

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

RECEIVED

South Carolina Coastal Conservation)
League and South Carolina Wildlife)
Federation,)

Docket No. 15-ALJ-07-0404-CC AUG 26 2016

SC Court of Appeals

Petitioners,)

vs.)

FINAL ORDER AND DECISION

South Carolina Department of Health and)
Environmental Control and Horry County)
Public Works,)

FILED

July 7, 2016

Respondents.)

SC ADMIN. LAW COURT

APPEARANCES: For Petitioner Coastal:

Amy E. Armstrong, Esq.
Jessie A. White, Esq.
Amelia Thompson, Esq.

For Respondent DHEC:

Michael Traynham, Esq.
Nathan Haber, Esq.

For Respondent Horry County:

Stan Barnett, Esq.

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or the Court) pursuant to a request for contested case filed by Coastal Conservation League (Coastal) and the South Carolina Wildlife Federation (Wildlife) (collectively, Petitioners) following South Carolina Department of Health and Environmental Control's (DHEC or Department) issuance of a Notice of Department Decision (NODD) on the proposed issuance of a Section 401 Water Quality Certification (401 Certification) and a Coastal Zone Consistency Certification (CZC) to Horry County Public Works (Horry) (collectively, Respondents). DHEC issued the NODD on June 25, 2015, and sent a copy to the United States Army Corps of Engineers (Corps) in response to the permit application that Horry submitted to the Corps seeking authorization to impact 24.19¹ acres

¹ The original project application called for impacts to 24.88 acres of wetlands. Project modifications during the application period reduced these impacts and resulted in a final wetland impact of 19.58 acres of wetland fill, 4.35 acres of wetland excavation, and 0.26 acres of mechanically cleared wetlands for a total impact of 24.19 acres.

of freshwater wetlands for expansion and paving of an existing 5.6-mile, unimproved dirt road known as International Drive located in Horry County, South Carolina.

On July 10, 2015, in accordance with the procedures set forth in S.C. Code Ann. § 44-1-60 et seq., Petitioners requested a final review conference by the DHEC Board concerning the initial staff decision. The Board declined to conduct a final review of the staff decision by letter dated July 29, 2015, and Petitioners subsequently filed a request for contested case hearing on August 28, 2015.

STIPULATIONS

As an initial matter, the parties have entered the following stipulations:

1. Respondents stipulate that Petitioners meet the three prongs necessary to establish Article III standing as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
2. Petitioners stipulate that they abandon their claims that the 401 Certification and CZC issued by DHEC were improperly issued on the basis of impacts related to the Red Cockaded Woodpecker.
3. Petitioners stipulate that the proposed plan to mitigate for wetlands impacts submitted to DHEC by Horry County does not render either the 401 Certification or the CZC issued by DHEC improper.

FINDINGS OF FACT

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

General Background

The proposed road project site sits on the footprint of the existing, unimproved, dirt road known as International Drive, with the exception of two locations where the proposed road deviates from the existing alignment. The proposed project would involve paving a 5.6-mile length of four-lane road with a shoulder and median turning lane, impacting 24.19 acres of wetlands. International Drive is located on the southwestern border of the Lewis Ocean Bay (LOB) Heritage Preserve. LOB is a Heritage Trust property comprised of approximately ten thousand

acres that is owned and managed by the South Carolina Department of Natural Resources (DNR). Some portion of the current LOB has been managed by DNR since 1989.²

Private property abuts International Drive on the opposite side from LOB. Approximately half of the wetland impact projected for this project will be direct fill of wetlands on private property with the other being filled upon the LOB property. The LOB property also contains twenty-three Carolina Bays. Carolina Bays are a subset of freshwater wetlands that are identified by their elliptical or oval geomorphology. According to DNR's management document for LOB, the property was "established to protect the twenty-three Carolina Bays and the numerous carnivorous and sensitive plant species that occur in or on the edge of these bays." In addition, DNR manages LOB as a habitat for the red-cockaded woodpecker³ and several game species, including the black bear.

The LOB property itself is surrounded on three sides by high-volume-traffic roads – namely, Highway 90 to the northwest, Highway 22 to the northeast, and Highway 31 to the southeast (running above and roughly parallel to Highway 17). Highway 90 runs east to west north of LOB and connects to Highways 501 and 22, which move traffic to and from the coast. The rapid proliferation of the Carolina Forest community and surrounding areas (i.e., 500% population growth in the last decade) contributed to severe traffic congestion on the roads in and around the Carolina Forest and Highway 90 communities. As a result, Horry sought an agreement with DNR for a right of way to allow expansion of International Drive in order to alleviate traffic congestion from the other traffic corridors in the area.

In June 2013, Horry and DNR entered into a right-of-way agreement (2013 Agreement or Agreement) allowing the expansion of International Drive with certain provisions consistent with the management of LOB.⁴ Specifically, in addition to minimization of wetlands impacts and

² DNR acquired the bulk of the LOB acreage from International Paper between 1989 and 1992. Additional tracts were added to LOB in 2006 and 2012.

³ As noted in the Stipulations, this case presents no justiciable issue with respect to the Red-Cockaded Woodpecker, a federally recognized endangered species that utilizes the LOB habitats. No material issue has been raised with respect to any other federally protected species.

⁴ Petitioners submitted evidence of a prior, 2010 right-of-way agreement (2010 Agreement) and the negotiations leading thereto, as well as the negotiations between DNR and Horry County to alter provisions of the 2010 Agreement in drafting the 2013 version. However, undisputed testimony established that the 2013 Agreement was in place before DHEC staff took any action on the certification application in this case. Therefore, while the 2010 Agreement, and statements relating to negotiations leading up to it and to the 2013 Agreement, were admitted into evidence, I find that this documentary and testimonial evidence have insufficient probative value with respect to the certification decisions at issue in this case.

compliance with the Endangered Species Act, the Agreement requires Horry County to close International Drive to traffic in order to allow DNR to perform prescribed burning on LOB; requires the construction of interstate fencing on both sides of the road according to the same standards used by the South Carolina Department of Transportation (DOT) in constructing fencing along federal interstate highways; and requires the County to implement a maximum speed limit of 45 miles per hour (mph) on the road when it becomes a four-lane highway (and 35 mph while it remains a two-lane highway).

In November 2013, Horry submitted a Joint Notice and Application, to the Corps and DHEC, requesting a federal permit to fill wetlands for the proposed project. A prerequisite for federal permitting is the issuance of a 401 Certification by DHEC. Because the proposed activity would occur in a coastal county, a CZC Certification was also required. During the public notice period, DHEC received comment letters from DNR, U.S. Fish and Wildlife, National Marine Fisheries, and Petitioners. In response to the comment letters and on two separate occasions, Horry provided additional information. On June 25, 2015, DHEC staff issued Horry a 401 Certification and CZC Certification.

Hydrology and Water Quality Impacts

Impacts to water quality are required considerations in both 401 and CZC decisions. The current, unpaved International Drive has sporadic wetlands contiguous to the roadway, and sediment runoff from International Drive is negatively impacting those adjacent wetlands. For instance, the ditch along the roadway which has developed into a wetland is being impacted by sediment runoff.⁵ Moreover, International Drive has, itself, caused the fragmentation of the wetlands system in the area. However, the proposed project would assist in restoring the wetland system impacted by that fragmentation. The road plan for the proposed International Drive expansion calls for a number of culverts underneath the paved road which would reconnect fragmented wetlands. The culverts would thus improve the natural movement of water through those reconnected wetlands.

The stormwater pollution prevention plan and stormwater Best Management Practices (BMPs) for the proposed road would also eliminate existing sediment runoff from the current dirt

⁵ In addition to the testimony of Steve Gosnell and Mike Wooten, Respondents' witnesses, Bart Baca, testified that the ditch between the road and LOB is a wetlands.

road into the adjacent wetlands, as well as control hydrocarbon runoff to the maximum extent practicable. DHEC's staff assessment for the 401 Certification noted that:

Water quality impacts from non-point sources will be minimized and should not contravene water quality standards or existing and classified uses of freshwater wetlands and tributaries . . . if the applicant uses [BMPs] and is in compliance with SCDHEC administered MS4 and other stormwater permitting requirements during and after project construction to minimize erosion and migration of sediments.

The 401 Certification in this case would be conditioned on the implementation of such BMPs. (See Department Exhibit 11, Section VIII).

Although Petitioners' contend that negative water quality impacts would occur as a result of this project, Petitioners did not present any evidence concerning sampling or monitoring of current water conditions, provide water quality data specific to this project, or quantify the extent or degree of impacts likely to occur. Instead, Petitioners' witnesses testified to the broad proposition that roads usually create runoff, which will inevitably impact wetlands.⁶ In the face of the specific evidence regarding the measures that will be taken to negate water quality impacts, I find Petitioners' evidence not to be probative.⁷ In fact, one of Petitioners' experts agreed that some of the water quality impact from the proposed road would at least be mitigated by the use of BMPs. Petitioners further conceded that the proposed culverts may improve hydrologic connectivity of currently fragmented wetlands.

Based on the above evidence, I find that any water quality impacts from the proposed activity would be temporary, Respondents gave reasonable assurances that no water quality standards would be violated by the proposed activity, and the proposed issuance of the 401 certification was proper.

⁶ It is noteworthy that Petitioners take the apparently incongruous position that the flow of silt does not runoff from the existing road into the wetlands, but that runoff will flow from the road into wetlands once the road is paved.

⁷ Though Daniel Tufford, an expert for Petitioners, opined that the functions and values of adjacent wetlands would be degraded by road construction, he could not say to what extent such degradation would occur. To the contrary, he conceded that the current road created a loss of connectivity and some negative impacts, and that loss could continue to have a negative impact, depending on how the road was maintained. Also, in light of the addition of culverts called for in the proposed road plan, Tufford did not opine whether this project would result in a net gain or loss to wetland connectivity near International Drive. Regarding the LOB, Tufford stated that the only purely aquatic habitat he was aware of in LOB were streams, and that he was not aware of streams that were directly impacted by this project.

Cumulative Impacts

Both 401 and CZC certification decisions require consideration of secondary and cumulative impacts. The private property abutting International Drive is currently undeveloped, and is owned by two property owners. The proposed road project calls for ten curb cuts (i.e., road access points) along the private property side of the 5.6-mile road. There was no evidence of any development plans in the area beyond the project that is the subject of this action.

Petitioners contend the potential of development warrants denial of 401 and CZC Certifications. However, although the curb cuts create an opportunity for development to occur, the private property tracts adjacent to International Drive are approximately 85 percent wetlands and could not be developed without permits from the Corps, which the evidence established would be difficult to secure. Any development impacting the wetlands on the private property side of the road would require the same permitting as the proposed International Drive project, but a residential or commercial development would have to satisfy the high regulatory standard of demonstrating an overriding public interest. Moreover, the cost of mitigation for a private, for-profit development that impacted wetlands would be significantly higher than the mitigation required for a public project such as International Drive. The mitigation cost as well as other factors would likely make any substantial development on the private tracts adjacent to International Drive prohibitively expensive. In short, though development could potentially take place on the private property adjacent to International Drive regardless of whether this project moved forward, significant secondary development of the property west of International Drive as a result of the 401 and CZC Certifications is highly unlikely.

Alternatives Analysis

As part of the certification process in this case, Horry submitted an analysis that discussed a number of alternatives to the proposed International Drive project. This Court has considered all of the information presented in that alternatives analysis.

The undisputed evidence is that Highway 501, one of only two routes providing access to central county residents, is currently a “failed” highway and is among the most congested roads in South Carolina.⁸ As stated in the Department’s NODD, the project purpose is “relieving current

⁸ Highway 501 is a “failed” highway because it is currently at a “level of service F,” which means that at peak times of traffic (“rush hour”), there is gridlock. It currently operates at approximately 40% over capacity.

and anticipated traffic congestion on the existing roadway network and to provide a secondary evacuation route for the residents of the fast-growing Carolina Forest Community.” In accomplishing that purpose, the project design was based on avoiding and minimizing impacts to wetlands. By using the existing road, the chosen route reduced wetland impacts to the maximum extent possible.

The proposed roadway would provide needed relief for local traffic by offering an alternative route to the current network of highly congested and well-above-capacity state highways, including Highways 501 and 22, which are primary evacuation routes. It would also provide an alternate route for traffic if there was an accident stopping traffic flow on Highway 31. The development of International Drive would also provide significant health and safety benefits. For instance, proposed roadway would:

- Provide a much needed additional route for emergency responders, cutting transportation times to local trauma centers for residents living near Highway 90 by one third or more.
- Help facilitate more rapid response times to residents, which would be potentially lifesaving given the severe congestion of existing routes.
- Provide an additional hurricane evacuation route, access for fighting wildfires, and additional access to critical services for residents during flooding events.

In addition, the proposed road would remove a number of trash trucks from the major tourist traffic arteries by providing a more direct route to landfills and recycling centers.

Nevertheless, Horry provided analysis for a no-build alternative, five (5) offsite alternatives, and five (5) onsite alternatives (including the proposed project). These alternatives are discussed, in turn, below. On the other hand, Petitioners offered no evidence to contradict the evidence offered by Horry as to the project purpose and need. Nor was any evidence offered to contradict the evidence regarding road design or the traffic assessments and projections of future traffic discussed in the individual alternatives below.

No-Action Alternative

The no-action alternative consists of abandoning any plans for construction on International Drive and leaving the road in its current unimproved condition. The no-action alternative eliminates the direct impacts on 24.19 acres of wetlands. However, it fails to address the overwhelming need to alleviate the myriad of traffic and hydrology concerns addressed above.

Therefore, the proposed roadway outweigh the benefits of leaving the dirt road in its present condition.

Offsite Alternatives

Offsite Alternative Number 1⁹ would involve construction of a new-built road and would not utilize the existing roadway footprint but would run directly through LOB property. This alternative would have a greater impact to wetlands than the proposed project as it would impact pristine wetlands rather than the already impaired wetlands adjacent to International Drive. It would have a potential adverse impact on eleven clusters of federally endangered Red Cockaded Woodpeckers; and because it would bisect LOB, it would be opposed by DNR.

Offsite Alternative Number 2 would involve construction of a new road that would not utilize the existing roadway footprint but would run directly through the private property southwest of the existing International Drive. This alternative would have a greater impact to wetlands than the proposed project as it would impact pristine wetlands rather than the already impaired wetlands adjacent to International Drive. This alternative would also negatively affect Carolina bays located on private property, create additional impacts to protected species, and increase the costs of the project due to acquiring the right of way for the project and clearing the road footprint. In short, this alternative would increase fragmentation, have a deleterious effect on undisturbed wetlands and wildlife habitats, and increase project costs.

Offsite Alternative Number 3 would follow the current alignment of International Drive at its intersection with Highway 90, which would bisect an existing residential community known as the Truevine Community. This alternative would displace residents in three existing dwellings and substantially impact eight individual private properties. The proposed project would instead deviate from the existing alignment of International Drive at this community in order to avoid such impacts.

Offsite Alternative Number 4 entails widening Highway 501. However, this highway is already slated for widening in 2018. Current traffic projections indicate that in the absence of some additional action to reduce traffic on Highway 501, it will return to its current level of congestion by 2035, regardless of the widening. Moreover, further expansion of the road beyond

⁹ The numbering in this section and summaries of specific alternatives are taken from Department Exhibit 11, Section III(B).

the currently planned construction is not practicable in the foreseeable future. Highway 501 has bottlenecks at Conway and at the bridge going across the Intracoastal Waterway, both of which make any future widening of Highway 501 of little value. Finally, widening 501 will be of limited public benefit to traffic flow from some of the Carolina Forest Community due to the distance of travel to access the highway.

Offsite Alternative Number 5 provides for improvements to River Oaks Drive and Carolina Forest Boulevard, the main arterial roadways of the Carolina Forest Community. These roads serve local traffic in the residential community and provide traffic outlets to the existing road networks (i.e., Highways 501, 31, and 22). While some improvements to these roads have been made and will soon require additional improvement, those improvements do not address the public need for an east-west corridor to and from the coast, and additional routes for commuters and emergency responders.

Onsite Alternatives

Onsite Alternative Number 1 is the proposed project. This alternative meets the public needs addressed above and presents the least environmental impacts.

Onsite Alternative Number 2 analyzed lowering the design speed of the road in order to reduce deviations from the existing alignment of International Drive. However, the road design evidence submitted by Horry indicates that due to the overall character of the proposed road, drivers would be unlikely to conform to a posted speed lower than the 45 mph currently proposed. Road design speeds are typically greater than the posted speed in order to make a road safe for emergency vehicles and that segment of the driving public that will exceed the posted limit. Thus, to be a safe road, International Drive must be designed to accommodate 60-mph traffic despite the proposed posted limit of 45 mph. The existing alignment of International Drive would not support a 60-mph design speed. The proposed alignment therefore deviates from the existing alignment to avoid a sharp curve, which would need to be navigated at approximately 25 mph in its current configuration.

Onsite Alternative Number 3 contemplated paving International Drive as a two-lane road. However, the entire width of the right of way would need to be utilized, regardless of the number of lanes paved; so the impact would likely be the same. Second, the evidence reflected that a two-lane road would be at or near traffic capacity by the year 2035. Moreover, International Drive is anticipated to be heavily used by trash trucks due to the proximity of the county solid waste landfill

and recycling center to the Highway-90 end of the proposed road. This mixture of slower-moving trash trucks within the traffic flow would likely strain the capacity of a two-lane highway by impeding traffic. A four-lane road, however, would provide an adequate number of passing zones for faster-moving vehicles.

Onsite Alternative Number 4 considered reducing the median and shoulder widths in the proposed plan. The proposed plan includes a median of 26 feet with a 10-foot outside shoulder. However, a median and shoulder are required for this kind of roadway, and have a proven safety benefit in reducing the frequency of crashes. In fact, the median in the proposed project will already be less than the DOT standard design median of 36 feet. Additionally, the proposed project utilizes side slopes of 3:1, which is steeper than SCDOT's design standard of 6:1, in order to reduce the footprint of the right of way.

Onsite Alternative Number 5 explored using guardrails in lieu of shoulders. However, guardrails are generally used only when it is "not economically feasible to eliminate a hazard more dangerous than the guardrail itself." Also, shoulders and traversable side slopes provide a driver additional time to come to a safe stop, as compared to a fixed object such as a guardrail.

In sum, upon review of the above alternatives, I find that there is no feasible alternatives to the proposed project that would meet the public need addressed above while creating less impact to wetlands. Moreover, Petitioners, who had the burden of proof, offered no direct evidence to contradict the above evidence with respect to the feasibility – or lack thereof – of these alternatives.

The Court has also considered an alternative of bridging the length of International Drive, which was not analyzed in the application for certification. However, bridging the roadway offers no discernable hydrological benefits to water quality since the proposed road includes connective culverts. Moreover, bridging for a project of this length would cost approximately 20 million dollars, which would be prohibitively expensive and therefore not feasible. As with the other alternatives, Petitioners, who had the burden of proof, offered no direct evidence that bridging was a feasible alternative to the proposed project.

Geographic Areas of Particular Concern

For purposes of CZC analysis, LOB is a Heritage Trust Program in a Geographic Area of Particular Concern (GAPC) and is subject to specific considerations under the Coastal Management Program (CMP). Therefore, the Court considered the priority of uses applicable to this GAPC and determined that there was no significant impact to LOB as a whole. In sum, I find

that the proposed project was consistent with management plan of LOB and the Heritage Trust Program.

The management plan for LOB states that a primary objective of all Heritage Preserves is to “protect[] the natural or cultural character of [the] area or feature” for which the property was dedicated. In this case, LOB was purchased to protect a Carolina Bay/longleaf pine ecosystem and several species of flora and fauna, including the black bear.¹⁰ Petitioners assert that the road project would directly impact Carolina Bays. However, Petitioners expert, Daniel Tufford, admitted that he had not conducted any wetlands delineation for this project to quantify any encroachment. To the contrary, Britt Feldner, an experienced expert in wetlands delineation, conducted an on-the-ground wetlands delineation for this project, including identifying whether there were Carolina Bays. He explained that no Carolina Bays would be directly impacted by this project. I find his testimony persuasive.

As a Heritage Trust property and GAPC, LOB should maximize public usage in a way that is still compatible and consistent with the character of the area. The general-public uses include hunting, fishing, wildlife or other natural resource observation, wildlife photography, environmental education, and environmental interpretation. Here, the proposed project – an access road directly adjacent to LOB - could actually increase public access and enjoyment of this Heritage Trust Property. Moreover, Petitioners presented no direct evidence that any of the priority general-public uses of LOB would be disrupted or impacted by this project. I therefore find that public usage of LOB will not be degraded by the proposed roadway.

The CZC also requires consideration of any feasible alternatives. As discussed above, no feasible alternatives to the proposed project exists. Indeed, there is an overriding public need for this project, and the project minimizes impacts to the wetlands and wildlife habitats. Also, the general character of the area is a mix of residential and commercial development, with some privately owned forested areas, in addition to the LOB property itself. The Court finds that Petitioners failed to prove that future development would necessarily be inconsistent with the general character of the area.

Finally, Petitioners’ surmised that the proposed project would degrade the functions and values of the wetlands in the immediate vicinity of the roadway. However, Petitioners’ witnesses

¹⁰ Wildlife considerations are discussed more fully below.

could not quantify that degradation. To the contrary, the evidence established that removing the existing dirt road, replacing it with the proposed road with culverts, and incorporating best management practices would help reestablish a hydrological connection between the wetlands and ultimately improve water quality.

Wildlife

Both 401 and CZC decisions are guided in part by provisions related to impacts on wildlife.¹¹ However, the only species presented as an issue for this Court to consider is the black bear.¹²

Petitioners have proposed the use of “bear tunnels” in conjunction with high fences to provide an avenue for black bears to pass under International Drive. Although the 2010 Agreement between Horry and DNR included a provision for three bear tunnels, based on the reduction in the bear population following the 2009 fire, DNR later concluded that by 2013, the bear tunnels were no longer justified, and that the project, subject to the requirements of the 2013 Agreement, was sufficiently protective of black bears.¹³

DNR biologists maintain data on the number of black bears utilizing the LOB property. In 2008, hair snare results indicated 14 male bears, and 15 female bears used LOB. However, in 2009, LOB suffered a massive wildfire resulting in a significant decrease black bears in the LOB. The most recent DNR data reflects that only 6 male bears and 4 female bears utilized LOB in 2014.¹⁴ Roadkills also reflect the utilization of the LOB by black bears. The number of

¹¹ As discussed in the Legal Conclusions, *infra*, and for the reasons outlined there, wildlife concerns were only relevant to the CZC determination under the facts of this case.

¹² Petitioners’ Prehearing Statement makes reference to red-cockaded woodpeckers and a number of other rare species in addition to the black bear. However, the parties stipulated that there was no justiciable issue in this contested case related to the red-cockaded woodpecker. Additionally, I find that no substantial evidence of any potential impact on species other than black bears was presented at trial.

¹³ Some of these protective requirements to impede the movement of black bears on the highway, which will be discussed further *infra* included federal-interstate-highway-standard fencing on both sides of the right of way to be constructed during the first phase of construction and for the full width of 125 feet, even if the road remained two lanes; a thirty-five mph speed limit while the road is two lanes and forty-five mph if the road becomes four lanes; and a limited number of access points to road.

It is also noteworthy that the parties in this matter took the deposition of Deanna Ruth, the DNR employee who was “the bear expert” and who was directly involved in the studies that led to the 2010 agreement regarding bear tunnels. Petitioners did not call Ms. Ruth to testify at trial in order to attempt to establish whether or not DNR saw a scientific basis for the alternative protections in the 2013 agreement, even though she, along with Sam Chappalear, had looked into the necessity of the bear tunnels and high fencing at the DNR Director’s request before she left DNR.

¹⁴ Petitioners challenged DNR’s bear population numbers due to a change in sampling technique instituted in 2011. Nonetheless, DNR’s Director testified that the agency’s information was the best available, and DNR had no reason to doubt its accuracy. Petitioners presented no evidence supporting a different population number, and Petitioners’

documented bear roadkills in the immediate vicinity of LOB dropped during the same period, from a high of 31 in 2007, to a low of 0 in proximity of LOB in 2013. In 2015, 6 roadkills were documented in close proximity to LOB.

Moreover, Petitioners' own bear expert, Joe Hamilton, explained that black bears could range within an area of tens of thousands of acres, and that there was no static population of bears living in LOB. Rather, the LOB habitat provided foraging opportunities for bears passing through the area, and individual bear numbers inside LOB might be constantly changing. The bears coming through LOB may be moving either north or south. Further, though it is unclear how many bears are utilizing LOB, no evidence reflects that the proposed road will render LOB any less desirable a habitat for the bear in terms of denning and food source. Furthermore, because the evidence showed that bears tend to travel throughout North and South Carolina in search of food, the bears obviously cross numerous roadways, including four-lane highways, in their travels making the proposed road no less of a danger to the bears.

Concerning the potential use of underpasses by the bears, Petitioners' witnesses, Steve Gilbert, explained that the use is simply not clear. In fact, there is bridging under Highway 22 which creates crossings that bears could use rather than climbing up the embankment and crossing that roadway. Highway 22 nevertheless has the second highest number of bear kills by vehicle collisions in Horry County. The evidence ultimately reflected that "bears will go where they want to go" and may not use passageways at all and specifically, if they are too long. Thus, bears might choose not to use similar tunnels if they were placed under International Drive. Indeed, Petitioners' bear expert, rated the chances of the success of the bear tunnels perhaps as low as 20%.

The length of tunnel also may deter bears usage of that passageway. Therefore, the required the length of a passageway under a four-lane road project might be an obstacle to successfully employing the passages. To address that concern, Petitioners proposed the installation of high fencing to direct the bears to use tunnels. But Petitioners' own expert objected to that fencing because of the potential to trap animals that enter from curb cuts or from either end of the fencing.

On the other hand, the lower "highway" fencing required by the 2013 Agreement would slow down bears entering the roadway. Furthermore, the 45-mph maximum speed limit required

bear expert opined that he could not quantify the black bear population in LOB at any given time but could only speculate.

by the 2013 Agreement would allow motorists sufficient time to see a bear in the roadway and avoid colliding with it. Thus, a lower speed limit is a much more practicable means of protecting bears potentially crossing International Drive. In fact, Petitioners' own expert witness agreed that a lower speed limit of 45 mph on International Drive would allow motorists to avoid hitting black bears in many, if not most, cases.¹⁵

In sum, there was simply insufficient evidence that the proposed project would pose a significant risk to the black bear population.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, the Court concludes the following as a matter of law:

General Conclusions

The ALC has jurisdiction over this case pursuant to the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-600(A); 44-1-60 (Supp. 2015); and 48-1-10 et seq. (Pollution Control Act); 48-39-10 et seq. (Coastal Tidelands and Wetlands Act) (2008 & Supp. 2015).

In reviewing this matter as a contested case, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. *See* S.C. Code Ann. § 1-23-600(B) (Supp. 2015); *Brown v S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *see also Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (2004). Therefore, as the trier of fact, the Court may give testimony, including an expert's testimony, the weight that he or she determines it deserves. *Florence Cnty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992), and may accept the testimony of one expert over that of another. *S.C. Cable Television Ass'n v. S. Bell Te. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992).

While the ALC acts as the fact finder, due consideration is given to the experience, technical competence and specialized knowledge of the agency and its staff in evaluating the evidence. S.C. Code Ann. §§ 1-23-330(4) (2005); 44-1-60(F)(2) (Supp. 2015). Moreover, the ALC must give the same deference to the Department's interpretation of its statutes and regulations that a court in the judicial branch would. The "deference doctrine properly stated provides that

¹⁵ Bart Baca, an expert for Respondents, testified that in Florida, a similar reduction in speed limit in the Keys has reduced vehicle kills of the Key Deer, an endangered species, to an extent that a population which was 50 ten years ago has now increased to 800.

where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute.” *Kiawah Development Partners II v. SCDHEC*, 411 S.C. 16, 766 S.E.2d 707, 718 (2014), citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 at 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The proper standard of proof to be applied by the ALC is a “preponderance of the evidence.” *Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs*, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998); *Nat'l Health Corp. v. Dep't of Health and Env'tl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). Furthermore, the burden of proof is upon the party asserting the affirmative of an issue. *Leventis v. Dep't of Health and Env'tl. Control*, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Therefore, Coastal and Wildlife, as Petitioners, bear the burden of proving that the agency decision was in error under the statutory and regulatory standards. *Id.* Here, Petitioners failed to demonstrate by a preponderance of the evidence that the proposed road expansion and paving project is inconsistent with the requirements of Reg. 61-101 and the Coastal Zone Management Program.

Background Statutory and Regulatory Standards

The Corps regulates the placement of fill material in the twenty four acres of wetlands for expansion of International Drive, under Sections 401 and 404 of the Clean Water Act. 33 U.S.C. § 1344. DHEC regulates this activity under the Coastal Tidelands and Wetlands Act, S.C. Code Ann. §§ 48-39-10 et seq. and the S. C. Pollution Control Act S.C. Code Ann. §§ 48-1-10 et seq. DHEC is required to certify all state and federal permits for consistency with the CMP. Thus, the Corps' Section 404 permit triggered the requirement of a Consistency Certification pursuant to S.C. Code Ann. § 48-39-80(B)(11) (2008).

The Corps Section 404 permit also triggers the requirement for a Water Quality Certification from DHEC. In fulfilling its obligation to the Corps under Section 401 of the Clean Water Act, DHEC applies Reg. 61-101, which governs water quality certifications. And, in determining whether there may be water quality impacts associated with the proposed expansion, DHEC considers Reg. 61-68 (Water Classifications and Standards) and Reg. 61-69 (Classified Waters). In addition, Reg. 61-101 specifically incorporates by reference “the Federal Clean Water

Act, 33 U.S.C. 1341, and regulations promulgated thereunder by the U.S. Environmental Protection Agency.”Reg. 61-101(F)(1).¹⁶

Water Quality Certification

An applicant for a federal permit that might result in any discharge into navigable waters of the United States is required under the federal Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2014), to obtain a Water Quality Certification from the state in which the discharge is or will be located. 33 U.S.C. § 1341 (2014). In South Carolina, the regulations that establish the policies and procedures for implementing Section 401 requirements are codified at 8 S.C. Code Ann. Regs. 61-101 (2012). Additionally, 8 S.C. Code Ann. Regs. 61-101(F)(3) (2012) states the following:

In assessing the water quality impacts of the project, the Department will address and consider the following factors:

- (a) Whether the activity is water dependent and the intended purpose of the activity;
- (b) Whether there are feasible alternatives to the activity;
- (c) All potential water quality impacts of the project, both direct and indirect, over the life of the project including:
 - (1) Impact on existing and classified water uses;
 - (2) Physical, chemical, and biological impacts, including cumulative impacts;
 - (3) The effect on circulation patterns and water movement;
 - (4) The cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

Regs. 61-101(F)(5) states that “[c]ertification will be denied if:

- (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;
- (b) if there is a feasible alternative to the activity, which reduces adverse consequence on water quality and classified uses.
- (c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;

¹⁶ This reference is to 40 C.F.R. Part 230, “Guidelines for Specification of Disposal Site for Dredged and or Fill Material.”

- (d) the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers[.]

Moreover, the applicant must provide “reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” *Id.* 61-101(A)(4). Also, the Department “may require water quality monitoring data” to assess the project. *Id.* 61-101(C)(2). Furthermore, a certification will also not be issued “unless the Department is assured appropriate and practical steps . . . will be taken to minimize adverse impacts on water quality and the aquatic ecosystem.” *Id.* 61-101(F)(6).

The evidence established that there would be minimal direct or indirect cumulative impacts of the proposed activity on water quality. Rather, the required stormwater controls would eliminate runoff into the adjacent wetlands to the maximum extent practicable. Also, the culverts that will be installed will improve the hydrology and water quality of the reconnected wetlands.

Although Petitioners’ water quality experts testified that negative water quality impacts would occur as a result of this project, these witnesses did not perform any sampling or monitoring of current water conditions, provide water quality data specific to this project, or quantify the extent or degree of impacts likely to occur. Instead, the witnesses testified to the general proposition that roads create runoff, which will inevitably impact wetlands.¹⁷ Despite this position, one of Petitioners’ experts agreed that there would be some mitigation of water quality impact from the proposed road because of the use of BMPs.

Similarly, Petitioners presented insufficient evidence to establish that the proposed project would permanently alter the aquatic ecosystem in the “vicinity” of the project such that its functions and values are eliminated or impaired. As an initial matter, the term “vicinity” is not defined within Reg. 61-101, but the South Carolina Supreme Court, in *Murphy v. S.C. Dep’t of Health and Env’tl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012), has defined this term as used in the same context. Using the Merriam-Webster definition, the Court defined vicinity as “‘the quality or state of being near: proximity’ or ‘a surrounding area or district: neighborhood.’” *Id.* at 640, 723 S.E.2d at 195 (quoting Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/vicinity>). The Court concluded that the term must necessarily include

¹⁷ It is noteworthy that Petitioners take the apparently incongruous position that the flow of silt does not runoff from the existing road into the wetlands, but that runoff will flow from the road into wetlands once the road is paved.

more than the immediate footprint of the project, or it would be impossible to obtain a certification under any circumstances, “as the functions and values of that area would always necessarily be eliminated.” *Id.*

Thus, the mere fact that direct fill of wetlands required for this expansion would impact that portion of a possible aquatic ecosystem in the immediate footprint of the road project is insufficient to conclude that the aquatic ecosystem in the “vicinity” of the project is permanently altered such that its functions and values are eliminated or impaired. Here, Petitioners’ experts testified only that the proposed project could degrade adjacent wetlands. However, they did not quantify the extent of any impact, or even whether the net impact would be positive or negative. I find more credible the testimony of Respondents’ experts in water quality and wetlands, who testified that the project would improve both water quality and wetland connectivity.

There is also insufficient evidence to establish a “feasible” alternative to the proposed project. There is no definition of “feasible” within the context of Reg. 61-101 governing the Water Quality Certification. However, the interpretation by an agency of its own regulation is given great deference. *Kiawah*, 411 S.C. at 34, 766 S.E.2d at 718. Based upon the vagueness of the regulation, which arises from a lack of regulatory definition of the term “feasible alternative,” I look to the South Carolina Supreme Court’s adoption of a definition for this phrase in *Murphy*, *supra*. In that case, the Court affirmed the lower court’s determination that the meaning of “feasible,” when used in the context of a Section 401 Water Quality Certification, is equivalent to “practicable,” a term utilized by the Corps of Engineers and by the EPA in its 404(b)(1) Guidelines. 396 S.C. at 643, 723 S.E.2d at 196.

The unrefuted evidence was that none of the alternatives considered by the applicant would satisfy the public need for the project and reduce impacts to the environment. In other words, the proposed project is the only alternative that both satisfies the public need for the project and minimizes impacts to the environment. The only alternative suggested by Petitioners was a plan that called for bridging the length of International Drive. However, bridging was not hydrologically necessary to avoid impacts to water quality since the proposed road included connective culverts. Thus, bridging was not practicable. Moreover, the evidence reflects that though bridging could have satisfied the public need for the project, bridging of this length would cost approximately 20 million dollars, which would be prohibitively expensive and therefore not feasible, or practicable. As with the other alternatives, Petitioners, who had the burden of proof,

offered no direct evidence that bridging was a feasible alternative to the proposed project. I therefore conclude that based on the weight of the testimony, bridging for this project is not practicable and thus does not constitute a feasible alternative.

For purposes of review of the Water Quality Certification, I conclude that there were no feasible alternatives that were practicable, that satisfied the public need for the project, and had less environmental impact than the preferred alternative. Additionally, Petitioners failed to demonstrate that the proposed road project will negatively impact water quality. For instance, Petitioners' experts had limited experience with the road as it exists today and performed no independent study of stormwater impacts or other water quality impacts of the proposed road. They offered no testimony to contradict that of Mike Wooten or Bart Baca, both experts with considerable experience in water quality generally and stormwater in particular, or of Steve Gosnell, an experienced engineer and the chief storm water official for Horry. Wooten and Gosnell have direct, personal experience with the road as it is today and their testimony was that the sediment washing off of the current road after rain is a serious problem. I conclude that the testimony of Wooten, Gosnell and Baca to be competent and entitled to more weight than the opinions offered by Petitioners' witnesses.

The weight of the testimony presented at trial supports a finding that the required storm water protections during road construction will eliminate stormwater-related pollution to the maximum extent practicable. Moreover, the elimination of the current dirt road will remove a source of sediment runoff presently impacting the LOB wetlands, and the engineered culverts designed into the proposed road will, in all likelihood, improve water quality and wetlands connectivity in the immediate vicinity of the roadway.

Regulation 61-101 makes only brief reference to wildlife considerations in subsection (F)(5)(c), which provides that “[c]ertification will be denied if the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species[.]” As a matter of law, the plain meaning of the word “containing” controls this provision, and Petitioners' assertions did not establish that black bears are “contained” in waters or within the scope of the Department's water-quality-certification regulation. To the extent that black bears are within the scope of *any* decision that is the subject of this contested case, their relevance is limited to the Department's CZC decision. As noted in the Findings of Fact, the black bear is the

only species at issue in this case. I conclude that the proposed project does not adversely impact waters containing state or federally recognized rare, threatened, or endangered species.

Further, the wetland to be impacted is not a "special or unique habitat" within the meaning of Reg. 61-101(F)(5)(d). While Petitioners' witnesses repeatedly made reference to LOB as a "special" or "unique" location, there was insufficient evidence that LOB, or Heritage Preserve property, was legally equivalent to a National Wild and Scenic River or any of the other similar designations described in 61-101, or that LOB otherwise met the regulatory meaning of the phrase "special or unique habitat." Based on the testimony of Petitioners' bear expert, LOB is similar in nature to tens of thousands of acres of habitat stretching from North Carolina to Francis Marion Forest, in which black bears periodically range. The "uniqueness" of LOB comes from the high concentration of Carolina Bays within the preserve. The evidence clearly established that those Carolina Bays would not be impacted by this project. More importantly, to the extent LOB could qualify as a special or unique habitat within the meaning of Reg. 61-101, Petitioners failed to carry their burden of proving an adverse impact to that habitat.

Finally, I conclude that the applicant provided reasonable assurances, in accordance with Reg. 61-101(A)(4), that water quality standards would not be violated by the proposed project. These assurances include the design of the stormwater management system and overall design of the road that (1) controls the flow of stormwater run-off into adjacent wetlands; and (2) provides water quality treatment through a series of BMPs.

Therefore, based upon the foregoing, I conclude that the proposed road expansion does not violate the Section 401 water quality regulations, and, therefore, DHEC should issue a Water Quality Certification.

Coastal Zone Consistency Certification

Permits for construction in the coastal zone are governed by what is commonly referred to as the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (2008 & Supp. 2015) (CZMA or the Act), and the policies promulgated in the CMP. The Department's Office of Ocean and Coastal Resource Management (OCRM) is charged with carrying out South Carolina's coastal zone policies and issuing permits in the critical areas. *See* 2 S.C. Code Ann. Regs. 30-4(C) (2011); *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env'tl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 485 (2005).

The CZMA requires the Department to certify all state and federal permits for consistency with the CMP. S.C. Code Ann. § 48-39-80(B)(11) (2008). Although the CMP has neither been codified nor made part of a DHEC regulation, it has been applied and enforced by this State's highest courts. *See Spectre, LLC v. SCDHEC*, 386 S.C. 357, 688 S.E.2d 844 (2010); *S.C. Wildlife Federation v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988) (reversing a coastal zone consistency certification decision due to a violation of the CMP's wetland policies). In *Brown v. SCDHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002), the South Carolina Supreme Court discussed the origin of the CMP, stating in part:

Under the Coastal Zone Act, one of the South Carolina Coastal Council's (OCRM's predecessor) duties was to develop and administer a Coastal Management Program (CMP).

* * *

The CMP was published as a special edition of the State Register ... and is reflected in the "CMP document." "Refinements" to the CMP document appear in the *State Register*. . . These refinements were approved by the General Assembly and Governor.

Id. at 516-17; 560 S.E.2d at 415 (citations omitted).

Petitioners allege that the certification of this project is in error because of lack of consistency with a number of specific provisions of the CMP policies. Specifically, Petitioners set out the following policies in their Prehearing Statement and assert potential error on the part of the Department in relation to each: CMP pp. III-3.I(1), (7)-(9); III-22(1)(a); and IV-4(1).

CMP III-3

The Guidelines for Evaluation of All Projects are described in the opening paragraph on CMP III-3 in the Department's Exhibit 13¹⁸ as "general considerations" to guide the Department in "review and certification of permit applications in the coastal zone." CMP III-3.I(1) states:

The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for OCRM in implementation of its management program, these being:

- a) 'To promote the economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within

¹⁸ The Department's page numbering for the CMP excerpts in its trial exhibits differ from the page numbering of the CMP on the Department's website. The Court uses the page numbering from the Department's trial exhibits where applicable, and uses the page numbering from the Department's website for all other CMP references not contained within the Department's trial exhibits.

the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

b) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations.' (Sections 2(8)(1) and (2), S.C. Coastal Management Act of 1977).

While this is the most general of the policy considerations cited by Petitioners, there was ample evidence, largely uncontested, regarding the economic and social improvement local citizens would receive from this project. The proposed road will significantly improve the health and safety of a substantial part of the County's population by

- allowing quicker access by emergency responders;
- allowing quicker access for them to trauma centers, emergency rooms, and other critical health services; and
- improving firefighting capabilities and hurricane evacuation.

Additionally, the project will improve the current condition of wetlands in the International Drive corridor through the use of numerous culverts. Further, the project will also improve water quality generally by eliminating the existing dirt road as a source of sediment runoff, which is the most serious water quality problem in the area, and by restoring hydrological connections via the installation of culverts.

CMP III-14.I(7) requires the Department to consider "The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." Petitioners suggested that the presence of several curb cuts in the proposed road plan meant that widespread development inconsistent with the character of the area would inevitably take place. However, there is ample evidence that the character of the area includes residential and commercial development, private forested land, and Heritage Trust Property, and that some future development would not inherently be inconsistent with the character of the area. Moreover, the evidence showed that the uplands available for development on the private property tracts adjacent to LOB are exceedingly limited, and that any development impacting wetlands there would be subject to the same or a higher degree of regulatory scrutiny and environmental protection requirements than is required for the proposed project.

CMP III-14.I(8) states:

The extent and significance of negative impacts on Geographic Areas of Particular Concern (GAPCs). The determination of negative impacts will be made by OCRM

in each case with reference to the priorities of use for the particular GAPC. Applications which would significantly impact a GAPC will not be approved or certified unless there are no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environmental impact is minimized.

The LOB is a GAPC specifically because it is a Heritage Trust property managed by DNR. Petitioners, however, have failed to carry their burden of proving a “significant impact” to the GAPC, and could not succeed on this particular claim even if such a significant impact were presumed to exist. There was extensive evidence regarding the public interest in this project, and the lack of feasible alternatives that were less impactful on the environment. Witnesses for Horry explained at length the efforts to minimize any substantial environmental impact. Ample evidence was also presented that the project will use BMPs to minimize sediment and other pollutant runoff from stormwater, will follow the existing alignment of the road wherever possible, and will utilize a reduced right-of-way width from the design recommendations of DOT in order to reduce the wetlands impacts.

Additionally, CMP III-4.I(9) states:

The extent and significance of impact on the following aspects of quality or quantity of these valuable coastal resources:

- (i) unique natural areas - destruction of endangered wildlife or vegetation or of significant marine species (as identified in the Living Marine Resources segment), degradation of existing water quality standards;
- (ii) public recreational lands - conversion of these lands to other uses without adequate replacement or compensation, interruption of existing public access, or degradation of environmental quality in these areas;
- (iii) historic or archeological resources - irretrievable loss of sites identified as significant by the S.C. Institute of Archeology and Anthropology or the S.C. Department of Archives and History without reasonable opportunity for professional examination and/or excavation, or preservation.

Petitioners presented testimony that the LOB is a “unique” area, due in part to the highly concentrated presence of Carolina Bays throughout the Preserve. However, even recognizing this quality, there was insufficient evidence to establish that the project would result in destruction of endangered wildlife, vegetation, or significant marine species. As noted above, Petitioners’ evidence generally reflected that roads create polluted runoff, but they offered no specific data or conclusions regarding the type or degree of impact on water quality standards, nor did those experts

offer any current data on existing water quality at the project site. Conversely, the evidence established that requisite storm water controls would eliminate runoff into the adjacent wetlands to the maximum extent practicable.

LOB is held open to the public for recreational purposes, including hiking, hunting, bird watching, and general enjoyment. To the extent that a portion of the project footprint converts LOB acreage to other uses, I conclude that the mitigation for those direct impacts to wetlands adequately provides replacement or compensation for those losses. In fact, the parties stipulated to the adequacy of the mitigation proposed in this case.¹⁹ Also, the paving of International Drive could improve public access to the LOB rather than disrupting public access.²⁰

With regard to CMP III-3.I(9), there is no evidence in the record pertaining to the project site as a site of significance as identified by the S.C. Institute of Archeology and Anthropology or the S.C. Department of Archives and History. Therefore, subsection (iii) is not relevant to this contested case.

Based on the foregoing, I conclude that the CZC determination in this case is consistent with all applicable portions of CMP Policy III-3(I).

CMP III-22(1)(a)

Petitioners offered no evidence at trial specific to this Policy (which is related to road construction project considerations). To the extent any issues not addressed elsewhere in this decision are contained in this policy, those issues were not raised by the Petitioners at trial and are deemed waived.

¹⁹ The Court considers the loss of wetlands to be an impact to wetlands. Indeed, per CMP III-14.I(9), such a conversion of this land to another use would be an "impact" on the "quantity" of "valuable coastal resources." Moreover, this land need not be replaced if there is "adequate . . . compensation." At the hearing, Petitioners stipulated that Horry's mitigation plan was sufficient and did not offer any evidence challenging the sufficiency of the mitigation plan to adequately replace or compensate for any impacts to the quality or quantity of the wetlands.

²⁰ Though LOB is owned by DNR and is available to the public for recreational purposes, it is not a "public open space" per the CMP, because LOB is designated as a GAPC. See CMP III-73.D ("For purposes of this section, public open spaces means State or local (county or municipal) parks or other open space areas, **other than those designated as GAPCs.**") (emphasis added). But even if it were considered a "public open space," I find that the public's use of the area would not be limited or restricted, but would rather be enhanced through greater access; that character of the area would not be unreasonably disrupted; and that regardless, there were no other feasible alternatives, as discussed above.

CMP IV-4(1)²¹

CMP IV-1(a) provides specific guidance related to GAPCs that are Heritage Trust Properties. This Policy recognizes that the DNR and a Heritage Trust Advisory Board administer these areas, and states that a “major requirement of the [Heritage Trust] program is provision of management criteria. . . .” CMP IV-6. A management plan must be developed for each property in the Heritage Trust.” The priority of uses for Heritage Trust properties, as stated in the Policy, are:

- 1) Uses which are consistent with the management plan developed for each property.
- 2) Uses which allow public enjoyment of the area as long as the primary natural character of the area is not disrupted.
- 3) Uses which are compatible with the area’s wildlife and wildlife management.

CMP, IV-7. The Policy also states that “[p]rohibited uses are any which jeopardize the integrity of the Heritage Trust Program.” *Id.*

The management plan for LOB, discussed previously, states that a primary objective of all Heritage Preserves is to “protect[] the natural or cultural character of [the] area or feature” for which the property was dedicated. There was ample evidence that the project is consistent with the management plan for LOB, but there was insufficient evidence to support a finding that the proposed project would jeopardize the integrity of the Heritage Trust Program.²² An accessible, public road would clearly improve public access to the area over the current, inaccessible dirt road. Finally, as discussed in more detail below, there was evidence that the proposed project was compatible with local wildlife and wildlife management.

CMP III-43 provides the Department with certification guidance related to impacts on Wildlife and Fisheries Management. It states in pertinent part:

The following policies were developed by OCRM in conjunction with the [DNR] for inclusion in the S.C. Coastal Program.

- (1) In the coastal zone, including critical areas, OCRM issuance or review and certification of permit applications which would impact

²¹ Though Petitioners cite to CMP IV-4(1) in their Prehearing Statement, the priority of uses for Heritage Trust properties, of which Petitioners allege a violation, are found at CMP IV-7. Geographic Areas of Particular Concern (GAPCs) are discussed from CMP IV-1 through IV-7, as well as mentioned in CMP III-14.(I)(8).

²² The Court will not consider DNR’s authority, as the author of the protected uses, to implicitly modify its own agreement regarding those uses.

wildlife and fisheries resources will be based on the following policies:

- (a) Activities deemed, by OCRM in consultation with [DNR], to have a significant negative impact on wildlife and fisheries resources, whether it be on the stocks themselves or their habitat, will not be approved unless overriding socio-economic considerations are involved. In reviewing permit applications relative to wildlife and fisheries resources, social and economic impacts as well as biological impacts will be considered.
- (b) Wildlife and fisheries stocks and populations should be maintained in a healthy and viable condition and these resources should be enhanced to the maximum extent possible.
- (c) Critical wildlife and fisheries habitat should be protected and enhanced to the extent possible.

Management Authority

[DNR] is the principal state agency with statutory authority for the protection, management and conservation of wildlife and marine resources, including fish, game, non-game and endangered species. The Memorandum of Agreement between OCRM and [DNR] confirms the cooperative relationship between OCRM and [DNR] which has authority in the establishment, implementation, administration and enforcement of State game, fish, and shellfish laws.

As noted previously, CMP IV-1 also raises wildlife implications to the extent a particular GAPC's priority of use relates to the management of wildlife or wildlife habitat, as LOB's management plan would appear to indicate. However, CMP III-4(C)(I)(8) recognizes that even projects that would pose a "significant impact" to a GAPC can be approved where "no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environmental impact is minimized." This is similar to the provisions of CMP III-43(A)(1)(a) relating to "overriding socio-economic considerations."

It is clear that DHEC consulted with DNR with respect to wildlife, and considered the provisions of the 2013 Agreement as well as DNR's silence on wildlife matters in the comment letters they provided. This Policy clearly requires DHEC to consult and cooperate with the natural resource agency with management authority over wildlife, and does not authorize DHEC to make a unilateral determination with respect to management of wildlife related to certification applications.

As noted above, Petitioners propose the use of bear tunnels to protect bears utilizing LOB. To discern the utility of bear tunnels, the Court must evaluate the potential use of those tunnels. That evaluation will necessarily involve consideration of the presence of bears in the area, their movement pattern, and the potential use of underpasses.

The evidence overwhelmingly reflected that there is no static population of bears living in LOB. Indeed, the bear population has clearly declined and the evidence of the number of bears that have returned is nebulous. The most recent DNR data reflects only 6 male bears and 4 female bears utilizing LOB in 2014. Petitioners' bear expert, Joe Hamilton explained that bears tend to travel throughout North and South Carolina in search of food. LOB is merely a potential food source for the black bear within a travel corridor that stretches from the Green Swamp area in North Carolina into the Francis Marion National Forest in South Carolina. The black bears could range within an area of tens of thousands of acres. Therefore, I find that the limited number of bears that actually utilize LOB as well as the lack of clarity as to how much time the bears spend in LOB makes a determination as to the need for protective measures speculative.

Moreover, not only did Petitioners fail to sufficiently establish the bear population, they did not establish any reliable information reflecting the movement of bears across International Drive sufficient to discern the utility of bear tunnels. Rather, the Petitioners presented evidence that the western area of International Drive contains Carolina Bays, which are attractive to bears. However, that evidence merely infers the **potential** use but says nothing about the number of bears that might use the area; rather, the Court is left to speculate as to how many bears that habitat attracts. Moreover, since the movement patterns were not established, the Court must speculate as to the location at which the bears may cross International Drive to or from the western property, and even the direction from which the bears may enter LOB or the western property.²³ Thus, the Court must again speculate as to the number of bear passageways needed, if any, and the proper location therefor.

Regarding the potential use of underpasses, all witnesses who testified about the bear agreed that "bears will go where they want to go." The evidence thus established that the use of bear tunnels at the project would be minimally effective - possibly as low as 20% effective. In

²³ Petitioners' evidence did reflect that the bears tend to move within their natural habitat. However, that limitation is ultimately vague when considering the possible directions that the bears may move within that continuum. Moreover, that limitation was belied by the bear-roadkill data, which reflected instances of bear movement outside of their natural habitat. The movement outside of their natural habitat makes this determination even more abstract.

fact, bears may not use passageways at all, and especially if they are too long. Moreover, the large number of bear-vehicle collisions on Highway 22, which has a number of crossings under it usable by bears, indicates that tunnels are of limited utility.

Additionally, the underpasses also potentially create adverse consequences. Petitioners' expert explained that the high fencing proposed by Petitioners, which they hope would steer the bears to the tunnel(s), would actually create the potential of trapping bears on the highway. Furthermore, as the land on the other side of the tunnels from the LOB is privately held, there is also no guarantee the owners of this land would allow bears to continually be funneled onto their land through these tunnels. Indeed, during hunting season, which probably will soon be expanded, the tunnels, if effective at all, would be ideal locations for hunters to pick off bears using them.

This evidence strongly suggests that the tunnels are not the optimum solution. Petitioners essentially want Horry to add \$2 or 3 million to the cost of a road project based upon speculation as to bear activity with no reasonable assurance the measures would protect bears or motorists. It is not a proper role for this Court to order such an expenditure be added to the cost of a public project when its effectiveness has not been proven and reasonable alternative safety measures are already in place. At best, the tunnels would give the bears "an option," which they may not choose to take.

On the other hand, the evidence established that the 45-mph maximum speed limit provides a cost-effective means of protecting bears and motorists. Petitioners' contend that the 2010 Agreement, which called for "bear tunnels," is scientifically supported while the 2013 Agreement, which eliminated this requirement, is based upon an unproven theory that lower-speed-limits protect bears. However, Petitioners are incorrect that there is no scientific evidence supporting a shift from the tunnels to a lower speed limit. There was testimonial evidence that the lower bear population in LOB made the need for the tunnels doubtful. Moreover, there was evidence that the better approach was to have a lower speed limit that would prevent most collisions. There was also agreement between witnesses on both sides that the difficulty of fixing locations for tunnels that the bears will use is that bears have a tendency to "go where they want to go." The 45-mph maximum speed limit would allow motorists sufficient time to see a bear in the roadway and avoid colliding with it. Thus, a lower speed limit is a much more practicable means of protecting bears potentially crossing International Drive.

Finally, Petitioners attempted to support the need for bear tunnels based upon the inference that but for the nefarious negotiations between Horry and DNR between 2010 and 2013, the bear tunnel requirement would not have been eliminated from the permit. But Petitioners failed to meet their burden of proof in this respect. As explained above, the change in DNR's position occurred as a result of a significant decline in the existence of bears in LOB. Furthermore, the director of DNR unequivocally denied that any such underhanded dealings took place between Horry and DNR leading up to the 2013 agreement. The Court found his testimony highly credible and persuasive.

Even assuming Petitioners were able to prove a significant negative impact on black bears was likely to occur as a result of this project, they cannot succeed where they have put forward no evidence sufficient to contradict the substantial evidence demonstrating the overriding public need for this road and minimization of impact on the bears. Both the GAPC and Wildlife policies under the CMP state that "overriding public interests" (or "overriding socio-economic considerations") will permit a project to move forward even in the face of negative environmental or wildlife impacts, as long as those impacts were minimized. I conclude that such overriding interests exist in this case and that the impacts will be minimized, and the Department appropriately found that the proposed project is consistent with the CMP.

In sum, Petitioners failed to meet their burden of proving that a significant negative impact on wildlife stocks will result from this project. While Petitioners presented evidence that bear tunnels *might* be used by an unknown number of bears to go under the road and thus reduce the number of bear/vehicle collisions, they failed to adequately establish the number of bears they may potentially cross International Drive to a sufficient degree of certainty to make proper evaluation as to the need for bear passageways. Moreover, Petitioners failed to adequately establish either the effectiveness of such tunnels or, more importantly, that the currently proposed protections – i.e., speed limits and highway fencing – would fail to provide the same or similar protections. On the contrary, there was evidence that the tunnels may be ineffective and that the high fencing necessary to direct bears to the tunnels may itself cause fatal bear strikes by trapping the animals on the roadway.

CONCLUSION

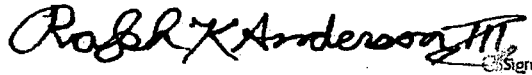
Upon hearing all of the testimony and reviewing the evidence, I find that the actions of the Department in issuing a Section 401 Water Quality Certification and Coastal Zone Consistency

Certification to Respondent Horry County are supported by substantial evidence and the applicable regulatory and statutory requirements.

ORDER

IT IS THEREFORE ORDERED that the Section 401 Water Quality Certification and Coastal Zone Consistency Certification are **APPROVED**. Accordingly, the Department shall issue these certifications for the proposed expansion.

AND IT IS SO ORDERED.


A handwritten signature in black ink that reads "Ralph King Anderson, III". The signature is written in a cursive style. To the right of the signature, there is a small, faint circular stamp with the word "Sign" inside.

Ralph King Anderson, III
Chief Administrative Law Judge

July 7, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

July 7, 2016
Columbia, South Carolina

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SC Court of Appeals