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STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

DEC 09 2015

Shirley C. Robinson, Administrative Law Judge

SC Court of Appeals

Case No. 14-ALJ-07-0282-CC
Appellant Case No. 2015-000602

Dan Abel and Mary Abel

Appellants,

vs.

South Carolina Department of Health and Environmental Control and
Pawleys Island Community Church,

Respondents.

**RECORD ON APPEAL
VOLUME II OF II**

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DEC 23 2014

SC ADMIN. LAW COURT

Docket No. 00-ALJ-07-0626-CC

**REPLY TO JOINT
RESPONSE ON MOTION
TO ENFORCE CONSENT ORDER
AND TO
CONSOLIDATE**

**South Carolina Department of Health and
Environmental Control, Office of Ocean and
Coastal Resource Management, and Pawleys
Island Baptist Church,**

Respondents.

The Petitioners Mary W. Abel and Daniel C. Abel (“the Abels”) submit this reply in support of the Motion to Enforce the Consent Order of Settlement and Dismissal (the “Consent Order”) and to Consolidate this action with the related challenge given Docket No. 14-ALC-07-0282-CC following the joint response submitted on December 12, 2014 by Respondents South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (“DHEC/OCRM” or “Department”) and Pawleys Island Baptist Church, now known as Pawleys Island Community Church (the “Church”).

As an initial matter, the Respondents' arguments regarding the effect of the Consent Order are visibly inconsistent. Respondents admit that the Church sought and received a storm water permit and Coastal Zone Consistency ("CZC") certification in order to carry out construction activities to accommodate growth of the Church and its facilities in 2000. (See Response to Motion to Enforce, pp. 1 - 2.). Respondents also admit that the Church sought and received a storm water permit and CZC certification in order to carry out construction activities to accommodate "continued

growth” in 2012, with authorization issued in 2014. (Response to Motion to Enforce, p. 3). Yet Respondents insist upon differentiating between these approvals and the work they authorize, arguably, in order to arrive at their perplexing position – that the terms agreed to under the Consent Order were only temporarily binding, only applicable to the construction activity authorized under the 2000 permit and certification, and unenforceable as to the “separate and distinct” construction activity proposed and authorized under the 2014 permit and certification.¹

Respondents agree and admit that the Consent Order effectively modified the Church’s storm water management plans and that “the Church did agree before the Court ... to leave ... the wetlands in the configuration as set forth in the 2000 Consent Order.” (*Id.*, at 2). Respondents further agree and admit that the additional construction activity for which the Church sought approval in 2012 involved work that “does reconfigure and expand the existing storm water retention pond and affect the remaining wetlands on the Church’s property.” (*Id.*, at 3). Notwithstanding the plain language of the Consent Order requiring that the remaining wetland area on the Church property shall be preserved in its natural state and the Respondents’ acknowledgment of this condition in the agreement, Respondents conclude that the Consent Order unilaterally applies to the activities authorized under the 2000 permit and certification but not to the similar activities authorized under the 2014 permit and certification. (*Id.*, at 2).

The Respondents maintain their disjointed position despite the complete lack of any language limiting the effect or duration of the Consent Order or narrowing its scope to a particular authorization from the Department. To the contrary, the Consent Order places explicit conditions

¹Petitioners would note that the basis for the Respondents’ joint motion to dismiss the pending challenge of the 2014 permit and certification to the Church is that the Consent Order is unenforceable with regard to those authorizations.

on storm water management and construction activities on the Church property and unambiguously mandates the preservation of the remaining onsite wetlands. If the remaining wetlands were not required to be preserved in perpetuity, then the language of the Consent Order specifically relating to and amending the work authorized under the 2000 permit and certification would have been sufficient. (See Motion to Enforce, Ex. A, p. 2, ¶ 1 (“The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved. . . .”)). However, the Consent Order goes a step further and includes an additional, independently enforceable provision reinforcing the requirement that the remaining wetland area on the Church property is to remain protected beyond the life of the Church’s 2000 construction project. (*Id.*, at ¶ 3 (“The Church agrees “that the wetland preserved by this Consent Order shall remain in its natural state.”)). Indeed, the inclusion of this stand alone provision requiring preservation of the onsite wetlands precludes any argument that the protection was intended to be anything other than absolute.

More importantly, however, the Respondents’ arguments must fail because they are contrary to the law. Although Respondents cite the applicable legal standard that interpretation and enforcement of settlement agreements is governed by principals of contract law, and state “[t]herefore, the settlement agreement between the parties [sic] enforceable on their [sic] face[.]” (*Id.*, at 3 - 4), Respondents’ ultimately advocate for the Court to adopt an understanding of the parties’ intent and the terms agreed to under the Consent Order to be something other than the plain language contained in that agreement. Since this position runs afoul of well-established legal rules, it must be denied.

Under South Carolina law, whether a contract is ambiguous, and the interpretation of an unambiguous contract, are questions of law for the court. S.C. Dep’t of Natural Res. v. Town of

McClellanville, 345 S.C. 617, 550 S.E.2d 299, 302–03 (2001). “A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.” Id., at 302. “When the language of a contract is unambiguous, however, a court’s only function is to interpret the contract’s lawful meaning and the intent of the parties as expressed in the contract’s terms.” Monster Daddy, LLC v. Monster Cable Products, Inc., 483 F. App’x 831, 834 (4th Cir. 2012).

Where the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, the contract’s language controls as the parties’ intended agreement. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497–98, 649 S.E.2d 494, 501–02 (Ct.App.2007) (stating a court must first look to the language of the entire contract to determine the parties’ intent and if the language is perfectly plain, “it alone determines the document’s force and effect”).

The language of the Consent Order is clear and unambiguous. It declares that the Church’s storm water management plans be amended so the remaining wetland area on the site “shall be preserved” and that the storm water pond “shall be altered to be located and configured as depicted” in the diagram attached as “Exhibit A” to the Consent Order. (See Motion to Enforce, Ex. A, p. 2). The Consent Order also imposes a non-discretionary duty on the Church to preserve the remaining wetland area “in its natural state.” (Id.). This language is only capable of one reasonable interpretation: that the remaining wetland area on the Church property must be preserved in its natural state. There is no indication in any of the provisions of the Consent Order that the parties intended the agreement’s force and effect to be of limited duration. Rather, the plain language of the Consent Order recognizes that construction activities will continue on the Church property in the future and, accordingly, sets forth the parameters within which the activity is permitted to occur and the protections which must remain in place.

The Respondents' position that the Consent Order is no longer binding or is unenforceable with regard to the work authorized under the 2014 permit and certification is contradictory to the plain terms and reasonable interpretation of the agreement, let alone irrelevant to the agreement's actual force and effect. "Interpretation of a contract is **governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.**" Laser Supply & Servs., Inc. v. Orchard Park Associates, 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (S.C. Ct. App. 2009) (emphasis added). "Parties are **governed by their outward expressions and the court is not at liberty to consider their secret intentions.**" Progressive Max, 405 S.C. at 46, 747 S.E.2d at 184 (emphasis added). "A court must **enforce an unambiguous contract according to its terms** regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Laser Supply, 382 S.C. at 334, 676 S.E.2d at 144 (emphasis added). Respondents were perfectly capable of advocating for whatever particular language they desired if their intent in entering into the Consent Order was to limit the duration or extent of the agreed upon conditions and restrictions. However, Respondents did not do so and the Court may not entertain after-the-fact arguments that they "never intended for the agreement to be perpetual or to run with the land" where the clear language of the agreement states otherwise. The Court must focus its inquiry on the plain and unambiguous terms finally agreed upon in the Consent Order as the manifestation of the parties' intent.

The language of the Consent Order clearly contemplates the possibility of future construction activity and storm water management on the Church property and directs that certain protections be maintained, including requirements such as:

- "approximately one-half (50%) of the wetland area on the site **shall be preserved**[:]"
- the "storm water pond **shall be altered to be located and configured as depicted in ... Exhibit A**[:]"

- the Church *will* instruct its agents, employees, contractors and others working on its behalf “to continue to explore additional design changes ... which will allow possible additional expansion of the wetland area to be preserved[;]”
- the Church *shall* instruct its agents, employees, contractors and others working on its behalf “to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended[;]” and
- “The Church agrees that the wetland preserved by this Consent Order *shall* remain in its natural state.”

(Motion to Enforce, Ex. A, p. 2) (emphases added)

The Court must look to the plain terms agreed to in the Consent Order, rather than the inconsistent, subjective theory crafted by Respondents of late, which seeks to get around the obligations required by the agreement and allow the Church to move forward with its additional construction activity project. Indeed, under the plain terms of the Consent Order, both the Department and the Church initially acknowledged that the agreement prevented the alteration of the remaining onsite wetlands sought through the 2014 permit and certification and unsuccessfully attempted to have the agreement modified by this Court. (See Motion to Enforce, p. 4).

Moreover, the court must determine the parties’ intent and the effect of the Consent Order by interpretation of the agreement as a whole. Respondents admit to having agreed to leave the onsite wetlands “as set forth in the 2000 Consent Order,” (Response to Motion to Enforce, p. 2), and admit that the additional construction activities proposed and authorized under the 2014 storm water permit and CZC certification “affect the remaining wetlands on the Church’s property[;]” (Id., at 3), yet claim to have fulfilled all conditions of the Consent Order and attempt to skirt any obligation to continue to preserve the onsite wetlands. (Id., at 4). Respondents seek an interpretation of the Consent Order that effectively allows them to pick and choose which provisions are enforceable and which they believe to be inapplicable. To accept the Respondents’ argument would violate

established principals of contract law as well as public policy.

For purposes of comparison, the opinions in Monster Daddy, LLC v. Monster Cable Products, Inc., 483 F. App'x 831 (4th Cir. 2012), and Topiwala v. Wessell, 509 F. App'x 184, 185 (4th Cir.) cert. denied, 134 S. Ct. 701, 187 L. Ed. 2d 552 (2013), provide useful analogies to the fallacy of the Respondents' position of late. In Monster Daddy, appellants challenged the district court's enforcement of a settlement agreement arguing that a particular provision was no longer enforceable. 483 F. App'x at 834. The Fourth Circuit disagreed, finding by the mere inclusion of the provision's language in the agreement, "the parties implicitly recognized" that issues could arise at a later date and manifested their intent with how to handle such issues in the future. Monster Daddy, at 835. The Fourth Circuit was clearly troubled by the fact that the basis for the appellants' claim in support of non-enforcement was "inconsistent with the very purpose" of the particular provision agreed to, as well as the potential, if appellants' position were accepted, for parties to be able to justify actively undermining or avoiding their contractual obligations. Id.

The Fourth Circuit further disagreed with the appellants' argument in opposition of enforcement given the fact that the particular provision in dispute was unambiguous and that it did "not mention any other term, clause, or obligation in the settlement agreement." Id. The Fourth Circuit reiterated that each term in a contract must be considered and given its full effect where possible. Id. Citing the principle that a contract's unambiguous language determines its force and effect, the Court determined "adoption of [appellants'] reasoning impermissibly would result in rendering an independent and unambiguous provision in the parties' contract meaningless, in violation of South Carolina law." Id. (emphasis added). Noting that appellants' undermined their own argument by taking a conflicting position regarding another provision of the settlement agreement, the Fourth Circuit found: "There is no principles basis ... for distinguishing between" the

two provisions “contained in the same paragraph of the settlement agreement. Thus, to permit such a distinction effectively would sanction [appellants’] attempt to pick and choose which portions of the settlement agreement remain enforceable.” *Id.* at 836. (emphasis added).

In *Topiwala*, appellants challenged the district court’s enforcement of a document entitled “Settlement Terms,” primarily contending that they never intended the document to be a binding agreement. 509 F. App’x at 185. The Fourth Circuit ultimately determined that the agreement “unambiguously evinces an intent to be bound, and contains sufficiently definite terms” for “both the document’s title and contents would lead a reasonable person in the parties’ position to believe that it was susceptible to only one meaning, as a binding agreement to settle the case along the terms contained therein” and since the document contained all essential elements to be a valid settlement agreement, the absence of the various discretionary terms emphasized by appellants “did not prevent enforceability[.]” *Id.*, at 186. Nor does “the fact that a party has ‘second thoughts’ about the agreement’s results” render the agreement unenforceable. *Id.* (citing *Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 540 (4th Cir. 2002) (“**Having second thoughts about the results of a valid settlement agreement does not justify setting aside an otherwise valid agreement**”) (emphasis added)). The Fourth Circuit agreed with the district court, finding:

[T]here was no substantial factual dispute with respect to the agreement’s existence, because the [appellants’] claim that there was no ‘meeting of the minds’ was implausible. The claim was entirely unsubstantiated and plainly pretextual. The parties drafted a written agreement entitled ‘Settlement Terms,’ signed the agreement, and represented to the district court that they had reach a settlement agreement. The [appellants’] alternative arguments against enforcement—that they were rushed into the agreement ... and that they mistakenly agreed to certain terms that they later discovered would be more difficult to satisfy than anticipated—**expose their true motivations for avoiding the agreement.**

Id., at 187 (emphasis added).

Similarly, here, Respondents appear to have developed second thoughts about the nature of the terms and conditions agreed to under the Consent Order, as well as a selective understanding of

those obligations. However, the law does not entitle Respondents to treat certain provisions of a valid and binding agreement as enforceable while electing not to be bound by others. Each of the unambiguous provisions enumerated as part of the Consent Order reflect the parties objective intent at the time the agreement was entered into and must each be considered and given full effect, including the express requirement that the Church preserve the remaining onsite wetland in its natural state.

Courts have "inherent authority to enforce settlement agreements" and, in the exercise of this authority, must find: 1) that the parties reached a final agreement, and 2) that it is able to determine the agreement's terms and conditions. Id. at 187 (citing Hensley, 277 F.3d at 540-41); Ross Dev. Corp. v. Fireman's Fund Ins. Co., 809 F. Supp. 2d 449, 453 (D.S.C. 2011) ("A trial court has inherent equitable power to enforce summarily a settlement agreement when the practical effect is merely to enter a judgment by consent"); Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995) ("A trial court has inherent jurisdiction to enforce settlement agreements entered before it") (emphasis added).

A final agreement was definitively reached between the Abels, Mr. Mims, the Department and the Church and adopted as part of the final order by this Court. (See Motion to Enforce, Ex. A, p. 1 ("The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order.")). Further, the terms and conditions of the Consent Order are enumerated in plain and unambiguous language. (Id., at 2 - 3). And "[a]fter review of the agreement," this Court determined "that it should be accepted and made a part of this order." (Id. at 3). The Consent Order then concludes:

IT IS HEREBY ORDERED that the agreements stated hereinabove shall be, and same hereby is, made a part of this final order of the Administrative Law Judge Division.
IT IS FURTHER ORDERED that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement or order.

IT IS FURTHER ORDERED that this matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein.

(Id.).

The Consent Order contains the signature of Administrative Law Judge C. Dukes Scott, as well as the signatures of each of the parties to the agreement. (Id., at 4). Therefore, the Consent Order is a final agreement between the parties that is enforceable by this Court.

Petitioners Dan and Mary Abel, as parties to the Consent Order, urge that this Court exercise its inherent authority to enforce the Consent Order. Respondents' allegation that the Abels "forewent any opportunity to suffer an injury-in-fact" for standing purposes is entirely without merit. Rather, Petitioners have consistently maintained that the protection afforded to the remaining wetlands on the Church property was an important concession to the Abels in reaching the settlement agreement and Consent Order, as well as the basis for the Abels' pending challenge to the 2014 Department authorizations for activity on the Church property that would directly destroy the protection agreed to. (See Affidavit of Dan Abel, attached as Exhibit 1, ¶¶ 7 - 9 ("The primary basis of my challenge to the authorizations for construction on the Church's property was the impacts to the wetlands. . . . As with many compromises, the decision to fill in the wetlands left us ... with a bittersweet feeling. We were saddened at the loss of half of the wetlands, but were comforted that the remaining half would continue to exist. . . . Thus, in late 2013, we were shocked to receive notification that the Church was in the final stages of receiving a permit to do precisely what they promised and legally agreed never to do under the 2001 Consent Order and settlement agreement—fill in the wetlands.")).

While the Abels have indeed moved to a different residence since entering into the Consent Order, they remain permanent residents and members of the small Pawleys Island community and maintain many of the same concerns with the Church's additional construction activities that led to

the original challenge and which were specifically addressed in the Consent Order - namely, the Abels' concern regarding the water quality of the Pawleys Creek tributary system, which is important salt marsh adjacent to the Church, from storm water runoff and other discharges associated with construction activity on the Church property. (See Exhibit 1, ¶ 5).

The Abels' retain their interests in protection of the natural resources of their environment for their use and enjoyment and possess sufficient standing to enforce the protection of those resources as agreed to under the terms of the Consent Order. (Id., at ¶ 6 ("The relationship between the wetlands proposed to be filled by the Church and the adjacent salt water Pawleys Creek are important to me for personal and professional reasons. I enjoy recreating in and around the Pawleys Island community, and Pawleys Creek in particular. I enjoy watching birds and other wildlife which are dependent on this estuarine system and the attendant water quality for their propagation and survival and my enjoyment.")). The Abels' rights as parties to the Consent Order are not contingent upon their residence and thus did not divest upon the sale of their property. According to the Consent Order, "the parties **shall retain full rights to enforce the agreements** stated herein." (emphasis added).

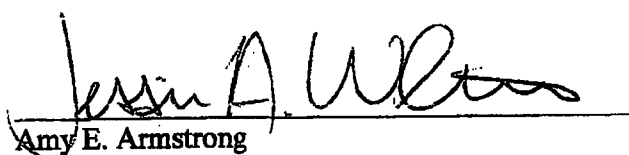
Regardless of any absence of loaded phrases that the agreement was "in perpetuity" or "ran with the land," the plain language of the Consent Order restricts the construction activities and storm water management plans for the Church property, including the obligation that the onsite wetland area remain preserved in its natural state. The agreement was adopted and formally issued by final order of this Court. Accordingly, the Consent Order is part of the public record and any hypothetical third party purchasers envisioned by Respondents are effectively placed on notice of the restrictions on the Church's property.

The Petitioners have recognized the importance and significance of the Consent Order and raised issues with the applicability and enforceability of its provisions in all filings before this Court:

- “In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from [the Church] ... The wetlands on [the Church’s] property were a key issue in that contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels’ decision to file the contested case and was specifically addressed in the Consent Order.” (See Request for Contested Case, attached as Exhibit 2, p. 2).
- “This is a contested case hearing brought by the Petitioners ... to review the decision of [DHEC/OCRM] to grant [the 2014 storm water permit and CZC certification] to [the Church] ... in plain violation of a previous settlement agreement entered between Dan and Mary Abel (‘the Abels’), [the Church] and DHEC/OCRM[,]” specifically, “[w]hether [the Church’s] plan, as approved by DHEC/OCRM, violates certain provisions of the Consent Order, including that the wetlands remaining on the [Church’s] property are to ‘remain in [their] natural state[.]’” (See Petitioners’ Prehearing Statement, attached as Exhibit 3, p. 1, 3).
- “Therefore, under the terms of the Consent Order, the parties agreed to the dismissal of the contested case in exchange for certain binding concessions with regard to construction activities on the Church property ... The wetlands on the Church property, which are adjacent to an important salt marsh creek in Pawleys Island, formed a key issue in the Abels’ challenge giving rise to the contested case. Accordingly, the inclusion of specific provisions in the Consent Order addressing and protecting those wetlands played a significant role in facilitating an agreement between the parties.” (See Motion to Enforce, p. 3).
- “The wetlands on the Church property, which are adjacent to an important salt marsh creek in Pawleys Island, formed a key issue in the Abels’ challenge giving rise to the contested case in 2000. (Exhibit 23, ¶ 4-7 (‘Of primary concern was the Church’s proposal to fill in 0.3 acres of jurisdictional wetlands onsite. . . . Those wetlands were a source of joy to us.’)). ‘[T]he onsite wetlands have a direct surface and hydrological connection to Pawleys Creek, a salt water creek in the Pawleys Island community. Currently Pawleys Island Creek is a eutrophic system owing to polluted groundwater and surface water runoff from the watershed. Wetlands mitigate nutrients and sediment runoff and contribute to biodiversity of the creek and surrounding area.’ (Exhibit 23, ¶ 5). Accordingly, the inclusion of specific provisions in the Consent Order addressing and protecting those wetlands played a significant role in facilitating an agreement between the parties. (Exhibit 23, ¶ 7 (Dr. Abel explains: ‘As with many compromises, the decision to fill in the wetlands left us (and the church as well, we suspect) with a bittersweet feeling. We were saddened at the loss of half of the wetlands, but were comforted that the remaining half would continue to exist.’)).” (See Petitioners’ Motion for Summary Judgment, attached as Exhibit 4, p. 4).

Respondents likewise acknowledged the relevance of the Consent Order to the pending contested case challenge and admitted the action seeks "to address the identical issues asserted by Petitioners in this motion." (Response to Motion to Enforce, p. 5).

Accordingly, Petitioners contend the interests in proper resolution of the law and judicial economy would best be served if this Court joined these cases and collectively ruled on the enforceability of the Consent Order to the additional construction activity authorized by the 2014 permit and certification, which is ultimately the core issue in dispute. Furthermore, as parties to the Consent Order, the Petitioners' Dan and Mary Abels respectfully request that this Court exercise its inherent authority to enforce the Consent Order, determine whether the Church's proposed additional construction activity affecting the remaining onsite wetlands is consistent with its obligations under the agreement, and order the 2014 storm water permit and CZC certification authorizing such activity to be vacated or amended in compliance with the agreement.



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December 23, 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Dan Abel and Mary Abel,

Petitioners,

vs.

South Carolina Department of Health
and Environmental Control, Pawleys
Island Community Church,

Respondents.

Docket No. 14-ALJ-07-0282-CC

**DEPARTMENT'S RESPONSE
IN OPPOSITION TO
PETITIONERS' MOTION FOR
SUMMARY JUDGMENT**

TO: THE ADMINISTRATIVE LAW COURT AND TO THE PETITIONERS:

PLEASE TAKE NOTICE that the South Carolina Department of Health and Environmental Control ("the Department" or "DHEC") hereby submits this Response in Opposition to Petitioners' Motion for Summary Judgment ("Motion") before the Administrative Law Court pursuant to ALC Rule 19 and the Scheduling Order in this matter.

The Department hereby incorporates by reference the factual summary and substantive arguments provided in Respondents' Joint Motion to Dismiss before this Court in this matter.

As to Petitioners' arguments regarding the initial Notice of Intent ("NOI") failing to disclose wetland impacts (Petitioners' Motion, pg. 5) and the lapse in time and implementation of a new NOI Sheet necessitating a new NOI to be submitted by the Church, both of these issues were resolved by the submission of a new NOI, which was included as Petitioners' Exhibit 11 to their Motion, upon which the Department's review was based. (Exhibit A, Geer Deposition pp. 45, l. 4 – p. 46, ll. 10). Since the defects were remedied and Petitioners' challenge is based upon their belief the activities allowed in the revised NOI are inconsistent with the Consent Order filed

by this Court on January 8, 2001 resolving and dismissing Docket No. 00-ALJ-07-0626-CC¹ ("Consent Order") any inference by Petitioners' that the information reviewed by the Department regarding the revised NOI in this project was deficient is incorrect and irrelevant to the issues challenged in this matter.

Petitioners are challenging DHEC's decision to grant an NPDES General Permit for Stormwater Discharges from Construction Activities (NPDES permit number SCR10Q459) ("stormwater permit") and its accompanying Coastal Zone Consistency ("CZC") certification (CZC-12-0149) to the Church. Petitioners assert these decisions violate the Consent Order by allowing for activities inconsistent with the terms of the Consent Order, specifically the alterations of wetlands. However, neither these Department decisions actually authorize the alteration of wetlands, about which the Petitioners are concerned. The language of the NPDES permit for stormwater discharges explicitly conveys to the Permittee: "You are responsible for obtaining any other federal, state, or local permit that may be required for this project. In particular, any permits through the U.S. Army Corps of Engineers for the placement of fill material in Waters of the United States." (Exhibit B, NPDES permit). Petitioners' challenge also includes the CZC that accompanied the NPDES permit, which provides:

"This Coastal Zone Consistency did not include a review and authorization for any direct or indirect wetland impacts to freshwater wetlands or critical area. Any impacts to Critical Areas as determined by SCDHEC-OCRM, and/or freshwater

¹ As Petitioners' point out to this Court in their Motion on pages 18 and 19, Department Staff was confused by the terminology used in legal proceedings and inadvertently referred to the Consent Order as a Restrictive Covenant in the review worksheet. However, had a recorded Restrictive Covenant been placed as a part of the Consent Order, Petitioners' interpretation of the Consent Order may be supported and the Department would issue a permit consistent with that recorded Restrictive Covenant and the regulations and as such this matter likely would not be before this Court for review.

wetlands, as determined by the U.S. Army Corps of Engineers must be authorized by the appropriate agency."

(Exhibit C, CZC certification).

Section 404 of the Clean Water Act requires a person to obtain a permit from the U.S. Army Corps of Engineers ("Corps") in order to place fill in jurisdictional wetlands. 33 U.S.C.A. §1344. Since this activity is to take place in the Coastal Zone, the Corps' permit must be found consistent with the State's Coastal Zone Management Program. S.C. Code Ann. §48-39-80(B)(11). The Department issued a separate consistency determination for the Corps' permit allowing for the alteration jurisdictional wetlands, which Petitioners have failed to challenge. Petitioners admit knowledge of the required Corps permit during Richard Geer's deposition, stating "I understand that there was a nationwide permit that was also – that applicant also received coverage under a nationwide permit." (Exhibit D, pg. 16, ll. 6-8; *see also* Exhibit E, Geer Deposition, pg. 30, ll. 7-16). Accordingly, the Department decisions that Petitioners are contesting do not authorize any modifications, impacts, or placement of fill material into any jurisdictional wetlands on the Church's property.

Petitioners' challenge before the Board and in its Request for Contested Case only involved the NPDES permit and the associated CZC, arguing these decisions violated the Consent Order. Petitioners' now assert "the impacts proposed for the remaining wetlands on the Church property prompted the Abels to challenge the Church's additional construction activity project not only from an environmental perspective, but also to enforce the protections expressly agreed to under the Consent Order." (Petitioners' Motion, pg. 11). However, Petitioners' are now raising these 'environmental perspective concerns' as a basis for this challenge for the first time

in this Motion. (see Exhibit F, Request for Final Review, Request for Contested Case, and Petitioners' Prehearing Statement).

The Department does not argue against the validity of the Consent Order. The issue in this matter concerns the interpretation of a Consent Order which contains ambiguous terms that Petitioners purport to run with the land in perpetuity, absent a recorded Restrictive Covenant and absent language binding any heirs, assigns, or successors in interest. This conflict in interpretation is due to the lack of clarity in regard to the Consent Order's scope of applicability. Petitioners even admit in their Motion "[i]n pertinent part, the Consent Order required that the Church's plan for expansion, including the construction of "the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Petitioners' Motion, pg. 5). The 'Church's plan' as referenced by the Petitioners are the activities that were permitted in 2000, challenged in the ALC, and resolved by all parties. Accordingly, the Department modified the Church's permit in accordance with that language.²

Consistent with the Department's interpretation that the Consent Order applied to the previous permit, the Consent Order provides "[t]he designs for the storm water pond and other improvements at the site **shall be amended** so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Exhibit G, Consent Order, pg. 2) (emphasis added). The requirement of amending clearly refers to the 2000 permit which was the subject of that litigation upon which the Consent Order resolved. Petitioners provide "[t]his language plainly and

² Additionally, Petitioners' Motion continues, providing, "[t]he Consent Order required that the Church instruct all agents, employees, contractors and other working on their behalf "to continue to explore additional design changes...which will allow possible additional expansion of the wetland area to be preserved" and "to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended." (Petitioners' Motion, pg. 5). All of these requirements put forth in the Consent Order refer specifically to activities taking place under the 2000 permit.

unambiguously mandates the preservation of the wetlands on the Church property.” (Petitioners’ Motion, pg. 12). However, Petitioners then provide that this condition “orders the Church to amend its plan and expansion to accommodate the requisite protection of the wetland area, specifically requiring that the location and configuration of the storm water pond be altered to eliminate some of the proposed impacts, as depicted in the exhibit to the Consent Order.” (Petitioners’ Motion, pg. 12). Petitioners provide two conflicting interpretations of identical language. In their first interpretation, Petitioners construe this language to “plainly and unambiguously” preserve the wetlands. Then Petitioners’ interpretation provides that the language requires the Church to “amend its plan to accommodate the requisite protection of the wetland area...as depicted in the exhibit to the Consent Order.” This second interpretation refers to the amending of a plan, which clearly could only have been the plan challenged in the matter before this Court in 2000, since the exhibit referred to is the activities permitted in 2000. The language of the Consent Order is ambiguous, which is reflected in history of interpreting this Consent Order and the parties’ disagreement over its terms.

Unlike the Petitioners, the Department does not feel that the terms of the Consent Order are clear and unambiguous. As Petitioners have provided the Department regularly resolves matters through negotiated settlement and that the Department must be reliable in abiding by the agreed upon terms in order to maintain credibility with which the Department concurs. However, in interpreting this Consent Order entered into some thirteen years ago, with confusing terms,³ the Department is bound by the language and requirements of the Consent Order and cannot input additional restraints that are not clearly included within the agreement. The Consent Order did not require the recordation of Restrictive Covenants and does not purport to apply to

³ This confusion is exemplified through letters sent to the applicant, application to the Court by the Church to modify the Consent Order, and draft documents with conflicting terms.

any successors in interest.⁴ The Department interpreted the words of the Consent Order to apply conditions to the previous permit and acted in accordance with those terms by modifying the permit as required by the Consent Order. Accordingly, the Department's decisions challenged by the Petitioners, even assuming arguendo they allow for the alterations of wetlands, does not violate the terms of the Consent Order.

The Department interprets the language of this Consent Order to apply specifically to the previous permit due to the absence of clear language supporting Petitioners' argument as well as the absence of the requirement of recording a Restrictive Covenant and the absence of application to heirs, assigns, or successors in interest. The Department's stance in this matter is in line with Petitioners' portrayal of the Church's position in their Motion, which is due to the conflict in the interpretation of the ambiguous terms contained in a Consent Order entered into some thirteen years ago.

WHEREFORE, the Department requests this Honorable Court to deny Petitioners' Motion for Summary Judgment.

⁴ Notably, without such language, the Consent Order only binds the parties of the Order. Even under Petitioners' argument, if a new entity purchases the Church's property they would not be bound by the terms of the Consent Order. Again reinforcing the idea if Petitioners wished to have such terms run with the land and bind subsequent purchasers, assigns, or successors in interest, it is their duty to ensure this language was plainly included in the Consent Order.

Respectfully submitted,



Nathan M. Haber

Counsel

South Carolina Department of Health and
Environmental Control

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(843) 953-0201 (fax)

habernm@dhec.sc.gov

December 30, 2014
Charleston, South Carolina

1 Exhibit 3, is that the original NOI that was submitted
2 by the applicant?

3 A. Yes.

4 Q. Okay. And as to Exhibit 13, is that an
5 updated NOI that was submitted by the applicant?

6 A. Yes.

7 Q. If you can, look at the first page of the
8 Exhibit 3, please, and specifically look at Section
9 IV.B.a. Do you see that? Within there, do you see
10 whether or not a Yes or a No is checked off in the box
11 under impacts to jurisdictional wetlands?

12 A. This exhibit says no impacts to
13 jurisdictional wetlands.

14 Q. Okay. Is it true, though, that -- Strike
15 that.

16 If you could, look at Exhibit 13, that NOI,
17 please.

18 A. Yes.

19 Q. If you could flip to page -- the second page
20 of that, under Section V.B.a. again?

21 A. Yes.

22 Q. Do you see anything different in that
23 NOI than in the first NOI?

24 A. Yes. This one indicates there are
25 jurisdictional wetland impacts.



1 Q. Okay. And with the permit that you issued,
2 which NOI were you utilizing to make that decision?

3 A. The NOI that was received on January 16th,
4 2014, the one indicated in Exhibit 13.

5 Q. Okay. Just for clarity, that's the most
6 recent of those two NOIs; correct?

7 A. Yes.

8 Q. And that one does have the box checked off
9 for wetland impacts?

10 A. Yes.

11 Q. Now, if you could, pull what's been labeled
12 as Petitioner's Exhibit No. 9. It should be a copy of
13 the Consent Order of Settlement and Dismissal.

14 A. Yes.

15 Q. Okay. There's some questions that you were
16 being asked regarding conditions of this agreement. Do
17 you recall that?

18 A. Yes.

19 Q. Would you be of the opinion that these
20 conditions that are in place within this exhibit are
21 reflected in the activity that was conducted after it
22 was executed?

23 A. Could you reask that again?

24 Q. Yeah. That wasn't very clear. Try that
25 again.



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

CERTIFIED MAIL

April 1, 2014

MIKE FIELDS (91 7199 9991 7030 0134 8071)
PAWLEYS ISLAND COMMUNITY CHURCH
10304 OCEAN HWY
PAWLEYS ISLAND SC 29585

RE: PAWLEYS ISLAND COMMUNITY CHURCH ADMINISTRATIVE BUILDING
Georgetown County
File Number: 22-00-06-03A
NPDES Coverage Number: SCR10Q459

Dear Mike Fields:

The Department of Health and Environmental Control (Department or DHEC) has approved the Stormwater Pollution Prevention Plan (SWPPP) for the referenced project on **March 31, 2014**. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Stormwater Discharges from Construction Activities SCR100000 (CGP), this project has been granted coverage under the CGP. This project's general permit coverage number is **SCR10Q459**. The total disturbed area for this site is **2.2 acres**.

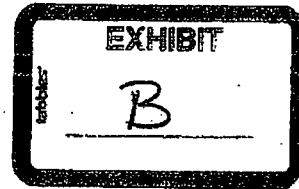
See attached DHEC Office of Ocean and Coastal Resource Management (DHEC-OCRM) certification approved 03/26/2014 for additional conditions related to the Coastal Zone Consistency determination.

Because this project is part of a larger common plan for development or sale (LCP), all applications for future land-disturbing activities that are part of this LCP (phases, outparcels, etc.) should include the above-referenced file number (22-00-06-03A), NPDES coverage number (SCR10Q459), and project name PAWLEYS ISLAND BAPTIST CHURCH.

An as-built survey, signed and sealed by a S.C. Licensed Land Surveyor, should be submitted for the 2 structure(s) on this site. The survey(s) should show grades, contours, and depths for all structures and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the project's S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/ or analysis must be accepted by the Department before a Notice of Termination (NOT) can be submitted.

The CGP can be downloaded at the following website:

<http://www.scdhec.gov/environment/water/swater/docs/CGP-permit.pdf> or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies



material in Waters of the United States. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

If material excavated during construction activities leaves the site, a mine operating permit may be needed. You are responsible for contacting the Mining and Reclamation Section to determine if a mining permit is required for the site. The Mining and Reclamation Section can be reached at (803)896-4261 or via e-mail at AskMines@dhec.sc.gov.

Please see the enclosed "Notice of Appeal Procedure" document for information about the procedures for appealing this NPDES coverage.

If you have any questions or cannot access the referenced websites, please call me at 843-953-0238.

Sincerely,



Richard V Geer, Engineer Associate
EQC Bureau of Water, Coastal Stormwater Permitting Section
1362 McMillan Ave, Suite 400, Charleston SC 29405

cc: Thomas P Bevins—ETS (91 7199 9991 7030 0134 8095)
Michael Corley—The South Carolina Environmental Law Project (91 7199 9991 7030 0134 8088)



Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment



Coastal Zone Consistency Certification

To: Richard Geer, Project Manager - BOW-Coastal, Stormwater Permitting
From: Christine Koczera, Project Manager - OCRM, Coastal Zone Consistency Section
Cc: Curtis Joyner, Section Manager - OCRM, Coastal Zone Consistency Section
Re: Pawley's Island Community Church Administrative Building
Site location: 10304 Ocean Highway, Pawley's Island, Georgetown County
Tax Map No: 04-0161-052-00-00, 04-0161-049-01-00
Date: March 26, 2014
CZC #: CZC-12-0149
PN#: SCR10Q459

The staff of the Office of Ocean and Coastal Resource Management (OCRM) has reviewed the above referenced Coastal Zone Consistency request for land disturbing activity, including the construction of a new administrative building, parking, and associated infrastructure, as well as, modifications to the access drive and existing stormwater management pond and certifies that the above referenced project is **Consistent** with the Public Services and Facilities (Public / Quasi Public Buildings) Policies, the Activities in Areas of Special Resource Significance (Wetlands) Policies and the Stormwater Management (Runoff) Guidelines contained in the S.C. Coastal Zone Management Program provided that:

- in the event that any historic or cultural resources and archaeological or paleontological remains are found during the course of work, the applicant must notify the State Historic Preservation Office and the South Carolina Institute of Archaeology and Anthropology pursuant to South Carolina Code of Laws. Historic or cultural resources consist of those sites named to the National Register and those sites that are eligible for the National Register and other areas of special historic significance. 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 and;
- demonstrate that storage of the first ½ inch of run-off from the entire site or storage of the first one (1) inch of run-off through retention, detention, or infiltration systems, from the built upon portion of the property, whichever is greater.

This Coastal Zone Consistency did not include a review and authorization for any direct or indirect wetland impacts to freshwater wetlands or critical area. Any impacts to Critical Areas as determined by SCDHEC-OCRM, and/or freshwater wetlands, as determined by the U. S. Army Corps of Engineers must be authorized by the appropriate agency.

This certification shall serve as the final DHEC OCRM Coastal Zone Consistency approval and does not alleviate the applicant's responsibility to obtain other required local, state or federal approvals.



1 easier -- easy enough for me to ask him just to send me
2 a copy of that with his certification. So I obtained
3 both of those before I issued coverage for this.

4 Q. Okay. In considering the impacts as we were
5 talking about to wetlands and your review for the
6 stormwater permit, I understand that there was a
7 nationwide permit that was also -- that applicant also
8 received coverage under a nationwide permit. But as
9 far as your review goes, did it include runoff
10 considerations and other impacts related to stormwater
11 to the wetlands on site in relation to the proposed
12 activities?

13 A. Yes. It would be -- it would have to be
14 reflected in the calculations. There is a specific --
15 I mean, it's based on cover type. So if you have, for
16 example, impervious parking lot would be represented,
17 you know, as completely impervious, no infiltration,
18 versus a wooded area would be very impervious -- I mean
19 very pervious, I should say, and a lot of rainfall
20 would infiltrate, in wetlands there would be a certain
21 amount of infiltration as well as storage. So that
22 would be reflected in those calculations that I
23 reviewed.

24 Q. Okay.

25 A. And so it would be -- it would be compared



1 permit; is that correct? Am I understanding you
2 correctly?

3 MR. HABER:-- Object to the form.

4 A. What I'm saying is that that pond, the
5 characteristics of that pond, the expanded form of it
6 addressed the stormwater requirements, and that's all I
7 could attest to. Now, you know, in terms of, you know,
8 authorizing-- I mean, you know, because it overlaps,
9 you know, wetlands or includes impact to wetlands, that
10 prompted me to say, I'm not going to issue this until
11 it's authorized by the Corps of Engineers, and that is
12 really as far as I can go with, you know, respect to
13 the stormwater permit. You know, I'm not -- I didn't
14 authorize it. I just, you know, approved it because it
15 met the stormwater permitting requirements, and
16 somebody else authorized the wetland impacts.

17 Q. Okay. I asked you whether you spoke with
18 other Department staff about the Consent Order. Do you
19 recall whether you spoke to the applicant about the
20 Consent Order and how it might affect your review, if
21 at all?

22 A. I don't recall.

23 (Deposition Exhibit No. 10 marked for
24 identification.)
25



RECEIVED

APR 18 2014
Rec'd via fax 4/16/2014
Clerk, Board of Health
and Environmental Control

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF
THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Dan Abel, Mary Abel and William Mashburn

Petitioners,

vs.

Pawleys Island Community Church and the South Carolina Department of Health and
Environmental Control,

Respondents.

RE: NPDES Coverage SCR10Q459; Coastal Zone Consistency CZC-12-0149

REQUEST FOR FINAL REVIEW CONFERENCE

Dan Abel, Mary Abel and William Mashburn hereby request that the Board of the Department of Health and Environmental Control conduct a Final Review Conference to review DHEC's decision to grant Stormwater Permit Coverage SCR10Q459 ("Stormwater Permit") and Coastal Zone Consistency Certification CZC-12-0149 ("Consistency Certification") to Pawleys Island Community Church ("the Church"). (Decisions attached as Exhibit 1). The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between the Abels, the Church, DHEC and OCRM.

BACKGROUND: PREVIOUS LEGAL CHALLENGE AND SETTLEMENT

1. This is not the first time that the Church has sought a stormwater permit and coastal zone consistency certification for modifications to its property. Back in 2000, the Church sought the same approvals for construction activities. As a part of its construction project, the Church

intended to fill federal and state jurisdictional wetlands.

2. When DHEC/OCRM issued the stormwater permit and consistency certification for that project, Mary Abel, Dan Abel and David F. Mims, as neighboring property owners, challenged that decision by filing requests for a contested case hearing in the Administrative Law Court. The parties had numerous settlement discussions that eventually resulted in a Consent Order of Settlement and Dismissal issued by Administrative Law Judge Scott Dukes on January 8, 2001. (Consent Order attached as Exhibit 2).

3. According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." (Consent Order, p. 1). The settlement was "made a part of th[e] final order of the Administrative Law Judge Division." (Consent Order, p. 2). In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from the Church. DHEC and OCRM were parties to the settlement and agreed to amend the stormwater permit and consistency certification in accordance with the agreement and Order. (Consent Order, p. 2).

4. The wetlands on the Church property were a key issue in the contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels' decision to file the contested case. Pursuant to the Consent Order, the Church's construction plan had to be "amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Consent Order, p. 1). Further, as to that area of preserved wetlands, the Church committed to the following: "The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state." (Consent Order, p. 1).

ANALYSIS: THE CHURCH'S NEWLY APPROVED PLANS

5. Under the valid, binding and enforceable Consent Order, the wetlands remaining on the Church's property today are to "remain in [their] natural state." Despite DHEC's agreement and commitment that the wetlands would remain unaltered, the DHEC staff issued a Stormwater Permit and Consistency Certification that authorizes just the opposite, allowing the Church to fill all remaining wetlands on its property as a part of its stormwater plan. The Stormwater Permit and Consistency Certification thereby violate both DHEC's and the Church's continuing obligations under the Consent Order.

6. Upon information and belief, the Church's plan, as approved by DHEC, also violates other provisions of the Consent Order, including those related to maintenance of a buffer between the Church property and surrounding properties.

7. Prior to issuance of the Stormwater Permit and the Consistency Certification, the Church and DHEC staff were aware that the Church's proposed plan violates the Consent Order. To wit, the Church unsuccessfully pursued an attempt to have that Consent Order modified and eviscerated by the ALC. (ALC Order of 1/7/14 attached as Exhibit 3). As stated by Judge Anderson: "The Church has now filed a request with this Court to modify its site plan and make further modifications to the Church property **not in compliance with the original Order.**" (Exhibit 3, p. 1). The ALJ rightfully denied the Church's request, which was opposed by Dan and Mary Abel.

8. Having failed with the ALJ, the Church has now gained DHEC staff's complicity in ignoring the binding Consent Order. That Consent Order is enforceable in the Administrative Law Court, and the Abels will seek such enforcement if necessary. First, though, this Board has an opportunity to correct staff's failure to recognize and honor the Agency's prior binding

commitments. DHEC regularly attempts to resolve environmental disputes through negotiated settlement. If these efforts are to be accepted in good faith in the future, DHEC must be reliable in abiding by its agreed terms. To maintain credibility at the bargaining table, the Agency should abide by previous settlement agreements and orders.

9. Dan and Mary Abel are residents of Pawleys Island and seek the Board's review as parties to the previous legal dispute and the Consent Order. William Mashburn lives on his property adjacent to the Church property and seeks the Board's review out of concern for his own property value, aesthetic value and quality of life.

WHEREFORE, the Petitioners request that the Board conduct a final review proceeding and issue an order remanding the decision to grant the Stormwater Permit and Consistency Certification, instructing that staff uphold the binding Consent Order agreed to by the Agency and the Church.

Respectfully submitted,



Michael G. Corley

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Attorneys for the Appellants

Georgetown, South Carolina
April 16, 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Dan Abel, Mary Abel and William Mashburn,

Petitioners,

vs.

Pawleys Island Community Church and the South
Carolina Department of Health and Environmental
Control,

Respondents.

Docket No. 14-ALC-_____-CC

**REQUEST FOR
CONTESTED
CASE HEARING**

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS

Dan Abel, Mary Abel and William Mashburn, pursuant to Administrative Law Court Rule 11, hereby request a contested case hearing to review the decision of the South Carolina Department of Health and Environmental Control Office of Coastal Resource Management ("DHEC/OCRM") to grant Stormwater Permit Coverage SCR10Q459 ("Stormwater Permit") and Coastal Zone Consistency Certification CZC-12-0149 ("Consistency Certification") to Pawleys Island Community Church ("PICC"). (Decisions attached as Exhibit 1). The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between Dan and Mary Abel ("the Abels"), PICC and DHEC/ OCRM.

In support of its request, the Petitioners submit the following:

BACKGROUND

1. This is not the first time that PICC has sought a stormwater permit and coastal zone consistency certification for modifications to its property. Back in 2000, PICC sought the same approvals for construction activities. As a part of its construction project, PICC intended to fill

federal and state jurisdictional wetlands.

2. When DHEC/OCRM issued the stormwater permit and consistency certification for that project, the Abels and David F. Mims, as neighboring property owners, challenged that decision by filing requests for a contested case hearing in the Administrative Law Court. The case was given Docket Number 00-ALJ-07-0626-CC. The parties had numerous settlement discussions that eventually resulted in a Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge Dukes Scott on January 8, 2001. (Consent Order attached as Exhibit 2).

3. According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." (Exhibit 2, p. 1). The settlement was "made a part of th[e] final order of the Administrative Law Judge Division[.]" which "FURTHER ORDERED that th[e] matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein." (Exhibit 2, p. 2) (emphasis added). In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from PICC. DHEC/OCRM was a party to the settlement agreement and agreed to amend the stormwater permit and consistency certification in accordance with the agreement and Consent Order. (Exhibit 2, p. 2).

4. The wetlands on PICC's property were a key issue in that contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels' decision to file the contested case and was specifically addressed in the Consent Order. Pursuant to the Consent Order, PICC's construction plan had to be "amended so that **approximately one-half (50%) of the wetland area on the site shall be preserved.**" (Exhibit 2, p. 1) (emphasis added). Further, as to that area of

preserved wetlands, PICC committed to the following: **"The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state."** (Exhibit 2, p. 1) (emphasis added).

5. On June 7, 2012, PICC submitted its Notice of Intent to conduct additional construction activities on its property, which included filling and otherwise disturbing the wetland area that was agreed upon by all parties to the Consent Order to **"remain in its natural state."** (Notice of Intent attached as Exhibit 3).

6. Since the additional construction activities PICC desired to make on its property were not in compliance with the Consent Order, PICC submitted a proposed Modified Consent Order of Settlement and Dismissal (**"Proposed Modification Order"**) dated October 1, 2013 to the Administrative Law Court in an attempt to replace the existing Consent Order. (Proposed Modification Order attached as Exhibit 4). The Proposed Modification Order was not agreed to or signed by all of the parties to the original Consent Order as the Abels neither consented to nor signed the Proposed Modification Order. (Exhibit 4, p. 3).

7. By Order dated January 7, 2014, the Administrative Law Court dismissed PICC's request to modify the Consent Order as premature, stating that PICC's request to conduct additional construction activity was still subject to DHEC/OCRM review. (ALC Order of January 7, 2014 attached as Exhibit 5).

8. Notwithstanding the agreed upon terms of the settlement agreement and Consent Order, DHEC/OCRM approved PICC's request to conduct additional construction activities on the subject property and issued the Consistency Certification and the Stormwater Permit on March 26, 2014 and March 31, 2014, respectively. (See Exhibit 1).

ANALYSIS

9. Under the valid, binding and enforceable Consent Order, the wetlands remaining on the PICC's property today are to "remain in [their] natural state." Despite DHEC/OCRM's agreement and commitment that the wetlands would remain unaltered, the DHEC/OCRM staff issued a Stormwater Permit and Consistency Certification that authorizes just the opposite, allowing PICC to fill all remaining wetlands on its property as a part of its stormwater plan. The Stormwater Permit and Consistency Certification thereby violate both DHEC/OCRM's and PICC's continuing obligations under the Consent Order.

10. Upon information and belief, PICC's plan, as approved by DHEC/OCRM, also violates other provisions of the Consent Order, including those related to maintenance of a buffer between the PICC property and surrounding properties.

11. Prior to issuance of the Stormwater Permit and the Consistency Certification, PICC and DHEC staff were aware that PICC's proposed plan violates the Consent Order. To wit, PICC unsuccessfully pursued an attempt to have that Consent Order modified and eviscerated by the Administrative Law Court. (See Exhibit 5). As stated by Administrative Law Judge Anderson: "The Church has now filed a request with this Court to modify its site plan and make further modifications to the Church property **not in compliance with the original Order.**" (Exhibit 5, p. 1) (emphasis added). The ALJ rightfully denied PICC's request, which was opposed by the Abels.

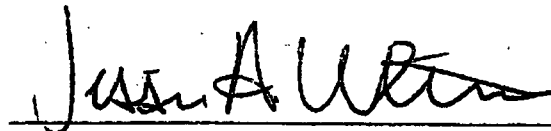
12. Having failed with the ALJ, PICC has now gained DHEC/OCRM's complicity in ignoring the terms of the Consent Order. That Consent Order is binding and enforceable by law. DHEC regularly resolves environmental disputes through negotiated settlement and consent orders of dismissal. If these efforts are to be accepted in good faith in the future, DHEC/OCRM must be reliable in abiding by the agreed upon terms, as well as Orders from this Court. To maintain

credibility at the bargaining table, the Agency should be held to the terms of the settlement agreements and orders to which it is a party.

13. The ALJ dismissed, without prejudice, PICC's request to modify the Consent Order pending a final determination by DHEC/OCRM and request for a contested case hearing. (Exhibit 5, p. 2). Accordingly, the ALC retained jurisdiction over this matter and is authorized to enforce the binding terms of the settlement agreement and Consent Order which are violated by the Consistency Certification and Stormwater Permit . S.C. Code Ann. § 1-23-600(A).

CONCLUSION

WHEREFORE, the Petitioners request that the Administrative Law Court conduct a contested case hearing and issue an order reversing DHEC/OCRM's decision to issue the Consistency Certification and Stormwater Permit to Pawleys Island Community Church.



Amy E. Armstrong

Michael Corley

Jessie A. White

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Attorneys for the Petitioners

Georgetown, South Carolina
June 13, 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Dan Abel, Mary Abel and William Mashburn,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Pawleys Island
Community Church,

Respondents.

Docket No. 14-ALC-07-0282-CC

**PETITIONERS' PREHEARING
STATEMENT**

TO: ADMINISTRATIVE LAW JUDGE SHIRLEY C. ROBINSON, AND ALL PARTIES
AND THEIR ATTORNEYS:

The Petitioners hereby submit the following information as their Prehearing Statement:

1. The nature of this proceeding;

This is a contested case hearing brought by the Petitioners Dan Abel, Mary Abel and William Mashburn, pursuant to Administrative Law Court Rule 11, to review the decision of the South Carolina Department of Health and Environmental Control Office of Coastal Resource Management ("DHEC/OCRM") to grant Stormwater Permit Coverage SCR10Q459 ("Stormwater Permit") and Coastal Zone Consistency Certification CZC-12-0149 ("Consistency Certification") to Pawleys Island Community Church ("PICC"). The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between Dan and Mary Abel ("the Abels"), PICC and DHEC/OCRM.

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

The statutory provisions conferring subject matter jurisdiction are: (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, *et seq.*; (2) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39-150; and (3) S.C. Code Ann. § 44-1-60.

The ALC further retained jurisdiction over this matter by virtue of the Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge Dukes Scott on January 8, 2001, Docket Number 00-ALJ-07-0626-CC, in a case challenging DHEC/OCRM's original decision to issue a stormwater permit and coastal zone consistency certification for modifications to the PICC property.

3. The issues to be presented for determination, including any claims or defenses expected to be raised;

Whether the Consent Order and its terms are binding and enforceable by law upon the parties thereto, including the Abels, DHEC/OCRM and PICC.

Whether DHEC/OCRM improperly issued the Stormwater Permit and Consistency Certification to PICC in violation of the Consent Order. Specifically, whether DHEC/OCRM's decision to issue the Stormwater Permit and Consistency Certification to PICC violates both DHEC/OCRM's and PICC's continuing obligations under the Consent Order.

Whether PICC's plan, as approved by DHEC/OCRM, violates certain provisions of the Consent Order, including that the wetlands remaining on the PICC's property are to "remain in [their] natural state" as well as those related to maintenance of a buffer between the PICC property and surrounding properties.

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 Petitioners respectfully request that the Court reverse DHEC/OCRM's decision to issue the Stormwater Permit and Consistency Certification to PICC as it is a plain violation of the binding settlement agreement and Consent Order previously entered into between the parties.

This requested action is supported by common law principles of contract, the plain language of the Consent Order, and the principle of res judicata.

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

This is not the first time that PICC has sought a stormwater permit and coastal zone consistency certification for modifications to its property. Back in 2000, PICC sought the same approvals for construction activities. As a part of its construction project, PICC intended to fill federal and state jurisdictional wetlands. When DHEC/OCRM issued the stormwater permit and consistency certification for that project, the Abels and David F. Mims, as neighboring property owners, challenged that decision by filing requests for a contested case hearing in the Administrative Law Court. The case was given Docket Number 00-ALJ-07-0626-CC. The parties had numerous settlement discussions that eventually resulted in a Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge Dukes Scott on January 8, 2001.

According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." The settlement was "made a part of th[e] final order of the Administrative Law Judge Division[.]" which "FURTHER ORDERED that th[e] matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein." (emphasis

added). In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from PICC. DHEC/OCRM was a party to the settlement agreement and agreed to amend the stormwater permit and consistency certification in accordance with the agreement and Consent Order.

The wetlands on PICC's property were a key issue in that contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels' decision to file the contested case and was specifically addressed in the Consent Order. Pursuant to the Consent Order, PICC's construction plan had to be "amended so that **approximately one-half (50%) of the wetland area on the site shall be preserved.**"(emphasis added). Further, as to that area of preserved wetlands, PICC committed to the following: **"The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state."**(emphasis added).

On June 7, 2012, PICC submitted its Notice of Intent to conduct additional construction activities on its property, which included filling and otherwise disturbing the wetland area that was agreed upon by all parties to the Consent Order to "remain in its natural state." Since the additional construction activities PICC desired to make on its property were not in compliance with the Consent Order, PICC submitted a proposed Modified Consent Order of Settlement and Dismissal ("Proposed Modification Order") dated October 1, 2013 to the Administrative Law Court in an attempt to replace the existing Consent Order. The Proposed Modification Order was not agreed to or signed by all of the parties to the original Consent Order as the Abels neither consented to nor signed the Proposed Modification Order. As stated by Administrative Law Judge Anderson: "The Church has now filed a request with this Court to modify its site plan and make further modifications to the Church property **not in compliance with the original Order.**" (emphasis added). Judge Anderson rightfully denied PICC's request, which was opposed by the Abels.

Notwithstanding the binding terms of the settlement agreement and Consent Order, DHEC/OCRM approved PICC's request to conduct additional construction activities on the subject property and issued the Consistency Certification and the Stormwater Permit on March 26, 2014 and March 31, 2014, respectively.

Under the valid, binding and enforceable Consent Order, the wetlands remaining on the PICC's property today are to "remain in [their] natural state." Despite DHEC/OCRM's agreement and commitment that the wetlands would remain unaltered, the DHEC/OCRM staff issued a Stormwater Permit and Consistency Certification that authorizes just the opposite, allowing PICC to fill all remaining wetlands on its property as a part of its stormwater plan. The Stormwater Permit and Consistency Certification thereby violate both DHEC/OCRM's and PICC's continuing obligations under the Consent Order.

Having failed with the ALJ, PICC then gained DHEC/OCRM's complicity in ignoring the terms of the Consent Order. That Consent Order is binding and enforceable by law. DHEC regularly resolves environmental disputes through negotiated settlement and consent orders of dismissal. If these efforts are to be accepted in good faith in the future, DHEC/OCRM must be reliable in abiding by the agreed upon terms, as well as Orders from this Court. To maintain credibility at the bargaining table, the Agency should be held to the terms of the settlement agreements and orders to which it is

a party.

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;**

The Petitioners anticipate filing a motion for summary judgment in this matter.

7. **A list of proposed witnesses and exhibits;**

Witnesses:

- a. Dan and Mary Abel,
- b. Mike Fields and other representatives of PICC,
- c. Richard Geer, Christopher Stout and other employees of DHEC/OCRM,
- d. Additional witnesses identified as preparations for this case continue,
- e. Any witnesses identified by the Respondents.

Exhibits:

- a. All documents contained in the DHEC/OCRM permitting file for this matter,
- b. All documents pertaining to construction activities on the PICC property,
- c. Other documents generated through discovery, research and preparations for this case.

8. **A statement regarding the necessity of discovery, if any;**

Discovery may be necessary, including standard interrogatories and requests for production of documents, entry upon the project site, and depositions.

9. **The estimated time required for the hearing;**

The Petitioners believe this hearing could be completed in one day.

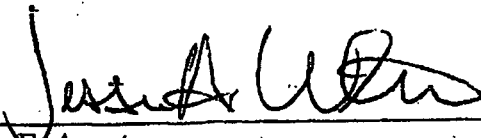
10. **Any dates the parties, counsel or key witnesses are specifically unavailable during the next three months; and**

August 11-12, 14-15, 28-29
September 5, 16-17

12. **An email address where you can be reached:**

Amy@scelp.org
Michael@scelp.org
Jessie@scelp.org

Respectfully submitted,



Amy E. Armstrong

Michael Corley

Jessie A. White

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

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Petitioners

Georgetown, South Carolina
July 31, 2014

*File
Close file
Provide copy to
SO permit file*



STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW JUDGE DIVISION

Mary W. Abel, Daniel C. Abel and David F.
Mims,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control, Office of Ocean and
Coastal Resource Management, and Pawleys
Island Baptist Church,

Respondents.

Docket No. 00-ALJ-07-0626-CC

**CONSENT ORDER
OF
SETTLEMENT AND DISMISSAL**

✓
P
This proceeding arises out of the application of the Pawleys Island Baptist Church, a South Carolina Not-for Profit Corporation, [hereinafter the "Church"] for a state storm water permit for the construction of a new sanctuary and other improvements of its property on US Highway 17 in the Pawleys Island area of Georgetown County. In a related application, the church also requested a wetland fill permit from the US Army Corps of Engineers which required a coastal zone consistency certification by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (DHEC/OCRM). After DHEC/OCRM issued the storm water permit and consistency certification, requests for a contested case hearing were filed by Mary W. Abel, Daniel C. Abel and David F. Mims.

The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order. Specifically, the parties have

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mmw/a
Consent Order of Settlement and Dismissal: Page 1 of 4

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[Signature]
mmw/a

agreed as follows:

1. The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved. The storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A. The Church shall also amend its plans for the proposed structure shown on Exhibit A as "PROPOSED FUTURE BUILDING PHASE II" so that no portion of this structure will encroach upon the area of the wetland.

2. The Church agrees that it will instruct its engineers, architects, contractors and others working on the Church improvement project and storm water management project, to continue to explore additional design changes, where feasible from a time and cost perspective, which will allow possible additional expansion of the wetland area to be preserved.

3. The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.

4. In constructing the storm water system and church improvements, the Church shall instruct its engineers, architects, contractors and others working on its behalf to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended. In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm.

5. Within the area designated on Exhibit A as the "30' NOISE/VISUAL BUFFER," the Church shall maintain a vegetated buffer of native, evergreen shrubbery and trees, with a density of at least one evergreen tree and one shrub every ten (10) feet; the trees and shrubs will be leyland

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cypress and wax myrtles and similar species, and at planting will be at least six (6) feet in height with fifty percent (50%) of the trees at least ten (10) feet in height; provided however, that the portions of the vegetated buffer in wetland areas or in wooded areas not affected by development on the property, will remain in their natural state.

6. The existing basketball and volleyball fields will be removed and will not be re-located any closer to the rear property line of the church property than the front of the new sanctuary.

7. All lighting on the church property will be placed so that it is shielded or directed away from the properties adjacent to the "30' NOISE/VISUAL BUFFER," shown on Exhibit A.

8. Upon execution of this Consent Order, the Church may immediately begin construction of the new sanctuary and other improvements not inconsistent with this agreement and order.

9. The Church and the Petitioners will cooperate in the execution of any documents needed to secure any required permit amendments to carry out the provisions of this agreement and order.

After review of the agreement, I conclude that it should be accepted and made a part of this order. Accordingly, upon the joint motion and consent of the parties,

IT IS HEREBY ORDERED that the agreements stated hereinabove shall be, and same hereby is, made a part of this final order of the Administrative Law Judge Division.

IT IS FURTHER ORDERED that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement and order.

IT IS FURTHER ORDERED that this matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein.

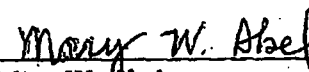
AND IT IS SO ORDERED.

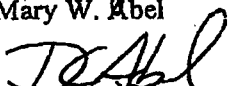

C. Dukes Scott
Administrative Law Judge

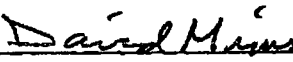
Columbia, South Carolina
December 8th, 2000
2000

WE SO MOVE AND CONSENT:

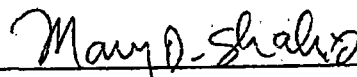
PETITIONERS:


Mary W. Abel

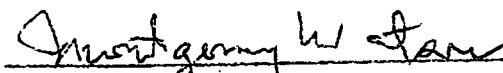

Daniel C. Abel


David Mims

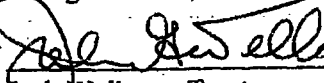
14
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

By: 
Mary D. Shahid, its Attorney

PAWLEYS ISLAND BAPTIST CHURCH,
a South Carolina Not-for Profit Corporation

By: 
Montgomery Watson, Trustee

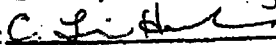
By: 
George Hilliard, Trustee

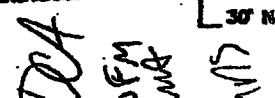
By: 
Jack Wellman, Trustee

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the party(ies) or their attorney(s).

This 8th day of January, 2001

By: 
Judicial Law Clerk



FILED

JAN 06 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Dan Abel, Mary Abel and William Mashburn,

Docket No. 14-ALC-07-0282-CC

Petitioners,

vs.

**RESPONSE TO
JOINT MOTION TO DISMISS**

Pawleys Island Community Church and the South
Carolina Department of Health and Environmental
Control,

Respondents.

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

The Petitioners Dan and Mary Abel ("the Abels") submit this response in opposition to the Motion to Dismiss by Respondents South Carolina Department of Health and Environmental Control ("DHEC" or "Department") and Pawleys Island Community Church (the "Church").

BACKGROUND

The background facts of this case are more thoroughly described in Petitioners' briefs on Motion for Summary Judgment and Motion to Enforce Consent Order and to Consolidate this case with Docket No. 00-ALJ-07-0626-CC, which are incorporated herein by reference. The most important evidence in this case is the Consent Order of Settlement and Dismissal ("Consent Order"), attached to Respondents' motion as Exhibit A, which was executed on January 8, 2001. The Consent Order was signed by the Petitioners Dan and Mary Abel, as well as David Mirns. The Consent Order was signed by both Respondents DHEC and the Church. And, finally, the Consent Order was signed by Administrative Law Judge C. Dukes Scott. The Consent Order contains enumerated agreements, several of which pertain to the wetland area on the Church property, as follows:

1. The designs for the storm water pond and other improvements at the site shall be amended so that **approximately one-half (50%) of the wetland area on the site shall be preserved**. The storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A. The Church shall also amend its plans for the proposed structure shown on Exhibit A as "PROPOSED FUTURE BUILDING PHASE II" so that **no portion of this structure will encroach upon the area of the wetland**.

2. The Church agrees that it will instruct its engineers, architects, contractors and others working on the Church improvement project and storm water management project, to continue to explore additional design changes, where feasible from a time and cost perspective, which **will allow possible additional expansion of the wetland area to be preserved**.

3. The Church agrees that the **wetland preserved by this Consent Order shall remain in its natural state**.

4. In constructing the storm water system and church improvements, the Church shall instruct its engineers, architects, contractors and others working on its behalf to **employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended. In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm**.

(Consent Order 2) (emphasis added).

However, in violation of the plain language of the Consent Order, the Church now seeks to fill the wetland area it agreed would remain preserved in furtherance of additional construction on its property. The Church and the Department were aware and acknowledged that the additional construction activities proposed for the Church property were inconsistent with the Consent Order for they sought to have the agreement modified by this Court. On October 10, 2013, the Church submitted a proposed Modified Consent Order of Settlement and Dismissal (the "Proposed Modification Order") in an attempt to replace the existing Consent Order. (Motion for Summary Judgment, Ex. 19). Specifically, the Proposed Modification Order stated that the Church "desire[d] to modify its site plan and mak[e] further modifications to the Church property not in compliance with the original Order" and thereby proposed to eliminate the requirements pertaining to the protection of the remaining wetlands on the Church property.

The Proposed Modification Order was not agreed to or signed by all of the parties to the original Consent Order as the Abels neither consented to nor signed the Proposed Modification Order. Additionally, by order dated January 7, 2014, the Administrative Law Court declined to modify the Consent Order.

Notwithstanding the agreed upon terms of the settlement and Consent Order, the Department approved the Church's plan for additional construction activities impacting the protected wetlands on its property and issued Stormwater Permit Coverage SCR10Q459 (the "2014 Permit") and CZC Certification CZC-12-0149 (the "2014 Certification") to the Church on March 31, 2014 and March 26, 2014, respectively. The Department's decision to authorize land disturbing activities on the Church property that affect the wetland violates the Consent Order. Accordingly, this matter is now ripe for review.

ANALYSIS

In deciding a motion to dismiss, the allegations made by the plaintiff, and all inferences reasonably deducible therefrom favorable to the plaintiff, must be taken as true. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (Ct. App. 1987). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). The Administrative Law Court has adopted the same standard. South Carolina Department of Revenue v. Collins Entertainment Corp., ALJD Docket No. 98-ALJ-17-0288-CC, 1998 WL 916498 (S.C. Admin. Law Judge Div. October 23, 1998); South Carolina Department of Revenue v. Washington, ALJD Docket No. 94-ALJ-17-0117-CC, 1994 WL 925017 (S.C. Admin. Law Judge Div. August 18, 1994). See also, Rule 68 of the Rules of Procedure for the Administrative Law Court.

I. FINALITY AND ENFORCEMENT OF A VALID CONSENT ORDER

A consent order is a “binding and conclusive” contract between the parties, signed by all parties and a judge. Jones & Parker v. Webb, 8 S.C. 202, 206 (1876). It is enforceable by any party to the contract. See, e.g., Monster Daddy, LLC v. Monster Cable Products, Inc., 483 F. App’x 831, 834 (4th Cir. 2012) (treating a consent order like a contract, subject to South Carolina contract law). A consent order cannot be altered or amended without the consent of all of the parties, and the authorization of the court. See, e.g., Outlaw v. Barnes, 118 S.C. 189, 110 S.E. 124, 125 (1921) (setting aside a court order which amended a consent order without the consent of the parties).

Moreover, there is no basis to alter or amend a consent order, absent the showing of some basis for equitable remedy. Wilson v. Wilson, 153 S.C. 472, 150 S.E. 897, 899 (1929) (“A party fully competent to protect himself; under no disability; advised as to all circumstances by which he may be saved in his rights; or in a situation where he might, by due diligence, be so advised; not overreached by fraud, concealment or misrepresentation, nor the victim of a mistake against which prudence might . . . have guarded; has no right to call upon Courts of justice to protect him against the consequences of his own carelessness, and to disturb the peace of society by his clamors for that justice which he has voluntarily or negligently surrendered.”) (internal citations and quotation marks omitted); Dixon v. Floyd, 73 S.C. 202, 53 S.E. 167 (1906).¹

In this case, where no equitable arguments are made by the Respondents, the Consent Order cannot be set aside by this Court absent the consent of all parties. See Outlaw, 110 S.E. at 125. The Abels do not consent to amending the Consent Order, therefore, this Court has no power to amend

¹ See also 139 A.L.R. 421 (“It is a general rule that an order, judgment, or decree, entered by the court upon the consent of the parties litigant, being in the nature of a contract to which the court has given its formal approval, cannot subsequently be opened, changed, or set aside without the assent of the parties, in the absence of fraud, mutual mistake, or actual absence of consent, and then only by an appropriate legal proceeding.”)

it. Id. Thus, to the extent the Respondents seek modification of the Consent Order, such modification must be denied.

Courts have “inherent authority to enforce settlement agreements” and, in the exercise of this authority, must find: 1) that the parties reached a final agreement, and 2) that it is able to determine the agreement’s terms and conditions. Hensley v. Alcon Labs., Inc., 277 F.3d 535, 540-41 (4th Cir. 2002); Ross Dev. Corp. v. Fireman's Fund Ins. Co., 809 F. Supp. 2d 449, 453 (D.S.C. 2011) (“A trial court has inherent equitable power to enforce summarily a settlement agreement ‘when the practical effect is merely to enter a judgment by consent.’”); Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995) (“A trial court has inherent jurisdiction to enforce settlement agreements entered before it.”).

A final agreement was definitively reached between the Abels, Mr. Mims, the Department and the Church and adopted as part of the final order by this Court. (See Consent Order 1 (“The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order.”)). Further, the terms and conditions of the Consent Order are enumerated in plain and unambiguous language. (Id. at 2 - 3). And “[a]fter review of the agreement,” this Court determined “that it should be accepted and made a part of this order.” (Id. at 3). The Consent Order then concludes:

IT IS HEREBY ORDERED that the agreements stated hereinabove shall be, and same hereby is, made a part of this final order of the Administrative Law Judge Division.

IT IS FURTHER ORDERED that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement or order.

IT IS FURTHER ORDERED that this matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein.

(Id.).

The Consent Order contains the signature of a judge of this Court, the signatures of each of the

parties to the agreement, as well as the initials of all parties and the judge on each page of the agreement. Thus, the Consent Order is a final contractual agreement between the parties that is binding and enforceable by this Court.

Furthermore, as parties to the Consent Order, just as with any other contract, the Abels have standing to enforce its terms. See Wilson, 150 S.E. at 899. Respondents' memorandum on motion to dismiss argues that the Abels "forfeited their enforcement rights when they elected to sell the property that was benefitted by the agreements in the 2001 Consent Order." (Res. Mem. 8.) This assertion, made with no legal authority to support it, is a fallacy for two reasons. First, the Abels' rights as parties to the Consent Order are not contingent upon their residence. Under the principles of contract law relied upon by the Respondents (Res. Mem. 5-6), the Abels could move anywhere, and that does not change the fact that they are parties to a valid, enforceable consent order/contract.²

² Assuming, *arguendo*, that the Abels did not have standing to enforce a contract that they entered into (which appears to be how the Respondents would like contract law to be rewritten), the Abels would still have traditional Lujan standing to protect the wetland for their continued enjoyment. In Sea Pines Association v. SC Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the basic legal test for standing announced in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992). The three-pronged test arising from Lujan is as follows:

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

Lujan, 112 S. Ct. at 2136 (internal citations omitted). Later, in Pye v. U.S., the Fourth Circuit reaffirmed the principle that "aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff's standing." 269 F.3d 459, 469 (4th Cir. 2001). In this case, the Abels remain permanent residents and members of the small Pawleys Island community and maintain many of the same concerns with the Church's additional construction activities that led to the original challenge and which were specifically addressed in the Consent Order - namely, the Abels' concern regarding the water quality of the Pawleys Creek tributary system, which is important salt marsh adjacent to the Church, from storm water runoff and other discharges associated with construction activity on the Church property. (See Dan Abel Aff.). The Abels' retain their interests in protection of the natural resources of their environment for their use and enjoyment. However, as explained above, this Court need not reach this issue here where the applicable law is standing to enforce a contract. The Respondents merely attempt to distract this Court with irrelevant issues in their motion to dismiss, and such unmerited arguments should be

Indeed, the Consent Order specifically allows that "the parties shall retain full rights to enforce the agreements stated herein" without limitation. (Consent Order 3.) Thus, the Abels' enforcement rights under the Consent Order did not divest upon the sale of their property.

The Respondents' second fallacy relates to its alternate theory about the Consent Order's status as a recorded restrictive covenant. While emphasizing the Consent Order's lack of a requirement for recording a restrictive covenant (Res. Mem. 4), the Respondents nonetheless treat the Consent Order as a restrictive covenant for purposes of their argument that the Abels lost enforcement rights because they no longer live at the property benefitting from the restrictions (Res. Mem. 8). The Abels have never asserted a grantor/grantee relationship, but rather a contractual relationship. Thus it is not the Abels' property itself that "was benefitted" by the Consent Order (Id.), but the Abels as individuals that benefitted from that Order. (See Dan Abel Aff.). And the Abels continue to benefit from the contractual obligations under the Consent Order, specifically retaining the rights to enforce those obligations under the Order.

Although it is the Petitioners' position that the Consent Order would put subsequent purchasers on notice of the restriction as to the wetland on the Church's property,³ that issue need not be reached by this Court. The Church still owns the property, the Church was a party to the Consent Order, and the Church is bound by its terms. (Consent Order 1, 4.) Thus, it makes no difference whether a subsequent purchaser would have to preserve the wetland, or whether a nonparty to the Consent Order might have standing to sue based upon property rights. This Court

disregarded by this Court.

³ The plain language of the Consent Order restricts the construction activities and storm water management plans for the Church property, including the obligation that the onsite wetland area remain preserved in its natural state. The agreement was adopted and formally issued by final order of this Court. Accordingly, the Consent Order is part of the public record and any hypothetical third-party purchasers envisioned by Respondents are effectively placed on notice of the restrictions on the Church's property. A restrictive covenant is not required.

should disregard these red herrings scattered throughout the Respondents' brief as without merit because they have no bearing on the matter before this Court. (Res. Mem. 4-9.) Petitioners seek to enforce a contract to which they are a party, and contract law, not property law, is applicable to interpreting and enforcing the Consent Order.

II. VIOLATION OF UNAMBIGUOUS CONSENT ORDER

Where the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, the contract's language controls as the parties' intended agreement. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct.App.2007) (stating a court must first look to the language of the entire contract to determine the parties' intent and if the language is perfectly plain, "it alone determines the document's force and effect").

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299, 302 (2001). "When the language of a contract is unambiguous, however, a court's only function is to interpret the contract's lawful meaning and the intent of the parties as expressed in the contract's terms." Monster Daddy, 483 F. App'x at 834.

In this case, the Consent Order provides that "the wetland preserved by this Consent Order shall remain in its natural state." (Consent Order 2, ¶ 3.) "Shall remain" is prospective, and prevails indefinitely into the future unless further modified. See Lyon v. Campbell, 217 F.3d 839 (4th Cir. 2000) (interpreting "shall remain" as prospective and permanent as to the object the phrase modified in contract); Plaza Dev. Servs. v. Joe Harden Builder, Inc., 294 S.C. 430, 433-34, 365 S.E.2d 231, 232-33 (Ct. App. 1988) (same). Thus, the wetland shall remain in its natural state, means that the wetlands will continue to be in its natural state forever. The law is clear that this is the proper use

of the phrase “shall remain,” and, further, that “shall remain” is an unambiguous phrase. Stanaland v. Jamison, 275 S.C. 50, 53, 268 S.E.2d 578, 580 (1980) (holding that contract with “shall remain” language was clear and unambiguous, thus it was error for the lower court to consider parol evidence).⁴ Thus, to the extent the Respondents argue that the terms of the Consent Order are ambiguous⁵ or that “shall remain” is a phrase of limited duration, such arguments must fail as a matter of law.

The parties freely bound themselves to the Consent Order, and its precise terms. If the parties intended “shall remain” to be of limited duration, they could have added such language to the agreement, by stating that the wetland shall remain in its natural state *until* the Church seeks further expansion. See, e.g., In re Connector 2000 Ass'n, Inc., 447 B.R. 752, 772-73 (Bankr. D.S.C. 2011) (contracting for consensual terms that “shall remain in effect *until* the Final Decree”) (emphasis added). Or, the parties could have left out paragraph three altogether. See also Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (“Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.”); Laser Supply & Servs., Inc. v. Orchard Park Associates, 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (S.C. Ct. App. 2009) (“Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.”).

⁴ “The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties.” McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009).

⁵ Specifically, the Respondents argue that ambiguity in a contract as to property use should be construed against restricting such use. (Res. Mem. 6.) However, since there is no ambiguity in this Consent Order, this Court cannot undertake such construction.

As written, the Consent Order prevents any disturbance to the natural state of the remaining wetland on the Church property, without limitation. See Laser Supply, 382 S.C. at 334, 676 S.E.2d at 144 (“A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.”). This condition is an express and unambiguous restriction agreed to by all parties to the Consent Order and this Court.

Notwithstanding the plain language of the agreement, the Respondents argue that the Consent Order only applies to the activities authorized under the 2000 permit and certification but not to the similar activities authorized under the 2014 permit and certification. The Consent Order places explicit conditions on storm water management and construction activities on the Church property and unambiguously mandates the preservation of the remaining onsite wetlands. If the remaining wetlands were not required to be preserved in perpetuity by the Church, then the language of the Consent Order specifically relating to and amending the work authorized under the 2000 permit and certification would have been sufficient. (See Consent Order 2, ¶ 2 (“The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved. . . .”)).

However, the Consent Order goes a step further and includes an additional, independently enforceable provision reinforcing the requirement that the remaining wetland area on the Church property is to remain protected beyond the life of the Church’s 2000 construction project. (Id. at ¶ 3 (“The Church agrees “that the wetland preserved by this Consent Order shall remain in its natural state.”)). Indeed, the inclusion of this stand alone provision requiring preservation of the onsite wetlands precludes any argument that the protection was intended to be anything other than absolute.

The language of the Consent Order clearly contemplates the possibility of future construction activity and storm water management on the Church property and directs that certain protections be maintained, including requirements such as:

- “approximately one-half (50%) of the wetland area on the site ***shall be preserved***[;]”
- the “storm water pond ***shall be altered to be located and configured as depicted in ... Exhibit A***[;]”
- the Church ***will*** instruct its agents, employees, contractors and others working on its behalf “***to continue to explore additional design changes ... which will allow possible additional expansion of the wetland area to be preserved***[;]”
- the Church ***shall*** instruct its agents, employees, contractors and others working on its behalf “***to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended***[;]” and
- “The Church agrees that ***the wetland preserved by this Consent Order shall remain in its natural state.***”

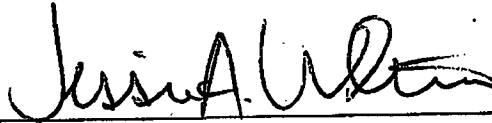
(Consent Order 2) (emphases added).

Thus, reading the contract as a whole, it unambiguously provides a basis for Petitioners to challenge the 2014 Stormwater Permit and Consistency Certification as in violation of the Consent Order, to the extent that they allow the Respondents to alter the protected wetland instead of leaving it in its natural state. See Topiwala v. Wessell, 509 F. App'x 184, 187 (4th Cir.) cert. denied, 134 S. Ct. 701, 187 L. Ed. 2d 552 (2013) (upholding an order granting a motion to enforce a settlement agreement where the parties were bound by the agreement and its terms were unambiguous).

CONCLUSION

The Petitioners' allegations, with all inferences construed in their favor, are sufficient to support a claim for relief that survives the Respondents' motion to dismiss. The Department has violated the Consent Order by issuing the 2014 Stormwater Permit and Consistency Certification to the Church, and the Church is now poised to fill or otherwise impact the protected wetland, also in

violation of the Consent Order. This matter is ripe for review, the Petitioners have standing to bring this case, and the Consent Order is unambiguous and enforceable. Accordingly, this Court should deny the Respondents' Motion to Dismiss.



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Attorneys for the Petitioners

Georgetown, South Carolina

January 6, 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Dan Abel and Mary Abel

Petitioners,

vs.

South Carolina Department of
Health and Environmental Control
and Pawleys Island Community
Church,

Respondents.

Docket No. 14-ALJ-07-0282-CC

**CHURCH'S RESPONSE IN
OPPOSITION TO PETITIONERS'
MOTION FOR SUMMARY
JUDGMENT**

TO: THE ADMINISTRATIVE LAW COURT AND TO THE PETITIONERS:

PLEASE TAKE NOTICE that the Pawleys Island Community Church (the "Church") hereby submits this Response in Opposition to Petitioners' Motion for Summary Judgment ("Motion") before the Administrative Law Court pursuant to ALC Rule 19 and the Scheduling Order in this matter.

The Church hereby incorporates by reference the factual summary and substantive arguments provided in Respondents' Joint Motion to Dismiss before this Court in this matter.

As to Petitioners' issues regarding the Church's first Notice of Intent ("NOI") failing to disclose wetland impacts (Petitioners' Motion, pg. 5) and the lapse in time and implementation of a new NOI Sheet necessitating a new NOI to be submitted by the Church, this issue appears to be a clerical error and was resolved by the submission of a new NOI, which was included as Petitioners' Exhibit 11 to their Motion, upon which the Department's review was based. Since the clerical defects were corrected and Petitioners' challenge is based upon their belief the activities allowed in the revised NOI are inconsistent with the Consent Order filed by this Court

on January 8, 2001 resolving and dismissing Docket No. 00-ALJ-07-0626-CC¹ ("Consent Order") any inference by Petitioners that the information reviewed by the Department regarding the revised NOI in this project was deficient has been addressed and resolved.

Petitioners also challenge DHEC's decision to grant an NPDES General Permit for Stormwater Discharges from Construction Activities (NPDES permit number SCR10Q459)("Stormwater Permit") and the accompanying Coastal Zone Consistency ("CZC") certification (CZC-12-0149) to the Church. Petitioners assert these decisions violate the Consent Order by allowing for activities inconsistent with the terms of the Consent Order, specifically the alterations of wetlands, about which the Petitioners are concerned. The language of the NPDES permit for stormwater discharges explicitly conveys to the Permittee: "You are responsible for obtaining any other federal, state, or local permit that may be required for this project. In particular, any permits through the U.S. Army Corps of Engineers for the placement of fill material in Waters of the United States." (Exhibit A, NPDES permit). Petitioners' challenge also includes the CZC that accompanied the NPDES permit, which provides:

"This Coastal Zone Consistency did not include a review and authorization for any direct or indirect wetland impacts to freshwater wetlands or critical area. Any impacts to Critical Areas as determined by SCDHEC-OCRM, and/or freshwater wetlands, as determined by the U.S. Army Corps of Engineers must be authorized by the appropriate agency." (Exhibit B, CZC certification).

¹As Petitioners point out to this Court in their Motion on pages 18 and 19, Department Staff was confused by the terminology used in legal proceedings and inadvertently referred to the Consent Order as a Restrictive Covenant in the review worksheet. However, had a recorded Restrictive Covenant been placed as a part of the Consent Order, Petitioners' interpretation of the Consent Order may be supported and the Department would issue a permit consistent with that recorded Restrictive Covenant and the regulations and as such this matter likely would not be before this Court for review.

Section 404 of the Clean Water Act requires a person to obtain a permit from the U.S. Army Corps of Engineers ("Corps") in order to place fill in jurisdictional wetlands. 33 U.S.C.A. §1344. Since this activity is to take place in the Coastal Zone, the Corps' permit must be found consistent with the State's Coastal Zone Management Program. S.C. Code Ann. §48-39-80(B)(11). The Department did issue a separate consistency determination for the Corps' permit allowing for the alteration of jurisdictional wetlands, which Petitioners have not objected to. The Department decisions that Petitioners are contesting do not actually authorize any modifications, impacts, or placement of fill material into any jurisdictional wetlands on the Church's property, and are therefore, misplaced.

Petitioners' challenge before the Board and in its Request for Contested Case only involved the NPDES permit and the associated CZC, arguing these decisions violated the Consent Order. Petitioners now assert "the impacts proposed for the remaining wetlands on the Church property prompted the Abels to challenge the Church's additional construction activity project not only from an environmental perspective, but also to enforce the protections expressly agreed to under the Consent Order." (Petitioners' Motion, pg. 11). The presentation of 'environmental perspective concerns' as a basis for this challenge are presented for the first time in this Motion. (*see* Exhibit C, Request for Final Review, Request for Contested Case, and Petitioners' Prehearing Statement).

The Church does not argue against the validity of the Consent Order. The issue in this matter concerns the interpretation of a Consent Order which contains clearly ambiguous terms that Petitioners interpret to create perpetual restrictions that run with the land, although there is no recorded Restrictive Covenant and the Order does not contain language binding any heirs, assigns, or successors in interest. This ambiguity is due to the lack of clarity in regard to the

Consent Order's scope of applicability. Petitioners argue in their Motion "[i]n pertinent part, the Consent Order required that the Church's plan for expansion, including the construction of "the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Petitioners' Motion, pg. 5). The "Church's plan" as referenced by the Petitioners refer solely to the activities that were permitted in 2000, challenged in the ALC, and resolved by all parties. Accordingly, the Department modified the Church's permit in accordance with that language.

Consistent with the Church's position that the Consent Order applies solely to the previous permit, the Consent Order provides "[t]he designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Exhibit D, Consent Order, pg. 2) (emphasis added). The requirement of amending refers to the 2000 permit which was the subject of that litigation upon which the Consent Order resolved. Petitioners provide "[t]his language plainly and unambiguously mandates the preservation of the wetlands on the Church property." (Petitioners' Motion, pg. 12). However, Petitioners then provide that this condition "orders the Church to amend its plan and expansion to accommodate the requisite protection of the wetland area, specifically requiring that the location and configuration of the storm water pond be altered to eliminate some of the proposed impacts, as depicted in the exhibit to the Consent Order." (Petitioners' Motion, pg. 12.). Petitioners themselves offer conflicting interpretations of disputed language. In their first interpretation, Petitioners construe this language to "plainly and unambiguously" preserve the wetlands. Then Petitioners' interpretation provides that the language requires the Church to "amend its plan to accommodate the requisite protection of the wetland area...as depicted in the exhibit to the Consent Order." This alternate interpretation

deals with modification of a plan which, given the permit for 2000, could only have been the plan challenged in the matter before this Court at that time, since the exhibit referred to is restricted to activities permitted in 2000. The language of the Consent Order is ambiguous, which is reflected in history of interpreting this Consent Order and the parties' disagreement over its terms.

The Church does not believe that the terms of the Consent Order are clear and unambiguous. In reflective analysis of the Consent Order entered over a decade ago, with confusing terms and with the members of the Church involved directly with this matter being gone from the congregation or deal², the Church is only restricted by the language and requirements of the Consent Order and does not agree to add additional restrictions and limitations that are not clearly included within the agreement. The Consent Order did not require the recordation of Restrictive Covenants and does not bind any successors in interest³. The Church interprets the words of the Consent Order to apply conditions to the previous permit and the Church acted in accordance with those terms by modifying the permit as required by the Consent Order and completing the 2000 project. Accordingly, the Church's past application challenged by the Petitioners does not violate the terms of the Consent Order.

The Church interprets the language of this Consent Order to apply specifically to the previous permit due to the absence of clear language supporting Petitioners' argument as well as the absence of the requirement of recording a Restrictive Covenant and the absence of

²This confusion is exemplified through letters sent to the applicant, application to the Court by the Church to modify the Consent Order, and draft documents with conflicting terms.

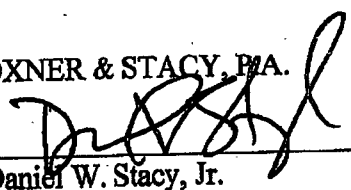
³ Notably, without such language, the Consent Order only binds the parties of the Order. Even under Petitioners' argument, if a new entity purchases the Church's property they would not be bound by the terms of the Consent Order. Again reinforcing the idea if Petitioners wished to have such terms run with the land and bind subsequent purchasers, assigns, or successors in interest, it is their duty to ensure this language was plainly included in the Consent Order.

application to heirs, assigns, or successors in interest. The Church's stance in this matter is in line with Petitioners' portrayal of the Church's position in their Motion, which is due to the conflict in the interpretation of the ambiguous terms contained in a Consent Order entered into some thirteen years ago.

WHEREFORE, the Department requests this Honorable Court do deny Petitioners' Motion for Summary Judgment.

Respectfully Submitted,

OXNER & STACY, P.A.



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danstacy@loslaw.net
Attorney for Respondent
Pawleys Island Community Church

January 7, 2015
Pawleys Island, South Carolina



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

CERTIFIED MAIL

April 1, 2014

MIKE FIELDS (91 7199 9991 7030 0134 8071)
PAWLEYS ISLAND COMMUNITY CHURCH
10304 OCEAN HWY
PAWLEYS ISLAND SC 29585

RE: PAWLEYS ISLAND COMMUNITY CHURCH ADMINISTRATIVE BUILDING
Georgetown County
File Number: 22-00-06-03A
NPDES Coverage Number: SCR10Q459

Dear Mike Fields:

The Department of Health and Environmental Control (Department or DHEC) has approved the Stormwater Pollution Prevention Plan (SWPPP) for the referenced project on March 31, 2014. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Stormwater Discharges from Construction Activities SCR100000 (CGP), this project has been granted coverage under the CGP. This project's general permit coverage number is SCR10Q459. The total disturbed area for this site is 2.2 acres.

See attached DHEC Office of Ocean and Coastal Resource Management (DHEC-OCRM) certification approved 03/26/2014 for additional conditions related to the Coastal Zone Consistency determination.

Because this project is part of a larger common plan for development or sale (LCP), all applications for future land-disturbing activities that are part of this LCP (phases, outparcels, etc.) should include the above-referenced file number (22-00-06-03A), NPDES coverage number (SCR10Q459), and project name PAWLEYS ISLAND BAPTIST CHURCH.

An as-built survey, signed and sealed by a S.C. Licensed Land Surveyor, should be submitted for the 2 structure(s) on this site. The survey(s) should show grades, contours, and depths for all structures and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the project's S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/or analysis must be accepted by the Department before a Notice of Termination (NOT) can be submitted.

The CGP can be downloaded at the following website:

<http://www.scdhec.gov/environment/water/swater/docs/CGP-permit.pdf> or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies

material in Waters of the United States. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

If material excavated during construction activities leaves the site, a mine operating permit may be needed. You are responsible for contacting the Mining and Reclamation Section to determine if a mining permit is required for the site. The Mining and Reclamation Section can be reached at (803)896-4261 or via e-mail at AskMines@dhec.sc.gov.

Please see the enclosed "Notice of Appeal Procedure" document for information about the procedures for appealing this NPDES coverage.

If you have any questions or cannot access the referenced websites, please call me at 843-953-0238.

Sincerely,



Richard V Geer, Engineer Associate
EQC Bureau of Water, Coastal Stormwater Permitting Section
1362 McMillan Ave, Suite 400, Charleston SC 29405

cc: Thomas P. Bevins—ETS (91 7199 9991 7030 0134 8095)
Michael Corley—The South Carolina Environmental Law Project (91 7199 9991 7030 0134 8088)



Catherine B. Templeton, Director
Promoting and protecting the health of the public and the environment

Coastal Zone Consistency Certification

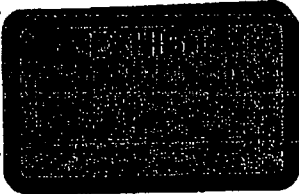
To: Richard Geer, Project Manager - BOW-Coastal, Stormwater Permitting
From: Christine Koczera, Project Manager - OCRM, Coastal Zone Consistency Section
Cc: Curtis Joyner, Section Manager - OCRM, Coastal Zone Consistency Section
Re: Pawley's Island Community Church Administrative Building
Site location: 10304 Ocean Highway, Pawley's Island, Georgetown County
Tax Map No: 04-0161-052-00-00, 04-0161-049-01-00
Date: March 26, 2014
CZC #: CZC-12-0149
PN#: SCR10Q459

The staff of the Office of Ocean and Coastal Resource Management (OCRM) has reviewed the above referenced Coastal Zone Consistency request for land disturbing activity, including the construction of a new administrative building, parking, and associated infrastructure, as well as, modifications to the access drive and existing stormwater management pond and certifies that the above referenced project is **Consistent** with the Public Services and Facilities (Public / Quasi Public Buildings) Policies, the Activities in Areas of Special Resource Significance (Wetlands) Policies and the Stormwater Management (Runoff) Guidelines contained in the S.C. Coastal Zone Management Program provided that:

- in the event that any historic or cultural resources and archaeological or paleontological remains are found during the course of work, the applicant must notify the State Historic Preservation Office and the South Carolina Institute of Archaeology and Anthropology pursuant to South Carolina Code of Laws. Historic or cultural resources consist of those sites named to the National Register and those sites that are eligible for the National Register and other areas of special historic significance. 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 and;
- demonstrate that storage of the first ½ inch of run-off from the entire site or storage of the first one (1) inch of run-off through retention, detention, or infiltration systems, from the built upon portion of the property, whichever is greater.

This Coastal Zone Consistency did not include a review and authorization for any direct or indirect wetland impacts to freshwater wetlands or critical area. Any impacts to Critical Areas as determined by SCDHEC-OCRM, and/or freshwater wetlands, as determined by the U. S. Army Corps of Engineers must be authorized by the appropriate agency.

This certification shall serve as the final DHEC OCRM Coastal Zone Consistency approval and does not alleviate the applicant's responsibility to obtain other required local, state or federal approvals.



RECEIVED
APR 18 2014
Rec'd via fax 4/16/2014
Clerk, Board of Health
and Environmental Control

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF
THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Dan Abel, Mary Abel and William Mashburn

Petitioners,

vs.

Pawleys Island Community Church and the South Carolina Department of Health and
Environmental Control,

Respondents.

RE: NPDES Coverage SCR10Q459; Coastal Zone Consistency CZC-12-0149

REQUEST FOR FINAL REVIEW CONFERENCE

Dan Abel, Mary Abel and William Mashburn hereby request that the Board of the Department of Health and Environmental Control conduct a Final Review Conference to review DHEC's decision to grant Stormwater Permit Coverage SCR10Q459 ("Stormwater Permit") and Coastal Zone Consistency Certification CZC-12-0149 ("Consistency Certification") to Pawleys Island Community Church ("the Church"). (Decisions attached as Exhibit 1). The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between the Abels, the Church, DHEC and OCRM.

BACKGROUND: PREVIOUS LEGAL CHALLENGE AND SETTLEMENT

1. This is not the first time that the Church has sought a stormwater permit and coastal zone consistency certification for modifications to its property. Back in 2000, the Church sought the same approvals for construction activities. As a part of its construction project, the Church

intended to fill federal and state jurisdictional wetlands.

2. When DHEC/OCRM issued the stormwater permit and consistency certification for that project, Mary Abel, Dan Abel and David F. Mims, as neighboring property owners, challenged that decision by filing requests for a contested case hearing in the Administrative Law Court. The parties had numerous settlement discussions that eventually resulted in a Consent Order of Settlement and Dismissal issued by Administrative Law Judge Scott Dukes on January 8, 2001. (Consent Order attached as Exhibit 2).

3. According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." (Consent Order, p. 1). The settlement was "made a part of th[e] final order of the Administrative Law Judge Division." (Consent Order, p. 2). In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from the Church. DHEC and OCRM were parties to the settlement and agreed to amend the stormwater permit and consistency certification in accordance with the agreement and Order. (Consent Order, p. 2).

4. The wetlands on the Church property were a key issue in the contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels' decision to file the contested case. Pursuant to the Consent Order, the Church's construction plan had to be "amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Consent Order, p. 1). Further, as to that area of preserved wetlands, the Church committed to the following: "The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state." (Consent Order, p. 1).

ANALYSIS: THE CHURCH'S NEWLY APPROVED PLANS

5. Under the valid, binding and enforceable Consent Order, the wetlands remaining on the Church's property today are to "remain in [their] natural state." Despite DHEC's agreement and commitment that the wetlands would remain unaltered, the DHEC staff issued a Stormwater Permit and Consistency Certification that authorizes just the opposite, allowing the Church to fill all remaining wetlands on its property as a part of its stormwater plan. The Stormwater Permit and Consistency Certification thereby violate both DHEC's and the Church's continuing obligations under the Consent Order.

6. Upon information and belief, the Church's plan, as approved by DHEC, also violates other provisions of the Consent Order, including those related to maintenance of a buffer between the Church property and surrounding properties.

7. Prior to issuance of the Stormwater Permit and the Consistency Certification, the Church and DHEC staff were aware that the Church's proposed plan violates the Consent Order. To wit, the Church unsuccessfully pursued an attempt to have that Consent Order modified and eviscerated by the ALC. (ALC Order of 1/7/14 attached as Exhibit 3). As stated by Judge Anderson: "The Church has now filed a request with this Court to modify its site plan and make further modifications to the Church property **not in compliance with the original Order.**" (Exhibit 3, p. 1). The ALJ rightfully denied the Church's request, which was opposed by Dan and Mary Abel.

8. Having failed with the ALJ, the Church has now gained DHEC staff's complicity in ignoring the binding Consent Order. That Consent Order is enforceable in the Administrative Law Court, and the Abels will seek such enforcement if necessary. First, though, this Board has an opportunity to correct staff's failure to recognize and honor the Agency's prior binding

commitments. DHEC regularly attempts to resolve environmental disputes through negotiated settlement. If these efforts are to be accepted in good faith in the future, DHEC must be reliable in abiding by its agreed terms. To maintain credibility at the bargaining table, the Agency should abide by previous settlement agreements and orders.

9. Dan and Mary Abel are residents of Pawleys Island and seek the Board's review as parties to the previous legal dispute and the Consent Order. William Mashburn lives on his property adjacent to the Church property and seeks the Board's review out of concern for his own property value, aesthetic value and quality of life.

WHEREFORE, the Petitioners request that the Board conduct a final review proceeding and issue an order remanding the decision to grant the Stormwater Permit and Consistency Certification, instructing that staff uphold the binding Consent Order agreed to by the Agency and the Church.

Respectfully submitted,



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Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Attorneys for the Appellants

Georgetown, South Carolina
April 16, 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Dan Abel, Mary Abel and William Mashburn,

Petitioners,

vs.

Pawleys Island Community Church and the South
Carolina Department of Health and Environmental
Control,

Respondents.

Docket No. 14-ALC-_____-CC

**REQUEST FOR
CONTESTED
CASE HEARING**

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS

Dan Abel, Mary Abel and William Mashburn, pursuant to Administrative Law Court Rule 11, hereby request a contested case hearing to review the decision of the South Carolina Department of Health and Environmental Control Office of Coastal Resource Management ("DHEC/OCRM") to grant Stormwater Permit Coverage SCR10Q459 ("Stormwater Permit") and Coastal Zone Consistency Certification CZC-12-0149 ("Consistency Certification") to Pawleys Island Community Church ("PICC"). (Decisions attached as Exhibit 1). The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between Dan and Mary Abel ("the Abels"), PICC and DHEC/ OCRM.

In support of its request, the Petitioners submit the following:

BACKGROUND

1. This is not the first time that PICC has sought a stormwater permit and coastal zone consistency certification for modifications to its property. Back in 2000, PICC sought the same approvals for construction activities. As a part of its construction project, PICC intended to fill

federal and state jurisdictional wetlands.

2. When DHEC/OCRM issued the stormwater permit and consistency certification for that project, the Abels and David F. Mims, as neighboring property owners, challenged that decision by filing requests for a contested case hearing in the Administrative Law Court. The case was given Docket Number 00-ALJ-07-0626-CC. The parties had numerous settlement discussions that eventually resulted in a Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge Dukes Scott on January 8, 2001. (Consent Order attached as Exhibit 2).

3. According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." (Exhibit 2, p. 1). The settlement was "made a part of th[e] final order of the Administrative Law Judge Division[.]" which "FURTHER ORDERED that th[e] matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein." (Exhibit 2, p. 2) (emphasis added). In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from PICC. DHEC/OCRM was a party to the settlement agreement and agreed to amend the stormwater permit and consistency certification in accordance with the agreement and Consent Order. (Exhibit 2, p. 2).

4. The wetlands on PICC's property were a key issue in that contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels' decision to file the contested case and was specifically addressed in the Consent Order. Pursuant to the Consent Order, PICC's construction plan had to be "amended so that approximately one-half (50%) of the wetland area on the site shall be preserved." (Exhibit 2, p. 1) (emphasis added). Further, as to that area of

preserved wetlands, PICC committed to the following: **"The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state."** (Exhibit 2, p. 1) (emphasis added).

5. On June 7, 2012, PICC submitted its Notice of Intent to conduct additional construction activities on its property, which included filling and otherwise disturbing the wetland area that was agreed upon by all parties to the Consent Order to **"remain in its natural state."** (Notice of Intent attached as Exhibit 3).

6. Since the additional construction activities PICC desired to make on its property were not in compliance with the Consent Order, PICC submitted a proposed Modified Consent Order of Settlement and Dismissal (**"Proposed Modification Order"**) dated October 1, 2013 to the Administrative Law Court in an attempt to replace the existing Consent Order. (Proposed Modification Order attached as Exhibit 4). The Proposed Modification Order was not agreed to or signed by all of the parties to the original Consent Order as the Abels neither consented to nor signed the Proposed Modification Order. (Exhibit 4, p. 3).

7. By Order dated January 7, 2014, the Administrative Law Court dismissed PICC's request to modify the Consent Order as premature stating that PICC's request to conduct additional construction activity was still subject to DHEC/OCRM review. (ALC Order of January 7, 2014 attached as Exhibit 5).

8. Notwithstanding the agreed upon terms of the settlement agreement and Consent Order, DHEC/OCRM approved PICC's request to conduct additional construction activities on the subject property and issued the Consistency Certification and the Stormwater Permit on March 26, 2014 and March 31, 2014, respectively. (See Exhibit 1).

ANALYSIS

9. Under the valid, binding and enforceable Consent Order, the wetlands remaining on the PICC's property today are to "remain in [their] natural state." Despite DHEC/OCRM's agreement and commitment that the wetlands would remain unaltered, the DHEC/OCRM staff issued a Stormwater Permit and Consistency Certification that authorizes just the opposite, allowing PICC to fill all remaining wetlands on its property as a part of its stormwater plan. The Stormwater Permit and Consistency Certification thereby violate both DHEC/OCRM's and PICC's continuing obligations under the Consent Order.

10. Upon information and belief, PICC's plan, as approved by DHEC/OCRM, also violates other provisions of the Consent Order, including those related to maintenance of a buffer between the PICC property and surrounding properties.

11. Prior to issuance of the Stormwater Permit and the Consistency Certification, PICC and DHEC staff were aware that PICC's proposed plan violates the Consent Order. To wit, PICC unsuccessfully pursued an attempt to have that Consent Order modified and eviscerated by the Administrative Law Court. (See Exhibit 5). As stated by Administrative Law Judge Anderson: "The Church has now filed a request with this Court to modify its site plan and make further modifications to the Church property **not in compliance with the original Order.**" (Exhibit 5, p. 1) (emphasis added). The ALJ rightfully denied PICC's request, which was opposed by the Abels.

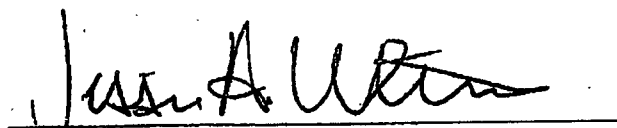
12. Having failed with the ALJ, PICC has now gained DHEC/OCRM's complicity in ignoring the terms of the Consent Order. That Consent Order is binding and enforceable by law. DHEC regularly resolves environmental disputes through negotiated settlement and consent orders of dismissal. If these efforts are to be accepted in good faith in the future, DHEC/OCRM must be reliable in abiding by the agreed upon terms, as well as Orders from this Court. To maintain

credibility at the bargaining table, the Agency should be held to the terms of the settlement agreements and orders to which it is a party.

13. The ALJ dismissed, without prejudice, PICC's request to modify the Consent Order pending a final determination by DHEC/OCRM and request for a contested case hearing. (Exhibit 5, p. 2). Accordingly, the ALC retained jurisdiction over this matter and is authorized to enforce the binding terms of the settlement agreement and Consent Order which are violated by the Consistency Certification and Stormwater Permit . S.C. Code Ann. § 1-23-600(A).

CONCLUSION

WHEREFORE, the Petitioners request that the Administrative Law Court conduct a contested case hearing and issue an order reversing DHEC/OCRM's decision to issue the Consistency Certification and Stormwater Permit to Pawleys Island Community Church.



Amy E. Armstrong

Michael Corley

Jessie A. White

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Attorneys for the Petitioners

Georgetown, South Carolina
June 13, 2014

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Dan Abel, Mary Abel and William Mashburn,	)	Docket No. 14-ALC-07-0282-CC
	)	
Petitioners,	)	
	)	
vs.	)	PETITIONERS' PREHEARING STATEMENT
	)	
South Carolina Department of Health and Environmental Control and Pawleys Island Community Church,	)	
	)	
Respondents.	)	
	)	
	)	

**TO: ADMINISTRATIVE LAW JUDGE SHIRLEY C. ROBINSON, AND ALL PARTIES
AND THEIR ATTORNEYS:**

The Petitioners hereby submit the following information as their Prehearing Statement:

1. The nature of this proceeding;

This is a contested case hearing brought by the Petitioners Dan Abel, Mary Abel and William Mashburn, pursuant to Administrative Law Court Rule 11, to review the decision of the South Carolina Department of Health and Environmental Control Office of Coastal Resource Management ("DHEC/OCRM") to grant Stormwater Permit Coverage SCR10Q459 ("Stormwater Permit") and Coastal Zone Consistency Certification CZC-12-0149 ("Consistency Certification") to Pawleys Island Community Church ("PICC"). The Stormwater Permit and Consistency Certification are in plain violation of a previous settlement agreement entered between Dan and Mary Abel ("the Abels"), PICC and DHEC/OCRM.

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

The statutory provisions conferring subject matter jurisdiction are: (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, *et seq.*; (2) the S.C. Coastal Zone Management Act, S.C. Code Ann. § 48-39-150; and (3) S.C. Code Ann. § 44-1-60.

The ALC further retained jurisdiction over this matter by virtue of the Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge Dukes Scott on January 8, 2001, Docket Number 00-ALJ-07-0626-CC, in a case challenging DHEC/OCRM's original decision to issue a stormwater permit and coastal zone consistency certification for modifications to the PICC property.

3. The issues to be presented for determination, including any claims or defenses expected to be raised;

Whether the Consent Order and its terms are binding and enforceable by law upon the parties thereto, including the Abels, DHEC/OCRM and PICC.

Whether DHEC/OCRM improperly issued the Stormwater Permit and Consistency Certification to PICC in violation of the Consent Order. Specifically, whether DHEC/OCRM's decision to issue the Stormwater Permit and Consistency Certification to PICC violates both DHEC/OCRM's and PICC's continuing obligations under the Consent Order.

Whether PICC's plan, as approved by DHEC/OCRM, violates certain provisions of the Consent Order, including that the wetlands remaining on the PICC's property are to "remain in [their] natural state" as well as those related to maintenance of a buffer between the PICC property and surrounding properties.

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 Petitioners respectfully request that the Court reverse DHEC/OCRM's decision to issue the Stormwater Permit and Consistency Certification to PICC as it is a plain violation of the binding settlement agreement and Consent Order previously entered into between the parties.

This requested action is supported by common law principles of contract, the plain language of the Consent Order, and the principle of res judicata.

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

This is not the first time that PICC has sought a stormwater permit and coastal zone consistency certification for modifications to its property. Back in 2000, PICC sought the same approvals for construction activities. As a part of its construction project, PICC intended to fill federal and state jurisdictional wetlands. When DHEC/OCRM issued the stormwater permit and consistency certification for that project, the Abels and David F. Mims, as neighboring property owners, challenged that decision by filing requests for a contested case hearing in the Administrative Law Court. The case was given Docket Number 00-ALJ-07-0626-CC. The parties had numerous settlement discussions that eventually resulted in a Consent Order of Settlement and Dismissal ("Consent Order") issued by Administrative Law Judge Dukes Scott on January 8, 2001.

According to the Consent Order: "The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order." The settlement was "made a part of th[e] final order of the Administrative Law Judge Division[.]" which "FURTHER ORDERED that th[e] matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein." (emphasis

added). In other words, the Abels agreed to dismiss their contested case in exchange for certain binding concessions from PICC. DHEC/OCRM was a party to the settlement agreement and agreed to amend the stormwater permit and consistency certification in accordance with the agreement and Consent Order.

The wetlands on PICC's property were a key issue in that contested case and a key component of the Consent Order. Protection of the wetlands, which are adjacent to important salt marsh creek in Pawleys Island, was a primary motivator in the Abels' decision to file the contested case and was specifically addressed in the Consent Order. Pursuant to the Consent Order, PICC's construction plan had to be "amended so that **approximately one-half (50%) of the wetland area on the site shall be preserved.**"(emphasis added). Further, as to that area of preserved wetlands, PICC committed to the following: **"The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state."**(emphasis added).

On June 7, 2012, PICC submitted its Notice of Intent to conduct additional construction activities on its property, which included filling and otherwise disturbing the wetland area that was agreed upon by all parties to the Consent Order to "remain in its natural state." Since the additional construction activities PICC desired to make on its property were not in compliance with the Consent Order, PICC submitted a proposed Modified Consent Order of Settlement and Dismissal ("Proposed Modification Order") dated October 1, 2013 to the Administrative Law Court in an attempt to replace the existing Consent Order. The Proposed Modification Order was not agreed to or signed by all of the parties to the original Consent Order as the Abels neither consented to nor signed the Proposed Modification Order. As stated by Administrative Law Judge Anderson: "The Church has now filed a request with this Court to modify its site plan and make further modifications to the Church property **not in compliance with the original Order.**" (emphasis added). Judge Anderson rightfully denied PICC's request, which was opposed by the Abels.

Notwithstanding the binding terms of the settlement agreement and Consent Order, DHEC/OCRM approved PICC's request to conduct additional construction activities on the subject property and issued the Consistency Certification and the Stormwater Permit on March 26, 2014 and March 31, 2014, respectively.

Under the valid, binding and enforceable Consent Order, the wetlands remaining on the PICC's property today are to "remain in [their] natural state." Despite DHEC/OCRM's agreement and commitment that the wetlands would remain unaltered, the DHEC/OCRM staff issued a Stormwater Permit and Consistency Certification that authorizes just the opposite, allowing PICC to fill all remaining wetlands on its property as a part of its stormwater plan. The Stormwater Permit and Consistency Certification thereby violate both DHEC/OCRM's and PICC's continuing obligations under the Consent Order.

Having failed with the ALJ, PICC then gained DHEC/OCRM's complicity in ignoring the terms of the Consent Order. That Consent Order is binding and enforceable by law. DHEC regularly resolves environmental disputes through negotiated settlement and consent orders of dismissal. If these efforts are to be accepted in good faith in the future, DHEC/OCRM must be reliable in abiding by the agreed upon terms, as well as Orders from this Court. To maintain credibility at the bargaining table, the Agency should be held to the terms of the settlement agreements and orders to which it is

a party.

6. **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion;**

The Petitioners anticipate filing a motion for summary judgment in this matter.

7. **A list of proposed witnesses and exhibits;**

Witnesses:

- a. Dan and Mary Abel,
- b. Mike Fields and other representatives of PICC,
- c. Richard Geer, Christopher Stout and other employees of DHEC/OCRM,
- d. Additional witnesses identified as preparations for this case continue,
- e. Any witnesses identified by the Respondents.

Exhibits:

- a. All documents contained in the DHEC/OCRM permitting file for this matter,
- b. All documents pertaining to construction activities on the PICC property,
- c. Other documents generated through discovery, research and preparations for this case.

8. **A statement regarding the necessity of discovery, if any;**

Discovery may be necessary, including standard interrogatories and requests for production of documents, entry upon the project site, and depositions.

9. **The estimated time required for the hearing;**

The Petitioners believe this hearing could be completed in one day.

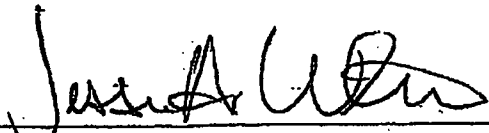
10. **Any dates the parties, counsel or key witnesses are specifically unavailable during the next three months; and**

August 11-12, 14-15, 28-29
September 5, 16-17

12. **An email address where you can be reached:**

Amy@scelp.org
Michael@scelp.org
Jessie@scelp.org

Respectfully submitted,



Amy E. Armstrong

Michael Corley

Jessie A. White

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

Office address: 430 Highmarket Street
Georgetown, SC 29440

Telephone (843) 527-0078

FAX (843) 527-0540

Attorneys for the Petitioners

Georgetown, South Carolina
July 31, 2014

File
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Mary W. Abel, Daniel C. Abel and David F.
Mims,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control, Office of Ocean and
Coastal Resource Management, and Pawleys
Island Baptist Church,

Respondents.

Docket No. 00-ALJ-07-0626-CC

CONSENT ORDER
OF
SETTLEMENT AND DISMISSAL

This proceeding arises out of the application of the Pawleys Island Baptist Church, a South Carolina Not-for Profit Corporation, [hereinafter the "Church"] for a state storm water permit for the construction of a new sanctuary and other improvements of its property on US Highway 17 in the Pawleys Island area of Georgetown County. In a related application, the church also requested a wetland fill permit from the US Army Corps of Engineers which required a coastal zone consistency certification by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (DHEC/OCRM). After DHEC/OCRM issued the storm water permit and consistency certification, requests for a contested case hearing were filed by Mary W. Abel, Daniel C. Abel and David F. Mims.

The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order. Specifically, the parties have

Consent Order of Settlement and Dismissal: Page 1 of 4

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agreed as follows:

1. The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved. The storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A. The Church shall also amend its plans for the proposed structure shown on Exhibit A as "PROPOSED FUTURE BUILDING PHASE II" so that no portion of this structure will encroach upon the area of the wetland.

2. The Church agrees that it will instruct its engineers, architects, contractors and others working on the Church improvement project and storm water management project, to continue to explore additional design changes, where feasible from a time and cost perspective, which will allow possible additional expansion of the wetland area to be preserved.

3. The Church agrees that the wetland preserved by this Consent Order shall remain in its natural state.

4. In constructing the storm water system and church improvements, the Church shall instruct its engineers, architects, contractors and others working on its behalf to employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended. In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm.

5. Within the area designated on Exhibit A as the "30' NOISE/VISUAL BUFFER," the Church shall maintain a vegetated buffer of native, evergreen shrubbery and trees, with a density of at least one evergreen tree and one shrub every ten (10) feet; the trees and shrubs will be leyland

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cypress and wax myrtles and similar species, and at planting will be at least six (6) feet in height with fifty percent (50%) of the trees at least ten (10) feet in height; provided however, that the portions of the vegetated buffer in wetland areas or in wooded areas not affected by development on the property, will remain in their natural state.

6. The existing basketball and volleyball fields will be removed and will not be re-located any closer to the rear property line of the church property than the front of the new sanctuary.

7. All lighting on the church property will be placed so that it is shielded or directed away from the properties adjacent to the "30' NOISE/VISUAL BUFFER," shown on Exhibit A.

8. Upon execution of this Consent Order, the Church may immediately begin construction of the new sanctuary and other improvements not inconsistent with this agreement and order.

9. The Church and the Petitioners will cooperate in the execution of any documents needed to secure any required permit amendments to carry out the provisions of this agreement and order.

After review of the agreement, I conclude that it should be accepted and made a part of this order. Accordingly, upon the joint motion and consent of the parties,

IT IS HEREBY ORDERED that the agreements stated hereinabove shall be, and same hereby is, made a part of this final order of the Administrative Law Judge Division.

IT IS FURTHER ORDERED that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement and order.

IT IS FURTHER ORDERED that this matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein.

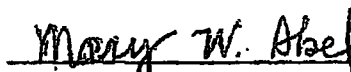
AND IT IS SO ORDERED.

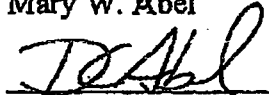

C. Dukes Scott
Administrative Law Judge

Columbia, South Carolina
December 8th, 2000
Present

WE SO MOVE AND CONSENT:

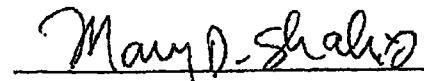
PETITIONERS:


Mary W. Abel

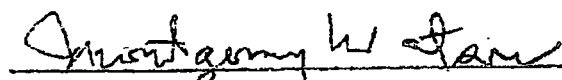

Daniel C. Abel


David Mims

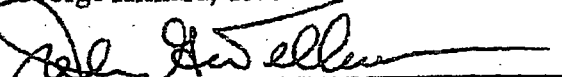
14
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

By: 
Mary D. Shahid, its Attorney

PAWLEYS ISLAND BAPTIST CHURCH,
a South Carolina Not-for Profit Corporation

By: 
Montgomery Watson, Trustee

By: 
George Hilliard, Trustee

By: 
Jack Wellman, Trustee

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy herein, postage paid, in the United States mail addressed to the party(ies) of their attorney(s).

This 8th day of January, 2001

By: 
Judicial Law Clerk

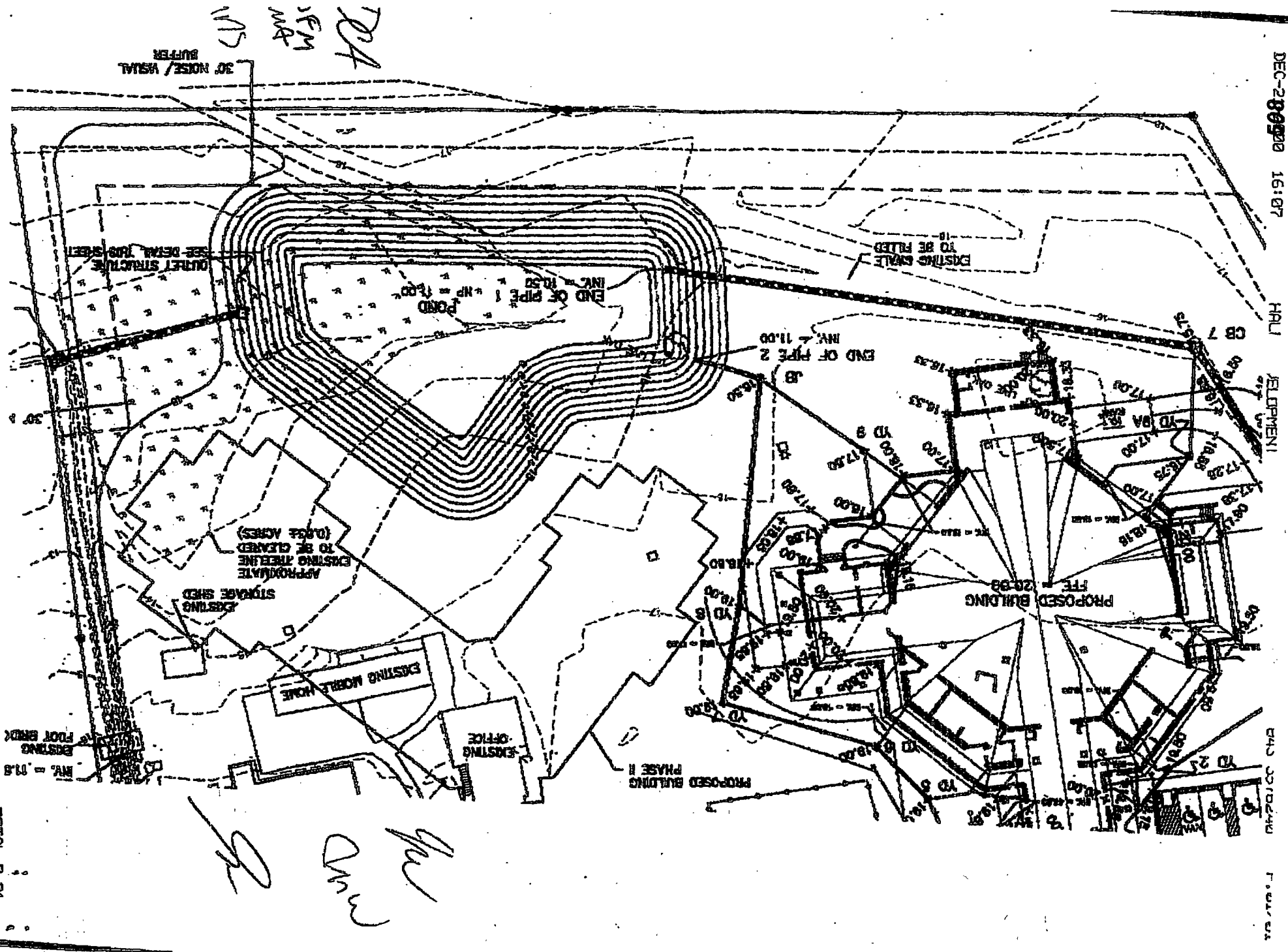
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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Dan Abel, Mary Abel and William Mashburn,)
)
Petitioners,)

Docket No. 14-ALC-07-0282-CC

vs.)

**REPLY ON
MOTION FOR SUMMARY
JUDGMENT**

Pawleys Island Community Church and the South)
Carolina Department of Health and Environmental)
Control,)
)
Respondents.)

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

The Petitioners Dan and Mary Abel ("the Abels") submit this reply in support of the Motion for Summary Judgment following the response submitted on December 30, 2014, by Respondent South Carolina Department of Health and Environmental Control ("DHEC" or "Department") and the response submitted on January 7, 2015, by Respondent Pawleys Island Community Church ("Church").¹

In this case, the Department decisions in dispute include a 2014 storm water permit and coastal zone consistency certification ("2014 Permit and Certification"). Those decisions authorize construction activities which will result in alteration of the wetlands on the Church property. Those wetlands are protected through a Consent Order of Settlement and Dismissal ("Consent Order") filed with this Court in 2001. The Respondents argue that the 2014 Permit and Certification do not authorize wetland impacts on the Church property, claiming those impacts were authorized under "a separate consistency determination" for the Nationwide Permit ("NWP") coverage from the

¹ The Church's response was untimely filed under the consent Scheduling Order adopted by this Court on September 4, 2014.

Corps. (DHEC Res. 3; Church Res. 3).² The Respondents attempt to distinguish the agency decisions at issue authorizing land-disturbing activity and an actual wetland permit. However, this distinction is misplaced.

Even setting aside the existence of a wetland on the Church property for a moment, the Department's 2014 decisions undisputedly authorize additional construction on the Church property. That additional construction activity includes alteration of wetlands on the Church property. (See Tr. Dep. Richard Geer pg. 14, ll. 11-19). That additional construction is land-disturbing activity that requires storm water permit coverage. (*Id.* at pg. 5, l. 12 - pg. 6, l. 9). And the Department must issue a consistency certification covering the land-disturbing activity authorized under the storm water permit. (See Tr. Dep. Christine Koczera pg. 10, ll. 11-17).

The Consent Order placed restrictions on land-disturbing activity on the Church property, including the requirement that certain land remain protected in its natural state. Any authorization permitting disturbance of the area that was required to be set aside is a violation of the Consent Order. Whether the Department's decision is in the form of an NPDES storm water permit, a wetlands permit, or a coastal zone consistency certification, to the extent it authorizes activity that

² The Petitioners did not have the opportunity to challenge the NWP and attendant certification as inconsistent with the Consent Order because those decisions were made prior to the Church submitting its current land disturbance application. Pursuant to Section 404(e) of the Clean Water Act, the Corps of Engineers is authorized to issue blanket coverage for certain categories of activities under a general or Nationwide Permit. The Department is authorized to issue blanket coverage under its 401 water quality certification and coastal zone consistency programs. (See S.C. Reg. 61-101; S.C. Code Ann. § 48-39-80). Specific to this case, the Corps issued NWP # 39 for Commercial and Institutional Developments on February 21, 2012. (See 77 FR 10184). On April 23, 2012, the Department certified the Corps' NWP # 39 as consistent, subject to certain conditions under Section 401 of the Clean Water Act and the S.C. Coastal Zone Management Program. (Attached as Exhibit A). The Department's NWP certification provided blanket coverage as long as the project qualified for a particular NWP and met the state's consistency conditions accordingly. There was no consideration of the specific projects that would seek coverage in the future and there was no way for DHEC or the Petitioners to know at the time that the NWP and state consistency coverage could be used to approve wetland impacts on the Church property in a manner inconsistent with the Consent Order. Thus the only route by which Petitioners could challenge the Church's additional construction project for violation of the Consent Order was through this appeal of the Department's 2014 decisions authorizing the land-disturbing activities.

will result in alteration of areas protected under the Consent Order, such Department decision must fail.

This case is a textbook example of one that is appropriate for summary judgment. None of the material facts, which were detailed in the Petitioners' Motion, are in dispute. The only issue before this Court is a matter of law: whether the DHEC authorizations at issue violate the Consent Order. It is the Petitioners position that the 2014 Permit and Certification authorize land-disturbing activity that will result in alteration of the protected wetlands on the Church property in violation of the Consent Order.

A consent order is a "binding and conclusive" contract between the parties, signed by all parties and a judge. Jones & Parker v. Webb, 8 S.C. 202, 206 (1876). It is enforceable by any party to the contract. See, e.g., Monster Daddy, LLC v. Monster Cable Products, Inc., 483 F. App'x 831, 834 (4th Cir. 2012) (treating a consent order like a contract, subject to South Carolina contract law). A consent order cannot be altered or amended without the consent of all parties, and the authorization of the court. See, e.g., Outlaw v. Barnes, 118 S.C. 189, 110 S.E. 124, 125 (1921) (setting aside a court order which amended a consent order without the consent of the parties).³

Under South Carolina law, whether a contract is ambiguous, and the interpretation of an unambiguous contract, are questions of law for the court. S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299, 302-03 (2001). "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." Id., at 302. "When the language of a contract is unambiguous, however, a court's only function is to interpret the contract's lawful meaning and the intent of the parties as expressed in the contract's terms." Monster

³ (See also Church Res. 3 ("The Church does not argue against the validity of the Consent Order."); DHEC Res. 4 (conceding the validity of the Consent Order)).

Daddy, 483 F. App'x at 834.

Where the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, the contract's language controls as the parties' intended agreement. Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013); Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497-98, 649 S.E.2d 494, 501-02 (Ct.App.2007) (stating a court must first look to the language of the entire contract to determine the parties' intent and if the language is perfectly plain, "it alone determines the document's force and effect").

The language of the Consent Order is clear and unambiguous. The Consent Order contains enumerated agreements, several of which pertain to the wetland area on the Church property, as follows:

1. The designs for the storm water pond and other improvements at the site shall be amended so that **approximately one-half (50%) of the wetland area on the site shall be preserved**. The storm water pond shall be altered to be located and configured as depicted in the drawing attached hereto as Exhibit A. The Church shall also amend its plans for the proposed structure shown on Exhibit A as "PROPOSED FUTURE BUILDING PHASE II" so that **no portion of this structure will encroach upon the area of the wetland**.
2. The Church agrees that it will instruct its engineers, architects, contractors and others working on the Church improvement project and storm water management project, to continue to explore additional design changes, where feasible from a time and cost perspective, which **will allow possible additional expansion of the wetland area to be preserved**.
3. The Church agrees that the **wetland preserved by this Consent Order shall remain in its natural state**.
4. In constructing the storm water system and church improvements, the Church shall instruct its engineers, architects, contractors and others working on its behalf to **employ all available Best Management Practices to prevent harm to the wetland beyond that authorized by this agreement and by the permit and certification as hereby amended. In the event such additional harm to the wetland occurs despite best efforts, the church will restore or mitigate any such harm**.

(Consent Order 2) (emphasis added).

This language is only capable of one reasonable interpretation: that the remaining wetland area on the Church property must be preserved in its natural state. There is no indication in any of

the provisions of the Consent Order that the parties intended the agreement's force and effect to be of limited duration. Rather, the plain language of the Consent Order recognizes that land-disturbing activities will continue on the Church property in the future and, accordingly, sets forth the parameters within which construction may be permitted as well as the protections which must be kept in place.

The Consent Order provides that "the wetland preserved by this Consent Order shall remain in its natural state." (Consent Order 2, ¶ 3). "Shall remain" is prospective, and prevails indefinitely into the future unless further modified. See Lyon v. Campbell, 217 F.3d 839 (4th Cir. 2000) (interpreting "shall remain" as prospective and permanent as to the object the phrase modified in contract); Plaza Dev. Servs. v. Joe Harden Builder, Inc., 294 S.C. 430, 433-34, 365 S.E.2d 231, 232-33 (Ct. App. 1988) (same). Thus, the wetland shall remain in its natural state, means that the wetland will continue to be in its natural state forever. The law is clear that this is the proper use of the phrase "shall remain," and, further, that "shall remain" is an unambiguous phrase. Stanaland v. Jamison, 275 S.C. 50, 53, 268 S.E.2d 578, 580 (1980) (holding that contract with "shall remain" language was clear and unambiguous, thus it was error for the lower court to consider parol evidence).⁴ Accordingly, to the extent the Respondents argue that the terms of the Consent Order are ambiguous⁵ or that "shall remain" is a phrase of limited duration, such arguments must fail as

⁴ "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument. Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties." McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009).

⁵ Specifically, the Respondents claim the Consent Order is ambiguous because it was "entered into some thirteen years ago" and contains "confusing terms" (DHEC Res. 5; see also Church Res. 4-5). The evidence of this "confusion" that Respondents allude to includes the Department's acknowledgment that the additional construction activities proposed for the Church property are inconsistent with the Consent Order (See Pet'r Motion, Ex. 13), the correspondence between the Department and the Church regarding the inconsistency of the proposed project with the Consent Order (See Pet'r Motion, Ex. 14, 15, 18), and the attempt to have the Consent Order modified by this Court in order for the proposed project to comply with the agreement (See Pet'r Motion, Ex. 19). However, this evidence actually

a matter of law.

The parties freely bound themselves to the Consent Order, and its precise terms. If the parties intended "shall remain" to be of limited duration, they could have added such language to the agreement, by stating that the wetland shall remain in its natural state *until* the Church seeks further expansion. See, e.g., In re Connector 2000 Ass'n, Inc., 447 B.R. 752, 772-73 (Bankr. D.S.C. 2011) (contracting for consensual terms that "shall remain in effect *until* the Final Decree") (emphasis added). Or, the parties could have left out paragraph three altogether. See also Progressive Max Ins., 405 S.C. at 46, 747 S.E.2d at 184 ("Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); Laser Supply & Servs., Inc. v. Orchard Park Associates, 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (S.C. Ct. App. 2009) ("Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it.").

As written, the Consent Order prevents any disturbance to the natural state of the remaining wetland on the Church property, without limitation. See Laser Supply, 382 S.C. at 334, 676 S.E.2d at 144 ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."). This condition is an express and unambiguous restriction agreed to by all parties to the Consent Order and this Court. Despite its as-of-late claim of ambiguity, the Department agreed that the Consent Order was unambiguous in 2012 when it unequivocally informed the Church that its current

supports the fact that the Consent Order is plainly *unambiguous* and that both the Department and the Church were aware and recognized there was a problem with the additional construction project in light of the existence of the Consent Order and the terms agreed to thereunder. Furthermore, the Respondents argue that there is a conflict between the contractual language preserving the wetland and language requiring the Church to amend its plan to protect the wetland. (DHEC Res.4- 5; Church Res. 4-5). To the contrary, both of these terms together in the Consent Order are consistent with each other, as the plain language of the written agreement between the parties.

plan was inconsistent with the Consent Order. (See Pet'r Motion, Ex. 14, 15). Furthermore, the Church attempted to negotiate a new Consent Order, accepting that its proposed construction plan would violate the parties' agreement. (See Pet'r Motion, Ex. 19). Thus the Respondents' recently adopted argument is at odds with its initial conclusions about the Consent Order and their new assertion of ambiguity should therefore be rejected.

Notwithstanding the plain language of the agreement and their previous conclusions, the Respondents now argue that the Consent Order only applies to the activities authorized under the 2000 permit and certification (DHEC Res. 4; Church Res. 4), but not to the similar activities authorized under the 2014 permit and certification. The Consent Order places explicit conditions on storm water management and construction activities on the Church property and unambiguously mandates the preservation of the remaining onsite wetlands. If the remaining wetlands were not required to be preserved in perpetuity by the Church, then the language of the Consent Order specifically relating to and amending the work authorized under the 2000 permit and certification would have been sufficient. (See, e.g., Consent Order 2, ¶ 2 ("The designs for the storm water pond and other improvements at the site shall be amended so that approximately one-half (50%) of the wetland area on the site shall be preserved. . . .")).

However, the Consent Order goes a step further and includes an additional, independently enforceable provision reinforcing the requirement that the remaining wetland area on the Church property is to remain protected beyond the life of the Church's 2000 construction project. (*Id.* at ¶ 3 ("The Church agrees "that the wetland preserved by this Consent Order shall remain in its natural state.")). Indeed, the inclusion of this stand alone provision requiring preservation of the onsite wetlands precludes any argument that the protection was intended to be anything other than absolute.

Respondents were perfectly capable of advocating for whatever particular language they

desired if their intent in entering into the Consent Order was to limit the duration or extent of the agreed upon conditions and restrictions. However, Respondents did not do so and the Court may not entertain after-the-fact arguments that are contrary to the language of the agreement. The Court must look to the plain and unambiguous terms finally agreed upon in the Consent Order as the manifestation of the parties' intent.

The Consent Order clearly contemplates the possibility of future construction activity and storm water management on the Church property and directs that certain protections be maintained, including "that the wetland preserved by this Consent Order shall remain in its natural state." (Consent Order 2). Contrary to the Respondents' arguments (DHEC Res. 4; Church Res. 3), the language of the Consent Order is not limited to the activities authorized under the 2000 permit and certification. Indeed, as set forth in greater detail in Petitioners' Motion, under the plain terms of the Consent Order, both the Department and the Church initially acknowledged that the agreement prevented the alteration of the remaining onsite wetlands sought through the 2014 permit and certification and unsuccessfully attempted to have the agreement modified by this Court.

The focus of this Court's inquiry must be on the plain language of the Consent Order, rather than the subjective theory crafted of late, which seeks to get around the obligations of the agreement in order to allow the Church's plan for additional land-disturbing activity to move forward. Moreover, the Consent Order must be interpreted as a whole. The Respondents seek an interpretation of the Consent Order that effectively allows them to pick and choose which provisions are enforceable and which it believes to be inapplicable. To accept this argument would violate established principals of contract law as well as public policy.

Nor does "the fact that a party has 'second thoughts' about the agreement's results" render the agreement unenforceable. Hensley v. Alcon Labs., Inc., 277 F.3d 535, 540 (4th Cir. 2002)

(“Having second thoughts about the results of a valid settlement agreement does not justify setting aside an otherwise valid agreement”). The Respondents have clearly developed second thoughts about the nature of the terms and conditions agreed to under the Consent Order, as well as a selective understanding of those obligations. However, the law does not entitle a party to a contract to treat certain provisions as enforceable while electing not to be bound by others. Each of the unambiguous provisions contained in the Consent Order reflect the parties’ objective intent at the time the agreement was entered into and must each be considered and given full effect, including the express requirement that the Church preserve the remaining onsite wetland in its natural state.

Courts have “inherent authority to enforce settlement agreements” and, in the exercise of this authority, must find: 1) that the parties reached a final agreement, and 2) that it is able to determine the agreement’s terms and conditions. Hensley, 277 F.3d at 540-41; Ross Dev. Corp. v. Fireman’s Fund Ins. Co., 809 F. Supp. 2d 449, 453 (D.S.C. 2011) (“A trial court has inherent equitable power to enforce summarily a settlement agreement ‘when the practical effect is merely to enter a judgment by consent.’”); Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995) (“A trial court has inherent jurisdiction to enforce settlement agreements entered before it.”).

A final agreement was definitively reached between the Abels, Mr. Mims, the Department and the Church and adopted as part of the final order by this Court. (See Consent Order 1 (“The parties have met, discussed, negotiated, and resolved their differences, and have reached a settlement which they desire to have incorporated into this order.”)). Further, the terms and conditions of the Consent Order are enumerated in plain and unambiguous language. (Id. at 2 - 3). And “[a]fter review of the agreement,” this Court determined “that it should be accepted and made a part of this order.” (Id. at 3). The Consent Order then concludes:

IT IS HEREBY ORDERED that the agreements stated hereinabove shall be, and same hereby is, made a part of this final order of the Administrative Law Judge Division.

IT IS FURTHER ORDERED that the DHEC/OCRM permit and certification shall be, and same hereby are, amended in accordance with this agreement or order.

IT IS FURTHER ORDERED that this matter shall be DISMISSED, with prejudice, except that the parties shall retain full rights to enforce the agreements stated herein.

(Id.).

The Consent Order contains the signature of a judge of this Court, the signatures of each of the parties to the agreement, as well as the initials of all parties and the judge on each page of the agreement. Thus, the Consent Order is a final contractual agreement between the parties that is part of the public record, as well as binding and enforceable by this Court.

In this case, where no equitable arguments are made,⁶ the Consent Order cannot be set aside by this Court absent the consent of all parties. See Outlaw, 110 S.E. at 125; Wilson v. Wilson, 153 S.C. 472, 150 S.E. 897, 899 (1929) ("A party fully competent to protect himself; under no disability; advised as to all circumstances by which he may be saved in his rights; or in a situation where he might, by due diligence, be so advised; not overreached by fraud, concealment or misrepresentation, nor the victim of a mistake against which prudence might . . . have guarded; has no right to call upon Courts of justice to protect him against the consequences of his own carelessness, and to disturb the peace of society by his clamors for that justice which he has voluntarily or negligently surrendered.") (internal citations and quotation marks omitted); Dixon v. Floyd, 73 S.C. 202, 53 S.E. 167 (1906).⁷

⁶ All parties agree that the Consent Order is valid and enforceable. (DHEC Res. 4; Church Res. 3).

⁷ See also 139 A.L.R. 421 ("It is a general rule that an order, judgment, or decree, entered by the court upon the consent of the parties litigant, being in the nature of a contract to which the court has given its formal approval, cannot subsequently be opened, changed, or set aside without the assent of the parties, in the absence of fraud, mutual mistake, or actual absence of consent, and then only by an appropriate legal proceeding.")

The Abels do not consent to amending the Consent Order, therefore, this Court has no power to amend it. Furthermore, the Abels' enforcement rights under the Consent Order are not contingent upon their residence. As parties to the Consent Order, just as with any other contract, the Abels have standing to enforce its terms. See Wilson, 150 S.E. at 899. Indeed, the Consent Order specifically allows that "the parties shall retain full rights to enforce the agreements stated herein" without limitation. (Consent Order 3).⁸

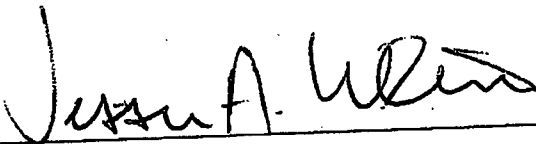
Contrary to the Respondents' assertions (DHEC Res. 3; Church Res. 3), Petitioners have consistently maintained that the protection afforded to the remaining wetlands on the Church property was an important concession to the Abels in reaching the settlement agreement and Consent Order, as well as the basis for the Abels' pending challenge to the 2014 Department authorizations for activity on the Church property that would directly destroy the protection agreed to. (See Dan Abel Aff., ¶¶ 7 - 9; see also Pet'r Req. for Final Review, Pet'r Req. for Contested Case, and Pet'r Prehearing Statement). The Abels' retain their interests in protection of the natural resources of their environment for their use and enjoyment and possess sufficient standing to enforce the protection of those resources as agreed to under the terms of the Consent Order. (Id. at ¶ 6).

Reading the Consent Order as a whole, it unambiguously requires the remaining wetland on the Church property to be preserved in its natural state, without limitation. The 2014 Stormwater Permit and Consistency Certification improperly authorize construction activity on the Church property which will result in alteration to the protected wetland in violation of the Consent Order. Therefore, as a matter of law, the Department's decisions should be invalidated or amended for

⁸ The Respondents' argument regarding the absence of language referencing a restrictive covenant or heirs/assigns/successors in interest in the Consent Order is a red herring (DHEC Res. 4; Church Res. 3-4). This is a matter of contract application and enforcement, not a property dispute. The contract at issue is the Consent Order, which the Department admits "binds the parties of the Order" (DHEC Res. 6). The Abels, the Department and the Church all remain parties to the agreement and are present in this action.

compliance with the terms of the contract between the parties. See Topiwala v. Wessell, 509 F. App'x 184, 187 (4th Cir.) cert. denied, 134 S. Ct. 701, 187 L. Ed. 2d 552 (2013) (upholding an order granting a motion to enforce a settlement agreement where the parties were bound by the agreement and its terms were unambiguous).

Petitioners request that this Court issue an order granting summary judgment and declaring that the 2014 Department decisions are inconsistent with and in violation of the Consent Order.



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January 14, 2015

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May 14, 2014

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RE: *Docket No. 14-RFR-13 – April 1, 2014, decision to approve NPDES Coverage*
SCR10Q459 and Coastal Zone Consistency Certification CZC-12-0149.

Dear Council of Record and Mr. Fields:

The South Carolina Board of Health and Environmental Control will not conduct a Final Review Conference on the above-referenced matter.

CONTESTED CASE GUIDANCE

S.C. Code Section 44-1-60 provides that if the Board declines in writing to schedule a final review conference, the staff 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 (ALC) within thirty calendar days after notice is mailed to the applicant, permittee, licensee, and affected person that the Board declined to hold a final review conference.

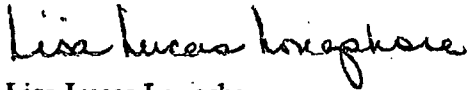
A request for a contested case hearing before the Administrative Law Court must be filed within the time allowed and in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

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

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,

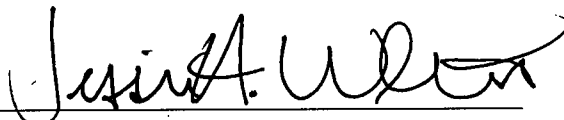


Lisa Lucas Longshore
Clerk

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

Certificate of Counsel

The undersigned does hereby certify that this Record on Appeal complies with SCRAP Rule 210.



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November 16, 2015

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SC Court of Appeals