STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

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.

HORRY COUNTY PUBLIC WORKS' REPLY TO APPELLANTS' RESPONSE IN OPPOSITION TO THE COUNTY'S MOTION TO DISMISS THE APPEAL AS MOOT

The Appellants' Response in Opposition to the Motion to Dismiss this Appeal as moot suffers from two fundamental flaws. First, Appellants misrepresent the arguments the County has made. Second, Appellants misrepresent the state of the law, both federal and state, which govern the question of the nature of the two state certifications at issue and whether the issues on appeal are now moot. The County has argued consistently two things: 1) the certifications at issue became moot when the Corps of Engineers issued its Section 404 permit; and 2) the state of construction of the project, just as was the case in the two decisions cited to this Court by Appellants, Town of Arcadia Lakes v. S.C.D.H.E.C., 404 S.C. 515, 745 S.E.2D 385 (Ct. App. 2013) and Upstate Forever v. SCDHEC, renders the issues related to both certifications moot. Contrary to Appellants' somewhat hyperbolic characterization, the County has cited applicable law to the Court and, perhaps more importantly, has noted the *absence of any controlling statutory or regulatory or case law* supporting Appellants' argument that certifications are independently enforceable. The cases cited by Appellants in their response do not stand for the propositions claimed by Appellants.

The issues raised by Appellants are moot for two reasons: 1) the federal permit which triggered their issuance has been issued and no ruling concerning how the certifications, which are not independently enforceable, were issued will change that fact; and 2) the project has progressed to the same point as the projects in Town of Arcadia Lakes and Upstate Forever which this Court and the Supreme Court held rendered an appeal moot.

I.

VOIDING THE CERTIFICATIONS WILL NOT ALTER THE LEGAL STATUS OF THE PROJECT

The County strenuously maintains that it is clear that the DHEC certifications were properly reviewed and issued. However, it is equally clear that once the Army Corps of

Engineers issued its Section 404 permit, those certifications had served their purpose under existing law. The conditions included in the certifications were incorporated into the federal permit and became *conditions of that permit*. Exhibit B, Corps Permit. Once a state either issues its certification or fails to act within the time period specified by Congress for a state to act pursuant to Section 401 of the Clean Water Act or the federal Coastal Zone Management Act (one year and six months respectively), the state becomes an "interested bystander" lacking the authority to affect the federal permit. Puerto Rico Sun Oil v. EPA, 8 F.3d 73, 778-80 (1st Cir. 1993). The County cited this case in its Response in Opposition to Appellants' Motion for a Stay. In South Carolina, our Supreme Court held in Triska v. SCDHEC, 292 S.C. 190, 355 S.E.2d 531 (1987), also previously cited by the County, that certifications are *not permits*. The fact that certifications can be the subject of a contested case does not render them the equivalent of permits.

Nothing in any state appellate case has held differently. As Judge Anderson held in his Order Denying Stay in this case (Order of October 10, 2016 and Exhibit D to Appellants' Motion for Supersedeas), DHEC, at his request briefed him in advance of his ruling and explained that it was the agency's position that the certifications became moot once the federal permit was issued. Just as now, Judge Anderson noted that Appellants provided him no authority to the contrary. Following the Supreme Court's ruling in Kiawah Dev. Partners, II v. S.C.Dep't of Health and Envil. Control, 411 S.C. 16, 32-34, 766 S.E.2d 707, 717-718 (2014), Judge Anderson not only followed his own analysis of the law regarding the limited nature of certifications, but gave what he said was required "deference to the Department's interpretation of its regulations." (Order at page 5). The more limited role of certifications is why they constitute what is called "indirect" authority, as noted by Judge Anderson. This distinguishes them from "direct" authority found in

permit requirements.

Independent enforcement authority is what creates *direct permitting authority.* If proceeding with an activity without a particular certification (or proceeding with the work when the certification has been stayed) could result in an enforcement action, the "certification" would be the equivalent of a permit. Appellants repeatedly argue that these two certifications are the same as permits, but never cite any authority which would create such an enforcement possibility. That is because there is no such legal authority. Were there no federal permit requirement for the road construction, DHEC would have had no authority to impose either 401 Water Quality certification requirement or a Coastal Zone Management Consistency certification requirement. (There was no state permit required for the project). The statutes cited by Appellants do no more than require DHEC to *perform these certification analysis* when a federal or state permit is required for a project and to develop regulations governing those certifications. Absent a federal or state permit requirement, there is no authority in DHEC to apply its certification regulations (including the Coastal Management Program policies) to work that alters the environment. Appellants do not cite to any statutory or regulatory provision providing such a requirement *because there are none.*

Instead, Appellants claim that several appellate court decisions create the requirement for certification absent a state or federal permit. They completely mischaracterize all of the decisions they cite. The case of Spectre, LLC v. S.C. Dep't of Health and Envtl. Control, 386 S.C. 357, 688 S.E.2d 844 (2010) concerned, not the application of the policies contained in the S.C. Coastal Management Plan ("CMP") as independently enforceable, but as applied to deny Coastal Zone Consistency certification to a *state storm water permit* for a project. The Supreme Court summarized the origin of the dispute this way, "As part of the plan, Spectre proposed to

fill 31.76 acres of isolated freshwater wetlands and applied to DHEC for a stormwater/land disturbance permit, as required by S.C.Code Ann. §§ 48–14–10, et seq., and S.C. Reg. 72–305. DHEC denied Spectre's application because it found the project inconsistent with various provisions of the CMP, including the following provision..." The dispute in that case was over DHEC's use of the CMP policies as if they were regulations to prevent the issuance of a state permit and the decision does not, as claimed by Appellants, stand for the proposition now advanced by Appellants.

The decision in Murphy v. S.C. Dep't of Health and Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012), simply reflects a review of the issuance of Section 401 Water Quality Certification triggered by the application for a Corps of Engineers Section 404 permit to fill part of a stream. The decision notes that the Corps issued its permit after certification was issued, but does not address the question of mootness of the certification issues. There is no indication of why the issue of certification proceeded in court after the Corps' permit. This case, therefore, also does not stand for the proposition advanced by Appellants.

This Court's decision in Bruning v. SCDHEC and Cat Island POA, Appellate Case No. 2014-00210, 2016 WL 6247005 (Ct. App. Oct. 26, 2016) similarly offers no support to Appellants' argument. The Coastal Zone Management Consistency certification at issue in that case was for a state storm water permit, as was the certification at issue in the Spectre decision. It is not surprising that the case went forward after the storm water permit was issued, as that permit was a state permit and, therefore, subject to state court jurisdiction.

Similarly, the Supreme Court decision in Kiawah Dev. Partners, II v. S.C. Dep't of Health and Envl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014) is not only not "decisive" on the question of the role of DHEC certifications, it has nothing to say about that role at all. That case

concerned DHEC's issuance of a critical area *direct permit* for an erosion control structure and not certification.

Contrary to Appellants' unsupported, but oft repeated claim, the certifications being challenged are *entirely derivative of the federal permit* requirement, there being no state permit required for the International Drive project. The General Assembly removed all doubt that a regulatory permit requirement was necessary to subject an activity to the provisions of the Pollution Control Act when it amended the Act to provide that,

> "The permit requirements of subsection (A)(1), Section 48-1-100, and Section 48-1-110 do not apply to:
>
> (b) discharges for which the department has no regulatory permitting program;"

S.C. Code Sec. 48-1-90(A)(2).

The Appellants' complaint about the County pointing out the significance of a permitting requirement being established by the General Assembly is either feigned surprise or deliberate disregard of this clear mandate. As DHEC has not established a "regulatory permitting program" requiring either a 401 Water Quality Certification of a Coastal Zone Management Consistency certification for the kind of work being undertaken by the County in wetlands outside the critical area where direct permits are required, the import of the certifications is confined to their role in the issuance of the federal permit. They are not independently enforceable. If this Court were to rule that one or both certifications were improperly issued, this would not create a permit requirement rendering that work illegal under state law. The only permit required for the work is a federal permit. A State court, as Judge Anderson noted, does not have jurisdiction over that federal permit. Therefore, what actions the Army Corps of Engineers took with respect to issuing their permit are beyond the review of this or any State court.

Appellants worry that the County's argument will upset the cooperative federalism

balance of environmental regulation in South Carolina. It will not. The Congress established the certification requirement for federal permits and placed specific time limits on a state to act. South Carolina could have chosen to not only direct DHEC to conduct the two certifications required by federal law, but to make those certifications permits. *The General Assembly has chosen not to do so.* Appellants seek to have this Court do what the legislature has manifestly refused to do and *create a new permit requirement with all the implications this would entail.* DHEC has taken the position that the role of its certifications is limited to an indirect one, and one which ends when the federal permit is issued. This agency interpretation, which is entirely consistent with the statutory framework and case law, is entitled to deference in line with the guidance in Kiawah Dev. Partners, II.

II.

THE STAGE OF CONSTRUCTION OF THE PROJECT RENDERS THE ISSUES BEFORE THE COURT MOOT

Appellants claim that the stage of construction of International Drive is not the same as the stage of construction in the two cases they cited to this Court in their argument for supersedeas. The distinction they try to draw is truly one that makes no substantive difference. Appellants argue that since International Drive is not yet fully built, despite the fact that all of the wetlands have been completely filled and the narrow portion of the Lewis Ocean Bay Heritage Preserve completely cleared, distinguishes this case from both Town of Arcadia Lakes and Upstate Forever. This argument is premised on their explanation that filled wetland can be restored. That is absolutely true. The same was also true, however, in both of the cases they have argued to this Court creates the risk of mootness if a project progresses too far. The utility line in the Upstate Forever case could have been removed and the stream restored to its former condition. Similarly, structures built in the Town of Arcadia Lakes, in part, on filled wetlands,

could have been torn down and the wetlands completely restored. There is no difference in those situations and International Drive that has any implications for the question of mootness.

In federal court, when Appellants sought unsuccessfully to secure a preliminary injunction, one of the seminal questions was whether continued work under the federal permit would result in "irreparable harm." Exhibit D, Federal Order Denying Preliminary Injunction. This is the reason there was evidence produced by the County regarding the possibility of restoration (and by the Appellants that restoration was not fully possible). The question of mootness before this Court is whether at this juncture, any meaningful relief can be ordered by the Court if the appeal goes forward. Under Appellants' reading of the law from previous cases, a reading with which the County agrees, there is no meaningful relief that can be awarded as to International Drive. The wetlands are completely filled. [1] All of the vegetation has been cleared and the road is ready for the remaining concreate and paving work. This Court and the Supreme Court were properly reluctant to entertain relief in the two earlier cases that would undo the utility and apartment projects at issue, not because restoration was not objectively possible, but because once the project reached that point, ordering restoration would have been extraordinarily wasteful as well as expensive. Possible relief does not equate to "meaningful" relief.

The County would suggest that a powerful reason for our courts adopting this approach to a mootness inquiry is to prevent exactly what is happening in this case. A party which could have moved expeditiously to seek preliminary injunctive relief did not do so, instead dragging out its challenge to the project with the result that the project proponent proceeded with the work

[1] The Appellants' critique of the Affidavit of Britt Feldner comes with no small amount of ill grace. Appellants have overflown the project site with a drone and with an airplane. They have inspected the work and could have again had they but asked. They are well aware that Mr. Feldner is intimately familiar with what wetlands had been on the site. His affidavit is succinct, but clear. The wetlands are now completely gone as is all the vegetation in the right of way.

and eliminated the wetlands and forested area they sought to protect. Appellants ungraciously accuse the County of making a "complete fabrication" by pointing out the actual chronology of their state and federal challenges to the International Drive. The dates on which they filed their various challenges are facts, not fabrications. Appellants' argument presupposes that Horry County was obligated to accommodate their chosen schedule of challenges. They correctly point out that the County moved expeditiously to construct the project – a project which it has concluded is an important matter of public safety. (While Appellants' counsel have been dismissive of the County's public safety claims, all backed up by professionals of long experience, they have presented no evidence challenging the County's conclusions regarding the public safety importance of this road project). It would be surprising if the County did not move as quickly as it could to get on with the construction of the road given its safety implications.

Appellants claim they could not have moved any quicker than they did to seek to have construction halted. That is simply not true. While they filed their appeal in this Court on August 23, 2016, they waited over three months, until December 1, 2016, to file their Petition for Supersedeas. In addition, instead of stringing out their filings in federal court, they could have filed, as is most common, their lawsuit *with* applications for *both* a temporary restraining order and a preliminary injunction. Instead, they *waited nearly three weeks* after filing their federal complaint before moving for a TRO. By then, over half the wetlands in the right of way had been filled to some extent and nearly all the trees cleared.

Earlier filing of their TRO motion was not the only option open to Appellants. The Clean Water Act provides for a citizen suit to challenge permits issued, as Appellants claim the Section 404 permit was, in violation of applicable statutory or regulatory provisions. Appellants' counsel are no strangers to this option. It requires the filing of a formal notice sixty days prior to

filing suit informing the federal agency, the state and the permit applicant of their intention to bring a specific challenge. 33 U.S.C. Sec. 1365. Appellants were under no obligation to wait until they knew the Corps of Engineers had issued its permit to file such a letter. They should have been well aware that the Corps could issue its permit. After the ALC Order was issued, that possibility increased significantly. Yet, they waited, they say, until they read about the County commencing work in the newspaper to act. Had they filed a sixty day notice letter, the Corps and Horry County would have been on notice of a likely legal challenge. The Appellants' proffered assumption that the County expected such a federal challenge is unfounded speculation. The ALC's clear rejection of every claim and argument made by the Appellants, for all intent and purpose, the same claims they would make in a federal challenge, provided the County with a reasonable expectation that Appellants would drop their attack on the International Drive project.

The Appellants' characterization of the County as unreasonable in the steps to construct the road ignores this fundamental reality: Appellants were only limited by the applicable federal statute of limitations of *six years* in their choice of when to file an action in federal court. The suggestion that the holder of a permit must wait for six years to see if someone will challenge their permit is frankly absurd, yet that is precisely what lies at the heart of Appellants' claim that the County unreasonably ignored the "risk" of a lawsuit. As explained above, and as recognized by the U.S. District Court in its denial of Appellants' motion for a preliminary injunction, the evidence is strong of a significant public safety goal of the International Drive project. It is a fundamental job of local government to look out for the safety of its citizens and that is exactly what the County is doing in attempting to get this project constructed. See Exhibit D to the County's Motion to Dismiss, pp. 42-43.

The unnecessary delay in challenging a large construction project displayed by Appellants in their state and federal cases is the sort of conduct often considered in equitable decisions by our courts. It is entirely proper for this sort of delay, when it results in allowing a large project – particularly one by a government entity – to proceed so far that the environmental harms the challengers claim to be trying to prevent have all occurred, to be held a proper ground for finding that challenge moot. To do otherwise, encourages delay in challenges to such projects that result in unwarranted harm to the proponents of the projects. [2] In this case, there will be considerable costs to the County if it is required to halt construction at this stage, all of those costs being *paid with scarce, public, taxpayer generated, funds*. In a case such as this, where a challenger has acted so as to allow a construction project to proceed to a point where all the environmental harm has occurred, the challenger should not expect a court to allow the challenge to continue. Where, as here, large amounts of public funds are at stake, there is an even stronger impetus for dismissing the lawsuit as moot.

CONCLUSION

The County respectfully requests that this appeal be dismissed as moot. The certifications being challenged are not independently enforceable and, therefore, voiding them would have no concrete effect on the legal rights of the parties. Moreover, the project has progressed to the stage where the issues being pursued by Appellants have been rendered moot and it would be inequitable to permit their legal challenge to continue.

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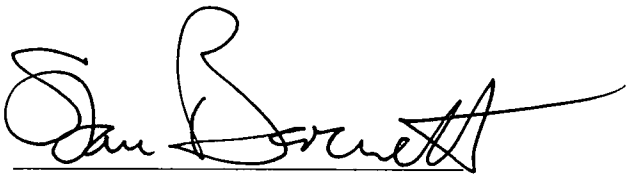
[2] Appellants have consistently acted so as to place the County in the position of taking action and then attempting to halt that action. After having agreed to a Consent Temporary Restraining Order, Appellants waited for the County to proceed with the work permitted by that Order and then filed a motion seeking to hold the County in contempt. They did this without ever visiting the work site. The U.S. District Court properly denied this motion which was utterly unwarranted. The County cannot say that Appellants' actions are simply gamesmanship designed to inflict harm on the County for a tactical advantage, but the result is the same regardless of the motivation.



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December 31, 2016
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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.

PROOF OF SERVICE

I hereby certify that on this date I served the forgoing Reply to Appellants' Response in Opposition to the County's Motion to Dismiss Appeal as Moot by placing copies of same in the U.S. Mail addressed to:

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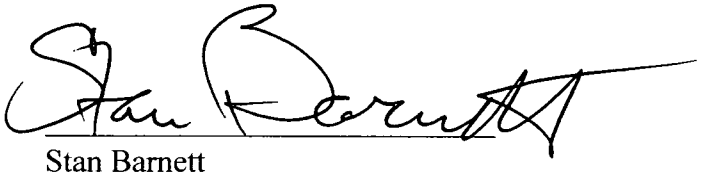

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December 31, 2016

The Honorable Jenny Abbott Kitchings
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RE: S.C. DHEC and Horry County Public Works v. SC Coastal Conservation League and SC Wildlife Federation: Admin Law Court Case No. 15-ALJ-07-0404-CC
Appellate Case No.: 2016-001758

Dear Ms Kitchings:

Enclosed for filing, please find the original and seven copies of Respondent Horry County's Reply to Appellants' Response in Opposition to the County's Motion to Dismiss the Appeal as Moot. Please return one stamped copy in the enclosed postage paid envelope.

With kindest regards and appreciation, I remain

Sincerely,

Stan Barnett

Cc: Amy E. Armstrong, Esq.
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Nathan Haber, Esq.
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