

STAN BARNETT

Attorney at Law
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031 / (843) 708-4887
stan.barnett@yahoo.com

January 19, 2016

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, S.C. 29201

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 six copies of Respondent Horry County's
Reply to Appellants' Response in Opposition to the County Motion to Vacate Stay and Proof of
Service.

With kindest regards and appreciation, I remain

Sincerely,


Stan Barnett

RECEIVED

JAN 20 2017
SC Court of Appeals

Cc: Amy E. Armstrong, Esq.
Michael Traynham, Esq.
Nathan Haber, Esq.
Arrigo Carotti, Esq.

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.

PROOF OF SERVICE

RECEIVED

JAN 20 2017

SC Court of Appeals

I hereby certify that on this date I served the forgoing
Respondent Horry County Reply to Appellants' Response in
Opposition to the County's Motion to Vacate by placing copies of
same in the U.S. Mail or delivery by Fed Ex addressed to:

Amy E. Armstrong, Esq.
S.C. Environmental Law Project
430 Highmarket Street
Georgetown, S.C. 29440

Michael S. Traynham, Esq.
SCDHEC
2600 Bull Street
Columbia, S.C. 29201

Nathan M. Haber, Esq.
SCDHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, S.C. 29405

A handwritten signature in black ink, appearing to read "Stan Barnett", written over a horizontal line.

Stan Barnett
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031/ (843) 708-4887
Attorney for Respondent,
Horry County Public Works

January 19, 2017
Mount Pleasant, South Carolina

RECEIVED

JAN 20 2017

SC Court of Appeals

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 Department of Public Works.....Respondents,

Vs.

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

RESPONDENT HORRY COUNTY’S REPLY TO APPELLANTS’ RESPONSE IN
OPPOSITION TO MOTION BY HORRY COUNTY TO VACATE THE STAY OF THE
SCDHEC CERTIFICATIONS AND THE ORDER PROHIBITING COMPLETION OF
INTERNATIONAL DRIVE

I.

INTRODUCTION

Appellants’ Response in Opposition to the Motion to Vacate the Stay filed by Horry County is certainly long on invective, but is lacking in anything approaching substance. While the County will not try to address each insult leveled at it by Appellants, at the outset of this Reply, the County believes it is appropriate to note that the content as well as the tone of the allegations and characterizations by Appellants are unworthy of practice before this or any other Court. The lawyers oath of civility as well as Rule 407, Preamble, (5) & (9), and Rule 3.6, SCACR, all require better. Nothing the County has done or said in the progress of this matter warrants being accused of dishonesty, regardless of how Appellants may view the project in question.

II.

THE COSTS OF CONTINUING THE STAY ARE EXPLAINED IN DETAIL

The affidavit of David Gilreath, Exhibit A to the County's Motion to Vacate, lists each element of his estimated cost of \$932,000 (over a two year period) if the stay preventing completion of the road is not lifted. Appellants state without any support or explanation that they could poke one hundred holes in this estimate. They do not, however, attempt any poking. They say the fact of the cost is not relevant to the issue before the Court – whether the stay should be lifted. In light of the language of SCACR 241(c)(3)(4), the cost to the County of a stay forbidding completion of construction is as much a consideration of the appropriateness of the terms of a stay as are any environmental impacts of completing the project.

Appellants complain that the figure of \$250,000 was cited in an email from the County's counsel to Ms Kitchings asking for clarification of the stay. That figure was specifically tied to the grassing stabilization work required for compliance with NPDES (storm water) requirements of state and federal law. Mr. Gilreath's estimate lists \$230,000 as the figure for this work, not far off the mark cited by counsel. The rest of his estimate is for other work necessitated by continuing the stay, work which would not be required if the project is completed.

If Appellants could have "poked" those holes they say they were capable of making in Mr. Gilreath's estimate, it must be assumed they would have provided the Court evidence. They did not because they cannot. It is, therefore, unrefuted that continuing the stay will cost Horry County's tax payers \$932,000 over a two year period.

III.

COMPLETING THE ROAD AND LIMITING ITS USE TO ONLY EMERGENCY VEHICLES WILL RESULT IN LESS WATER QUALITY IMPACTS THAN LEAVING IT MERELY STABILIZED

Appellants once again offer testimony by Dr. Dan Tufford on a matter of civil engineering – the question of whether leaving the road merely stabilized will risk more sediment erosion and transport than completing the road in accord with the engineered storm water and water pollution prevention plan approved for the project. Dr. Tufford is a biologist and an ecologist. While he may be qualified to opine about the effects of various forms of pollution on the environment which receives such pollution, he is simply not qualified to offer engineering opinions on the likelihood of sediment being transported from any given physical situation. That is a quintessential civil engineering question for which he is not qualified, much less licensed.

Most of Dr. Tufford's affidavit is a reprise of earlier affidavits aimed at his claim that use of the road by many vehicles would result in contaminants washing off of the road surface. This same testimony was found by the ALC to be less credible than that of DHEC and the County. The question is not relevant to the County's request in this motion, however. What is relevant is whether leaving the road merely grassed poses more of a risk of sediment runoff than completing the road. The undisputed engineering evidence is that it does. The Supplemental Affidavit of Steve Gosnell explains why this is so: the road has not yet been graded to create the slopes and gradients required to minimize erosion and transport of sediment, the more impervious surfaces in the completed project will reduce the chances for run off of sediment and mere stabilization of the current road risks erosion and run off in large rain events. Exhibit A, Supplemental Affidavit of Steve Gosnell. For this reason, it is better for water quality if the road is completed. As noted, the county's request is that the stay be vacated and replaced with one that allows the road to be

completed, but until the case is finally resolved, used only for emergency vehicles and with no curb cut connections.

Dr. Tufford also claims that paving the road will further compress filled wetland areas and make them more difficult to restore should Appellants prevail. He does not say, and could not say, that restoration would be rendered impossible. That is because restoration is always possible. The question is merely one of degree of difficulty. Some further compression of soil is another engineering question beyond Dr. Tufford's expertise and one that would, if at all, only marginally affect the ease of restoration.

If, as seems clear from the submittals before the Court, there is no additional environmental harm from allowing the County to complete the road and completion improves water quality, on balance the County's request is reasonable as it allows the conservation of \$932,000 of public tax payer funds.

IV.

COMPLETION OF THE ROAD IS A MATTER OF PUBLIC SAFETY

Appellants state, without the benefit of any support whatsoever, that the County's claim that the project is a matter of public safety is "hollow alarmism." It is not a hollow claim, but it is one of appropriate alarm. The Declaration of Randy Webster is the only competent evidence on the question before the Court. Appellants' argument that because the County did not use the word "safety" in its permit application, it must not be an important consideration is ludicrous. Congestion of highways is always a safety consideration. If the highways that provide fire, police, EMS and other emergency services to the Highway 90 communities are congested – the most congested in South Carolina – that is obviously a safety problem. Mr. Webster classifies it as

potentially a matter of life and death. This is an important consideration in the decision to be reached on the County's motion.

Appellants' cavalier treatment of the safety of the citizens of Horry County is unsupported by any competent evidence that the County's conclusions are in error. That makes their challenge to this conclusion not only empty, but callous.

V.

NOTHING THE COUNTY HAS DONE HAS BEEN IN VIOLATION OF THE LAW OR
DISRESPECTFUL OF THIS OR ANY COURT

Repeatedly, Appellants imply that somehow the County was violating some law or prohibition by proceeding with construction of International Drive. In spite of these aspersions, Appellants make this clear admission at page 7 of their Response, "While all of Horry County's construction activities may have been within their rights under the letter of the law..." One would hope that a party who acknowledges the legality of work would restrain itself from implying otherwise in court filings.

Appellants repeatedly refer to their motion to hold Horry County in contempt of court. The obvious reason for this is to imply that the County was contemptuous of the U. S. District Court. They lost that motion. A copy of the District Court's order denying their motion is attached as Exhibit B and explains fully why the Appellants' motion was without foundation.

Appellants flatly accuse the County of being disrespectful of this Court by continuing some minor work after the Supersedeas stay was granted. As the County has explained, in light of the ALC Order Denying a Stay, the County concluded that staying the two state certifications did not amount to an injunction as there is no state permit in place that authorizes the work being done.

When the issue was raised, the County asked for clarification and has assiduously abided by the Court's rulings. There is no basis whatsoever for characterizing the County as disrespectful.

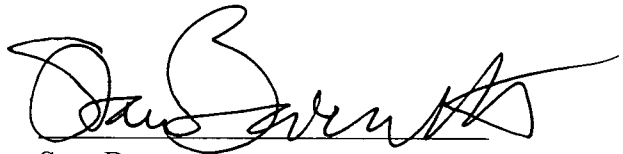
From the beginning of this dispute, Appellants have accused the County, the Department of Natural Resources and the legislative delegation of Horry County of all manner of improper motives and actions. All of these allegations have been without any proof and the most serious directly refuted by its own witnesses. This kind of approach to litigation is inappropriate, to say the least. It exceeds the limits of proper advocacy. The purpose of such tactics is to put the opposing party on the defensive, to paint them in a bad light. The County would ask the Court to reject such unwarranted and improper characterizations of its actions. ¹

CONCLUSION

For the reasons set forth herein, Horry County respectfully requests that the Orders of December 15 and 20, 2016 staying the SCDHEC certifications at issue in this appeal and prohibiting completion of the construction of International Drive be vacated with the condition that the County will allow the road to be used only for emergency vehicles and will not connect the road to adjacent properties with curb cuts until this appeal is fully resolved.

¹ Appellants' strangely claim at page 1 of their Response that the County filed the Motion to Vacate to bring public pressure and scrutiny on this Court. This is on its face a peculiar statement. In fact, the County has made no public statements on this litigation in quite some time and none related to the Motion to Vacate. Appellants' counsel, on the other hand, released, simultaneously with their Response to the Motion, a press release, presumably for the purpose of drawing public attention to the matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stan Barnett", written over a horizontal line.

Stan Barnett
305 North Civitas Street
Mount Pleasant, South Carolina 29464
(843) 884-1031/ (843) 708-4887
stan.barnett@yahoo.com
Attorney for Respondent,
Horry County Public Works

January 19, 2017
Mount Pleasant, South Carolina

EXHIBIT A

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

Coastal Conservation League and)	Civil Action No.: 4:16-cv-03008-RBH
South Carolina Wildlife Federation,)	
)	
Plaintiffs,)	
)	
v.)	ORDER
)	
United States Army Corps of Engineers,)	
Charleston District; Lt. General Todd T.)	
Semonite, <i>in his official capacity as Chief</i>)	
<i>of Engineers, U.S. Army Corps of Engineers;</i>)	
Lt. Colonel Matthew Luzzatto, <i>in his official</i>)	
<i>capacity as District Engineer, U.S. Army Corps</i>)	
<i>of Engineers, Charleston District; United States</i>)	
Environmental Protection Agency; Gina McCarty,)	
<i>in her official capacity as Administrator of the U.S.</i>)	
<i>Environmental Protection Agency; Heather</i>)	
McTeer Toney, <i>in her official capacity as Regional</i>)	
<i>Administrator, Region IV, U.S. Environmental</i>)	
<i>Protection Agency; and Horry County,</i>)	
)	
Defendants.)	
)	

This matter is before the Court on Plaintiffs’ Motion for Contempt. *See* ECF No. 35. The Court held a hearing on the motion on October 28, 2016, and took the matter under advisement. *See* ECF No. 46. Having considered Plaintiffs’ motion, Defendant Horry County’s response, the attorneys’ oral arguments, and the relevant law and evidence, the Court denies the motion for the reasons set forth below.

Relevant Background

Plaintiffs, which are two public interest environmental organizations, initiated this action by filing a complaint on September 1, 2016. *See* ECF No. 1. Plaintiffs challenge a permit issued to Horry County by the United States Army Corps of Engineers (“Corps”) pursuant to section 404 of the Clean

Water Act (“CWA”), 33 U.S.C. §§ 1251 through 1387. *See* Administrative Record (“AR”)¹ at 1496-1543. The permit authorizes the widening, paving, and realignment of International Drive in Horry County, South Carolina, activities that will involve the filling of wetlands protected under federal law. AR at 1497.

On September 14, 2016, Plaintiffs filed a motion for a preliminary injunction seeking an order enjoining Horry County from proceeding with the construction activities that form the basis of the complaint.² ECF No. 6. On September 21, Plaintiffs filed a motion for a temporary restraining order based on many of the same reasons set forth in their preliminary injunction motion.³ ECF No. 16. The next day, September 22, the Court held an on-the-record telephone conference call with counsel for all parties. ECF Nos. 20 & 22. During that teleconference, the Court asked counsel for Plaintiffs (Amy Armstrong and Jessie White) and counsel for Horry County (Stanley Barnett) whether they could reach a temporary agreement regarding the type of construction activities that could be performed pending a ruling on the preliminary injunction motion. Counsel indicated they would discuss the possibility of a consent temporary restraining order. The following day, September 23, Plaintiffs and Horry County submitted a consent temporary restraining order (“the Consent Order”) for the Court’s signature, and the Consent Order was entered the same day. ECF No. 23. In relevant part, the Consent Order enjoined Horry County from “[p]erforming any more filling, physical work or alteration in any wetlands in the project right of way which have not been filled as of the date of the issuance of this Order.” ECF No.

¹ The Administrative Record is available at electronic docket entries 38 and 40. *See* ECF Nos. 38 & 40.

² The Court rules on the preliminary injunction motion in a separate order.

³ Plaintiffs stated the motion for a temporary restraining order “is made on the grounds that immediate and irreparable harm will occur before the Defendants can be heard. Specifically, the Defendant Horry County has begun construction activity on the proposed road paving project . . . [and] is rapidly moving forward with the project, having already begun clearing trees and vegetation along the path of the proposed new road.” ECF No. 16 at 2.

23 at 1.

On October 6, 2016, Plaintiffs filed the instant motion for contempt, asserting “Defendant Horry County has continued construction activity on the proposed road paving project in violation of the September 23, 2016 Order restraining such activities.” ECF No. 35. Specifically, Plaintiffs allege Horry County violated the provision of the Consent Order enjoining the County from “[p]erforming any more filling, physical work or alteration in any wetlands in the project right of way which have not been filled as of the date of the issuance of this Order.” *Id.* Plaintiffs seek as relief an order holding Horry County in civil contempt and requiring restoration of all work conducted since September 23, 2016, a fine to deter further violations, fees and costs for the motion, and any other relief deemed appropriate by the Court. *Id.* at 3.

On October 20, 2016, Horry County filed a response to Plaintiffs’ motion in which it denied violating the Consent Order and requests sanctions against Plaintiffs pursuant to Federal Rule of Civil Procedure 11(c). ECF No. 39. Plaintiffs filed a reply on October 25, 2016. ECF No. 43. The Court heard oral arguments on the motion from Ms. Armstrong and Mr. Barnett on October 28, 2016. ECF No. 46.

Legal Standard

A court may impose sanctions for civil contempt “to coerce obedience to a court order or to compensate the complainant for losses sustained as a result of the contumacy.” *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 821 (4th Cir. 2004) (internal quotation marks and citation omitted). Civil contempt is an appropriate sanction if a party has violated “an order of this Court which set[s] forth in specific detail an unequivocal command.” *In re Gen. Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) (alteration in original) (internal quotation marks and citation omitted). To hold a party in civil

contempt, the moving party must prove the following four elements *by clear and convincing evidence*: (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) the decree was in the movant's "favor"; (3) the alleged contemnor by its conduct violated the terms of the decree and had knowledge (at least constructive knowledge) of such violation; and (4) that the movant suffered harm as a result. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000); *see In re Gen. Motors*, 61 F.3d at 258 ("[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous. . . . Willfulness is not an element of civil contempt." (alteration in original)).

"The appropriate remedy for civil contempt is within the court's broad discretion. Remedies include ordering the contemnor to reimburse the complainant for losses sustained and for reasonable attorney's fees. However, the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive." *In re Gen. Motors*, 61 F.3d at 259 (internal citations omitted).

"Generally, a compensatory sanction may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding." *Id.* (internal quotation mark and citation omitted).

Discussion

In their motion for contempt, Plaintiffs ask the Court to hold Horry County in civil contempt for violating the provision of the September 23, 2016 Consent Order enjoining the County from "[p]erforming any more filling, physical work or alteration in any wetlands in the project right of way which have not been filled as of the date of the issuance of this Order." ECF No. 35 at 1-2 (quoting Consent Order [ECF No. 23] at 1). Plaintiffs have attached aerial photographs taken by a photojournalist from an airplane on September 29, 2016, as well as copies of the permitted plans for

the construction project. ECF Nos. 35-1 & 35-2. Plaintiffs assert, “The photographs clearly show that the Defendant Horry County is actively placing fill material in wetlands and waters of the United States that are the subject of the Order restraining fill in wetlands.”⁴ ECF No. 35 at 2.

In response, Horry County denies violating the Consent Order and asserts Plaintiffs have not submitted the requisite clear and convincing evidence necessary for a finding of civil contempt.⁵ ECF No. 39. The County asserts the “key language” in the Consent Order is the phrase “wetlands in the project right of way *which have not been filled as of the date of the issuance of this Order.*” *Id.* at 4 (emphasis in original) (quoting Consent Order at 1). The County argues the meaning of “fill” with respect to Section 404 of the CWA is critical to evaluating Plaintiffs’ allegation that the County continued to work in wetlands that had not been filled as of September 23, 2016. *Id.* The County maintains it performed mechanized land clearing on the wetlands at issue *before* September 23, 2016, and therefore could continue working in those wetlands after entry of the Consent Order because those wetlands were already “filled” within the meaning of 33 C.F.R. § 323.2. *Id.* at 5-6. The County has submitted three declarations describing the wetlands that “had been filled by mechanized land clearing and/or the addition of offsite fill material.” *See* ECF Nos. 41-4, 41-5, & 41-6. The County argues “the only wetland identified by Plaintiffs as allegedly having been filled in violation of this Court’s Order was filled by mechanized land clearing, an activity which changed the bottom elevation of the wetland

⁴ Specifically, Plaintiffs allege that Horry County is engaging in construction activities along a curve in the road where over eight acres of wetlands (delineated as Wetlands 19 and 20, *see* Permit Drawing Excerpts, ECF No. 35-2) are located, and that the photographs show “dump trucks transporting fill materials, wetlands containing visible water, large mounds of fill material adjacent to the wetland areas, and trucks and backhoes dumping and spreading fill material into wetlands.” ECF No. 35 at 2.

⁵ The County disputes the relevancy of the aerial photographs and argues it is impossible to identify wetland fill from an aerial flyover. ECF No. 39 at 8-10. The County also disputes Plaintiffs’ reliance on statements made by Mr. Barnett during the teleconference on September 22, 2016. *Id.* at 8.

and destroyed its wetland functions prior to the date the Order was issued on September 23, 2016.”⁶ ECF No. 39 at 7. In summary, the County contends that in the context of the CWA, the wetlands at issue had been “filled”—via mechanized landclearing—prior to entry of the Consent Order.⁷ *Id.*

“[T]he Clean Water Act (CWA), 33 U.S.C. §§ 1251 through 1387, authorizes the Corps, with oversight by the United States Environmental Protection Agency (EPA), *id.* § 1344(c), to issue permits for the discharge of fill material into the waters of the United States, *id.* § 1344(a).” *S.C. Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475, 478 (4th Cir. 2015). Specifically, section 404 of the CWA prohibits “the discharge of dredged or fill material into” into United States waters—including wetlands—without a permit from the Corps. *See* 33 U.S.C. §§ 1311(a), 1344; 33 C.F.R. §§ 323.3, 328.3. The implementing regulations for section 404 define “dredged material” as “material that is excavated or dredged from waters of the United States.” 33 C.F.R. § 323.2(c). The regulations define “discharge of dredged material” as:

any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

- (I) The addition of dredged material to a specified discharge site located in waters of the United States;
- (ii) The runoff or overflow from a contained land or water disposal area; and
- (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, *including mechanized landclearing*, ditching, channelization, or

⁶ In support of this argument, Horry County relies upon the declaration of Britt Feldner (the County’s project consultant) who states “that due to the disturbance of the vegetative component through mechanized land clearing, the wetlands no longer have the ability to serve as a filter.” ECF No. 41-5 at 5.

⁷ As noted above, Horry County requests that the Court impose sanctions on Plaintiffs pursuant to Federal Rule of Procedure 11(c). *Id.* at 10-11.

other excavation.

Id. § 323.2(d)(1) (emphasis added); *see also* Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material,” 66 Fed. Reg. 4,550, 4,557 (Jan. 17, 2001) (“[W]e regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material unless there is project-specific information to the contrary.”). The regulations define “fill material”⁸ as “material placed in waters of the United States” that has the effect of “(I) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(1). The regulations define “discharge of fill material” as “the addition of fill material into waters of the United States.”⁹ *Id.* § 323.2(f). Finally, the regulations define “wetlands” as “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(c)(4).

In this case, the Court finds Plaintiffs have not shown by clear and convincing evidence that Horry County knowingly violated the terms of the September 23, 2016 Consent Order. *See Ashcraft*, 218 F.3d at 301. The Consent Order enjoined Horry County from “[p]erforming any more filling,

⁸ “Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.” *Id.* § 323.2(d)(2).

⁹ “The term discharge of fill material . . . generally includes, without limitation, the following activities: [p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills” *Id.* § 323.2(f).

physical work or alteration in any wetlands in the project right of way which have not been filled as of the date of the issuance of this Order.” ECF No. 23 at 1. The crux of the parties’ dispute is the meaning of “filled” as used in the Consent Order.

Plaintiffs make a strong and logical argument that filling a wetland—like pouring water into a glass—is a process, not a singular action whereby a wetland immediately transitions from undisturbed to filled. ECF No. 43 at 6. On the other hand, Horry County presents a plausible and persuasive argument that, before entry of the Consent Order, it had filled the wetlands at issue through mechanized landclearing, thereby changing their bottom elevation and destroying their functionality as wetlands. As Mr. Barnett argued at the hearing, the County did not merely throw a few spoonfuls of dirt in the wetlands but instead had already—before entry of the Consent Order—radically altered them by clearing and grubbing vegetation. Horry County’s position is supported by the definitions in the implementing regulations for section 404, under which the term “discharge of dredged material” is synonymous with “mechanized landclearing,” 33 C.F.R. § 323.2(d)(1), and the term “fill material” contemplates “the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States.” *Id.* § 323.2(e)(1). And, as noted above, a section 404 permit governs “the discharge of dredged or fill material into” into wetlands. *See* 33 U.S.C. §§ 1311(a), 1344; 33 C.F.R. §§ 323.3, 328.3.

The Court recognizes that both Ms. Armstrong and Mr. Barnett are very reputable and highly competent attorneys in the specialized field of environmental law, and that they evidently had different interpretations of the word “filled” in advising their respective clients. Mr. Barnett indicates he interpreted the Consent Order to mean Horry County could continue working in those wetlands he believed had been “filled” within the legal meaning of the word (i.e., by mechanized landclearing that changed the bottom elevation of the wetlands) prior to entry of the Consent Order. Mr. Barnett’s

interpretation of the term “filled” is not implausible in light of the statutory and regulatory language of the CWA. Moreover, the Court is mindful that it cannot hold a party in civil contempt unless the party knowingly violates the terms of an order that are *clear* and *unequivocal*. *Ashcraft*, 218 F.3d at 301; *In re Gen. Motors*, 61 F.3d at 258. Here, given the parties’ differing but reasonable interpretations of the term “filled” and having examined the relevant statutes and regulations, the Court cannot conclude the disputed provision of the Consent Order was sufficiently clear and unequivocal to justify holding Horry County in contempt. The term “filled,” as used in the Consent Order, is arguably ambiguous and subject to multiple reasonable interpretations, and Horry County’s understanding of the term was plausible under the circumstances (namely, the fact that it had mechanically cleared the wetlands before entry of the Consent Order). *See In re Gen. Motors*, 61 F.3d at 258 (“[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous.” (quoting *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991) (“Related to this last requirement is the principle that any ambiguities or uncertainties in such a court order must be read in a light favorable to the person charged with contempt.”))). Consequently, a finding of civil contempt is not warranted.

Conclusion

For the reasons explained above, the Court **DENIES** Plaintiffs’ Motion for Contempt [ECF No. 35] because Plaintiffs have not shown by clear and convincing evidence that Horry County violated a clear and unequivocal command of the September 23, 2016 Consent Order. Additionally, the Court **DENIES** any motion for Rule 11 sanctions by Horry County.¹⁰

¹⁰ The Court **DENIES** Horry County’s request for Rule 11 sanctions because the County did not seek sanctions by motion and, more importantly, because Plaintiffs’ legal position is objectively reasonable. *See Patrick Collins, Inc. v. Osburn*, 595 F. App’x 243 (4th Cir. 2015) (“[W]here a party seeks sanctions under Rule 11, the moving party’s “motion for sanctions must be made separately from any other motion.” Fed. R. Civ. P. 11(c)(2). [The defendant]’s argument for Rule 11 sanctions was not made by separate motion. Therefore, the district court did not err in denying sanctions pursuant to Fed. R. Civ. P. 11.”); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th

IT IS SO ORDERED.

Florence, South Carolina
November 18, 2016

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

Cir. 2002) (“We have recognized that maintaining a legal position to a court is only sanctionable when, in applying a standard of objective reasonableness, it can be said that a reasonable attorney in like circumstances could not have believed his actions to be legally justified.” (internal quotation marks omitted)).

EXHIBIT B

DEPARTMENT OF PUBLIC WORKS

INFRASTRUCTURE & REGULATION
DIVISION

4401 Privetts Road
Conway, South Carolina 29526



Post Office Box 1236
Conway, SC 29528-1236

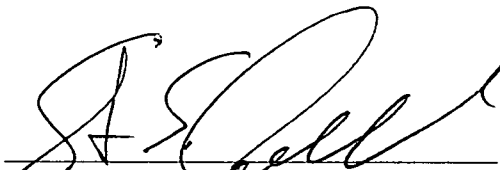
Phone: (843) 915-5410
Fax: (843) 365-0671

----- SUPPLEMENTAL AFFIDAVIT -----

I have read the Declaration of Daniel Tufford dated January 17, 2017. I believe he is completely in error in implying that there would be a greater chance of sediment transport if International Drive is completed in accord with the approved storm water and water pollution prevention plan for the project than if the County grasses and stabilizes the bare ground that is the current condition of the project.


The area to be stabilized is large and only rough graded with slopes that will not exist when the project is completed. This condition would require a significant effort to stabilize, monitor and maintain. Typically, unfinished areas of this size are not simply grassed, and large rain fall events could easily cause a failure of the grassed areas, which could result in significant sediment load being washed into adjacent wetlands. The more impervious surface on a site, the less area there is subject to erosion.

Moreover, and perhaps more importantly, there has not been final grading of the site to produce the proper slopes and other gradients needed to minimize erosion. When the project is fully constructed the engineered slopes, grades, storm water conveyances and sediment and erosion control measures will greatly reduce the chance of sediment transport, which, as I have previously testified is the greatest threat to water quality in Horry County. On balance, in my opinion and to a proper degree of certainty as an engineer, mere stabilization of the road in its current condition will pose a risk of sediment contamination of adjacent waters that will not be present if the road is completed as designed.



Steve S. Gosnell, P.E.
Assistant Administrator, I&R Division
Horry County Engineer

Sworn to before me this 19th day of January, 2017



Anna J. Lumsden
Notary Public for South Carolina
My Commission Expires: February 13, 2019