



South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

December 29, 2016

a 501c3
non-profit organization

VIA EMAIL AND U.S. MAIL

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Re: SCCCL & SCWF v. SCDHEC & Horry County;
Appellate Case No. 2016-001758

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Dear Ms. Kitchings:

In accordance with this Court's Order dated December 22, 2016, the Appellants are submitting the enclosed Response to Horry County's Motion to Dismiss in the above-referenced case, along with my certificate of service.

Kindly return a clocked-in copy of the motion in the enclosed postage-paid, self-addressed envelope. Thank you for your assistance with this matter.

Yours very truly,


Amy E. Armstrong

cc: Stan Barnett, Esq.
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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

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

vs.

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

RESPONSE TO MOTION TO DISMISS

The Appellants submit this Response to Respondent Horry County's Motion to Dismiss this appeal as moot. The most persistent theme of that Motion is Horry County's declaration of significant legal principles and conclusions without any supporting authority, as well as its statement of factual conclusions without any citation to record evidence. Regardless of how many times the County restates the legal and factual mantras through which it has attempted to diminish this appeal, those propositions do not become self-supporting. In order to award the remedy that the County seeks, this Court would have to reach legal holdings that would spell significant consequences in relation to cooperative state-federal environmental permitting and the state environmental regulatory system as a whole. Horry County has not provided a basis for the Court to award such a remedy, and doing so would run contrary to established legal authority and the history of this legal challenge.

I. THIS COURT CAN AWARD APPELLANTS EFFECTUAL RELIEF

Contrary to what is argued by the County, this Court retains the authority and ability to award effectual relief to the Appellants in their challenge to Horry County’s construction of a highway through wetlands and a state-designated Heritage Trust Preserve. The basis of Horry County’s Motion to Dismiss is its argument that this appeal has been “rendered moot as there is no legal redress available for Appellants’ objections to the certifications having been issued.” (Motion, p. 6). For reasons of fact, of science, and of law, this mootness argument fails.

A. The Certified Work That Is Already Completed Can Be Undone

As for the progress of road construction, Horry County’s witness, Britt Feldner, states that “all wetlands within the [highway] right-of-way have been impacted as authorized by the US Army Corps of Engineers permit (SAC 2010-01157).” (Motion, Exhibit B). As reflected in that permit, this apparently means that 19.58 acres of wetlands have been filled, 4.35 acres of wetlands have been excavated, and 0.26 acres of wetlands have been cleared of vegetation.¹ See (Motion, Exhibit C). The fundamental implication underlying Horry County’s mootness

¹Counsel uses the modifier “apparently,” because Mr. Feldner’s three-paragraph affidavit, which is the only evidence Horry County has submitted as to the current state of road construction, is too vague and superficial to meaningfully assess the state of onsite wetlands. See (Motion, Exhibit A). Mr. Feldner bases his affidavit on “[a] site visit conducted on December 16, 2016,” but he does not even say that he participated in that site visit. Id. at ¶ 3. He likewise does not say that his affidavit is based upon his own personal knowledge. He does say that “wetland characteristics within the wetlands ... are no longer present within the [highway] right-of-way,” but he does not explain which characteristics or how he made such an assessment. He does not differentiate between wetlands that were slated to be filled, excavated, or cleared. As discussed below in relation to Dr. Tufford’s affidavit, wetlands that have only been cleared of trees would still maintain meaningful wetland characteristics, but Mr. Feldner’s affidavit does not nearly get to this level of detail. All-in-all, the affidavit upon which Horry County asks this Court to conclude that all wetlands have been eliminated, rendering this appeal moot, is fundamentally insufficient for this purpose for which it has been introduced.

argument is that these wetlands, having been so impacted, cannot be restored. In other words, Horry County argues, the purpose of Appellants' legal challenge was to protect these wetlands, but that purpose cannot be fulfilled now that the wetlands have been filled, excavated, or cleared. See (Motion, p. 2). To use the common legal analogy, Horry County contends that this Court cannot "unring the bell" as it relates to the onsite wetlands. This argument, however, is directly contradictory to the position Horry County has previously taken in relation to this highway construction and is inconsistent with wetland science.

Horry County has previously represented in official court documents that it could readily restore onsite wetlands that had been filled, excavated, and cleared and that it was willing to do so if ordered by a court. Particularly, in opposing any injunctive limitations during the pendency of the federal challenge to this project, Horry County represented as follows:

Restoration of wetlands is not difficult. All that is required is removal of whatever has filled them so as to allow natural flow of surface or ground water into them. Restoration can be hastened by revegetation. (Exhibit 5, Declaration of Britt Feldner). **Any harm to wetlands from construction of the road would, therefore, not be irreparable** should this Court rule in favor of Plaintiffs and invalidate the Corps' permit.

(County Response to Motion for Preliminary Injunction, excerpts attached hereto as Exhibit A, p. 17) (emphasis added).

The Plaintiffs' claim that the ongoing work creates an irreversible change in the environment is simply not true. **Wetlands are restored after being filled on a routine basis. The technology for doing so is well known and not complicated.** The work now being done, where it involves filling wetlands, includes culverting the wetlands, all as required by the Corps of Engineers permit, so as to maintain and in most cases improve water connectivity in these wetlands. **None of the work currently being done is irreversible** and is all consistent with the permit issued properly by the Corps of Engineers.

(County Response to Motion for Temporary Restraining Order, attached hereto as Exhibit B, p. 2) (emphasis added).

It is reasonable to expect that [wetland] restoration activities would be fully successful due to the lack of alteration to the existing hydrologic regime. **Lag time** between the loss of the vegetative component and the restoration planting **would be minimal** since the majority of the existing vegetation occurring within the project area is in the scrub/shrub phase of regeneration resulting from the 2009 wildlife which eliminated over story species.

These activities are feasible and based on past experience would succeed in completely restoring the wetlands to their prior functions and values.

(Britt Feldner Declaration, excerpts attached hereto as Exhibit C, ¶ 11) (emphasis added).

If the wetlands that have been filled, excavated, or cleared on the project site can be completely restored using routine methods that are not difficult, as Horry County has unequivocally represented, the fact that all wetlands in the project right-of-way have been impacted, as stated in Mr. Feldner's affidavit, is of little import in terms of this Court's ability to craft effectual relief. A case becomes moot when judgment, if rendered, will have no practical effect upon the existing controversy. Sloan v. Greenville Cty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). However, if this Court rendered judgment that the certifications for this project were granted in error, such judgment draws practical effect from the fact that the wetlands could and would be restored to their original condition.

The permittee's acknowledged ability to undo the regulated work is one of the critical factors that distinguishes this case from the Arcadia Lakes appeal relied upon by Horry County. In that case, the authorization at issue established terms for controlling stormwater runoff from the *active construction site* (specifically, the authorization was a permit for stormwater discharges from land-disturbing activities associated with construction). See Town of Arcadia Lakes v. S.C. Dep't of Health & Env'tl. Control, 404 S.C. 515, 520, 745 S.E.2d 385, 388 (Ct.

App. 2013); Unpublished Supreme Court Opinion, attached hereto as Exhibit D). Once construction was complete, it was impossible for the courts to have any say in how stormwater had been controlled during construction. Moreover, the challenged decision in Arcadia Lakes authorized construction of a multi-family residential complex, which was completely built by the time the case reached the Supreme Court. Unlike the situation at hand, it was impossible to roll back the regulated conduct. The Supreme Court found the appeal to be moot on the basis that it was quite literally “impossible for this Court to grant any redress in the context of the issues as framed and litigated below.” (Exhibit D, p. 2). That impossibility does not exist here, as Horry County can restore the wetlands to their prior functions and values, and the road has not be constructed. Indeed, Horry County issued a news release stating that it would take an additional 8-12 months to construct the project authorized by the state certifications once a paving and construction contract had been awarded. (Exhibit E, p. 2). The Supreme Court’s finding of mootness in Arcadia Lakes is not controlling.

It is worth noting that Horry County has contemplated and accepted the risk of proceeding with road construction in the face of pending legal challenges and has acted with knowledge that it may be required to undo its work pursuant to court order. Indeed, the County has shown a unique propensity for such risk during the pendency of this challenge, proceeding with construction at a breakneck pace any time it has been allowed a window, including while motions to enjoin construction have been pending and, in Appellants’ view, even after such motions have been granted.

Horry County began construction of International Drive on August 22, 2016, after issuance of the Administrative Law Court’s final decision. See (myhorrynews.com article,

attached hereto as Exhibit E). At the time construction began, Horry County Council Chairman Mark Lazarus acknowledged that an appeal of the ALC decision and a federal challenge were coming, but he indicated that Horry County had made the decision to begin work anyway, stating: “There are always risks, but this is certainly an acceptable risk we are willing to take. ... We have the money in the bank and all the required permits for this project, and we are going to get this road built.” (*Id.*). Appellants’ filed their notice of appeal in this Court the day after construction began, on August 23, 2016, and also filed a motion for stay in the ALC on that same day, seeking to halt filling of the wetlands during the pendency of the appeal. On September 1, 2016, Appellants filed their challenge to the federal permit for this project, and on September 14, 2016, Appellants moved for a preliminary injunction in federal court. Horry County pushed forward with construction through the notice of appeal, the motion for stay, the federal complaint, and the motion for preliminary injunction.

As of September 23, 2016, one month after construction began, Horry County had purportedly filled all of the wetlands on the non-Heritage Preserve side of the project and some of the wetlands within the Heritage Preserve. See (Declaration of David Gilreath, attached hereto as Exhibit F). On September 23, a temporary restraining order was entered in federal court preventing further destruction of the Heritage Preserve wetlands, among other limitations. Appellants’ Petition for Supersedeas was filed in this Court on November 7, 2016, while the temporary restraining order was still in effect. The TRO was then dissolved on November 18, and this Court entered supersedeas on December 15, leaving a 27-day window wherein Horry County could have performed construction activities. Horry County now says that it completed fill, excavation, and clearing of all of the wetlands during this time, despite the fact that the

Petition for Supersedeas was pending and that the question of whether it could proceed with construction under the contested authorizations was still very much unresolved.

In sum, with the exception of the very first day of construction, all of Horry County's construction activities have been undertaken while either a motion for injunctive relief was pending or while an injunction was actually in place.² During the relatively brief window wherein Horry County was lawfully allowed to proceed with construction, the County managed to fill, excavate, or clear all 24+ acres of wetlands on the project site. While all of Horry County's construction activities may have been within their rights under the letter of the law, the County has certainly embraced the risk inherent in proceeding with construction that is under direct and immediate dispute. Perhaps the County undertook construction in this manner because it knew that it would be able to readily restore the wetlands it was impacting, should it be ordered to do so. At any rate, restoration of the impacted wetlands would be an effectual, appropriate remedy under the circumstances, and, on this basis, the appeal is not moot.

B. All Of The Certified Work Has Not, In Fact, Been Completed

Even if the wetlands have been filled, excavated, or cleared, construction activities authorized by the certifications at issue³ remain to be completed, and this appeal is therefore not

²The Appellants have had to seek intervention from both this Court and the federal court after Horry County continued construction activities after entry of the supersedeas and temporary restraining order, respectively. In both instances, Horry County claimed to have understood a liberal interpretation of the orders that allowed continued work in onsite wetlands.

³Horry County has attempted to diminish the importance of authorizations by "certification," versus authorizations by "permit." However, the County has not cited any authority to support the significance of such distinction and has, in fact, not even indicated what significance such distinction should receive in relation to its Motion to Dismiss. As explained in greater detail below, Horry County's attempt to thrust significant meaning onto this rhetorical distinction runs counter to the legislative history and plain statutory language of the certification

moot. Horry County has previously acted on its narrow interpretation that only the literal filling, excavating, or clearing of onsite wetlands lies within the purview of the Clean Water Act Section 401 Certification and Coastal Zone Consistency Certification (“CZC Certification”) at issue in this appeal. The County did so by continuing with construction activities, even after this Court’s issuance of supersedeas, under claim that construction outside of the wetlands was not regulated. See (Appellants’ Motion to Compel Compliance previously filed with this Court). Such interpretation was soundly rejected by this Court in its Order on Appellants’ Motion to Compel Compliance, in which the Court ruled as follows:

Because this court stayed the issuance of **the certifications that “authorize Horry County to build a highway within and adjacent to Lewis Ocean Bay Heritage Preserve in Horry County,”** the order requires that Horry County halt all work on the road project, including the widening, paving, and realigning of the existing unimproved portion of International Drive, pending the resolution of this appeal or other proceedings of this court.

(Order, dated December 20, 2016, p. 1) (emphasis added). To the extent Horry County’s Motion to Dismiss is based on the argument that all work authorized by the certifications is complete, the Motion fails.

As an initial matter, as discussed in the footnote above, the evidence submitted by Horry County in relation to its Motion to Dismiss—that is, the three-paragraph affidavit of Britt Feldner—is insufficient to determine with specificity what work has been performed and what work remains. Mr. Feldner states that the right-of-way has been cleared and that the wetlands have been impacted to an extent where they do not maintain their original wetland characteristics, but he says nothing of next steps or the total remaining steps. To the extent Horry

programs at play.

County's Motion contains any statements about what work is next or how much work remains, such statements are testimony from counsel. Based on the evidence submitted by Horry County, International Drive exists as a cleared path wherein road construction can take place.

In light of the fact that substantial roadway construction remains,⁴ the 401 Certification and CZC Certification have continuing viability and have not been rendered moot by completion of the wetland impacts. From the face of the certification document issued by Respondent DHEC, it is apparent that the agency's scope of review and authority extends beyond merely wetland activity. DHEC's certification document defines the project in terms of construction of the highway, not destruction of the wetlands: "The proposed work consists of widening, paving and re-aligning of the existing unimproved portion of International Drive." (DHEC Certification Document, excerpts attached as Exhibit G, p. 3). The certification document further imposes conditions that are to apply to Horry County during, and even after, the entire highway construction project. See, e.g., (Id.) ("The applicant must implement appropriate best management practices that will minimize erosion and migration of sediments on the project site *during and after construction*. ... All disturbed land surfaces affected by the project must be stabilized."). These conditions derive from the legal authority embodied in the CZC Certification and 401 Certification programs, which clearly extends beyond the wetland work that triggered the federal Section 404 permit.⁵

⁴Once the paving and road construction contracts have been awarded, it will take an additional 8-12 months to complete construction. (Exhibit E, p. 2). Upon information and belief no such contracts have been awarded as of the date of this response.

⁵On this point our Supreme Court's Opinion in Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014), is decisive. In that case, the Court had occasion to consider the scope of DHEC's authority under Coastal Zone Management Act

In sum, Horry County has not cited any legal authority for the proposition that the CZC Certification and 401 Certification have no viability in relation to the remaining highway construction, and significant authority exists to the contrary.

The fact that the regulated project at-large remains in progress is one of the critical factors that distinguishes this case from the Upstate Forever appeal relied upon by Horry County. In that case, a 401 Certification (but no CZC Certification) was required for construction of a water pipeline. (Unpublished Opinion, attached hereto as Exhibit H). While the appeal of that certification was pending before this Court, the *entire pipeline project*, including the wetland fill, was completed. See (Id.) (“Respondents have filed a motion to dismiss this appeal as moot because no justiciable controversy exists due to the completion of the project.”). The basis for the Court’s finding of mootness was that the entire regulated project had been completed, not that

(“CZMA”), which is the legislation that creates the CZC Certification program. The Court found that authority to be quite broad:

Under the CZMA, DHEC was required to develop a comprehensive coastal zone management program-the CZMP-for the coastal zone, and was given responsibility to enforce and administer the CZMP.... Parts of the CZMA explicitly require DHEC to consider the larger coastal zone. As previously discussed, section 48-39-150 requires DHEC to consider the policies set forth in section 4-39-20 and those policies repeatedly refer to the coastal zone. The CZMA also provides that the “basic state policy” behind the Act is to “protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone....” S.C.Code Ann. § 48-39-30. Therefore, DHEC's interpretation is sound because it cannot be expected to protect the coastal zone as instructed by the General Assembly if it cannot consider how projects within the [regulated resource] may affect the broader coastal zone.

Id. at 35-36, 766 S.E.2d at 719 (internal citations ommitted). Under this and other authority, Horry County’s efforts to constrain the Certifications at issue here to cover only work taking place in the wetlands is misguided.

the wetland fill had been completed while the overall project remained incomplete.⁶ The County acknowledges that it was construction of the pipeline that mooted the Upstate Forever appeal, but it attempts to equate pipeline construction with the wetland fill that has taken place on International Drive: “the pipeline was installed as permitted, just as the wetland fill has been completed in this case.” (Motion, p. 5). The apt comparison, though, is to the road construction, which requires significant additional work for completion. This Court’s finding of mootness in Upstate Forever is not controlling, and this appeal has continued viability as to the remaining highway construction.

C. The Federal Permit Is Not A Legal Obstacle to Effectual Relief

The other component of Horry County’s Motion to Dismiss is the same mootness argument that it advanced in opposition to supersedeas: that the CZC Certification and Section 401 Certification issued by Respondent DHEC are meaningless and ineffectual in light of the fact that a federal Clean Water Act permit has been issued. See (Motion, p. 9). 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 because “[a] ruling that the certifications were improperly issued would have no effect on the Corps permit.” (Id.). The Court should reject this recycled argument that is once again offered without citation to a single case wherein its underlying propositions have been adopted or applied. The County has not provided a legal basis for this Court to adopt a principle that would substantially limit the reach of the 401 Certification and CZC Certification programs going forward.

⁶Additionally the question of whether the manner in which the legal issues were presented resulted in a hypothetical or academic question existed and also played a role the Court’s finding of mootness.

As a starting place, if Horry County's position on the relationship between federal and state authorizations were correct, significant cases in our state's environmental jurisprudence simply wouldn't exist. A good example is the case of Murphy v. S.C. Dep't of Health & Env'tl. Control, which went all the way to our state Supreme Court. 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). And 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.⁷ 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 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."). 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

⁷Here, the case for viability of the 401 Certification is actually even stronger, as the Corps' 404 permit is currently under challenge in federal court.

of the status of the federal permit.⁸

Only two months ago, this Court operated similarly in a case involving a CZC Certification accompanying a Clean Water Act permit. See Bruning v. SCDHEC & Cat Island POA, Appellate Case No. 2014-002010, 2016 WL 6247005 (S.C. Ct. App. Oct. 26, 2016). The Clean Water Act stormwater permit had been issued for the project—and Horry County would have argued that the CWA permit then controlled, to the exclusion of the state certification—but this Court considered the propriety of the underlying CZC Certification. See Id. Horry County’s unsupported position on the viability of state certifications is at odds with our appellate court precedent.

Moving to the statutory framework, the cornerstone of this part of Horry County’s mootness argument is the significant import it assigns its position that our state certifications are derivative of the federal Clean Water Act permit, meaning that the CZC Certification and 401 Certification are not “standalone” or “independent” requirements. (Motion, p. 9). This proposition, which Horry states and assigns great weight without any legal backing other than its

⁸Another illustrative Clean Water Act case is Triska v. Dep’t of Health & Envtl. Control, 292 S.C. 190, 193, 355 S.E.2d 531, 532 (1987), wherein DHEC issued its 401 Certification, the Corps issued its federal permit, and the period for legal challenge passed for both. “[N]o one contested [DHEC’s] certification of the project.” Id. Two and one-half years later, though, 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 legal 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 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.

counsel's generalized musings on the law, is contrary to the legislative history of the Certifications at issue. The CZC Certification requirement, for example, 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 requires DHEC, in developing the CMP, to create a system whereby it reviewed **all** state and federal permits for compliance with our state coastal policies.⁹ *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. 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 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

⁹Section 48-39-80 specifically 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.

site.”).

Horry County’s argument for mootness on the basis of the federal Section 404 permit is half-formed and contrary to law. Again, no South Carolina court has ever adopted the legal principles advanced by Horry County, nor issued a holding that would directly support such principles. On the contrary, 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 mootness argument advanced by Horry County strikes at the heart of this relationship, leaving the state’s role in this collective environmental regulatory system as a hollow shell. For this reason and the ones preceding, this Court should reject Horry County’s argument that issuance of the federal permit renders this appeal moot.¹⁰

II. APPELLANTS HAVE NOT SQUANDERED OPPORTUNITIES FOR JUDICIAL REVIEW OF THIS PROJECT

One of the most confounding aspects of the County’s Motion to Dismiss is its repeatedly stated premise that delay or lack of diligence on the part of the Appellants is somehow to blame for this case becoming, in the County’s view, moot. First of all, Appellants are aware of no basis

¹⁰A corollary to Horry County’s mootness argument is again the great significance to which it assigns the rhetorical distinction between a “permit” and a “certification.” See (Motion, p. 8) (“The distinction between a certification and a permit requirement is fundamental.”). Once again, no South Carolina court has ever found that distinction to hold the legal significance to which Horry County assigns it, and the County has cited to no supporting authority.

upon which such considerations would bear legal significance to the inquiry before the Court. Second, to put it bluntly, the central component of this premise is a complete fabrication. That is, the County's proposition that "Appellants had the ability long before the Corps of Engineers issued its Section 404 permit to commence a federal court challenge and to seek an injunction prohibiting work" is entirely false. See (Motion, p. 7).

As is typical of the Motion to Dismiss, the County fails to explain exactly how the Appellants might have initiated a federal lawsuit prior to the issuance of a federal permit, or any other agency decision, instead only generally citing to "[a] variety of statutes" that would authorize such action. (Motion, p. 7). However, the principle that one cannot challenge an agency decision until such time as that decision is actually issued is axiomatic. In other words, the requirement for a final agency decision is the cornerstone of administrative adjudication, and Appellants certainly had no way to enjoin a non-existent federal permitting decision, nor to challenge purely state-level certification decisions in federal court. The proposition advanced by Horry County in this regard is so vague and foreign that it nearly defies pointed counter-argument.

The timeline outlined above demonstrates the diligence with which Appellants have sought to hold back construction, so as to facilitate effectual judicial review, as well as the fervency with which Horry County has sought to thwart that objective. Contrary to what is stated by Horry County, the Appellants pursued federal judicial review and federal injunctive relief at their earliest reasonable opportunity. Appellants specifically filed their federal challenge only ten days after learning that the Corps had issued its Section 404 permit, and only one week after actually receiving a copy of that permit. Appellants and counsel learned of the federal permit

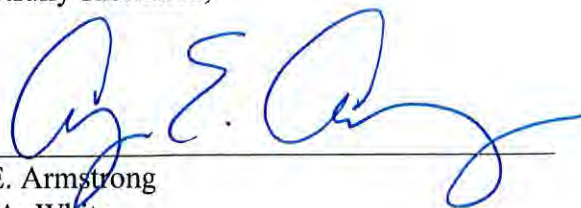
through the aforementioned news release of August 22, 2016, which announced that Horry County had commenced construction. Appellants and counsel were not provided notice of the issuance of that permit by the Corps, despite the fact that Appellants were actively involved in the Corps' decision-making process, having submitted multiple comment letters to the agency. Upon learning of the issuance of the Section 404 permit and commencement of construction, Plaintiffs immediately submitted a Freedom of Information Act, receiving a partial response containing the federal permit on August 25, 2016. The Plaintiffs filed a federal complaint on September 1, 2016.

Horry County's argument that the Appellants' passed up opportunities to timely enjoin construction in federal court is simply false, as are the County's other allegations of delay or lack of diligence. Appellants have filed four separate motions/petitions to stop Horry County from pressing forward with the disputed construction, and have been forced to file both a Motion for Contempt and a Motion to Compel Compliance when Horry County continued construction despite these motions/petitions being granted. The circumstances through which the onsite wetlands came to be filled, excavated, and cleared during the pendency of this matter speak for themselves.

III. CONCLUSION

This appeal is not moot as: 1) the work authorized by the state certifications which has already been performed is reversible; 2) significant additional work authorized by the state certifications remains to be completed; and 3) the federal permit, which is currently under challenge in federal court, does not render null the state Certifications. Horry County's Motion to Dismiss must be denied.

Respectfully submitted,



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Attorneys for the Appellants

Georgetown, South Carolina
December 29, 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

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

vs.

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


CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Response to Motion to Dismiss on Respondents SCDHEC and Horry County Public Works and the Administrative Law Court by placing copies of same in the U.S. Mail addressed to:

Stan Barnett, Esquire
305 North Civitas Street
Mount Pleasant, SC 29464

Nathan M. Haber, Esquire
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Michael S. Traynham
SCDHEC
2600 Bull Street
Columbia, SC 29201



Amy E. Armstrong

Georgetown, South Carolina

December 29, 2016

Exhibit A

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

Coastal Conservation League and	)	Civil Action No.: 4:16-CV-3008-RBH
South Carolina Wildlife Federation,)	
)	
Plaintiffs,)	
)	
vs.)	
	)	HORRY COUNTY’S
United States Army Corps of Engineers,	)	RESPONSE IN OPPOSITION
Charleston District, and Lt. General Todd	)	TO PLAINTIFFS’ MOTION FOR
T. Semonite, Lt. Colonel Matthew Luzzato;	)	A PRELIMINARY INJUNCTION
US Environmental Protection Agency;)	
Gina McCarty; Heather McTeer Toney,)	
Horry County,)	
)	
Defendants.)	
_____)	

INRODUCTION

This case involves challenges by Plaintiffs to a permit issued by the US Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Sec. 1344 authoring the discharge of dredged or fill material in to certain wetlands deemed to be jurisdictional “waters of the United States”, such fill being needed to construct a 5.6 mile section of a highway in Horry County by the County known as International Drive. The Plaintiffs seek relief pursuant to the Administrative Procedures Act, 5 U.S.C. Sec. 701-706, and the National Environmental Policy Act (NEPA) 42 U.S.C. Sec. 4321, asserting that the Corps did not follow its regulations in issuing the permit and that it did not comply with NEPA by failing to adequately evaluate the environmental effects likely to result from the project.

Plaintiffs are now moving for a Preliminary Injunction halting any further construction of the road, which has been under construction since August 22, 2016, since September 23 limited

Moreover, it is uncontested that DNR has the sole discretion to manage the Preserve. It was pursuant to that discretion that DNR contracted with Horry County to convey the southwest edge of the property to Horry County for the purpose of constructing the project. That contract specifically provides that DNR – not the County – has the right to harvest the timber in the road right of way. Therefore, those trees could be removed immediately, regardless of the status of the Corps permit, absent an action by Plaintiffs enjoining DNR from exercise of its proprietary control over the property. Such an action would be utterly without foundation.

d. Loss of Wildlife: The only species the Plaintiffs have addressed with evidence they claim indicates the road will harm is the black bear. The risk to the bear is from vehicle collisions. The contract between DNR and the County requires that a speed limit of 45 mph be imposed on the road. Plaintiffs' only bear expert, Joe Hamilton, admitted that no measure to prevent bears from crossing a road are particularly effective, at one point using a figure of 20 percent. "Bears will go where they want to go," he said. He also acknowledged that the 45 mph speed limit would greatly reduce the incidence of collisions, at one point suggesting "in most cases." Hamilton also agreed with DNR's director that the population of bears in Horry County is increasing so fast that measures to control their population are called for – such as a longer hunting season or more kills permitted per hunter. (Exhibit 12, Testimony of Joe Hamilton; Exhibit 15, Testimony of Alvin Taylor). The population of the black bear – which is neither threatened nor endangered – is not at risk in Horry County, despite significant collisions with vehicles that kill bears on existing roads. There is simply no evidence at all, much less clear and convincing evidence, of any irreparable harm to wildlife likely to result from the road.

4. Any damage to the wetlands impacted by construction of the road can be fully repaired through restoration of the wetlands. While it would entail considerable cost to the

County, should this Court rule in favor of the Plaintiffs in this matter, restoration of the wetlands impacted by the road could be ordered. Restoration of wetlands is not difficult. All that is required is removal of whatever has filled them so as to allow natural flow of surface or ground water into them. Restoration can be hastened by revegetation. (Exhibit 5, Declaration of Britt Feldner). Any harm to wetlands from construction of the road would, therefore, not be irreparable should this Court rule in favor of Plaintiffs and invalidate the Corps' permit.

C. Balancing the Equities.

While Plaintiffs have failed to clearly establish any irreparable harm to the environment from the project, the County will suffer substantial irreparable harm if the completion of the road is enjoined. That harm will be manifested in both financial and non-monetary forms.

1. Safety has been one of, and perhaps the foremost, purpose for the road. The uncontested evidence is that the road will alleviate a significant safety problem for a substantial number of Horry County residents. The communities along Highway 90 are currently without reliable quick access to emergency room care or to quick response time by EMS, police or fire services due to traffic congestion. While Plaintiffs disregard this conclusion by the County's experts, their own witnesses acknowledge that the County experts are in the best position to make this judgment. (Exhibit 11, Testimony of Steve Gilbert; Exhibit 12, Testimony of Joe Hamilton). The safety risks the people along Highway 90 now face are summarized in the testimony of the Emergency Management Director of the County, Randy Webster, the Chairman of County Council and Mark Lazarus. (Exhibit 19, Testimony of Randy Webster; Exhibit 2, Declaration of Randy Webster; Exhibit 1 Declaration of Mark Lazarus). Without quick access to emergency health care, life threatening conditions are more likely to result in death for many

CONCLUSION

The Plaintiffs have failed to establish any of the four required criteria for a preliminary injunction. The International Drive project is a road which, the undisputed evidence proves, is needed for public health and safety for a substantial section of Horry County. Delay in its creation risks not only public funds but life and property. For the reasons set forth above, the County requests that the Plaintiffs’ Motion be denied. In the alternative, the County respectfully requests that, should the Court decide to impose an injunction, the Plaintiffs be required to post a bond of \$1 million.

Respectfully submitted,

s/ Stan Barnett

Stan Barnett Fed ID # 5306
305 North Civitas Street
Mt. Pleasant, SC 29464
(843) 884-1031; (843) 881-1623
stan.barnett@yahoo.com

October 20, 2016
Mount Pleasant, South Carolina

Exhibit B

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

Coastal Conservation League and	)	Civil Action No.: 2;16-CV-3008-RBH
South Carolina Wildlife Federation,)	
)	
Plaintiffs,)	
)	
vs.)	
	)	HORRY COUNTY'S
United States Army Corps of Engineers,	)	RESPONSE TO MOTION FOR
Charleston District, and Lt. General Todd	)	TEMPORARY RESTRAINING
T. Semonite, Lt. Colonel Matthew Luzzato;	)	ORDER BY PLAINTIFFS
US Environmental Protection Agency;)	
Gina McCarty; Heather McTeer Toney,)	
Horry County,)	
)	
Defendants.)	
_____)	

Plaintiffs have asked that ongoing road construction by Horry County should be temporarily enjoined pending a hearing on their Motion for a Preliminary Injunction. The County opposes such an injunction as explained below in more detail as the construction in progress is intended to create a useable road for emergency vehicles to access the communities along Highway 90.

Plaintiffs are incorrect that paving is slated to begin in October. It is not expected to begin until after the first of the year in 2017. The ongoing work and schedule is set forth in Exhibit 1, a statement by Andy Markunas of the Horry County Public Works Department. In advance of the hearing today, counsel has had Mr. Markunas confirm that the County needs another three weeks of the work now being done to make the road passable and maintainable for emergency vehicles. This is the most pressing need for the road as explained in Exhibits 2 and 3, affidavits from the County Emergency Management Director and County Fire Chief. In the

recent hearing in the SC Administrative Law Court, the testimony by the County that the road could save lives was unrebutted.

The Plaintiffs' claim that the ongoing work creates an irreversible change in the environment is simply not true. Wetlands are restored after being filled on a routine basis. The technology for doing so is well known and not complicated. The work now being done, where it involves filling wetlands, includes culverting the wetlands, all as required by the Corps of Engineers permit, so as to maintain and in most cases improve water connectivity in these wetlands. None of the work currently being done is irreversible and is all consistent with the permit issued properly by the Corps of Engineers.

The harm the County would suffer from being ordered to halt completion of the road to a state where it can be used for emergency vehicle access is the risk to the health and safety of the residents of the Highway 90 communities. That harm far outweighs and temporary harm – if there be any – from the clearing, grading and filling work (with culvert installation) not underway to facilitate emergency access for police, fire and EMS vehicles. There will be no public access to the road until it is paved and complete in all aspects.

The lack of evidence of any harm to the environment from the road is well summarized in the Order by the Honorable Ralph King Anderson, III, who heard the challenge to two state certifications needed for the Corps of Engineers permit. Exhibit 4.

As there is no showing of immediate or irreparable harm and the harm to the County is immediate from any TRO and can not be ameliorated in any fashion, the TRO should be denied.

Respectfully submitted,

s/ Stan Barnett

Stan Barnett
P.O. Box 1542
1037 Chuck Dawley Blvd., Bldg. F
Mt. Pleasant, S.C. 29465 (PO Box)
843-881-1623
stanleyb@s3blaw.com
Attorney for Horry County

September 22, 2016
Mount Pleasant, South Carolina

Exhibit C

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

Coastal Conservation League and	)	Civil Action No.: 2;16-CV-3008-RBH
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.)	
)	

DECLARATION OF BRITT FELDNER

After being sworn, Affiant testified as follows:

1. I am Britt Feldner and I am a resident of Conway in Horry County, S.C.
2. I received an Associate Degree in Science with a major in forestry from Horry-Georgetown Technical College in 1996 and immediately began work for The Brigman Company, an environmental consulting firm located in Conway. Since that time, I have been heavily engaged in performing delineations of areas that meet the Corps of Engineers definition of “waters of the United States” including wetlands and in the application for and processing of permits to discharge dredged and fill material into such areas pursuant to the Section 404 of the Clean Water Act.
3. My first major project was delineation of jurisdictional areas for purposed of Section 404 it the Carolina Forest development east of Highway 501 between Conway and Myrtle Beach.

the site in question post initial removal of vegetation and prior to any land disturbance having a common Nadir(the point vertically beneath the common center at the time of exposure) for comparative purposes. Furthermore, any definitive qualitative/quantitative interpretive exercise would require true vertical aerial photography in conjunction with ground truthing. Absent of any pre-land disturbance photography, it is not possible to definitively determine the condition of "wetland area(s)" based solely on interpretation of the aerial photography entered into evidence. In my experience, the only way to definitively determine the limits and type of impacts is through on the ground inspection and study of the site's original condition and any changes made to the site. The photographs submitted by Plaintiffs, in my opinion, do not demonstrate that any additional wetlands were filled after September 23, 2016 which had not already been filled.

11. Assuming completion of all authorized improvements associated with International Drive as per the permitted plans, the following statements describe wetland restoration activities that in my opinion and based on my experience could be conducted to restore the function and character of the wetland resources within the project area.

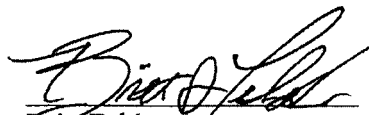
- a) Complete removal of imported fill material deposited within wetland resources would be accomplished using conventional earth moving equipment. Material will be placed directly on adjacent uplands and/or transported to the closest available upland disposal site and stabilized. Once fill material has been completely removed, remaining parent soil shall be restored to original grade and contour utilizing the adjacent undisturbed wetland component as a benchmark.
- b) Once the affected area has been restored to original grade and contour, the restoration effort shall be completed by means of artificial regeneration of plant

materials. Plant materials selection and spacing shall mimic existing conditions of the adjacent undisturbed wetland community. It is reasonable to expect that restoration activities would be fully successful due to the lack of alteration to the existing hydrologic regime. Lag time between the loss of the vegetative component and the restoration planting would be minimal since the majority of the existing vegetation occurring within the project area is in the scrub/shrub phase of regeneration resulting from the 2009 wildfire which eliminated over story species.

These activities are feasible and based on past experience would succeed in completely restoring the wetlands to their prior functions and values.

12. Pursuant to 28 U.S.C. Sec. 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: 19 of October 2016.


Britt Feldner

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

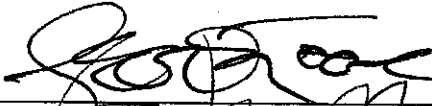
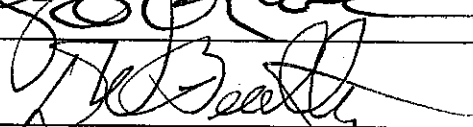
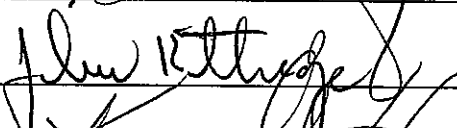
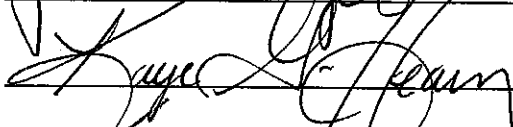
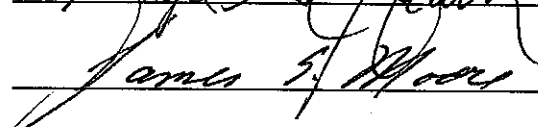
We granted a petition for a writ of certiorari to review the court of appeals' decision in *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013), in which the court of appeals affirmed certifications for certain construction 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 E



BREAKING

Solicitor: Gilbert Road death appears to be self defense



http://www.myhorrynews.com/news/local/carolina_forest/article_50cc8572-6886-11e6-99bc-3fddaac6696c.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 F

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

Coastal Conservation League and	)	Civil Action No.: 2;16-CV-3008-RBH
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.)	
)	

DECLARATION OF DAVID GILREATH

After being sworn, Affiant testified as follows:

1. I am David Gilreath, a resident of Horry County, South Carolina.
2. I am currently the Director of Public Works for Horry County, a position I have held since 2007. In that capacity, I am responsible for the International Drive project in terms of construction and am knowledgeable about the funding, the costs, the contracts for the work, and the work which has been done on the project and the chronology of that work.
3. Beginning on or about Thursday, August 18th, 2016, Horry County Public Works began clearing the right-of-way (ROW) of International Drive (except for portions of ROW located on Lewis Ocean Bay Heritage Preserve) but did not perform any grubbing. Clearing was accomplished using excavator mounted grinders and chainsaws.

4. On August 22nd, 2016 all conditions required by the permits necessary to begin construction within the ROW were satisfied. Filling operations were commenced on this date. On September 23rd, 2016 a temporary restraining order was issued limiting construction activities. At this point all work within wetland areas was limited to sections that were already filled. To the best of my knowledge and belief no additional wetlands have been filled after the issuance of the temporary restraining order. There are some small areas within the ROW but outside of the Lewis Ocean Bay Heritage Preserve easement that have not been cleared or filled. These areas will not be filled until the temporary restraining order is lifted. My staff and the County's contractors have been scrupulous in adhering to the Order issued on September 23, 2016.

5. Prior to the issuance of the temporary restraining order, Horry County had expended approximately \$3,186,148 for construction of International Drive (including wetland impact mitigation). As of October 16th, 2016 total construction expenditures were approximately \$4,289,877.

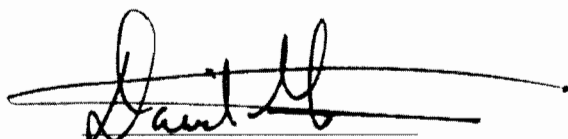
6. If Horry County were to be ordered to suspend construction activities until resolution of all litigation Horry County would be required to bring all disturbed areas to a maintainable grade with full stabilization including permanent vegetation, demobilize, mobilize back to the project upon resolution of litigation, and then strip all vegetation from the project. All of this expense is outside of the normal construction process and would be wholly attributable to the current litigation. These costs are estimated to be approximately \$825,000.

7. If the completion of this project is delayed for an additional two years while litigation is resolved the cost to complete the project are expected to increase by \$180,000. This is based on the National Highway Construction Cost Index published by the Federal Highway

Administration. This index shows an average annual increase in cost of highway construction for the last three complete years (2013-2015) to be 0.83% per year. The stoppage of work costs listed above (\$825,000) plus the increased costs due to inflation (\$180,000) would result in damages to Horry County for just these two items of approximately \$1,005,000.

8. Pursuant to 28 U.S.C. Sec. 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: 19th of October 2016.



David Gilreath



Exhibit G

Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

Public Notice # 2010-01157-3H (1)

Public Notice Date: June 25, 2015

NOTICE OF DEPARTMENT DECISION – STATE CERTIFICATION

The Department, acting on an application for Water Quality Certification pursuant to Section 401 of the Federal Clean Water Act and for certification of consistency with the SC Coastal Zone Management Program in accordance with R. 48-39-10 et. seq. and 15 CFR 93 has reached a proposed decision for the project described below:

Horry County Public Works
International Drive Improvements
Waccamaw River Tributaries
Horry County
P/N 2010-01157-3H (1)

After reviewing the project plans, staff of the Bureau of Water determined that there is a reasonable assurance that the proposed project will be conducted in a manner consistent with the certification requirements of Section 401 of the Federal Clean Water Act. Additionally, staff of the Ocean and Coastal Resource Management determined that the proposed work is consistent with the Coastal Zone Management Program (48-39-10 et. seq. and 15 CFR 93). Accordingly, the Department proposes to certify the project with conditions as follows:

1. The applicant must implement appropriate best management practices that will minimize erosion and migration of sediments on the project site during and after construction. These practices should include the use of appropriate grading and sloping techniques, mulches, silt fences, or other appropriate devices. All disturbed land surfaces affected by the project must be stabilized.
2. The applicant must follow Horry County guidelines to control runoff and protect harmful contaminants from entering sensitive aquatic resources, as proposed. A final stormwater management plan must be in compliance with MS4 and other SCDHEC administered stormwater permitting requirements.
3. Only clean earthen material, free of all potential sources of pollution, may be used as fill.
4. Appropriate containment measures must be taken to prevent pollutants such as gasoline, oil, tar, and debris and other pollutants from entering the adjacent waters or wetlands.

Exhibit A

5. All wetland and tributary crossings must be made with appropriately sized culverts, as proposed, to maintain natural stream morphology and allow unrestricted aquatic life passage.
6. The applicant must compensate for unavoidable project impacts by providing a minimum of 287.8 mitigation credits to compensate for wetland impacts. Credit documentation from the proposed Bass Lake Mitigation Tract III permittee responsible site must be submitted to SCDHEC and the Corps of Engineers prior to the work beginning.
7. Annual monitoring reports, as proposed in the Bass Lake Mitigation Tract III monitoring plan dated December 18, 2014, must be submitted to the SCDHEC for a period of five years after issuance of a Department of Army permit or until performance standards are met.

The SC Department of Health and Environmental Control reserves the right to impose additional conditions on this Certification to respond to unforeseen, specific problems that might arise and to take any enforcement action necessary to ensure compliance with State standards.

The evaluation of the proposed work was conducted by the Bureau of Water and the Office of Ocean and Coastal Resource Management. A copy of the staff assessment supporting the proposed decision is enclosed. A copy of plans submitted by the applicant is available for review in the office of the Division of Water Quality, Bureau of Water or at the Office of Ocean and Coastal Resource Management. Additional information about the technical aspects of this application is available from Mark A Giffin, the project manager, at 803-898-4179.

The final State Certification will be issued if a request for a review conference is not granted by the Department.

The issuance of this Notice of Department Decision represents a final staff decision that may be appealed. Please see the attached appeal procedures for details.



Chuck Hightower, Manager
Water Quality Certification,
and Wetlands Section

cc: US Army Corps of Engineers
Charleston District Office
SC DHEC, Myrtle Beach EQC Office
OCRM

STAFF ASSESSMENT

**SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL (SCDHEC)
DIVISION OF WATER QUALITY
WATER QUALITY CERTIFICATION AND WETLANDS SECTION**

I. Background Information

Applicant: Horry County Public Works

P/N Number: P/N 2010-01157-3H

P/N Date: December 11, 2013

Date Received: December 11, 2013

P/N Close: January 11, 2014

Section of Applicable Federal Law: () Section 10 (x) Section 404 (x) Section 401

Section of Applicable State Law: (x) Coastal Zone Consistency () Construction in Navigable Waters Permit

Brief explanation and purpose of activity:

The proposed work consists of realigning, widening and paving a 5.6-mile portion of the existing International Drive. The purpose of the proposed project is to relieve traffic congestion and to provide a secondary evacuation route for the residents of the Carolina Forest Community and surrounding areas.

Waterbody Names: Waccamaw River tributaries

Water Classifications: FW

Waterbody Location: Between SC 90 and SC 31 east of Conway along the unimproved portion of International Drive in Horry County (Latitude 33.802391° N, Longitude -78.884481° W.)

Waterbody on 2014 303(d) List or within approved TMDL?

() Yes (x) No

There are no monitoring sites in tributaries in the project vicinity. The project is not located within a TMDL watershed.

II. Project Description

A. Description of Work

The proposed work consists of widening, paving and re-aligning the existing unimproved portion of International Drive. In detail, the work involves the construction of a paved 4-lane roadway with 14-foot-wide lanes with a 125-foot right of way. The remaining right-of-way width on either side of the travel lanes will be filled and graded to allow for drainage during storm events. The project originally

would have impacted 24.88 acres of freshwater wetlands located adjacent to tributaries of the Waccamaw River. Impacts include filling 21.33 acres, clearing 0.22 acre and excavating 3.33 acres. However, the project was modified (see Sections II. B. through E. below.) The majority of the project is located along the existing footprint of International Drive, but deviates from the existing footprint at 2 locations. The first location is where the existing International Drive intersects SC 90 where the proposed roadway is shifted to the west to avoid encroachment in a residential area. The second location is located at the midpoint of the proposed project. At this location, the existing footprint curvature is not sufficient to meet the 60-mph design speed criteria, and to accommodate current/future projected traffic volume for the service area. The project purpose, as stated by the applicant, is to relieve current and anticipated congestion for local/transient commuters and to provide a secondary evacuation route for the residents of the Carolina Forest Community and surrounding areas.

B. Fill

1. Is fill required? Yes No If no, proceed to Section II. C.

Amount	Acres/LF
Total	19.58 Acres and 26LF
Wetlands	19.58 LF
Open Waters of U. S.	26 LF

2. Is the fill temporary? Yes No

C. Excavation

1. Is excavation required? Yes No If no, proceed to Section II. D.

Amount	Acres
Total	4.35
Wetlands	4.35
Open Waters of U. S.	

2. Is excavation spoil site adequately sized for the amount of material?

Yes The applicant stated that all excavated material will be contained and stabilized within uplands until used for roadway fill. Excavated material not used for construction will be removed from the project site and deposited within uplands.

No

N/A

D. Other Impacts: Yes No Mechanically cleared wetlands (0.26 acre)
 Flooding wetlands

E. Project Modification

Was the project modified from the original public notice?

Yes The applicant modified the project by relocating an access road within the Horry County Solid Waste Authority property to reduce impacts to forested wetlands by 0.72 acres. The revised impacts are reflected in above Section B. 1.

No

F. Compensatory Mitigation

Is compensation required by DHEC?

(x) Yes The applicant proposed to provide compensatory mitigation to offset unavoidable project impacts by providing a permittee responsible plan due to the lack of sufficient available mitigation credits from an approved mitigation bank within the watershed. The originally proposed conceptual permittee responsible plan included the enhancement and restoration of 93.4 acres of wetlands adjacent to the South Prong of Sterritt Swamp located in Central Horry County west of the proposed project as detailed in the *404 Permit Application Package International Drive Re-Alignment/paving Horry County, South Carolina*. The applicant submitted a revised permittee-responsible plan with details in *Bass Lake Mitigation Tract III, Pee Dee Road, Yauhannah, Georgetown County, South Carolina* (December 18, 2014). The Bass Lake Mitigation Tract III site is located adjacent to and including a portion of the Pee Dee River Swamp in the Yauhannah Community in northern Georgetown County. The tract is located just upstream of the Highway 701 Bridge and northeast of Pee Dee River Road. The tract is situated southwest of Bass Lake Mitigation Tract II, north of the Richardson Mitigation Tract and northwest of the Haulover Tract WRP that is also protected. The tract consists of a total of 126.79 acres and includes approximately 121.54 acres of forested wetlands and approximately 5.25 acres for forested uplands occupying an area that buffers the river swamp from adjacent properties to the west. The tract is located within HUC 03040207 and within the secondary service area as defined by the COE for the Waccamaw River Lower Coastal Plain. Mitigation activities would enhance 121.54 acres of mature forested wetlands and interior drainage ways associated with Conch Creek, Bass Lake and the Pee Dee River by removing portions of an above-grade roadway that bisects the tract from east to west. This roadway has affected the pattern of natural drainageways within the tract and restricted the back-flooding function of the bottomland hardwood community during periods of low and rising water (generally less than 2 feet in depth). The work would involve the removal of 3 road crossings and would include the removal of an existing box culvert and replacing it with a bridge span (crossing 1), creating a multiple breached section (crossing 2) and replacement of an existing bridge with a longer span (crossing 3). These activities are expected to enhance the back flooding function of the hardwood community (as previously described) similar to successful mitigation activities used in the Bass Lake Mitigation Tracts I and II. The revised plan would provide 291.69 credits, which exceed the 287.8 wetland credits needed to offset project impacts. Mitigation Credits were calculated using the current Charleston Corps calculation methods found in "Guidelines for Preparing a Compensatory Mitigation Plan". The site will be protected through a conservation easement to be held by the Horry County Conservation Foundation, Inc. Therefore, the proposed mitigation should adequately offset project impacts provided the applicant submits a final mitigation plan with appropriate permittee responsible credit documentation and/or mitigation bank credit withdrawal documentation, which should be submitted to SCDHEC and the Corps of Engineers prior to the work beginning.

- No
- N/A

G. Remediation

Is remediation required? Yes No

H. Stormwater Concerns

1. Are water quality impacts from stormwater expected?

- Yes
- Temporary

(x) No Water quality impacts from non-point sources will be minimized and should not contravene the water quality standards or existing and classified uses of freshwater wetlands and tributaries associated with Waccamaw River if the applicant uses Best Management Practices (BMPs) and is in compliance with SCDHEC administered MS4 and other stormwater

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

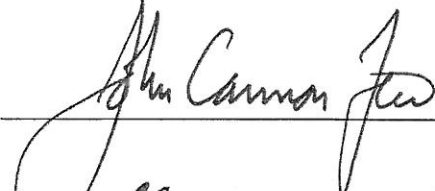

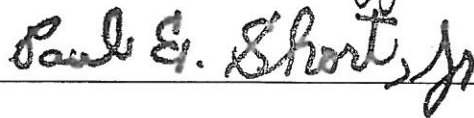
Appellants appeal an order from the administrative law court (the ALC) affirming the decision of the Board of the Department of Health and Environmental (the Department) and granting Respondents' motion for summary judgment. Respondents have filed a motion to dismiss this appeal as moot because no justiciable 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
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FILED
5/25/12 ST