

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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AUG 26 2016

SC Court of Appeals

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

Petitioners,)

vs.)

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

Respondents.)

Docket No. 15-ALJ-07-0404-CC

RECONSIDERATION ORDER

This matter comes before the South Carolina Administrative Law Court (ALC or Court) upon a Motion for Reconsideration filed by South Carolina Coastal Conservation League and South Carolina Wildlife Federation (Petitioners) pursuant to Rule 29(D) of Rules of Procedure for the Administrative Law Court (ALC Rules) asking the Court to reconsider and clarify its Final Order and Decision dated July 7, 2016 (Final Order). Specifically, Petitioners ask the Court to amend its Final Order to address and issue a ruling on two CMP policies: CMP III-14.I(3) and III-73(E)(1). The Court will not issue an amended Final Order but hereby incorporates therein by reference the following discussion for the purpose of further clarifying the Final Order.

CMP III-14.I(3)

During the hearing, there was testimony regarding CMP III-14.I(3), and Petitioners mentioned this provision in their proposed order. However, Petitioners did not mention this provision in their prehearing statement, nor specifically addressed this provision at the hearing,¹ though they presented testimony on negative impacts to water quality, which the Court addressed in its Final Order with respect to 401 Water Quality Certification requirements. I therefore find

¹ The Court did not find a specific discussion pertaining to the specific requirements of CMP III-14.I(3) until the cross-examination of Blair Williams by the South Carolina Department of Environmental Control (DHEC). (Day 2 Tr., p. 61, line 11 to p. 62, line 2). Since Petitioners did not clearly bring the issue to the Court's attention, the Court did not specifically address it.

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that this issue was not properly raised to the ALC. Nevertheless, because Petitioners raised the issue of negative impacts to water quality at the hearing, and that issue is substantially similar to the consideration required in CMP III-14.I(3) (“the extent to which the project will protect, maintain or improve water quality”), the Court will specifically address CMP III-14.I(3) here.²

CMP III-14.I(3) states:

In review and certification of permit applications in the coastal zone, the Coastal Council will be guided by the following general considerations (apply to erosion control and energy facility projects, as well as activities covered under Resource Policies):

- (3) The extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds.

(emphasis added). In this case, as the Court found in its Final Order, culverts that will be installed will improve the hydrology and water quality of the reconnected wetlands. Moreover, as the Court also found in its Final Order, the Best Management Practices (BMP) will also improve water quality. In sum, the culverts and BMPs will both improve water quality, which exceeds the minimum requirements of either protecting or maintaining water quality. Therefore, based on the evidence in the record,³ the Court finds that CMP III-14.I(3) is satisfied.

CMP III-73(E)(1)

Though Petitioners did discuss this provision in their proposed order, here again, this issue was not raised by Petitioner in their prehearing statement. During the hearing, there was testimony relating the criteria set forth in CMP III-73(E)(1), though it was erroneously referred to as “Roman

² The Court also notes that though the Court did not specifically cite CMP III-14.I(3) in its Final Order, the Court discussed water quality in its conclusions of law with respect to other provisions. *See* Final Order, pp. 11-12 (“[T]he 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.**”) (emphasis added); 18 (“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.”) (emphasis added); and 22 (“[T]he 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.”) (emphasis added). In their Reply on Motion for Reconsideration, Petitioners acknowledge that the Court made findings that generally relate to CMP III-14.I(3) and CMP III-73(E)(1). Nevertheless, though neither provision was specifically raised by Petitioners in their prehearing statement or at the hearing, they seek conclusions specifically addressing these provisions.

³ Specifically, the Court relies on the evidence reflected in the testimony of Blair Williams. (Day 2 Tr., p. 61, line 11 to p. 62, line 2).

numeral III-61” (Day 2 Tr., p. 74, line 17 to p. 75, line 3). However, it appears to the Court that this provision was only discussed during the hearing on DHEC’s cross-examination of Blair Williams. Thus, it was not raised as an issue by Petitioners at the hearing or in their prehearing statement. In order for this issue to be subject to reconsideration by this Court, the issue must have been raised by Petitioners at or before the hearing. Therefore, the Court need not address this issue. *See RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct.App.2008) (“[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.”) (citing *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)).

But even if the Court were to address this issue, the Court finds that CMP III-73(E)(1) is satisfied. CMP III-73(E)(1) states: “Project proposals which would require fill or other significant permanent alteration of a productive freshwater marsh will not be approved unless no feasible alternative exists or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized.” Here, for the reasons discussed in the Final Order, there was no feasible alternative to the project at issue. Moreover, there was an overriding public interest. Therefore, Horry County Public Works (Horry), which only had to demonstrate either no feasible alternatives or an overriding public interest, established both. Also, the Court finds that Horry made efforts to minimize any substantial environmental impacts. This minimization of substantial environmental impacts results for the same reasons discussed in the Final Order, specifically where the Court discussed CMP III-14.I(8), which has almost identical qualification language as CMP-73(E)(1): “unless there are no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environmental impact is minimized.”⁴

⁴ The Court addressed feasible alternatives, overriding public interest, and minimization of substantial environmental impacts at the following pages in its Final Order: pp. 10 (“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.”) (emphasis added); 23 (“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.”) (emphasis added); and 29 (“I conclude that **such overriding [public] 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.”) (emphasis added). The Court based the findings above on the same evidence upon which it relied for the findings set forth in this footnote – the testimony of Blair Williams (Day 2 Tr., p. 74, line 17 to p. 80, line 6).

ORDER

IT IS THEREFORE ORDERED that Petitioners' Motion for Reconsideration is **GRANTED** to the extent that the issues discussed herein were not already addressed in the Court's Final Order.

AND IT IS SO ORDERED.

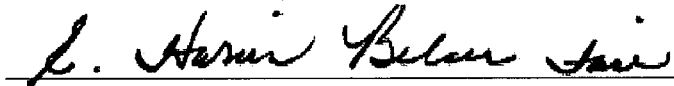
A handwritten signature in black ink that reads "Ralph King Anderson, III". The signature is written in a cursive style. To the right of the signature, there is a small, faint logo that appears to say "eSign".

Ralph King Anderson, III
Chief Administrative Law Judge

July 26, 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

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