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

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[1]Counsel 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 says 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 & Envtl. 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 wiling 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 issue[3] remain to be completed, and this appeal is therefore not

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[2]The 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.

[3]Horry 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 Certifiction") 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

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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]

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[4]Once 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.

[5]On this point our Supreme Court's Opinion in Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. 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

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("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 nave 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.

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[6]Additionally 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 & Envtl. 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

[7]Here, 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

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[8]Another 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 & Envtl. 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

[9]Section 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

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[10]A 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

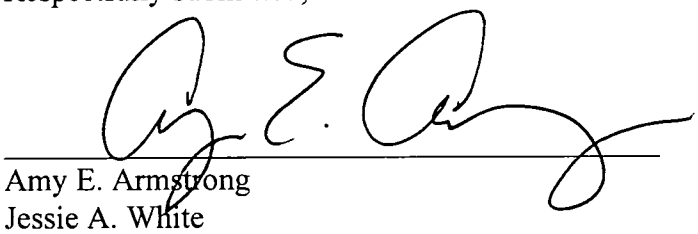
through the aforementioned news release of August 22, 2016, which announced that Horry County had commenced construction. Appellants and counsel were not provided notice of the issuance of that permit by the Corps, despite the fact that Appellants were actively involved in the Corps' decision-making 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 dilligence. 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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December 29, 2016

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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:

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December 29, 2016

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December 29, 2016

VIA EMAIL AND U.S. MAIL

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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

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.

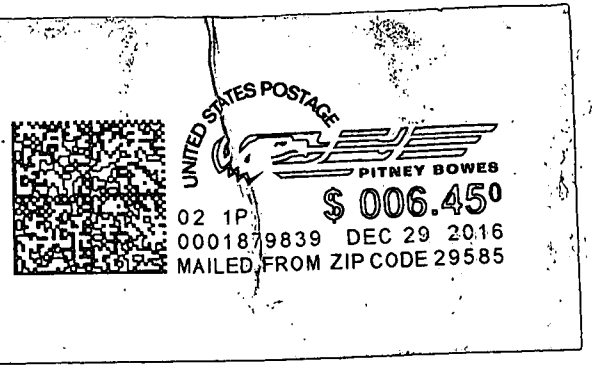
Kindly return a clocked-in copy of the motion in the enclosed postage-paid, self-addressed envelope. Thank you for your assistance with this matter.

Yours very truly,

Amy E. Armstrong

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

S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585



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