

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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Appellate Case No. 2016-001758

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**RECEIVED**

DEC 05 2016

**SC Court of Appeals**

South Carolina Coastal Conservation League and South Carolina  
Wildlife Federation ..... Appellants,

vs.

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

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**APPELLANTS' REPLY IN SUPPORT OF  
PETITION FOR WRIT OF SUPERSEDEAS**

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Horry County Public Works ("Horry County") has filed a Return opposing Appellants' petition for an order imposing a supersedeas, pursuant to S.C. Appellate Court Rule 241(c), of matters decided in the Final Order and Decision on appeal from the administrative tribunal. Horry County's Return is almost entirely silent on the arguments presented in Appellants' petition, instead focusing on a single legal proposition: that the Coastal Zone Consistency Certification ("CZC Certification") and Clean Water Act Section 401 Certification ("401 Certification") issued by Respondent South Carolina Department of Health and Environmental Control ("DHEC") are meaningless and ineffectual in light of the fact that a federal Clean Water Act permit has been issued. In short, Horry County believes that this appeal is moot and that neither this Court nor DHEC have any legal authority over its road construction project.

In advancing such proposition, Horry County casually states legal conclusions that would fundamentally alter the landscape of environmental law and litigation in this state, but fails to cite a single case where such conclusions have been adopted or applied. That part is worth restating: none of the core principles relied upon by Horry County have ever been enunciated or adopted by a South Carolina appellate court. On the contrary, as will be demonstrated in this Reply, those principles have been repeatedly rejected by our courts, either implicitly or explicitly, and they are contrary to a plain reading of state law. Cooperative federalism is a keystone of environmental law. That is, while our major environmental laws are enacted on a federal level, those laws are most often effectuated and enforced cooperatively at the federal, state and local levels. That is true, not just of the two environmental laws implicated in this appeal, but across the spectrum of the field of environmental law. The legal conclusions expounded repeatedly in Horry County's Return strike at the heart of this relationship, leaving the state's role in this collective environmental regulatory system as a hollow shell. For these reasons and the ones that follow, this Court should reject the unsupported conclusions in Horry County's Return and grant supersedeas so as to preserve the meaning of this appeal.

***The South Carolina Coastal Management Program***

One of the fundamental weaknesses in Horry County's Return is that it focuses almost exclusively on the 401 Certification, brushing over the fact that this case is just as much about the CZC Certification issued under South Carolina's Coastal Management Program ("CMP"). By shifting the focus in this manner, Horry County is attempting to obscure the failures in its mootness argument that are more readily apparent when viewed in the context of the CZC Certification.

Horry County makes much of its position that our state's 401 certification is derivative of the federal Clean Water Act, meaning that our legislature has not enacted a "standalone" or "independent" state statute regulating wetland fills. (Return, p. 6). However, this cornerstone of the County's mootness argument is eviscerated in the context of the CZC Certification, as such approval flows directly from an independent state statute that spawned a standalone state regulatory program. In 1978, the South Carolina legislature passed our Coastal Tidelands and Wetlands Act, S.C.Code Ann. § 48-39-10 *et seq.*, which required DHEC to develop a comprehensive coastal management program (the CMP) for our state's "coastal zone." See S.C.Code Ann. § 48-39-80, Spectre, LLC v. S.C. Dep't of Health & Env'tl. Control, 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010). The Act further required DHEC, in developing the CMP, to create a system whereby it reviews all state and federal permits for compliance with our state coastal policies.<sup>1</sup> Id. In other words, the CZC Certification at issue in this case is the product of an approval process created by state law (S.C. Code Ann. § 48-39-80), with such approval being granted or denied based entirely on state-level program and policies (the CMP). In that way, the CZC Certification is in no way derivative of the federal permit at issue in this case (the Section 404 permit issued by the Army Corps of Engineers). Indeed, our Supreme Court has previously held exactly that. See Spectre, LLC, 386 S.C. at 368, 688 at 850 (rejecting the ALC's finding

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<sup>1</sup>Section 48-39-80 states that: "The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter." Under subsection 80(B)(11) the state has "*the authority to review all state and federal permit applications in the coastal zone*, and to certify that these do not contravene the management plan." (Emphasis added). DHEC's interpretation of these state law provisions resulted in the CZC Certification requirement. Spectre, LLC, 386 S.C. at 360, 688 S.E.2d at 845.

that a CZC Certification is only required for properties over which the Corps has Clean Water Act jurisdiction and instead holding: “The language of the CMP sets forth broad jurisdiction over the coastal zone, thereby supporting DHEC’s interpretation of the CMP as applicable to the Spectre site.”).

Horry County argues that, because the certifications at issue in this appeal are not “independent” or “standalone,” those certifications are now moot, and any modifications to those certifications would be ineffective, given that the Corps has issued its federal Section 404 permit. Especially as it relates to the CZC Certification, Horry County’s mootness argument runs counter to the legislative history and plain statutory language of South Carolina’s independent coastal law and program. Again, no South Carolina court has ever reached the legal conclusion advanced by Horry County, nor issued a holding that would directly support such conclusion. The CZC Certification at issue in this appeal is not mooted by issuance of the federal permit.

Not only does Horry County argue that issuance of the federal permit moots the CZC Certification, but it further argues that the passage of six months also renders such approval moot. (Return, p. 5). In other words, Horry County argues that CZC Certification is automatically satisfied as of six months after application, even if that Certification is under judicial review. In so arguing, Horry County misapprehends a deadline for state *action* on a CZC Certification as being a deadline for *final resolution* of that Certification. Such misapprehension is not supported by the plain statutory language upon which Horry County relies, nor this state’s well-established history of CZC Certification appellate review.

Horry County’s argument on this point is based on the federal Coastal Zone Management Act, which provides a time limit for states to take action on certifying the consistency of federal

permits with state coastal law.<sup>2</sup> Under the federal CZMA, states are required to notify the federal permitting agency as to whether “the state concurs or objects to the applicant’s certification.” 16 U.S.C. § 1456(c). Such notice must be provided within six months, or certification is presumed: “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.” *Id.* (emphasis added).

Horry County erroneously interprets this language as creating a hard time limit on state jurisdiction. In other words, Horry argues, if CZC Certification is not finally resolved within six months, the “shelf life” for that Certification expires, and it is no longer necessary or relevant. (Return, p. 7). Starting from a practical perspective, such interpretation would render CZC Certifications virtually beyond challenge in a court of law, as any pending legal challenge would be rendered moot shortly after its initiation. Indeed, the prospect of securing an agency decision and a court decision on a CZC Certification within six months is a practical impossibility. What’s more, the plain language of 16 U.S.C. § 1456(c) states that some decision from the state is required within six months in order to avoid the presumption of certification, but once that initial decision has been made, nothing in the statutory language suggests that such decision cannot be challenged or modified beyond the six month period. In other words, the language upon which Horry County relies is written merely as a limitation on state inaction, meant to insure prompt decision making, not as an impenetrable barrier to state authority. The language

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<sup>2</sup>As an initial matter, as explained above, the CZC Certification derives standalone authority from state law, and Horry County has not explained that the federal language it cites controls or overrides the state program. In fact, South Carolina has been delegated authority to implement its state CZMA and the CMP under the federal CZMA.

requires initial state action within six months; it does not establish a firm “shelf life” for state jurisdiction.

The fallacy in Horry County’s argument is readily apparent in the fact that our Courts have regularly considered the propriety of CZC Certifications well after the expiration of six months and have indeed ordered modification of those Certifications years after the initial application. For example, in Brown v. S.C. Dep’t of Health & Env’tl. Control, the applicant sought CZC Certification of a stormwater permit in September 1995, and the Certification was issued by OCRM within the six month time frame. 348 S.C. 507, 510, 560 S.E.2d 410, 412 (2002). The Certification was then challenged through the administrative law court and multiple appellate steps, finally being reviewed by our Supreme Court over six years later, at which point the Certification was remanded to the agency for further consideration. Id. at 522, 560 S.E.2d at 418. It was the initial DHEC decision, and not the subsequent judicial review or modification, for which the six month limitation was relevant. The previously cited case of Spectre, LLC v. S.C. Dep’t of Health & Env’tl. Control likewise involved reversal of a coastal zone consistency certification years after the decision was initially issued. See 386 S.C. 357, 688 S.E.2d 844 (2010). On a broader level, that case also stands for the independence and significance of the CZC Certification as a state review process, apart from any federal authority. See Id. at 368, 688 at 850. The overall message of Spectre is entirely inconsistent with the tightly constrained state role for which Horry County advocates in its Return. A final example, from a case decided by this Court just last month, is Bruning v. S.C. Dep’t of Health & Env’tl. Control & Cat Island POA, which similarly involved the scenario of a CZC Certification accompanying a Clean Water Act permit. See Appellate Case No. 2014-002010, 2016 WL 6247005 (S.C. Ct. App. Oct. 26, 2016).

This Court analyzed and eventually reversed the CZC Certification, years after that approval had initially been applied for, remanding to DHEC for further consideration. Id.

Clearly our appellate courts have operated with the understanding that a CZC Certification has continuing relevance after the period of six months and that modification of a CZC Certification after that period is effectual. Contrary to Horry County's position, the clear indication from statutory and case law is that the six month limitation is a guard on state inaction, meaning that if a state is inactive or silent on a CZC Certification for six months, federal permitting can move forward. Horry County has provided no legal support for the proposition that this language was meant as a sharp limitation on state authority and jurisdiction.

Finally, a corollary to Horry County's mootness argument is the great significance to which it assigns the rhetorical distinction between a "permit" and a "certification." Once again, no South Carolina court has ever found that distinction to hold the legal significance to which Horry County assigns it. This is particularly true in the context of the CZC Certification, in that Appellants are aware of no case that has assigned any legal significance to the fact that the CMP approval is termed a "certification," rather than a "permit." Horry County cites only to the Triska case, which involved interpretation of a specific provision of South Carolina's Pollution Control Act, as applied to state 401 certification. See 292 S.C. 190, 195, 355 S.E.2d 531, 534 (1987). Whether termed a "certification" or a "permit," the CZC Certification is an independent state approval required for Horry County's highway project, and neither Triska nor Horry County's unsupported conclusions change that. The CZC Certification for this project is not moot, and Horry County's only argument in opposition to supersedeas is invalid.

### ***Section 401 Water Quality Certification***

The crux of Horry County's mootness argument as to the 401 Certification issued by DHEC is identical to that addressed above in relation to the CZC Certification. While Appellants will not restate the analysis made above, certain elements specific to the context of the 401 Certification warrant additional attention.

Again, Horry County's argument is that DHEC's 401 Certification is rendered moot by the Corps' issuance of its federal Section 404 permit and that the 401 Certification is also rendered moot by the passage of a statutory deadline for state action, which in this context is one year. To get right to the point, if Horry County's argument is an accurate reflection of South Carolina law, cases like Murphy v. S.C. Dep't of Health & Envtl. Control would not exist. Just like this case, Murphy was a challenge to a 401 Certification granted by DHEC. See 396 S.C. 633, 636, 723 S.E.2d 191, 192 (2012). Just like this case, the Corps issued its Section 404 permit after DHEC issued its 401 Certification, and while the challenge to the 401 Certification was pending. Id. at 638, 723 S.E.2d 194. Under Horry County's argument, the 401 Certification and the Murphy case would become moot when the Corps issued its federal permit. However, the Murphy case continued after issuance of the federal permit, with the Supreme Court considering whether DHEC should have issued its 401 Certification, even though the federal permit had been issued and had not been challenged.<sup>3</sup> Id. ("The issuance of this [Corps 404] permit has not been challenged."). Indeed, the Supreme Court explicitly stated that the Corps' issuance of its Section 404 permit was "not dispositive" to the Court's 401 Certification analysis. Id. at 645, 723 S.E.2d

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<sup>3</sup>Here, the case for viability of the 401 Certification is actually even stronger, as the Corps' 404 permit for this project is currently under challenge in federal court as well.

at 198 (“Additionally, although the analysis of the Corps is not dispositive, because the Corps eventually issued the fill permit, it apparently concluded that the District had overcome these presumptions and established no practicable alternatives existed.”). Further, under Horry County’s argument, the 401 Certification and the Murphy case would have become moot one year after the 401 Certification application was submitted. However, the Murphy case continued for years after DHEC’s initial issuance of the 401 Certification. See Id. at 636-37, 723 S.E.2d at 193-94. In Murphy, our Supreme Court was recently confronted very directly with the scenario which Horry County has argued renders this case moot, and it was a non-issue. Our Supreme Court very clearly considers itself to have continuing jurisdiction and authority in relation to a DHEC 401 Certification, regardless of the status of the federal permit or the passage of time during judicial review.<sup>4</sup>

Specific to the time limitation component of Horry County’s mootness argument, the statutory language relied upon by the County is once again very clearly intended to be a limitation on state inaction, rather than a “drop dead date” for state jurisdiction and authority. That statutory language is as follows: “If the State, interstate agency, or Administrator, as the

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<sup>4</sup>Murphy and the case at hand are readily distinguishable from the Triska case cited by Horry County. In Triska, DHEC issued its 401 Certification, the Corps issued its federal permit, and the period for legal challenge passed. 292 S.C. at 193, 355 S.E.2d at 532 (1987) (“[N]o one contested certification of the project.”). Id. Two and one-half years later, DHEC attempted to revoke the 401 Certification *sua sponte*. Id. at 197, 355 S.E.2d at 537. The Supreme Court held that DHEC did not have that authority, but made very clear that the 401 Certification could have been revoked or modified as part of the appeals process: “It is the opinion of the Court that DHEC does not have statutory, regulatory or federal authority to suspend or revoke a 401 Certification after it has been granted by the agency **and the appeals process expired.**” Id. at 195, 355 S.E.2d at 534 (emphasis added). The holding of Triska actually supports the conclusion that this appeal of the 401 Certification is not moot. Indeed, the very fact that DHEC would attempt to revoke its 401 Certification years after the Corps’ Section 404 permit had been issued demonstrates that the agency sees the 401 Certification as having continuing effect and viability.

case may be, *fails or refuses to act* on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.” 33 U.S.C. § 1341(a)(1) (emphasis added). Again, this section serves to insure an initial agency decision on 401 Certification within a year, but it says nothing of any time limit on subsequent judicial review, nor does it limit subsequent judicial modification or revocation. Indeed, the only case cited by Horry County involves the circumstance where a state agency issued no decision within a year and then attempted to impose conditions through the 401 Certification. See Puerto Rico Sun Oil Co. v. U.S. Env'tl. Prot. Agency, 8 F.3d 73, 76 (1<sup>st</sup> Cir. 1993). Horry County has not cited any case holding that a judicial challenge to a 401 Certification becomes moot one year from the initial application date, and Appellants are aware of no such cases. On the contrary, in addition to Murphy, the case of Stono River Env'tl. Prot. Ass'n v. S.C. Dep't of Health & Env'tl. Control involves a 401 Certification appeal that proceeded years beyond DHEC's initial issuance of the Certification. See 305 S.C. 90, 406 S.E.2d 340 (1991). Specifically, DHEC issued its 401 Certification on August 20, 1987, and the Supreme Court remanded that Certification to the agency for further consideration on June 24, 1991. Id. at 92, 406 S.E.2d at 341. Clearly our Supreme Court has not applied a one-year “shelf life” on state jurisdiction in this context, as Horry County has argued for. In sum, DHEC “acted on a request for certification,” by issuing the 401 Certification for Horry County's highway project, and the time limitation in 33 U.S.C. § 1341(a)(1) was thereby satisfied.

Of final note, the Supreme Court's decision in Stono River actually guarantees an opportunity for review to opponents of a 401 Certification, which cuts entirely against Horry

County's opposition to supersedeas. Specifically, when opponents of a 401 Certification granted by DHEC were denied any opportunity to contest that Certification, the Court held that "constitutional due process" conferred the right to an appeal in 401 Certification cases and "an opportunity to contest the 401 certification in an adjudicatory proceeding." 305 S.C. 90, 93-94, 406 S.E.2d 340, 341-42 (1991). While the Stono River case arose in the context of a procedural issue that is not at play here, the underlying holding of the case is completely at odds with the ephemeral, constrained view of 401 Certification review advanced by Horry County. The 401 Certification for this project is not moot, and Horry County's only argument in opposition to supersedeas is invalid.

***Propriety of Horry County's Argument***

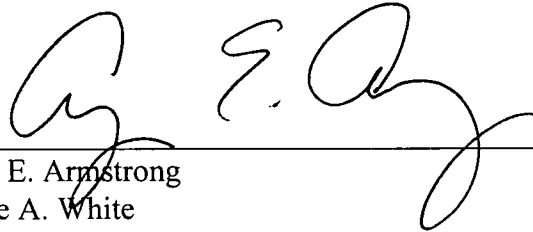
Horry County's Return makes very clear that the County's sole argument in opposition to supersedeas is that this appeal is moot. See e.g. (Return, p. 8 ("The issues raised by Appellants in their challenge to the two SCDHEC certifications at issue are now moot.")). Appellants obviously do not think that this argument has any validity. Appellants also submit, though, that this argument has not been properly submitted to the Court in the context of a supersedeas Return. If this case were moot, it would be subject to dismissal. However, Horry County has not moved to dismiss the appeal, even as the County now faces a briefing deadline following Appellants' submission of their Initial Brief. Horry County's mootness argument is inconsistent with continuation of this appeal, and the County is effectively asking the Court to grant dismissal on the basis of its Return. This "back door" request for dispositive relief is inconsistent with the Appellate Court Rules, including the procedures for moving for such relief under Rule 240. As would be the case if Horry County had requested an extension of time, substitution of counsel, or

any other form of relief that is the proper subject of an appellate motion, Horry County's request in its Return to have this appeal deemed moot is not properly before the Court.

***Conclusion***

For the reasons stated herein, the Appellants respectfully request that the Court grant supersedeas, so as to protect 24.19 acres of wetlands, some of which occur within a state-designated heritage preserve, and prevent the paving of 5.6 acres of road; including conversion of 22 acres of heritage trust property into roadbed, until such time as this Court can determine whether DHEC acted properly under state law in authorizing the elimination of those wetlands and state heritage trust preserve lands.

Respectfully submitted,



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December 4, 2016

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2016-001758

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South Carolina Coastal Conservation League  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this date I served Respondents Horry County Public Works and SCDHEC with Appellants' Reply in Support of Petition for Supersedeas by placing copies of same in the U.S. Mail addressed to:

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Georgetown, South Carolina

December 1, 2016



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*Lawyers for the Wild Side of South Carolina*

December 1, 2016

a 501c3  
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**SC Court of Appeals**

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Appellate Case-No. 2016-001758

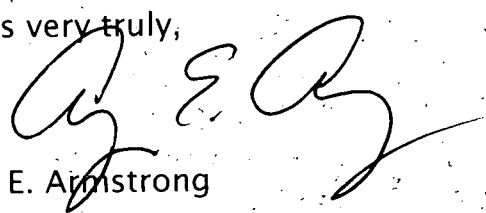
Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of the Appellants' Reply in Support of Petition for Supersedeas, along with my certificate of service.

Appellants' Motion for Leave to File Out of Time is presently pending before the Court. This Reply is being filed provisionally, so as to comply with the extension requested in the pending Motion.

Please return a clocked-in copy in the enclosed, postage-paid envelop. Thank you for your assistance.

Yours very truly,

  
Amy E. Armstrong

cc: Stan Barnett, Esq.  
Michael Traynam, Esq.  
Nathan Haber, Esq.