

EXHIBIT A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

FINAL ORDER AND DECISION

FILED

July 7, 2016

SC ADMIN. LAW COURT

APPEARANCES: For Petitioner Coastal:

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For Respondent DHEC:

Michael Traynham, Esq.
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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 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 Envtl. 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 Envtl. 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).

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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.

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

E. Harvin Belser Fair
Judicial Law Clerk

July 7, 2016
Columbia, South Carolina

EXHIBIT B

RECEIVED APR 13 2006

South Carolina Department of Natural Resources



John E. Frampton
Director

Office of Chief Counsel
Buford S. Mabry, Jr.
Paul S. League
James A. Quinn

April 11, 2006

Mr. David Helms
Right-of-Way Technician
Horry County Engineering Dept.
P.O. Box 1236
Conway, SC 29528

RE: International Drive (Burroughs Road)

Dear Mr. Helms:

This will acknowledge receipt of your letter dated March 13, 2006, wherein Horry County requests an easement from the Department of Natural Resources in connection with the proposed paving of International Drive. The centerline of International Drive (Burroughs Road) is the property boundary of a substantial portion of the western end of the Department's Lewis Ocean Bay Heritage Preserve.

All property within the Lewis Ocean Bay Preserve has been placed in the corpus of the South Carolina Heritage Trust. The conversion of this private road into a public way will not benefit the preserve in any way. The Department is of the opinion that the paving of International Drive and opening the road to public use will substantially diminish the natural character of the Lewis Ocean Bay Heritage Preserve.

Therefore, please be advised that the Department of Natural Resources must reject your request for the grant of an easement over its property on International Drive. Please contact me if you have any additional questions concerning this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Paul S. League".

Paul S. League
Deputy Chief Counsel

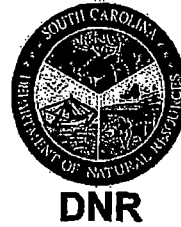
PSL/mwr

cc: John E. Frampton, SCDNR Director
Barry Beasley, Director, Habitat Protection Program
Jamie Dozier, Region IV-Unit A Wildlife Manager

EXHIBIT C

South Carolina Department of

Natural Resources



John E. Frampton
Director

February 25, 2010

Mr. John L. Weaver
Interim County Administrator
P.O. Box 1236
Conway, SC 29528

Office of Chief Counsel
Buford S. Mabry, Jr.
Paul S. League
James A. Quinn
Robert J. Stephenson

Re: Burroughs Road/International Drive

Dear Mr. Weaver:

This letter follows up our recent meeting and the more recent request by S&ME for a permit to enter the Lewis Ocean Bay Heritage Preserve to perform work for the County. For the reasons that follow, the DNR has determined that no new authorization for work on the Preserve will be granted until several issues on mitigation are resolved.

Horry County has been well aware for many years that the DNR's Lewis Ocean Bay property was dedicated as a South Carolina Heritage Preserve. As such, the County also must be aware of DNR's duty to protect the property for the beneficiaries of the State Heritage Trust. Mindful of this requirement, the DNR staff agreed to meet with representatives of the County to determine if a mutually acceptable consensus could be reached that would allow the County to improve Burroughs Road/International Drive, while at the same time protecting the core natural values that lead to the acquisition and dedication of the Preserve land. Initially, we discussed drafting an agreement in principle to be used as a basis for the County to begin its planning for the road improvement. As you are aware, no agreement was ever reduced to writing.

In any event, the DNR provided permission for County contractors to go on the Preserve and undertake surveying and topographic studies. Since agreeing to that intrusion onto the Preserve, we have continued to discuss the matter. In our last meeting on February 1, 2010, the County informed the DNR that its current planning for improvement of the road would affect a substantially larger portion of the Preserve than previously stated. Also, at that meeting the County made another point very clear; that is, Horry County is not willing to fund mitigation measures that may limit the County's ability to improve the road within its current budget. The DNR now is confronted with the likelihood of losing additional dedicated Preserve land, while at the same time, we have no commitment from the County on implementing necessary mitigation measures.

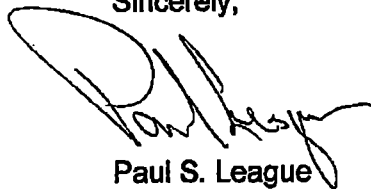
Two recent events have compelled the DNR to take this position. First, the DNR received a request from S&ME engineers to begin a soil boring project along the road corridor. S&ME's description of the work to be done includes land disturbing activities of the sort that are not allowed under State Heritage Trust laws. Second, the DNR recently received a proposal from your political subdivision, the Horry County Solid Water Authority in connection with its request to participate in the State's red-cockaded woodpecker safe harbor program. The Authority's request included the following proposed language, "This Agreement is not intended to and shall not prevent Cooperator from continuing its ongoing planning with other governmental entities with the paving of International Drive as related to Cooperator's properties covered by this Agreement and it is hereby acknowledged that the paving of International Drive as related to Cooperator's properties covered by this Agreement is not in any way impacted or prohibited by the terms of this Agreement." The DNR has not yet responded to the Authority proposal, which already has been publicized in your local press. DNR staff concludes from the above that the County is moving forward towards improving the road regardless of any agreement or understanding on mitigation. Until the DNR has necessary assurances on protection of the Preserve, the DNR cannot permit any new encroachments on the property. We are very much concerned that local officials and the local population will form an unwarranted opinion as to the DNR's willingness to allow improvement of the road over the Preserve land.

An additional point is significant here. The DNR understands that the expert on bear habitat contacted by the County will be visiting the property within the next couple of weeks. The Lewis Ocean Bay Heritage Preserve was created, in part, to protect the population of black bears that range along the Waccamaw River corridor and make extensive use of Preserve lands. Until the DNR and the County reach a consensus on mitigation measures to protect bear passage in the vicinity of the road, the DNR believes the County should place planning for the construction of the road on hold.

The DNR is very willing to meet with you and your bear expert to discuss conditions at the Preserve and your road improvement project. Please let me know if you want to arrange such a meeting.

I look forward to hearing from you on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul S. League". The signature is fluid and cursive, with a large initial "P" and "S".

Paul S. League
Deputy Chief Counsel

Copy: John E. Frampton
Buford Mabry

EXHIBIT D

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

ORDER DENYING STAY

This matter comes before the South Carolina Administrative Law Court (ALC or Court) upon a Motion for Stay filed by Petitioners South Carolina Coastal Conservation League and South Carolina Wildlife Federation (Petitioners) pursuant to Rule 29(E) of Rules of Procedure for the Administrative Law Court (SCALC Rules) and Rule 241 of the South Carolina Appellate Court Rules (SCACR). Petitioners seek a “stay the effectiveness” of its Final Order and Decision dated July 7, 2016 (Final Order) and its Reconsideration Order dated July 26, 2016 pending the resolution of this case on appeal. Petitioners contend a stay will maintain the *status quo* as well as preserve the jurisdiction of the appeal and prevent the matter from becoming moot thereby allowing judicial review of this case on appeal.

On August 30, 2016, Respondent Horry County Public Works (Horry) filed a Response in Opposition to Petitioners’ Motion for Stay arguing that because the United States Army Corps of Engineers (Corps) issued a Section 404 permit on July 22, 2016, authorizing the fill of wetlands as part of the construction of International Drive, the question of whether the two South Carolina Department of Health and Environmental Control (DHEC or Department) certifications were issued properly became moot. Additionally, Horry asserts that whether the Corps properly issued its permit is a question of federal law subject to enforcement by a federal court. Horry also argues that there is an immediate public need for the construction of International Drive, to provide “faster access for residents of Highway 90 to emergency health care and access to them by EMS and fire services.”

FILED

October 10, 2016

SC ADMIN. LAW COURT

A hearing on the Motion for Stay was held at the ALC offices in Columbia, South Carolina on Thursday, September 15.

DISCUSSION

Petitioners argue that the Court should grant a stay in this matter because it will preserve the *status quo*, thereby preventing this case from becoming moot and preserving the jurisdiction of the appeal. Specifically, Petitioners argue that if construction of the road at International Drive is allowed to go forward, twenty-two acres of public heritage preserve, twenty-four acres of wetlands, and wildlife habitat will be lost. They also argue that their constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution would be violated because they would not have an opportunity to have meaningful judicial review in a meaningful time and manner. They further contend that there would be no harm to Horry County if the stay is granted. Horry, on the other hand, argues that the case is already moot and that the State courts no longer have jurisdiction in this matter following the Corps' issuance of a Section 404 permit on July 22, 2016. It also argues that there is an immediate public need for the construction of International Drive, including "faster access for residents of Highway 90 to emergency health care and access to them by EMS and fire services," and that residents of the County would be harmed if these services were not available.

After the issuance of a decision by the ALC, the decision is generally not subject to an automatic stay pending appeal. See S.C. Code Ann. § 1-23-610(A)(2) (Supp. 2015) ("Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision."). However, except where extraordinary circumstances make it impracticable, upon a petition to stay its decision, the ALC must determine whether its Final Decision should be stayed pending appeal. That determination is made by considering "whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. In this case, that determination has been complicated by the action of the Federal Government. Thus, the role of the States under the federal law in this area is limited to providing input during the process (if they choose to) by either issuing a 401 Certification and CZM Certification, or an objection. Concerning water quality certification under Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341(a)(1) provides in pertinent part:

Any applicant for a Federal license or permit . . . shall provide the licensing or permitting agency a certification from the State. . . If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

The corresponding regulation, 33 C.F.R. § 325.2(b)(1)(ii), echoes this statutory provision by stating the following:

No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

Concerning coastal zone consistency certification under the federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(3)(A) provides in pertinent part:

[A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone . . . shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. . . At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is

consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

The corresponding regulation, 33 C.F.R. § 325.2(b)(2)(ii), echoes this statutory provision by stating the following:

If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

Here, after the Court issued its Final Order and Decision, the Federal Government decided to issue a Section 404 permit.¹ Though the Federal Government provides the States an opportunity to participate in the federal permitting process under the CWA and CZMA, as set forth in the applicable statutes and regulations set forth above, the Federal Government has restricted the States' participation in this process to either concurring with certification by issuing a 401 Water Quality Certification and CZM Certification, or doing nothing at all for a period of one year and six months, respectively, or objecting to certification. A State is given no authority under federal law to review permitting decisions made by the Federal Government after the State has issued either an objection or certification. Therefore, it would fly in the face of our system of federalism, specifically under the Supremacy Clause in Article VI, clause 2 of the United States Constitution,

¹ It is unclear whether the Corps waited for this Court to render a decision or whether it waited for a year to expire following DHEC's issuance of its 401 Water Quality and CZM Certifications. Therefore, since neither party provided evidence of the Corps' intent in waiting to issue the permit, the Court will not consider it.

to allow a State court to stay a project authorized by the Federal Government; and Petitioners have provided no authority to the contrary.²

Indeed, DHEC took a similar position in the Memorandum on Effect of a Stay that it issued in this matter. This Court finds that DHEC's position properly follows the plain meaning of the federal law regulating the issue of a 404 permits. Moreover, even if the Court were to find the issue ambiguous, the Supreme Court has clearly established that this Court must give deference to the Department's interpretation of its regulations. *See generally Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envtl. Control*, 411 S.C. 16, 32-34, 766 S.E.2d 707, 717-18 (2014) (emphasizing the importance of agency deference where any ambiguities exist); *see also id.* at 33-34, 766 S.E.2d at 718, *quoting United States v. Moore*, 95 U.S. 760, 763, 5 Otto 760, 24 L.Ed. 588 (1877) *in Read Phosphate Co. v. S.C. Tax Comm'n*, 169 S.C. 314, 168 S.E. 722 (1933) ("The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.' "). In *Kiawah*, the Court explained that "the deference doctrine properly stated provides that 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. The ALC is to defer to an agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *See id.* at 34-35, 766 S.E.2d at 717-18 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

In its Memorandum, DHEC acknowledged that the Department has only indirect permitting authority as it relates to water quality and activities within the Coastal Zone (except for critical areas, which are not at issue here). Rather, it is federal law that allows the Department to issue certifications as prerequisites to the issuance of a federal Section 404 permit, which DHEC does pursuant to S.C. Code 8 S.C. Code Ann. Regs. 61-101 (2012) and S.C. Code ann. § 48-39-80(B)(11) (2008). It is also federal law that requires Horry County to first obtain a federal Section 404 permit before beginning construction, and it is only this permit that authorizes the activities at issue to move forward.

Moreover, the implications of the matters decided by the ALC bear only upon its subsequent influence upon the actions of the Corps. However, though the Corps has the ability to

² Indeed, at the hearing, Petitioners agreed that any order from this Court would have no effect on the federal government's issuance of the Section 404 permit.

reevaluate its permitting decision, as noted in Special Condition 5 of the 404 permit, there is no language in the permit or federal law that requires the Corps to reevaluate – or even suggests that the Corps would reevaluate – its permitting decision based on a State court’s stay of the Department’s certification decisions. Indeed, Petitioners have provided no evidence of the Corps’ position with respect to any stay that this Court would issue. Thus, the effect of a stay on the Federal Government’s permitting decision would be speculative at best.

In addition, an appeal of the Court’s decision is limited by the same subject matter jurisdiction of the Court. The need to “preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot” is made in light of this jurisdiction. Here, however, the relief that could occur as a result of the review of this State’s certification has already been rendered moot because the Court’s decision would not have any effect in redressing Petitioners’ injury. The purpose of Rule 241, SCACR is to stay activity that this Court’s order would authorize. In this case, the Corps apparently considered the State’s role in the permitting process to be completed at this point (i.e., the Federal Government has preempted South Carolina’s involvement beyond the point of issuing a concurrence – barring a change in the project), and thus issued the Section 404 permit. Therefore, any stay issued by this Court would not stay the activity authorized in this case because this Court’s Final Order did not authorize that activity; the Court cannot stay what it never authorized. This Court merely approved certifications that had, upon DHEC’s prior issuance, constituted South Carolina’s concurrence. However, it was the Federal Government, through the Corps of Engineers, that authorized the construction of the road by issuing the Section 404 permit.³ This intervening event rendered this matter moot, and thus the purpose of Rule 241, SCACR would not be served by any stay issued by this Court. *See S.C. Ret. Sys. Inv. Comm’n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) (“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.”).

³ A decision by this Court would not redress the injury alleged by Petitioners because it would have no effect on the Federal Government’s decision to issue the permit allowing the activity that would purportedly cause the harm that Petitioners allege. Even had this Court not rendered a decision, the Corps could still have exercised its authority to issue the Section 404 permit, since more than one year had elapsed since DHEC issued the certifications, resulting in a conclusive presumption concurrence from South Carolina pursuant to 33 C.F.R. § 325.2(b)(1)(ii) and (2)(ii). Furthermore, at best, a decision by this Court would still have no effect on the project because the Federal Government has already exercised its prerogative to issue the Section 404 permit, authorizing the project to proceed and affording no redress to Petitioners from a State court.

Therefore, the only remaining issue is whether the ALC can take any action that will preserve the jurisdiction of Petitioner's appeal. Indeed, the issue of the soundness of the ALC's decision is still subject to review. But the only action the ALC could take is to stay the matters decided in its Final Decision. However, based on the federal statutory and regulatory framework, as well as the principles of federalism, it appears that an appeal of this matter, in its current state, will not provide any meaningful review of the Federal Government's issuance of a Section 404 permit; and there has been no evidence provided to the contrary. In this light, a stay of the Court's decision would not have any effect upon the appellate court's review of this matter. Indeed, it was disclosed at the hearing that Petitioners have recently filed a complaint in the United States District Court, Charleston Division seeking an injunction in this matter, which is the appropriate forum to resolve this issue since it is the District Court that has the jurisdiction to consider whether the issuance of the Section 404 permit was proper.

ORDER

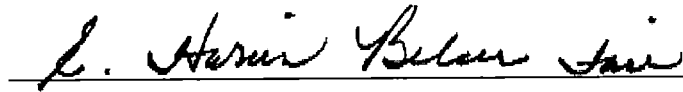
IT IS THEREFORE ORDERED that Petitioners' Motion for Stay is **DENIED**.
AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

October 10, 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).

A handwritten signature in cursive script, reading "E. Harvin Belser Fair", is written over a horizontal line.

E. Harvin Belser Fair
Judicial Law Clerk

October 10, 2016
Columbia, South Carolina

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Coastal Conservation League and
South Carolina Wildlife Federation,

Plaintiffs,

vs.

United States Army Corps of Engineers,
Charleston District, and Lt. General Todd
T. Semonite, Lt. Colonel Matthew Luzzato;
US Environmental Protection Agency;
Gina McCarty; Heather McTeer Toney,
Horry County,

Defendants.

Civil Action No. 4:16-CV-3008-RBH

CONSENT ORDER

This matter comes before the Court on motion of the Plaintiffs for a Temporary Restraining Order. At the request of the Court, the Plaintiffs and Horry County explored the possibility of an agreement obviating the need for a hearing on that motion. As a result of that effort, the parties have agreed to certain limitations on work by Horry County within the project right of way for the project at issue, paving and improvement of International Drive in Horry County. With the consent of the parties, it is hereby ordered that pursuant to F.R.C.P 65(b), the County is enjoined from the following actions until such time as this Order is dissolved:

1. Performing any more filling, physical work or alteration in any wetlands in the project right of way which have not been filled as of the date of the issuance of this Order;
2. Removing or clearing any tree in the project right of way over 6" DBH. The County may remove damaged, unhealthy trees if they pose a safety hazard to persons or property; or

3. Performing any further physical work, alteration, clearing or filling on the Lewis Ocean Bay Preserve side of the project right of way.

By agreement of the parties, posting security by Plaintiffs is waived for the purposes of this Order.

The parties do not by consenting to this Order waive any position or argument or make any admission related to the factual and/or legal issues to be addressed in this case.

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

September 23, 2016
Florence, South Carolina

WE CONSENT:

s/ Amy E. Armstrong (ID # 9625)

S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, S.C. 29585
Attorneys for Plaintiffs

s/ Stan Barnett (ID # 5306)

P.O. Box 1542
Mt. Pleasant, S.C. 29465
Attorney for Horry County

EXHIBIT F

Times Change
Values Don't



A Tradition
You Can Trust
Since 1903.



BREAKING

Solicitor: Gilbert Road death appears to be self defense



http://www.myhorrynews.com/news/local/carolina_forest/article_50cc8572-6886-11e6-99bc-3fdda66696c.html



PREVIOUS

Albini transfers his love of animals into children's books



TOP STORY

Horry County begins work on International Drive

From staff reports info@myhorrynews.com Updated Aug 22, 2016



Horry County won't wait for an appeal.

County officials on Monday announced they are moving forward with the construction of International Drive, despite a court challenge from two conservation groups. Crews began working on the road Friday.

"After lengthy discussions with county staff and legal counsel, Horry County began construction on International Drive," the county said in a news release. "County construction crews began clearing trees and vegetation along the right-of-way corridor of International Drive in order to get the road passable for construction vehicles in the interim. This work is estimated to take approximately 40 days. Horry County will contract the construction and paving operations of International Drive by a request for proposal that is estimated to be publicized around the first of October. Once a contract is awarded the paving operation are estimated to take 8-12 months, but a final date will not be known until a contract is awarded."

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The project in question is the paving and widening of a nearly 6-mile section of road between Carolina Forest and S.C. 90.

Residents have long argued that extending International Drive will benefit their community by providing another evacuation route as well as quicker access to medical facilities.

Although Horry County voters approved the road work in a 2006 sales tax referendum, International Drive is one of the last unfinished projects from the county's road-building program, RIDE II.

Construction was supposed to begin in 2015, but environmental objections put the brakes on the project.

Although conservationists challenged the DHEC certifications in court, last month a judge ruled in the county's favor. The conservationists vowed to appeal the decision, meaning the legal process would be delayed for at least a year.

County officials, however, opted to begin work anyway.

"There are always risks, but this is certainly an acceptable risk we are willing take," Horry County Chairman Mark Lazarus said in the release. "Now that the judge ruled in favor of SC DHEC Sec 401 (water quality) permit, this allowed the U.S. Army Corps to issue their Sec 404 (wetland fill) permit to us on July 22, 2016. We now have all the permits in our possession that allows us to begin construction on this road. There is the potential that a federal court action could be filed to stop us from paving the road, but again we are willing to take that risk. We have the money in the bank and all the required permits for this project, and we are going to get this road built."

The conservation groups plan to ask a judge to issue an "automatic stay" to prevent the county from proceeding with the project during the appeal process, said Nancy Cave, north coast director for the Coastal Conservation League, one of the two groups pursuing the court action (the other is the S.C. Wildlife Federation).

Before Monday's announcement, Cave said she had heard rumblings about the county's plans.

"I wasn't completely surprised by it," she said.

EXHIBIT G

The Supreme Court of South Carolina

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2013-001521

Lower Court Case No. 2009AL0700069

ORDER

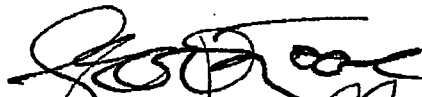
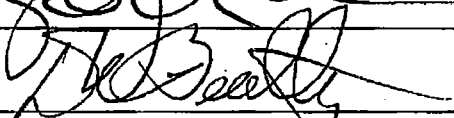
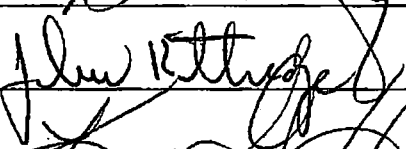
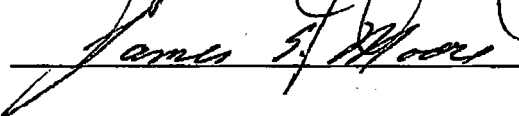
We granted a petition for a writ of certiorari to review the court of appeals' decision in *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013), in which the court of appeals affirmed certifications for certain construction activities (including land disturbance and storm water discharges) under a state-wide general permit. Essentially, Petitioners' contention is that Respondent Roper Pond, LLC, (Roper) does not qualify for coverage under a state-wide general permit, and therefore, Roper's construction activities are not authorized to proceed.

At oral argument before this Court, the parties conceded Roper's construction project proceeded and was completed during the pendency of this matter.¹ As all

¹ "[T]he serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision." S.C. Code Ann. § 1-23-610 (A)(2) (Supp. 2014); *see also* S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2014) ("A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.");

construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated.

Accordingly, we dismiss this matter as moot, as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide general permit).² See *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions." (citing *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))).

	_____ C.J.
	_____ J.
	_____ J.
	_____ J.
	_____ A.J.

Columbia, South Carolina

April 9, 2015

Rule 241(b)(11), SCACR (noting that, in appeals from administrative tribunals, the service of a notice of appeal does not automatically stay matters decided in orders).

² As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate post-construction complaints and the prosecutorial discretion to initiate regulatory enforcement proceedings for any violations of applicable law.

cc:

W. Thomas Lavender, Jr., Esquire

Joan Wash Hartley, Esquire

Amy Elizabeth Armstrong, Esquire

Stephen Philip Hightower, Esquire

Jacquelyn Sue Dickman, Esquire

James Blanding Holman, IV, Esquire

The Honorable Jana Shealy

EXHIBIT H

The South Carolina Court of Appeals

Upstate Forever, South Carolina
Native Plant Society, and South
Carolina Wildlife Federation, Appellants,

v.

South Carolina Department of
Health and Environmental
Control and Greenville Water
System, Respondents.

The Honorable John D. McLeod
Administrative Law Court
Trial Court Case No. 2009-AL-07-00226

ORDER

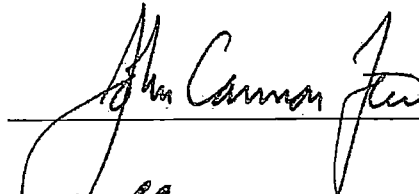
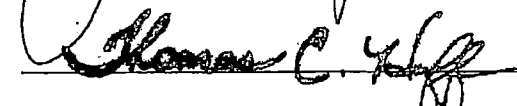
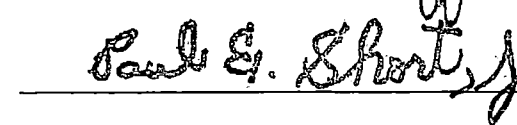
Appellants appeal an order from the administrative law court (the ALC) affirming the decision of the Board of the Department of Health and Environmental (the Department) and granting Respondents' motion for summary judgment. Respondents have filed a motion to dismiss this appeal as moot because no justiciable controversy exists due to the completion of the project. Additionally, Respondents argue Appellants' sole issue on appeal, whether the Department has the authority to impose minimum stream flow requirements as a condition of its water quality certification permits, is a purely hypothetical question that does not fall within any of the mootness exceptions. However, Appellants argue this appeal is not moot because this court can provide effectual relief and a cognizable remedy. In support, Appellants argue the Department has the discretion to establish any limitations on certification permits, the ability to modify the conditions of the certification, and the authority to mandate protections for navigable waterways in South Carolina. Moreover, Appellants asserts that even if

this court determines the appeal is moot, the public importance exception applies because the consequences of a low flow stream are of global significance.

Generally, this Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* at 567-68, 549 S.E.2d at 596. However, the public importance exception to mootness permits a court to consider moot issues if "the issue . . . present[s] a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) (citation and quotation marks omitted).

After careful consideration of the parties' filings, we dismiss this appeal as moot. Furthermore, we find the public importance exception does not apply to this appeal. Moreover, because we dismiss this appeal, we need not address Trout Unlimited's motion to file an amicus curiae brief.

IT IS SO ORDERED.

 C.J.
 J.
 J.

Columbia, South Carolina

cc: Amy E. Armstrong, Esquire
Eugene C. McCall, Jr., Esquire
Randolph R. Lowell, Esquire
Chad N. Johnston, Esquire
Stephen Philip Hightower, Esquire
David D. Armstrong, Esquire
Frank S. Holleman III, Esquire
Nicholas S. Torrey, Esquire

FILED
5/25/12 

EXHIBIT I

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

COASTAL CONSERVATION LEAGUE AND)
SOUTH CAROLINA WILDLIFE)
FEDERATION,)

No. 2:16-cv-03008-RBH

Plaintiffs,)

vs.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, CHARLESTON DISTRICT; LT.)
GENERAL TODD T. SEMONITE, in his official)
capacity as Chief of Engineers, U.S. Army Corps)
of Engineers; LT. COLONEL MATTHEW)
LUZZATTO, in his official capacity as District)
Engineer, U.S. Army Corps of Engineers,)
Charleston District; UNITED STATES)
ENVIRONMENTAL PROTECTION AGENCY;)
GINA MCCARTY, in her official capacity as)
Administrator of the U.S. Environmental)
Protection Agency; HEATHER MCTEER)
TONEY, in her official capacity as Regional)
Administrator, Region IV, U.S. Environmental)
Protection Agency; and Horry County,)

Defendants.)

DECLARATION OF DANIEL TUFFORD

I, Daniel Tufford, declare as follows:

1. I live at 4714 Meadowood Road, Columbia, South Carolina.
2. I have an undergraduate degree from Indiana University in Biological Sciences with an emphasis in Ecology. In 1996 I received my PhD from the University of South Carolina in Environmental Health Sciences where my dissertation research was related to hydrology and specifically water quality in South Carolina. Since that time, I've been on

the research faculty of the University of South Carolina, first in the Department of Environmental Health Sciences, then in the Department of Biological Sciences, and currently in the Baruch Institute. My research has focused on hydrology, water quality, aquatic system ecology, watershed ecology, and wetlands. A great deal of my research has been on various kinds of wetlands, mostly focused on the Coastal Plain of the Carolinas.

3. I was a co-investigator on a team grant from the US Environmental Protection Agency in which we studied several aspects at length of geographically isolated wetlands on the Coastal Plain of North and South Carolina. I've also done extensive work in tidal freshwater marshes along the coast of South Carolina, as well as Georgia and North Carolina. I have done significant watershed scale work in the Waccamaw River Watershed, where the disputed project is located, and the nearby Pee Dee River Watershed, looking at stream flow and hydrology, as well as evaluating climate impacts on both hydrology and water quality in those areas.
4. I have utilized aerial photography in my wetlands assessment research, as well as satellite imagery and geographic information system modeling. I have also undertaken quality assessments of the wetlands that I am studying, including looking at the subsurface hydrology and the related water quality as well as habitat issues for those wetlands.
5. Wetlands provide several valuable functions, including the filtering of water; supporting aquatic ecosystems; providing wildlife habitat, including for breeding, nesting, foraging and denning; and serving as a buffer for flooding during heavy rain and storms.

6. Hurricane Matthew was a strong reminder of the flood buffering functions of wetlands. Where wetlands are filled and replaced with impervious surfaces, as proposed for the paving of International Drive, flooding can be exacerbated in the area where such filling occurs. Impervious surfaces, such as a paved road, increase the risk of flooding during storm events because they do not buffer stormwater or allow it to be filtered into the groundwater system, instead causing it to runoff the impervious road surface. When such impervious runoff occurs, and specifically on a roadbed, the runoff carries pollutants associated with vehicular travel.
7. Horry County contains a significant amount of paved and impervious surfaces. During storm events, like Hurricane Matthew, Horry County experienced significant flooding along Highways 90 and 501 according the Declarations of Randall Webster. (Horry County Response, Exhibit 2). There is ample scientific basis to conclude that the flooding in Horry County would have been lessened if more wetlands had been preserved rather than converted into impervious surfaces. Similarly, if 5.6 miles of 5-lane highway is paved, including the filling and elimination of 24 acres of wetlands and their attendant flood buffering functions, my opinion to a reasonable degree of scientific certainty is that flooding in that area would be exacerbated.
8. Contrary to the assertion that a wetland can easily be restored (Horry County Response, Exhibit 5, Declaration of Britt Feldner), the harm caused by filling in wetlands is extremely difficult to remedy. While the fill can be removed, the area graded and vegetation replanted, it is extremely difficult to undo environmental damage of this sort and to completely restore a wetland to its pre-fill state of functions and values.

Ecosystems take time to develop natural processes that give them their wetland characteristics and which help them provide their functions. Hydrology and habitat take time to develop. While one can reset the system to create the conditions that will allow a wetland to restore itself, it is a time consuming process that would almost certainly take greater than five years before coming close to performing pre-fill functions and values.

9. Simply because some activities toward filling wetlands have occurred does not mean that a wetland is no longer a wetland, nor that a wetland is no longer performing any wetland functions. Even though wetlands have been cleared by machines, I would expect that at a minimum those cleared wetlands continue to provide some storm buffering and water filtration functions, and perhaps aquatic habitat, although to a lesser degree than if completely unaltered. Similarly, even if some fill material has been placed in a wetland, it does not necessarily mean that the wetland completely ceases to be a wetland or completely ceases to provide any functions.
10. Wetlands that have had either mechanized clearing and/or some fill would certainly be impacted wetlands and their functions impaired, but not all functions are necessarily eliminated. The inquiry is dependent upon the nature of the specific wetland and the extent of the fill activity. For example, if wetlands are cleared but the elevation remains constant and they are left undisturbed they will revegetate over a period of time. Depending on magnitude of impact, some wetland functions may be completely destroyed, but it is impossible to say that a wetland is no longer a wetland simply because the County has taken some actions toward filling that wetland. Some activities that are less than a complete filling of the wetland may result in diminishing all functions

or may result in complete loss of some functions (such as habitat), but retention of other functions (such as flood buffering).

11. According to the Corps, there are 5 wetland areas, including the largest wetland area, Wetland #19, which cross the entire road. (AR 408). The functions and values lost by filling these areas of natural wetland connectively cannot be replaced with culverts. This is because while culverts will maintain some hydrologic connection between the wetlands, they largely fail to maintain the habitat connectivity that is vital for the aquatic ecosystem, movement of wetland species, wildlife habitat and water quality functions. Culverts cannot adequately remedy the damage to wetlands and water quality.

12. The existing dirt road does not pose water quality concerns due to sedimentation.

Because there was no vehicular traffic prior to construction, the road is not used for vehicular traffic and thus is not disturbed. While some small amounts of sediment may flow into adjacent wetlands, I observed minimal, if any, degradation of those wetlands as a result of sedimentation from the dirt road. In fact, one of the important functions of wetlands is to filter sediments and other pollutants. Conversely, paving the road and the pollution associated with runoff from vehicular traffic almost certainly poses a much more significant and serious threat to water quality than the dirt road.

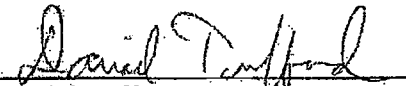
13. There is no scientific basis upon which one could conclude that paving a 5 lane road, including filling and eliminating 24 acres of wetlands at this site, would improve water quality.

14. I have reviewed the photographs attached to the Plaintiffs' motion for contempt. The photographs show very dark soil, which is an indicator of wetlands soils. More

importantly, comparing the aerial photographs to the permit drawings, it is clear that fill material is being placed in areas that have been delineated as wetlands (specifically Wetland #19) by the Corps of Engineers. As more and more fill is placed in the wetlands the harm and damage to those wetlands becomes greater and greater. Once the wetlands are completely filled then there will be a complete loss of all functions, but until complete fill has occurred most of the wetlands will continue to provide some level of function, albeit to varying degrees depending on the nature and extent of those fill activities.

15. It is not scientifically defensible to make a blanket categorical statement that because some fill activities have occurred all wetland functions and values are lost.
16. The large wetland depicted in the exhibits attached to the Plaintiffs' motion for contempt, Wetland #19, is classified as an undisturbed, fully-functioning wetland. The photographs demonstrate that Wetland #19, which is over 8 acres, has not been completely filled and converted to uplands. Instead, the photographs depict dump trucks hauling fill material and spreading it around in Wetland #19.
17. Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct to the best of my professional opinion, knowledge and belief.

Signed on the 25th of October, 2016.


Daniel Tufford