ORDERED that the Respondent Ports Authority's Motion for Sanctions is **GRANTED**; and

IT IS FURTHER ORDERED that the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control are jointly and severally liable for the Sanction Award; and

IT IS FURTHER ORDERED that the Petitioners must tender full payment of the Sanctions Award in the amount of Twenty Thousand Nine Hundred Seventy-two and 50/100 Dollars ($20,972.50) to the Respondent Ports Authority within ten (10) days of the date of this order.

AND IT IS SO ORDERED.

_____

Ralph King Anderson, III
Chief Administrative Law Judge

October ___, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC

AFFIDAVIT OF FEES AND COSTS

PERSONALLY APPEARED BEFORE ME, Randolph R. Lowell, who after being first duly sworn, deposes and states as follows.

1. I am over the age of 18 and competent to make this affidavit, and the facts stated within this affidavit are within my personal knowledge and are true and correct.

2. I am a member of the South Carolina Bar and was admitted to practice on June 6, 2000. I am a shareholder in the law firm of Willoughby & Hoefer, PA, where I have practiced for over 12 years. During this period of active practice, I have litigated numerous administrative and civil matters in both state and federal courts and before state and federal administrative agencies.

3. I am an attorney of record and lead counsel in this action for the Respondent South Carolina State Ports Authority (Ports Authority). Other lawyers at this firm and staff have worked on this matter researching and litigating the above-captioned case under my direction and have

devoted time and effort to opposing the Motion to Remand to the Board of the South Carolina Department of Health and Environmental Control (DHEC) filed by the Petitioners on February 27, 2013, and the Motion for Sanctions filed by the Respondent Ports Authority in direct response to the Motion to Remand this matter to the DHEC Board.

4. Willoughby & Hoefer, P.A. undertook the representation of the South Carolina Ports Authority on a billable hour contract pursuant to which the Ports Authority pays hourly rates of $250 for each shareholder and senior counsel and $225, $200, or $175 for other attorneys based on experience levels and reimburses litigation expenses. These hourly rates represent a discounted, state agency rate for shareholders and senior counsel.

5. Based on a review of the time records in this matter, Willoughby & Hoefer, P.A., devoted no less than 40.0 hours to the Motion to Remand and no less than 47.8 hours to the Motion for Sanctions. A summary of the time devoted to this case by Willoughby & Hoefer, P.A. from the filing of the Motion to Remand on February 27, 2013, through the motions hearing on September 6, 2013, is set forth below.

Attorney	Hours Re: Motion to Remand	Hours Re: Motion for Sanctions	Total Hours
Randolph R. Lowell	10.5	19.6	30.1
Chad N. Johnston	28.0	9.1	37.1
ElizabethAnn Loadholt Carroll	1.5	19.1	20.6
TOTAL	40.0	47.8	**87.8**

At the rate of $250 per hour for Randolph R. Lowell and ElizabethAnn Loadholt Carroll and $225 per hour for Chad N. Johnston, the attorneys' fees attributable to the Motion to Remand are Nine Thousand Three Hundred and No/100 Dollars ($9,300.00). At the rate of $250 per hour for Randolph R. Lowell and ElizabethAnn Loadholt Carroll and $225 per hour for Chad N.

Johnston, the attorneys' fees attributable to the Motion for Sanctions are Eleven Thousand Six Hundred Seventy-two and 50/100 Dollars ($11,672.50).

6. Based upon the above-referenced hours of time expended by counsel, and the hourly rates corresponding thereto, the total billable attorneys' fees from the firm of Willoughby & Hoefer, P.A. directly attributable to the Motion to Remand and the Motion for Sanctions is therefore Twenty Thousand Nine Hundred Seventy-two and 50/100 Dollars ($20,972.50).

7. Additional attorney work hours will be expended and expenses will be incurred in the event Petitioners oppose the award of fees, expenses, and costs requested in Respondent's affidavit, which hours and expenses will be set forth in a supplemental affidavit if necessary.

8. The amount of time set forth above was invested in the good faith and diligent investigation, preparation, and defense and prosecution of this matter.

9. Based upon all of the foregoing information, affiant is of the opinion and submits that attorneys' fees in this case directly attributable to the Motion to Remand and the Motion for Sanctions of $20,972.50 were necessarily and reasonably incurred.

FURTHER AFFIANT SAYETH NOT.

Randolph R. Lowell

Randolph R. Lowell
Willoughby & Hoefer, P.A.

SWORN to and Subscribed before
me this 21st day of October 2013.

Breanna M. Karns

Notary Public for South Carolina
My commission expires: 11/19/2019

BREANNA M. KARNS
NOTARY PUBLIC
SOUTH CAROLINA
Exp. November 19, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC

Personally appeared before me, John S. Simmons, who being duly sworn deposes and states as follows:

1. I am the founding member of Simmons Law Firm, LLC. I received my Bachelor of Arts and Juris Doctor degrees from the University of South Carolina. I have been a member of the Bar in South Carolina since 1987. I previously served as Chief of the State Grand Jury for the South Carolina Attorney General's Office and as the Assistant United States Attorney and then the United States Attorney for the District of South Carolina. I have received an "AV" rating from Martindale-Hubbell and named as a South Carolina Super Lawyer by Thomson Reuters. I also co-authored the South Carolina Bar's publication "Environmental Crimes and Corporate Liability."

2. I am over the age of 18 and competent to make this affidavit, and the facts stated within this affidavit are within my personal knowledge or based on information and belief and are

true and correct. This affidavit states my professional opinion for which I am competent to testify.

3. Based on my experience as an attorney, I am familiar generally with the prevailing market rate for attorneys in South Carolina in litigation matters, and have personally litigated environmental matters.

4. I have reviewed the filings, orders, motions, related papers and correspondence in the above-captioned action related to the Motion to Remand to DHEC Board and the Motion to Dismiss and For Sanctions.

5. In addition to reviewing the documents referenced in paragraph 4 above, I have also reviewed the affidavit in support of attorneys' fees, costs, and expenses submitted to the Court by Respondent S.C. State Ports Authority's (Ports Authority's) counsel setting forth the attorneys' time, hourly rate, expenses, and costs associated with the two motions at issue for the above-captioned action.

6. I am familiar with the Ports Authority's counsel both personally and by reputation. I personally know Mr. Lowell to be a lawyer of the highest level of skill and competence, and with significant experience in litigating environmental matters in both judicial and administrative forums. I am aware that Mr. Lowell is rated "AV" by Martindale-Hubbell, which is the highest rating, that Mr. Lowell has been designated as a "Rising Star Super Lawyer" in Environmental Law by Thomson Reuters, and that he has edited *South Carolina Administrative Practice and Procedure* for the South Carolina Bar and teaches South Carolina Administrative Law as an adjunct professor at the University of South Carolina School of Law.

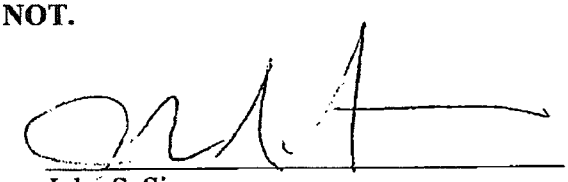
7. I consider the time submitted by Willoughby & Hoefer, P.A. to be necessary, reasonable, and appropriate for these matters. These matters necessarily involved research,

investigation, document review, and preparation of papers, including motions, responses, and replies, as well as preparation for and participation in a hearing on the motion for sanctions. Litigating a remand in the administrative context can be complicated and requires skill, effort, and expertise. Mr. Lowell and his firm accomplished this task in less time than it may have taken other law firms to litigate this issue, and this is attributable to their experience and knowledge in these matters. Bringing a motion for sanctions also requires preparation and research and is not undertaken lightly. Here, the motion for sanctions was a direct result of the motion to remand, and Mr. Lowell and his firm reasonably expended time in consulting with opposing counsel to avoid both motions and the Petitioners advanced their position with full knowledge that a motion for sanctions may be a consequence. Based upon the foregoing, I did not find any of the time expended by Ports Authority's counsel to be excessive, unnecessary, or redundant. The time spent was necessary given the nature of the case, the vigorous opposition presented by the Petitioners to the filings and the Ports Authority's efforts, and the nature of and type of legal theories presented by Petitioners in the motions.

8. Based upon my knowledge of the level of skill and reputation of Mr. Lowell and his firm, my review of the materials referenced in this affidavit, the nature of these proceedings, and my knowledge of the prevailing market rates in the South Carolina legal community for similar services by lawyers of comparable skill, experience, and reputation, I consider the hourly rates of Mr. Lowell and his firm to be below the prevailing market rates in South Carolina for this type of service.

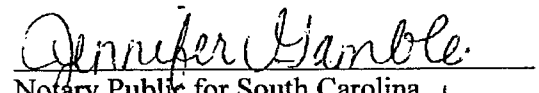
9. It is my opinion that an award of attorneys' fees of $20,972.50 for the two motions at issue in the above-described action is fair and reasonable.

FURTHER THE AFFIANT SAYETH NOT.



John S. Simmons

Sworn to and Subscribed before me
This 24 day of October, 2013.



Notary Public for South Carolina
My Commission Expires: 8/28/2016

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of a proposed order, Randolph R. Lowell's Affidavit of Fees and Costs and John S. Simmons' Affidavit of Fees and Costs by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Breanna M. Karns

Columbia, South Carolina
This 24th day of October 2013.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' MOTION TO VACATE**

TO: ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III

The Petitioners hereby move this honorable Court for an Order vacating the Critical Area permit and Coastal Zone Consistency Certification issued by the South Carolina Department of Health and Environmental Control (DHEC) to the South Carolina State Ports Authority (SPA).

I. INTRODUCTION

SPA was required to obtain a Rivers and Harbors Appropriations Act (RHA) Section 10 Permit from the U.S. Army Corps of Engineers (Corps) prior to undertaking the construction activities associated with a new cruise ship terminal at issue in this contested case. SPA's application for an RHA permit to conduct work in waters of the United States triggered the need for a 401 Water Quality Certification from DHEC. 33 U.S.C. §1341; 33 C.F.R. Pt. 330.4(c); 23A

S.C. Code Ann. Regs. 61-101(A)(2). SPA purported to meet its obligations in this regard by having the Corps give its RHA authorization pursuant to Nationwide Permit 3 (NWP 3), for which DHEC had issued a Water Quality Certification on a statewide basis.

On September 18, 2013, the United States District Court for the District of South Carolina issued an order vacating the Corps' NWP 3 authorization for SPA's proposed cruise terminal project. *See* Order, C/A No. 2:12-cv-02942-RMG [Attached as Exhibit 1]. As discussed below, vacatur of the Corps' NWP 3 authorization presents an additional procedural defect in the DHEC authorization challenged by Petitioners in this case.

When DHEC's office of Ocean and Coastal Resource Management (OCRM) issued the Critical Area permit and Coastal Zone Consistency (CZC) Certification for SPA's project, on December 18, 2012, it did so premised on the belief that SPA's project had been authorized pursuant to NWP 3. Because DHEC had previously issued a state-wide categorical 401 Water Quality Certification for NWP 3 authorizations, DHEC did not require a separate 401 Water Quality Certification for SPA's project.[1]

The U.S. District Court's order vacating the NWP 3 authorization for SPA's project removed the predicate for exempting SPA from a separate individual 401 Water Quality Certification for the project. Moreover, under DHEC's regulations, a 401 Water Quality Certification for the project must be issued simultaneously with, and combined with, issuance of a Critical Area Permit and Coastal Zone Consistency Certification.

The Critical Area Permit and Coastal Zone Consistency Certification here did not even

[1] All discharges in South Carolina water requiring a Rivers and Harbors Act permit must also receive a §401 state Water Quality Certification. 33 U.S.C. §403; 33 C.F.R. Pt. 322; 33 C.F.R Pt. 320.3; 23A S.C. Code Ann. Regs. 61-101(A)(2).

purport to contain the required 401 Water Quality Certification or any analysis of whether SPA's project comports with South Carolina water quality standards. The permit and certification are thus invalid and must be vacated. Although SPA has appealed the U.S. District Court's order, that order is in effect, and DHEC has no basis for not having an individual 401 Water Quality Certification. Further, it would be – at a minimum – a waste of time and resources to proceed with this case when DHEC must go back and evaluate the project for a 401 Water Quality Certification and issue such certification concurrently with the Critical Area permit and Coastal Zone Consistency Certification.

For these reasons, as more fully set forth below, the state permit should be immediately vacated. Alternatively, proceedings in relation to the state permit should be remanded to DHEC.

II. FACTUAL AND LEGAL BACKGROUND

SPA's $35 million project consists of constructing a new cruise terminal by transforming an existing transit shed on the northern end of the Union Pier property (Building 322). To accomplish the transformation, SPA would emplace five (5) clusters of 16" precast pile driven into the marl underlying the Cooper River to provide necessary support for the refurbishments, including installation of three elevators and two escalators. The overall project enabled by the pilings would include construction of a mezzanine, customs and immigration offices, dedicated crew areas, gangways and two covered staging areas designed to handle passengers, luggage and loading and unloading of cruise ship supplies. The new terminal is sized to accommodate vessels with nearly twice as many passengers as are on the Carnival *Fantasy*, the vessel currently based at an existing SPA cruise terminal nearby. The existing facility does not comply with modern federal security regulations and SPA would have to modify that facility to meet regulatory

requirements.

The Cooper River is a South Carolina waterway and a navigable water of the United States. Pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, SPA is required to obtain authorization from the Corps through issuance of a permit before engaging in activity that would result in obstruction or alteration of any navigable water of the United States or the construction of any structure in or over the navigable water of the United States. 33 U.S.C. §403. A 401 Water Quality Certification is required for any Section 10 RHA permit. S.C. Code Ann. Reg. 61-101.A.2.(b). In early 2012, SPA sought authorization from the Corps of Engineers to conduct its project. On April 20, 2012, the Corps authorized SPA's project pursuant to NWP 3, which is available for "maintenance" projects that do not change a previously permitted structure's "use." 77 Fed. Reg. 10184. Because the Corps authorized the activity under a Nationwide Permit, no individual 401 Water Quality Certification was required because DHEC issued state-wide certification for NWP 3.

Two of the Petitioners in this case filed an action in United States District Court challenging the Corps' NWP 3 authorization for SPA to construct a new and expanded cruise ship terminal, arguing that the Corps unlawfully restricted the scope of its review and improperly found that the proposed activity will result in minimal individual and cumulative adverse environmental effects. On September 18, 2013, the United States District Court for the District of South Carolina issued an order on summary judgment, holding the Corps' NWP 3 authorization for SPA's project "unlawful and void" and remanding the matter to the Corp to consider all activities within the scope of its analysis (i.e., the proposed terminal) rather than merely the new piling clusters that the Corps authorized pursuant to NWP 3. Order at 29 [Ex. 1].

In this case, an individual Water Quality Certification was not sought or evaluated, much less obtained, presumably on the assumption that DHEC had separately issued a general Certification for all NWP 3 authorizations in South Carolina. With NWP 3 coverage no longer operational for SPA's proposed RHA discharges, however, that assumption is no longer correct and leaves the requisite State Water Quality Certification fatally absent.

SPA did seek, and DHEC purported to consider and issue, a Critical Area Permit and a Coastal Zone Consistency Certification. The former is required for any activity which will alter a critical area. 23A S.C. Code Ann. Regs. 30-2(B). The latter is required under the South Carolina Coastal Management Plan (CMP), which mandates DHEC review all state and federal permits for activity within any of South Carolina's eight coastal counties and issue a consistency certification if the activity complies with the CMP. S.C. Code Ann. §48-39-80 (1976). Because DHEC's regulatory programs require that where a Water Quality Certification is required for a project that also requires a Coastal Zone Consistency Certification, the latter must be issued as a component of, and concurrently with, a Water Quality Certification. 23A S.C. Code Ann. Regs. 61-101.A.(7). Further, where a Water Quality Certification is required for a project that must obtain a Critical Area Permit, the Water Quality Certification must be issued as a component of, and concurrently with, a Critical Area Permit. 23A S.C. Code Ann. Regs. 61-101(A)(8); 23A S.C. Code Ann. Regs. 30-2.H.

III. BECAUSE THE COASTAL ZONE CONSISTENCY CERTIFICATION MUST BE ISSUED AS A COMPONENT OF A WATER QUAILTY CERTIFICATION, WHICH WAS NOT DONE IN THIS CASE, THE CZC CERTIFICATION IS NOT VALID

"For Federal permits that require both a water quality certification and a coastal zone consistency certification, the coastal zone consistency certification determination shall be issued

as a component of, and concurrently with, the water quality certification," and must be issued "according to the administrative procedures set forth in" the Water Quality Certification regulations (R. 61-101) and in accordance with the S.C. Coastal Management Program and applicable laws and regulations. 23A S.C. Code Ann. Regs. 61-101(A)(7). "In these instances, the water quality certification will serve also as the coastal zone consistency certification." Id.

Because no required Water Quality Certification was sought, considered or granted with the CZC Certification issued to SPA, the CZC was improperly issued and is a legal nullity that cannot serve as the CZC Certification for this project.

IV. SINCE DHEC REGULATIONS REQUIRE THAT A 401 WATER QUALITY CERTIFICATION AND CRITICAL AREA PERMIT BE ISSUED TOGETHER, WHICH WAS NOT DONE IN THIS CASE, THE CRITICAL AREA PERMIT IS NOT VALID

Any activity which will result in alteration of the critical area—coastal waters, tidelands, beach and/or beach/dune systems—must obtain a permit from DHEC, specifically from the OCRM division. S.C. Code Ann. §§48-39-10 *et seq.*; 23A S.C. Code Ann. Regs. 30-1 *et seq.* As reflected in SPA's application materials to DHEC, SPA's proposed project involves alteration to the critical area, and SPA is required to obtain a Critical Area permit from DHEC, in addition to a federal permit from the Corps as well as 401 Water Quality and CZC Certifications from DHEC.

A Critical Area permit that requires a 401 Water Quality Certification is not complete and is not valid if issued without the accompanying 401 Water Quality Certification. The 401 Regulations and the Critical Area Regulations both contain the identical language that: "The Department *will not* issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone pursuant to applicable

regulations governing issuance of permits for alteration of the critical area of the coastal zone. . . . The direct permit will serve as the 401 water quality certification for an associated Federal permit." 23A S.C. Code Ann. Regs. 61-101(A)(8); 23A S.C. Code Ann. Regs. 30-2.H (emphasis added). Thus, while DHEC does "not issue a separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone," 23A S.C. Code Ann. Regs. 61-101.A.(8); 23A S.C. Code Ann. Regs. 30-2.H., DHEC's Bureau of Water and OCRM must coordinate and exchange input in processing permit applications that trigger the 401 water quality and critical area regulations. Id.

Water Quality Certification review is distinct from the Critical Area Permit in several important respects. The provisions contained in R. 61-101 governing evaluation and issuance of Water Quality Certifications are required pursuant to federal law, see 33 U.S.C. § 1341(a)(1); City of Tacoma v. FERC, 460 F.3d 53, 68 (D.C. Cir. 2006), and differ markedly from those applicable to Critical Area Permits. Compare, e.g., R. 61-101(F)(5) with R. 30-11(B)(8). DHEC's own regulations provide, accordingly, for review of Water Quality Certifications "*included* in the direct permit for alteration of the critical area," R. 61-101(G)(6) (emphasis added), which would be meaningless if water quality certifications were wholly merged into critical area permits. For Water Quality Certifications, DHEC must address SPA's project for effect on water quality, including "whether there are feasible alternatives to the activity" and "all potential water quality impacts of the project, both direct and indirect, over the life of the project including: . . . the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others." 23A S.C. Code Ann. Regs. 61-101.F.(3)(b),(c)(4). The water quality regulations further prohibit any activity that "permanently alters the aquatic ecosystem aquatic

ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired" or if "there is a feasible alternative to the activity, which reduces adverse consequences on water quality and classified uses." 23A S.C. Code Ann Regs. 61-101.F.(5)(a) & (b). Thus, the 401 Regulations mandate a broad review of direct and indirect water quality impacts, an assessment of the aquatic ecosystem, and an effort to assess alternatives that would reduce water quality impacts. These mandates are focused on water quality and contain specific prohibitions, which are lacking in the critical area regulations.

Moreover, while OCRM staff evaluate and issue Critical Area Permits, a separate branch of DHEC, the Bureau of Water, evaluates and makes decisions on Water Quality Certificates. Once the separate evaluations take place, DHEC issues a single document – the Critical Area Permit – which serves as the 401 Water Quality Certification for the associated Federal permit. 23A S.C. Code Ann. Regs. 61-101(A)(8); 23A S.C. Code Ann. Regs. 30-2(H). In the present case, however, DHEC did not evaluate or authorize a Water Quality Certificate in evaluating and issuing a Critical Area Permit to accompany SPA's federal authorization.

Importantly, the federal court's order vacating SPA's permit and remanding the project to the Corps directs that agency to evaluate all aspects of SPA's proposal for construction of a new cruise terminal at Union Pier. Embedded in the court's order is the requirement that the agency carefully review each component of the project while evaluating it as a whole in order to properly determine the nature and extent of the project's impacts. Since scope of review for the required 401 Water Quality Certificate will be influenced by the Corps' "scope of analysis," the instruction by the federal court on remand has direct implication for DHEC's evaluation of SPA's project. DHEC should be given a chance to review SPA's project in its entirety and render its coordinate

decisions concerning SPA's project using a proper scope of analysis. Any other approach would result in piece-meal decision-making and would needless expend the resources of this court and the parties.

CONCLUSION

Because a federal court has vacated the Corps' NWP 3 authorization for SPA's proposed activity at Union Pier, SPA may not move forward with its new and expanded cruise ship terminal with only a Critical Area Permit and Coastal Zone Consistency Certification, and DHEC's issuance of those authorizations without evaluating or issuing a Water Quality Certification was invalid. Accordingly, the Critical Area Permit and Coastal Zone Consistency Certification authorized by DHEC are, in addition to a variety of other procedural defects, void. DHEC did not have authority to issue a Critical Area Permit and Coastal Zone Consistency Certification without the required 401 Water Quality Certification, and this honourable Court should not expend its valuable resources or the resources of the parties evaluating what is in essence, and in law, a dead letter.

Respectfully submitted,

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November 1, 2013

EXHIBIT 1

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

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

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

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

Legal Standards

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

analysis."

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

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

Charleston, South Carolina
September 18, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, Charleston Communities for Cruise Control, Petitioners, vs. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALC-07-056-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents SC State Ports Authority and DHEC by placing copies of the foregoing Petitioners' Motion to Vacate in the U.S. Mail addressed to:

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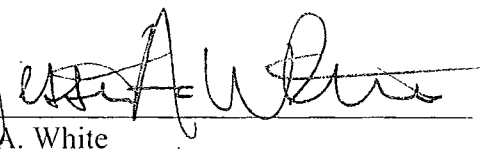

Jessie A. White

Georgetown, South Carolina

November 1, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC

MEMORANDUM IN OPPOSITION TO CRUISE OPPONENTS' MOTION TO VACATE

In the latest frivolous effort to delay adjudication of this case, and avoid the airing of facts that expose the baseless nature of the campaign against cruise operations in Charleston, Cruise Opponents ask this Court for a second time to remand this matter. In their Motion to Vacate (Motion), the Cruise Opponents demonstrate a misunderstanding of the applicable regulatory scheme and mischaracterize the order from a Federal District Court in a related federal case—an order that has been appealed and is pending before the Fourth Circuit. The Motion should be summarily denied.

The relevant facts and background are well known to the Court, and the Ports Authority adopts and incorporates by reference the background and facts as previously set forth in its Motion to Dismiss for Lack of Standing and Motion for Sanctions, both filed on July 1, 2013.

I. THE CRUISE OPPONENTS MISUNDERSTAND THE REGULATORY SCHEME.

A. Background on the applicable State and Federal permitting schemes.

The dual track permitting process involved in projects like the one at issue is not unique. Many similar permitting cases are required to adhere to both State and Federal regulatory bodies. While factually intertwined in the same project, the jurisdiction of the State and Federal permitting agencies are well-defined and distinct. The Motion not only clearly misapprehends the process, but also demonstrates a proclivity to assign meaning and preclusion to issues where none exists in an attempt to further muddy the waters of this litigation, necessitating that the Ports Authority clarify and set forth the regulatory scheme applicable to the Union Pier Terminal Project (Project).

Section 10 of the Rivers and Harbors Act (RHA) requires the authorization of the United States Army Corps of Engineers (Corps) prior to the obstruction or alteration of any navigable water of the United States. *See* 33 U.S.C.A. §§ 401 *et seq.* Specifically, Section 403 prohibits, *inter alia*, the (1) construction of any structure in or over any navigable water of the United States; (2) excavation or deposition of dredge or fill material; and (3) the accomplishment of any other work affecting the course, location, condition, or capacity of a navigable water. 33 U.S.C.A. § 403; *see also* 33 C.F.R. § 320.2(b). The instrument through which obstruction or alteration of navigable waters may be approved is a Section 10 permit from the Corps. *See* 33 C.F.R. § 320.2(b).

In turn, any application for a Federal permit or license whose construction or operation of facilities may result in a discharge into navigable waters is required to obtain a Water Quality Certification (401 Certification) from the State in which the proposed discharge is to take place, assuring that the project complies with Section 401 of the Clean Water Act (CWA). 33 U.S.C.A.

§ 1341. By necessity, in order for the Corps to finally issue a Section 10 permit to the Ports Authority authorizing the Project to move forward under the Rivers and Harbors Act, the Corps must first obtain a 401 Certification from the State of South Carolina. In South Carolina, the agency that assesses and issues 401 Certifications under the CWA is the South Carolina Department of Health and Environmental Control (DHEC).[1] *See* S.C. Code Ann. Regs. 61-101 ("Any applicant for a federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by federal law to first obtain a certification from the Department.").

Congress has seen fit to streamline some of the Corps' permitting responsibilities for similar categories of activities by authorizing the Corps to issue general permits that do not require applicants and the Corps to undergo the extensive individual permit review process. *See* 33 U.S.C.A. § 1344(e). These "general permits" are known as nationwide permits (NWPs), and

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[1] The CWA's requirement that a State provide a certification that a project complies with the State's water quality standards is also subject to additional parameters; namely, the State must issue a 401 Certification within one year of the submission of the permit application. Specifically, the CWA provides:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.

33 U.S.C.A. § 1341(a)(1). Similarly, Regulation 61-101.A.6 provides that "[t]he Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended." This requirement imposes a consequence on the failure to "act" within the one year, as DHEC is deemed to have waived its responsibilities under the CWA and the Corps is under no obligation to incorporate into its Section 10 permit any of the terms and conditions that may have been imposed in the 401 Certification.

authorize certain activities that require Corps approval under, *inter alia*, Section 10 of the Rivers and Harbors Act. The purpose of NWPs is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b) - 2(b). The Corps undertakes an environmental analysis for each of the NWPs in order to determine whether the individual and cumulative adverse environmental impacts of the activities authorized by each NWP are no more than "minimal." *See* 33 C.F.R. Part 330.

In response and in conjunction with NWPs issued by the Corps, state agencies like DHEC are permitted to review the Corps' NWPs and issue similarly streamlined 401 Certifications which offer authorization for projects determined by the Corps to fall under the general NWPs. In accordance with its obligations, DHEC has reviewed the NWPs issued by the Corps and issued 401 Certifications for certain of the NWPs as being consistent with the provisions of the CWA. The practical effect of these review processes by the Corps and DHEC is that, for projects which are deemed to fall under a NWP reviewed and issued by the Corps, the 401 Certification required of DHEC under the CWA has also been issued.

In addition to the Federal permitting requirements administered by the Corps under the Rivers and Harbors Act, projects that occur within a "critical area"[2] of the coastal zone[3] of South Carolina require additional review and permitting requirements. Specifically, these projects must obtain a critical area permit from the DHEC Office of Ocean and Coastal Resource Management

[2] "Critical area" is defined as coastal waters, tidelands, beaches, and the beach/dune system. *See* S.C. Code Ann. § 48-39-10(J). "Coastal waters" are defined as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark." *See* S.C. Code Ann. § 48- 39-10(F). "Tidelands" are defined to include "all areas at or below mean high tide...." *See* S.C. Code Ann. § 48-39-10(G).

[3] The "coastal zone" is defined as all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas (*i.e.*, Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown counties). *See* S.C. Code Ann. § 48-39-10(B).

(OCRM) prior to the utilization of the critical area. *See* S.C. Code Ann. § 48-39-130(A).[4] These permits are subject to the requirements of the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (CZMA), and associated regulations that govern the management, development, and protection of the critical areas and coastal zone of the State. S.C. Code Ann. Regs. 30-1 to -21. Further, the CZMA requires DHEC to certify State and Federal permits for consistency with the Coastal Management Program (CMP), commonly referred to as a Coastal Zone Consistency Determination (CZCD). *See* S.C. Code Ann. § 48-39-80(B)(11).[5]

Because of the interplay and overlap between these separate permitting and certification requirements, the South Carolina Code of Regulations provides for the oversight, coordination, and combination of these authorizations for projects that implicate multiple requirements and provisions. As discussed, projects requiring a Federal permit or license and implicating DHEC's 401 Certification requirement which *also* take place within the coastal zone require a critical area permit under the CZMA and a CZCD certifying the project's compliance with the CMP. However, under Regulation 30-2(H), OCRM generally does not issue a separate 401 Certification for a project requiring a direct critical area permit for alteration of the coastal zone. Instead, OCRM staff is tasked with coordinating with the appropriate DHEC staff regarding water quality impacts, and the ***critical area permit serves as the 401 Certification.*** *See* S.C. Code Ann. Regs. 30-2(H); S.C. Code Ann. Regs. 61-101.A.8 ("The Department will not issue a

[4] OCRM is charged with carrying out South Carolina's coastal zone policies and issuing permits in the critical areas of the coastal tidelands and waters. *See* S.C. Code Ann. Regs. 30-4(C); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005).

[5] Although the CMP has neither been codified nor made part of a DHEC regulation, it has been applied and enforced by the Supreme Court of South Carolina. *See, e.g., Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 370, 688 S.E.2d 844, 851 (2010) (holding the General Assembly meant the CMP policies to be enforceable in the consistency review of state and federal permits).

separate 401 water quality certification for an activity which requires a direct permit for alteration of the critical area of the coastal zone ... The direct permit will serve as the 401 water quality certification for an associated Federal permit.").

Additionally, permit applications that require both a 401 Certification and a CZCD—*i.e.*, projects that are both located within the coastal zone and require a Federal permit—"the [CZCD] determination shall be issued as a component of, and concurrently with, the [401] certification" in accordance with the requirements of a CZCD under the CMP, and "the [401] certification will serve also as the [CZCD]." S.C. Code Ann. Regs. 61-101.A.7. In other words, for efficiency purposes, the analysis by OCRM of the criteria found in the CMP is envisioned to be conducted in conjunction with and as a part of the water quality certification analysis, essentially merging the two authorizations into one license document.

The Project at issue in this case implicates the preceding permitting and certification requirements. The Project involves driving pilings in a navigable water implicating the Corps' jurisdiction under Section 10 of the Rivers and Harbors Act. Because the Project requires a federal permit, DHEC is obligated to evaluate the Project for water quality compliance and either issue, deny, or waive a 401 Certification. Further, because the Project takes place in the coastal zone and involves the alteration of a critical area, a critical area permit is required from DHEC. Finally, because the Project requires, *inter alia*, a critical area permit, DHEC is required to issue a CZCD certifying the Project's compliance with the CMP. In compliance with these requirements, the Union Pier Terminal Project received all of the necessary permits and certifications at the appropriate time.

The trigger for review of the Project was the submission of the joint federal and state application to the Corps and DHEC in January 2012. By memorandum and letter dated April 18

and 20, 2012, respectively, the Corps notified the Ports Authority that the Project was authorized under NWP 3, although the authorization was provisional pending receipt from DHEC of verification of the Project's compliance with Section 401 of the CWA and the CMP. Pursuant to its certification requirements under Section 401 of the CWA, DHEC evaluated, *inter alia*, NWP 3 for its compliance with State water quality standards, and on April 23, 2012, certified activities authorized under NWP 3 as compliant with the State's water quality standards. Accordingly, based on the Corps' authorization of the Project under NWP 3, the Project also received the requisite 401 Certification from DHEC. Thereafter, on December 18, 2012, DHEC issued the required critical area permit and CZCD for the Project. Consequently, and notwithstanding the applicability of DHEC's 401 Certification for NWP 3, water quality issues were a part of DHEC's analysis in its critical area permit evaluation, *see* S.C. Code Ann. Regs. 30-2(H), and the critical area permit issued by DHEC for the Project also serves as supplementary 401 Certification. Therefore, all of the requisite licenses were issued by DHEC for the Project.

B. The analysis under the critical area, coastal zone consistency, and water quality certification regimes are nearly identical.

While arguing that some analysis must occur at the same time, Cruise Opponents also argue that DHEC's evaluation of a project's compliance with state water quality standards under Section 401 of the CWA is wholly distinct and separate from its consideration of a critical area permit and CZCD under the CZMA. Motion at 7-8 ("Water Quality Certification review is distinct from the Critical Area Permit...."). Without providing the proper context, Cruise Opponents argue that DHEC's consideration of issues relevant to a 401 Certification is unique and should be conducted separate and apart from its evaluation of a critical area permit application. *See id.* ("The provisions contained in R.61-101 governing evaluation and issuance of

Water Quality Certifications ... differ markedly from those applicable to Critical Area Permits.").

However, one of the reasons for combining review and analysis is the significant overlap in the substantive considerations.[6] Cruise Opponents attempt to portray the substantive analysis of a 401 Certification and a critical area and CZCD permitting as widely divergent.[7] This is simply not the case. For example and ease of reference, the following table demonstrates the clear overlap between the water quality certification and critical area permitting regimes.

Factors for consideration in assessing a water quality certification	Factors for consideration in assessing a critical area permit
Whether the activity is water dependent and the intended purpose of the activity. S.C. Code Ann. Regs. 61-101.F.3.a.	The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water. S.C. Code Ann. § 48-38-150(A)(1); S.C. Code Ann. Regs. 30-11(B)(1)

[6] In fact, the Supreme Court has expressly held that "Regulation 61-101 provides that where a critical area in involved, the procedures found in the critical area permitting regime apply, rather than the procedures found in the Section 401 permitting regime." *See S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control*, 390 S.C. 418, 424 n.6, 702 S.E.2d 246, 249 n.6 (2010).

[7] It is ironic that counsel for Cruise Opponents has previously argued that the scope of DHEC's analysis for critical area permitting and the CZCD is and should be interpreted as being broad and all-encompassing, permitting the consideration of every conceivable hypothetical and theoretical situation one could imagine. *See Kiawah Development Partners, II v. S.C. Dep't of Health & Envtl. Control*, Pet. for Reh'g of Appellant S.C. Coastal Conservation League at 7-9 (filed March 14, 2013). That position is inconvenient and incongruous to Cruise Opponents' position advanced in the Motion, which would narrow DHEC's analysis as a part of a critical area permit and CZCD evaluation, and ignores Regulation 61-101.A.8's directive that the respective analyses should be conducted in concert with one another.

Factors for consideration in assessing a water quality certification	Factors for consideration in assessing a critical area permit
Whether there are feasible alternatives to the activity. S.C. Code Ann. Regs. 61-101.F.3.b.	All feasible safeguards are taken to avoid adverse environmental impact. S.C. Code Ann. § 48-38-150(A)(9); S.C. Code Ann. Regs. 30-11(B)(9) Any adverse environmental impact that cannot be avoided by reasonable safeguards. S.C. Code Ann. § 48-38-150(A)(8); S.C. Code Ann. Regs. 30-11(B)(8).
All potential water quality impacts of the project, both direct and indirect, over the life of the project including: (1) impact on existing and classified water uses. S.C. Code Ann. Reg. 61-101.F.3.c.1.	The project could affect ... marine life, wildlife ... or other natural resources ... including water and oxygen supply. S.C. Code Ann. § 48-38-150(A)(3); S.C. Code Ann. Regs. 30-11(B)(3). Commercial dock should be located in areas that will have minimal adverse impact on ... water quality. S.C. Code Ann. Regs. 30-12(A)(4)(d).
All potential water quality impacts of the project, both direct and indirect, over the life of the project including: ... (2) physical, chemical, and biological impacts, including cumulative impacts. S.C. Code Ann. Reg. 61-101.F.3.c.2.	The activity could cause erosion, shoaling ... or creation of stagnant water. S.C. Code Ann. § 48-38-150(A)(4); S.C. Code Ann. Regs. 30-11(B)(4). Commercial dock should be located in areas that will have minimal adverse impact on ... water quality, wildlife ... or other critical habitats. S.C. Code Ann. Regs. 30-12(A)(4)(d). The project could affect ... marine life, wildlife ... or other natural resources ... including water and oxygen supply. S.C. Code Ann. § 48-38-150(A)(3); S.C. Code Ann. Regs. 30-11(B)(3).

Factors for consideration in assessing a water quality certification	Factors for consideration in assessing a critical area permit
All potential water quality impacts of the project, both direct and indirect, over the life of the project including: ... (3) effect on circulation patterns and water movement. S.C. Code Ann. Reg. 61-101.F.3.c.3.	The activity could cause ... creation of stagnant water. S.C. Code Ann. § 48-38-150(A)(4); S.C. Code Ann. Regs. 30-11(B)(4). The activity would obstruct the natural flow of navigable water. S.C. Code Ann. § 48-38-150(A)(2); S.C. Code Ann. Regs. 30-11(B)(2). Transportation structures must ... not [ ] alter the natural water flow and circulation. S.C. Code Ann. Regs. 30-11(F)(2)(d).
All potential water quality impacts of the project, both direct and indirect, over the life of the project including: ... (4) cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others. S.C. Code Ann. Reg. 61-101.F.3.c.4.	Long-range cumulative effects ... within the context of other possible development. S.C. Code Ann. Regs. 30-11(C)(1).
Certification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem. S.C. Code Ann. Reg. 61-101.F.5.a.	The project could affect ... marine life, wildlife ... or other natural resources ... including water and oxygen supply. S.C. Code Ann. § 48-38-150(A)(3); S.C. Code Ann. Regs. 30-11(B)(3). Commercial dock should be located in areas that will have minimal adverse impact on ... water quality, wildlife ... or other critical habitats. S.C. Code Ann. Regs. 30-12(A)(4)(d). The development could affect the habitats for ... wildlife. S.C. Code Ann. § 48-38-150(A)(6); S.C. Code Ann. Regs. 30-11(B)(6).
Certification will be denied if (b) there is a feasible alternative to the activity, which reduces adverse consequences [to water quality]. S.C. Code Ann. Reg. 61-101.F.5.b.	All feasible safeguards are taken to avoid adverse environmental impact. S.C. Code Ann. § 48-38-150(A)(9); S.C. Code Ann. Regs. 30-11(B)(9). Any adverse environmental impact that cannot be avoided by reasonable safeguards. S.C. Code Ann. § 48-38-150(A)(8); S.C. Code Ann. Regs. 30-11(B)(8).

Factors for consideration in assessing a water quality certification	Factors for consideration in assessing a critical area permit
Certification will be denied if (c) the proposed activity adversely impacts... rare... species. S.C. Code Ann. Reg. 61-101.F.5.c.	The project could affect ... marine life, wildlife ... or other natural resources. S.C. Code Ann. § 48-38-150(A)(3); S.C. Code Ann. Regs. 30-11(B)(3). Commercial dock should be located in areas that will have minimal adverse impact on ... wildlife ... or other critical habitats. S.C. Code Ann. Regs. 30-12(A)(4)(d). The development could affect the habitats for ... wildlife. S.C. Code Ann. § 48-38-150(A)(6); S.C. Code Ann. Regs. 30-11(B)(6).
Certification will be denied if (d) the proposed activity adversely impacts special ... habitats. S.C. Code Ann. Reg. 61-101.F.5.d.	The development could affect the habitats for ... wildlife. S.C. Code Ann. 48-38-150(A)(6); S.C. Code Ann. Regs. 30-11(B)(6). The project could affect ... marine life, wildlife ... or other natural resources. S.C. Code Ann. § 48-38-150(A)(3); S.C. Code Ann. Regs. 30-11(B)(3).
Certification will not be issued unless ... appropriate ... steps ... will be taken to minimize adverse impacts. S.C. Code Ann. Reg. 61-101.F.6.	Any adverse environmental impact that cannot be avoided by reasonable safeguards. S.C. Code Ann. § 48-38-150(A)(8); S.C. Code Ann. Regs. 30-11(B)(8). All feasible safeguards are taken to avoid adverse environmental impact. S.C. Code Ann. § 48-38-150(A)(9); S.C. Code Ann. Regs. 30-11(B)(9).

As is evident in a side-by-side comparison, the factors considered by DHEC as part of an evaluation of a critical area permit overlap, and in many instances mirror, the factors considered as a part of a water quality certification evaluation. Thus, the argument that DHEC's analysis and actions in evaluating the Project and issuing the requisite licenses are somehow void lacks any basis in law or fact.

C. The scope of analysis for a federal permit under federal law does not dictate the scope of analysis for a state permit under state law.

The CZMA established and continues to serve as a regulatory scheme that is designed to ensure, through DHEC's oversight, the protection and enhancement of the State's coastal resources. It is decidedly local, and is intended to both protect and promote the coast of South Carolina on an on-going basis. Notwithstanding the tailoring of the CZMA to South Carolina-specific issues and regulation, Cruise Opponents now assert that the issues of federal permitting law should dictate the scope of analysis of and level of review employed by the State's regulatory body.

In the Motion, Cruise Opponents aver that "[s]ince scope of review for the required 401 Water Quality Certificate will be influenced by the Corps' 'scope of analysis,' the instruction by the federal court on remand has direct implication for DHEC's evaluation of SPA's project." Motion at 8. In effect, Cruise Opponents are projecting the Federal Court's allegations of inadequacies of the Corps' review onto DHEC (which the Ports Authority does not agree with), prior to this Court's evaluation of the Project. However, Cruise Opponents offer no basis for their contention that DHEC's application of state law to state permitting decisions should be influenced by or track the scope of analysis of the Corps under federal law.

Under the *de novo* contested case review of permitting decisions of DHEC, this Court acts as the ultimate arbiter of whether the applicable statutes and regulations have been complied with, prior to issuing the final agency decision. Thus, Cruise Opponents' request implies that this Court will apply the wrong "scope of analysis" in its review of State law to the Project, absent proper instruction by the Corps. This is not the law, and Cruise Opponents fail to identify what "influence" the Corps' analysis has on DHEC or this Court's analysis, and there is none. Further, Cruise Opponents fail to identify the holdings within the Federal Order that will have "direct

implication" on DHEC and this Court's evaluation of the Project, because there are none. Moreover, as a contested case, the burden of persuasion is on Cruise Opponents, and through this motion they simply presume that their interpretation and application of the scope of analysis for the Project under state law is correct and that DHEC has failed to appropriately apply state law—but that puts the cart before the horse, as the point of the contested case is to adjudicate that very issue.

DHEC is a state agency that operates pursuant to state law and in exercising its duties and responsibilities implicated by the Project, DHEC is governed by state law. In serving as the permitting agency of the CZMA, the scope of DHEC's analysis of projects that alter the coastal zone and for which a critical area permit is required is clearly set forth in state law. *See* S.C. Code Ann. §§ 48-39-10 *et seq.*; S.C. Code Ann. Regs. 30-1 *et seq.* Further, state law sets forth DHEC's scope of analysis in determining a project's compliance with the CMP and evaluating projects pursuant to Section 401 of the CWA. *See* S.C. Code Ann. § 48-39-80(B)(11); CMP; S.C. Code Ann. Regs. 61-101.

By contrast, the scope of analysis for a federal permit, like the Rivers and Harbors Act Section 10 permit at issue for the Project, is established under federal statute, federal regulations, and federal case law. Cruise Opponents offer no connection and no authority for the proposition that the scope of analysis utilized by the Corps to satisfy its federal obligations has an effect or impact on DHEC or this Court's evaluation of the Project under state law. Accordingly, Cruise Opponents' contention is without merit and simply the latest in a long series of tactics employed to delay the Project under state law (and, ironically, delay implementation of measures that directly mitigate and ameliorate the very complaints of Cruise Opponents).

II. CRUISE OPPONENTS MISREPRESENT THE EFFECT OF THE ORDER FROM THE FEDERAL DISTRICT COURT.

Beyond their misunderstanding and misapplication of the law with respect to the statutes and regulations at issue for the Project permit issued by DHEC, Cruise Opponents further extrapolate conclusions from the Federal Order which are inconsistent with its clear holdings and the directions given by the Federal Court to the Corps on remand. A plain reading of the Federal Order directly contradicts the conclusions Cruise Opponents would have this Court reach. What is left is a motion based on willful misconstruction used to argue an untenable position.

Cruise Opponents repeatedly contend that the Federal Court "vacated" the Corps' determination that NWP 3 would be applicable to the Project, when no such holding exists. *See, e.g.*, Motion at 2 (incorrectly stating the Federal Court "issued an order vacating the Corps' NWP 3 authorization"), 5 ("With NWP 3 coverage no longer operational for SPA's proposed RHA discharges...."). In actuality, the Federal Order's only holding is that the Corps did not use the proper scope of analysis in evaluating the Project, remanding the Project to the Corps for reconsideration under a broadened scope of analysis. Thus, Cruise Opponents' contention is misleading, at best.

The Federal Court stopped short of holding that NWP 3 is inapplicable or "vacated" with respect to the Project. The word "vacate" does not appear in the Federal Order at all. Instead, the Federal Order distinctly and unambiguously held the opposite: on remand, upon re-evaluation of the Project under the Court's mandated scope of analysis, the Corps may still determine that the Project is eligible for general, NWP approval. Federal Order at 29.

> Once the Army Corps uses the proper "scope of analysis," the agency must undertake an appropriate NEPA and NHPA review, which should include such issues as (1) ***whether the passenger terminal project is entitled to a general permit or must undergo the individual permitting process***; (2) whether, if an individual permit is required, the Corps must perform an EIS; and (3) whether

> the passenger terminal is the "type of activity that does not have the potential to cause effects on historic properties."

(emphasis added) (citations omitted). Further, the Federal Court expressly held that its decision should not be interpreted as reaching a conclusion as to the level of permit review required. *See* Federal Order at 29-30 ("In reversing and remanding the Army Corps' authorization in this matter, ***the Court does not reach or in any way address the type of permit or level of review which the Corps must undertake*** once it evaluates the proposed project under the proper 'scope of analysis.'") (emphasis added); *see also* Federal Order at 23 (holding that it "is undoubtedly true" that construction activity on a wharf like that at issue in this case, while subject to the Corps' jurisdiction, "is eligible for general [*i.e.*, NWP] permit treatment").

Notwithstanding the plain language of the Federal Order, Cruise Opponents contend the Federal Order "removed the predicate for exempting [the Ports Authority] from a separate individual 401 Water Quality Certification for the project." *See* Motion at 2. However, for the reasons already provided and under the plain language and clear holding of the Federal Court going forward, NWP 3 is still available to the Corps after additional analysis; therefore, even assuming Cruise Opponents' argument has any credibility, the "predicate" remains and no preclusion to these State permit issues applies. Even if the Federal Order is affirmed, this contested case proceeding provides value in moving forward for adjudication because it may serve as the basis for future permitting or licensing decision.[8]

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[8] For example, in a prior case involving the replacement of a bridge on Highway 601, the plaintiffs/petitioners in that case initially prevailed in the parallel federal case. This Court had issued a decision on the DHEC-issued 401 Certification. After the revised federal agency analysis, which considered this Court's final order, the federal court, on the second challenge to the federal agency decision, relied on this Court's final order and the record developed in the contested case to affirm the federal agency's analysis and decision (including the scope of analysis used to evaluate the project at issue in that case). *Friends of Congaree Swamp v. Federal Hwy. Admin.*, 786 F. Supp. 2d 1054 (D.S.C. 2011).

Moreover, in addition to the obvious misconstruction of the Corps' review on remand, Cruise Opponents ignore that the Federal Order has been appealed by the Ports Authority and the Corps to the Fourth Circuit Court of Appeals and is therefore capable of reversal. *See Preservation Society of Charleston v. U.S. Army Corps of Eng'rs*, 2:12-cv-02942-RMG, dkt.#88, 91. Accordingly, even under Cruise Opponents' strained attempt to assign some measure of preclusion to the Federal Order, those efforts are clearly premature given the status of the Federal case and the deference afforded to the Corps' future review of the Project.

III. CRUISE OPPONENTS' MOTION IS MERITLESS, AS THE PORTS AUTHORITY HAS THE REQUISITE LICENSES FROM DHEC.

The Ports Authority filed its application for the Union Pier project with the Corps on January 23 and with DHEC on January 27, 2013. Ex. A (Permit Applications, Bates Nos. SCPA 002642-50 and SCPA000001-9). The top portion of the application form includes "33 USC 403" and "33 USC 1341," which is the Section 10 permit required under the Rivers and Harbors Act and the attendant Section 401 water quality certification. Thus, the "Authorities" section of the application form clearly references the Section 401 as a consideration and governing authority. There is no separate application for a 401 Certification.

Public notices were issued by DHEC to receive comment on March 9, March 23, and August 3, 2012. Ex. B (Public Notices, Bates Nos. DHEC-SCPA 001568-93). On April 20, 2012, the Corps determined that the Project qualifies for coverage under NWP 3. Ex. C (Bates Nos. DHEC-SCPA 001489-92). DHEC issued a water quality certification and coastal zone consistency determination for NWP 3 on April 23, 2012 and did not impose any additional terms or conditions. Ex. D (401 Certification and CZCD). That certification and consistency determination was not challenged by any person. A public hearing was held on September 19,

2012. DHEC issued a permit/license for the Project on December 18, 2012 (Permit). Ex. E (Bates Nos. DHEC-SCPA 000091-111).

Cruise Opponents first argue that a single piece of paper must be issued for the critical area permit, coastal zone consistency, and water quality certification. *See* Motion at 5 ("Because DHEC's regulatory programs require that where a Water Quality Certification is required for a project that also requires a Coastal Zone Consistency Certification, the latter must be issued as a component of, and concurrently with, a Water Quality Certification. Further, where a Water Quality Certification is required for a project that must obtain a Critical Area Permit, the Water Quality Certification must be issued as a component of, and concurrently with, a Critical Area Permit."). Thus, according to Cruise Opponents, the failure of the Permit to specifically include the magic words "Water Quality Certification" is a fatal flaw.[9]

And yet Cruise Opponents also acknowledge that a 401 Certification and the accompanying CZCD were issued and valid to accompany the Corps' decision to allow the Project to move forward under a NWP. Specifically, the Cruise Opponents argue that "[i]n this case, an individual Water Quality Certification was not sought or evaluated, much less obtained, presumably on the assumption that DHEC had separately issued a general Certification for all

[9] Interestingly, Cruise Opponents argue that "while OCRM staff evaluate and issue Critical Area Permits, a separate branch of DHEC, the Bureau of Water, evaluates and makes decisions on Water Quality Certificates." Motion at 8. This is a distinction without a difference, according to certain Cruise Opponents' and its counsels' prior positions and the South Carolina Supreme Court. In *South Carolina Coastal Conservation League v. S.C. Department of Health and Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010), a case which involved the League's challenge to a DHEC permit issued for another Ports Authority project, the League argued, and the Supreme Court accepted, that a staff member of the Bureau of Water could bind and create obligations for OCRM even when OCRM issues the permit. *Id.* at 251-52 (allowing an email comment from a BOW staffer to create a binding obligation of notice on an OCRM permit). The Supreme Court did not distinguish between individual divisions and bureaus, instead treating "DHEC" as "DHEC," as the League then urged. In this case, that is an inconvenient position for Cruise Opponents, so they abandon that position in favor of one that advances their goal of stopping cruise operations at UPT.

NWP 3 authorizations in South Carolina. With NWP 3 coverage no longer operational for SPA's proposed RHA discharges, however, that assumption is no longer correct and leaves the requisite State Water Quality Certification fatally absent." Motion at 5. Therefore, on the one hand the Cruise Opponents argue a single document must be issued, but on the other hand they acknowledge that a 401 Certification may be valid in a separate document issued at a separate point in time.

Notwithstanding the internal inconsistencies, Cruise Opponents claim that nothing DHEC has done is valid. This is unsurprising given the vitriol they have shown for cruise operations at UPT. Nonetheless, there are four rational and logical positions that can be taken on the current status of the State-issued or State-required licenses based on the law and relevant documentary evidence. The Cruise Opponents' theory is not one of them.

For example, under one reasonable theory, DHEC may issue a 401 Certification in conjunction with a future application to the Corps for the Project, if an individual certification is deemed necessary. Despite Cruise Opponents' representation, the Federal Order merely remanded the question about the scope of analysis back to the Corps. The Federal District Court explicitly did not hold that the NWP 3 or the existing general 401 Certification were invalid, inapplicable, or even unavailable for the Project. Further, as a 401 Certification is tied to a federal permit, if the federal permit is, as Cruise Opponents claim, vacated and no longer in effect, there similarly is no legal requirement or basis at this time to even demand a 401 Certification. As no 401 Certification is triggered, then Cruise Opponents cannot demand voidance for lack of a 401 Certification. Thus, the Motion is baseless and must be denied.

Under another reasonable reading of the law, the critical area permit issued by DHEC already satisfies the 401 Certification and, thus, the 401 Certification has already been issued.

Cruise Opponents wholly ignore the legal effect of the regulatory language that provides: "The direct permit [for alteration of the critical area] will serve as the 401 water quality certification for an associated Federal permit." S.C. Code Ann. Regs. 30-2.H, 61-101.A.8. The Corps' letter issued April 20, 2012 states that the "Corps has not received Section 401 Water Quality Certification (WQC) and Coastal Zone Management Act (CZMA) consistency determinations from the State of South Carolina for the NWPs...." Ex. C (Bates Nos. DHEC-SCPA 001489-92). Subsequent to that letter, DHEC issued a general 401 Certification for the NWPs and DHEC issued the critical area permit. However, as the critical area permit is "project specific" and by law it "serves as the 401 water quality certification," then a strong argument exists that the existing critical area permit document simultaneously serves as a 401 Certification as it was issued later in time and subsequent to DHEC's general certification for NWP 3. Using the Cruise Opponents' logic, the Corps is now free to issue an individual permit or a NWP for the Project as a 401 Certification for both purposes has been issued by DHEC. Thus, the Motion is baseless and must be denied.

Alternatively, under another interpretation, it is reasonable to conclude that, considering a joint application was submitted, the 401 Certification requirement under federal and state law was waived because the magic words "401 Certification" were not included in the critical area permit within one year of the application's submission. As discussed above, "[t]he Department is required by Federal law to issue, deny, or waive certification for Federal licenses or permits within one (1) year of acceptance of a completed application unless processing of the application is suspended." S.C. Code Regs. 61-101.A.6. The application was submitted on January 27, 2012, with administrative deficiencies corrected in February 2012, and the critical area permit was issued in December 2012. Arguably, one year has passed and, based on Cruise Opponents'

argument, the 401 Certification has been waived. Thus, the Motion is baseless and must be denied.

Finally, if Cruise Opponents actually believe a single sheet of paper is necessary, then this Court instead may adjudicate and rule on the 401 Certification in conjunction with this contested case, assuming, of course, that Cruise Opponents have not waived or otherwise lost any claim to raise the 401 Certification issues in the first place. As the Permit, by regulation, serves as the 401 Certification, then the order of this Court and resulting order to DHEC would serve the same purpose and act as the critical area permit, CZCD, and the 401 Certification. Thus, the Motion is baseless and must be denied.

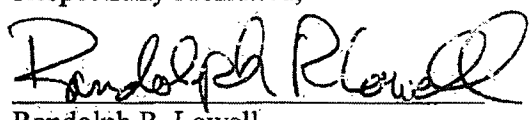
Each of these four theories has some basis in law and fact. In contrast, Cruise Opponents have merely hurled unsupported allegations aimed at more delay and harassment. Under any supportable theory, the Ports Authority filed an application for all necessary licenses necessary, and DHEC met its legal obligations in issuing a license on December 18, 2012.

CONCLUSION

In conclusion, the scope of analysis for a federal permit under federal law does not dictate the scope of analysis for a state permit under state law, nor do federal permit decisions under federal law circumscribe or limit state permit determinations under state law. For efficiency purposes, state law merges the 401 Certification, critical area permit, and CZCD into one license document, recognizing that the analysis under the critical area, coastal zone consistency, and water quality certification regimes overlap and are nearly identical. The critical area permit therefore serves as the 401 Certification. The Union Pier Terminal Project received all of the necessary permits and certifications at the appropriate time. Further, the Federal District Court did not vacate NWP3 or determine that it was inapplicable.

Cruise Opponents offer no coherent theory or support for voiding the Permit as requested in the Motion. They misrepresent the Federal Order and offer no rational reason and no legal authority at all in support of their position—despite bearing the burden of persuasion. This Motion is nothing more than another attempt by Cruise Opponents to delay the Project and cause additional litigation expense. They seek to hit the reset button on a matter that has been pending since February and is scheduled for a merits hearing in approximately two months. The Motion has no merit, is frivolous, and should be summarily denied.

Respectfully submitted,



Randolph R. Lowell
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Philip L. Lawrence
General Counsel
S.C. STATE PORTS AUTHORITY
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Charleston, South Carolina 29413-2287
plawrence@scspa.com

Attorneys for the Respondent
South Carolina State Ports Authority

November 25, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina State Ports Authority and South Carolina Department of Health and Environmental Control, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of **South Carolina Ports Authority's Memorandum in Opposition to Cruise Opponents' Motion to Vacate** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Amy Armstrong, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Bradley D. Churdar, Esquire
South Carolina Department of
Health and Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

J. Blanding Holman, Esquire
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401

Breanna M. Karns

Columbia, South Carolina
This 25th day of November 2013.

EXHIBIT A

JAN 27 2012

South Carolina State **PORTS AUTHORITY**

P.O. Box 22287
Charleston, S.C. 29413-2287 USA
(843) 856-7048
Fax: (843) 856-7067

January 23, 2012

Mr. Nathaniel Ball
Permit Evaluation Branch, USACOE
69A Hagood Avenue
Charleston, SC 29403-5107

Dear Mr. Ball:

Subject: Joint Federal and State Application Form for Activities Affecting Waters of The Unites States or Critical Areas of the State of South Carolina
Union Pier Cruise Facility – Renovation of Building 322
Union Pier Terminal – State Pier 2
Project Number CIF11E006B

The South Carolina State Ports Authority would like to submit the above referenced application for your review and approval. If you have any questions or require any additional information, please feel free to contact me.

Respectfully submitted,

Derrick L. Bellamy

Derrick L. Bellamy, P.E.
Staff Engineer

cc: Mr. Joe T. Bryant, SCSPA
Mr. David N. Smith, SCSPA

Joint Federal and State Application Form For Activities Affecting Waters of the United States Or Critical Areas of the State of South Carolina	This Space for Official Use Only Application No. _____ Date Received 27 2017 Project Manager _____ Watershed # _____

Authorities: 33 USC 401, 33 USC 403, 33 USC 407, 33 USC 408, 33 USC 1341, 33 USC 1344, 33 USC 1413 and Section 48-39-10 et. Seq of the South Carolina Code of Laws. These laws require permits for activities in, or affecting, navigable waters of the United States, the discharge of dredged or fill material into waters of the United States, and the transportation of dredged material for the purpose of dumping it into ocean waters. The Corps of Engineers and the State of South Carolina have established a joint application process for activities requiring both Federal and State review or approval. Under this joint process, you may use this form, together with the required drawings and supporting information, to apply for both the Federal and/or State permit(s).

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2. Applicant First Name: Derrick		12. Agent First Name:	
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4. Applicant Mailing Address: Post Office Box 22287		14. Agent Mailing Address:	
5. Applicant City: Charleston		15. Agent City:	
6. Applicant State: South Carolina	7. Applicant Zip: 29413-2287	16. Agent State:	17. Agent Zip:
8. Applicant Area Code and Phone No.: 843-856-7057		18. Agent Area Code and Phone No.:	
9. Applicant Fax No.: 843-856-7067		19. Agent Fax No.:	
10. Applicant E-mail: dbellamy@scspa.com		20. Agent E-mail:	

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23. Project City: Charleston	24. Project County: Charlesotn	25. Project Zip Code: 29403	26. Nearest Waterbody: Cooper River
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29. Latitude: 32 47' 9"		30. Longitude: 79 55' 29"	

31. Directions to Project Site (Include Street Numbers, Street Names, and Landmarks and attach additional sheet if necessary):

Exit I-26 at Exit 219 - B (Morrison Drive & East Bay Street). From East Bay Street. turn left onto Calhoun Street. From Calhoun Street. turn right onto Concord Street. The Cruise Terminal will be at 180 Concord Street.

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See Attached Sheet

33. Overall Project Purpose and the Basic Purpose of Each Activity In or Affecting U.S. Waters (attach additional sheets if needed):

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Clay:	_____	☐cubic yards
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36. Individually list wetland impacts including mechanized clearing, fill, excavation, flooding, draining, shading, etc. and attach a site map with location of each impact (attach additional sheets if needed).

Impact No.	Wetland Type	Distance to Receiving Water body (LF)	Purpose of Impact (road crossing, impoundment, flooding, etc)	Impact Size (acres)
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			Total Stream Impacts (Linear Feet)	

38. Have you commenced work on the project site? ■ YES ☐ NO If yes, describe all work that has occurred and provide dates.

New work has not commenced. Repairs to the building substructure has been started.

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40. Provide a brief description of the proposed mitigation plan to compensate for impacts to aquatic resources or provide justification as to why mitigation should not be required (Attach a copy of the proposed mitigation plan for review).

It is reasonably anticipated that the work planned will cause no adverse impacts to jurisdictional areas.

41. See the attached sheet to list the names and addresses of adjacent property owners.
A search is being performed to identify the names and addresses of the adjacent property owners.

42. List all Corps Permit Authorizations and other Federal , State, or Local Certifications, Approvals, Denials received for work described in this application.

#71-05-37 / #72-10-087 / 78-3R-337

43. Authorization of Agent. I hereby authorize the agent whose name is given on page one of this application to act in my behalf in the processing of this application and to furnish supplemental information in support of this application. [1]

Applicant's Signature Date

44. Certification. Application is hereby made for a permit or permits to authorize the work and uses of the work as described in this application. I certify that the information in this application is complete and accurate. I further certify that I possess the authority to undertake the work described herein or am acting as the duly authorized agent for the applicant. [1]

Derrick L. Bellamy 23 Jan. 12

Applicant's Signature Date Agent's Signature Date

[1]**The application must be signed by the person who desires to undertake the proposed activity or it may be signed by a duly authorized agent if the authorization statement in blocks 11 and 43 have been completed and signed. 18 U.S.C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or disguises a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.**

32. Description of Overall Project and of Each Activity in or Affecting U.S. Waters or State Critical Areas

The South Carolina State Ports Authority's (SCSPA) first cruise sailing from Charleston seems to have been the Moore-McCormack Lines vessel, Brasil, which sailed from Charleston to Bermuda on April 30, 1967. Cruise activity in Charleston steadily grew resulting in a dedicated passenger facility and berth being constructed at Union Pier Terminal. The current passenger terminal was dedicated in October 1973. With continued growth of the cruise business and especially with the current terminal security requirements, the need for a new facility has become critical. To address the requirements of new Federal regulations, in 2007 the SCSPA entered into a Memorandum of Understanding with US Customs and Border Protection (CBP) for the conditional approval of ongoing cruise operations on a trial basis. That conditional approval has been renewed on an annual basis with the understanding that an improved facility would be needed for continued operations.

The current cruise operation involves the Passenger Terminal (Building #325), Buildings #302, #303 & #304 for stores and luggage. These buildings are denoted on Sheet 2 of 4.

The SCSPA evaluated several options for providing an improved facility satisfactory to CBP requirements. These options were explored in a study by Berimello Ajamil & Partners, Inc. completed September 2007 and in the Concept Plan for Union Pier Terminal completed in March 2010, by Cooper Robertson & Partners. Relocating the passenger facility to Building #322 is the preferred option. Building #322 is denoted on Sheet 2 of 4.

The only activity in the preferred option that will affect U.S. Waters or State Critical Areas will be the installation of five pile clusters driven to the marl to support three elevators and two escalators. All clusters will be within the footprint of the existing pile supported Building #322. Those locations are shown on the attached Sheet 3 of 4 with cross section shown on Sheet 4 of 4.

Other activities not affecting waters of the US, but relative to this project, will be general renovation of Building #322. The renovation will include a mezzanine accessed by ADA compliant elevators and escalators for boarding passengers to the cruise ships similar to the stairs and elevators serving the mezzanine of Building #325. Other landside improvements include renovation of the building's exterior and interior, canopies over pedestrian areas, and a loading dock for transferring ship stores from delivery trucks to the cruise ship. Ship store activity is now carried out in Buildings #302, #303, & #304. Building #330 (Sheet 2 of 4) will be demolished.

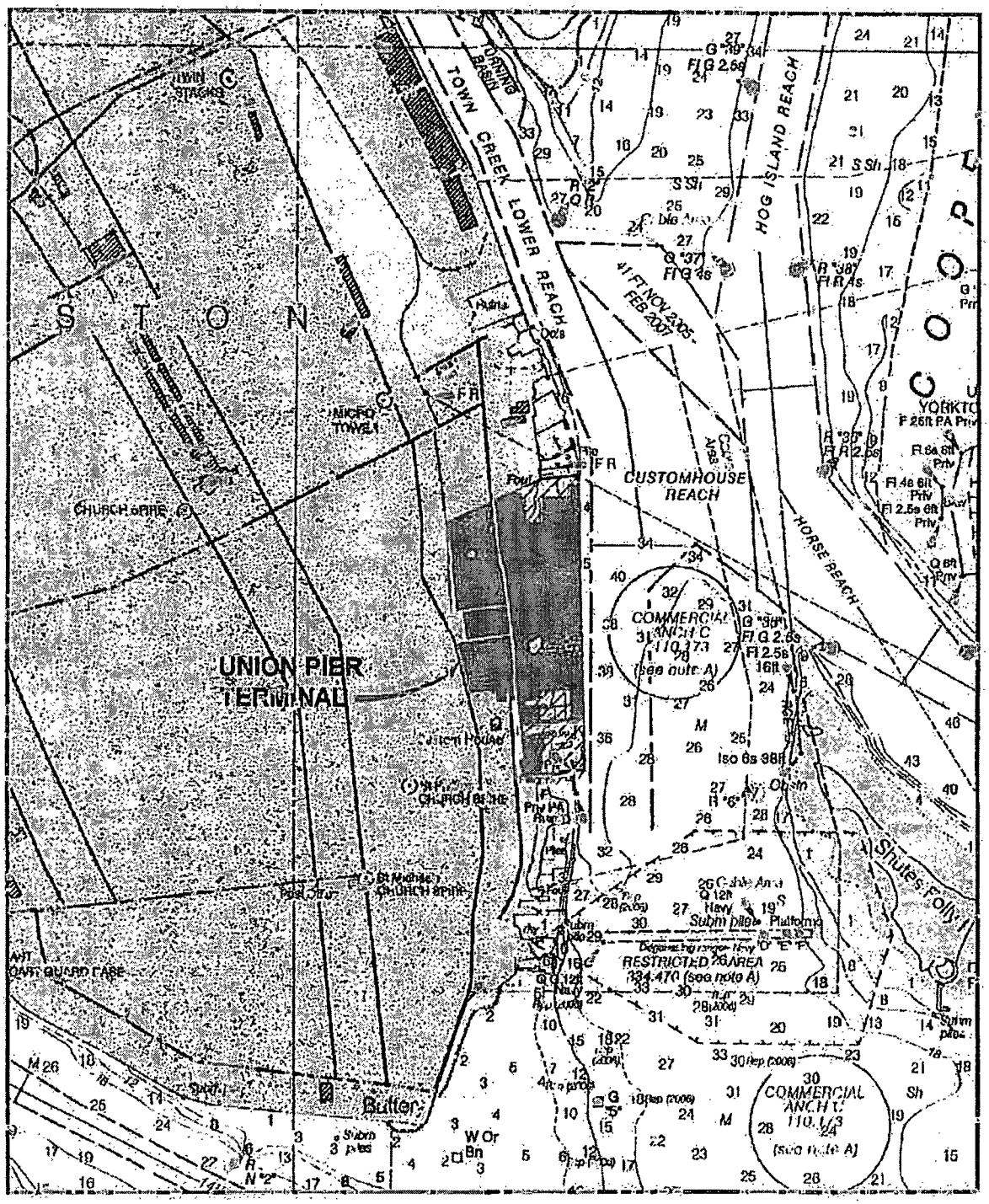
33. Overall Project Purpose...

The overall project purpose is to provide a passenger facility satisfactory for the continued handling of cruise vessels at Union Pier Terminal. The purpose of the installation of elevators and escalators (activity affecting US waters) is to provide ADA compliant access to the mezzanine level for boarding passengers.

39. Describe measures taken to avoid...

The use of Building #322 for cruise passenger operations reduces the impacts to US waters. Modifying the current Passenger Terminal (Building #325) by enlarging and improving its access to better accommodate current CBP requirements would impact wetlands immediately to the shore side of the building. Constructing a new facility on the footprint of Buildings #301 - #305 would involve, at a minimum, demolition of Buildings #301, #302, & #305 and reconstructing over water at the same site.

The use of Building #322 will also reduce the cargo capacity of Union Pier Terminal, since Building #325 (current passenger terminal) is not suitable for cargo. Its reuse would likely center around waterfront events, such as tall ships and other such water dependent activities. The use of Building #322 will also require the removal of existing rail service to Union Pier. This also affects Union Pier's cargo capability. The reduced cargo capacity and single passenger berth will result in a reduction in the number of large vessels calling Union Pier Terminal.



LOCATION

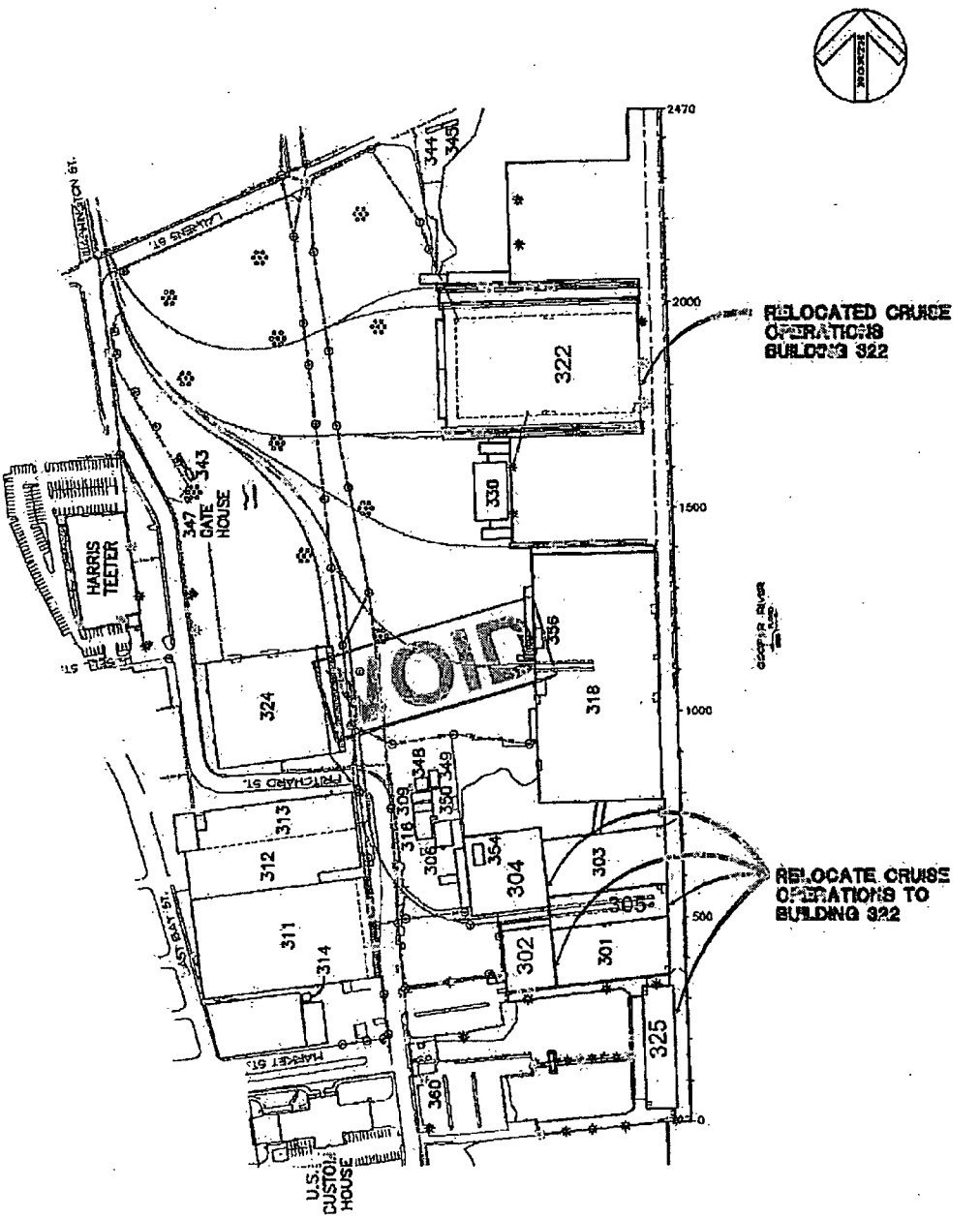
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CF:1E006B
FILE NAME: Uoverp1
DATE: DECEMBER 2011
SHEET: 1 OF 4

COE00042

SCPA 002647

R.000831



BUILDING LOCATION PLAN
UNION PIER TERMINAL

400 0 400

SCALE IN FEET

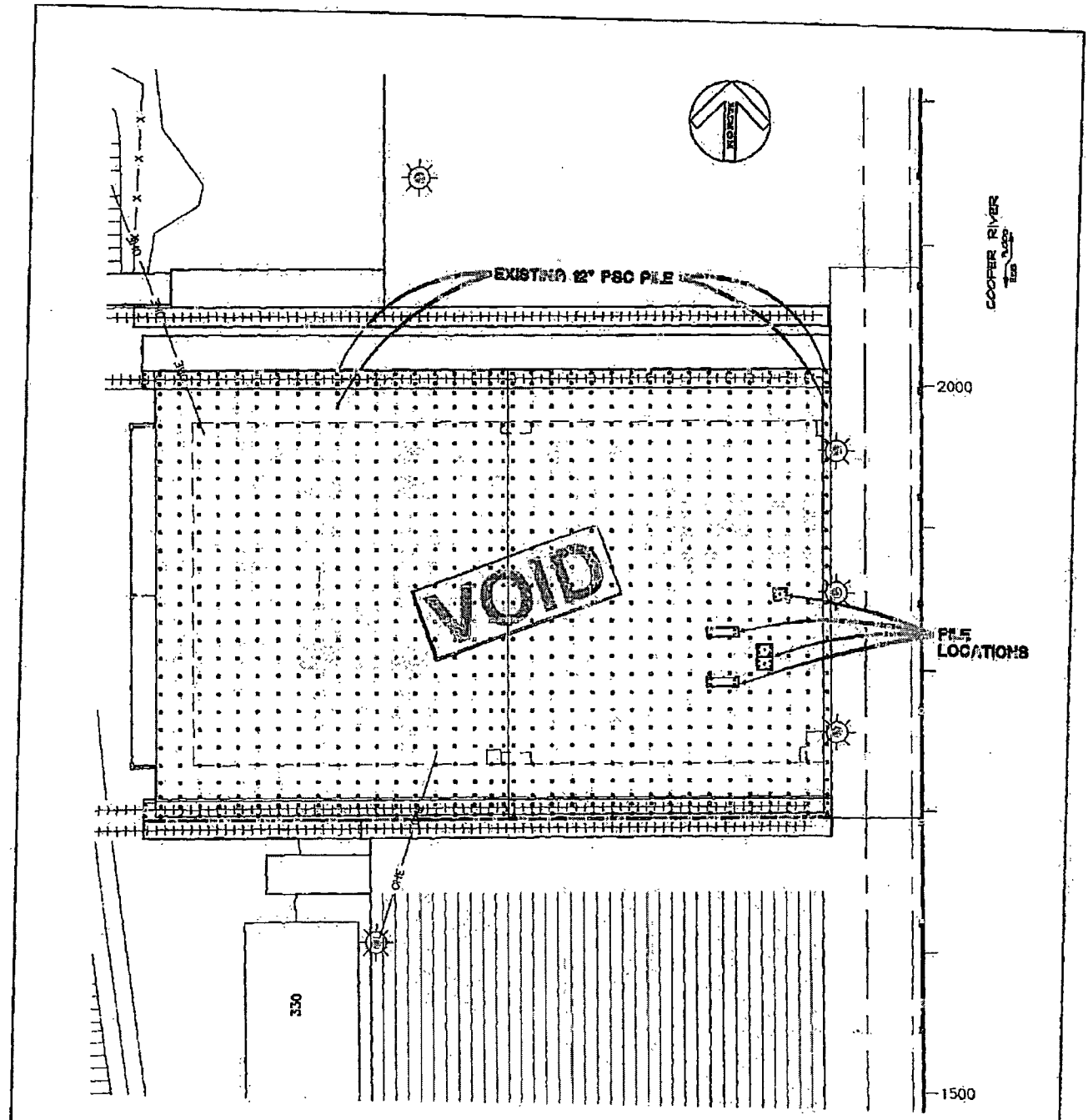
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E0068
FILE NAME: Upcptp2
DATE: DECEMBER 2011
SHEET: 2 OF 4

COE00043

SCPA 002648

R.000832



LEGEND

ELEVATORS

ESCALATOR

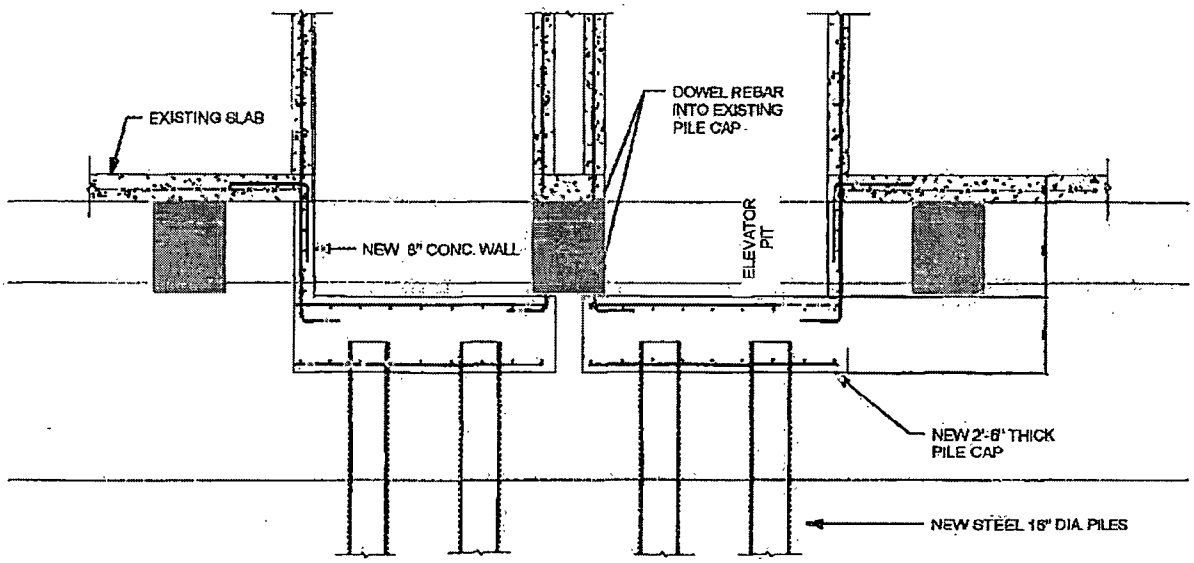
MODIFICATIONS (BUILDING 322)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

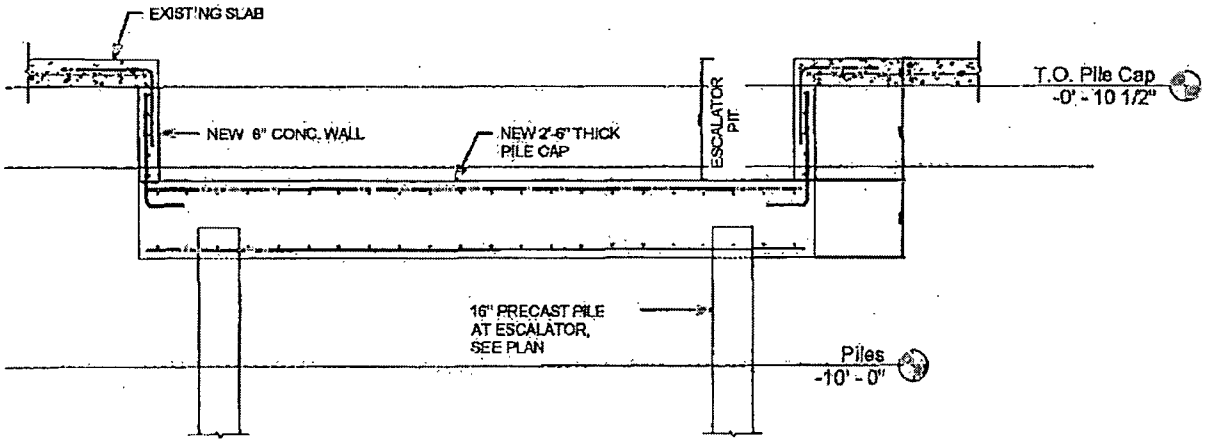
PROJECT NO. : CIF11E006B
FILE NAME : Upcplp3
DATE: DECEMBER 2011
SHEET: 3 OF 4

COE00044

SCPA 002649



A/E5 SECTION
ELEVATOR



B/E5 SECTION
ESCALATOR

MODIFICATIONS
(CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO. : CIF11E0068
FILE NAME : Upcplp4
DATE: DECEMBER 2011
SHEET: 4 OF 4

PORTS AUTHORITY

P.O. Box 22287
Charleston, S.C. 29413-2287 USA
(843) 856-7038
Fax: (843) 856-7067

January 27, 2012

Mrs. Rheta DiNovo, Director
Regulatory Programs Division
South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management
1362 McMillian Ave., Suite 400
Charleston, SC 29405

Dear Mrs. DiNovo:

Subject: Joint Federal & State Application Form for Activities Affecting Waters of The Unites States or Critical Areas of the State of South Carolina
Union Pier Cruise Facility – Renovation of Building 322
Union Pier Terminal – State Pier 2
Project Number CIF11E006B

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Respectfully submitted,

Derrick L. Bellamy

Derrick L. Bellamy, P.E.
Staff Engineer

Enclosures

cc: Mr. Joe T. Bryant, SCSPA
Mr. David N. Smith, SCSPA

Joint Federal and State Application Form For Activities Affecting Waters of the United States Or Critical Areas of the State of South Carolina	This Space for Official Use Only Application No._____ Date Received_____ Project Manager_____ Watershed #

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9. Applicant Fax No.: 843-856-7067		19. Agent Fax No.:	
10. Applicant E-mail: dbellamy@scspa.com		20. Agent E-mail:	
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Derek L. Belling 1-22-12

Applicant's Signature Date Agent's Signature Date

[1] The application must be signed by the person who desires to undertake the proposed activity or it may be signed by a duly authorized agent If the authorization statement in blocks 11 and 43 have been completed and signed. 18 U.S.C. Section 1001 provides that: Whoever, in any manner within the jurisdiction of any department of the United States knowingly and willfully falsifies, conceals, or covers up any trick, scheme, or disguises a material fact or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

32. Description of Overall Project and of Each Activity in or Affecting U.S. Waters or State Critical Areas

The South Carolina State Ports Authority's (SCSPA) first cruise sailing from Charleston seems to have been the Moore-McCormack Lines vessel, Brasil, which sailed from Charleston to Bermuda on April 30, 1967. Cruise activity in Charleston steadily grew resulting in a dedicated passenger facility and berth being constructed at Union Pier Terminal. The current passenger terminal was dedicated in October 1973. With continued growth of the cruise business and especially with the current terminal security requirements, the need for a new facility has become critical. To address the requirements of new Federal regulations, in 2007 the SCSPA entered into a Memorandum of Understanding with US Customs and Border Protection (CBP) for the conditional approval of ongoing cruise operations on a trial basis. That conditional approval has been renewed on an annual basis with the understanding that an improved facility would be needed for continued operations.

The current cruise operation involves the Passenger Terminal (Building #325), Buildings #302, #303 & #304 for stores and luggage. These buildings are denoted on Sheet 2 of 4.

The SCSPA evaluated several options for providing an improved facility satisfactory to CBP requirements. These options were explored in a study by Berimello Ajamil & Partners, Inc. completed September 2007 and in the Concept Plan for Union Pier Terminal completed in March 2010, by Cooper Robertson & Partners. Relocating the passenger facility to Building #322 is the preferred option. Building #322 is denoted on Sheet 2 of 4.

The only activity in the preferred option that will affect U.S. Waters or State Critical Areas will be the installation of five pile clusters driven to the marl to support three elevators and two escalators. All clusters will be within the footprint of the existing pile supported Building #322. Those locations are shown on the attached Sheet 3 of 4 with cross section shown on Sheet 4 of 4.

Other activities not affecting waters of the US, but relative to this project, will be general renovation of Building #322. The renovation will include a mezzanine accessed by ADA compliant elevators and escalators for boarding passengers to the cruise ships similar to the stairs and elevators serving the mezzanine of Building #325. Other landside improvements include renovation of the building's exterior and interior, canopies over pedestrian areas, and a loading dock for transferring ship stores from delivery trucks to the cruise ship. Ship store activity is now carried out in Buildings #302, #303, & #304. Building #330 (Sheet 2 of 4) will be demolished.

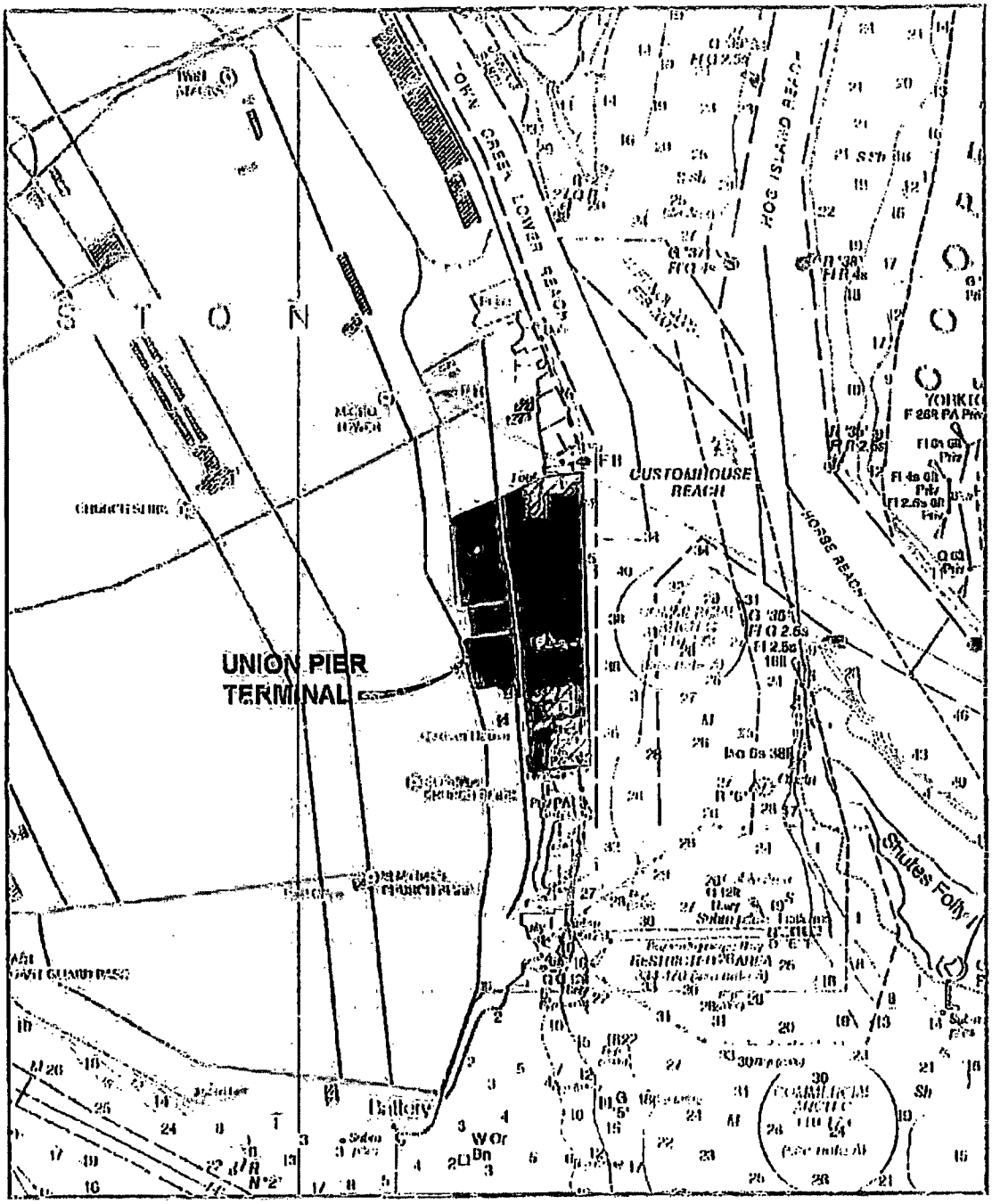
33. Overall Project Purpose...

The overall project purpose is to provide a passenger facility satisfactory for the continued handling of cruise vessels at Union Pier Terminal. The purpose of the installation of elevators and escalators (activity affecting US waters) is to provide ADA compliant access to the mezzanine level for boarding passengers.

39. Describe measures taken to avoid...

The use of Building #322 for cruise passenger operations reduces the impacts to US waters. Modifying the current Passenger Terminal (Building #325) by enlarging and improving its access to better accommodate current CBP requirements would impact wetlands immediately to the shore side of the building. Constructing a new facility on the footprint of Buildings #301 - #305 would involve, at a minimum, demolition of Buildings #301, #302, & #305 and reconstructing over water at the same site.

The use of Building #322 will also reduce the cargo capacity of Union Pier Terminal, since Building #325 (current passenger terminal) is not suitable for cargo. Its reuse would likely center around waterfront events, such as tall ships and other such water dependent activities. The use of Building #322 will also require the removal of existing rail service to Union Pier. This also affects Union Pier's cargo capability. The reduced cargo capacity and single passenger berth will result in a reduction in the number of large vessels calling Union Pier Terminal.

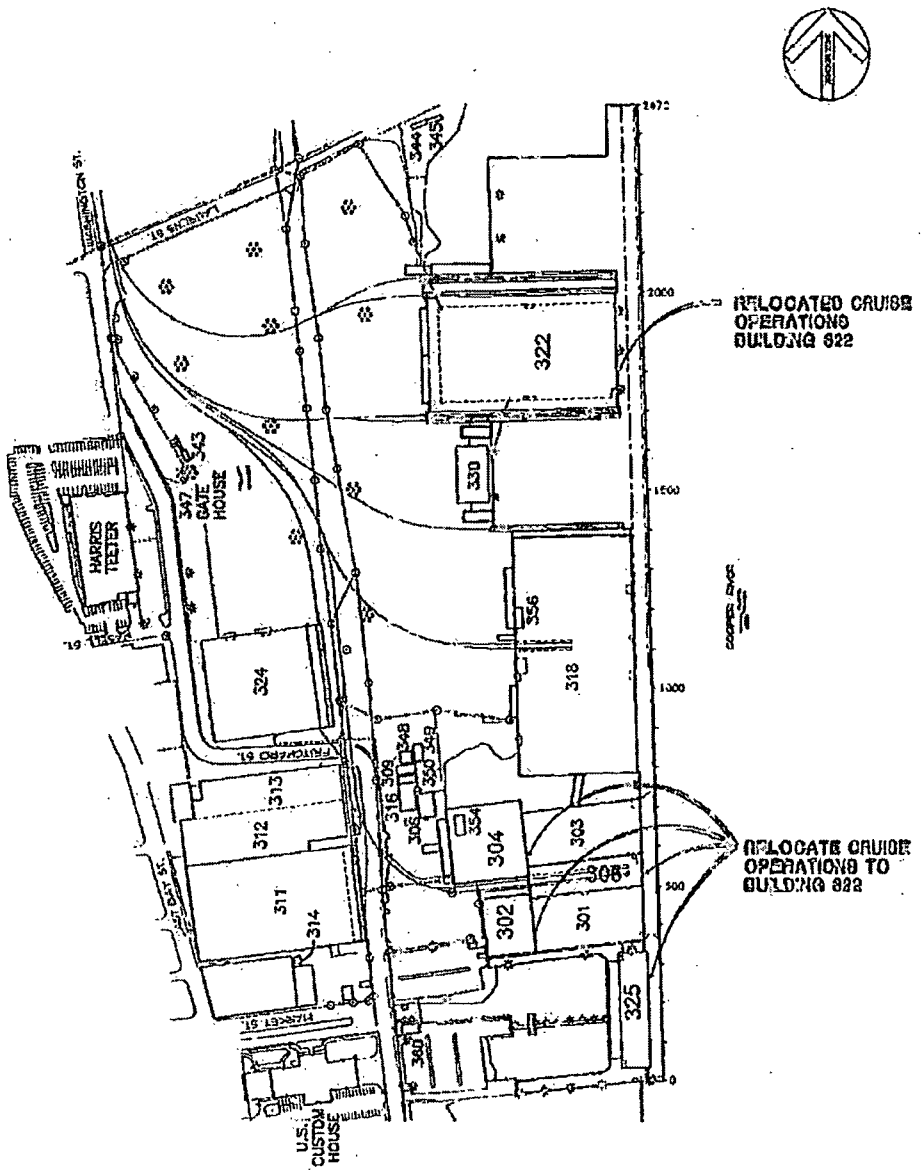


LOCATION

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E0030
FILE NAME : Upcptp1
DATE: DECEMBER 2011
SHEET 1 OF 4

SCPA 000006



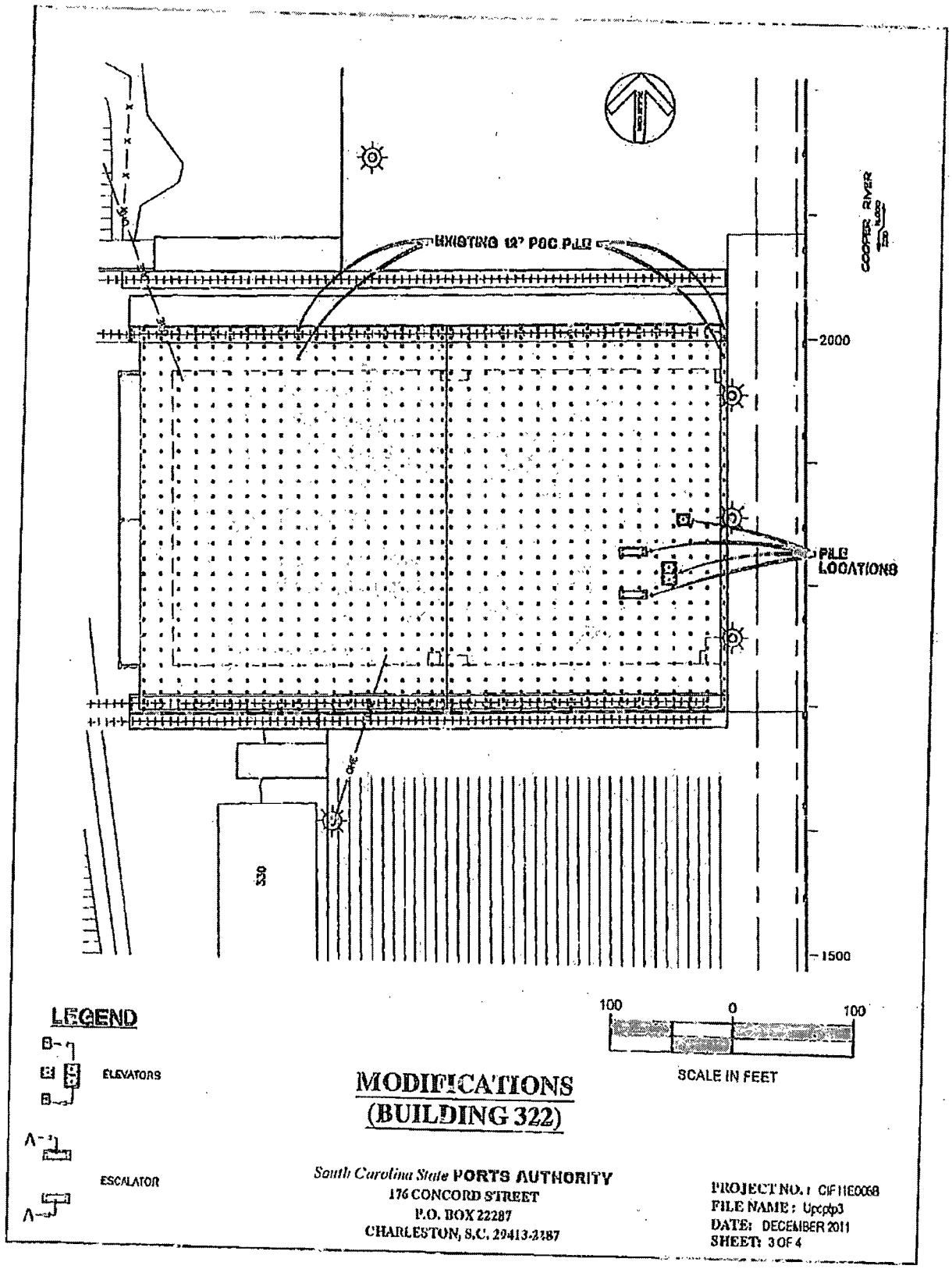
BUILDING LOCATION PLAN
UNION PIER TERMINAL

400 0 400
SCALE IN FEET

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E0068
FILE NAME: Upcplp2
DATE: DECEMBER 2011
SHEET: 2 OF 4

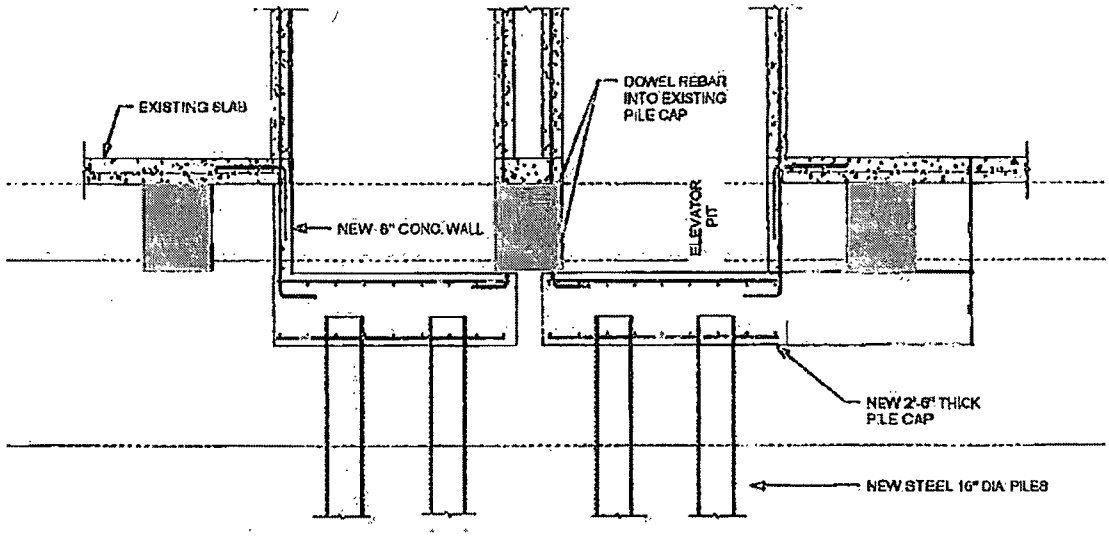
SCPA 000007



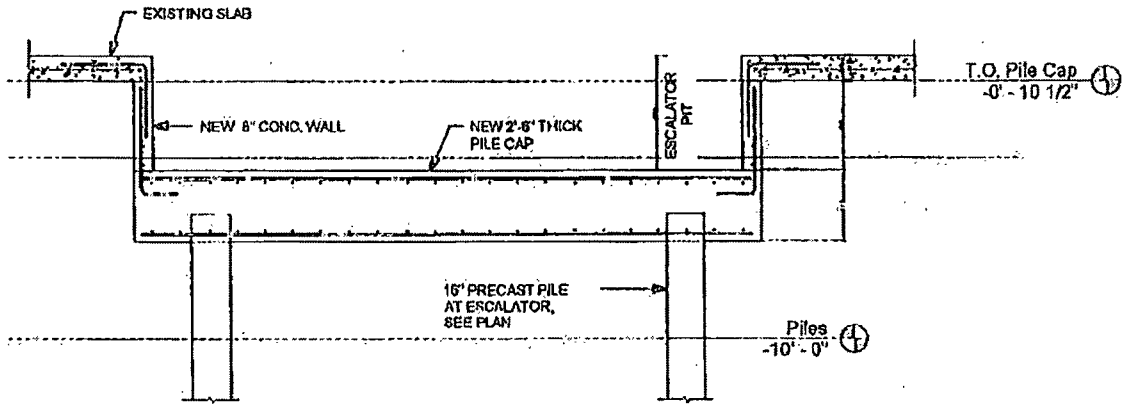
MODIFICATIONS (BUILDING 322)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2387

PROJECT NO.: CIP11E0068
FILE NAME: Upcpdp3
DATE: DECEMBER 2011
SHEET: 3 OF 4



A/E5 SECTION ELEVATOR



B/E5 SECTION ESCALATOR

MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: 0F11E0068
FILE NAME: Upcplp4
DATE: DECEMBER 2011
SHEET: 4 OF 4

EXHIBIT B

SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
PERMIT APPLICATION PUBLIC NOTICE

August 3, 2012 (Revision)

Permit Number: OCRM-12-054-B
Permit ID: 75114

The SCDHEC Office of Ocean and Coastal Resource Management has received an application for a permit for the alteration of a critical area. This application was submitted pursuant to the Coastal Zone Management Act (Act 123) of the 1977 South Carolina General Assembly. The application, in brief, is described as follows:

APPLICANT: South Carolina State Ports Authority
C/O Derrick Bellamy
PO Box 22287
Charleston, SC 29413

LOCATION: On and adjacent to Cooper River at 32 Washington Street (Future 180 Concord Street), South Carolina State Ports Authority ~ Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.

WORK: The work as proposed and shown on the attached plans consists of making improvements to an existing waterfront building. Previously, this project was advertised as a proposal to install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. This project is being revised to include proposed modifications, in accordance with the attached plans dated July 24, 2012, that are associated with this project. Specifically, these modifications consist of additional structural changes that are to be made to building 322 and the construction of two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies. The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322. **Please Note:** This notice will only address the improvements to building 322 and the construction of two covered staging areas.

This public notice is being distributed to all known interested persons and agencies to assist in developing facts on which a decision by OCRM can be based. Comments concerning the proposed work should be submitted in writing, setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition.

The decision to issue or deny a permit will be based on the individual merits of the application, the policies specified in the South Carolina Coastal Zone Management Act, and the considerations outlined in the State of South Carolina Coastal Zone Management Program. Interested parties who wish to be notified of final permit action must notify OCRM in writing of this request.

To assure review by OCRM, comments regarding this application must be received by OCRM on or before September 2, 2012. For further information please contact the project manager for this activity, Steve Brooks at 843-953-0235.

PLEASE REPLY TO:

SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

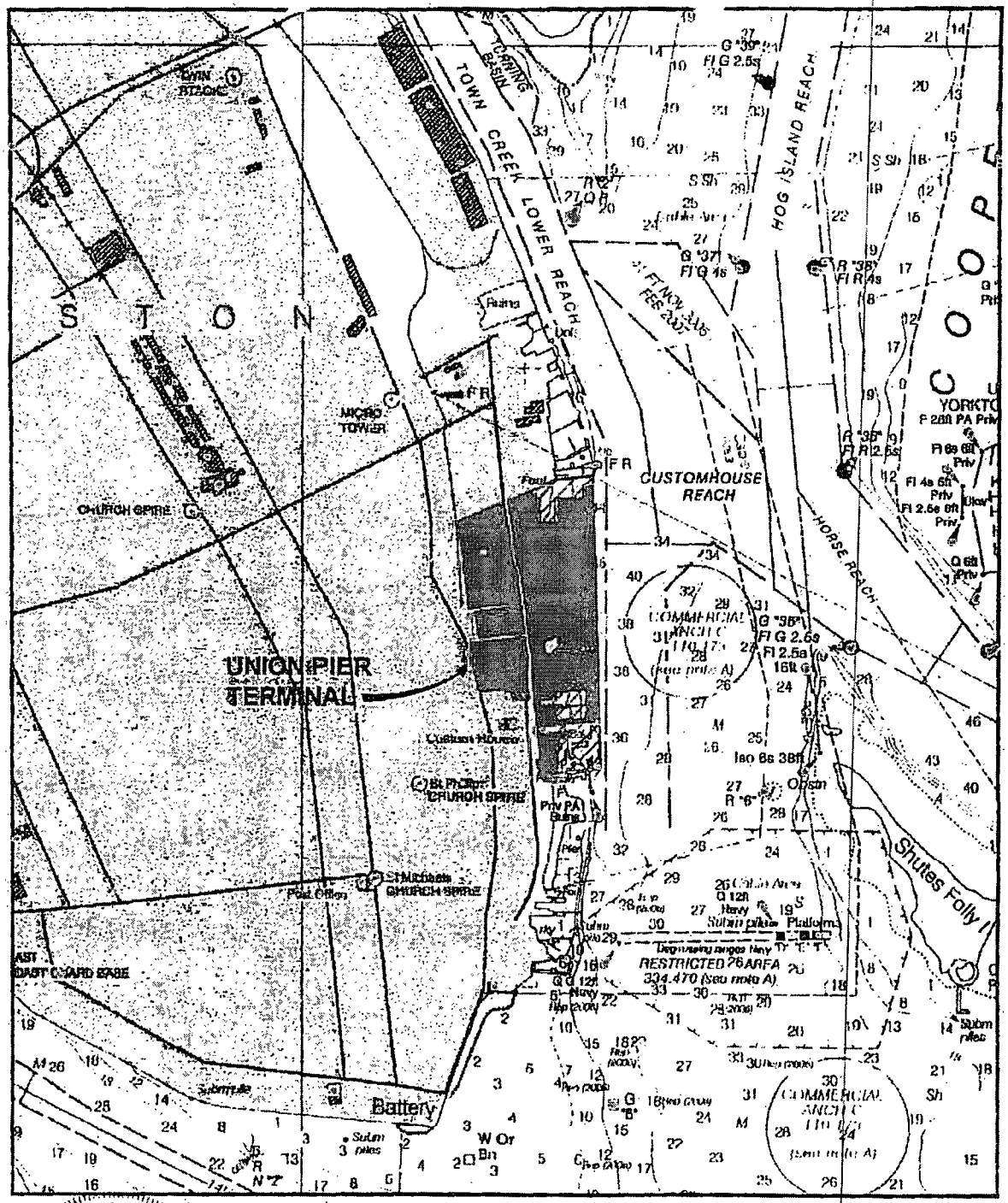
Please refer to P/N# OCRM-12-054-B BW

Steven Brooks

Steven Brooks, Wetland Section Project Manager

M

DHEC-SCPA 001568



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

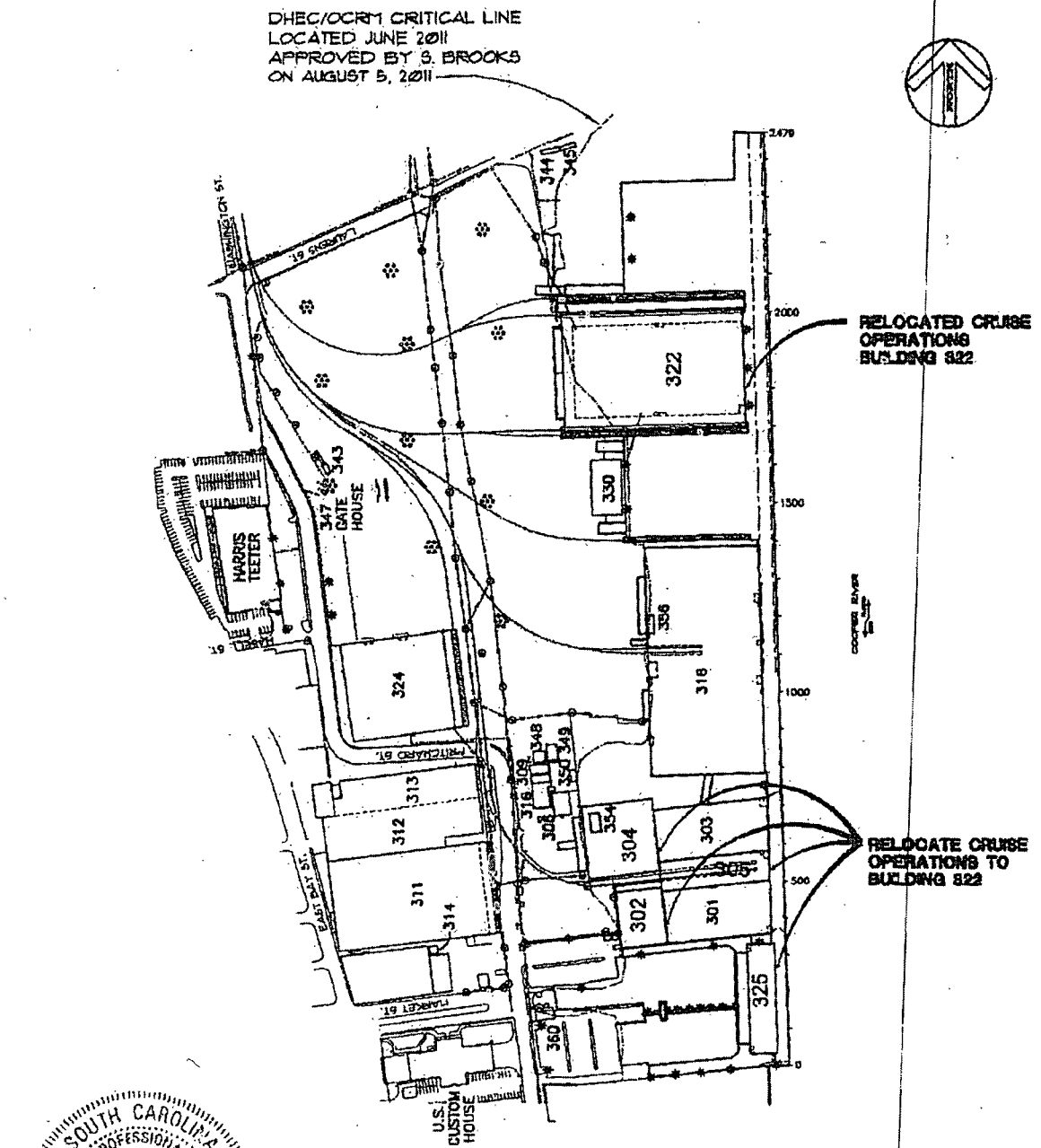
LOCATION

OCRM-12-054-B

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcptp1
DATE: JULY 2012
SHEET: 1 OF 11

DHEC-SCPA 001569



SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

Derrick L Bellamy

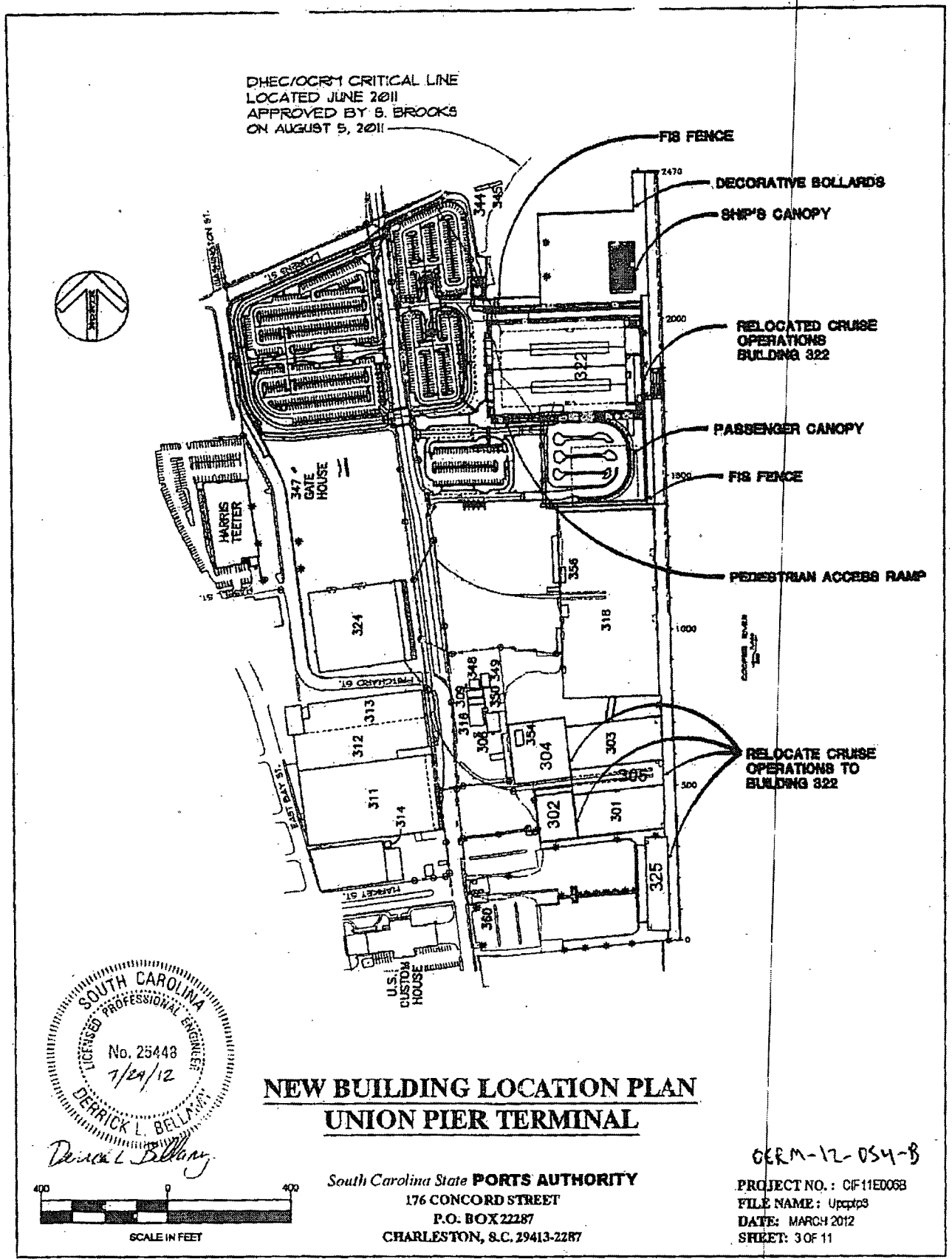
BUILDING LOCATION PLAN
UNION PIER TERMINAL

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CIF11E006B
FILE NAME: Upoptp2
DATE: MARCH 2012
SHEET: 2 OF 11

DHEC-SCPA 001570



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
7/29/12
DERRICK L. BELLAMY

NEW BUILDING LOCATION PLAN
UNION PIER TERMINAL

OCRM-12-054-B

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E0068
FILE NAME: Upcptp3
DATE: MARCH 2012
SHEET: 3 OF 11

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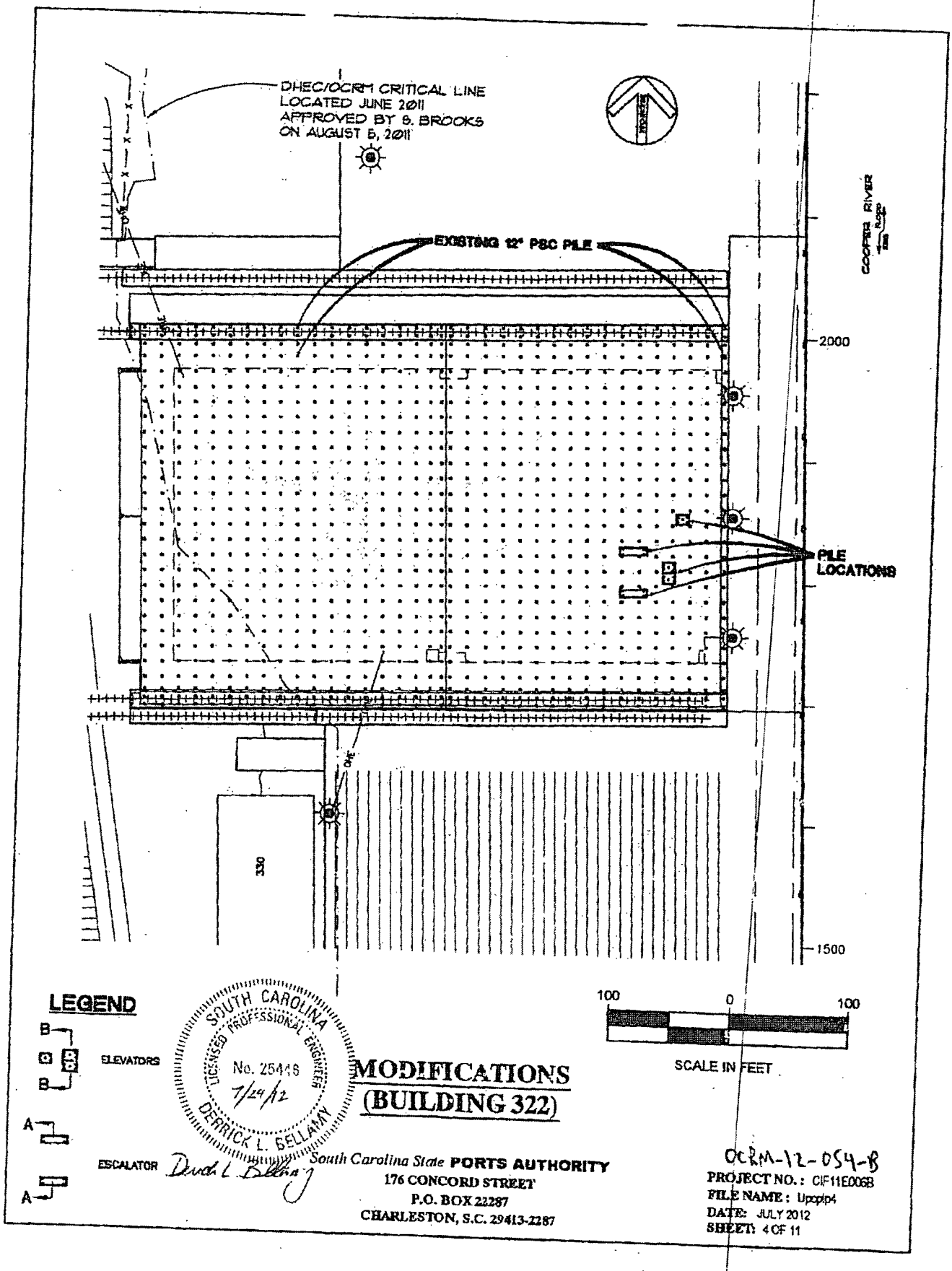

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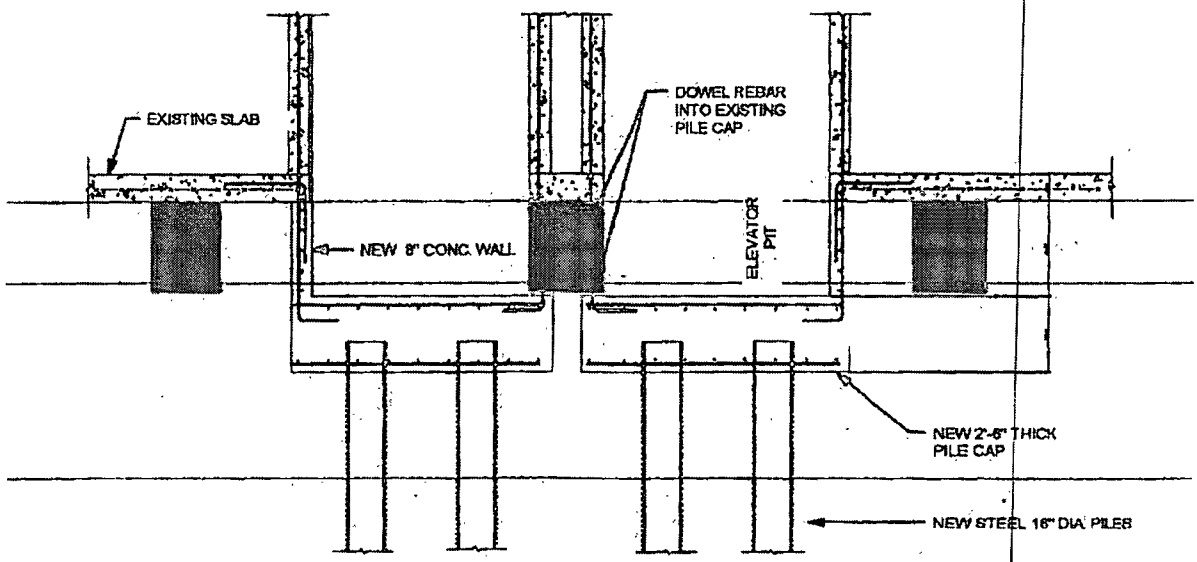

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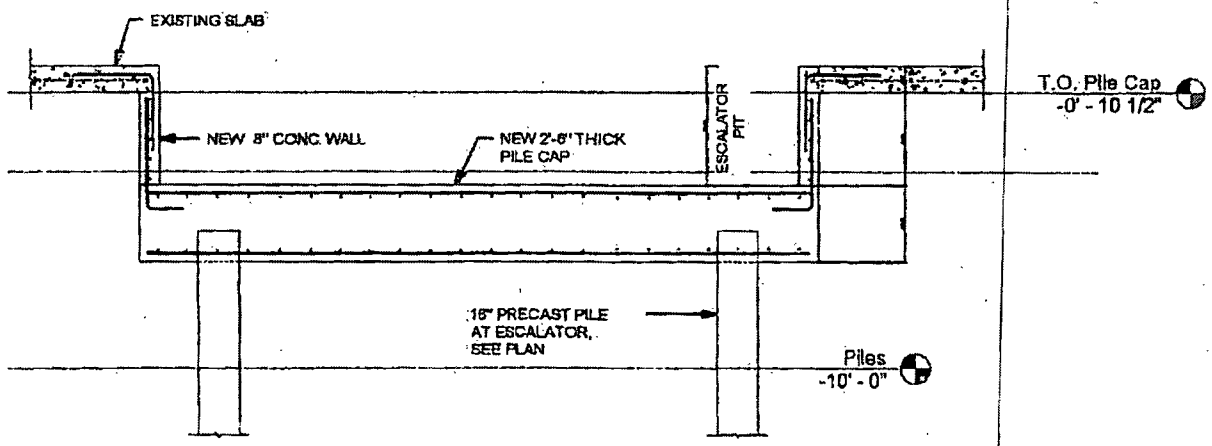


B/E5 SECTION
ESCALATOR

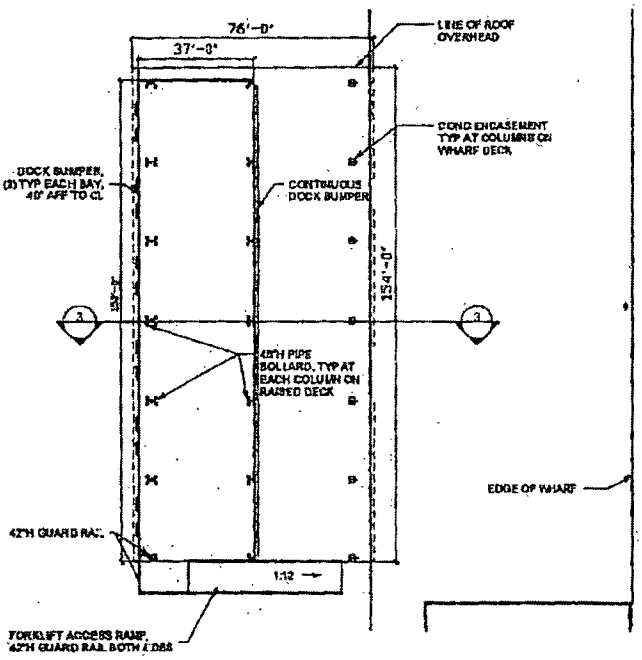
SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 25040
7/24/12
DERRICK L. BELLAMY
Derrick L. Bellamy

MODIFICATIONS (CROSS SECTION)

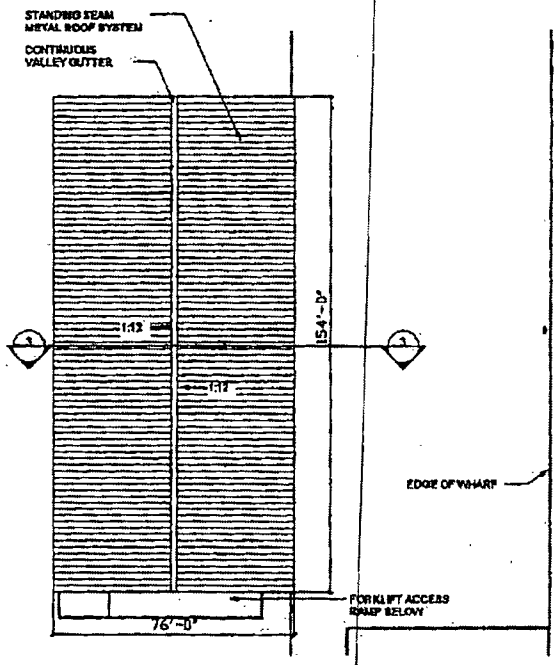
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E0066
FILE NAME: Upcptp5
DATE: JULY 2012
SHEET: 5 OF 11

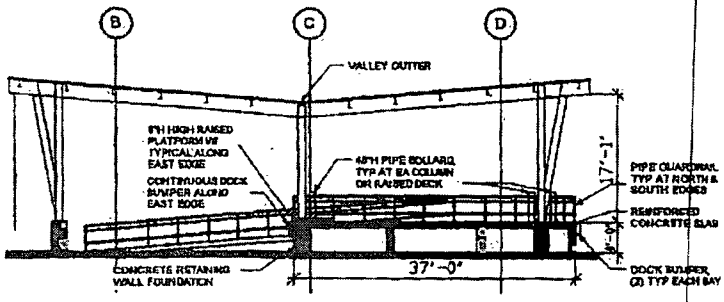
DHEC-SCPA 001573



1 STORES CANOPY FLOOR PLAN



2 STORES CANOPY ROOF PLAN



3 STORES CANOPY E-W SECTION

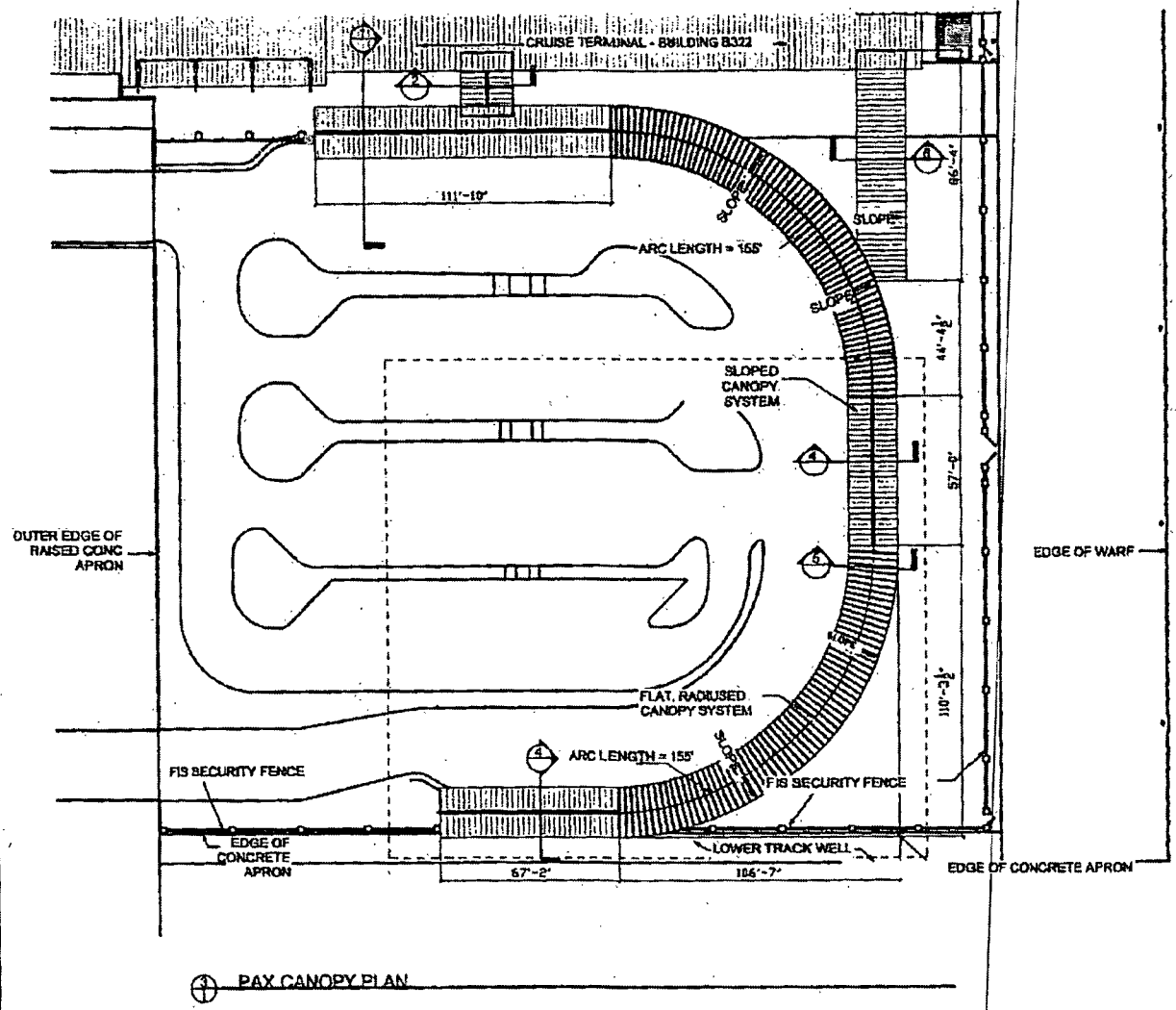
SOUTH CAROLINA
No. 25441
7/24/12
DERRICK L. BALLARD

MODIFICATIONS
NORTH APRON

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E0058
FILE NAME: Upcplp8
DATE: JULY 2012
SHEET: 6 OF 11

DHEC-SCPA 001574



4 PAX CANOPY PLAN

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

Derrick L. Bellamy

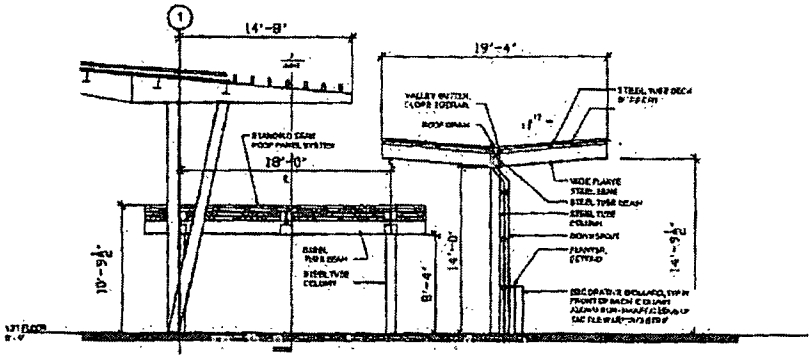
MODIFICATIONS
SOUTH APRON

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

CCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp7
DATE: JULY 2012
SHEET: 7 OF 11

DHEC-SCPA 001575

R.000852



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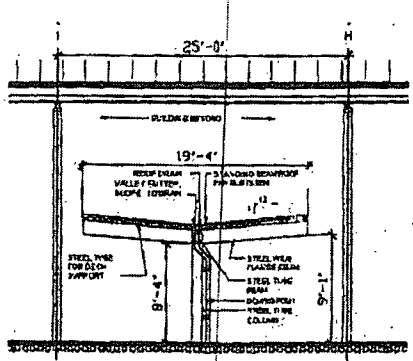

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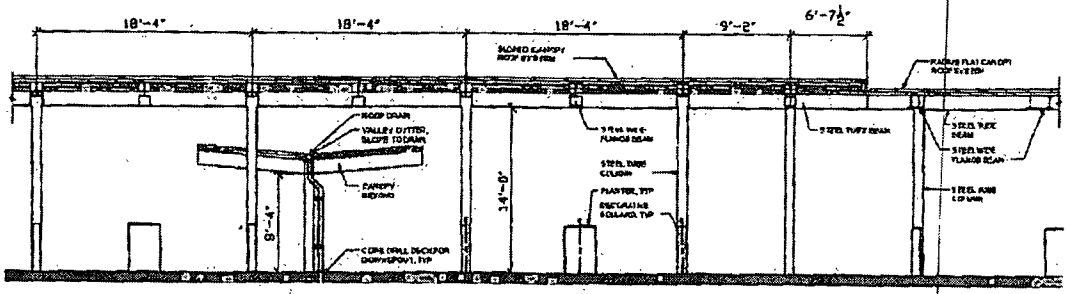

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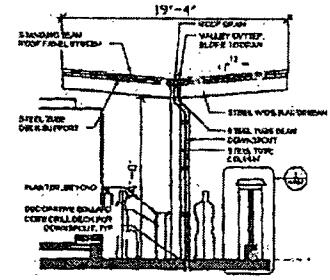

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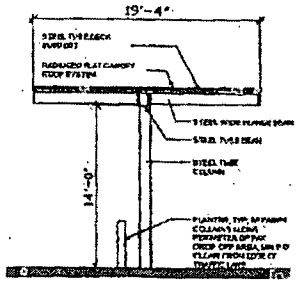

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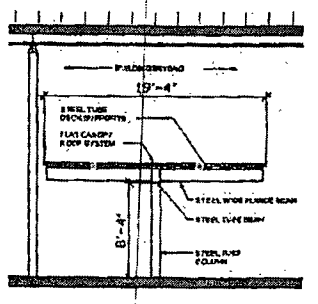

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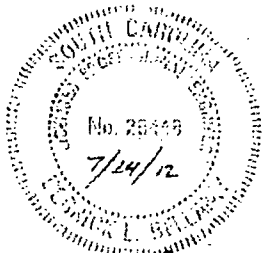


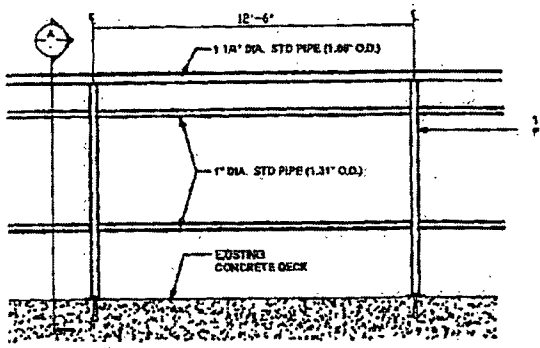
Derrick L. Bellamy

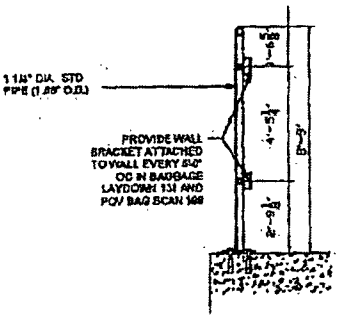
MODIFICATION
SOUTH APRON - DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

CKRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp8
DATE: JULY 2012
SHEET: 8 OF 11

DHEC-SCPA 001576





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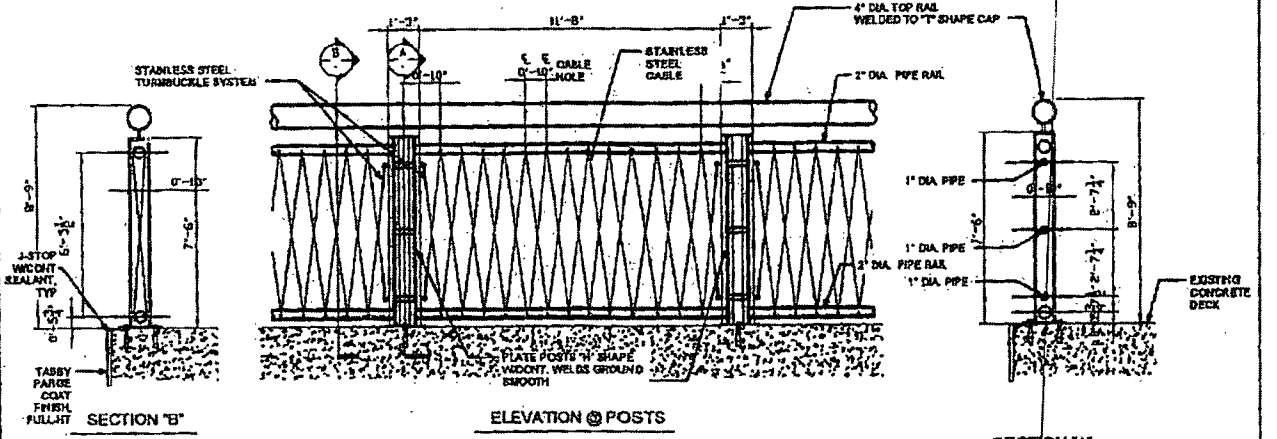

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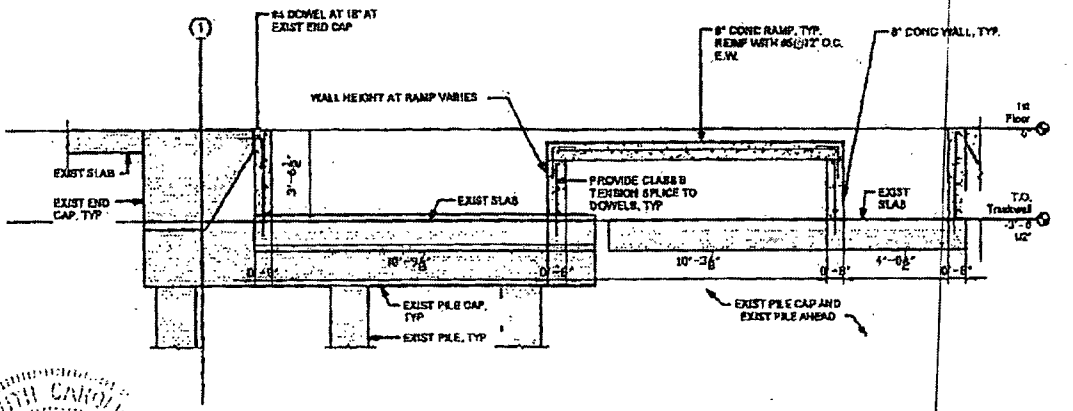


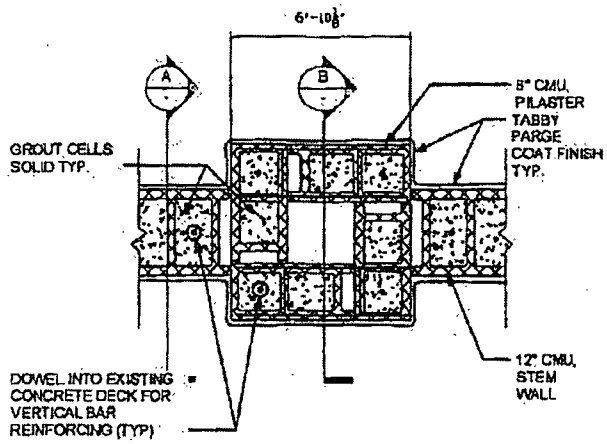
MODIFICATIONS
PEDESTRIAN ACCESS RAMP DETAIL

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

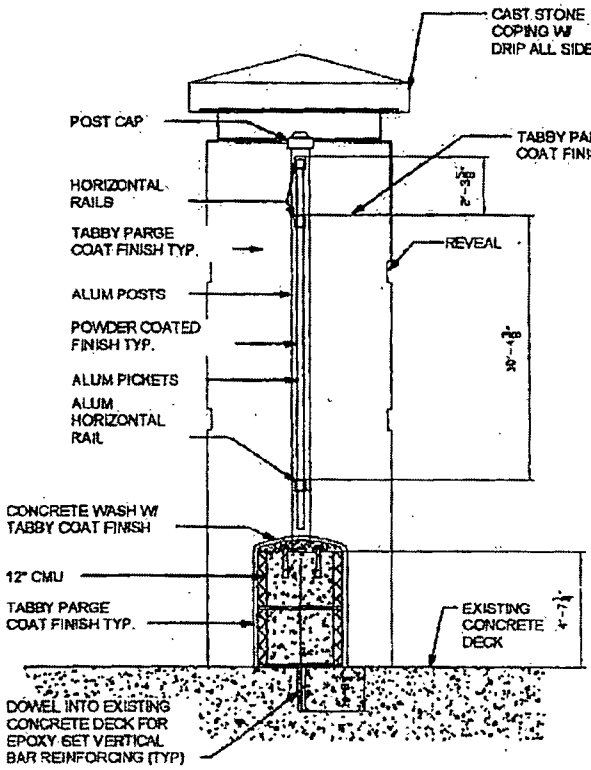
OCRM-12-054-B
PROJECT NO.: CIF11E005B
FILE NAME: Upcptp9
DATE: JULY 2012
SHEET: 9 OF 11

DHEC-SCPA 001577

R.000854



PLAN DETAIL @ MASONRY PILASTER



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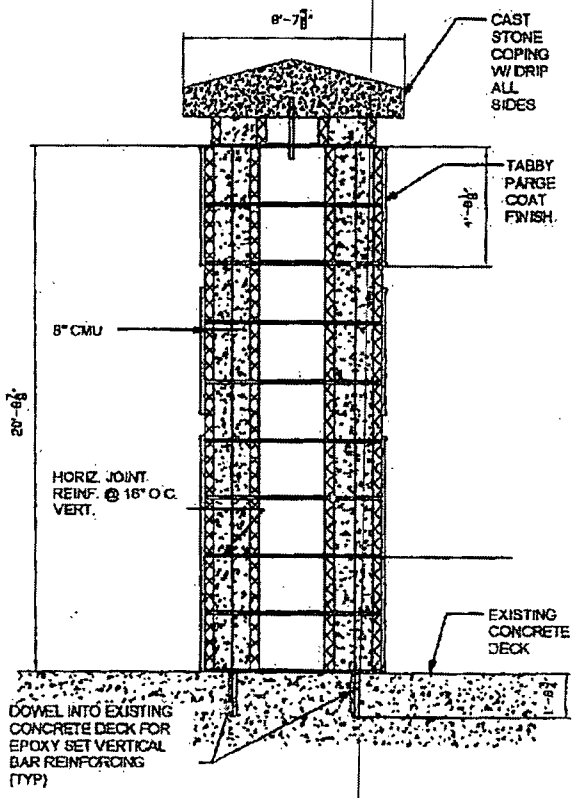


WALL SECTION "B" @ MASONRY PILASTER

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25348 7/24/12 DENNIS L. BELLAMY

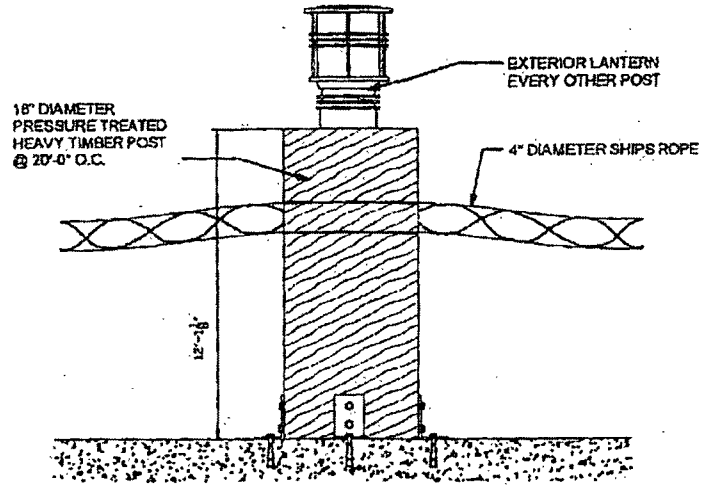
Dennis Bellamy

MODIFICATIONS
SECURITY FENCE DETAILS

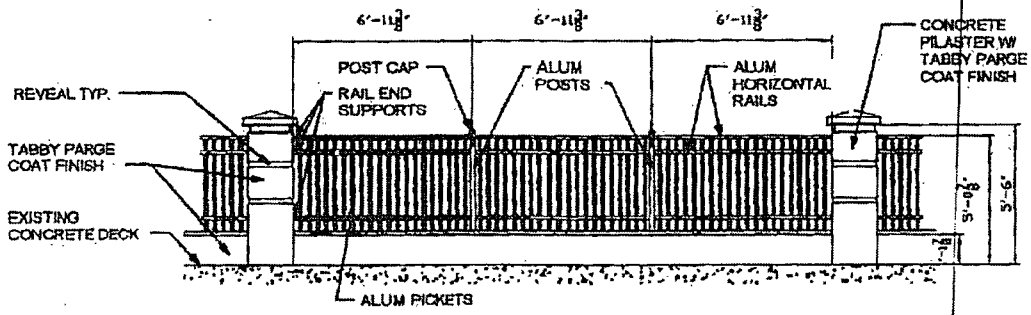
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp10
DATE: JULY 2012
SHEET: 10 OF 11

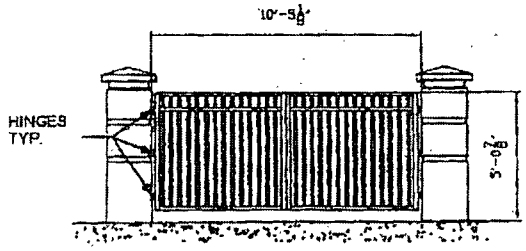
DHEC-SCPA 001578



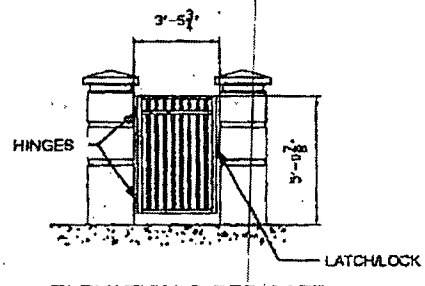
NORTH APRON DECORATIVE BOLLARDS



ELEVATION @ FIS SECURITY FENCE



ELEVATION @ ACCESS GATE



ELEVATION @ PED GATE

7/24/12

David L. Billings

MODIFICATIONS
SECURITY FENCE DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

6CRM-12-0854-B

PROJECT NO.: 0F11E006B
FILE NAME: Upgtp11
DATE: JULY 2012
SHEET: 11 OF 11

DHEC-SCPA 001579

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

TO ALL INTERESTED PARTIES

Notification of Public Notice

Enclosed are public notices issued by the SCDHEC Office of Ocean and Coastal Resource Management. All interested parties are allowed 30 days for major developments and 15 days for minor developments after receipt of the public notices to file written comments to the OCRM pertaining to the applications. Only those comments received within this period must be reviewed by the OCRM in processing the permit application. Any person wishing notification of the initial OCRM decision on any specific public notice must make written request within the designated review period for that public notice.

APPLICANT	PUBLIC NOTICE NUMBER	SUSPENSE DATE
SC State Ports Authority	OCRM-12-054-B	September 2, 2012
Jean F. McCombs	OCRM-12-161-A	August 18, 2012
Aaron Nettles	OCRM-12-164-B	September 2, 2012
Evans Townsend	OCRM-12-189-E	August 18, 2012
Evans Townsend	OCRM-12-190-E	August 18, 2012
Janet Machado	OCRM-12-191-B	August 18, 2012

OCRM-09-005-D Amendment, has been withdrawn by the applicant, Teresa Norton.

August 3, 2012

DHEC-SCPA 001580

SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
PERMIT APPLICATION PUBLIC NOTICE

March 23, 2012 (Revision)

Permit Number: OCRM-12-054-B
Permit ID: 75114

The SCDHEC Office of Ocean and Coastal Resource Management has received an application for a permit for the alteration of a critical area. This application was submitted pursuant to the Coastal Zone Management Act (Act 123) of the 1977 South Carolina General Assembly. The application, in brief, is described as follows:

APPLICANT: South Carolina State Ports Authority
C/O Derrick Bellamy
PO Box 22287
Charleston, SC 29413

LOCATION: On and adjacent to Cooper River at 32 Washington Street (Future 180 Concord Street), South Carolina State Ports Authority ~ Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.

WORK: The work as proposed and shown on the attached plans consists of making improvements to an existing waterfront building. Specifically, the applicant seeks to install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. The work as described is to provide a passenger facility satisfactory of the continued handling of cruise vessels at the Union Pier Terminal. The purpose of the pilings for the elevators and escalators is to provide ADA compliant access to the mezzanine level for boarding passengers. **Please Note:** This project is being revised to reflect the correct OCRM Critical Area Line location on the permit drawings. There are no changes to the project impact from the original notice of March 9, 2012. **The suspense date for this project will remain April 8, 2012.**

This public notice is being distributed to all known interested persons and agencies to assist in developing facts on which a decision by OCRM can be based. Comments concerning the proposed work should be submitted in writing, setting forth sufficient detail to furnish a clear understanding of the reasons for support or opposition.

The decision to issue or deny a permit will be based on the individual merits of the application, the policies specified in the South Carolina Coastal Zone Management Act, and the considerations outlined in the State of South Carolina Coastal Zone Management Program. Interested parties who wish to be notified of final permit action must notify OCRM in writing of this request.

To assure review by OCRM, comments regarding this application must be received by OCRM on or before April 8, 2012. For further information please contact the project manager for this activity, Steve Brooks at 843-953-0235.

PLEASE REPLY TO:

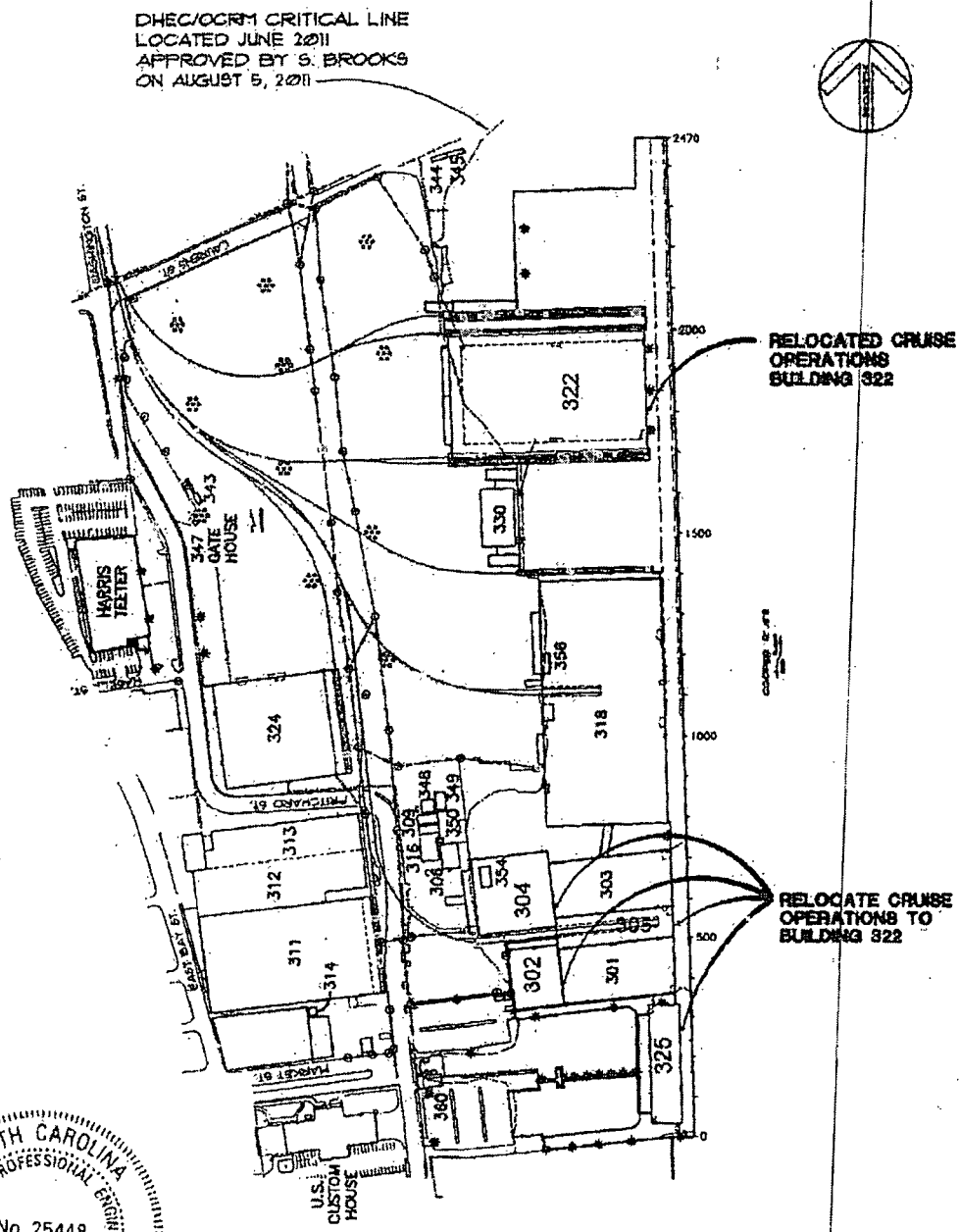
SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

Please refer to P/N# OCRM-12-054-B

[illegible] Wetland Section Coordinator

M

DHEC-SCPA 001581



SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
3/19/12
DERRICK L. BELLAMY

OCRM-D-054-B

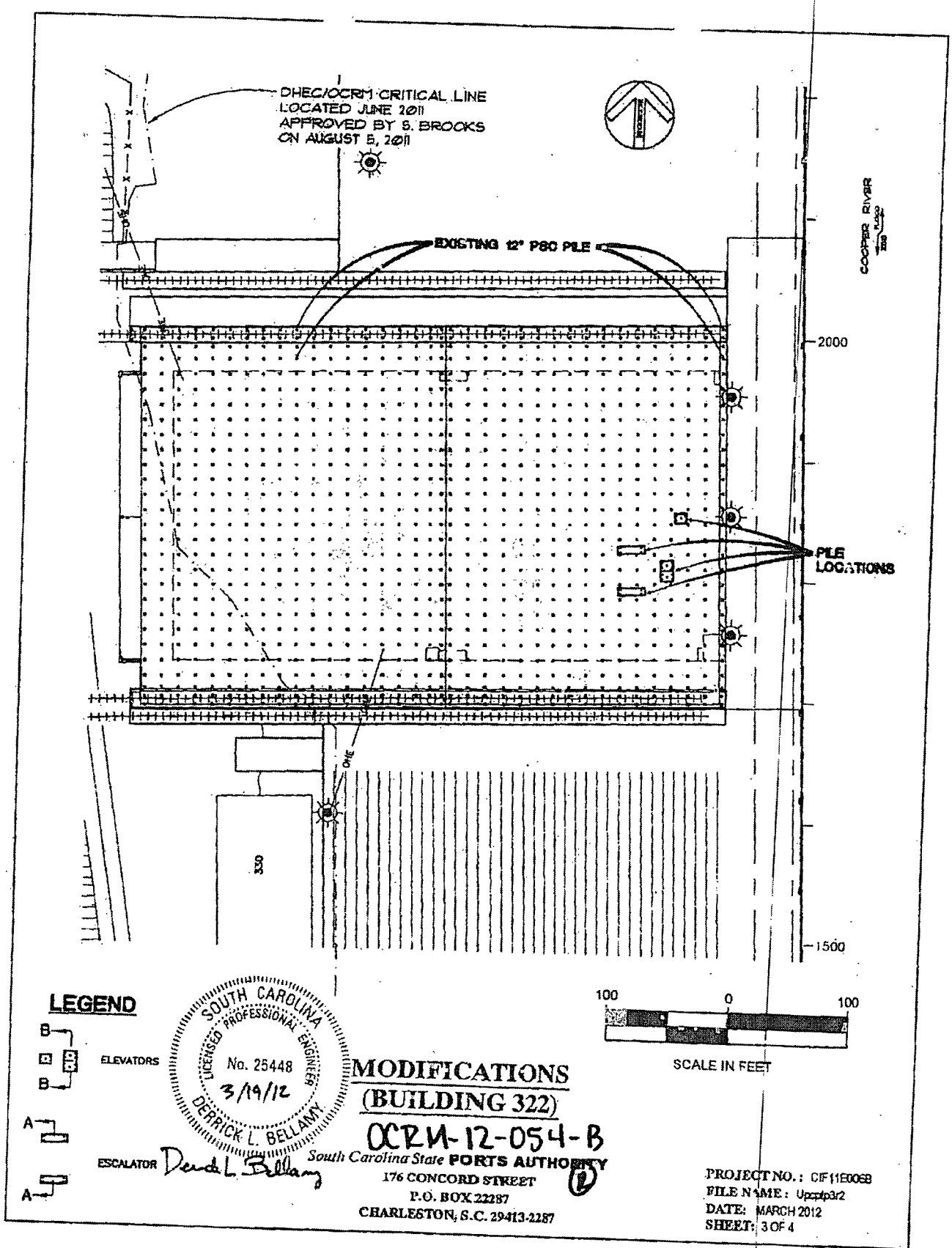
BUILDING LOCATION PLAN
UNION PIER TERMINAL

400 0 400
SCALE IN FEET

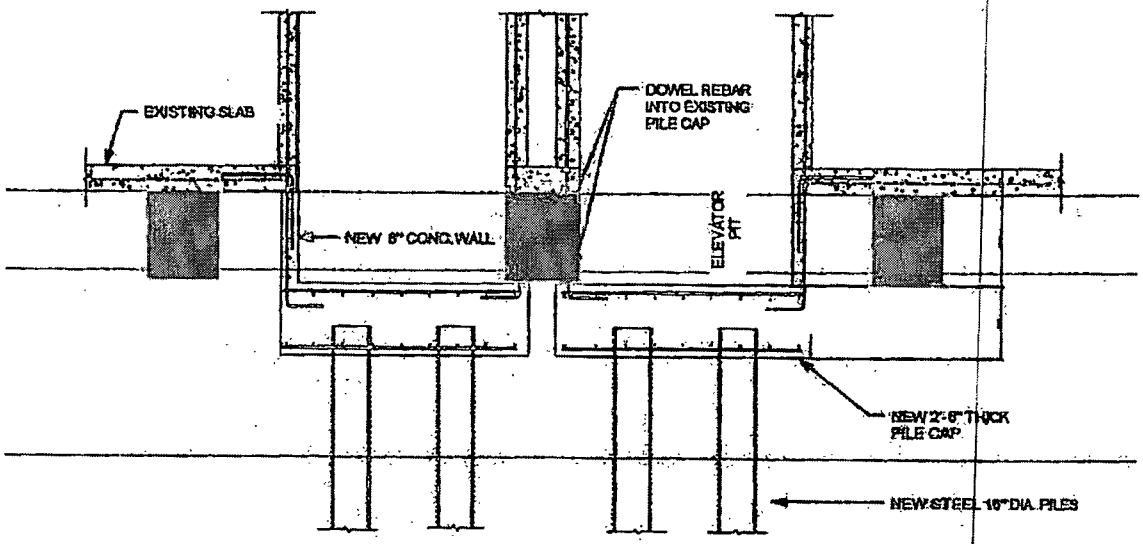
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E0068
FILE NAME: Upcplp2r2
DATE: MARCH 2012
SHEET: 2 OF 4

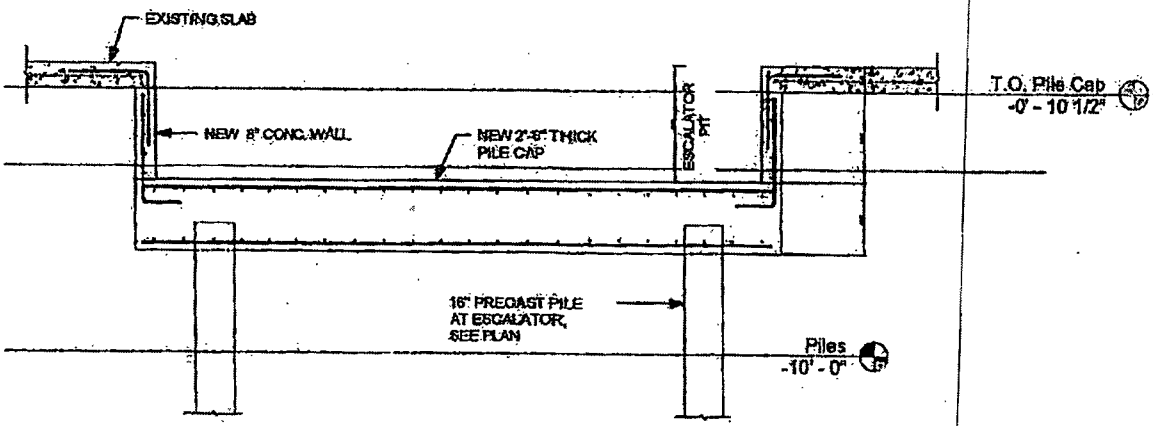
DHEC-SCPA 001582



DHEC-SCPA 001583



A SECTION ELEVATOR



B SECTION ESCALATOR

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER
No. 25448
2/21/12
DERRICK L. BELLAMY

Derrick L. Bellamy

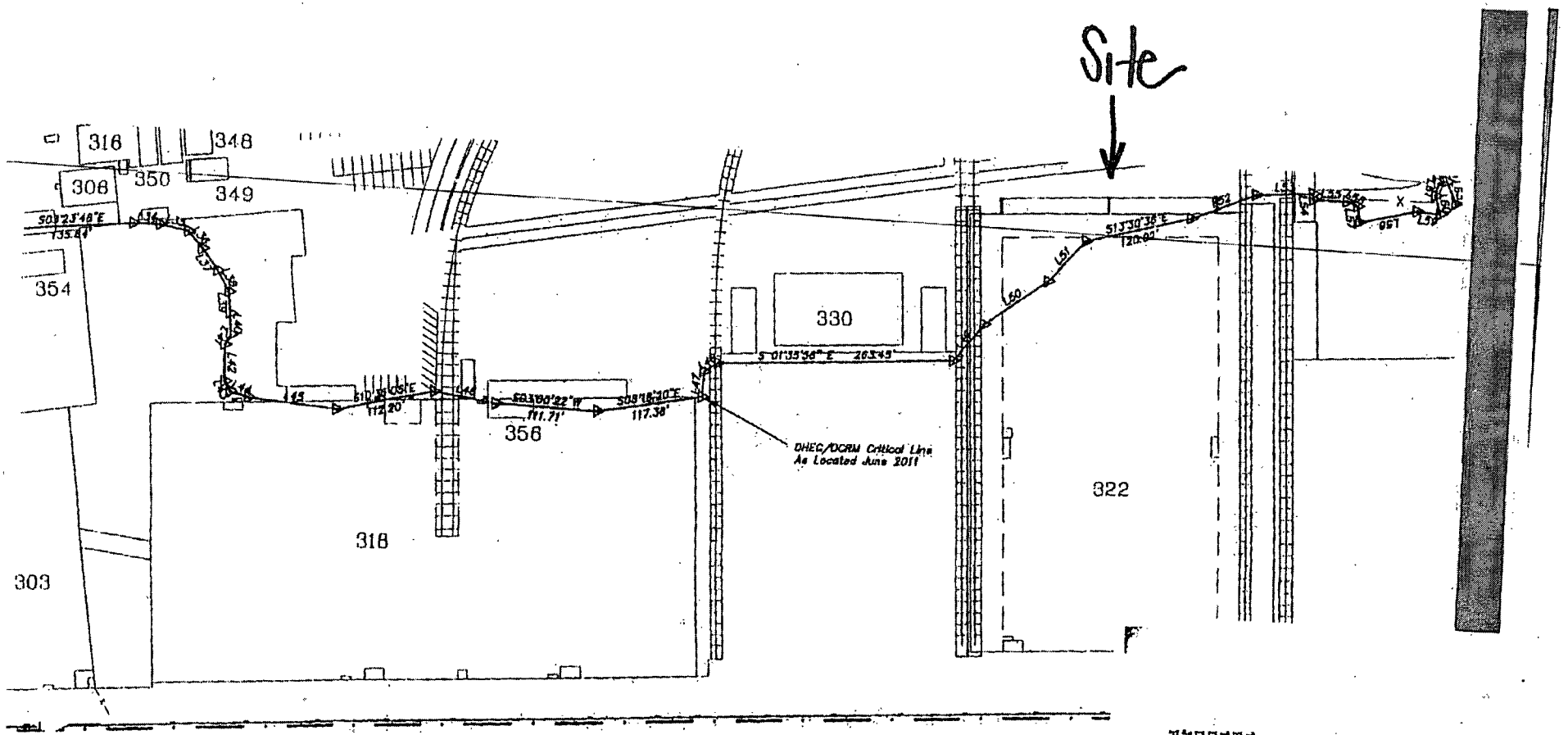
MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CF-11E0068
FILE NAME: Upcptp4
DATE: DECEMBER 2011
SHEET: 4 OF 4

DCRM-12-054-B (P)

DHEC-SCPA 001584



SC STATE PORTS Authority

OCRM-12-054-B

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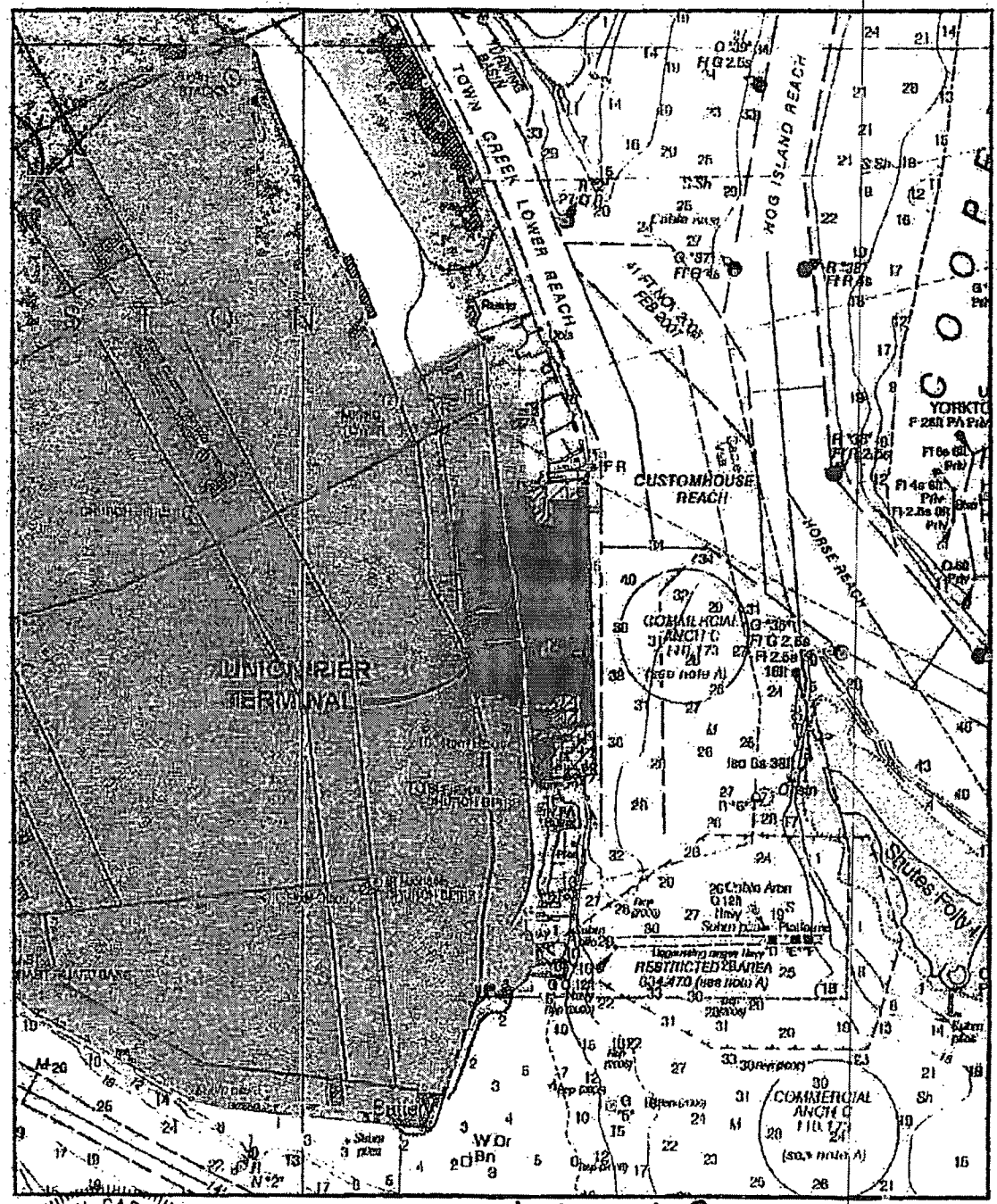

OCRM-12-054-B

LOCATION (2)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CF11E006B
FILE NAME: Upptpt1
DATE: DECEMBER 2011
SHEET: 1 OF 4

SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 25448
2/21/12
DERRICK L. BELLAMY

Derrick L. Bellamy

RECEIVED
DHEC-SCPA 001586
MAR 02 2012

D H E C

PROMOTE PROTECT PROSPER

C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment.

TO ALL INTERESTED PARTIES

Notification of Public Notice

Enclosed are public notices issued by the SCDHEC Office of Ocean and Coastal Resource Management. All interested parties are allowed 30 days for major developments and 15 days for minor developments after receipt of the public notices to file written comments to the OCRM pertaining to the applications. Only those comments received within this period must be reviewed by the OCRM in processing the permit application. Any person wishing notification of the initial OCRM decision on any specific public notice must make written request within the designated review period for that public notice.

APPLICANT	PUBLIC NOTICE NUMBER	SUSPENSE DATE
Estate of Hilda G. Boltjes	OCRM-11-106-B	April 07, 2012
Michael Heidingsfelder	OCRM-12-033-E	April 07, 2012
SC State Ports Authority	OCRM-12-054-B	April 08, 2012
Chuck Richardson	OCRM-12-057-S	April 07, 2012
Palmetto Bluff Uplands, LLC	OCRM-12-061-L	April 22, 2012
Nimrod 102, LLC	OCRM-12-064-E	April 07, 2012
Charles C. Wannamaker, II	OCRM-12-065-M	April 07, 2012
Dewey Wise	OCRM-12-066-M	April 07, 2012
Agnes L. Baldwin	OCRM-12-067-M	April 07, 2012
Clay M. Rice	OCRM-12-068-G	April 07, 2012
Florence Kirchoffer	OCRM-12-069-M	April 07, 2012
Tracy Loggins	OCRM-12-070-M	April 07, 2012

March 23, 2012

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405 • Phone: (843) 953-0200 • Fax: (843) 953-0207 • www.scdhec.gov

DHEC-SCPA-001587

SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
PERMIT APPLICATION PUBLIC NOTICE

March 9, 2012

Permit Number: OCRM-12-054-B
Permit ID: 75114

The SCDHEC Office of Ocean and Coastal Resource Management has received an application for a permit for the alteration of a critical area. This application was submitted pursuant to the Coastal Zone Management Act (Act 123) of the 1977 South Carolina General Assembly. The application, in brief, is described as follows:

APPLICANT: South Carolina State Ports Authority
C/O Derrick Bellamy
PO Box 22287
Charleston, SC 29413

LOCATION: On and adjacent to Cooper River at 32 Washington Street (Future 180 Concord Street), South Carolina State Ports Authority ~ Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.

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The decision to issue or deny a permit will be based on the individual merits of the application, the policies specified in the South Carolina Coastal Zone Management Act, and the considerations outlined in the State of South Carolina Coastal Zone Management Program. Interested parties who wish to be notified of final permit action must notify OCRM in writing of this request.

To assure review by OCRM, comments regarding this application must be received by OCRM on or before April 8, 2012. For further information please contact the project manager for this activity, Steve Brooks at 843-953-0235.

PLEASE REPLY TO:

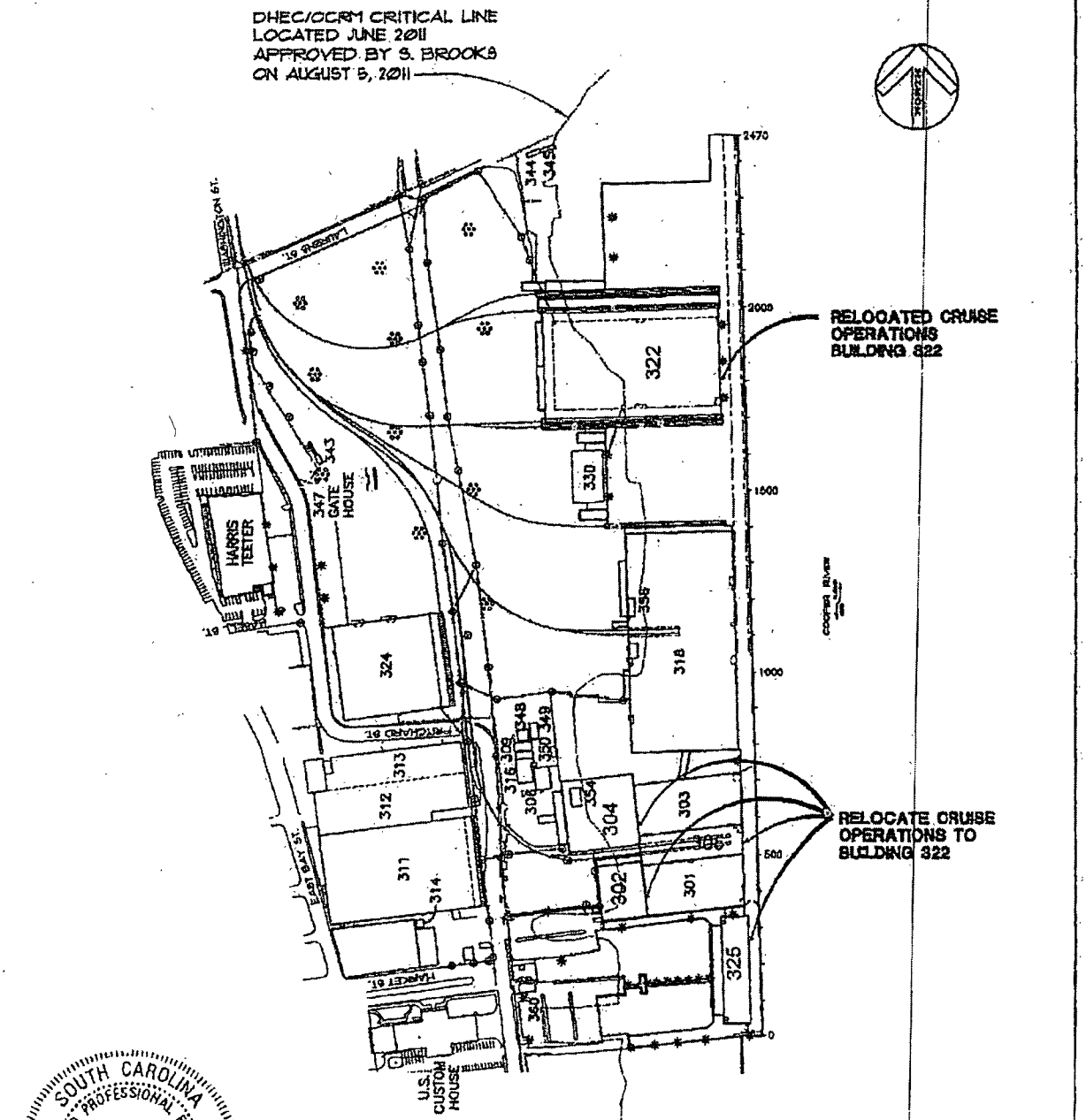
SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
1362 McMillan Avenue, Suite 400
Charleston, South Carolina 29405

Please refer to P/N# OCRM-12-054-B

Tess Trumbull, Wetland Section Coordinator

M

DHEC-SCPA 001588



SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER
No. 25448
2/21/12
DERRICK L. BELLAMY

Derrick L. Bellamy

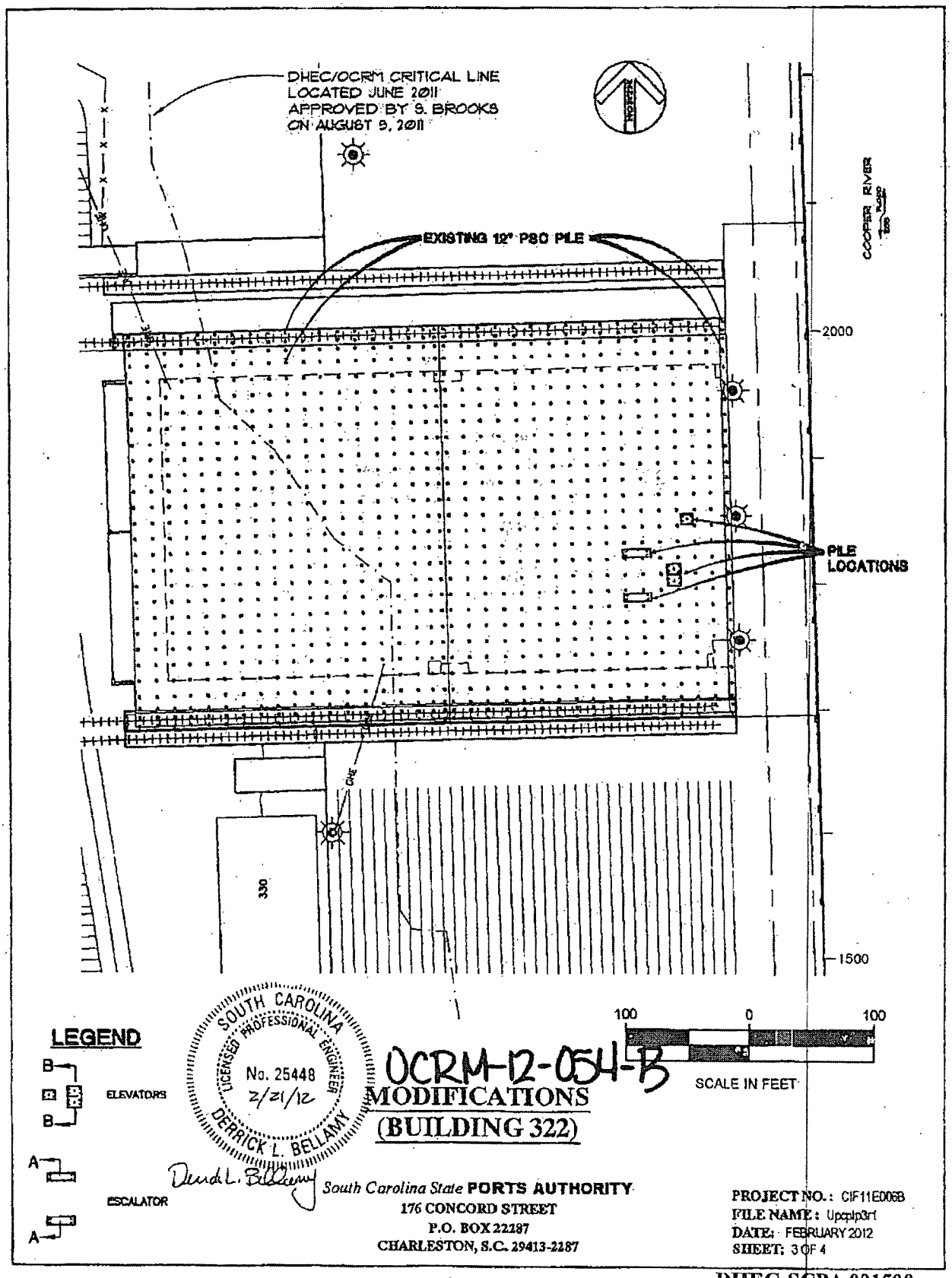
400 0 400
SCALE IN FEET

OCRM-12-054-B
BUILDING LOCATION PLAN
UNION PIER TERMINAL

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp2rt
DATE: FEBRUARY 2012
SHEET: 2 OF 4

DHEC-SCPA 001589



OCRM-12-054-B

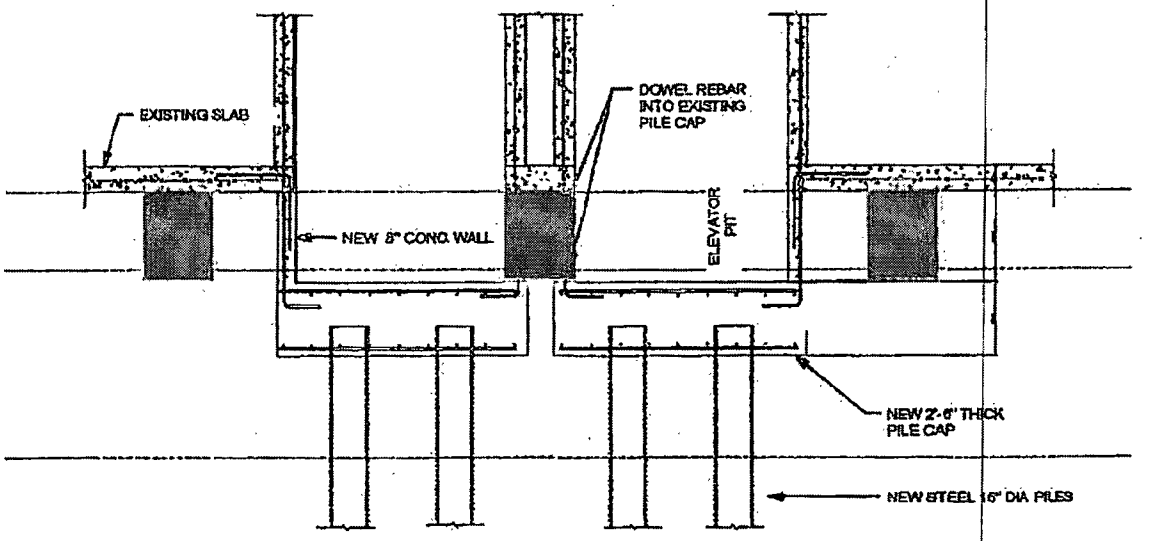
MODIFICATIONS

(BUILDING 322)

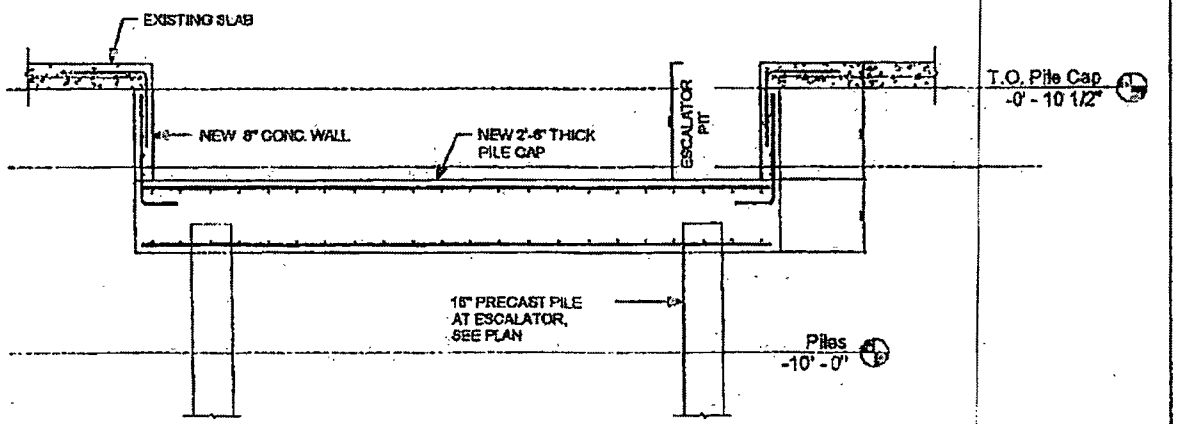
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp3rf
DATE: FEBRUARY 2012
SHEET: 3 OF 4

DHEC-SCPA 001590



A SECTION ELEVATOR



B SECTION ESCALATOR

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 2/21/12 DERRICK L. BELLAMY

Derrick L. Bellamy

MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CF11E006B
FILE NAME: Upcplp4
DATE: DECEMBER 2011
SHEET: 4 OF 4

OCRM-12-054-B

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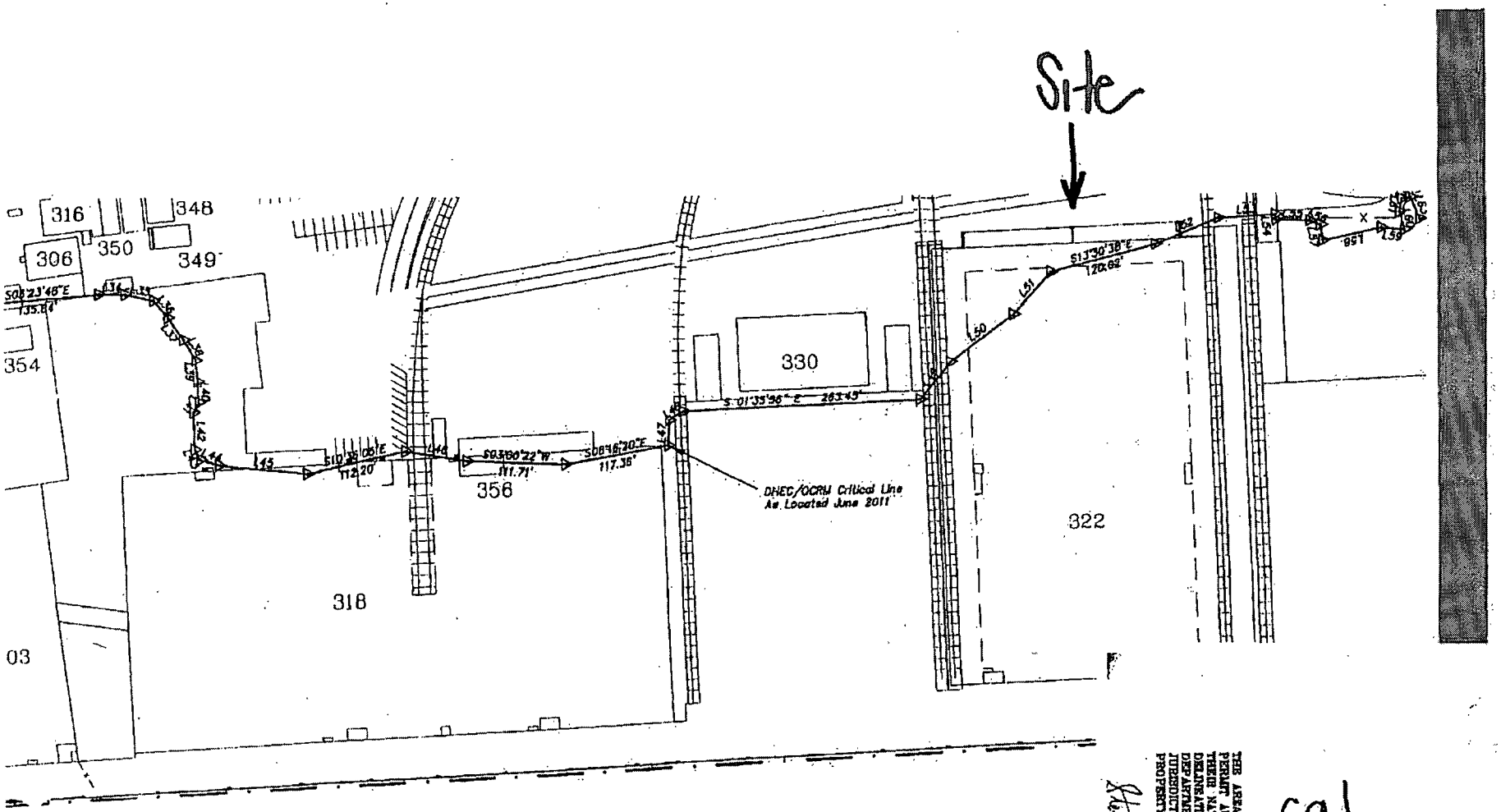

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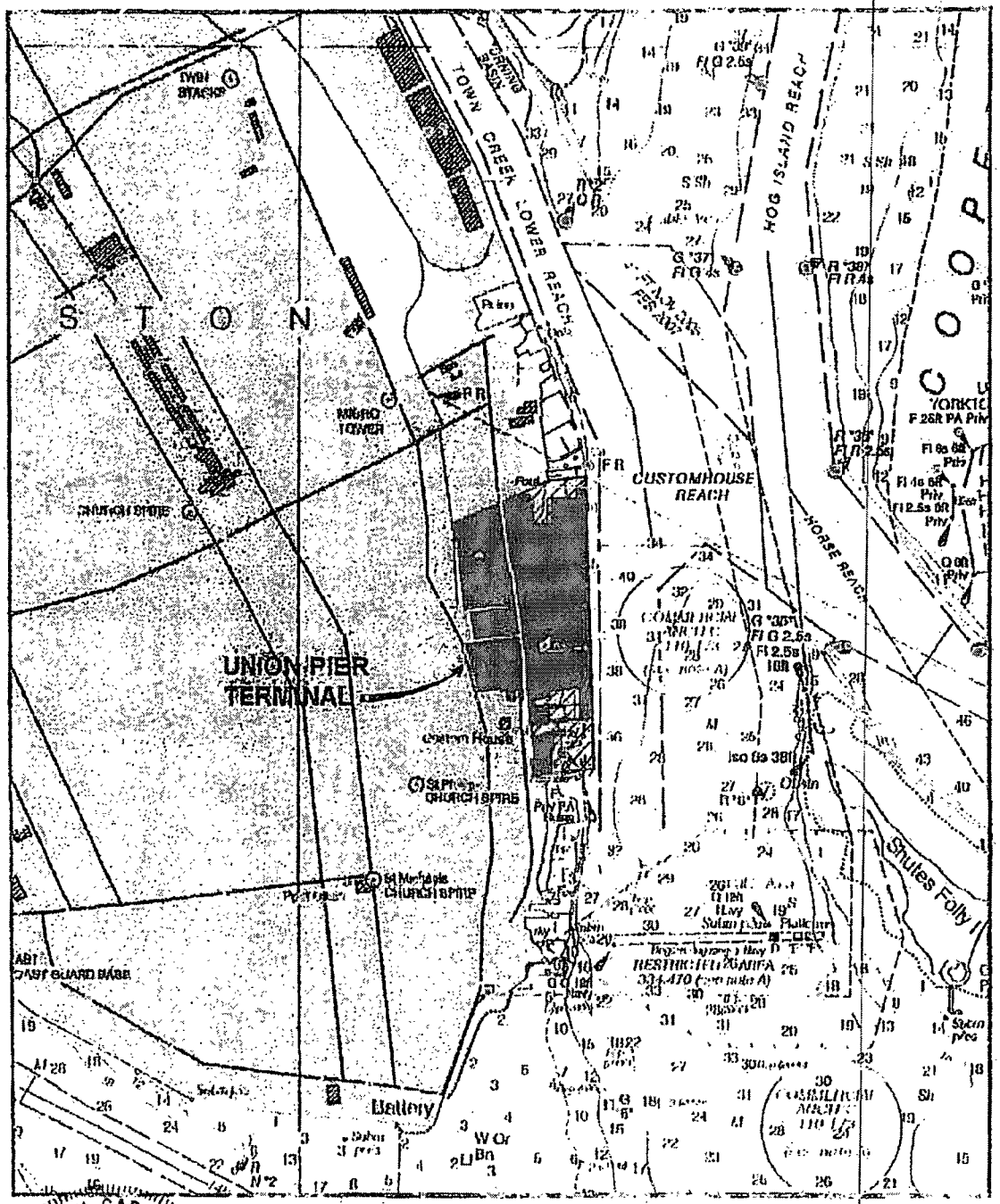

SOUTH CAROLINA
LICENSED PROFESSIONAL ENGINEER
No. 25448
3/21/12
DERRICK L. BELLAMY

Derrick L. Bellamy

LOCATION

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcpt1
DATE: DECEMBER 2011
SHEET: 1 OF 4

RECEIVED
DHEC-SCPA 001593
MAR 02 2012

EXHIBIT C

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

REPLY TO
ATTENTION OF

RECEIVED
APR 24 2012
DHEC - OCRM
CHARLESTON OFFICE

April 20, 2012

Regulatory Division

Mr. Derrick L. Bellamy
South Carolina State Ports Authority
Post Office Box 22287
Charleston, South Carolina 29413-2287

Dear Mr. Bellamy:

This letter is in response to a Pre-Construction Notification (PCN) dated January 23, 2012, which was determined to be complete on April 16, 2012. By submittal of the PCN, you requested verification that the proposed project is authorized by a Department of the Army Nationwide Permit.

The PCN contains the following identifying information for this project. The work affecting waters of the United States is part of an overall project known as Building No. 322 Renovation. The project involves impacts to not more than 0.01 acres of waters of the United States associated with the installation of additional pilings underneath an existing pile supported structure. The project is located on the Cooper River at Union Pier Terminal, 32 Washington Street in the City of Charleston, Charleston County, South Carolina. The PCN also includes the following supplemental information:

a. Drawing sheets 1 and 4 of 4 titled "Project No.: CIF11E006B; File Name: Upcptp1" and dated December 2011, and sheets 2 and 3 of 4 titled "Project No.: CIF11E006B; File Name: Upcptp1" and dated March 2012;

b. The location of the DHEC/OCRM Critical Line is shown on sheet 3 of 4. Based on this information, the proposed pilings are located in navigable waters of the United States.

Based on a review of the PCN, including the supplemental information indicated above, it has been determined that the proposed activity will result in minimal individual and cumulative adverse environmental effects and is not contrary to the public interest. Furthermore, the activity meets the terms and conditions of Department of the Army Nationwide Permit # 3.

As of the date of this letter, the Corps has not received Section 401 Water Quality Certification (WQC) and the Coastal Zone Management Act (CZMA) consistency determination from the State of South Carolina for the NWPs; therefore, **this NWP verification is provisional**. The permittee must either obtain individual WQC and/or CZMA consistency determinations from the State prior to beginning work or the permittee may elect to postpone beginning work until the State has reached a final position on WQC and CZMA for the NWPs.

For this authorization to remain valid, the project must comply with the enclosed Nationwide Permit General Conditions and the following special conditions:

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APR 24 2012
DHEC - OCRM
CHARLESTON OFFICE

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful and knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

2. That impacts to aquatic areas do not exceed those specified in the above mentioned PCN, including any supplemental information or revised permit drawings that were submitted to the Corps by the permittee;

3. That the construction, use, and maintenance of the authorized activity is in accordance with the information given in the PCN, including the supplemental information listed above, and is subject to any conditions or restrictions imposed by this letter;

4. That the permittee shall submit the attached signed compliance certification to the Corps within 30 days following completion of the authorized work.

5. That the permittee agrees to provide all contractors associated with construction of the authorized activity a copy of the permit and drawings. A copy of the permit will be available at the construction site at all times.

6. That the permittee shall submit a signed compliance certification to the Corps within 60 days following completion of the authorized work and any required mitigation. The certification will include:

a) A copy of this permit;
b) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;
c) A statement that any required mitigation was completed in accordance with the permit conditions;
d) The signature of the permittee certifying the completion of the work and mitigation.

7. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

8. It is recognized that this structure is to be constructed on/or adjacent to an area subject to a prism and/or disposal easement held by the United States in perpetuity in conjunction with a Congressionally authorized project for the maintenance and improvement of Charleston Harbor. This permit does not convey any property rights either in real estate or material or any exclusive use privileges; nor does it relinquish any right the United States has for the use of its easement or the maintenance and future widening or deepening of Charleston Harbor pursuant to its easement rights.

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APR 24 2012
DHEC - OCRM
CHARLESTON OFFICE

9. It is understood and agreed that if the District Commander determines that the structure shall in any way in the future conflict with the improvement, operation, maintenance and widening or deepening of Charleston Harbor, the owners themselves, their heirs, successors and assigns will remove said structure within 45 days from the date that written notice is given by the District Commander, and there shall be no entitlement to compensation from the United States for damage or injury.

10. Conveyance of this permit applies only to the structure authorized and does not authorize the construction of any permanent structure or any structure suitable for habitation or any utility leading either to permanent structures suitable for habitation or to permanent structures within the bounds of areas on which the Corps of Engineers enjoys easement rights.

11. That the permittee agrees that no permanent structures, beyond those authorized by this document, will be placed on the prism easement or on any adjacent disposal easement without written approval of the District Commander.

12. That the Secretary of the Army, representing the United States of America, hereby consents to the herein authorized facilities or structures to be located on or across easement lands vested in the United States of America for the construction and operation of Charleston Harbor. The permittee shall not engage in any act which may interfere with or abridge the easement interests of the United States, except those specifically authorized herein.

This verification is valid until the Nationwide Permits (NWP) expire or for two (2) years, whichever comes first. The time specified for this authorization will remain valid if the Nationwide Permit(s) is reissued without modification, or the activity complies with any subsequent modification; however, the provisions of 33 CFR 330.6(b) will apply if the Nationwide Permit expires, is suspended or revoked, or is modified such that the activity no longer complies with the original terms and conditions. In general, these provisions provide that if the work authorized by this letter has commenced in accordance with the requisite terms and conditions or you, acting in reliance of this Nationwide Permit, have entered into a contract to have the work performed prior to such date, this authorization will remain in effect if the work can be completed within twelve months of the date of the Nationwide Permit's expiration, modification or revocation unless discretionary authority has been exercised in accordance with 33 CFR 330.4(c) or (d).

Your cooperation in the protection and preservation of our navigable waters and natural resources is appreciated. In all future correspondence concerning this matter, please refer to our file number SAC 2003-13026. A copy of this letter is being forwarded to certain State and/or Federal agencies for their information. If you have any questions concerning this matter, please contact Mr. Nat Ball at 843-329-8044, or toll free at 1-866-329-8187.

Sincerely,

Edward P. Chamberlayne, P.E.
Lieutenant Colonel, U.S. Army
Commander and District Engineer

Enclosures:
Permit Drawings
Nationwide Permit General Conditions
Nationwide Permit Regional Conditions
Compliance Certification Form

Copy Furnished:

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

EXHIBIT D

BOARD:
Allen Amsler
Chairman
Mark B. Hunt
Vice Chairman

D H E C
PROMOTE PROTECT PROSPER
Catherine B. Templeton, Director
Protecting and protecting the health of the people and the environment

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

April 23, 2012

Lieutenant Colonel Edward P. Chamberlayne P.E., Commander
U.S. Army Corps of Engineers
69A Hagood Avenue
Charleston, SC 29403-5107

Re: Certification in Accordance with Section 401 of the Clean Water Act, as amended
Certification of Consistency with the S.C. Coastal Zone Management Program

Dear Lieutenant Colonel Chamberlayne:

The South Carolina Department of Health and Environmental Control's (Department) Bureau of Water and the Office of Ocean and Coastal Resource Management have reviewed the U.S. Army Corps of Engineers' proposal to amend the Nationwide Permit program regulations. In accordance with agency procedures, the Department issued a Notice of Department Decision on April 06, 2012, taking action on these Nationwide Permits. Department staff determined that provided the proposed actions listed below (and in the attached table) are implemented and the proposed conditions outlined in the April 06, 2012 Notice of Department Decision are adhered to, there is a reasonable assurance that work authorized will be conducted in a manner consistent with the certification requirements of Section 401 of the Federal Clean Water Act (CWA), as amended, and the Coastal Zone Management Act (48-39-10 et seq.).

In accordance with the provisions of Section 401, we certify that the indicated Nationwide Permits, subject to the provided conditions, are consistent with applicable provisions of Section 303 of the CWA, as amended. We also hereby certify that there are no applicable effluent limitations under Sections 301(b), and 302, and that there are no applicable standards under Sections 306 and 307 of the CWA. The attached general conditions apply to all Nationwide Permits.

Certification and Finding of Consistency

401 Water Quality Certification issued without conditions	Coastal Zone Consistency Certification issued without conditions
3. Maintenance	1. Aids to Navigation
4. Fish & Wildlife Harvesting, Enhan. Attract Devices, & Activities	2. Structures in Artificial Canals
5. Scientific Measurement Devices	3. Maintenance
6. Survey Activities	4. Fish & Wildlife Harvesting, Enhan, Attract Devices, & Activities
7. Outfall Structures and Associated Intake Structures	5. Scientific Measurement Devices
13. Bank Stabilization	6. Survey Activities
15. U.S. Coast Guard Approved Bridges	7. Outfall Structures and Associated Intake Structures
18. Minor Discharges	8. Oil and Gas Structures on the Continental Shelf
19. Minor Dredging	9. Structures in Fleeting and Anchorage Areas
20. Response Operations for Oil and Hazardous Substances	10. Mooring Buoys
22. Removal of Vessels	11. Temporary Recreational Structures
25. Structural Discharges	13. Bank Stabilization
27. Aquatic Habitat Restoration, Establm & Enhancement Activities	15. U.S. Coast Guard Approved Bridges
30. Moist Soil Management for Wildlife	18. Minor Discharges
31. Maintenance of Existing Flood Control Facilities	19. Minor Dredging
32. Completed Enforcement Activities	20. Response Operations for Oil and Hazardous Substances
33. Temporary Construction, Access, and Dewatering	22. Removal of Vessels
36. Boat Ramps	25. Structural Discharges
37. Emergency Watershed Protection and Rehabilitation	27. Aquatic Habitat Restoration, Establm & Enhancement Activities
38. Cleanup of Hazardous and Toxic Waste	28. Modifications of Existing Marinas
40. Agricultural Activities	30. Moist Soil Management for Wildlife
41. Reshaping Existing Drainage Ditches	31. Maintenance of Existing Flood Control Facilities
45. Repair of Uplands Damaged by Discrete Events	32. Completed Enforcement Activities
48. Commercial Shellfish Aquaculture Activities	33. Temporary Construction, Access, and Dewatering

401 Water Quality Certification issued without conditions	Coastal Zone Consistency Certification issued without conditions
	36. Boat Ramps 37. Emergency Watershed Protection and Rehabilitation 38. Cleanup of Hazardous and Toxic Waste 40. Agricultural Activities 41. Reshaping Existing Drainage Ditches 45. Repair of Uplands Damaged by Discrete Events 48. Commercial Shellfish Aquaculture Activities

401 Water Quality Certification issued with conditions	Coastal Zone Consistency Certification issued with conditions
12. Utility Line Activities 14. Linear Transportation Projects 23. Approved Categorical Exclusions 29. Residential Developments 39. Commercial and Institutional Development 42. Recreational Facilities 43. Stormwater Management Facilities 44. Mining Activities 46. Discharge in Ditches	12. Utility Line Activities 14. Linear Transportation Projects 23. Approved Categorical Exclusions 29. Residential Developments 39. Commercial and Institutional Development 42. Recreational Facilities 44. Mining Activities 46. Discharge in Ditches

Denial and Finding of Inconsistency

The Department has determined that there is not a reasonable assurance that work authorized by the following Nationwide Permits will be conducted in a manner consistent with the certification requirements of Section 401 of the CWA, as amended, or the Coastal Zone Management Act (48-39-10 et.seq.). In accordance with the provisions of Section 401 and the S.C. Coastal Zone Management Program, we deny 401 Water Quality Certification and Coastal Zone Consistency Certification for these Nationwide Permits.

401 Water Quality Certification denied	Coastal Zone Consistency Certification denied
16. Return Water From Upland Cont. Disposal Areas 17. Hydropower Projects 21. Surface Coal Mining Activities 34. Cranberry Production 49. Coal Remining Activities 50. Underground coal Mining Activities 51. Land-Based Renewable Energy Generation Facilities 52. Land-Based Renewable Energy Generation Pilot Projects	16. Return Water From Upland Cont. Disposal Areas 17. Hydropower Projects 21. Surface Coal Mining Activities 24. Indian Tribe or State Administered Section 404 Programs 34. Cranberry Production 35. Maintenance Dredging of Existing Basins 43. Stormwater Management Facilities 49. Coal Remining Activities 50. Underground coal Mining Activities 51. Land-Based Renewable Energy Generation Facilities 52. Land-Based Renewable Energy Generation Pilot Projects

If you have any questions, please contact Heather Preston at (803) 898-3105 or prestohs@dhec.sc.gov or Rheta Geddings DiNovo at (843) 953-0256 or dinovorg@dhec.sc.gov .

Sincerely,

Heather S. Preston, Director
Bureau of Water
Environmental Quality Control

Rheta Geddings DiNovo, Director
Regulatory Division
Office of Ocean and Coastal Resource Management

Nationwide Permit Number & Topic	401 Cert Action	CZC Cert Action (Outside of the Critical Area)
1. Aids to Navigation	N/A	Issue
2. Structures in Artificial Canals	N/A	Issue
3. Maintenance	Issue	Issue
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Issue	Issue
5. Scientific Measurement Devices	Issue	Issue
6. Survey Activities	Issue	Issue
7. Outfall Structures and Associated Intake Structures	Issue	Issue
8. Oil and Gas Structures on the Outer Continental Shelf	N/A	Issue
9. Structures in Fleeting and Anchorage Areas	N/A	Issue
10. Mooring Buoys	N/A	Issue
11. Temporary Recreational Structures	N/A	Issue
12. Utility Line Activities	Issue w/ Cond	Issue w/ Cond
13. Bank Stabilization	Issue	Issue
14. Linear Transportation Projects	Issue w/ Cond	Issue w/ Cond
15. U.S. Coast Guard Approved Bridges	Issue	Issue
16. Return Water From Upland Contained Disposal Areas	Deny	Deny
17. Hydropower Projects	Deny	Deny
18. Minor Discharges	Issue	Issue
19. Minor Dredging	Issue	Issue
20. Response Operations for Oil and Hazardous Substances	Issue	Issue
21. Surface Coal Mining Operations	Deny	Deny
22. Removal of Vessels	Issue	Issue
23. Approved Categorical Exclusions	Issue w/ Cond	Issue w/ Cond
24. Indian Tribe or State Administered Section 404 Programs	N/A	Deny
25. Structural Discharges	Issue	Issue
26. [Reserved]	N/A	N/A
27. Aquatic Habitat Restoration, Establishment & Enhancement Activities	Issue	Issue
28. Modifications of Existing Marinas	N/A	Issue
29. Residential Developments	Issue w/ Cond	Issue w/ Cond
30. Moist Soil Management for Wildlife	Issue	Issue
31. Maintenance of Existing Flood Control Facilities	Issue	Issue
32. Completed Enforcement Actions	Issue	Issue
33. Temporary Construction, Access and Dewatering	Issue	Issue
34. Cranberry Production Activities	Deny	Deny
35. Maintenance Dredging of Existing Basins	N/A	Deny
36. Boat Ramps	Issue	Issue
37. Emergency Watershed Protection and Rehabilitation	Issue	Issue
38. Cleanup of Hazardous and Toxic Waste	Issue	Issue
39. Commercial and Institutional Developments	Issue w/ Cond	Issue w/ Cond
40. Agricultural Activities	Issue	Issue
41. Reshaping Existing Drainage Ditches	Issue	Issue
42. Recreational Facilities	Issue w/ Cond	Issue w/ Cond
43. Stormwater Management Facilities	Issue w/ Cond	Deny
44. Mining Activities	Issue w/ Cond	Issue w/ Cond
45. Repair of Uplands Damaged by Discrete Events	Issue	Issue
46. Discharges in Ditches	Issue w/ Cond	Issue w/ Cond
47. [Reserved]	N/A	N/A
48. Commercial Shellfish Aquaculture Activities	Issue	Issue
49. Coal Remining Activities	Deny	Deny
50. Underground Coal Mining Activities	Deny	Deny
51. Land-Based Renewable Energy Generation Facilities	Deny	Deny
52. Land-Based Renewable Energy Generation Pilot Projects	Deny	Deny

EXHIBIT E

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

RECEIVED

DEC 19 2012

DHEC - OCRM
CHARLESTON OFFICE

DEC 19 2012

TRIDENT CONSTRUCTION CO., LLC

MEMORANDUM

TO: **All interested parties**

FROM: **STEVEN BROOKS**

RE: **SC State Ports Authority**
P/N# **OCRM-12-054-B**

DATE: **DECEMBER 18, 2012**

This is to inform you that the above referenced permit was issued and validated on December 18, 2012.

This letter is in reference to the following activities:

To make improvements to an existing waterfront building. Specifically, the permittee will install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes will be made to building 322 and two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies will be constructed. The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322

Any person adversely affected by this decision has the right to appeal as outlined in the enclosed "Notice of Appeal Procedure."

I Scanned & e-mailed to everyone. No one claimed this. Call 572-7600 to discuss.
Thanks
Bobbie

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure
Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed or otherwise sent to the applicant, permittee, licensee and affected persons who have requested in writing to be notified, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of $100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed or otherwise sent to persons entitled to receive notice. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.

4. The request for final review should include the following:

a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision

b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference

c. a copy of the Department's decision for which review is requested

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

January 7, 2011

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

JAN 03 2013

DHEC - OCRM
CHARLESTON OFFICE

December 18, 2012

Derrick Bellamy
SC State Ports Authority
P.O. Box 22287
Charleston, SC 29413-2287

SEE SPECIAL CONDITION(S)

Re: **P/N# OCRM-12-054-B**
SC State Ports Authority

Dear Mr. Bellamy:

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to make improvements to an existing waterfront building and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority - Union Pier Terminal, Charleston, Charleston County, South Carolina, and has issued a permit for this work. You should carefully read the description of the authorized project and any special conditions that have been placed on the permit, as these conditions may modify the permitted activity. In addition, there are a series of general conditions that should be reviewed. The original and one photocopy of the permit, as issued, are enclosed. After carefully reading the permit, if you wish to accept the permit as issued, sign and date in the signature block entitled "PERMITTEE" on the original version of the permit and return it to this Department. Keep the photocopy for your records.

PLEASE READ CAREFULLY: You are required to sign and return the original version of your permit to this Department. If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card. You must send in this card before the time you wish to start construction. At that time a construction placard will be sent to you to post at the construction site.

PLEASE NOTE: You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site. The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required.

Sincerely,

Steven Brooks

Steven Brooks
Senior Regulatory Project Manager
Regulatory Programs Division

Cc: Blair Williams, Wetland Section Manager
Patrick Moore, SCSPA
Nathaniel Ball, USACOE
Enclosure

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

DHEC-SCPA 000093

D H E C

PROMOTE PROTECT PROSPER

Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure
Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of $100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

SEE SPECIAL CONDITIONS(S)

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.

4. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference
   c. a copy of the Department's decision for which review is requested

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

July 1, 2010

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office · 1362 McMillan Avenue, Suite 400 · Charleston, SC 29405
Phone: 843-953-0200 · Fax: 843-953-0201 · www.scdhec.gov

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s):	**SC State Ports Authority**
Permit Number(s):	**OCRM-12-054-B**
Date of Issuance:	**December 18, 2012**
Expiration Date:	**December 18, 2017**
Location:	**On and adjacent to Cooper River at 32 Washington Street, South Carolina State Ports Authority - Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.**

SEE SPECIAL CONDITIONS(S)

This permit is issued under the provisions of S. C. Code Ann. Section 48-39-10, *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2005). Please carefully read the project description and any special conditions that may appear on this permit/certification as they will affect the work that is allowed. If there are no special conditions, then the work is authorized as described in the project description and as modified by the general conditions. The general conditions are also a part of this permit/certification and should be read in their entirety. The S. C. Contractor's Licensing Act of 1999, enacted as S.C. Code Ann. Section 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The work as shown on the attached plans will consist of making improvements to an existing waterfront building. Specifically, the permittee will install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes will be made to building 322 and two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies will be constructed. The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322.

SPECIAL CONDITIONS

1. Provided that operations for the new passenger cruise facility at Union Pier Terminal are conducted in accordance with the attached Voluntary Cruise Management Plan (Attachment A). If there are any future changes proposed to the Voluntary Cruise Management Plan, the Department must be included in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".

2. Provided that the construction detailed in this permit does not begin until after the Memorandum of Agreement, dated March 26, 2007 (as amended), between the State Ports Authority and the SCDHEC has been revised and finalized.

3. Provided that the SPA require its contractors, for the activities addressed under this permit, to:

   a. perform work in compliance with all applicable local, state, and federal environmental laws and requirements.

   b. use low emission vehicles that conform to the federal Tier 2 or higher emissions standards for all non road equipment between 100 and 750 horsepower.

   c. turn off construction equipment and vehicles not in active use.

   d. implement dust control using the best management practices that may include but not be limited to, water spraying, applying mulch and establishing vegetation, applying polymers, and spraying tackifiers in compliance with state and federal environmental regulations.

   e. require that all diesel vehicles, construction equipment and generators on site use ultra-low sulfur diesel (15 ppm), a biodiesel blend approved by the original engine or equipment manufacturer with sulfur content of 15 ppm or less, or other clean burning alternative fuel such as propane, where such fuel is commercially and reasonably available.

4. Provided that any disturbed critical area adjacent to the construction site be restored to original contours and conditions upon project completion.

5. Once the project is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment.

6. Provided that an as-built survey of the modified terminal facility must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the new terminal facility, and must list the starting and ending coordinates of the new terminal facility in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning System equipment.

7. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

SEE SPECIAL CONDITIONS!

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5). BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

SEE SPECIAL CONDITIONS(S)

Permit Number: **OCRM-12-054-B**

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

Barbara L Melvin
(PERMITTEE(S))
SC State Ports Authority

1/2/13
(DATE)

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

Steven Brooks
(PROJECT MANAGER, WETLAND SECTION)
Steven Brooks
or her Designee
Other Authorized State Official

12/18/12
(DATE)

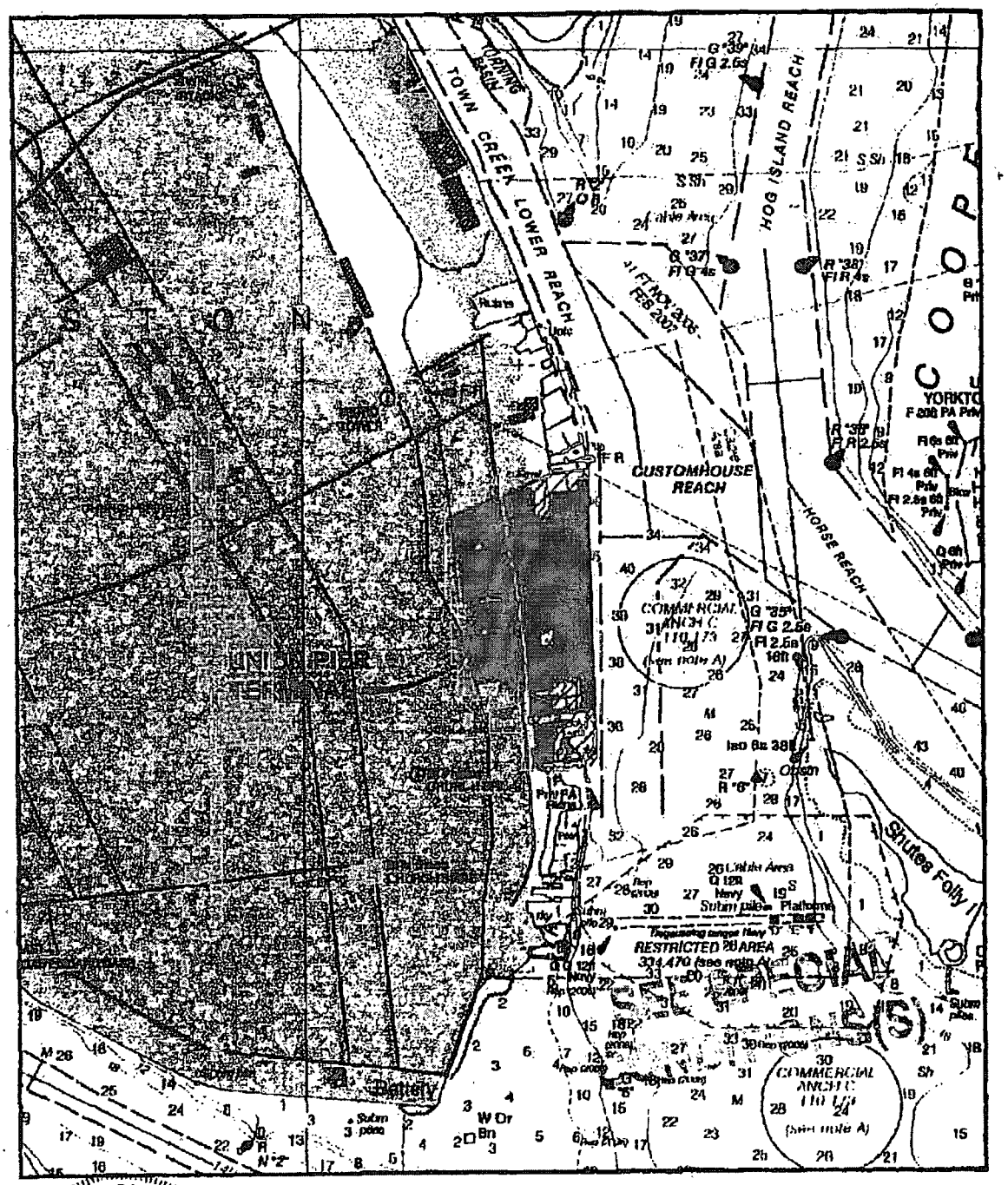
RECEIVED
JAN 03 2013
DHEC-OCRM
CHARLESTON OFFICE

DHEC-SCPA 000097

GENERAL CONDITIONS:

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than sixty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further, to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate, material or any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise prejudice the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM.
8. That this permit may not be transferred to a third party without prior written notice to OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition, shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent, or representative of OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others. This permit authorizes no invasion of adjacent private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.



SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY
LICENSED

Derrick L. Bellamy

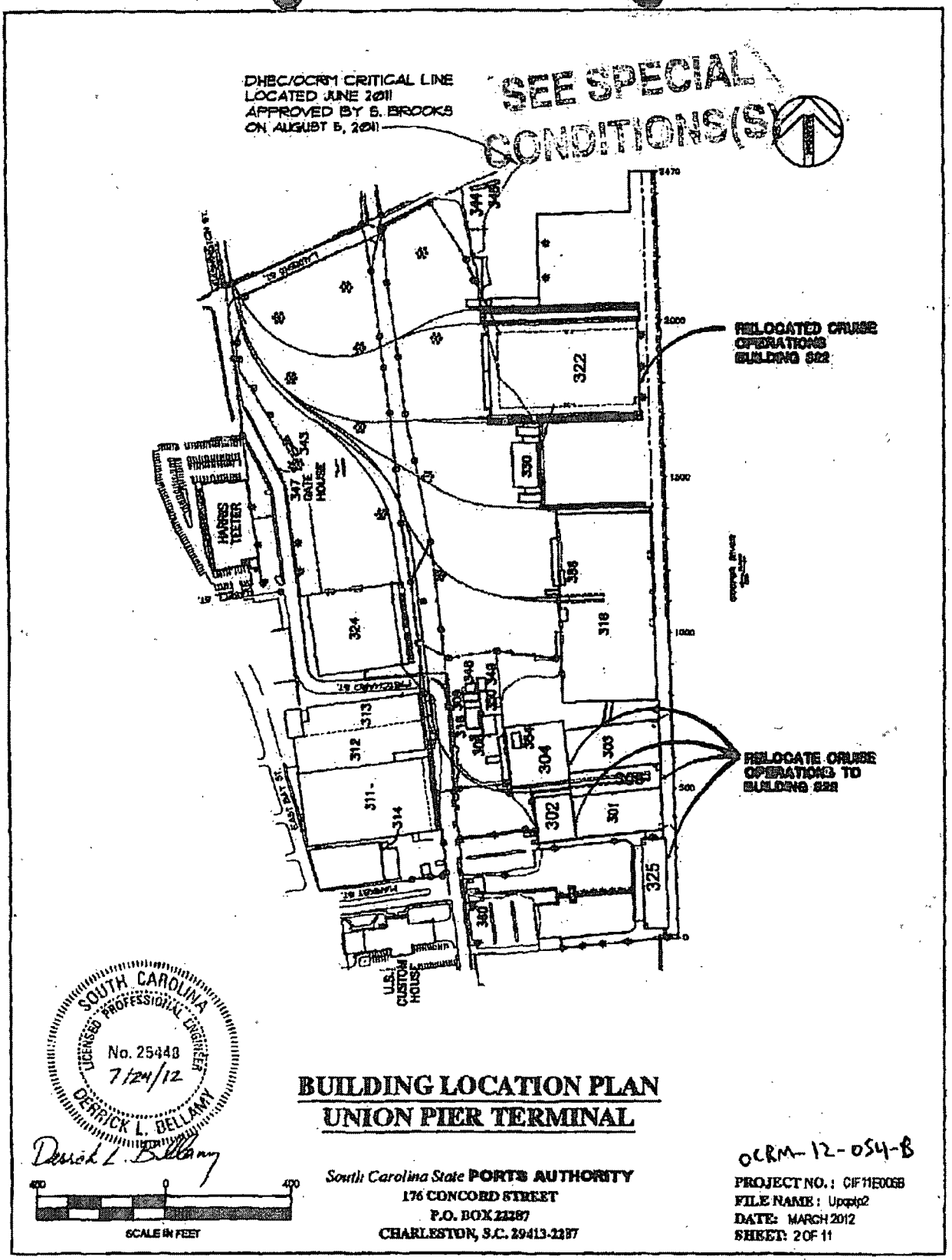
LOCATION

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B

PROJECT NO.: CF11E0058
FILE NAME: Upcplp1
DATE: JULY 2012
SHEET: 1 OF 11

DHEC-SCPA 000099



BUILDING LOCATION PLAN
UNION PIER TERMINAL

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E0058
FILE NAME: Upoplp2
DATE: MARCH 2012
SHEET: 2 OF 11

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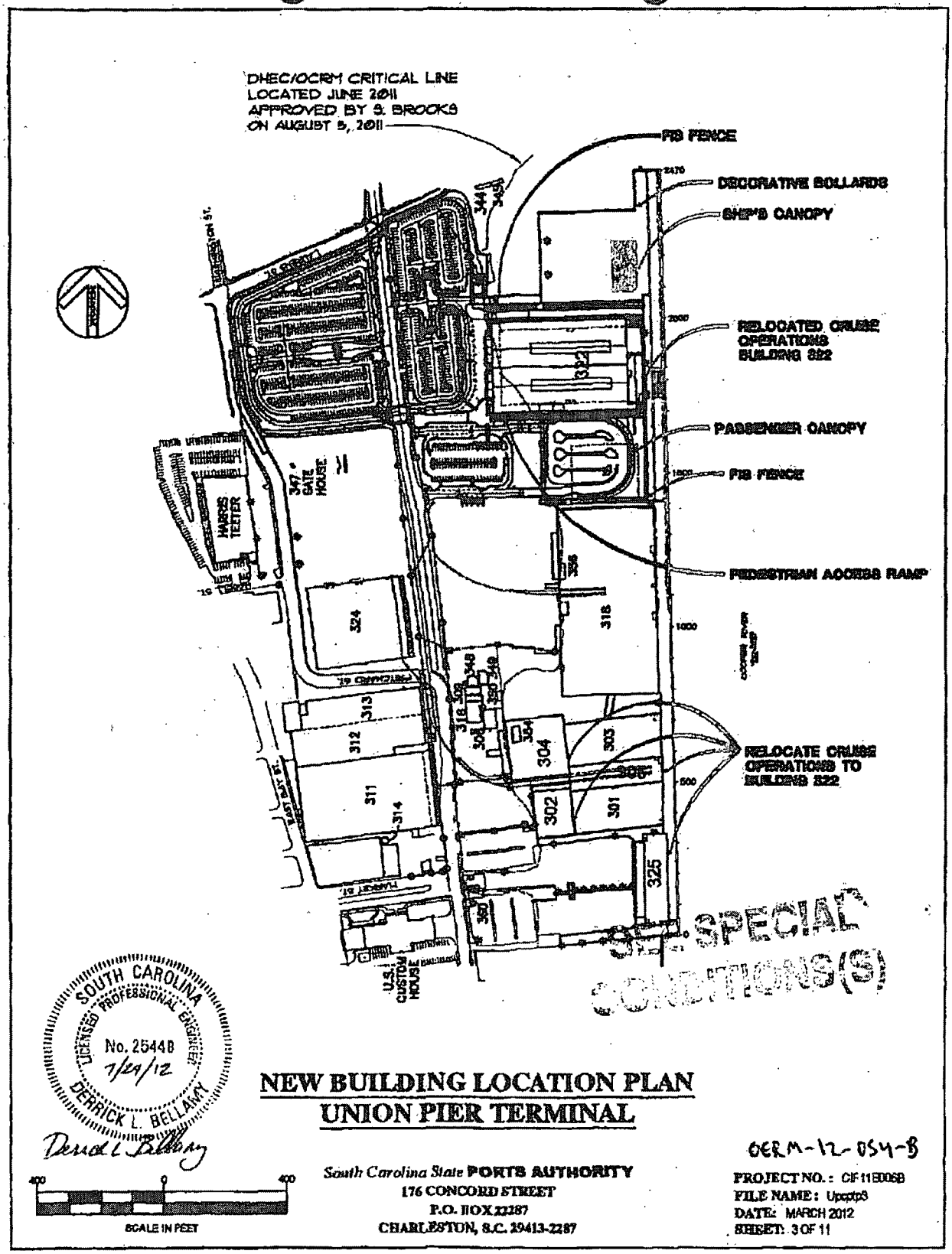

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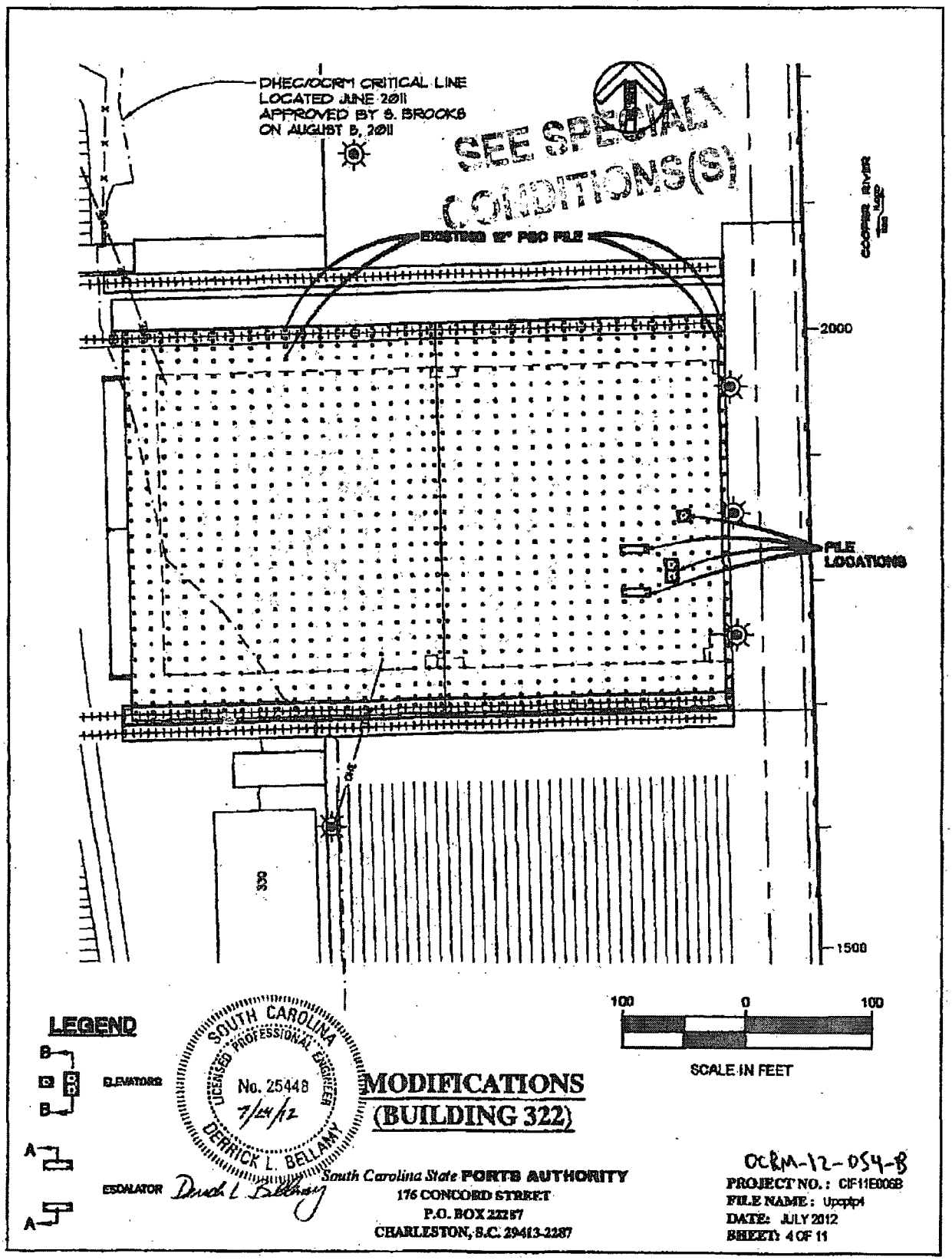

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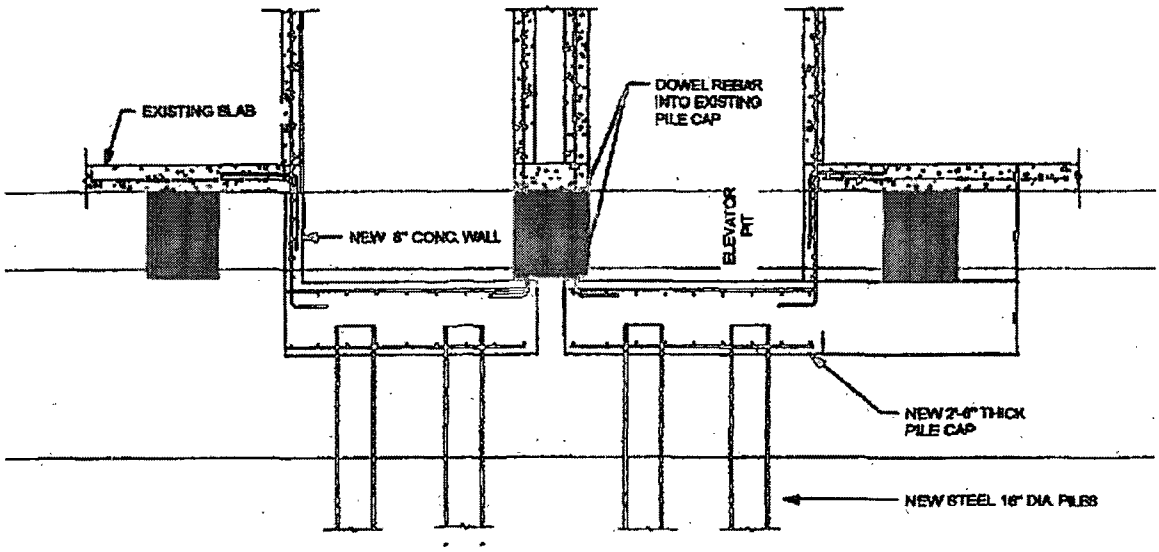

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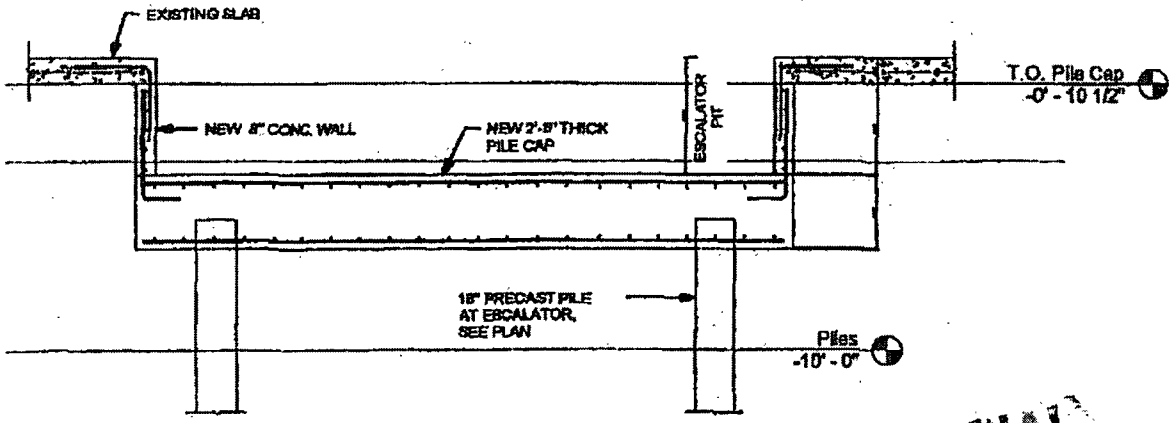


B SECTION ESCALATOR

SEE SPECIAL CONDITIONS

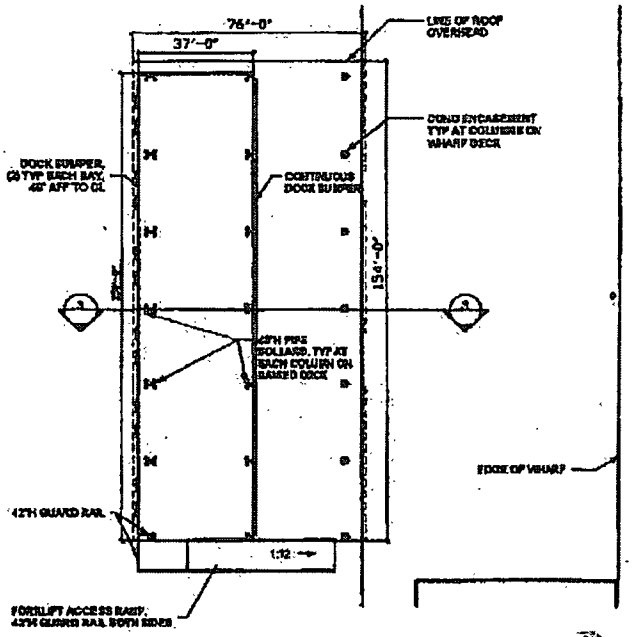
SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

Derrick L. Bellamy

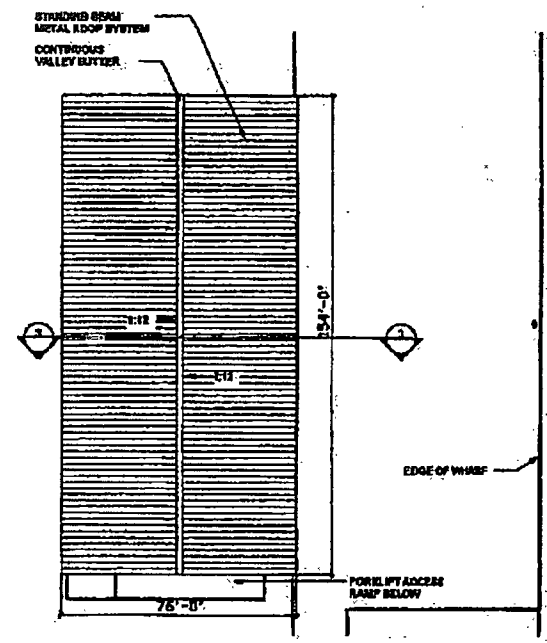
MODIFICATIONS (CROSS SECTION)

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

ECRM-12-054-B
PROJECT NO.: CF11E006B
FILE NAME: Upgrd5
DATE: JULY 2012
SHEET: 5 OF 11



STORES CANOPY FLOOR PLAN



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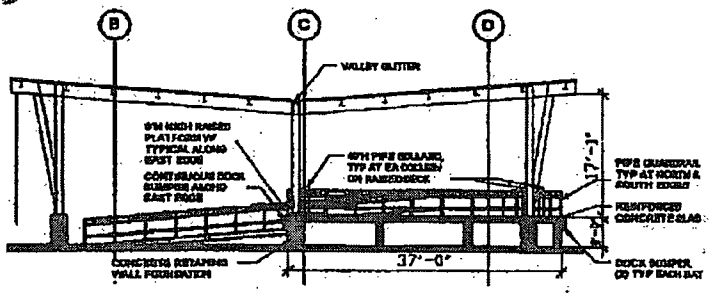
SEE SPECIAL CONDITIONS(S)



STORES CANOPY E-W SECTION

SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

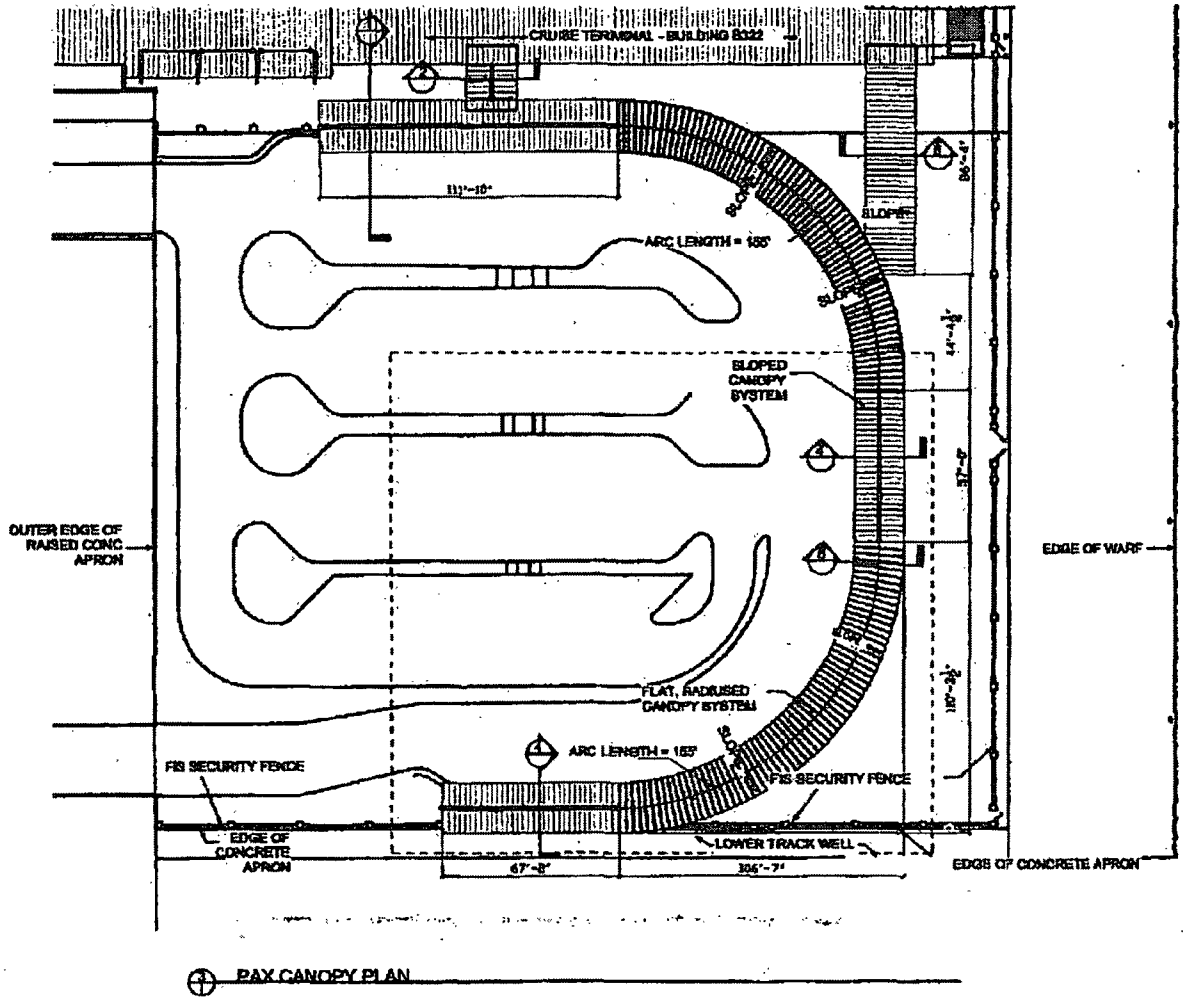
MODIFICATIONS
NORTH APRON

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CF11E0068
FILE NAME: Upcplp8
DATE: JULY 2012
SHEET: 8 OF 11

DHEC-SCPA 000104

SEE SPECIAL CONDITIONS(S)



PAX CANOPY PLAN

SOUTH CAROLINA PROFESSIONAL ENGINEER
No. 25448
7/24/12
DERRICK L. BELLAMY

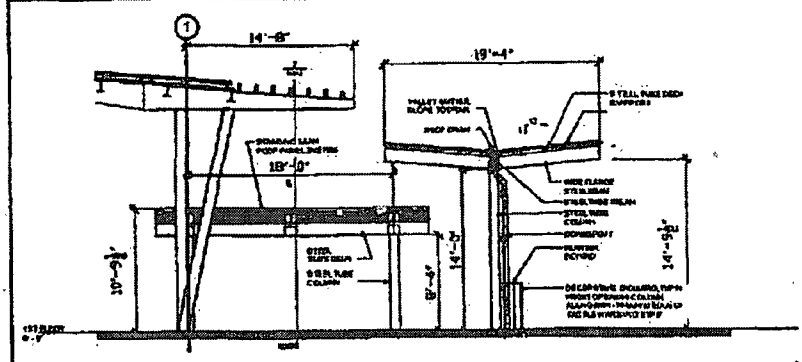
Derrick L. Bellamy

MODIFICATIONS
SOUTH APRON

South Carolina State PORTS AUTHORITY
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E0058
FILE NAME: Upcptp7
DATE: JULY 2012
SHEET: 7 OF 11

DHEC-SCPA 000105



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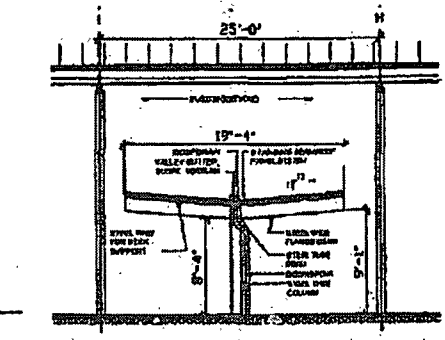

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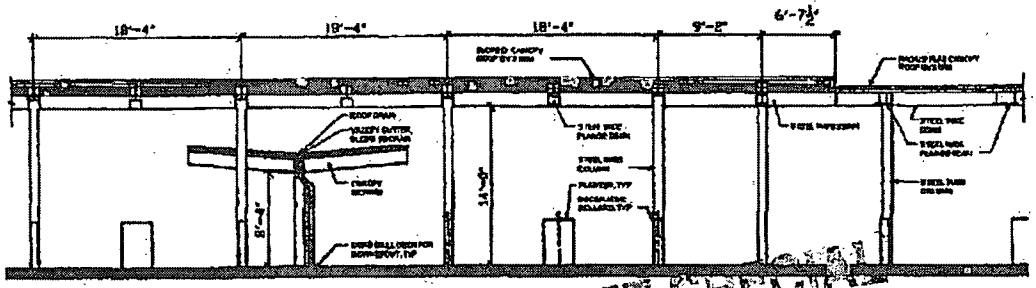

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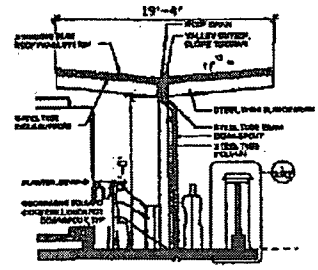
SEE SPECIAL CONDITIONS(S)



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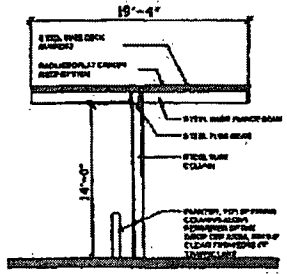

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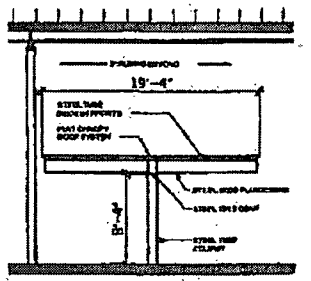


SECTION - FLAT POV BAG CANOPY

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 25148 7/24/12 CEDRICK L. BELLAMY

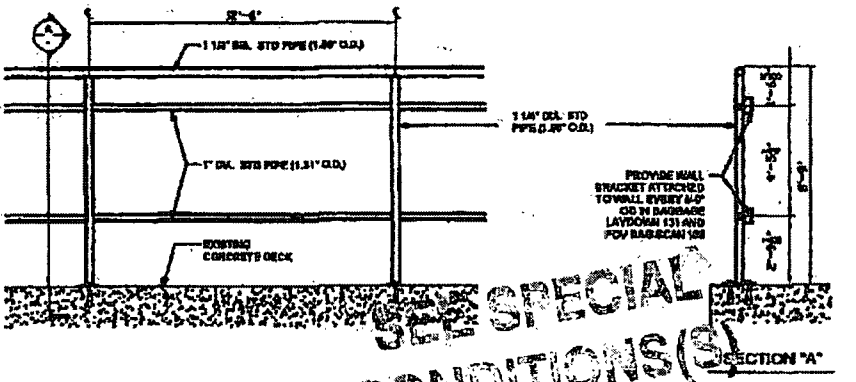
Cedrick L. Bellamy

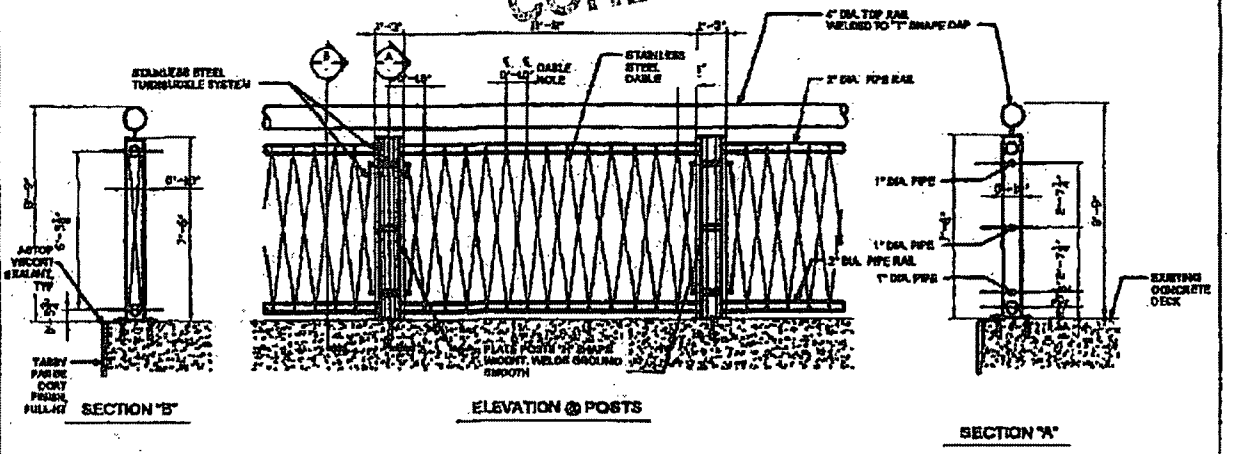
MODIFICATION
SOUTH APRON - DETAILS

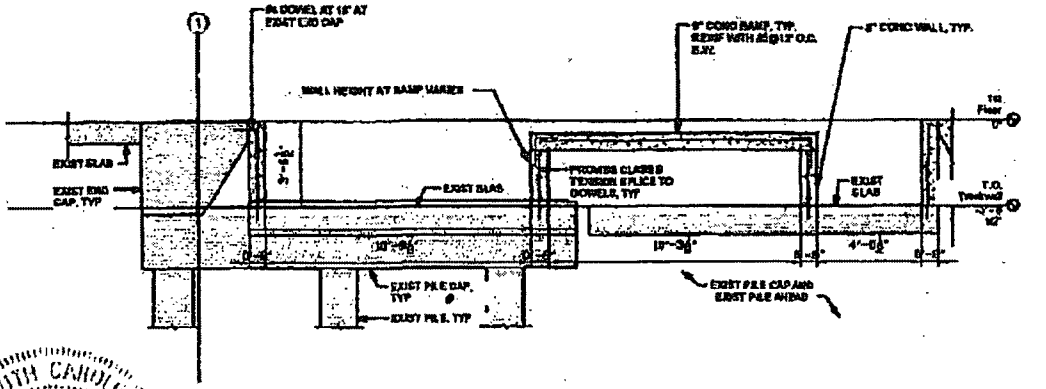
South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

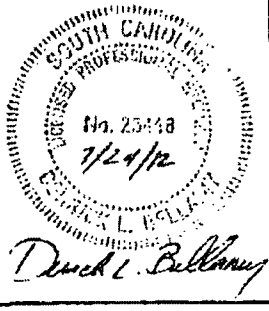
OCRM- 12-054-B
PROJECT NO.: CIP11E006B
FILE NAME: Upgrd8
DATE: JULY 2012
SHEET: 8 OF 11

DHEC-SCPA 000106









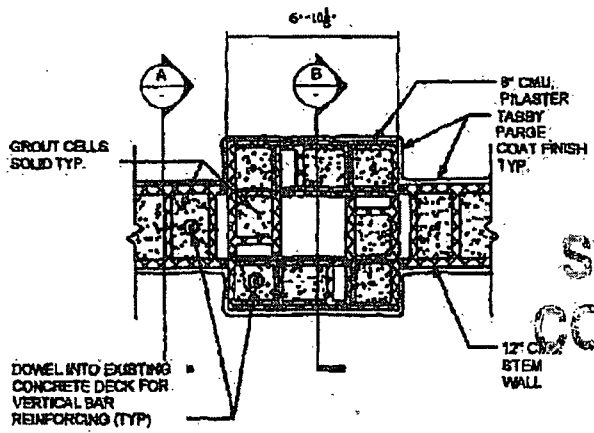
MODIFICATIONS
PEDESTRIAN ACCESS RAMP DETAIL

OCRM 12-054-B

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

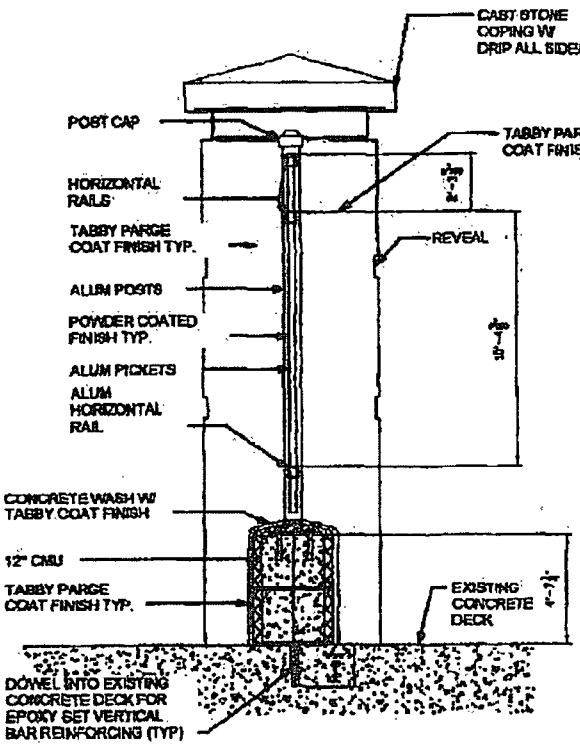
PROJECT NO.: CF11E008B
FILE NAME: Upgrd9
DATE: JULY 2012
SHEET: 9 OF 11

DHEC-SCPA 000107



PLAN DETAIL @ MASONRY PILASTER

SEE SPECIAL CONDITIONS (S)



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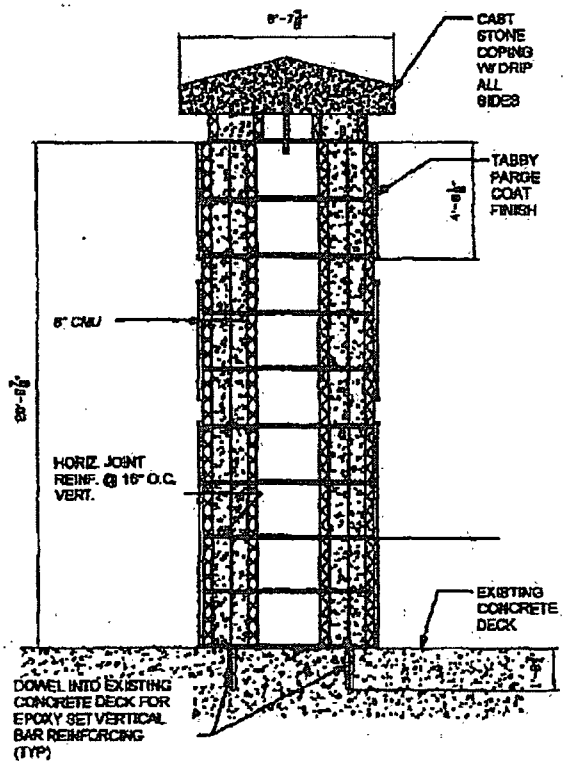


WALL SECTION "B" @ MASONRY PILASTER

SOUTH CAROLINA LICENSED PROFESSIONAL ENGINEER No. 25448 7/24/12 DERRICK L. BELLAMY

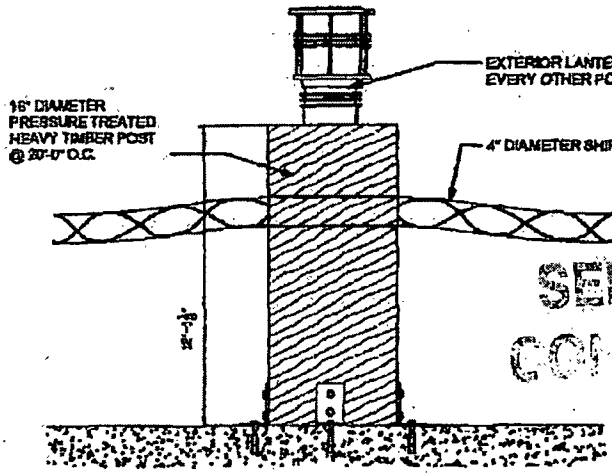
Derrick L Bellamy

MODIFICATIONS
SECURITY FENCE DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

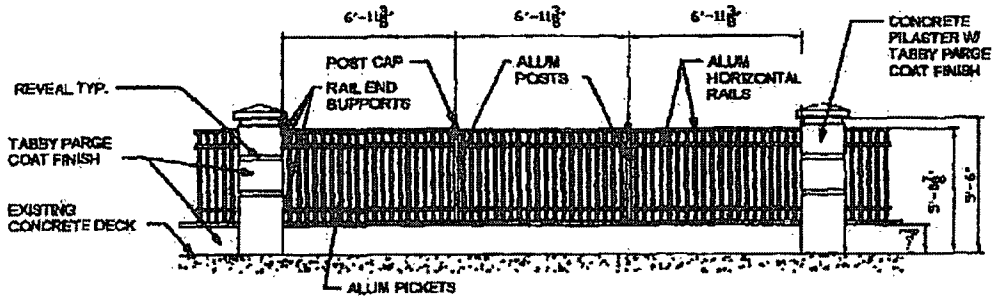
OCRM-12-054-S
PROJECT NO.: CIF11E006B
FILE NAME: Upgrp10
DATE: JULY 2012
SHEET: 10 OF 11

DHEC-SCPA 000108



SEE SPECIAL CONDITIONS(S)

NORTH APRON DECORATIVE BOLLARDS



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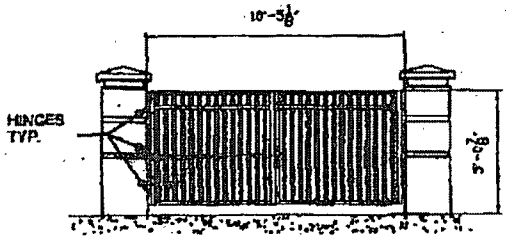

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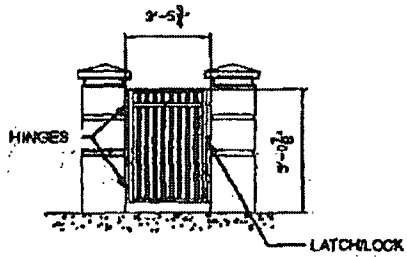

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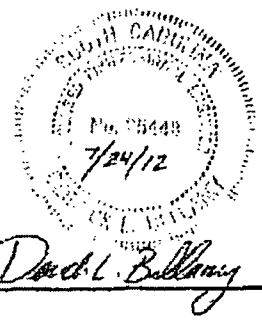


MODIFICATIONS
SECURITY FENCE DETAILS

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

OCRM-12-054-B
PROJECT NO.: CIF11E006B
FILE NAME: Upcptp11
DATE: JULY 2012
SHEET: 11 OF 11

DHEC-SCPA 000109

ATTACHMENT A

CLARIFICATION OF PROCESS OF CITY CONSULTATION REGARDING CRUISE MANAGEMENT PLAN ALTERATION

Should the SCSPA, at any future date, deem that any material change should be made to the Voluntary Cruise Management Plan, at least one year prior to effecting any such change the following will be done:

(1) Written notification to the Mayor and City Council.

(2) Written notification to the Cruise Neighborhood Advisory Council.

(3) Written notification to Charleston Metro Chamber of Commerce and the Maritime Association of South Carolina.

(4) Written notification to the Historic Charleston Foundation and the Preservation Society.

(5) The convening of a community forum to discuss any material change to the plan.

(6) The solicitation of public input through one or more public hearings, including a public hearing at a City Council meeting.

(7) Careful and thoughtful consideration of the public input.

(8) Report to the Mayor and City Council of the SCSPA board and staff findings and decision.

ATTACHMENT A

VOLUNTARY CRUISE MANAGEMENT PLAN
SOUTH CAROLINA STATE PORTS AUTHORITY
AND
CITY OF CHARLESTON

(1) The number of cruise ships will be no more than 104 calls per calendar year.

(2) The port will host no more than one ship at a time at the cruise terminal.

(3) The terminal will be designed at the northern end of Union Pier to accommodate ships consistent with the size and profile that have called Charleston in the past (1,900 to 3,500 passenger design capacity)

(4) A Traffic Management Plan which removes maritime cruise traffic from City streets as soon as possible as well as continued coordination and communication with the Charleston City Police Department and the City Special Events Committee.

(5) A continued commitment by the SCSPA to contribute an allocation to the DASH Downtown Shuttle program, as described in the City Agreement with the SCSPA, providing free shuttle rides to those traveling in the downtown areas of the City.

SEE SPECIAL CONDITION(S)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC **PETITIONERS' REPLY IN SUPPORT OF MOTION TO VACATE**

FILED
DEC 19 2013
ADMINISTRATIVE LAW COURT

The basis for Motion to Vacate filed by the Petitioners is straightforward: because the Critical Area Permit and Coastal Zone Consistency Certification (combined, "the Permit") issued for the new cruise terminal lacked a required Water Quality Certification ("WQC"), the Permit is legally incomplete and must be vacated. Regulations developed by the Department of Health and Environmental Control ("DHEC") mandate that an individual WQC *must* be evaluated by appropriate DHEC staff and issued concurrently with any Critical Area Permit ("CAP") and Coastal Zone Consistency Certification ("CZCC") requiring one. This plain and clear legal requirement was not met here. SPA's Permit is legally and fundamentally flawed on its face, and must be set aside.

The response filed by the S.C. State Ports Authority ("SPA") attempts, but fails, to complicate this simple issue. Importantly, SPA has *not* contested the fundamental truth that a

WQC is needed for its project. SPA instead tries to excuse the lack of an individual WQC with four internally inconsistent theories, claiming: (1) that SPA may rely on a *separate* WQC issued for nationwide permits, even though it no longer has NWP coverage; (2) that DHEC invisibly issued an individual WQC when it issued an individual CAP and CZCC for SPA's project; (3) that DHEC didn't act on SPA's request for certification and thus waived its WQC authority; and (4) even if SPA lacks the required WQC, this Court should cure that absence by issuing a WQC by unilateral fiat.

All of SPA's theories are meritless.

1. The WQC Issued for NWP 3 in South Carolina Does Not Apply to SPA's Individual Cruise Terminal Project.

SPA concedes that that it needs a Rivers and Harbors Appropriations Act ("RHA") Section 10 authorization from the U.S. Army Corps of Engineers ("Corps") for its new cruise ship terminal. SPA Resp. at 6. That federal authorization came in an April 20, 2012 letter from the Corps to SPA authorizing SPA's $35 million cruise terminal project pursuant to the Corps' Nationwide Permit for maintenance, NWP 3. SPA does not contest that its RHA permit application to conduct work in waters of South Carolina triggered the need for a 401 Water Quality Certification from DHEC before construction can begin. *See* 33 U.S.C. §1341; 33 C.F.R. Pt. 330.4(c); 23A S.C. Code Ann. Regs. 61-101(A)(2). SPA in fact admits that the Corps' April 20 authorization was "provisional" on DHEC's issuing a certification for its project, and that because DHEC certified "activities authorized under NWP 3 as compliant with the State's water quality standards," SPA's Project received certification "based on the Corps' authorization of the Project under NWP 3." SPA Resp. 7.

Certain of the Petitioners challenged SPA's NWP 3 authorization in United States District Court. The parties, including SPA, cross moved for summary judgment on the merits. On September 18, 2013, the U.S. District Court for the District of South Carolina the issued an order siding with the plaintiffs, holding the Corps' NWP 3 authorization for SPA's project "**unlawful and void,**" and remanding the matter to the Corp to consider all activities within the scope of its analysis (i.e., the proposed terminal, not just the piling clusters). *Preservation Society of Charleston et al. v. U.S. Army Corps of Engineers*, Order at 29, C/A No. 2:12-cv-02942-RMG [ECF No. 60] (emphasis added) [Ex. 1 to Motion to Vacate].

Inasmuch as SPA's Project relied on DHEC's certification for "activities authorized under NWP 3 as compliant with the State's water quality standards" and was "based on the Corps' authorization of the Project under NWP 3," SPA Resp. 7, a federal court's judgment that the Corps' NWP 3 authorization of the Project is "unlawful and void" removed the NWP's WQC from the Project.

SPA proposes several theories for ignoring a federal court order and judgment, but none are persuasive. SPA first tries to fault Petitioners for attributing "some measure of preclusion [*sic*] to the Federal Order." Resp. 16. In truth, Petitioners have simply alerted this Court to the fact that the federal authorization – which was the premise for SPA *not* obtaining an individual WQC – has been declared "unlawful and void" by a federal court granting a motion for summary judgment seeking to have the NWP 3 authorization "set aside." *See Preservation Society of Charleston, supra,* Plaintiffs' Mot. For Summary Judgment at 3 (July 15, 2013) [ECF No. 58].

The District Court's judgment does not present "some measure" of preclusion for SPA; it effectuates *resolution* of the April 20, 2012 NWP 3 coverage for SPA's Project.[1]

That notices of appeal have been filed hardly makes recognition of the District Court's judgment "clearly premature," Resp. 16. Pursuant to federal rule, the District Court's order is effective now, and SPA would need to seek (and obtain) a stay to alter that reality. *See* Fed. R. App. P. 8. SPA did not inform this Court it intends to seek a stay, but even if it had, its chances of success would be diminishingly small given the stringent test governing such relief. *See Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761, 173 L. Ed. 2d 550 (2009) (stay applicant must, *inter alia,* make a strong showing of likely success on the merits and show irreparable injury absent stay).

The reality of the situation is that SPA no longer has NWP 3 authorization for its cruise terminal project – period. Thus, as a straightforward legal matter, SPA's project does not qualify for coverage under the WQC issued by DHEC for NWP 3 projects statewide. SPA's hope that the Project might qualify for NWP 3 one day *in the future,* Resp. 15-16, does not alter the reality that SPA has no NWP *now*. At any rate, SPA's claim is entirely speculative, depends on matters beyond its control (such as federal law and the Corps' decision-making under it), and is facially unpersuasive: A $35 million project intended to transform a defunct warehouse into a new cruise terminal that home bases vessels twice as large as those serviced now is not, in law or in common

[1] SPA seems to questions whether DHEC, if it must issue individual WQCs for projects, can also issue WQCs for general permits such as NWPs. DHEC's regulations specifically provide for general certifications for NWPs. S.C. Code Reg. 61-101(A)(3) (authorizing DHEC to issue "general certifications for categories of activities or for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations.").

parlance, "maintenance." *See, e.g.*, 77 Fed. Reg. 10184 (Feb. 21, 2012) (NWP 3 maintenance does not include projects that change "uses" of permitted structures).[2]

Again, there is no occasion to resolve SPA's eligibility for a federal permit here. Whatever chances SPA has of getting NWP 3 coverage years from now, it has, at present, no NWP 3 coverage for its project, and no WQC.

2. DHEC Did Not Consider, Let Alone Issue, an Invisible Water Quality Certification for SPA's Project.

SPA contends that even if it lacks coverage under the Water Quality Certification issued for NWP 3 in South Carolina, it nevertheless has a WQC by virtue of having obtained a Critical Area Permit. Resp. 18-19. That argument is flatly inconsistent with SPA's contention that the NWP 3 WQC serves *as* the operable WQC certification for this Project: if SPA is relying on the NWP 3 WQC, it cannot also be relying on a separate WQC purportedly considered and issued *sotto voce* via SPA's Critical Area Permit.

DHEC's regulations provide that a CAP "will serve as the 401 water quality certification for an associated Federal permit," but only "with coordination and input from appropriate [Bureau of Water] staff regarding water quality impacts." S.C. Code Ann. Regs. 30-2.H, 61-101(A)(8). Moreover, for "Federal permits that require a water quality certification and a coastal zone consistency certification" – as here – the coastal zone consistency determination must itself be evaluated "in accordance with the management policies of the S.C. Coastal Management Program and applicable laws and regulations" and issued "as a component of, and concurrently with," the

[2] SPA's strange argument that the Corps' "future review" of the Project – and eventual decision on NWP 3 eligibility – should be given "deference," Resp. 16, is hard to fathom, since there is nothing in existence to which deference could be given. To the extent SPA is just saying that the Corps has pre-determined that SPA's project will qualify for NWP 3 coverage before evaluating the project as directed by federal court order, the legitimacy of the Corps' review process would be severely undercut and any basis for deference to it would be removed.

WQC, which must in turn be evaluated and issued pursuant to the rules governing WQCs. S.C. Code Ann. Regs. 30-2.H, 61-101(A)(7).

Taken together, these regulations allow DHEC to issue *joint* permitting and certification documents that include *separate* component decisions to authorize a project as: (1) being entitled to a Critical Area Permit; (2) as being consistent with South Carolina's federally approved water quality standards; and (3) being consistent with "the management policies of the S.C. Coastal Management Program and applicable laws and regulations." SPA proposes to read these component reviews out of the law, so that where a project requires a Critical Area Permit, the project's federally permitted discharges need not be reviewed for consistency with the coastal zone management program or water quality standards.

SPA's theory is flatly contrary to the language and intent of the law, which requires separate evaluations of compliance for separate programs. The Court will note that SPA's view is also contrary to that urged by the Savannah Maritime Commission ("SRMC") in litigation concerning the Savannah Harbor Expansion Project. One issue in that matter was DHEC's power to issue a Navigable Waters Permit as part of a WQC. DHEC's regulations provide that where an activity requires a Navigable Waters Permit, "review for the water certification will consider issues of that permit and the Department will not issue a separate permit for construction in State navigable waters," and the WQC "shall serve as the permit." S.C. Code Ann. Regs. 61-101(A)(9).

SRMC maintained that it, rather than DHEC, possessed the power to issue the SHEP's Navigable Waters Permit, and that this power was distinct from DHEC's power to issue a WQC. Addressing the question in its original jurisdiction, the Supreme Court appeared to agree. *See Savannah Riverkeeper v. S. Carolina Dep't of Health & Envtl. Control*, 400 S.C. 196, 206, 733

S.E.2d 903, 908 (2012) (finding that DHEC staff certification denial, which SRMC actively participated in formulating, was final agency decision).

As SRMC argued to the Supreme Court, DHEC's regulations require compliance with the Navigable Waters Permit permitting criteria and procedure "as part of the 401 [WQC] Certification" and "further requires consultation with navigable waters permitting staff to meet this requirement" because the "law states that no separate Construction in Navigable Waters Permit will be issued." Reply Brief of Savannah River Maritime Commission 16 (S.C. Orig. May 23, 2012) [attached as Ex. A].

SPA's logic – that procedures for issuance of a joint decision document *erase* the component evaluations – appears contrary to the Supreme Court's rendering of the law and the (correct) rationale espoused by the SRMC. If a Navigable Waters Permit remains a discrete component even where "review for the water certification will consider issues of [the Navigable Waters P]ermit" directly, it follows that a WQC remains a discrete component of a CAP where DHEC must separately evaluate "water quality impacts . . . *with coordination and input from appropriate [Bureau of Water] staff.*" S.C. Code Ann. Regs. 30-2.H, 61-101(A)(9), (8) (emphasis added). Said another way, the argument for maintaining component review procedures is stronger here than it was in the Savannah Harbor matter.

In fact, rather than any "strong argument," SPA's contention that "the existing critical area permit document simultaneously serves as a 401 Certification as it was issued later in time and subsequent to DHEC's general certification for NWP 3," Resp. 19, is directly contrary to the text and spirit of regulations, which require an independent evaluation of whether South Carolina's water quality standards have been met. The law does not allow for WQC requirements to be

ignored when a project also requires a CAP; instead, it pointedly insists in such cases that "water quality impacts" *must* be considered "with coordination and input" from Bureau of Water ("BOW") staff. This reflects the ultimate source of Water Quality Certification requirement: the federal Clean Water Act, *see* 33 U.S.C. § 1341(a)(1); *see City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006). If SPA were right that this federally-pedigreed review requirement dissolves whenever a CAP is present, the provision of review for component Water Quality Certifications "*included* in the direct permit for alteration of the critical area," R. 61-101(G)(6) (emphasis added), would be nonsensical. The law is clear: OCRM staff is not entitled to issue CAPs without any required WQC, nor to issue WQCs without considering impacts on water quality standards and without "coordination and input from appropriate staff," *i.e.*, the Bureau of Water.

SPA includes as an exhibit South Carolina's WQC decision for NWP 3 projects, rendered April 23, 2012. *See* Resp. Ex. D. The document proves that SPA's merger argument is wrong. It adheres to DHEC's mandatory R. 61-101 requirements applicable to WQCs, even when jointly issued with a CZCC component. Conspicuously titled a "Certification in Accordance with Section 401 of the Clean Water Act," the document contains an explicit, positive certification by the Bureau of Water that covered projects comply with various enumerated federal Clean Water Act standards and provisions. For example, BOW staff "certify" that the covered projects "are consistent with applicable provisions of Section 303 of the CWA, as amended" and "certify" that other provisions of the Act provide no applicable standards. The "Certification in Accordance with Section 401 of the Clean Water Act" references attached general conditions imposed by BOW on the Corps' Nationwide Permits in making its legally required determination that "there is a reasonable assurance that work authorized will be conducted in a manner consistent with the

certification requirements of Section 401 of the Federal Clean Water Act (CWA). . . ." *Id.* The Certification document also includes a table *separately* listing WQC and CZCC actions for each individual NWP, consistent with DHEC's duty to separately examine compliance pursuant to the Clean Water Act and the Coastal Zone Management Act.

The Critical Area Permit evaluation for SPA's individual project is a different animal. Rather than reference the Clean Water Act or any Water Quality Certification, SPA's public notice was issued solely by OCRM and announced that SPA's application was "submitted pursuant to the Coastal Zone Management Act (Act 123) of the 1977 South Carolina General Assembly." OCRM "Permit Application Public Notice," Rev. (Aug. 3, 2012) (DHEC-SCPA 001568) [Resp. Ex. B.].[3] This contrasts with the notice requirements when WQCs are present, as reflected in the notice that DHEC actually gave of its proposed WQC (and CZCC) for the Corps' Nationwide Permits. *See* DHEC, "NOTICE OF DEPARTMENT DECISION- 401 WATER QUALITY CERTIFICATION - CONSISTENCY WITH THE S.C. COASTAL ZONE MANAGEMENT PROGRAM," (April 6, 2012) [attached as Exhibit B]. The NWP WQC Notice contains an April 6, 2012 Staff Assessment of whether the various NWPs satisfy the conditions for a Water Quality Certification, including, at Page 2-3, an evaluation of NWP 3. DHEC found consistency using the following rationale:

> This NWP provides for normal maintenance activities and restoration of existing facilities as originally permitted. Maintenance, by definition, should not result in substantial change in the configuration or area impacted. If a structure or fill has been authorized and is currently serviceable, there should be minimal adverse impact on water quality or water uses as a result of routine maintenance. While there are provisions of the NWP that allow

[3] OCRM required a revised public notice because SPA originally tried to have only five pilings clusters considered by OCRM, even though SPA proposes to modify Building 322's structure above the marsh and construct new buildings there as well. *Compare id. and* OCRM "Permit Application Public Notice," (March 23, 2012) (DHEC-SCPA 001581) [Resp. Ex. B.]

> for minor modification of existing facilities, these activities will not have an overall adverse impact on water quality or existing or classified uses.

Id. BOW's understanding that NWP 3 applies only to "routine" and "normal" maintenance and restoration of structures "as originally permitted" is consistent with the federal definition of NWP 3's scope. Precisely for this reason, several of the Petitioners challenged the Corps' erroneous determination that NWP 3 encompasses SPA's $35 million project to construct a new cruise terminal – a project that is not "routine maintenance," nor intended to restore a decrepit cargo warehouse "as originally permitted." When Petitioners succeeded, SPA's NWP 3 coverage was set aside, as was the Water Quality Certification that came with it. The WQC issued for NWP 3 thus shows two things. First, it shows the error of attempting to categorize SPA's major terminal construction project as "maintenance." Second, it shows the error of trying to re-characterize a self-identified "Critical Area Permit & Coastal Zone Consistency Certification"[4] – issued with no reference to the requirements of R. 61-101, the federal Clean Water Act, or the Bureau of Water whatsoever – into an actual lawful Water Quality Certification issued pursuant to R. 61-101, pursuant to the CWA, through the Bureau of Water.

Even if SPA's attempt to retroactively convert its CAP into a WQC weren't procedurally impossible, its claim that the CAP and WQC are so *substantively* identical as to be indistinguishable is also wrong. SPA presents a table said to show the supposed identity between the two programs, but it is vague on its face and materially incomplete. In fact, the WQC and CAP programs have significant distinguishing features that would be rendered meaningless by SPA's view. Reflecting unique federal requirements, the WQC regulations require the Department to comply with specific provisions of the Clean Water Act, calling (1) for the use of

[4] Resp. Ex. E.

"best practicable control technology," (2) for special permits for activity that releases into a water body "toxic pollutants" specified by the statute, and (3) for conformance with the Charleston Harbor Total Maximum Daily Load (TMDL). S.C. Code Ann. Regs.§ 61-101(A)(4). Also, the WQC regulations require the Department to "consider reasonable foreseeable similar activities of the applicant," S.C. Code Ann. Regs.§ 61-101(F)(3)(a)(4), and to go beyond mere consideration of the impacts to water quality, listed species, and aquatic ecosystems with expressed authority to deny a permit for a purposed activity based on any harm to these entities. S.C. Code Ann. Regs.§ 61-101(F)(5)(a)-(b). Finally, the WQC regulations require the Department to follow different procedures prior to the issuance of a permit for public notice and informational hearings, S.C. Code Ann. Regs.§ 61-101(D)(1), (E)(2) & (G)(1), and require the Department to "prepare a written assessment on the purposed activity requiring a Federal [] permit." S.C. Code Ann. Regs.§ 61-101(E)(2).

DHEC purported to follow these procedures in issuing the WQC for NWPs in April of 2012, but did no such thing in issuing the CAP for SPA's project in December of 2012. There is no basis for SPA's theory that a Critical Area Permit subsumes and erases a component Water Quality Certificate, and the assertion contradicts binding law. SPA simply does not have a WQC by virtue of a Critical Area Permit that was issued *without* the required WQC evaluation or certification.

The Court should note that SPA's arguments attacking the WQC program in this case echo ones it made to the Supreme Court in *South Carolina Coastal Conservation League v. S. Carolina Dep't of Health & Envtl. Control*, 390 S.C. 418, 430, 702 S.E.2d 246, 253 (2010). Indeed, SPA has claimed, in footnote 6 of its brief here, that the Supreme Court "expressly held" in that case

that where a CAP and WQC are both needed, the procedures for issuing CAPs govern, rather than those found in the WQC regime.

In fact, the text quoted by SPA is found in the Supreme Court's *recounting* of the *ALC's* holdings – in a case where the ALC was *reversed*. As summarized by the Supreme Court:

> The ALC first ruled Regulation 61–101 notice requirements were not applicable to this permit.[6] However, the ALC went on to find the notice requirements in Regulation 61–101 directly conflicted with the notice requirements in § 44–1–60(E) and, therefore, ruled the regulation "had been superseded" by the statute.[7]

South Carolina Coastal Conservation League, 390 S.C. at 424, 702 S.E.2d at 249-50. The Supreme Court disagreed, specifically fiding that Regulation 61-101's notice provisions were *not* superseded by S.C. Code Ann. § 44-1-60(E):

> Section 44–1–60(E) sets forth the procedure for appealing from a staff decision and provides which parties DHEC is required to notify by certified mail of the decision. On the other hand, Regulation 61–101 serves to further DHEC's policy goals including providing notice to the public, fostering openness, and keeping the public informed about important environmental decisions. Section 44–1–60(E) addresses appellate procedures, while Regulation 61–101 addresses public notice. Although § 44–1–60(E) places an affirmative duty on DHEC to send simultaneous notification of appealable staff decisions to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, it does not prohibit DHEC from sending notice of these decisions to additional persons. For these reasons, we find the regulation [61-101] does not alter or add to the statute.

Id., 390 S.C. at 430, 702 S.E.2d at 253. In reversing the position of the lower court on this point, the Supreme Court was rejecting the position urged by SPA in that case: that WQC procedure was merged into CAP procedure and eradicated by Section 44-1-60. Had SPA been right on merger, the Court would have had no occasion to reach the issue (of whether that WQC procedure was displaced by S.C. Code Ann. § 44-1-60). But the Court did reach that issue, and resolved it against SPA. The footnote quoted by SPA did not "expressly hold" otherwise; at best it explains of the (reversed) lower court's rationale, and does not counter Supreme Court's overall thrust: that

DHEC's WQC's procedures are additive of other requirements, not subsumed and preempted by them.

3. The Court Should Reject SPA's Bid To Declare South Carolina's WQC Authority "Waived"

SPA's contention that South Carolina waived its WQC authority over SPA's project is meritless. According to SPA, even though it was proceeding under color of the NWP 3's WQC, once that WQC was rendered inapplicable by virtue of a federal court order, the absence of a WQC resulted in waiver.

This Court is familiar with the issue of WQC waivers. As it is aware, the Clean Water Act requires that DHEC act on an application for a WQC within one year. 33 U.S.C. § 1341. Where a state acts – *e.g.*, by denying or granting a WQC for a project – within the year period, there is no waiver. *See* Order Denying Motion to Enforce Stay at 10 n.11, *Savannah Riverkeeper et al. v. S.C. DHEC,* ALC No. 11-ALJ-07-0618-CC (May 31, 2012) [attached as Exhibit C].

Here, SPA applied for its federal and state approvals in January of 2012. The Corps, in issuing its April 20, 2012 authorization, said its authorization was "provisional" on SPA obtaining either an individual WQC or relying on DHEC's WQC for the NWPs. Corps Letter to Bellamy (Aug. 20, 2012) [Resp. Ex. C]. DHEC then issued its WQC for the NWPs, including NWP 3, on April 23, 2012. Resp. Ex. D. Because DHEC's April 23 action was taken within less than four months of SPA's application, the agency acted well within the one-year period, and DHEC did not waive its WQC authority.

SPA seems to think that waiver *subsequently* occurred when the U.S. District Court set aside the specific NWP 3 authorization for SPA's project. However, where an agency *acts* within the statutory period, subsequent activity on judicial review does not result in waiver. *See* Order at 10

n.11, *Savannah Riverkeeper et al. v. S.C. DHEC,* ALC No. 11-ALJ-07-0618-CC [Exhibit C] (citing and quoting *FPL Energy Me. Hydro LLC v. Dep't Envtl. Prot.*, 926 A.2d 1197, 1203 (Me. 2007) (holding no waiver of certification requirements occurred where agency took action within one year, and finding "no indication" that "Congress intended for all in-state appeals to be completed within the same one-year deadline"); *City of Klammath Falls v. Envtl. Quality Comm'n*, 119 Or. App. 375, 377-378 (Or. Ct. App. 1993) (finding no waiver where agency acted within one-year period and applicant then instigated contested case challenge that extended beyond year) *aff'd on other grounds,* 870 P.2d 825 (Or. 1994).

Were it otherwise, parties could unilaterally *force* waiver, for example by appealing – and staying – a WQC denial while the statutory period runs. Even more absurdly, if a court were to declare a WQC invalid after the statutory period had run, its order to that effect would (under SPA's theory) render itself moot because it would directly effectuate waiver.

SPA's theory that a court order setting aside the basis for its WQC results in "waiver" of South Carolina's review authority under the Clean Water Act recklessly attempts to undermine effective judicial review and remove South Carolina authority over federally-permitted projects. There is no basis for SPA's position, and this Court should not adopt it.[5]

4. The Court Should Decline SPA's Invitation to Issue a WQC by Unilateral Fiat.

SPA offers one final theory, contending that even if DHEC did not issue a required WQC, the ALC could simply evaluate SPA's project unilaterally and issue a certification by fiat. This theory is completely inconsistent with SPA's claims that (1) it currently has a NWP 3 WQC; (2)

[5] DHEC's November 27, 2013 letter to the Court seems to oppose with SPA's waiver theory, as well as SPA's theory that a CAP issued without any WQC notice, procedure or substance can nonetheless serve as a WQC. Since the numbering/pagination used in DHEC's letter does not seem to correspond to the numbering/pagination in the filed version of SPA's brief, however, the undersigned is unable to determine DHEC's exact position.

that currently it has a WQC by virtue of a CAP issued without a WQC; and (3) that South Carolina has waived its WQC authority. Indeed, the only consistency among any of these theories is that they are all wrong. SPA's proposal to have WQCs processed and issued by the ALC directly distinguishes itself by being the most glaringly misguided.

The South Carolina General Assembly has set forth binding procedure for *"all"* decisions for issuance of DHEC permits and certifications that give rise to contested cases. S.C. Code Ann. § 44-1-60(A)(emphasis added). In making those decisions, DHEC, "the Department," must comply with "all requirements for public notice, receipt of public comments and public hearings before making a department decision." *Id.* § 44-1-60(B). For Water Quality Certifications those requirements are found at Regulation 61-101, which "establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act, 33 U.S.C. Section 1341." S.C. Code Ann. Regs. § 61-101(A)(1). Regulation 61-101 establishes elaborate requirements that the "Department" must follow in giving public notice of an application and its decision-making. Public notice is required of all applications for certification of Federal licenses or permits, and that notice "shall provide a reasonable period of time, normally thirty (30) days from the date of notice within which interested persons may submit their views and information concerning the certification application *to the Department.*" *Id.* § 61-101(D)(1) (emphasis added). **"Department" is explicitly defined as "the Department of Health and Environmental Control."** *Id.* § 61-101(B)(4) (emphasis added).

DHEC must give notice to "the applicant"; "any agency with jurisdiction over or interest in the activity or disposal site"; "owners or residents of property adjoining the area of the proposed activity as identified in the application"; "newspapers of local and statewide interest in the area";

any "adjacent State agency of North Carolina or Georgia with jurisdiction over or interest in common waters affected by the proposed activity"; and "anyone who has specifically requested copies of public notices. *Id.* § 61-101(D)(4)(a). Moreover, the Department must give notice "by publication by the applicant of the Notice of Application in a newspaper of local or general circulation reasonably expected to cover the area affected by the activity," with "sufficient information for the reader to understand the location, nature, and extent of the proposed activity and a contact for further information." *Id.* § 61-101(D)(4)(b).

"The Department shall hold a public informational hearing whenever twenty (20) or more individual written requests are received during the public comment period and which raise water quality and classified use issues," and "[s]uch hearing will be conducted by Department staff personnel." *Id.* § 61-101(E)(2). In making its decision, "the Department" must prepare a written assessment on each proposed activity requiring a Federal license or permit. S.C. Code Ann. Regs.§ 61-101(E)(2). This written assessment must address the water quality impacts of the project; make conclusions concerning compliance with water quality standards, protection of classified uses, and related water quality impacts; and must be available to the applicant and to the public upon request. *Id.* As with any DHEC decision on "any permit, license, certification or other approval, the department" is required to "take into consideration all materials comments received in response to the public notice in determining whether to issue, deny, or condition such permit, license, or other approval." S.C. Code Ann. § 44-1-60(D).

"The Department shall issue a notice of proposed decision on application for certification, including any proposed conditions" and notice "of availability of the staff assessment and related file information." S.C. Code Ann. Reg. § 61-101(G)(1). The Department must mail notice to"

the "applicant"; "agencies having jurisdiction or interest over the disposal site or activity site"; "owners or residents of property adjoining the area of the proposed activity"; and "those persons providing comment in response to the initial notice of application." *Id.* Notice must also be sent by certified mail to those who have requested in writing to be notified, or electronic means if requested. S.C. Code Ann. § 44-1-60(E)(1).

The Department's "initial decision involving the issuance" of a WQC is "a staff decision," issued as a "department decision on the administrative record" whose statutorily-specified components include the application and public comments as well as "material readily available at the department, or published materials which are generally available" if referenced in the decision." S.C. Code Ann. § 44-1-60(D).

After a staff decision has issued, affected parties and others may request a Final Review Conference before the Board of Health and Environmental Control. *Id.* § 44-1-60(E–F). The Board is DHEC's governing body, consisting of eight members appointed by the Governor upon the advice and consent of the South Carolina Senate. *Id.* § 44-1-20. After the Board review process yields a "final agency decision," such decision "must inform the parties of their right to request a contested case hearing before the Administrative Law Court." *Id.* § 44-1-40 (E)(2). A "contested case hearing" may then be requested "before the Administrative Law Court, in accordance with the Administrative Procedures Act," with due "consideration" given by the ALC "to the provisions . . . regarding the department's specialized knowledge." *Id.*

What SPA proposes here is something different, and unlawful. Rather than having a request for certification publicly noticed and evaluated by the designated state agency (DHEC) pursuant to elaborate procedures and protections, SPA invites the Court to ignore the legal procedures and

issue a WQC directly by fiat. That approach ignores the elaborate procedure dictated by law. It would also work obvious unfairness to parties such as adjacent landowners, who would be deprived of their legally protected rights to notice and participation. SPA's theory would, moreover, bypass DHEC entirely, rendering the agency's statutorily recognized "specialized knowledge" – if not its entire water quality budget – a complete nullity. Not surprisingly, SPA's theory would also yield procedural absurdities, such as a party appealing an ALC decision to the ALC as a contested case, outcomes the General Assembly by its plain direction did not intend.

While these results might suit SPA's goal of stripping authority away from its sister agency and making the ALC a "department of one," they do not suit the law, and would violate the principles of fairness and requirements of due process. The law could not be clearer in requiring that *DHEC* notice, process, consider, and decide WQC applications, with this honorable Court's authority limited to *reviewing* any resulting decisions as a contested case. SPA's request to have this Court bypass an entire and issue a WQC for its project directly would take this tribunal into unlawful territory, and must be rejected.

5. SPA Has Failed to Rehabilitate its Invalid Coastal Zone Consistency Certification.

As pointed out in the Petitioners' motion, where a Water Quality Certification is required for a project that *also* requires a Coastal Zone Consistency Certification, the latter must be issued as a component of, and concurrently with, a Water Quality Certification. 23A S.C. Code Ann. Regs. 61-101.A.(7). SPA admits this, Resp. 5, and also admits that its project was required to have a Coastal Zone Consistency Certification apart from a CAP, *id.* 6. SPA further admits that where a CZCC and WQC are both required for a project, the CZCC must be issued as a

"component of, and concurrently with" the WQC. Resp. 6 (quoting S.C. Code Ann. Regs. 61-101(A)(7)).

Despite conceding that it was required to have a CZCC issued as a component of an WQC, SPA has no response to our demonstration that the CZCC issued for SPA's project is invalid because it was *not* issued as a component of and concurrently with a WQC for the project. SPA presumably hopes the Court will ignore this point, or that it will somehow conclude that the project's CAP implicitly included a WQC (even though the required coordination and analysis did not take place), and that, in turn, this imputed WQC itself implicitly included a CZCC (even though there is no evidence that the CZCC was issued as "a component of, and concurrently" with any WQC).

The Court need not embark on a magical mystery trail to discovery nested, invisible actions. The law requires actual, explicit actions, and those simply did not occur. The CZCC issued for SPA's project is invalid and must be vacated.[6]

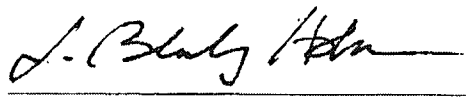
CONCLUSION

Because a federal court has vacated the Corps' NWP 3 authorization for SPA's cruise terminal project, SPA may not move forward with its new and expanded cruise ship terminal with a Critical Area Permit and Coastal Zone Consistency Certification issued without a Water Quality Certification. DHEC did not have authority to issue a CAP and CZCC without the required WQC. This honorable Court should not expend its valuable resources or the resources of the

[6] SPA's suggestion that its Critical Area Permit and CZCC should not be vacated because it has no immediate need for a WQC, Resp. 18, misapprehends the issue. This Court is reviewing SPA's CAP and CZCC. Petitioners contend both those approvals are legally infirm because they lack the WQC component that state law requires be issued concurrently. SPA's preference for obtaining a WQC later is beside the point.

parties evaluating dead letter authorizations that are invalid on their face. The motion should be granted.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	Docket No. 13-ALJ-07-0056-CC **CERTIFICATE OF SERVICE**

FILED
DEC 19 2013
ADMINISTRATIVE LAW COURT

I hereby certify that I have on this 16th day of December, 2013, served a copy of the foregoing Reply In Support of Motion to Vacate upon all parties and counsel of record in the above-captioned case, via United States Mail, postage pre-paid, addressed as follows:

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Exhibit A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Savannah Riverkeeper, South Carolina Coastal Conservation League, South Carolina Wildlife Federation, Conservation Voters of South Carolina, and the Savannah River Maritime Commission ..... Petitioners,

v.

The South Carolina Department of Health and Environmental Control,..... Respondent.

REPLY BRIEF OF SAVANNAH RIVER MARITIME COMMISSION

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S.C. SUPREME COURT

> (A) In addition to the above provisions of this joint resolution, a commission to be known as the Savannah River Maritime Commission is hereby established **to represent this State in all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels.** The commission as an instrumentality of this State is empowered to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Army Corps of Engineers, and other involved parties in regard to the above which bind the State of South Carolina
>
> ...
>
> (F) **Except as provided below**, nothing in this section shall supersede the authority of other state agencies, departments, or instrumentalities including the Department of Natural Resources, the **Department of Health and Environmental Control**, or the State Ports Authority to exercise all powers, duties, and functions within their responsibilities as provided by law. **However, on an interstate basis and specifically in regard to the State of Georgia, the responsibilities granted to the Savannah River Maritime Commission in this joint resolution supersede any other concurrent responsibilities of a particular state agency or department.** Any requirements for permitting and constructing new terminal facilities on the Savannah River in Jasper County are declared not to be the responsibility of this commission, except as they may relate to this state's responsibility for the navigability or depth of the South Carolina portion of the Savannah River.

(Emphasis added). The language of Section 54-6-10 is clear: with respect to this discrete area and purpose, which includes the SHEP, the General Assembly transferred any and all responsibilities of DHEC's Navigable Waters Permitting staff under Regulation 19-450 to the Commission while allowing DHEC to retain authority over issuance of the 401 Certification. In practical effect, the Commission was empowered by the General Assembly to step into the shoes of DHEC for this limited purpose.

Under this authority, DHEC's 401 Certification staff was required to coordinate with the Construction in Navigable Waters Permitting staff [here, the Commission] to insure the provisions of this regulation are adhered to." Reg. 19-450.3.G. DHEC failed to heed the plain language of the General Assembly.

DHEC suggests that the Commission has no authority under Regulation 19-450, and further makes the assertion that compliance with Regulation 19-450 is optional (while at the same time acknowledging that its own 401 Certification claimed "compliance" with Regulation 19-450). DHEC Br. at 23-24. DHEC compounds its confusion of the applicable legal requirements when it notes that a 401 Certification is not a permit, but then spends pages explicitly relying on DHEC "permitting" authority and the use of the word "permit" in the statutes. DHEC Br. at 14-30.

In truth, the law requires compliance with Regulation 19-450 as part of the 401 Certification. *See* Reg. 61-101.A.9; Reg. 19-450.3.G. The law further requires consultation with navigable waters permitting staff to meet this requirement, as the law states that no separate Construction in Navigable Waters Permit will be issued. *See* Reg. 61-101.A.9. ("If an activity also requires a permit for construction in State navigable waters ... the review for the water quality certification will consider issues of [state navigable waters] permit and [DHEC] will not issue a separate permit for construction in State navigable waters. The certification will serve as the permit."). When the General Assembly gave the Commission authority and jurisdiction over "navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels," such is clearly inclusive of the SHEP. As the SHEP

involved the dredging of the Savannah Harbor in a federal navigation channel and in the navigable waters of South Carolina to aid ocean-going commerce, it falls squarely within authority granted by statute. A grant of authority over "navigability" includes "navigable waters" permitting.

Further, DHEC makes much of the use of the word "represent" in the statute. However, this term was used in recognition of the regulatory language that no separate navigable waters permit be issued and instead that DHEC was required to confer with the navigable waters staff—here the Commission. In this way, the Commission "represented" the State by standing in the place of the navigable waters permitting staff. Thus, it was DHEC's failure to comprehend the plain language of the statute and regulation that resulted in its contravention of law.

DHEC also references the comments submitted by the Commission to DHEC as evidence of a failure by the Commission to exercise its authority or somehow fail to act in a manner commensurate with its authority. However, those comments were submitted by the Commission for DHEC's consideration on the 401 Certification, which was within the purview of DHEC. Once DHEC announced it a proposed decision to deny the 401 Certification, there was nothing left for the Commission to do, as a denial of the 401 Certification rendered an analysis under Regulation 19-450 unnecessary. Nonetheless, the Commission did offer to participate in the final review conference—an offer DHEC rebuffed. Instead, the DHEC Board, oblivious to the bifurcation of authority and the instruction of the General Assembly, moved forward and gave the Savannah Corps and the GPA what they wanted in the 401 Certification, including stating the criteria in Regulation 19-450 was met, continuing what the Court

(same). Notably, after all of DHEC's resistance to the Commission's authority, DHEC ultimately acknowledges that the water quality and navigability conditions included in the Commission Decision are similar to those considered by DHEC and does not object to their inclusion in the timely 401 Certification. *See* DHEC Br. at 28.

SAVANNAH RIVER MARITIME COMMISSION

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Attorneys for Savannah River Maritime Commission

Columbia, South Carolina

May 23, 2012

Exhibit B

D H E C
PROMOTE PROTECT PROSPER
South Carolina Department of Health and Environmental Control

Bureau of Water
2600 Bull Street
Columbia, S. C. 29201

Public Notice No. DHEC-NWP-2012 Public Notice Date: April 6, 2012

NOTICE OF DEPARTMENT DECISION
401 WATER QUALITY CERTIFICATION
CONSISTENCY WITH THE S.C. COASTAL ZONE MANAGEMENT PROGRAM

The Department, is taking action for Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act, and for certification of consistency with the S.C. Coastal Zone Management Program in accordance with 15 CFR 930, for reissuance of 48 existing and issuance of two (2) new U S. Army Corps of Engineers' Nationwide Permits (NWP).

After reviewing the U.S. Army Corps of Engineers' (Corps) proposal to amend the Nationwide Permit program regulations to reissue and modify the NWPs, Department Staff determined that provided the proposed actions listed in the following table are implemented and proposed conditions are adhered to, there is a reasonable assurance that work authorized by the herein will be conducted in a manner consistent with the certification requirements of Section 401 of the Federal Clean Water Act and the Coastal Zone Management Program in accordance with 15 CFR 930. The Office of Ocean and Coastal Resource Management must issue its own permit for any activity covered by the nationwide permits in the critical areas of South Carolina's Coastal Zone. Individuals applying for Nationwide Permits should be so advised. This does not preclude compliance with 15 CFR 930 for direct federal activities.

Accordingly, the Department proposes to act on the Nationwide permits as listed in the attached table. In reference to proposed Coastal Zone Management Program consistency certifications, "Issue" means that the Nationwide Permit can be made consistent with the Coastal Zone Management Program if the proposed regional conditions are adopted by the U.S. Army Corps of Engineers

The Corps issued the final notice in the Federal Register on February 21, 2012. The evaluation of the proposed work was conducted by the Bureau of Water and the Office of Ocean and Coastal Resource Management and a copy of the staff assessment supporting the Department decision is enclosed.

The final 401 Water Quality Certification will be issued unless there is a timely request for review of the Department Decision based on water quality or water use impacts.

The issuance of this Notice of Department Decision represents a final staff decision that may be appealed. The procedures for appeals went into effect July 1, 2010 pursuant to 2010 Act No. 278. Please see attached page titled "Notice of Appeal Procedure" for details.

Heather S. Preston,
Division of Water Quality

Notice of Appeal Procedure
Pursuant to S.C. Code Section 44-1-60

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 calendar days after notice of the decision has been mailed or otherwise sent to the applicant, permittee, licensee and affected persons who have requested in writing to be notified, unless a written request for final review accompanied by a filing fee in the amount of $100 is filed with the Department by the applicant, permittee, licensee, or affected person.

2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a timely written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393. A filing fee in the amount of $100 made payable to SC DHEC must also be received by the Clerk within the time allowed for filing a request for final review. However, if a request for final review is filed by facsimile, the filing fee may be mailed to the Clerk of the Board if the envelope is postmarked within the time allowed for filing a request for final review.

   Clerk of the Board
   SC DHEC
   2600 Bull Street
   Columbia, SC 29201

3. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 calendar days after notice of the decision has been mailed or otherwise sent to persons entitled to receive notice. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due. A request for final review will be returned to the requestor if the filing fee is not received on time as described above.

4. The request for final review should include the following:
   a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
   b. a statement of any significant issues or factors the Board should consider in deciding whether to conduct a final review conference
   c. a copy of the Department's decision for which review is requested

5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures. If the Board declines in writing to schedule a final review conference, the Department's decision becomes the final agency decision and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court within 30 calendar days after notice is mailed that the Board declined to hold a final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

January 7, 2011

Nationwide Permit Number & Topic	401 Cert Action	CZC Cert Action (Outside of the Critical Area)
1. Aids to Navigation	N/A	Issue
2. Structures in Artificial Canals	N/A	Issue
3. Maintenance	Issue	Issue
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Issue	Issue
5. Scientific Measurement Devices	Issue	Issue
6. Survey Activities	Issue	Issue
7. Outfall Structures and Associated Intake Structures	Issue	Issue
8. Oil and Gas Structures on the Outer Continental Shelf	N/A	Issue
9. Structures in Fleeting and Anchorage Areas	N/A	Issue
10. Mooring Buoys	N/A	Issue
11. Temporary Recreational Structures	N/A	Issue
12. Utility Line Activities	Issue w/ Cond	Issue w/ Cond
13. Bank Stabilization	Issue	Issue
14. Linear Transportation Projects	Issue w/ Cond	Issue w/ Cond
15. U.S. Coast Guard Approved Bridges	Issue	Issue
16. Return Water From Upland Contained Disposal Areas	Deny	Deny
17. Hydropower Projects	Deny	Deny
18. Minor Discharges	Issue	Issue
19. Minor Dredging	Issue	Issue
20. Response Operations for Oil and Hazardous Substances	Issue	Issue
21. Surface Coal Mining Operations	Deny	Deny
22. Removal of Vessels	Issue	Issue
23. Approved Categorical Exclusions	Issue w/ Cond	Issue w/ Cond
24. Indian Tribe or State Administered Section 404 Programs	N/A	Deny
25. Structural Discharges	Issue	Issue
26. [Reserved]	N/A	N/A
27. Aquatic Habitat Restoration, Establishment & Enhancement Activities	Issue	Issue
28. Modifications of Existing Marinas	N/A	Issue
29. Residential Developments	Issue w/ Cond	Issue w/ Cond
30. Moist Soil Management for Wildlife	Issue	Issue
31. Maintenance of Existing Flood Control Facilities	Issue	Issue
32. Completed Enforcement Actions	Issue	Issue
33. Temporary Construction, Access and Dewatering	Issue	Issue
34. Cranberry Production Activities	Deny	Deny
35. Maintenance Dredging of Existing Basins	N/A	Deny
36. Boat Ramps	Issue	Issue
37. Emergency Watershed Protection and Rehabilitation	Issue	Issue
38. Cleanup of Hazardous and Toxic Waste	Issue	Issue
39. Commercial and Institutional Developments	Issue w/ Cond	Issue w/ Cond
40. Agricultural Activities	Issue	Issue
41. Reshaping Existing Drainage Ditches	Issue	Issue
42. Recreational Facilities	Issue w/ Cond	Issue w/ Cond
43. Stormwater Management Facilities	Issue w/ Cond	Deny
44. Mining Activities	Issue w/ Cond	Issue w/ Cond
45. Repair of Uplands Damaged by Discrete Events	Issue	Issue
46. Discharges in Ditches	Issue w/ Cond	Issue w/ Cond
47. [Reserved]	N/A	N/A
48 Commercial Shellfish Aquaculture Activities	Issue	Issue
49. Coal Remining Activities	Deny	Deny
50. Underground Coal Mining Activities	Deny	Deny
51. Land-Based Renewable Energy Generation Facilities	Deny	Deny
52. Land-Based Renewable Energy Generation Pilot Projects	Deny	Deny

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
AND DIVISION OF WATER QUALITY

Staff Assessment of application for 401 Water Quality Certification and Consistency with the S.C. Coastal Zone Management Program

BACKGROUND INFORMATION

The U.S. Army Corps of Engineers (Corps) is proposing to revise its nationwide permit regulations (33 CFR 330). This Corps is reissuing 48 of the 49 existing nationwide permits (NWPs) and adding two new NWPs. The permits will replace the existing NWPs, which expire on March 18, 2012. The Corps published notice of this proposal in the Federal Register on February 16, 2011. This notice explained the requirement for the State to issue Water Quality Certification and Coastal Zone Consistency Certification for certain nationwide permits. The Corps issued the final notice in the Federal Register on February 21, 2012. The South Carolina Department of Health and Environmental Control (SCDHEC) issued a public notice on February 17, 2012 announcing that it would be accepting public comments related to the certifications.

NWPs are general permits issued on a nationwide basis to authorize minor activities with little delay or paperwork. General permits are issued for a category of activities when those activities are similar in nature and cause only minimal individual and cumulative environmental impacts or the general permit would result in avoiding unnecessary duplication of regulatory control exercised by another regulatory agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. The Corps believes that the nationwide permits generally comply with State water quality standards and the S.C. Coastal Zone Management Program.

State Water Quality Certification pursuant to Section 401 of the Clean Water Act, or waiver thereof, is required prior to issuance or reissuance of the NWPs which may result in a discharge into waters of the United States. The Corps has determined that the discharges associated with NWPs number 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49 50, 51, and 52 should be reviewed by the South Carolina Department of Health and Environmental Control (SCDHEC) in accordance with provision of Section 401 of the Clean Water Act. All of the nationwide permits should be reviewed for consistency with the S.C. Coastal Zone Management Program.

SUMMARY OF PUBLIC COMMENTS

The following submitted written comments:

South Carolina Department of Transportation
Tom Ballou, Ballou Associates
Wayne Beam, Beam and Associates
South Carolina Environmental Law Project

All comments received were considered in reaching the decisions on the nationwide permits.

EXPLANATION, EVALUATION, AND PROPOSED ACTION OF THE NATIONWIDE PERMITS

General Conditions: This condition applies to all Nationwide Permits (NWP).

1. Activities in the Critical Areas (as defined in 48-39-10, R 30.1(D) and R 30.10) require a direct permit from SCDHEC OCRM. SCDHEC OCRM's action on direct critical area permits will serve as the consistency determination for the critical area activity

Nationwide Permit Number 1 **Section 10** **CZC**

Aids to Navigation. The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66).

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program.

Rationale: Direct SCDHEC OCRM permits are required within the critical area (as defined in 48-39-10, R. 30.1(D) and R. 30.10). Outside of the critical area, S.C. Construction in Navigable Waters Permits are required.

Nationwide Permit Number 2 **Section 10** **CZC**

Structures in Artificial Canals. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)).

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program.

Rationale: Direct SCDHEC OCRM permits are required within the critical area (as defined in 48-39-10, R. 30.1(D) and R. 30.10). Outside of the critical area, S.C. Construction in Navigable Waters Permits are required.

Nationwide Permit Number 3 **Section 10 and Section 404** **CZC & 401**

Maintenance. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project or within the boundaries of the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and/or the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a

manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre- construction elevations. The areas affected by temporary fills must be revegetated, as appropriate

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre- construction notification to the district engineer prior to commencing the activity (see general condition 31) The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals.

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

Proposed Action. Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: This NWP provides for normal maintenance activities and restoration of existing facilities as originally permitted Maintenance, by definition, should not result in substantial change in the configuration or area impacted. If a structure or fill has been authorized and is currently serviceable, there should be minimal adverse impact on water quality or water uses as a result of routine maintenance. While there are provisions of the NWP that allow for minor modification of existing facilities, these activities will not have an overall adverse impact on water quality or existing or classified uses. Certification of this NWP maintains the proper sequence of avoidance, minimization, and compensation for unavoidable impacts while providing applicants expeditious approval when proposed projects meet or exceed the criteria for the NWP

Nationwide Permit Number 4 **Section 10 & Section 404** **CZC & 401**

Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi- impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: These devices and/or activities should have no adverse impacts on water quality or water uses, including wetlands functions, because of the nature of the devices. They would not obstruct flow or circulation patterns. Any impact from clam or oyster digging would be temporary with no changes in existing water quality or water uses

Nationwide Permit Number 5 **Section 10 & Section 404** **CZC & 401**

Scientific Measurement Devices. Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (e g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Due to the nature of these devices and/or activities, this NWP should have no adverse impacts on water quality or uses, including wetland functions. The size of the weirs and flumes covered by this NWP are such as not to obstruct flow or circulation patterns. Further, unless the purpose of the project is to impound water, which is not the case for this NWP, general condition # 2 for the NWPs prohibits disruption of the movement of indigenous aquatic life; therefore, the construction authorized by this NWP would not obstrud aquatic life movement

Nationwide Permit Number 6 **Section 10 & Section 404** **CZC & 401**

Survey Activities. Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act.

Proposed Action. Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: These devices and/or activities should have no adverse impacts on water quality or water uses, including wetlands functions, because of the nature of the devices. They would not obstruct flow or circulation patterns.

Nationwide Permit Number 7 **Section 10 & Section 404** **CZC & 401**

Outfall Structures and Associated Intake Structures. Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or that are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S C. Coastal Zone Management Program

Rationale: Even though the placement or construction of these structures has the potential to adversely affect some water uses, including aquatic life passage or secondary recreational uses, the Department will have the opportunity to review these impacts through review of applications for Construction in Navigable Waters

Permitting Program. Further, data obtained from the Corps indicates that for the period from 2007, through 2011, 38 NWPs were issued under this NWP with only 0.279 acres of fill and 24 linear feet of stream impacts. Therefore, SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program.

Nationwide Permit Number 8 **Section 10** **CZC**

Oil and Gas Structures on the Outer Continental Shelf. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f), as well as 33 CFR 322.5(l) and 33 CFR part 334. Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

Notification. The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program.

Rationale: SCDHEC OCRM will review these applications under a separate Federal Consistency process with the Department of the Interior and consequently has a review process in place.

Nationwide Permit Number 9 **Section 10** **CZC**

Structures in Fleeting and Anchorage Areas. Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose.

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program.

Rationale: Direct SCDHEC OCRM permits are required within the critical area (as defined in 48-39-10, R. 30.1(D) and R. 30.10). Outside of the critical area, S.C. Construction in Navigable Waters Permits are required.

Nationwide Permit Number 10 **Section 10** **CZC**

Mooring Buoys. Non-commercial, single-boat, mooring buoys.

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program.

Rationale: Direct SCDHEC OCRM permits are required within the critical area (as defined in 48-39-10, R. 30.1(D) and R. 30.10). Outside of the critical area, S.C. Construction in Navigable Waters Permits are required.

Nationwide Permit Number 11 **Section 10** **CZC**

Temporary Recreational Structures. Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that

such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually.

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program.

Rationale: Direct SCDHEC OCRM permits are required within the critical area (as defined in 48-39-10, R. 30.1(D) and R. 30.10). Outside of the critical area, S.C. Construction in Navigable Waters Permits are required. In the critical area, there is a General Permit for these structures that allows them to be in place for 45 days.

Nationwide Permit Number 12 **Section 404** **CZC & 401**

Utility Line Activities. Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project. Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody. Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows. This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction

activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 31.) (Sections 10 and 404)

Note 1: Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.
Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.
Note 3: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).
Note 4: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program. (Policy IX. A. 1(a), (c), (d) & (e), Policy IX.E 1(c) & (d); Policy VII.A.1 and others depending upon the activity)

Rationale: In order to qualify for the nationwide permit, the activity should have minimal impacts. Due to the criteria for use of the nationwide permit, any impact to water quality, water uses, or wetland functions should be temporary provided the applicant adheres to the criteria. However, as currently proposed, this NWP has no limit on the utility line crossings of aquatic systems. Corps data on NWPs shows us that between 2007, and 2011, 775 of these NWPs were issued with impacts of 14.805 acres of fill and 9,905.625 linear feet of stream. SCDHEC believes that these impacts cannot be categorized as minimal as intended for the nationwide permitting program. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated with the addition of the proposed Regional Conditions and if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions of the 401 Water Quality Certification:

1. If the project involves more than 10 aquatic site crossings (not including directionally bored crossings), the project will not be certified under this NWP and will require separate approval through SCDHEC's individual certification process.
2. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act).

Regional Conditions of the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following condition, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC OCRM concurrence.

2 Impacts to aquatic sites associated with the construction of temporary, permanent and maintenance easements must be limited to a total width of 50' (including filling, excavation and clearing) except where required for safety reasons.

3. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10 acres or 300 linear feet.

Nationwide Permit Number 13 **Section 10 & Section 404** **CZC & 401**

Bank Stabilization. Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosionprotection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and.

(g) The activity is not a stream channelization activity. This NWP also authorizes temporary structures, fills, and work necessary to construct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate. Invasive plant species shall not be used for bioengineering or vegetative bank stabilization.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 31.)

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Although these activities may cause temporary increases in turbidity, there should be no permanent impacts to water quality or water uses and in fact, these activities should improve water quality over time by improving eroding areas. In most instances there will be no loss of wetland functions due to Corps criterion d. Direct SCDHEC OCRM permits are required within the critical area. Outside of the critical area, S.C. Construction in Navigable Waters Permits are required. Corps data on NWPs shows us that between 2007, and 2011, 299 NWPs with a total impact of 5.747 acres were issued. SCDHEC believes, in light of the amount of times this NWP has been used, that these impacts can be categorized as minimal as intended for the nationwide

permitting program.

Nationwide Permit Number 14 **Section 10 & Section 404** **CZC & 401**

Linear Transportation Projects. Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than ½ -acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10 acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 27.)

Note: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with theS.C. Coastal Zone Management Program. (Policy II. B.1 (a), (b) and (f), Policy VII.A.1, and others depending on the activity.)

Rationale: The criteria for use of this NWP reduces potential impacts on water quality, water uses, and wetland functions. However, inclusion of several conditions will insure impacts are minimal. The NWP as currently proposed provides no limit on the number of road crossings

Corps data from 2007, through 2011, indicates that 164 NWPs with a total impact of 14.14 acres and 3,902 linear feet of stream have been issued for this NWP. The potential for significant impacts are present with this NWP as proposed and we propose the following conditions. NWP #14 can be made consistent with the S.C. Coastal Zone Management Program and result in no significant adverse impacts from the proposed activities with the addition of the proposed Regional Conditions and if the NWP is compliant with the following proposed 401 water quality certification conditions.

Proposed Conditions of the 401 Water Quality Certification:

1. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10 acres or 300 linear feet.
2. Linear transportation projects must cross perpendicular (to the extent practicable) to the aquatic site area. Impacts certified under this NWP must be limited to three crossings per single and complete project and must be in non-tidal wetlands only.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters

4. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act).

Proposed Regional Conditions for the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following conditions, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC OCRM concurrence.

2. For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. **WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants.** The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.

3. A one-day newspaper notice in accordance with the provisions of the S.C. Coastal Zone Management Program, Chapter V C. 1 A., Notice of Certification must be included.

Nationwide Permit Number 15 **Section 404** **CZC & 401**

U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899 and other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale. Because the issuance of a U. S. Coast Guard bridge permit also requires a Water Quality Certification from the SCDHEC, SCDHEC will have the opportunity to review proposed bridge construction projects and address any adverse impacts to water quality, water uses, or wetland functions through review for that Federal permit. Review of activities proposed under this NWP by the Corps will be conducted concurrently with the 401 Water Quality Certification review for the U.S. Coast Guard permit. The NWP is consistent with the S.C. Coastal Zone Management Program because separate federal consistency review would be required for all U. S. Coast Guard approved bridges and in the critical areas direct SCDHEC OCRM permits are required.

Nationwide Permit Number 16 **Section 404** **CZC & 401**

Return Water From Upland Contained Disposal Areas. Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States.

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program (Policies VIII. A. 1) and B. 1), and others depending on the activity).

Rationale: This NWP requires each applicant to obtain an individual certification from the Department. The NWP can be found consistent with the S.C. Coastal Zone Management Program if individual 401 Water Quality Certifications are issued for proposed projects.

Nationwide Permit Number 17 | Section 404 | CZC & 401

Hydropower Projects. Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Policy XI and XII.E.1. and others depending on the activity.)

Rationale: Presently, SCDHEC reviews all applications for FERC licenses and must act on the 401 Water Quality Certification. Therefore, we would have the opportunity during project review for the FERC licensing or relicensing process to evaluate any fill associated with the licensing or relicensing. Any fills at existing projects or sediment releases from licensed projects would not be reviewed by the Department. Fills have the potential to affect wetlands as well as open waters so SCDHEC must retain its right to review the effect of fills in wetlands. Currently, there are no hydropower projects in the coastal zone of South Carolina. The NWP is inconsistent with the S.C. Coastal Zone Management Program because separate federal consistency review would be required for all FERC projects.

Nationwide Permit Number 18 | Section 10 & Section 404 | CZC & 401

Minor Discharges. Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10 acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 27.)

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Corps data on NWPs shows us that between 2007 and 2011, 60 NWPs with an impact of 2.141 acres of fill and 577.213 linear feet of stream impacts were issued under this NWP in South Carolina. Therefore, SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program. If SCDHEC were to impose additional conditions to the certification of this NWP, the result would be additional delays and costs for permit applicants. Given the limited impacts to the aquatic environment, additional conditions are not justified.

Nationwide Permit Number 19 | Section 10 & Section 404 | CZC & 401

Minor Dredging. Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the

dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)).

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Corps data on NWPs shows us that between 2007, and 2011, only 18 NWPs with an impact of 0.027 acres of fill were issued under this NWP in South Carolina. Therefore, SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program. If SCDHEC were to impose additional conditions to the certification of this NWP, the result would be additional delays and costs for permit applicants. Given the limited use of this NWP and the limited impacts to the aquatic environment, additional conditions are not justified.

Nationwide Permit Number 20 **Section 10 & Section 404** **CZC & 401**

Response Operations for Oil and Hazardous Substances. Activities conducted in response to a discharge or release of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3. (2) the direction or oversight of the federal on- scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: The Department will have oversight of these activities through membership on the Regional Response Team. These cleanup activities should be allowed to proceed in a timely manner and requirement of a Corps permit and individual water quality certification could unduly delay the process with potential threats to water quality, water uses, and wetland functions.

Nationwide Permit Number 21 **Section 10 & Section 404** **CZC & 401**

Surface Coal Mining Operations. Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations.

(a) Previously Authorized Surface Coal Mining Activities. Surface coal mining activities that were previously authorized by the NWP 21 issued on March 12, 2007 (see 72 FR 11092), are authorized by this NWP, provided the following criteria are met:

(1) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of Interior, Office of Surface Mining Reclamation and Enforcement;

(2) The permittee must submit a letter to the district engineer requesting re- verification of the NWP 21 authorization. The letter must describe any changes from the previous NWP 21 verification. The letter must be submitted to the district engineer by February 1, 2013;

(3) The loss of waters of the United States is not greater than the loss of waters of the United States previously verified by the district engineer under the NWP 21 issued on March 12, 2007 (i.e., there are no proposed expansions of

surface coal mining activities in waters of the United States);

(4) The district engineer provides written verification that those activities will result in minimal individual and cumulative adverse effects and are authorized by NWP 21, including currently applicable regional conditions and any activity-specific conditions added to the NWP authorization by the district engineer, such as compensatory mitigation requirements; and

(5) If the permittee does not receive a written verification from the district engineer prior to March 18, 2013, the permittee must cease all activities until such verification is received. The district engineer may extendthe February 1, 2013, deadline by so notifying the permittee in writing, but the permittee must still cease all activities if he or she has not received written verification from the Corps by March 18, 2013, until such verification is received.

(b) Other Surface Coal Mining Activities. Surface coal mining activities that were not previously authorized by the NWP 21 issued on March 12, 2007, are authorized by this NWP, provided the following criteria are met:

(1) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of Interior, Office of Surface Mining Reclamation andEnforcement;

(2) The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that thedischarge will result in minimal individual and cumulative adverse effects. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

(3) The discharge is not associated with the construction of valley fills: A ''valley fill'' is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

Notification: For activities under paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.)

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.f)

Rationale: No known coal reserves are found in South Carolina and therefore coal miningis not performed. This permit would serve no purpose in South Carolina.

Nationwide Permit Number 22 **Section 10 & Section 404** **CZC & 401**

Removal of Vessels. Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 27.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the ''Historic Properties'' general condition is completed.

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Any expected water quality impacts from use of this NWP would be temporary and isolated to the immediate area of the work. Any major movement of sediments, such as maintenance dredging or shoal removal, for vessel removal would require an individual permit and individual certifications. If a vessel is located in an area of known or suspected sediment contamination, there is the potential that removal of this vessel will result in the release of these contaminants. Adherence with the Corps regional Condition number 8, which prohibits authorization in these areas, will ensure that there are no adverse impacts to water quality.

Nationwide Permit Number 23 **Section 10 & Section 404** **CZC & 401**

Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters.

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rgls indx.htm. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with theS.C. Coastal Zone Management Program. (Guidelines for the Evaluation of All Projects C.3.1. Policy XII. E.1, and others depending on the activity)

Rationale: This NWP would allow federal agencies to make a determination of minimal impacts to state resources for their own projects without review and concurrence by the state. Data obtained from the Corps indicates that NWP #23 has not been issued during the period from 2007 through 2011. However, since there is no limitation on the scope of these activities, SCDHEC believes that there is the potential for this NWP to have more than the minimal impacts intended for the nationwide permitting program and is proposing to add a condition to prohibit the use of the NWP in special aquatic sites including wetlands. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated with the addition of the proposed Regional Conditions and if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. This NWP is not certified for activities if the discharge will cause the loss of greater than 0.25 acres of Waters of the United States or more than 300 linear feet of stream impacts.
2. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act).

Regional Conditions of the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following condition, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC - OCRM concurrence.
2. A compensatory mitigation plan must be submitted and approved by the SCDHEC OCRM for projects with impacts exceeding 0.10 acre.

Nationwide Permit Number 24 — **Section 10** — **CZC**

Indian Tribe or State Administered Section 404 Programs. Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899.

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.5(a)(2)).

Proposed Action. Find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C 3.f)

Rationale: South Carolina does not have a state administered 404 Program.

Nationwide Permit Number 25 — **Section 404** — **CZC & 401**

Structural Discharges. Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale. Due to the nature of the discharges, changes in water quality because of the discharges will be minimal. Acreage impacts to aquatic sites will be minimal because of the limitations.

Nationwide Permit Number 26 (Reserved)

Nationwide Permit Number 27 Section 10 & Section 404 CZC & 401

Aquatic Habitat Restoration, Establishment, and Enhancement Activities. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to establish or re-establish wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services. Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments. Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted:

(1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the NationalMarine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies;

(2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity

did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action, or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 31), except for the following activities: (1) Activities conducted on non- Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies; (2) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency. However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement.

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: This NWP authorizes aquatic habitat restoration, establishment, and enhancement activities, provided those activities result in net increases in aquatic resource functions and services. Pre-construction notification is required for activities authorized by the NWP, except for those activities conducted in accordance with binding agreements between certain Federal agencies or their designated state cooperating agencies, voluntary wetland activities documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards or the reclamation of surface coal mining lands, in accordance with permits issued by the Office of Surface Mining or the applicable state agency. For those activities that do not require pre-construction notification, reporting to the district engineer is required. These reporting requirements provide the district engineers with the opportunity to review aquatic habitat restoration, establishment, and enhancement activities to ensure that those activities result in net increases in aquatic resource functions and services. Activities conducted under the authority of this NWP have the potential to improve water quality, water uses, and wetland functions.

Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP.

Proposed Action: Find consistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.1)

Rationale: The reconfiguration of existing docking facilities with no increase in slips or other expansions should have minimal impact on water quality or other natural resources in the area. Direct permits are required from the state for reconstructing marinas in critical areas and other waters of the State.

Nationwide Permit Number 29 | Section 10 & Section 404 | CZC & 401

Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non- tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with S.C. Coastal Zone Management Program. (Guidelines for the Evaluation of All Projects C.3.1. Policy I.(1)(b) and Policy XII. E. (1), and others depending on the activity.)

Rationale: The criteria for use of this NWP minimizes the impact on water quality, water uses, and wetland functions, however it still has the potential to result in adverse impacts. If the proposed conditions are approved, they will insure that there are no adverse effects from the proposed activity. The NWP is inconsistent with the S.C. Coastal Zone Management Program because it would allow alteration of wetlands without regard to the type of wetland, location or consideration of feasible alternatives The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated with the addition of the proposed Regional Conditions and if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. The impounding of water and creating of lakes or ponds is not authorized by this NWP
2. The placement of fill in Waters of the United States for a single residence must be limited to 0.10 acres or 60 linear feet.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters
4. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act).

5. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10 acres or 300 linear feet.

Proposed Regional Conditions for the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following conditions, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of this NWP for individual lots that are not part of a larger common plan is limited to adjacent wetlands lacking a surface connection to other waters of the US (i.e. isolated wetlands less than 1 acre in size)

2. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC OCRM concurrence.

3. For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. **WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants.** The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.

4. A one-day newspaper notice in accordance with the provisions of the S.C. Coastal Zone Management Program, Chapter V C. 1. A., Notice of Certification must be included.

Nationwide Permit Number 30 **Section 404** **CZC & 401**

Moist Soil Management for Wildlife. Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies.

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S. C. Coastal Zone Management Program.

Rationale: Data obtained from the Corps indicates that during the period from 2007, through 2011, there were no activities authorized under this NWP in South Carolina. Therefore, there is limited potential for these activities to have more than minimal adverse impacts to the aquatic environment.

Nationwide Permit Number 31 **Section 10 & Section 404** **CZC & 401**

Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP.

To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an area that has no waters of the United States or a separately authorized disposal site in waters of the United States, and proper siltation controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity- specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

Mitigation: The district engineer will determine any required mitigation one- time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permitteeestablish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 31). The pre- construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Corps data on NWPs shows us that between 2007 and 2011, there were no permits issued under this NWP in South Carolina. Therefore, SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program. Further, this NWP requires pre-construction notification for all activities. The review by the district engineers will ensure that this NWP does not result in more than minimal

impacts to the aquatic environment. If SCDHEC were to impose additional conditions to the certification of this NWP, the result would be additional delays and costs for permit applicants. Given the limited use of the NWP and the limited impacts to the aquatic environment, additional conditions are not justified.

Nationwide Permit Number 32 **Section 10 & Section 404** **CZC & 401**

Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e).

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: This NWP is applicable to enforcement actions by EPA and the Corps only. EPA and Corps must ensure that State Water Quality Standards are maintained through appropriate coordination with SCDHEC and are required do so on enforcement actions that may have an adverse effect on water quality within State waters. The district engineer can require an individual permit if the impacts are more than minimal and the applicant has not proposed compensatory mitigation to minimize the impacts. Restoration or compensatory mitigation is addressed in the General Conditions applicable to all NWPs and therefore this NWP can be found consistent with the S.C. Coastal Zone Management Program. Further, data obtained from the Corps indicates that between 2007, and 2011, 14 NWPs with a total impact of 2.565 acres were issued in South Carolina for this NWP. Therefore, SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program.

Nationwide Permit Number 33 **Section 10 & Section 404** **CZC & 401**

Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Best Management Practices are included in the Corps and SCDHEC General Conditions applicable to all NWPs. Due to the restoration requirements of this permit, the impacts to water quality, water uses, or wetland functions should be temporary. Data obtained from the Corps indicates that between 2007 and 2011, 24 NWPs with a total impact of 0.348 acres and 326 linear feet of stream impacts have been issued for this NWP. SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program. Further, this NWP requires pre-construction notification for all activities. The review by the district engineers will ensure that this NWP does not result in more than minimal impacts to the aquatic environment. If the SCDHEC were to impose additional conditions to the certification of the NWP, the result would be additional delays and costs for permit applicants. Given the limited use of the NWP and the limited impacts, additional conditions are not justified.

Nationwide Permit Number 34 **Section 404** **CZC & 401**

Cranberry Production Activities. Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 27.)

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.1)

Rationale: There is no cranberry production in South Carolina, and none is anticipated. Therefore, this permit

would serve no purpose in South Carolina.

Nationwide Permit Number 35 | Section 10 | CZC

Maintenance Dredging of Existing Basins. Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is deposited at an upland site and proper siltation controls are used

Proposed Action: Find inconsistent with the S.C. Coastal Zone Management Program. (Policies VIII.A.1 (a), (b) & (c), and others depending on the activity)

Rationale: This permit has the potential to be abused. Many existing marinas are known to have problems with excessive siltation, suspected contamminant problems and do not have available upland spoil disposal sites. While direct permits are required within the critical areas, State Navigable Waters Permits are required outside the critical areas.

Nationwide Permit Number 36 | Section 10 & Section 404 | CZC & 401

Boat Ramps. Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre- cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in minimal adverse effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands. The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

Notification. The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 31.)

Proposed Action. Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: In general, construction impacts of boat ramp installation to water quality and water uses are minimal and temporary. Data obtained from the Corps indicates that between 2007, and 2011, 46 NWPs with a total impact of 1.384 acres and six linear feet of stream impacts were issued for this NWP in South Carolina. SCDHEC believes, with the addition of the proposed Regional Conditions, these impacts can be categorized as minimal as intended for the nationwide permitting program. Further, if the SCDHEC were to impose additional conditions to the certification of the NWP, the result would be additional delays and costs for permit applicants. Given the limited use of the NWP and the limited impacts, additional conditions are not justified

Nationwide Permit Number 37 | Section 10 & Section 404 | CZC & 401

Emergency Watershed Protection and Rehabilitation. Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR Subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre- construction notification to the district engineer prior to commencing the activity (see general condition 31).

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S. C. Coastal Zone Management Program.

Rationale: If an action is truly an emergency situation and the result of a natural disaster, there would not be time to await an individual consistency determination. Rapid response is necessary for situation threatening life and property. Further, data obtained from the Corps for the period from 2007 through 2011 indicates that NWP #37 has been used 9 times with total impacts to wetlands of 0.548 acres and 2,488 linear feet of stream impacts. SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program.

Nationwide Permit Number 38 **Section 10 & Section 404** **CZC & 401**

Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: These cleanup activities should be allowed to proceed in a timely manner and requirement of a

Army Corps of Engineers permit and individual water quality certification could unduly delay the process with potential threats to water quality, water uses, and wetland functions. The preamble to the regulation indicates that the District Engineer can require an individual permit if the impacts are more than minimal and the applicant has not proposed compensatory mitigation to minimize the impacts. Restoration or compensatory mitigation is addressed in the General Conditions applicable to all NWPs and therefore this NWP can be found consistent with the S.C. Coastal Zone Management Program. Corps data on NWPs shows us that between 2007, and 2011, 3 NWP.#38 with a total impact of 0.79 acres have been issued for this NWP. SCDHEC believes that these impacts can be categorized as minimal as intended for the nationwide permitting program.

Nationwide Permit Number 39 **Section 10 & Section 404** **CZC & 401**

Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals; and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non- tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for the Evaluation of All Projects C 3.1, Policy IV.1 (a), (b) & (c), Policy VII A.1, Policy VII C.1, Policy XII.E.1 and others depending upon the activity)

Rationale: The criteria for use of this NWP attempts to minimize impacts on water quality, water uses, and wetland functions, however many of the activities have the potential to result in adverse impacts. These activities should be reviewed on an individual basis to insure that aquatic site impacts are avoided, minimized, and unavoidable impacts are adequately compensated for with appropriate and practicable mitigation. Adherence to the proposed conditions will insure that there are no adverse effects from the proposed activities. Outside the critical area, S. C Coastal Zone Management Program policies require that wetland impacts be addressed in a manner consistent with the program refinements (Wetland Master Planning Policies). This NWP is inconsistent with the S.C. Coastal Zone Management Program because it would allow alteration of wetlands without regard to the type of wetland, location or consideration of feasible alternatives

Issuance of the NWP with the proposed conditions will enhance regulatory processing by eliminating areas of duplication and clarifying for all agency personnel and applicants the difference between NWP applications and Individual Permit applications. This will allow applicants to follow the appropriate mitigation sequence of avoiding, minimizing, and compensating for unavoidable impacts such that they can receive quick approval for their proposed projects when the NWP criteria have been meet or exceeded for a project. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated if the proposed 401 water quality certification conditions are applied to

the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10 acres or 300 linear feet.
2. Stream channelization or use of the permit in perennial streams is not certified under this NWP and will require separate approval through SCDHEC's individual certification process.
3. Sedimentation/sediment ponds in special aquatic sites, including wetlands, are not certified under this NWP.
4. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.
5. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act).

Proposed Regional Conditions of the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following conditions, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC OCRM concurrence.
2. For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. **WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants.** The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.
3. A one-day newspaper notice in accordance with the provisions of the S.C. Coastal Zone Management Program, Chapter V C. 1. A., Notice of Certification must be included.

Nationwide Permit Number 40 **Section 404** **CZC & 401**

Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non- tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Authorization of this permit in South Carolina should have minimal impact. According to the Natural Resources Conservation Service (NRCS), there are very few farmed wetlands in the state. In fact, data obtained from the Corps indicate that no NWPs were issued during the period from 2007, through 2011, in South Carolina for this NWP. Consequently, issuance of the 401 Water Quality Certification and consistency with the S.C. Coastal Zone Management Program for this NWP should not result in adverse impacts to water quality or contravene State water quality standards. Further, this NWP requires pre-construction notification for all activities. The review by the district engineers will ensure that this NWP does not result in more than minimal impacts to the aquatic environment. If the SCDHEC were to impose additional conditions to the certification of this NWP, the result would be additional delays and costs for permit applicants. Given the limited use of this NWP during the past five years and the limited impacts to the aquatic environment, additional conditions are not justified.

Nationwide Permit Number 41 **Section 404** **CZC & 401**

Reshaping Existing Drainage Ditches. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 27.) (Section 404)

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: Based on the criteria for use of this NWP, any impact to water quality, water uses, and/or wetland functions should be temporary provided the applicant adheres to the stated criteria.

Nationwide Permit Number 42 **Section 404** **CZC & 401**

Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program (Policy V.A.1 (d), Policy V.B.1 (a) & (b), Policy VII.A.1. and others depending on the activity)

Rationale: Although the criteria for use of this NWP attempts to reduce potential impacts on water quality, water uses, and wetland functions, it would allow impacts for non-water or wetland dependent activities. Limitations on the size and types of the impacts will insure that water quality and water uses, including wetland functions, are maintained. Outside the critical area, S. C. Coastal Zone Management Program policies require that wetland impacts be addressed in a manner consistent with the program refinements (Wetland Master Planning Policies). This NWP is inconsistent with the S.C. Coastal Zone Management Program because it would allow alteration of wetlands without regard to the type of wetland, location or consideration of feasible alternatives.

Issuance of the NWP with the proposed conditions will enhance regulatory processing by eliminating areas of duplication and clarifying for all agency personnel and applicants the difference between NWP applications and Individual Permit applications. This will allow applicants to follow the appropriate mitigation sequence of avoiding, minimizing, and compensating for unavoidable impacts such that they can receive quick approval for their proposed projects when the NWP criteria have been met or exceeded for a project. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. This NWP is not certified for discharges causing the loss of greater than 0.25 acres of Waters of the United States.
2. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act)

Proposed Regional Conditions of the Coastal Zone Consistency Certification:

Provided all the conditions of the 401 Water Quality Certification, plus the following conditions, are included as Regional Conditions, the NWP will be consistent with the S.C. Coastal Zone Management Program.

1. The use of multiple NWPs on one tract or land parcel is not approved in the coastal zone without SCDHEC OCRM concurrence.
2. The use of this NWP must be limited to nature trails/horse trails, bike paths, small bridges or walkways. These activities must be a maximum of 8' wide and involve hand clearing only (Golf courses, ski areas, buildings and campgrounds are not approved.
3. For all projects, the applicant must provide a Wetland Master Plan consistent with the policies and procedures of Chapter III Policy Section XII E. of the S.C. Coastal Zone Management Program. **WMP policies also include the preservation of all wetlands not proposed to be impacted through approved restrictive covenants.** The plan must include an identification of all wetlands, all wetland impacts/activities, drainage patterns, conceptual development, and a mitigation plan.
4. A compensatory mitigation plan must be submitted and approved by the SCDHEC OCRM for projects with impacts exceeding 0.10 acre
5. A one-day newspaper notice in accordance with the provisions of the S.C. Coastal Zone Management Program, Chapter V C. 1. A., Notice of Certification must be included

Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures,outfall structures and emergency spillways; and the construction of low impact development integrated management features such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches. This NWP also authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities. Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non- tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility.

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for the Evaluation of All Projects C.3.I, Policy XII.E.1, Policy XIII.A)

Rationale: The criteria for use of this NWP attempts to minimize impacts on water quality, water uses, and wetland functions, however the activities have the potential to result in adverse impacts. These activities should be reviewed on an individual basis to insure that aquatic site impacts are avoided, minimized, and unavoidable impacts are adequately compensated with appropriate and practicable mitigation. This NWP is not consistent with the Coastal Zone Management policies regarding Wetland Master Planning, Stormwater Management and the protection of salt, brackish, and freshwater wetlands. Adherence to the proposed conditions will insure that there are no adverse effects from the proposed activities.

Proposed Conditions for the 401 Water Quality Certification:

1. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10 acres or 300 linear feet.
2. Activities authorized by this certification are limited to maintenance of existing facilities, such as stormwater ponds, detention and retention basins, water control structures, outfall structures, emergency spillways, and existing ponds that are proposed for use as water quantity or volume control. This NWP cannot be used for existing ponds that are proposed to be converted into water quality treatment facilities such as sediment basins, sediment traps, or other similar structures
3. Impacts for the repair, maintenance, or conversion of existing ponds for use as quantity or volume control can be permitted under this NWP
4. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.
5. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act)

Nationwide Permit Number 44 | Section 10 & 404 | CZC&401

Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification.

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program. (Policy III.C.1, Policy VII.A.1, Policy XII.E.1, Policy XIII.E, and others depending on the activity)

Rationale: In order to qualify for the NWP, the activity should truly have minimal impacts and the inclusion of several conditions should provide that the impacts are minimal in size and limited to specific activities necessary for small mining operations. This permit is not consistent with the S. C. Coastal Zone Management Program policies regarding the protection of salt, brackish, and fresh water wetlands, Stormwater Management and Dredging. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated if the proposed 401 water quality certification conditions are applied to the NWPs.

Proposed Conditions for the 401 Water Quality Certification:

1. A compensatory mitigation plan must be submitted and approved by the SCDHEC for projects with impacts exceeding 0.10 acres or 300 linear feet.
2. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW), Outstanding Resource Waters (ORW), or Trout Waters.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act)

Nationwide Permit Number 45 | Section 10 & 404 | CZC&401

Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period. This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 31) within 12-months of the date of the damage. The pre- construction notification should include

documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program.

Rationale: This NWP authorizes the restoration of damaged uplands to the extent that existed before the damage occurred. It also authorizes any bank stabilization necessary to protect the restored uplands. Since this NWP only authorizes activities to restore damaged areas to previously existing conditions, SCDHEC does not believe that it will result in adverse impacts. Further, this NWP requires pre-construction notification for all activities. The review by the district engineers will ensure that this NWP does not result in more than minimal impacts to the aquatic environment.

Nationwide Permit Number 46 **Section 404** **CZC & 401**

Discharges in Ditches. Discharges of dredged or fill material into non-tidal ditches that are:

(1) Constructed in uplands,
(2) receive water from an area determined to be a water of the United States prior to the construction of the ditch,
(3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and
(4) are determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Proposed Action: Issue 401 Water Quality Certification with conditions and find inconsistent with the S.C. Coastal Zone Management Program.

Rationale: To qualify for the NWP program, the proposed activity must have minimal impacts. As proposed, this NWP would allow fill in non-tidal ditches impacting up to one acre of waters of the United States. However, if the proposed condition is approved, it will minimize the impacts to ensure that there are no adverse effects from the proposed activity. The NWP is inconsistent with the S.C. Coastal Zone Management Program because it would allow alteration of wetlands without regard to the type of wetland, location or consideration of feasible alternatives. The NWP could be made consistent with the S.C. Coastal Zone Management Program and no significant adverse effects from the proposed activities will be anticipated with the addition of the proposed Regional Conditions and if the proposed 401 water quality certification condition are applied to the NWPs

Proposed Conditions for the 401 Water Quality Certification:

1. This NWP is not certified for discharges causing the loss of greater than a half acres of waters of the United States.
2. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) waters defined (as per Regulation 61-68) as Outstanding National Resource Waters (ONRW). Outstanding Resource Waters

(ORW), or Trout Waters.
3. This NWP is not certified for activities located in or adjacent to (as determined by SCDHEC) impaired waters (as defined by 303(d) of the Clean Water Act).

Nationwide Permit Number 47 **(Reserved)**

Nationwide Permit Number 48 **Section 10 & 404** **CZC&401**

Commercial Shellfish Aquaculture Activities. Discharges of dredged or fill material in waters of the United States or structures or work in navigable waters of the United States necessary for commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is currently authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any other easement, lease, deed, or contract which establishes an enforceable property interest for the operator. This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked. This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or,

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste.

This NWP also authorizes commercial shellfish aquaculture activities in new project areas, provided the project proponent has obtained a valid authorization, such as a lease or permit issued by an appropriate state or local government agency, and those activities do not directly affect more than 12-acre of submerged aquatic vegetation beds.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) Dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation; (2) the activity will include a species not previously cultivated in the waterbody; (3) the activity involves a change from bottom culture to floating or suspended culture; or (4) the activity occurs in a new project area. (See general condition 31.)

In addition to the information required by paragraph (b) of general condition 31, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; (2) the name(s) of the cultivated species; and (3) whether canopy predator nets are being used.

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.
Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.
Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

Proposed Action: Issue 401 Water Quality Certification and find consistent with the S.C. Coastal Zone Management Program

Rationale: Authorization of this permit in South Carolina should have minimal impact. With the exception of harvesting activities, the activities authorized by this NWP usually enhance habitat characteristic to support the growth of shellfish. As for harvesting activities, pre-construction notification is required for dredge harvesting in areas inhabited by submerged aquatic vegetation, so case-by-case review will be conducted to ensure that the activity does not result in more than minimal adverse effects to the aquatic environment.

Nationwide Permit Number 49 | Section 10 & 404 | CZC&401

Coal Remining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act (SMCRA) of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts. As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.)

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.I)

Rationale: No known coal reserves are found in South Carolina and therefore coal mining is not performed. This permit would serve no purpose in South Carolina.

Nationwide Permit Number 50 | Section 10 & 404 | CZC&401

Underground Coal Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre construction notification.

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.I)

Rationale: No known coal reserves are found in South Carolina and therefore coal mining is not performed. This permit would serve no purpose in South Carolina.

Nationwide Permit Number 51 | Section 10 & 404 | CZC&401

Land-Based Renewable Energy Generation Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This permit does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Note 1: Utility lines constructed to transfer the energy from the land-based renewable generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization. If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines, then NWP 12 shall be used if those activities meet the terms and conditions of NWP 12, including any applicable regional conditions and any case specific conditions imposed by the district engineer.

Note 2: For any activity that involves the construction of a wind energygenerating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

> **Proposed Action:** Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.I)
>
> **Rationale:** This is a new NWP with no history of the Corps' interpretation and implementationand it would allow alteration of wetlands without regard to the type of wetland, location, or consideration of feasible alternatives. In consideration of these facts, the Department finds the potential for significant impacts to water quality, water uses, and wetland function are likely.

Nationwide Permit Number 52 **Section 10 & 404** **CZC&401**

Water-Based Renewable Energy Generation Pilot Projects. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term "pilot project" means an experimental project where the renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The discharge must not cause the loss of greater than 1/2-acre of waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a

navigable water of the United States is not a loss of waters of the United States for the purposes of applying the 1/2-acre or 300 linear foot limits.
For each single and complete project, no more than 10 generation units (e.g., wind turbines or hydrokinetic devices) are authorized. This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.
Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is issued. Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.)

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.
Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers under 33 U.S.C. 408.
Note 3: If the pilot project, including any transmission lines, is placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation. Note 4: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Proposed Action: Deny 401 Water Quality Certification and find inconsistent with the S.C. Coastal Zone Management Program. (Guidelines for Evaluation of All Projects C.3.I)

Rationale: This is a new NWP with no history of the Corps' interpretation and implementation and it would allow alteration of wetlands without regard to the type of wetland, location, or consideration of feasible alternatives. In consideration of these facts, the Department finds the potential for significant impacts to water quality, water uses, and wetland function are likely.

Prepared by: _____ Date: April 5, 2012

_____ Date: April 5, 2012

Reviewed/Approved by: _____ Date: April 5, 2012

_____ Date: April 5, 2012

Exhibit C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Savannah Riverkeeper, S.C. Coastal Conservation League, S.C. Wildlife Federation, and Savannah River Maritime Commission, Petitioners, v. South Carolina Department of Health and Environmental Control, Georgia Ports Authority, and the U.S. Army Corps of Engineers, Savannah District, Respondents. In re: Savannah Harbor Expansion Project	)	Docket No. 11-ALJ-07-0618-CC **ORDER**

This matter is before the Administrative Law Court (ALC or Court) pursuant to Petitioners' request for a contested case hearing to challenge the November 15, 2011 decision of the Board (Board) of the South Carolina Department of Health and Environmental Control (DHEC) to issue a Section 401 Water Quality Certification (401 Certification), a Construction in Navigable Waters Permit (Navigable Waters Permit) and a Coastal Zone Consistency Determination (CZCD) (collectively, the DHEC Authorizations) for the proposed Savannah Harbor Expansion Project (SHEP). On May 1, 2012, Petitioner Savannah River Maritime Commission (Maritime Commission) filed a motion pursuant to S.C. Code Ann. § 1-23-600(H)(2) (Supp. 2011) for an order enforcing the automatic stay of the Board's decision. The Maritime Commission contends that the automatic stay was violated by the publication of a final Environmental Impact Statement (EIS) by the Savannah District of the U.S. Army Corps of Engineers (the Corps). A hearing was held on this matter on May 16, 2012. For the reasons set forth below, the Maritime Commission's motion is denied.

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SC ADMIN. LAW COURT

Carolina law, contested case hearings regarding Section 401 certifications are held *de novo* by the ALC **after** the DHEC Board makes its final decision. See S.C. Code Ann. § 44-1-60(F)(2), (G); Brown v. S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). Significantly, a "contested case" is a proceeding in which the "legal rights, duties, or privileges of a party" are decided after an opportunity for a hearing. See S.C. Code Ann. § 1-23-310(3) (2005); S.C. Code Ann. § 1-23-505(3) (Supp. 2011). In the present case, no contested case hearing has yet been held by this Court regarding the 401 Certification and thus no "legal rights" have yet been adjudicated. Accordingly, the 401 Certification is not yet effective. [11]

Nevertheless, I find that the present motion does not provide this Court with an appropriate basis for taking action to remedy this situation. As the Maritime Commission acknowledges, "public misstatements are not in and of themselves a violation of the automatic stay." Although the Commission contends that resolution of this issue is pertinent to determining the proper remedy to be assessed for the publication of the final EIS, as noted above, I have determined that the publication of the final EIS did not violate the automatic stay. Accordingly, I find no legal ground for this Court taking action here.

> of the Savannah River Maritime Commission, hereinafter the Maritime Commission, superseded the responsibilities of the department for such approval, as established by Act 56 of 2007, and the approval by the department could present imminent and irreversible public health and environmental concerns for the South Carolina portion of the Savannah River.

2012 S.C. Act No. 125, § 1 (effective March 1, 2012) (emphasis added).

[10] On April 9, 2012, the South Carolina Supreme Court agreed to hear a petition by Savannah Riverkeeper, S.C. Coastal Conservation League, S.C. Wildlife Federation and Conservation Voters of South Carolina contending that the DHEC Board exceeded its authority and usurped the authority of the Maritime Commission in granting the DHEC Authorizations.

[11] Although the 401 Certification is not yet effective, DHEC (and thus the State of South Carolina) presumably "act[ed]" on the Corps' request for certification within the one-year period set forth in Section 401 of the CWA. See 33 U.S.C. § 1341(a)(1) ("If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."); FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot., 926 A.2d 1197, 1203 (Me. 2007) (holding no waiver of certification requirements occurred where agency took action within one year, and finding "no indication" that "Congress intended for all in-state appeals to be completed within the same one-year deadline"); City of Klamath Falls v. Environmental Quality Comm'n, 119 Ore. App. 375, 377-378 (Or. Ct. App. 1993) (finding no waiver where agency acted within one-year period and applicant then instigated contested case challenge that extended beyond year), aff'd on other grounds, 870 P.2d 825 (Or. 1994).

My ruling, however, does not mean that the Maritime Commission is without redress. For instance, the Maritime Commission may bring a suit under the federal Administrative Procedure Act to challenge the sufficiency of the final EIS. See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (addressing whether an EIS must include a fully developed mitigation plan and a "worst case" analysis); see also Ray Vaughan, Necessity and Sufficiency of Environmental Impact Statements Under the National Environmental Policy Act, 38 Am. Jur. Proof of Facts 3d 547, § 3 ("[C]ourts have long allowed citizens, environmental groups, and corporations to bring legal actions under the [federal] Administrative Procedure Act . . . regarding decisions made under NEPA."). The Maritime Commission may also bring a federal suit challenging the Corps' failure under 40 C.F.R. § 1502.9(c) to supplement the final EIS to include a discussion of the Maritime Commission's May 8, 2012 decision. See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) (addressing whether the Corps' failure to supplement an EIS was arbitrary and capricious under the Federal APA).

ORDER

As set forth above, I find that the automatic stay imposed by Section § 1-23-600(H)(2) was not violated by the publication of the final EIS. I further find, however, that any future issuance of a ROD in this case would violate the automatic stay absent receipt or waiver of, or exemption from, a Section 401 certification from the State of South Carolina. Accordingly,

IT IS HEREBY ORDERED that the Motion to Enforce the Automatic Stay is **DENIED.**

AND IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

May 31, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Petitioners, v. South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.	)	Docket No. 13-ALJ-07-0056-CC

MOTION FOR RECONSIDERATION

The South Carolina State Ports Authority (Ports Authority) respectfully files this Motion for Reconsideration of the December 2, 2013 Order Denying Ports Authority's Motion to Dismiss the contested case requests of Petitioners Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities for Cruise Control (Cruise Control) (collectively, Cruise Opponents).

As the Court is familiar with the facts of this case, the Ports Authority incorporates by reference the statement of facts found in its Motion to Dismiss for lack of standing filed July 1, 2013 and its reply filed August 5, 2013.

STANDARD OF REVIEW

Rule 29(D) of the Rules of Procedure of the Administrative Law Court (RPALC) provides that "[a]ny party may move for reconsideration of a final decision of an administrative law judge ... subject to the grounds for relief set forth in Rule 59, SCRCP." RPALC 29(D). Rule 59(a) of the South Carolina Rules of Civil Procedure (SCRCP) provides that "[a] new trial may be granted ... on all or part of the issues ... for any of the reasons for which rehearings have heretofore been granted in the courts of the State." *See also* Jean H. Toal *et al.*, *Appellate Practice in South Carolina*, 40 (2d. ed. 2002) ("in practice, motions for reconsideration under Rule 59(e), SCRCP are also filed with the ALJ"); *S.C. Dep't of Motor Vehicles v. Bradley*, No. 06-ALJ-21-0613-AP, 2007 WL 3208694 at 5, fn. 6 (Oct. 8, 2007) (Anderson, J.) (same and stating "[a]ny party may move for reconsideration of an administrative law judge's decision in a contested case provided that a petition for judicial review has not been filed."); *New Generation, Inc., d/b/a Diamonds v. S.C. Dep't of Revenue*, No. 05-ALJ-17-0498-CC, 2006 WL 1126415 (April 5, 2006) (McLeod, J.) ("A motion under Rule 59(e), SCRCP, as applied through ALC Rule 68, serves to ask the judge to reconsider any previously raised and decided issue encompassed in the judgment.") (citation omitted).

The right to file motions for reconsideration in administrative proceedings has also been recognized by South Carolina's appellate courts. All questions that may have existed on the issue were definitively resolved by the Supreme Court in *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, 382 S.C. 556, 563, 677 S.E.2d 582, 586 (2009), when the Court specifically held that "Rule 59(e), SCRCP motions are permitted in ALC proceedings." In *Risher v. South Carolina Department of Health and Environmental Control*, 393 S.C. 198, 208, 712 S.E.2d 428, 433 (2011), the Supreme Court affirmed the holding in *Home Medical Systems* while

recognizing that standard issue preservation rules have long been enforced in actions involving administrative appeals.[1]

ARGUMENT

As set forth herein, the Ports Authority respectfully contends the Order contains errors and mistakes of law and fact that warrant reconsideration and amendment of the judgment denying the motion to dismiss. Most importantly, the Order erred in limiting its consideration to the pleadings and in failing to consider the contrary evidence and documentation submitted by the Ports Authority proving that Cruise Opponents lack standing to bring this contested case.

I. The Order erred as a matter of law in its determination of the nature of the inquiry of a motion to dismiss for lack of standing.

The Order states that "though the *Lujan* test is separate from Petitioners' ability to establish standing under the statute, in this instance where a clear, specific definition of 'affected person' is not available, the test provides a sufficient framework to determine whether the Petitioners have been sufficiently affected to have standing to survive this motion to dismiss." Order at 12 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). In the instant case, however, established South Carolina statutes, regulations and case law make clear that to qualify for "affected person" status, a party must demonstrate standing under the traditional *Lujan* test. In form and practice, the concepts of statutory and traditional constitutional standing have been merged.

It is manifest that the Court has only such power and authority as conferred by the General Assembly. The laws of this State may provide for or restrict this Court's subject matter jurisdiction[2]

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[1] In fact, in *Risher*, an appeal from an ALC decision, the Supreme Court held that appellants did not preserve an issue for review when they "failed to file a motion for reconsideration or a motion to alter or amend the judgment pursuant to Rules 29 or 68, [RPALC], or Rules 59(e) or 60, SCRCP." *Risher*, 393 S.C. at 208, 712 S.E.2d at 433.

[2] Black's Law Dictionary defines "subject-matter jurisdiction" as "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct

and also dictate how and when the Court's jurisdiction[3] may be invoked. This comports with our state's more recent jurisprudence that distinguishes between the concepts of "subject matter jurisdiction" and other uses of the term "jurisdiction" when referring to a Court's actions or ability to act.[4]

As a threshold matter, the requirements for standing as an "affected person" pursuant to statute and regulation are synonymous with the "constitutional standing" requirements identified in *Lujan*.[5] *See Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31,

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of persons or the status of things." *Black's Law Dictionary* (9th ed. 2009). The first definition tracks the types of cases that may be heard, while the second definition reflects a broader description akin to "jurisdiction" and the authority to issue a decision. As the South Carolina Supreme Court has stated, "[s]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.... However, we acknowledge, while the trial court has subject matter jurisdiction over tort claims, certain cases may be taken from the trial court's original jurisdiction by the General Assembly." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002).

[3] Black's Law Dictionary defines "jurisdiction" as a "court's power to decide a case or issue a decree." *Black's Law Dictionary* (9th ed. 2009).

[4] *See, e.g., South Carolina Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 675 S.E.2d 756 (Ct. App. 2009). In *Holtzclaw*, the Court of Appeals affirmed the decision of this Court related to a collateral attack on a decision of the municipal court. Although the appellant styled its argument as addressing an error of subject matter jurisdiction, the Courts recognized that the argument did not implicate the municipal court's general grant of subject matter jurisdiction. *Holtzclaw*, 382 S.C. at 349, 675 S.E.2d at 758 (citing *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 83 n. 5, 529 S.E.2d 6, 8 n. 5 (2000) and *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). Rather, the error was in the exercise of the municipal court's jurisdiction. *See id.* at 350, 675 S.E.2d at 759 (quoting *Piana v. Piana*, 239 S.C. 367, 372, 123 S.E.2d 297, 299 (1961) ("[W]hen there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.").

Similarly here, while standing does not implicate this Court's general grant of subject matter jurisdiction to hear contested cases from DHEC, standing is a matter of justiciability and does implicate the Court's jurisdiction (thus permitting the consideration of evidence outside of the pleadings). Hence, where a Court permits a petitioner to bring and sustain an action in the face of clear evidence that it cannot meet the stringent test of constitutional standing, the Court has committed an error in the exercise of its jurisdiction. *See also State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008).

[5] DHEC similarly has averred that an "affected person" means a person meeting the elements of the *Lujan* standing test as adopted by our Supreme Court in *Sea Pines Ass'n for the*

32 (2007) (concluding that a person "adversely affected" by a permitting decision pursuant to former S.C. Code Ann. § 48-39-150 must satisfy the requirements of "constitutional standing" set forth *Lujan*); *O'Sullivan v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0491-CC (Jan. 18, 2002) (J. Geathers) ("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 also* S.C. Code Ann. Regs. 30-6.A ("A [DHEC] decision involving the issuance, denial, suspension, or revocation of a permit or certification may be appealed by an affected person ***with standing*** pursuant to applicable law.....) (emphasis added).

Section 44-1-60 of the South Carolina Code states that an "applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing...." However, as the Order notes, the "self-imposed moniker that a person is 'affected' by a decision does not automatically confer standing." Order at 11. Indeed, pursuant to S.C. Code Ann. Regs. 30-6.A, "[a] [DHEC] decision involving the issuance, denial, suspension, or revocation of a permit or certification may be appealed by ***an affected person with standing*** pursuant to applicable law, including S.C. Code Title 44, Chapter 1; Title 1, Chapter 23; and Title 48, Chapter 39." (Emphasis added); *see* S.C. Code Ann. § 48-39-150(D) (The Coastal Zone Management Act providing that "a person adversely affected by the granting of the permit has the right of direct appeal from the decision of the administrative law judge pursuant to Section 1-23-610. An applicant having a permit denied may challenge the validity of any or all reasons given for denial.").

Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). *See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 07-ALJ-21-0107-CC, -0108-CC, Ex. 1 Hrg. Trans. at 37 (July 2, 2007) ("[G]enerally the Department's view would be that unless otherwise defined by statute or regulations [the meaning of affected person] would be the equivalent of judicial standing....").

"South Carolina Courts routinely hold that a party must not only be an affected person to obtain a contested case hearing, but must also have standing.... Initially, the [petitioner] must satisfy the general standing requirements required for all litigants." *City of Denmark v. S.C. Dep't of Health & Envtl. Control*, Docket No. 06-ALJ-07-0926-CC (Aug. 8, 2007) (J. Matthews) (dismissing case for lack of standing) (internal citations omitted); *Sanders v. S.C. Dep't of Health & Envtl. Control*, Docket No. 00-ALJ-07-0357-CC (March 20, 2001) (J. Anderson) (dismissing case for lack of standing) ("A fundamental prerequisite to institute an action is the requirement that the Plaintiff have standing."). If a party lacks standing, the Court's "jurisdiction has not been properly invoked." *Bryant v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0350-CC (Jan. 10, 2002) (J. Stephens) ("Not everyone is entitled to a contested case hearing; rather, only a 'proper party' may obtain such a hearing.... A person is not entitled as of right to be admitted as a party without first having 'standing.'").

This Court has previously explained the requirement to prove standing as part of the legal regime applicable to the Permit in this contested case.

> "A party may appeal an administrative decision if he has standing to sue." 6 Jacob A. Stein et al., *Administrative Law* § 50.01, at 50-3 (Supp. 2000). Accordingly, a person may not challenge OCRM's decision to issue a permit unless that person is "adversely affected" by the granting of the permit and thus has standing to bring the challenge. S.C. Code Ann. § 48-39-150(D) (Supp. 2000); 23A S.C. Code Ann. Regs. 30-6 (Supp. 2000). In analyzing questions of standing, the South Carolina Supreme Court has adopted the three-prong test enunciated by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001).

O'Sullivan, Docket No. 01-ALJ-07-0491-CC (dismissing case for lack of standing).[6]

Consequently, Cruise Opponents must satisfy the "***stringent*** standing test" articulated in *Lujan. Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (emphasis added); *see Upstate Forever v. S.C. Dep't of Health and Envtl. Control*, Docket No. 10-ALJ-07-0919-CC (July 14, 2011) (J. Anderson) (employing the *Lujan* test to determine whether petitioners had standing to challenge a DHEC decision); *Murphy v. S.C. Dep't of Health and Envtl. Control*, Docket No. 11-ALJ-07-0406-CC (Feb. 9, 2010) (J. Anderson) (citing to S.C. Code Ann. Regs. 61-9.124.19(a) containing language analogous to S.C. Code Ann. Regs. 30-6.A and applying the *Lujan* test to determine whether petitioners had standing). The establishment of standing is a statutory condition precedent and prerequisite to the Court's exercise of its jurisdiction. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998) (reasoning that lack of standing fails to invoke jurisdiction because "South Carolina courts, like the federal courts, require a justiciable case or controversy ***before*** any decision on the merits can be reached") (emphasis added); *Solomon v. S.C. Dep't of Health & Envtl. Control*, Docket No. 01-ALJ-07-0367-CC (April 30, 2002) (J. Matthews) ("The Respondents argue that the present action should be dismissed because the Petitioners do not have standing to pursue the action. I agree.... The Administrative Law Judge Division may only hear those cases that present a legitimate justiciable controversy. In order to revoke a permit issued by OCRM, the Petitioners must have been adversely affected by the granting of the permit. S.C. Code Ann. § 48-39-150 (Supp. 2001); 23A S.C. Code Ann. Regs. 30-6(B). Otherwise, the Petitioners would not have standing to bring an action."); *Thomas v. S.C. Dep't of Health and Envtl. Control*, Docket No. 01-ALJ-07-0163-CC (Jun. 28, 2001) (J. Stevens)

[6] The Cruise Opponents are challenging the Permit—which by their own admission is a critical area permit issued pursuant to the critical area permitting regulations found in S.C. Code Ann. Regs. 30-1 *et seq*. *See* Request and Cruise Opponents' Preh'g Statement.

(quoting *Lawrence Brunoli, Inc. v. Branford*, 722 A.2d 271 (1999) with approval for the proposition that "[s]tanding is the legal right to set judicial machinery in motion [since] [o]ne cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.").

Additionally, the Order cites to a state environmental law treatise for the proposition that "South Carolina's approach is not unlike other states' application of standing in state cases, including environmental disputes. *See* 2 *State Environmental L.* § 14:2 (2012) ('Unlike the federal law of standing, which is rooted in the Constitution's 'case or controversy' requirement, standing in the state courts is not normally viewed as a constitutional doctrine.')." Order at 10 n.5. A further review of that treatise section supports the principle that constitutional standing is a fundamental component of jurisdiction under South Carolina's statutory language that must be proved by the Cruise Opponents.

> In most instances the state law of standing is based on statutory requirements that a party be "aggrieved" as well as on common law jurisprudential limitations that courts adopt to preserve the adversariness of the litigation process.... Standing questions in state environmental cases often involve private "third parties" seeking to challenge governmental decisions.... In these instances the courts require a plaintiff to demonstrate that the challenged action will result in a cognizable, adverse effect on the plaintiff, reasoning that this adversity will give the plaintiff the necessary stake in the outcome for the litigation process to function properly.

2 *State Envtl. L.* § 14:2 (2013). In fact, the state environmental law treatise goes on to support the argument made by the Ports Authority that the traditional constitutional test for standing (as adopted by the South Carolina Supreme Court) is applicable to this proceeding, as the Cruise Opponents must, under South Carolina law, establish they are an "affected person," which in this state is synonymous with establishing constitutional standing.

> Most commonly, these laws declare that an "aggrieved party" can seek judicial review of an agency decision.... Lesser-used terms delineating those who may appeal to the courts include persons "affected" or "adversely affected" by an agency decision....
>
> The courts tend to construe these statutes as requiring the same type of showing by a plaintiff as in the standing cases that apply only judge-made law.[7] Similarly, a North Carolina court, interpreting a statute defining an "aggrieved party" as one "directly or indirectly affected substantially ... by an agency decision," noted that requiring a person to be "aggrieved" is similar to the usual concept of standing. And the Supreme Court of Utah has found that the phrase "adversely affected" simply "incorporates the traditional standing test."

2 *State Envtl. L.* § 14:7 (2013).

Looking at other states, "standing" is considered a jurisdictional prerequisite to adjudication and, in at least one state, is considered a component of subject matter jurisdiction. In Texas, a "lack of standing deprives a court of subject matter jurisdiction because standing is an element of such jurisdiction. A plaintiff must plead facts that affirmatively demonstrate standing; that is, the plaintiff must affirmatively show jurisdiction." *Texas Dep't of Transp. v. City of Sunset Valley*, 92 S.W.3d 540, 550 (Tex. App. 2002), *rev'd on other grounds*, 146 S.W.3d 637 (Tex. 2004) (internal citations omitted).[8] The Hawaii Supreme Court has designated standing as a

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[7] *See Bosque River Coalition v. Texas Comm'n on Envtl. Quality*, 347 S.W.3d 366, 375 (Tex. App. Austin 2011) ("the same basic principles governing whether a party has standing to challenge governmental action in court also govern whether a party is an 'affected person' entitled to a contested-case hearing"); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 903-04 (Del. 1994) (after first observing that the Data Processing test "[n]ormally ... applies only in the absence of a specific statutory grant of review," the court went on to apply the Data Processing test in determining whether the plaintiff was "substantially affected" under the relevant statute); *Trepanier v. City of Everett*, 64 Wash. App. 380, 824 P.2d 524, 526 n.1 (1992) ("We see no reason ... why the statutory standing requirements [under the State Environmental Policy Act] should differ from the constitutional standing test established before the statute was enacted.").

[8] The Supreme Court of Connecticut has addressed the interplay of subject matter jurisdiction and justiciability as follows:

> We begin by noting that subject matter jurisdiction and justiciability are closely related concepts. "Subject matter jurisdiction involves

"jurisdictional" issue as well, stating that "[t]he issue of standing implicates this court's jurisdiction, and, therefore, must be addressed first. Because standing is a jurisdictional issue that may be addressed at any stage of a case, an appellate court has jurisdiction to resolve questions regarding standing, even if that determination ultimately precludes jurisdiction over the merits." *Keahole Def. Coal., Inc. v. Bd. of Land & Natural Res.*, 134 P.3d 585, 593-94 (Haw. 2006). South Carolina is in accord, as the South Carolina Supreme Court has recognized that a court may have subject matter jurisdiction but may still be deprived of jurisdiction over a matter. *See, e.g.*, *State v. Dudley*, 362S.C. 578, 582, 614 S.E.2d 623, 625-26 (2005) ("Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding."); *Murray v. S.C. Dep't of Health & Envtl.*

> the authority of the court to adjudicate the type of controversy presented by the action before it." (Internal quotation marks omitted.) *Peters v. Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005). Justiciability involves the authority of the court to resolve *actual* controversies. *Office of the Governor v. Select Committee of Inquiry*, supra, 271 Conn. at 568, 858 A.2d 709. "'Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable.' *State v. Nardini*, 187 Conn. 109, 111, 445 A.2d 304 (1982). 'Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute ... (2) that the interests of the parties be adverse ... (3) that the matter in controversy be capable of being adjudicated by judicial power ... and (4) that the determination of the controversy will result in practical relief to the complainant.' ... *Seymour v. Region One Board of Education*, 261 Conn. 475, 481, 803 A.2d 318 (2002). As we have recognized, justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine.... *Esposito v. Specyalski*, 268 Conn. 336, 346–48, 844 A.2d 211 (2004)." *Office of the Governor v. Select Committee of Inquiry*, supra, at 568–69, 858 A.2d 709. Consequently, a court may have subject matter jurisdiction over certain types of controversies in general, but may not have jurisdiction in any given case because the issue is not justiciable.

Statewide Grievance Comm. v. Burton, 917 A.2d 966, 970-71 (2007).

Control, Docket No. 97-ALJ-07-0262-CC (Aug. 28, 1997) (J. Geathers) ("The [Administrative Law Judge Division] does possess statutory authority to hear the class of cases to which the instant matter belongs. However, ***while the Petitioners' lack of standing does not deprive the Division of subject matter jurisdiction, it does deprive the Petitioners of the opportunity to properly invoke that jurisdiction***") (emphasis added); *see also Holtzclaw*, *supra*; *Lennon, supra.*

As a result, the *ATC South*, *Freemantle*, *Bodman*, and *Youngblood* decisions are inapplicable and irrelevant to the standing analysis in this case. South Carolina law specifically requires the traditional elements of standing be satisfied to file a contested case challenge to a critical area permit, and therefore no distinction of statutory or *Lujan/Sea Pines* standing exists. Thus, there is no need to delve into any question of "statutory standing" separate and apart from the *Lujan/Sea Pines* test, as South Carolina law has merged the two together.

The Cruise Opponents must demonstrate that there exists a justiciable controversy permitting this Court to exercise its jurisdiction. A lack of standing deprives the Court of the authority to rule in this matter, thus depriving the Court of jurisdiction. As jurisdiction is a threshold question under the governing statutory and regulatory law, the question of whether the Cruise Opponents have standing is a jurisdictional prerequisite to any further determinations or orders from this Court.

II. The Order erred as a matter of law in holding that evidence outside the pleadings may not be considered in determining standing and that the Court must blindly accept allegations without inquiry or question.

The Order holds that the Court's "review is limited to the 'pleadings,' [and thus] the Court must limit its review to the Request for Contested Case Hearing and Prehearing Statements to determine whether Petitioners have failed to state facts sufficient to state a claim unless otherwise provided by law." Order at 4. However, as discussed above, the Order erred in finding that

"standing is not a jurisdictional question in South Carolina," leading to the erroneous conclusion that "the Court may not consider evidence outside the pleadings in resolving a motion to dismiss based on lack of standing. Thus, for the purposes of considering the Ports Authority's Motion to Dismiss, this Court's review will be limited to those allegations set forth in Petitioners' Prehearing Statement." Order at 10.

As discussed above, standing is jurisdictional. The Court has an obligation to ensure that the case is properly before it; without standing, this Court is without authority to render a decision. In a case where the facts supporting jurisdiction are challenged, the Court may consider evidence outside the four corners of the petitioner's document. As Judge Bell wrote, "[w]hen the issue is the existence of jurisdiction in fact, the court is not confined to the allegations of the complaint, but may resort to affidavits or other evidence to determine its jurisdiction."[9] *Graham v. Lloyd's of London*, 296 S.C. 249, 251 n.1, 371 S.E.2d 801, 802 n.1 (Ct. App. 1988); *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) (same); *see The Beach Co. v. S.C. Dep't of Health & Envtl. Control,* 04-ALJ-07-0199-CC (Feb. 7, 2005) (J. Stephens) ("Although subject matter jurisdiction is essentially a question of law, if factual determinations are necessary to resolve jurisdiction, the court may rely upon the facts placed before it. Here, the parties have provided the factual material needed to determine jurisdiction."); 1 *Motions in Federal Court* § 5:45 (3d ed.) ("If the motion presents a factual challenge to the existence of jurisdiction ... the court may consider matters beyond the pleadings and may conduct

[9] In truth, consideration of extra-pleading materials is not limited solely to the narrowly construed definition of subject matter jurisdiction reflected in the Order. For example, the Eighth Circuit has examined extra-pleading material in determining jurisdiction on a motion to dismiss founded on failure to exhaust administrative remedies. *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637-38 (8th Cir. 2003) ("Because the district court in this case had to consider affidavits and physicians' findings in order to determine whether or not Harris had exhausted his administrative remedies, we review its findings for clear error.").

an evidentiary hearing.").

The Cruise Opponents bear the burden of establishing that this Court has jurisdiction, including demonstrating satisfaction of the standing requirements. *See Georgetown County. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011) (citing *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291). The law requires an actual inquiry into standing even at the motion to dismiss stage, and the Cruise Opponents are not entitled to a "free pass" by using magic words in a filing. "Elements of standing ... 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case'; therefore, 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation.'" *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013).

The Ports Authority has challenged the Cruise Opponents' threadbare and conclusory allegations. As a result, even at the motion to dismiss stage Cruise Opponents may not rest on their conclusory allegations but must instead proffer specific allegations of fact in support of their standing. *See Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) (finding that "a plaintiff cannot rely solely on conclusory allegations of injury ... in order to find standing") (internal citations omitted); *see also Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs.*, 747 F. Supp. 88, 92 (D. Mc. 1990) (reasoning that "the court can [test the asserted theory of injury, causation and redressability at the factual, evidentiary level] ***at the motion to dismiss stage*** ... and ... conclusory allegations in an amended complaint, will not suffice to establish [ ] standing...") (quoting *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987) (internal quotations omitted) (emphasis added)). Moreover, because the Ports Authority has challenged the

factual allegations ostensibly supporting Cruise Opponents' standing, the Court may look beyond the allegations contained in the "pleadings."[10]

For instance, what can be charitably characterized as willful ignorance by the Cruise Opponents should not be permitted to suffice to satisfy standing. As one example, at the oral argument on the motion to dismiss, Cruise Opponents' counsel stated that the UPT "before 2010 did not serve as the home base for cruise ships.... That never happened until then." Ex. 2, Hrg. Trans. at 97-98. This representation simply is false, as other cruise lines used Charleston as a home

[10] *See, e.g., Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 *op. am. on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001) (stating that on a motion to dismiss, a court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"); *Orrock v. Appleton*, 213 P.3d 398, 403 (Idaho 2009) (finding that on a motion to dismiss "[a]ny factual allegations will be accepted as true, unless they are purely conclusory"); *Strickland v. Hedrick*, 669 S.E.2d 61, 73 (N.C. Ct. App. 2008) (noting that on a motion to dismiss the court "[is] not required ... to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences") (internal quotations omitted); *Dominski v. Frank Williams & Son, LLC*, 46 A.D.3d 1443, 1444, 848 N.Y.S.2d 791, 792 (N.Y. App. Div. 2007) ("While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support"); *Berea ex rel. Ward v. Trupo*, 753 N.E.2d 286, 288 (Ohio Ct. App. 2001) ("While the factual allegations of the complaint are taken as true, '[u]nsupported conclusions of a complaint are not considered admitted ... and are not sufficient to withstand a motion to dismiss'"); *Prof'l Mgmt. Associates, Inc. v. Coss*, 574 N.W.2d 107, 110 (Minn. Ct. App. 1998) ("[U]pon a motion to dismiss, only well-pleaded allegations of fact must be accepted as true; conclusory allegations of fact or law not supported by allegations of specific fact may not be taken as true"); *Other Place of Miami, Inc. v. City of Hialeah Gardens*, 353 So. 2d 861, 862 (Fla. Dist. Ct. App. 1977) (finding that while "well pled" allegations "must be accepted as true" on a motion to dismiss, "mere statements of opinion or conclusions unsupported by specific facts will not suffice. In other words, [the court] will not be bound by bare allegations which are unsupported or unsupportable") (citing *Brandon v. Cnty. of Pinellas*, 141 So.2d 278 (Fla. 2d Dist. Ct. App. 1962); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971)); *Richards v. Leimbacher*, 131 Ill. App. 2d 775, 778, 267 N.E.2d 523, 525 (Ill. App. Ct. 1971) ("A motion to dismiss admits for purposes of review only such facts as are well pleaded, but it does not admit conclusions of law, the pleader's construction of a statute, or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest").

port prior to 2010.[11] It is also curious how Cruise Opponents' counsel can seriously question whether a ship larger than the Carnival Fantasy—at approximately 855 feet in length—could berth at the UPT, which has a dock over 2,400 feet long and has accommodated multiple ships at a time. Ex. 2, Hrg. Trans. at 103. Cruise Opponents continue to make conclusory and unsupportable allegations to prolong the litigation and continue harassing the Ports Authority in an effort to stop cruise operations at the UPT.[12]

The Court's analytical framework of looking only at the allegations of Cruise Opponents without any examination of the absurdity or inquiry into the sufficiency of the allegations of each and every Cruise Opponent amounts to an error of law. The Court clearly may examine the evidence outside the bare claims of the Cruise Opponents to determine whether jurisdiction exists. To hold otherwise renders a motion to dismiss for lack of standing meaningless and is contrary to the long line of cases and precedent from this and other courts.

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[11] Celebrity Cruise Lines and Norwegian Cruise Lines both "home ported" at the UPT as early as 2003.

[12] The sworn affidavit of Carrie Agnew submitted to the South Carolina Supreme Court and this Court claiming nuisance and then the complete about-face and representation that no nuisance existed when she desired to sell her home is indicative of the ends-justifies-the-means attitude embraced by the Cruise Opponents in their crusade against cruise. *See* Ex. 3, Ltr. of Lowell to Anderson, dated Nov. 15, 2013 (detailing Carrie Agnew's misrepresentations).

Indeed, the purpose of the court examining specific factual allegations and evidence in support of standing at the motion to dismiss stage is to weed out unsupported and unsupportable allegations of standing and outright duplicitous claims, like those in the Agnew affidavit. *See Maine Ass'n of Interdependent Neighborhoods*, 747 F. Supp. at 92 ("[C]ourts have one additional and essential protection against unmeritorious standing claims ... the court can initiate [a] factual inquiry [into standing] at the motion to dismiss stage"); *Other Place of Miami, Inc.*, 353 So. 2d at 862. (reasoning that "[the court] will not be bound by bare allegations which are unsupported or unsupportable" even at the motion to dismiss stage).

III. The Order failed to clarify the applicable burden of proof for a petitioner to satisfy its burden of demonstrating constitutional standing.

The Order fails to rule on the proper standard applicable for a petitioner to demonstrate standing in a contested case, which was a disputed issue between the parties in briefing and during the hearing. The Ports Authority argued to the Court that the appropriate standard required of Cruise Opponents is the "irreducible constitutional minimum of standing" set forth in the United States Supreme Court case of *Lujan*, and adopted by the South Carolina Supreme Court in *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. Rather than meet this clear burden and test, Cruise Opponents instead opted to advance a discredited and outlying case which would have rendered Cruise Opponents' standing burden meaningless. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (purporting to only require an "identifiable trifle" of an injury in order to overcome justiciability concerns). While including citations to *Lujan* and noting its adoption by this state, the Order appears to apply a lesser burden requiring only the use of magic words without examination or analysis (rather than *Lujan*), and therefore fails to clarify the appropriate standard that is applicable to this challenge. As the appropriate level of proof required of Cruise Opponents' directly impacts the viability of the allegations set forth in their "pleadings," the Court's determination on this issue is critical to the motion to dismiss for lack of standing, and the Ports Authority respectfully requests the Court to reconsider the appropriate standard and reissue an Order in line with the established standards in this state.

The appropriate standard for this Court's evaluation of a petitioner's burden of proving standing is set forth in *Lujan*. The "irreducible constitutional minimum of standing"—*i.e.*, constitutional standing—consists of three elements: (1) the plaintiff/petitioner must have suffered an injury-in-fact; (2) there must be 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*, 345 S.C. at 601, 550 S.E.2d at 291 (2001) (citing *Lujan*, 504 U.S. at 560–61 (1992)). "To have standing, one must have a personal stake in the subject matter of the lawsuit." *Id.* 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))). A private party has standing to bring an action challenging an executive or legislative action when he has sustained, or is in immediate danger of sustaining, prejudice from the action. *Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999) (citing *Blandon v. Coleman,* 285 S.C. 472, 330 S.E.2d 298 (1985)). The prejudice required of an individual must be of a personal nature to the party asserting the challenge, not merely of general interest common to all members of the public. *Id.* (citing *Citizens of Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)). Further, where a party chooses not to assert its own rights, but instead relies on an organization to maintain an action on its behalf, it is "substantially more difficult," *see Beaufort Realty Company, Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citing *Lujan*, 504 U.S. at 560-61), and the association bears the additional burden of proving itself to be the appropriate party to bring a claim on the party's behalf. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

By contrast, Cruise Opponents advocated a standard for this Court's standing analysis that reduces the requirement of standing to a judicial afterthought. *See* Cruise Opponents' Resp. at 5-13. (arguing that "the injury required for standing purposes need not be substantial injury," it need only be an "identifiable trifle") (citing *SCRAP*). However, *SCRAP* has been criticized repeatedly by courts across the country, including the authoring Supreme Court in later cases. In fact, the Supreme Court in *Lujan v. National Wildlife Federation* expressly departed from the standing

analysis in *SCRAP* and embraced a more rigorous standard for satisfying the injury-in-fact requirement. 497 U.S. at 889 ("The *SCRAP* opinion, whose expansive expression of what would suffice ... has never since been emulated by this Court...."); *see also United States v. AVX Corp.*, 962 F.2d 108, 118 (1st Cir. 1992) ("In light of *Lujan*, the continued vitality of *SCRAP* as a divining rod for locating associational standing is highly questionable."); *Sierra Club v. Peterson*, 185 F.3d 349, 361 n.13 (5th Cir. 1999) *vacated on reh'g*, 228 F.3d 559 (5th Cir. 2000) ("[I]t seems safe (and sage) to note that *Lujan* likely eviscerated certain prior cases that afforded procedural rights [to] plaintiffs['] standing where the three-part test was not met, *see, e.g.*, [*SCRAP*].").

By failing to expressly set forth the applicable standard and discard the discredited *SCRAP* opinion and its "identifiable trifle" threshold for standing, the Order erroneously perpetuates Cruise Opponents' continued citation to *SCRAP*. Because the Order fails to correct Cruise Opponents' erroneous averment, as it cites *Lujan* but appears to apply *SCRAP*, the omission constitutes an error of law under the state's standing jurisprudence.

IV. The Court erred as a matter of law and fact in its ruling on the allegations of injury-in-fact.

The Ports Authority respectfully submits that in considering the Ports Authority's challenge to Cruise Opponents' standing, the Order improperly accepted threadbare allegations and conclusory statements of injury-in-fact that do not comport with the rigorous standard imposed on a petitioner under binding precedent.[13] Even at the motion to dismiss stage, a petitioner

[13] With respect to injury-in-fact, a petitioner must suffer "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 (2001) (citing *Lujan*, 504 U.S. at 559–61). There is no injury-in-fact when a party merely alleges harm indistinguishable from that suffered by the general public. *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. Seldin*, 422 U.S. 490, 501 (1975)

challenged as to standing must meet the standard set forth in *Lujan* of an injury to a legally protected interest that is concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical. Despite the Court's apparent belief that it is required to take Cruise Opponents' fanciful allegations as true at this stage of the litigation, Cruise Opponents failed to meet their burden and the Ports Authority respectfully requests the Court reconsider its Order.

Moreover, even if the Court believes it is constrained by the magic words advanced in Cruise Opponents' pleadings, it still has an obligation to evaluate whether the alleged harms derive from the permitted conduct, or are merely part and parcel of Cruise Opponent-members choosing to live in the urban environment that is the Charleston peninsula. An injury-in-fact must be more than merely a "general interest common to all members of the public." *See Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 291. Nonetheless, Cruise Opponents' arguments barely amount to that much. Cruise Opponents argue generally that their members "commute along the streets of Charleston which are congested by cruise ship traffic" (Request at 3, ¶4), that continued cruise operations will "increase[ ] ... congestion" on city streets (Request at 7, ¶19), and that the "membership ... express[es] concerns about ... noise" (Request at 4, ¶5). Cruise Opponents assert that "members ... breathe the air into which cruise ship emissions are discharged" (Request at 3, ¶4). They claim that relocation of the cruise passenger terminal 600 yards north will result in "significant[ly] degrad[ed] [ ] air quality," (Request at 13, ¶26), and will allegedly affect their members' "recreational, environmental, aesthetic and property interests" (Request at 13, ¶2). Finally, Cruise Opponents also allege a "significant degradation of ... property values" (Request at 13, ¶26) as a result of relocating the cruise operations within the existing marine terminal.

(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 share in the injury).

Respectfully, the Order errs as a matter of fact and law in finding that the above-threadbare general allegations amount to concrete, particularized injury-in-fact. Allegations of traffic congestions, noise, pollution, crowds, and historic ambiance are simply insufficiently concrete and particularized to individuals to meet the standard, but instead are generalized damages that are a part of living in any urban environment. Clearly, these harms derive not from the permitted conduct, but from current cruise operations,[14] and they fail to articulate a harm any different from what may be suffered by the public generally. *See Taubman Realty Group Ltd. P'Ship v. Mineta*, 198 F.Supp.2d 744, 755 (E.D. Va. 2002) (stating that courts "do not sit to entertain generalized grievances that are shared by the public at large") (citing *Lujan*, 504 U.S. at 573-74).

Nor can the singular, generic claims of prospective exacerbation of injury satisfy the requirement of a particularized and concrete injury.[15] With no way of measurably proving that the installation of five pile clusters will cause injury to Cruise Opponents in the future—which is the very definition of hypothetical and conjectural pleading—Cruise Opponents instead attempt to

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[14] While Cruise Opponents assert their interests are adversely affected "[a]s a direct and proximate result" of the Permit, (Request at 13, ¶2), they fail to allege any specific facts or circumstances to support this assertion. This sort of conclusory pleading is insufficient as a matter of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient to withstand a motion to dismiss). Instead, they complain that the Permit "authorized" a new cruise terminal and "enable[d]" cruise operations to persist in Charleston. *See* Request at 6, ¶15.

[15] It should not be lost on this Court that establishing injury-in-fact by alleging merely prospective harm is subject to a rigorous analysis. *See* Order at 14 (noting that Cruise Opponents' injury is limited to allegations of prospective harms). In the recent case of *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), the United States Supreme Court reemphasized and reinforced the standard concerning prospective harms, stating "we have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient" 133 S. Ct. at 1147 (emphasis in original). To that end, the Court dismissed the "objectively reasonable likelihood" standard employed by the Second Circuit as "inconsistent with our requirement that 'threatened injury must be certainly impending to constitute injury-in-fact.'" *Id.*

cobble together a hybrid approach to standing, alleging current harm, which cannot be tied to the permitted conduct, combined with *ipse dixit* conclusory statements that the alleged current injuries will be exacerbated. *See, e.g.*, Resp. to Mot. to Dismiss at 12 ("[Cruise Opponents'] members have articulated substantial and concrete injuries that are real and that face an imminent ***threat of being exacerbated*** as a result of the permitted activity contested in this case") (emphasis added); Resp. to Mot. to Dismiss at 14 ("[I]f the proposed new terminal is constructed it will result in new and ***increased harms*** to their health, welfare, recreational and aesthetic interest, as well as their quality of life.") (emphasis added); Resp. to Mot. to Dismiss at 20 ("[Cruise Opponents] describe the correlation between the injuries they have already experienced, based on Carnival Fantasy utilizing Union Pier Terminal, and the proposed new cruise ship terminal, ***which will exacerbate the existing injuries***.") (emphasis added); Resp. to Mot. to Dismiss at 22 ("***It logically follows that*** if cruise ship operations are increased, if larger ships are ported more frequently, then the ***harms complained of will increase***.") (emphasis added). These statements, which serve as the only basis on which Cruise Opponents attempt to tie the permitted activity to future harm, are purely conjecture. *Compare Beaufort Realty*, 346 S.C. at 302, 551 S.E.2d at 590 (rejecting the League's assertions of future harm as "purely conjectural and hypothetical.").

However, there is no case law that supports Cruise Opponents' method of alleging standing, and the Order errs as a matter of law in sanctioning their efforts. Instead, case law requires the injuries asserted by Cruise Opponents to be actual or imminent, rather than conjectural or hypothetical. Without question, the injuries asserted by Cruise Opponents relate only to on-going cruise operations, followed by the obligatory conclusory statement that these injuries will be exacerbated. The Court of Appeals evaluated a similar allegation of future harm in *Beaufort Realty* and found it insufficient. 346 S.C. at 302, 551 S.E.2d at 590 ("Although the League alleges

its members will suffer injury if the islands are developed, the injury is purely conjectural and hypothetical."); *see also Clapper*, 133 S. Ct. at 1147 ("[W]e have repeatedly reiterated that "threatened injury must be *certainly impending* to constitute injury in fact," and that "[a]llegations of *possible* future injury" are not sufficient") (emphasis in original).[16] While Cruise Opponents assert harm that derives from current cruise operations, those injuries are not traceable to the as-of-yet unimplemented plan of shifting cruise operations to the northern end of UPT. *But see Beaufort Realty* at 303, 551 S.E.2d at 590 ("Prospective concern falls far short of the standard of 'concrete and particularized and ... actual or imminent' harm set forth in [*Lujan*]. Consequently, the League did not present evidence of injury in fact."); *Baur*, 352 F.3d at 637 (finding that "a plaintiff cannot rely solely on conclusory allegations of injury ... in order to find standing") (internal citations omitted).

[16] The Supreme Court in *Clapper* further directly distinguished *Laidlaw* with respect to the reasonableness standard cited in this Court's Order. *See* Order at 13 (quoting *Laidlaw* for the proposition that affiants may establish standing when they assert "reasonable concerns" that their recreational, aesthetic and economic interests may be adversely affected by the challenged conduct). However, the *Clapper* Court noted that standing in *Laidlaw* related to "a company's continuous and pervasive illegal discharges of pollutants into a river'" which were "concededly ongoing." *See Clapper*, 133 S. Ct. at 1153 (citing *Laidlaw*, 528 U.S. at 184). Thus, the question in *Laidlaw* was not whether the petitioners' allegations of injury were "reasonable"—as the illegal discharges were conceded—but rather whether it was "reasonable" for those petitioners to avoid using the polluted waterway. *Clapper*, 133 S. Ct. at 1153 (citing *Laidlaw*, 528 U.S. at 183-84). Here, Cruise Opponents' complaint is directed at ***lawful*** activity, and the Ports Authority certainly does not concede that Cruise Opponents have been injured. There have been no allegations that cruise vessels calling on the UPT operate, have operated, or will operate in violation of applicable laws and regulations governing air emissions or other environmental impacts. Instead, Cruise Opponents' allegations of harm are limited to general inconveniences, *i.e.*, traffic, air emissions, and noise accompanying lawful activities that characterize a port city.