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

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

vs.

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

MOTION FOR RECONSIDERATION

TO: THE COURT OF APPEALS AND THE RESPONDENTS

PLEASE TAKE NOTICE that the Coastal Conservation League and the South Carolina Wildlife Federation, by and through their undersigned attorneys, hereby move the Court for an Order of reconsideration.

On December 15, 2017, Chief Judge Lockemy issued an Order granting the Appellants' petition for supersedeas. The December 15, Order resulted in multiple filings, culminating with Horry County's motion to vacate. On January 20, 2017, this Court issued an Order vacating the stay of matters decided in the Final Order and Decision on appeal from the administrative tribunal, allowing Horry County to proceed with concrete and paving work while this appeal is pending.

Rule 241 of mandates only two considerations for this Court in determining whether to impose supersedeas or suspend a stay: "whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." SCACR 241(c)(2). The Appellants submit that the factual and legal landscape has not changed since this Court imposed its Order granting supersedeas to warrant vacating the stay and disrupting the *status quo*. Moreover, without the supersedeas there can be no doubt that the contested issues in this appeal will become entirely moot and this Court will be deprived of the ability to render any relief. This case is a textbook example of the purpose and need for SCACR Rule 241, which is to protect this Court's jurisdiction, preserve the *status quo*, and ensure that the parties can exercise their constitutional rights to seek judicial relief.

The Nature of the Contested Issues are Such That Paving and Concrete Work Will Foreclose Relief

The Appellants believe it is necessary to alert the Court to the contested issues, and the relief sought, which would become moot if concreting and paving occurs. An understanding of the contested issues and relief sought should elucidate the urgency and need for the supersedeas or stay to be reinstated. Through this appeal, the Coastal Conservation League and South Carolina Wildlife Federation ("Conservation Groups") have challenged the Department of Health and Environmental Control's ("DHEC") certification decisions that "authorize Horry County to build a highway within and adjacent to Lewis Ocean Bay Heritage Preserve in Horry County." See DHEC Certifications, Ex. A of Appellants' Motion to Compel.

Among other assertions, the Appellants challenge the agency's conclusion that there are no feasible alternatives to the project as authorized. The water quality regulations and Coastal

Management Program both require DHEC to deny certification if there are feasible alternatives for the project. R. 61-101.F(5)(b); CMP Policy II.B(1)(a); III-73.D(1) & III-73.E(1). In their initial brief, the Appellants discuss a number of alternatives – some which originated with the County – including only building a two-lane road, as was approved by the Horry County taxpayers; limiting the number of curb cuts from the ten which are authorized; reducing the road width/shoulder; and installing wildlife underpasses to maintain habitat connectivity, reduce habitat fragmentation and reduce bear/vehicular collisions, to name a few. See Appellants' Initial Brief, pp. 49-60.[1] Should this Court conclude that any of these options are feasible and reverse the ALC, but the road has already been constructed, then the relief would be meaningless because utilization of these alternatives would be foreclosed.

In addition, the Appellants assert that the direct impacts on a Geographic Area of Particular Concern ("GAPC"), including the conversion of 22 acres of Lewis Ocean Bay Heritage Preserve into a five-lane paved road, and the attendant habitat fragmentation, warrant denial under R. 61-101.F(5)(d) (certification "shall be denied" if the project has "adverse impacts on special or unique habitats"); CMP III-14.I(8); III-31, Policy VII.A.(1)(a)-(c); see also Appellants' Initial Brief, pp. 33-39. If, for instance, this Court agrees that the project does not qualify for certification because it will have an adverse impact on state heritage trust properties and/or wildlife productivity, but the road has already been built, then any relief in denial of the certifications will be meaningless and any ability to modify or amend the decision foreclosed. The Appellants would be left in exactly the same situation as the parties in Town of Arcadia Lakes v. S.C. Dept. of Health & Envtl. Control, No. 2013-001521, slip op at 2

[1] See also Declaration of Steve Gilbert, ¶19-28, attached as Exhibit A (explaining the harm of habitat fragmentation and loss of biodiversity for the black bear, which will be exacerbated should the road be paved instead of remaining a dirt road).

(S.C. Apr. 9, 2015) (dismissed as moot given that project construction completed); see also Upstate Forever v. Greenville Water Systems, No. 2009-AL-07-00226, slip op. at 2 (S.C. Ct. App. May 25, 2012) (same) (both unpublished opinions are attached as Exhibit B). The result in those cases is what has compelled the Appellants to take every opportunity available to protect their interests in this state's natural resources, and public trust lands, before it is too late. This Court's Order, if not reconsidered and the supersedeas or stay reinstated, would make it too late.

The basis upon which this Court should grant supersedeas is straightforward and not particularly onerous: "the appellate court should consider whether such an order is necessary to **preserve jurisdiction of the appeal** or to **prevent a contested issue from becoming moot.**" SCACR Rule 241(c)(2) (emphasis added). The Supreme Court has held that "the general rule is that the effect of a supersedeas or stay is to suspend proceedings and preserve the *status quo* pending the determination of the appeal or proceeding in error" and to prevent a case from becoming moot. Melton v. Walker, 209 S.C. 330, 336, 40 S.E.2d 161, 164 (1946) (citing 4 C.J.S., Appeal and Error §§ 626, 662.). Thus, preserving the *status quo* is equated with preserving the Court's jurisdiction.

While Horry County has adamantly maintained in filings and representations to the Court that restoring wetlands once they have been filled with dirt is not complicated and is done "on a routine basis," the County has not and cannot assert the same for concrete and paving work. The Appellants have uncovered no instance where a governmental entity that had laid down concrete and paved a road has ever removed that pavement and restored the underlying area to its natural conditions, much less a court order requiring such action. Indeed, it is outside the realm of possibilities, and runs contrary to basic principles of practicality and common sense, to believe that 5.6 miles of concrete and pavement

would be removed once it is laid upon the earth, including covering over 20 acres of state heritage trust property.

The Road is Currently Passable and Useable for Emergency Purposes

The Appellants are also compelled to elucidate on the County's previously disclosed position that the road is passable and useable for emergency purposes without going to the extreme and permanent lengths of paving and concreting over this dirt road. The County's statements before the district court indicated that the road is currently passable and maintainable for emergency vehicles, making paving unnecessary to satisfy that objective. In a federal court filing dated September 22, 2016, the County stated that it "needs another three weeks of the work now being done to make the road passable and maintainable for emergency vehicles." (Horry County Response to Motion for TRO attached as Exhibit C, p. 1). The County further asserted that all of "the clearing, grading and filling work (with culvert installation) now [sic] underway to facilitate emergency access for police, fire and EMS vehicles." (Exhibit C, p. 2). There can be no dispute that three weeks has passed and the County has done the above-described work to make the road passable and maintainable, save for concrete and paving work. Indeed, the County informed this Court that, as of December 15, when supersedeas was initially ordered, "all work on International Drive other than some clean up, or 'dressing up", was completed" and that it "had intended to award a contract today for the concrete and paving work and other details of completion of the road." (Letter from Counsel of Horry County, dated December 21, 2016, attached as Exhibit D.) The County then sought permission to perform limited work in order to stabilize the construction site while the supersedeas was in place. Id. Thus, according to the County's filings in federal court and representations to this Court, the road is already capable of handling any

emergency access that may be required while this case is pending.

The County has not asserted that emergency vehicles cannot use the road as it currently exists, and any such assertion at this point would be contradictory to both its September representation that after three weeks the road would be "passable and maintainable for emergency vehicles" and its representations that as of December 15, 2016,"no work remained to be done other than minor clean up work to prepare the site for final concrete and paving work." (Exhibits C&D.)

Costs to the County are not an appropriate consideration under Rule 240

The League and SCWF have been unable to find any legal support for the theory that costs associated with preserving the *status quo* or delay of a construction project weigh into this Court's determination of whether or not to grant a supersedeas. Notwithstanding the Appellants' position that financial detriment to the County is not a relevant factor in determining whether this Court's jurisdiction will be preserved or the case will become moot, an investigation into the standard for preliminary injunctions sheds light on the weight courts give to such claims.[2]

In South Carolina Dept. of Wildlife and Marine Resources v. Marsh, 866 F.2d 97 (4th Cir. 1989), the Fourth Circuit upheld a South Carolina district court's granting of a preliminary injunction "that the potential harm to the Corps from an injunction, which would be substantially higher costs, 'by no means equates to the loss the environment and general public will suffer if the fisheries at the [subject Dam] are lost.'" Id. at 100. Other courts considering this balance test have reached the same conclusion as the Fourth Circuit in Marsh: financial loss from delay is inherently present in the NEPA

[2]While the standard for preliminary injunction is not directly applicable here, the Appellants note that (1) the standard is instructive on the issue of whether costs considerations area appropriate and (2) Horry County itself referenced that standard in making its public interest arguments.

process and should be given little weight in balance with permanent environmental loss.

The court in Anglers of the AU Sable v. U.S. Forest Service reached this very conclusion, citing:

> Nat'l Parks Conservation Assoc. v. Babbitt, 241 F.3d 722, 738 (9th Cir.2001) (reasoning that "loss of anticipated revenues does not outweigh potential irreparable injury to the environment"); Greenpeace Action, 14 F.3d at 1332 (stating that although an injunction "could present a financial hardship to the Forest Service ... this possible financial hardship is outweighed by the fact that the old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce"); Seattle Audubon Society v. Evans, 771 F.Supp. 1081, 1096 (W.D.Wash.1991) (reasoning that "[t]he mightiest economy on earth" can afford a temporary stay to ensure the Forest Service properly analyzes and discloses environmental impacts). Similarly, the Tenth Circuit has concluded that "[a]ny increased cost from delay ... is not sufficient to establish prejudice because NEPA contemplates just such a delay." Preservation Coalition v. Pierce, 667 F.2d 851, 855 (10th Cir.1982)

402 F.Supp.2d 826, 839 (E.D.Mich. 2005).

Further, once the money is spent and the road is fully paved, the economic considerations of beginning a new construction will be too high to resist, regardless of the environmental impacts.[3] See South Carolina Dept. of Wildlife and Marine Resources v. Marsh, 866 F.2d 97 C.A. 4 (S.C. 1989).

Without a stay, the relief sought by Appellants will become unattainable. Horry County has evaded this quintessential dilemma in all of its filings before this Court, none of which address how this Court's jurisdiction would be preserved or how the underlying issues would not become moot, which is the proper standard under Rule 241.

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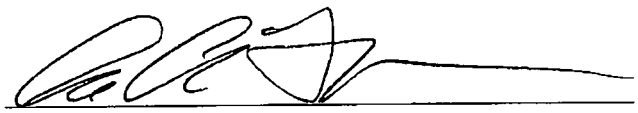
[3]Indeed, the County has already claimed that though "it would entail considerable cost to the County, should this Court rule in favor of the Plaintiffs in this matter, restoration of the wetlands impacted by the road could be ordered." (Horry County's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, p.16-17, attached as Exhibit E.) However, the laying of concrete and paving will make such relief an economic and practical impossibility.

WHEREFORE, the Appellants, having demonstrated through their petition for supersedeas, initial brief, and this motion how this case would become moot, they would be unable to obtain relief, and this Court's jurisdiction would be eviscerated if the project is allowed to move forward and be constructed as authorized, and in light of the fact that there have been no changes in facts and circumstances such that might warrant vacating the stay, request that the Court of Appeals reconsider its Order of January 20, 2017, and enter an order reinstating the supersedeas pursuant to Rule 241. The Appellants further request that this Court stay its Order granting Horry County's motion to vacate while considering this motion.

Respectfully submitted,



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January 24, 2017

Georgetown, South Carolina

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

COASTAL CONSERVATION LEAGUE AND SOUTH CAROLINA WILDLIFE FEDERATION, Plaintiffs, vs. UNITED STATES ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT; LT. GENERAL TODD T. SEMONITE, in his official capacity as Chief of Engineers, U.S. Army Corps of Engineers; LT. COLONEL MATTHEW LUZZATTO, in his official capacity as District Engineer, U.S. Army Corps of Engineers, Charleston District; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTY, in her official capacity as Administrator of the U.S. Environmental Protection Agency; HEATHER MCTEER TONEY, in her official capacity as Regional Administrator, Region IV, U.S. Environmental Protection Agency; and HORRY COUNTY, Defendants.	No. 2:16-cv-03008-DCN

DECLARATION OF STEVE GILBERT

I, Steve Gilbert, declare as follows:

1. I live at 202 Key Court, Charleston, South Carolina.

2. I have a Bachelor's degree in Biological Sciences and Master's degree in Biological Sciences with a Marine Biology major from the Florida Institute of Technology. The topic of my master's thesis was a zonational and productivity study of sea grasses and other macrophytes in the Northern Indian River Lagoon around the Kennedy Space

Exhibit A

Center. The project was funded by NASA in an effort to develop an ecological baseline to assess the ecosystem and measure for changes in the event of a space shuttle crash.

3. From 1976 until 1978 I was employed with the Florida Game and Fresh Water Fish Commission as an Environmental Specialist. I reviewed various projects from an ecological standpoint including wetland and other Corps of Engineers permits under Section 404 of the Clean Water Act ("CWA") or Section 10 of the Rivers and Harbors Act, ecological assessments, and activities that would have affected fish and wildlife resources in the State of Florida. I prepared reports and letters that went out on Game and Fish Commission stationary to various state and federal permitting agencies such as the Corps of Engineers.

4. From 1978 until 2002 I was employed with the Ecological Services (ES) Division of the U.S. Fish and Wildlife Service ("USFWS") as a Senior Fish and Wildlife Biologist in Charleston, South Carolina. My work in that position was similar to but went beyond what I did at the Florida Game and Fish Commission. I was the lead in the Fish and Wildlife ES Office for the wetlands regulatory program reviewing Section 404 wetlands permits as well as environmental assessments and environmental impact statements pursuant to the National Environmental Policy Act ("NEPA"). I am intimately familiar with analyzing and assessing the impacts to water quality, wetlands, aquatic ecosystems, wildlife and wildlife habitats resulting from projects requiring CWA Section 404 permits and/or NEPA review. I also taught wetlands regulatory and other Ecological Services related courses at the National Conservation Training Center.

5. From 2002 until 2006 I worked on the Comprehensive Everglades Restoration Project

for the Fish and Wildlife Service's ES office in Vero Beach, Florida. I was one of three leads on an interagency team that focused on the science and adaptive management of this major restoration project.

6. From 2006 until 2009 I was employed with National Oceanic and Atmospheric Administration ("NOAA") as Program Manager for their Coastal Learning Services program that primarily developed and taught courses for coastal professionals across the United States and its territories.

7. From 2014 to present I have been an Ecological Consultant, primarily consulting for the South Carolina Wildlife Federation ("SCWF") on environmental issues of concern including CWA Section 404 wetland permits.

8. I have a career spanning over 32 years in federal and state service as a biologist, leader and supervisor. I reviewed hundreds and hundreds of permits, the majority of which involved analysis and assessment of wetland, water quality, wildlife/wildlife habitat and aquatic ecosystem impacts.

9. Typically when reviewing a wetland permit I would go out in the field to look at the site, characterize the area and take samples if needed. I would then bring the data collected in the field back to the office and, utilizing my knowledge of ecology and ecological systems as well as the literature, develop recommendations on the project to be provided to the permitting agencies. Likewise, when undertaking an assessment of a project, I would make a site visit in order to determine how the proposed project would affect wetland functions, wildlife and wildlife habitat, and other characteristics of that ecosystem.

10. In addition to site visits and literature, other tools I utilized to familiarize myself with a project, its habitats and its potential impacts included aerial photography, the National Wetlands Inventory, published and grey literature, and surrogate species. Also called indicator species, surrogate species are representative of a particular habitat or assemblage of species and provide a model for habitat quality and the impacts of a project. Surrogate species are particularly important when evaluating cumulative impacts of a project like the International Drive project at issue.

11. I testified before the Administrative Law Court in Docket No. 15-ALC-07-0404-CC as an expert in wildlife and wetlands ecology and environmental impact analysis in wetlands, water quality, wildlife and their habitats.

12. For approximately 25 years, I reviewed permit applications and made determinations on the potential impacts of a project. I provided those opinions under USFWS letterhead to the regulatory agencies as well as made recommendations about how to address, lessen or minimize adverse impacts of a project.

13. I was involved in the elevation of a CWA Section 404 permit decision under a Corps/USFWS memorandum of understanding that went all the way up to the Assistant Secretary's of Interior and Army, as well as two of the rare CWA Section 404(c) "veto" actions where the Administrator of the Environmental Protection Agency ("EPA") determined a site for which the Corps issued a Section 404 permit was unsuitable for discharge of dredged or fill material.

14. Thus, I am intimately familiar with Section 404 of the CWA and the 404(b)(1) Guidelines that govern the Corps' issuance of permits under that section. I am also

intimately familiar with the NEPA guidelines that govern federal agencies' environmental assessment and environmental impact statement implementation.

15. I have reviewed the Section 404 permit issued by the Corps to Horry County on July 22, 2016 authorizing the paving and widening of a 5.6-mile portion of the existing unimproved road known as International Drive and impacts to 24.19 acres of wetlands in and adjacent to the Lewis Ocean Bay Heritage Trust Preserve ("LOB"). I have also reviewed the Corps' Environmental Assessment document ("EA") for the project, which was approved on July 14, 2016.

16. I am familiar with LOB, its habitat and its wildlife having visited the project site, conducting a literature review and applying my knowledge of ecology, wetland systems, water quality and wildlife and its habitat.

17. LOB and the surrounding undeveloped environs, including much of the private property to the southwest of International Drive, is an exceptional and interconnected ecosystem consisting of a matrix of wetlands and uplands, including pine flatwood habitats dominated by Loblolly, Longleaf and Pond pines, pocosin habitats and the largest known intact system of rare Carolina Bays in the world.

18. Carolina Bays have peat-based soils, which are highly acidic and permeable and which support certain species uniquely adapted to the ecology of these systems, such as pitcher plants and Venus flytraps. They, along with pocosins, are also prime habitat for South Carolina's coastal population of black bear who utilize these wetland habitats for feeding and denning and depend on their soft mast or berry production for sustenance.

19. In my professional opinion, the construction of International Drive in its current design

form will result in significant, irreparable harm.

20. First, the project would physically eliminate approximately 20 acres of LOB property because a portion will be paved and the remaining portion will be graded and become road shoulder, resulting in a direct loss of habitat. This would entail complete loss and fragmentation of public trust property, a special aquatic site and valuable habitat.

21. The project would also fill and eliminate over 24 acres of wetlands, which are waters of the United States. All of the functions and values of these 24 acres of wetlands, from water filtration and stormwater buffering to wildlife habitat and aquatic ecosystem functions will be completely and permanently destroyed if they are filled with dirt and converted to upland and paved road.

22. In addition to the direct loss of valuable habitat, the project will permanently alter the natural conditions of LOB and the surrounding area. The habitat quality of LOB is tied to the proper functioning of the ecosystem as a whole. If the construction of International Drive moves forward as designed, it will immediately and irreparably affect the functioning of the ecosystem in and around LOB thereby impacting habitat quality and the plant and animal species that depend upon it.

23. The current condition of International Drive is a dirt road with portions entirely underwater where wetlands on either side have reestablished a hydrologic connection. It has existed for several decades in this condition with little to no automobile traffic, so the packed soil of the dirt road is not being disturbed and there have been little to no road-generated pollutants running into adjacent wetlands and no disturbance from road noises. The wetland system is healthy and functioning. The existing dirt road also

presents little to no interference with wildlife movements across the area.

24. However, if the project proceeds as approved by the Corps and the dirt road is converted to a 125-foot cleared and paved right-of-way supporting high volumes of automotive traffic, it will adversely impact water quality, wildlife, and habitat. The project will introduce and increase runoff of contaminants into the natural system, degrading the quality of the wetlands and habitat immediately adjacent to the road. Moreover, wildlife will be affected road noise and lights and their movements directly impacted and result in higher rates of mortality, specifically bear-vehicular collisions. These impacts will not be limited in scope but rather will be felt throughout the entire LOB ecosystem.

25. Habitat fragmentation, which occurs by placing unnatural barriers to movement through a natural system, is one of the most significant impacts that will result from the road project as authorized by the Corps. The adverse effects will be most notably and immediately experienced by large range requiring species such as the black bear. Wildlife do not recognize human boundaries, instead they look for good and similar habitat to form travel corridors. The habitat conditions on either side of International Drive are substantially similar and the present-day dirt road has naturalized, which indicates it is not disturbing that continuous habitat. I have observed bear tracks crossing over the narrow dirt road indicating that the road is within a travel corridor of valuable foraging habitat. However, if a 125-foot right-of-way is cleared and a highway placed in the midst of that habitat, it will necessarily fragment that habitat essentially blocking off an important existing wildlife corridor to the detriment of the wildlife and entire ecosystem.

26. Cumulative impact analysis is a requirement of NEPA and the 404 (b)(1) guidelines and is totally lacking in the Corps' EA for this permit. Such analysis is difficult, but should rely on surrogate species that represent potential impacts. The black bear is an ideal species to represent the increased loss of habitat connectivity for many wildlife species that travel through the corridor to be affected by the project.

27. LOB forms a large portion of the black bears' home range; however, male black bears can require up to 30,000 acres and travel back and forth along the Waccamaw River and Pee Dee River drainages between South Carolina and North Carolina. The black bears move around a significant amount depending on food availability, habitat conditions, and other factors like season. Key to the success of the coastal black bear population is the ability to move along suitable habitat to locate those with adequate food provision. Continued development in coastal Horry County, including the road network to support it, has already impacted the ability of bears and other wildlife to freely move between former habitats through travel corridors now interrupted with highly trafficked roads (hence the high number of auto/bear collisions over the last decade). The current project would add yet another significant barrier to these critical wildlife movement corridors.

28. Unobstructed wildlife corridors can offset some of the worst effects of habitat fragmentation, whereby urbanization splits up habitat areas and causes animals to lose both their natural habitat and the ability to move between areas to use all of the resources they need to survive. This allows an exchange of individuals between populations, which helps prevent the negative effects of inbreeding and reduced genetic diversity (via genetic drift) that often occur within isolated populations. Corridors also help facilitate

the re-establishment of populations that have been reduced or eliminated due to random events (such as fires or disease). Habitat fragmentation due to human development is an ever-increasing threat to biodiversity, and obstruction of yet another habitat corridor by the current road project will have significant adverse effects on black bears and other wildlife.

29. Despite strong comments by the USFWS and environmental organizations that the project allow for wildlife passage by reducing the width of the road and constructing wildlife underpasses, the Corps neglected to require it as a part of the necessary process of steps for minimizing and avoiding impacts.

30. LOB is already surrounded on three of its sides by highways. International Drive would be the fourth highway, completely isolating the preserve, interfering with a significant travel corridor for species such as black bear, and contributing to a loss of biodiversity.

31. The project will further result in the permanent loss of over 24 acres of wetlands and all of their important functions and values, which include filtering water and sediments, providing habitat for plants and animals, and preventing runoff and erosion. Those wetlands are part of a larger ecosystem connected to LOB and the large private tracts on the other side with substantially similar habitat and quality as the wetlands to be filled. Once these wetlands are filled and the road is paved, the damage will be irreparable.

32. Loss of pocosin wetlands, major wildlife habitat fragmentation and other impacts to LOB and its resources will not be offset by the proposed project compensatory mitigation resulting in a significant net loss to an important public trust resource.

33. The inherent value of this natural system and its functions are irreplaceable. Once these

wetlands are destroyed and the habitat degraded, that loss is permanent and cannot be replaced.

34. The EA gives little to no consideration to the project's impact on the functioning of the unique ecosystem of LOB and the similar undeveloped habitat surrounding it. While recognizing LOB as a special aquatic site, the EA fails to give meaningful consideration to its significance as a state heritage trust preserve and, in turn, the impacts on this special aquatic site from the road project.

35. The EA's analysis is lacking in scope and depth. Indeed entirely absent from the EA is a cumulative impacts assessment evaluating habitat fragmentation (i.e., how the area was impacted in the past, how it sits today already isolated by roads on three sides, how the project will impact it and the reasonably foreseeable impacts, including secondary impacts that will occur with a not-so-limited access road containing 10 curb cuts to undeveloped properties).

36. The EA fails to support its conclusions with scientific analysis and data. It fails to analyze the habitat, wildlife, and wetland ecosystem issues I have addressed above in any scientifically sound manner. The EA consists primarily of information supplied by the applicant and comments submitted by third parties without any independent or documented analysis. It provides only conclusory statements without any scientific studies or data in support.

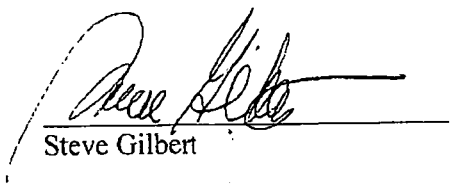
37. The alternatives analysis in the EA fails to provide meaningful consideration of the natural system and its associated benefits and, therefore, does not truly balance the costs and benefits of each alternative. There are practicable alternatives that would avoid or

minimize the adverse impacts associated with this road paving project and accomplish the applicant's stated goal of relieving congestion. Specifically, one alternative is widening Highway 501, which is the road experiencing the brunt of congestion. Another would be to lessen the project footprint, limit curb cuts and provide for wildlife passage thereby avoiding and minimizing direct, secondary and cumulative impacts. Instead, the selected alternative as proposed will have very significant adverse impacts on wildlife and aquatic resources.

38. Once this property has been converted into paved road and once these wetlands are filled, the damage cannot be undone and will be permanent. The status quo is a natural, functioning wetlands system and undisturbed heritage trust property. That status will be completely destroyed if construction of International Drive as authorized by the Corps is allowed to proceed.

39. Pursuant to 28 U.S.C. ' 1746, I declare, under penalty of perjury, that the foregoing is true and correct to the best of my professional opinion, knowledge and belief.

Signed on the 7 of September, 2016.



Steve Gilbert

The Supreme Court of South Carolina

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2013-001521
Lower Court Case No. 2009AL0700069

ORDER

We granted a petition for a writ of certiorari to review the court of appeals' decision in *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013), in which the court of appeals affirmed certifications for certain construction activities (including land disturbance and storm water discharges) under a state-wide general permit. Essentially, Petitioners' contention is that Respondent Roper Pond, LLC, (Roper) does not qualify for coverage under a state-wide general permit, and therefore, Roper's construction activities are not authorized to proceed.

At oral argument before this Court, the parties conceded Roper's construction project proceeded and was completed during the pendency of this matter.[1] As all

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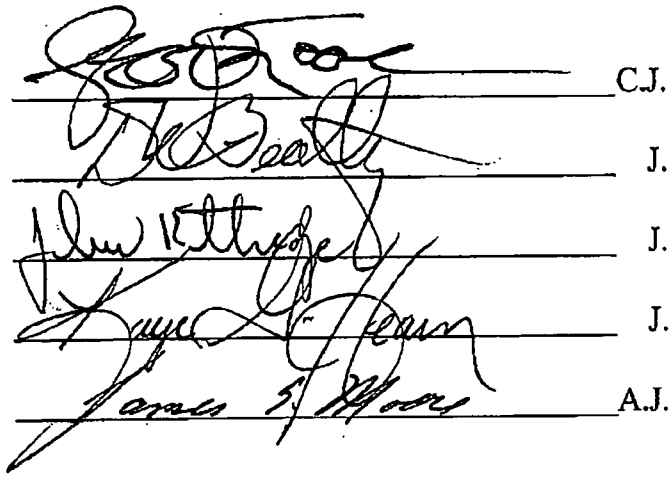
[1] "[T]he serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision." S.C. Code Ann. § 1-23-610 (A)(2) (Supp. 2014); *see also* S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2014) ("A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.");

Exhibit B

construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated.

Accordingly, we dismiss this matter as moot, as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide general permit).[2] *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions." (citing *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))).



C.J.

J.

J.

J.

A.J.

Columbia, South Carolina

April 9, 2015

Rule 241(b)(11), SCACR (noting that, in appeals from administrative tribunals, the service of a notice of appeal does not automatically stay matters decided in orders).

[2] As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate post-construction complaints and the prosecutorial discretion to initiate regulatory enforcement proceedings for any violations of applicable law.

cc:
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Stephen Philip Hightower, Esquire
Jacquelyn Sue Dickman, Esquire
James Blanding Holman, IV, Esquire
The Honorable Jana Shealy

The South Carolina Court of Appeals

Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation, Appellants,

v.

South Carolina Department of Health and Environmental Control and Greenville Water System, Respondents.

The Honorable John D. McLeod
Administrative Law Court
Trial Court Case No. 2009-AL-07-00226

ORDER

Appellants appeal an order from the administrative law court (the ALC) affirming the decision of the Board of the Department of Health and Environmental (the Department) and granting Respondents' motion for summary judgment. Respondents have filed a motion to dismiss this appeal as moot because no justiciable controversy exists due to the completion of the project. Additionally, Respondents argue Appellants' sole issue on appeal, whether the Department has the authority to impose minimum stream flow requirements as a condition of its water quality certification permits, is a purely hypothetical question that does not fall within any of the mootness exceptions. However, Appellants argue this appeal is not moot because this court can provide effectual relief and a cognizable remedy. In support, Appellants argue the Department has the discretion to establish any limitations on certification permits, the ability to modify the conditions of the certification, and the authority to mandate protections for navigable waterways in South Carolina. Moreover, Appellants asserts that even if

this court determines the appeal is moot, the public importance exception applies because the consequences of a low flow stream are of global significance.

Generally, this Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* at 567-68, 549 S.E.2d at 596. However, the public importance exception to mootness permits a court to consider moot issues if "the issue . . . present[s] a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27, 630 S.E.2d 474, 478 (2006) (citation and quotation marks omitted).

After careful consideration of the parties' filings, we dismiss this appeal as moot. Furthermore, we find the public importance exception does not apply to this appeal. Moreover, because we dismiss this appeal, we need not address Trout Unlimited's motion to file an amicus curiae brief.

IT IS SO ORDERED.

John Cannon Fw C.J.

Thomas C. Kelly J.

Paul E. Short, Jr. J.

Columbia, South Carolina

FILED
5/25/12 ST

cc: Amy E. Armstrong, Esquire
Eugene C. McCall, Jr., Esquire
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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

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

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

Exhibit C

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

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

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

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

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

Respectfully submitted,

s/ Stan Barnett

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September 22, 2016
Mount Pleasant, South Carolina

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December 21, 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:

I am writing on behalf of Horry County concerning the Order issued yesterday clarifying the Writ of Supersedeas issued by the Court last Thursday, December 15. The second Order made clear that the Supersedeas was intended to require the County to "halt all work on the road project, including the widening, paving, and realigning of the existing unimproved portion of International Drive...."

The County wants to emphasize that they did not understand the first Order to be a prohibition on continuing work authorized by the Army Corps of Engineers permit. This same understanding was expressed in the media by the Director of one of the Appellants, the S.C. Coastal Conservation League. I have attached the article in which Dana Beach noted that his organization intended to seek a restraining order after the Supersedeas was issued. This was consistent with the County's interpretation of the December 15 Order and the County anticipated an immediate filing by Appellants. The County wants to make clear that in no way did its officials believe they were violating any prohibition by this Court.

At the time the December 15 Order was issued, all work on International Drive other than some clean up, or "dressing up", was completed. The County had intended to award a contract today for the concrete and paving work and other details of completion of the road. That will not be done until the case is resolved, or by other direction of the Court.

However, there are some items of work that the County believes need to be done, to avoid pollution and to protect the public. These are placement of barricades for safety purposes,

Exhibit D

work to comply the with the N.P.D.E.S. storm water general permit authorization (including some minor grading and grass seeding, which must be commenced within 14 days), and filling a trench some 100 feet long that the County is concerned is a hazard to hunters and others accessing the area. In addition, there is earth material stockpiled on the site the County would like to remove. Except for the barricade placement, the County will not undertake any of the above work without approval from the Court. All of this is consistent with the Court's ruling, as its result is not in furtherance of construction, will not alter the status quo that the Court is directing be maintained, but rather is necessitated to preserve the status quo and provide for the safety of the community. We request that the Court allow this small additional work to that end.

With kindest regards and appreciation, I remain

Sincerely,

Stan Barnett

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

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

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

INRODUCTION

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

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

Exhibit E

by a Consent Order issued by this Court. As explained below, the County strongly contends that none of the four mandatory criteria for injunctive relief have been satisfied by Plaintiffs and their motion should be denied.

BACKGROUND FACTS

In November 2013, the County applied for a permit from the US Army Corps of Engineers pursuant to Section 404 of the Clean Water Act, 33 U.S.C Sec. 1344, which would authorize the necessary discharge of dredged or fill material into certain parts of the right of way for a road project known as International Drive. Part of the road is already paved to four lanes. A 5.6 mile stretch of the road (which has existed for many years on some form) was a dirt road, impassable in many areas, running from the end of the paved section near Carolina Forest to Highway 90. (Exhibit 7). The original project application called for impacts to 24.88 acres of wetlands. Project modifications during the application period reduced these impacts and resulted in a final wetland impact of 19.58 acres of wetland fill, 4.35 acres of wetland excavation, and 0.26 acres of mechanically cleared wetlands equaling a total impact of 24.19 acres.

In late 2015, Plaintiffs filed an appeal of the two certifications issued by the South Carolina Department of Health and Environmental Control (DHEC) and required by federal law before the Corps could issue its permit. These certifications are the 401 Water Quality Certification required by 33 U.S.C. Sec. 1341 and the Coastal Zone Certification required by 16 U.S.C. Sec. 1456(c)(3)(A). The respective statutes allow states specific time periods to act on requests for certification – one year for a 401 Certification and six months for a CZM Certification. 33 U.S.C. Sec. 1341(a)(1) and 16 U.S.C. Sec. 1456(c)(3)(A). Both required certifications were issued by DHEC on June 25, 2015 after expiration of the deadlines set by federal law.

The SC Administrative Law Court, Judge Ralph King Anderson, III, heard the case and issued his order upholding the two state certifications on July 7, 2016. As the evidence presented by Plaintiffs on this motion is all taken from the record of that proceeding and, more importantly, as the issues as to environmental harm and consideration of alternatives are the same in this case, the relevant portions of Judge Anderson's order are summarized below, annotated with references to portions of the record of the ALC proceeding which are attached hereto as exhibits. (The order by Judge Anderson was filed as Exhibit 4 to Horry County's Response in Opposition to the Plaintiffs' Motion for a Temporary Restraining Order).

As to alleged impacts to wetlands, Judge Anderson held that to the extent that direct fill of wetlands required for the project would impact that portion of a possible aquatic ecosystem in the immediate footprint of the road project, such evidence is insufficient to conclude the aquatic ecosystem in the "vicinity" of the project is permanently altered, such that its functions and values are eliminated or impaired. He found that Plaintiffs' experts testified only that the proposed project could degrade adjacent wetlands, but could not quantify the extent of any impact, or even whether the net impact would be positive or negative. He found more credible the testimony by the County's witnesses, including experts in water quality and wetlands, who testified that the project would improve both water quality and wetland connectivity. (Exhibit 17, Testimony of Mike Wooten; Exhibit 14, Testimony of Britt Feldner).

Similarly, Judge Anderson found there is no evidence contradicting DHEC's determination that there is no "feasible" alternative to the proposed project. He cited the unrefuted testimony of the County's witnesses that none of the alternatives considered by the applicant would satisfy the project purpose and reduce impacts to the environment. The "preferred alternative" is the only alternative which meets project purposes and minimizes impacts to the environment. The only

alternative suggested by Plaintiffs at the ALC hearing that was not discussed in the applicant's submitted materials was a plan that called for bridging the length of International Drive. The court found that based on the weight of the testimony that bridging for this project is not practicable, and thus does not constitute a feasible alternative. The only testimony as to the cost of bridging was by Mike Wooten. Wooten testified that the cost of bridging would be $20 million. (Exhibit 14, Testimony of Britt Feldner; Exhibit 16, Testimony of Steve Gosnell, Exhibit 8 and Exhibit 9). Contrary to Plaintiffs' claims, the Corps was fully and actively engaged in reviewing all of the alternatives to the project. (Exhibits 8 and 9; Exhibit 14, Testimony of Britt Feldner).

For purposes of review of the Water Quality Certification, Judge Anderson concluded that the County satisfied the requirement to consider feasible alternatives and appropriately rejected the alternatives that were not practicable, that did not satisfy the project purpose, and that had greater environmental impact than the preferred alternative. Additionally, he found that Plaintiffs failed to demonstrate by a preponderance of the evidence that the proposed road project will negatively impact water quality. Plaintiffs' experts had limited experience with the road and performed no independent study of storm water impacts or other water quality impacts of the proposed road. They offered no testimony to contradict that of Mike Wooten or Bart Baca, both experts with considerable experience in water quality generally and storm water in particular, or of Steve Gosnell, an experienced engineer and the chief storm water official for Horry. Wooten and Gosnell had direct, personal experience with the road as it is today and their testimony was that the sediment washing off of the current road after every rain is a serious problem. The court found the testimony of Wooten, Gosnell and Baca to be competent and entitled to more weight than the unspecific and unsubstantiated opinions offered by Petitioners' witnesses. (Exhibit 13,

Testimony of Bart Baca; Exhibit 16, Testimony of Steve Gosnell; Exhibit 17, Testimony of Mike Wooten).

Judge Anderson found that the weight of the testimony presented at trial supported a finding that the required storm water protections during road construction will eliminate storm water related pollution to the maximum extent practicable. Moreover, he held based on the testimony of Baca, Wooten and Gosnell that elimination of the current dirt road will remove a source of sediment runoff presently impacting the Lewis Ocean Bay Heritage Preserve (LOB) wetlands, and the engineered culverts designed into the proposed road will, in all likelihood, improve water quality and wetlands connectivity in the immediate vicinity of the roadway.

The court noted that while, as in this case, Plaintiffs' witnesses repeatedly made reference to LOB as a "special" or "unique" location, there was no evidence that LOB, or Heritage Preserve property generally, was equivalent to a National Wild and Scenic River or any of the other similar designations described in SC Reg 61-101, or that LOB otherwise met the regulatory meaning of the phrase "special or unique habitat." Based on the testimony of Plaintiffs' bear expert, Joe Hamilton, Judge Anderson found that LOB is similar in nature to tens of thousands of acres of habitat stretching from North Carolina to Francis Marion Forest in which black bears will periodically range. (Exhibit 12, Testimony of Joe Hamilton). The "uniqueness" of LOB comes from the high concentration of Carolina Bays within the preserve. The testimony of the County's witnesses was that no Carolina Bays would be impacted by this project. To the extent LOB could qualify as a special or unique habitat, the court found that the Plaintiffs failed to carry their burden of proving an adverse impact to that habitat.

Finally, Judge Anderson concluded that the County provided reasonable assurances that water quality standards would not be violated by the proposed project. These assurances included

the design of the storm water management system and overall design of the road that (1) controls the flow of storm water run-off into adjacent wetlands; and (2) provides water quality treatment through a series of BMPs. (Exhibit 16, Testimony of Steve Gosnell; Exhibit 17, Testimony of Mike Wooten; Exhibit 13, Testimony of Bart Baca).

As to impacts to wildlife, Judge Anderson held that Plaintiffs again failed to meet their burden of proving a significant negative impact on wildlife stocks will result from this project. While they presented evidence that bear tunnels *might* be used by bears to go under the road and thus reduce the number of bear/vehicle collisions, Judge Anderson held that they failed to adequately demonstrate either the effectiveness of such tunnels or, more importantly, that the currently proposed protections – i.e., speed limits and highway fencing – would fail to provide the same or similar protections. DNR's testimony was that the tunnels may be ineffective and that the high fencing necessary to direct bears to the tunnels may itself cause fatal bear strikes by trapping the animals on the roadway. (Exhibit 15, Testimony of Alvin Taylor; Exhibit 18, Testimony of Sam Chappalear).

The court noted that all witnesses who testified about the bear, agreed that "bears will go where they want to go" and might not use the tunnels at all. Hamilton, Petitioners' bear expert, said that the tunnels at the project would be minimally effective - possibly as low as 20% effective. He was specifically opposed to high fencing to "herd" the bears to the tunnels. As the land on the other side of the tunnels from the LOB is privately held, there is also no guarantee the owners of this land would allow bears to continually be funneled onto their land through these tunnels. Indeed, during hunting season, which may soon be expanded, the tunnels, if effective at all, would be ideal locations for hunters to pick off bears using them. Plaintiffs essentially wanted the County to build a $3 million experiment in animal behavior with no reasonable assurance it would protect

bears or motorists. Judge Anderson held that it was not a proper role for his court to order such an expenditure be added to the cost of a public project when its effectiveness had not been proven, and reasonable alternative safety measures are already in place. Well intentioned though he was, the best that Hamilton could say about building the tunnels is that they would give the bears "an option," which he readily admitted they may not chose to take. (Exhibit 12, Testimony of Joe Hamilton).

Plaintiffs' stated theory at the ALC trial with respect to the black bears is that the 2010 Right of Way Agreement called for scientifically supported "bear tunnels," while the 2013 Agreement eliminated this requirement for a – to their mind – scientifically unproven lower speed limit protection. To further this theory, Judge Anderson noted that the Plaintiffs continuously attempted to support an implication – never close to being proven by a preponderance of the evidence – that there were some nefarious negotiations between the County and DNR between 2010 and 2013 to eliminate the bear tunnel requirement. As a result, they posit, the proposed project is not consistent with the wildlife protection policies of the CMP or with the management plan for the LOB. But, he found that Plaintiffs could not meet their burden of persuasion through innuendo alone.

Judge Anderson also rejected Plaintiffs' contention that there is no scientific evidence supporting a shift from the tunnels to a lower speed limit. He cited the testimony of Sam Chappalear that the lower population in LOB caused him to doubt the need for the tunnels. (Exhibit 18, Testimony of Sam Chappalear). Moreover, he testified that given the serious negative effects of high fencing, he testified the better approach was to have a lower speed limit that would prevent most collisions. The difficulty of fixing locations for tunnels the bears will use, something both Chappalear and Hamilton testified to, and the agreed upon tendency of bears to "go where

they want to go," is strong evidence that the tunnels were not the optimum solution. Moreover, the large number of bear/vehicle collisions on Highway 22, the court held, which has a number of crossings under it equally usable by bears, indicates that tunnels are of limited utility.

Moreover, the court held, the evidence never included anything other than suspicion as to DNR's motivation. Taylor and Chappalear, who were the primary DNR officials involved in advocating the 2013 Agreement that omitted the tunnel requirement, testified their decision was not prompted by any improper influence. (Exhibit 15, Testimony of Alvin Taylor; Exhibit 18, Testimony of Sam Chappalear).

Even assuming Plaintiffs were able to prove a significant negative impact on black bears was likely to occur as a result of this project, Judge Anderson ruled, they cannot succeed where they have put forward no evidence whatsoever to contradict the substantial evidence put forward by Respondents regarding the public need for this road. He held that "overriding public interests" (or "overriding socio-economic considerations") will permit a project to move forward even in the face of negative environmental or wildlife impacts. He found that such overriding interests exist in this case, and that DHEC appropriately found that the proposed project is consistent with the Coastal Zone Management Plan."

Judge Anderson also rejected Plaintiffs'' claims, repeated in this case, that there was inadequate consideration of cumulative impacts. The proposed road project calls for ten curb cuts along the private property side of the 5.6 mile road. The property on that side of International Drive is currently undeveloped, and is owned by two property owners. Plaintiffs alleged that the curb cuts will result in additional development on the southwestern side of International Drive, which will create additional, indirect impacts to wetlands, to the LOB property itself, and to wildlife utilizing the LOB habitat, but the court found that they had not provided evidence of any

specific development proposed now or for a foreseeable future date on the private property adjacent to International Drive, and that their witnesses did not offer anything but pure speculation on what development might be likely.

The County's witnesses, he held, offered specific testimony about the nature of the property to the west of International Drive. Britt Feldner, a wetlands consultant with decades of wetlands delineation experience, and who conducted the wetlands assessment and delineation for this project, testified to his assessment that the private property tracts adjacent to International Drive are approximately 85 percent wetlands and could not be developed without permits from the Corps, which would be extremely difficult to secure. Feldner, as well as Mike Wooten, an expert for Horry, testified that any development which impacts the wetlands on the private property side of the road would require the same permitting as the proposed International Drive project, but that a residential or commercial development would face a "high regulatory hurdle to demonstrate overriding public interest." (Exhibit 14, Testimony of Britt Feldner; Exhibit 17, Testimony of Mike Wooten). Wooten is a civil engineer with many years' experience in design of road projects, a S.C. District Highway Commissioner, and a member of the firm which designed the International Drive project. Based on his experience with land use planning, Wooten testified that the limited uplands on the private tracts would not support high density residential development. (Exhibit 17, Testimony of Mike Wooten). Wooten further testified that the cost of mitigation for a private, for-profit development that impacted wetlands would be significantly higher than the mitigation required for a public project such as International Drive, and that other factors could make such development on the private tracts adjacent to International Drive prohibitively expensive. (Exhibit 17, Testimony of Mike Wooten). Judge Anderson found that the weight of evidence supported a

finding that significant secondary development of the property west of International Drive is highly unlikely.

After Judge Anderson issued his order, the Corps issued its 404 permit to the County on July 22, 2016. On August 18, 2016, the County proceeded with the project construction. News of this appeared in the press on August 22. Plaintiffs filed this action on September 1, this motion for preliminary injunction on September 14 and their motion for a temporary restraining order on September 21. A consent TRO was issued by this Court on September 23.

STANDARD FOR PRELIMINARY INJUNCTION

Preliminary, prohibitory injunctive relief "protects the status quo...to prevent irreparable harm during the pendency of a lawsuit and ultimately to preserve the court's ability to render a meaningful judgment on the merits." In re Microsoft Corp. Antitrust Litigation, 333 F.3d 517, 525 (4th Cir. 2003). A preliminary injunction is, in the words of the Supreme Court, "a drastic and extraordinary" remedy that is only to be granted in extraordinary circumstances, including in cases allegedly seeking to protect some aspect of the environment, and never as a matter of right. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 376, 172 L.Ed.2d 248 (2008); and Monsanto v. Geerston Seed Farms, 561 U.S. 139, 130 S.CT. 2743, 2757-2761, 177 L.Ed.2d 461 (2010). The Court has described its "frequently reiterated standard" for injunctive relief requires a plaintiff to establish upon a clear showing four points: "1) that the plaintiff is likely to succeed on the merits; 2) that the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in the plaintiff's favor; and 4) that an injunction is in the public interest." Winter, supra.

In response to the tightened rules for preliminary injunctions announced by the Court in Winter and Monsanto, the Fourth Circuit has significantly modified its longstanding traditional

standard originally set forth in Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 195 (4th Cir. 1977). In Real Truth About Obama, Inc. v. Fed. Elec. Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), the Fourth Circuit held that its prior rule, "now stands in fatal tension" with Winter. The Court read Winter as "articulating four requirements, each of which must be satisfied as articulated," thereby precluding any standard that depends on a "flexible interplay" among the four factors. Winter, at 347. In particular, the Court observed that a plaintiff is required to make a "clear showing" in every case that it "will likely succeed on the merits," a requirement that the court viewed as "far stricter" that the requirement to demonstrate only a "serious question for litigation." The court abandoned its balance of hardship test in favor of a strict application of the Winter standard. Plaintiffs must, in this case, therefore, clearly establish all four of the requirements set forth in Winter to be entitled to a preliminary injunction. As explained below, they have failed to present a clear showing as to even one of these requirements.

EVALUATION OF THE FOUR CRITERIA PLAINTIFFS MUST ESTABLISH

On the evidence produced to date, Plaintiffs are not able to establish any of the required four criteria required to justify the extraordinary remedy of a preliminary injunction.

A. Likelihood of Success on the Merits

The County incorporates the argument filed by the Federal Defendants concerning likelihood of success on the merits. The County would note that the discussion herein concerning the failure of the Plaintiffs to offer competent proof of any specific environmental harm serves also to illustrate that they are not likely to succeed on the merits.

B. Likelihood of Irreparable Harm

The fact that allowing the project to be completed will not likely result in irreparable harm is evident from a number of factors, including the actions of the Plaintiffs themselves.

1. The Plaintiffs waited six weeks after the County received its permit from the Corps to file this action, another week and a half to move for a preliminary injunction and a further week and a half to move to a temporary restraining order. They waited nearly two weeks after they say they learned the Corps and issued its permit *and after they learned the County had commenced work on the project* to file this action (both on August 22). By the time they filed their motion for a preliminary injunction on September 14, the County had been engaged in construction of the project for three and one half weeks. Their motion for a temporary restraining order came a full month after the County commenced construction. (Exhibit 4, Declaration of David Gilreath).

Plaintiffs complain that they did not know the Corps issued its permit until the press announced the County was working on the project. This complaint is weak in light of the fact that Plaintiffs had been engaged in a year long legal battle with the County and S.C.D.H.E.C. over the two state certifications issued in response to the Corps' statutorily required request for them. If the threat of harm was as dire as Plaintiffs claim, one would expect they would have used all the tools at their disposal to prevent work on the permit from commencing. They were not required to wait until the S.C. Administrative Law Court ruled on their challenges to the certifications. They could have filed the sixty day notice letter with the Corps and EPA as a predicate to filing a citizens suit under the Clean Water Act, 33 U.S.C. Sec. 1365. In addition, when the ALC issued its order upholding both certifications, they could have immediately demanded to know what the Corps intended to do. Failing an answer, they were free to commence an action and ask for an injunction at that point.

The Plaintiffs also did not need to wait for weeks after filing their complaint to seek an injunction. They were fully aware that the County was expending substantial sums in the construction of the road. Such action – deliberately and unnecessarily waiting until a project is well under way – has been held to be strong evidence that the harm complained of by a plaintiff was a product of their own delay. The Fourth Circuit has recognized that delay such as that by Plaintiffs in this case indicates that there is no irreparable harm to be risked from the project's completion. Quincy Orchard Valley Citizens Association, Inc. v. Hodel, 872 F.2d 75, 79 (4th Cir. 1989), holding that much of the plaintiff's potential harm was a product of their own delay. The same is true in this case and for that reason alone, Plaintiffs' motion should be denied.

2. Prior to commencing their legal challenge to the two state certifications in the ALC, Plaintiffs made a demand on the County for payment to them (or a third party of their choosing) of $1.5 million which they said would provide additional wildlife corridors which would offset the impacts of the project. (Exhibit 1, Declaration of Mark Lazarus, Chairman of Horry County Council; Exhibit 10, Deposition Excerpt of Steve Gilbert). Perhaps the most significant harm Plaintiffs complained of in that challenge was that the road would block wildlife – principally the Black Bear – from moving north and south across the road without being struck by vehicles. Only when the County refused to make this payment, did Plaintiffs proceed with their state court challenge to the project.

If the harm from the project could be remedied by a $1.5 million payment to Plaintiffs by the County, those harms are clearly not irreparable or serious enough to warrant issuance of a preliminary injunction. Industrial Park Development Co. v. EPA, 604 F.Supp. 1136 (E.D. Pa. 1985).

3. The allegations of environmental harm have been litigated in the ALC. While not controlling on this Court certainly, the record made in that forum illustrates that the evidence for Plaintiffs claims is extraordinarily weak. Moreover, the Plaintiffs have submitted portions of the record to this Court in support of their allegations of harm. It is, therefore, entirely proper to cite the evidence held by the ALC to be more persuasive establishing that there is no significant harm from the project which will not be fully mitigated for by the County. The plaintiffs list three harms they claim would result from the road which would be irreparable: filing of 24 acres of wetlands, conversion of 22 acres of the Lewis Ocean Bay Heritage Preserve into the road, and loss of wildlife (which Plaintiffs do not specify other than claiming broadly an increase in vehicle – black bear collisions).

a. Loss of wetlands: The Plaintiffs claims that filling the 24 acres of wetlands would result in the loss of the functions and values of these wetlands and that there would be a degradation of values of adjacent wetlands as well. This claim was shown at the ALC hearing to be completely unsupported. The overwhelming evidence is that the direct loss of wetlands will be mitigated for through the mitigation plan made part of the 404 permit (mitigation which has already been paid for by the County). More important, is the uncontested evidence that wetlands on both sides of the road as it existed before construction began were degraded by the severing of flow between the two sides by the existing dirt road. The 20 culverts the Corps required to be included in the plans will, according to the testimony by the County and by its experts, Britt Feldner and Mike Wooten, return the connectivity of those wetlands and improve their functions as well as the water quality of the wetlands. (Exhibit 5, Declaration of Britt Feldner; Exhibit 14, Testimony of Britt Feldner; Exhibit 17, Testimony of

Mike Wooten; Exhibit 16, Testimony of Steve Gosnell). On balance, there will be net benefit to wetland functions from the project because of the culverting of the wetlands.

b. Loss of Water Quality: Concurrent with their claim of a loss to wetland functions is the claim that water quality would suffer. Plaintiffs have produced no evidence of this and did not at the ALC hearing. All of the competent evidence was that implementation of the storm water plans as part of the project would reduce to a minimal level any increase in sediment transport or pollution from the road. (Exhibit 13, Testimony of Bart Baca; Exhibit 16, Testimony of Steve Gosnell; Exhibit 17, Testimony of Mike Wooten). Plaintiffs have never produced anything but complete speculation on this point.

c. Loss of Part of the Lewis Ocean Bay Heritage Preserve:

Plaintiffs claim that conversion of 22 acres of the southwestern edge of the Preserve will constitute a significant harm. In making this assertion, they place themselves in the shoes of the entity which has always managed the Preserve, the SC Department of Natural Resources. That agency clearly is not concerned that the road will harm the Preserve. The Director testified that he personally approved the transfer of the edge of the property to the County for purposes of the road construction. There are no endangered species impacts that have been identified or any other specific negative impact to the property. The claim that construction of this road would have some unspecified impacts because it is the fourth major road to frame the Preserve is utter speculation. Nothing in any of the documents relating to creation or management of the Preserve identify this type project as a threat to the functions of the Preserve. This argument is nothing more than Plaintiffs attempting to supplant the sound discretion of the DNR as to what is best for the Preserve. (Exhibit 15, Testimony of Alvin Taylor; Exhibit 18, Testimony of Sam Chappelear; Exhibit 20 to Plaintiffs' Motion for Preliminary Injunction).

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

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

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

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

C. Balancing the Equities.

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

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

people along Highway 90. Lack of reliable quick fire and police service to these communities is also a threat to them.

The recent hurricane produced historic flooding of the Waccamaw River in Horry County. This flooding illustrates the problem warned of by the County's officials and the reason the road is so important to the health and safety of its people. In the immediate aftermath of the hurricane, one tragedy occurred that serves to illustrate this risk. A man in his late sixties suffered a heart attack in the Hillsborough subdivision along Highway 90 on Sunday, October 9. A neighbor, a retired EMT with 25 years experience performed CPR to the victim for over 20 minutes without success. The EMS, which had been summoned immediately, arrived some 25 minutes later. The lack of more rapid arrival of a defibulator or other services associated with EMS left the victim with less of a chance to survive. Had International Drive been in place as designed, the EMS would have been on the scene much sooner. (Exhibit 2, Declaration of Randy Webster; Exhibit 3, Declaration of Roger Hofmann). Certainly, it cannot be said that this caused the victim's death. The situation, however, illustrates that this aspect of the project is real and, as explained by Mr. Webster, can be a matter of life and death.

2. As a result of the Plaintiffs waiting so long before filing this action and their motions for injunctive relief, the County committed itself to expensive construction and supply contracts. Had Plaintiffs moved expeditiously, as would be expected of groups seeking to prevent genuine irreparable harm, the County would not have made these commitments. Suspending these contracts will cost the County large sums of public money which the County will never be able to recover. David Gilbreath, the county Director of Public Works estimates that this loss would be some $835,000. An additional $180,000 he estimates would be incurred as cost due to inflation over the life of this litigation. (Exhibit 4, Declaration of David Gilreath).

The Plaintiffs claim that the County caused itself this harm by moving forward with the project as it should somehow have known that litigation was imminent. The cases cited by Plaintiffs all involve instances where a permit holder had commenced work after being informed litigation had been or was about to be filed seeking an injunction. That was not the case here. While Plaintiffs could have filed a notice of intent to file a Citizens Suit or otherwise warned the County they intended to file a federal court challenge, they did nothing after the ALC rejected their challenges of the state 401 and CZM certifications. Plaintiffs do not say how long the County was supposed to wait for them to act. Unlike a challenge to a state permit or certification, there is no time period in which a plaintiff is required to act before they are deemed to have waived their right, other than the statute of limitations. It is not reasonable to expect a county to wait years for the statute of limitations to run out. The County waited a full month after the Corps permit was issued to commence construction. In the complete absence of any indication by the Plaintiffs that they intended to challenge the Corps permit, this was an entirely reasonable course of conduct to pursue. It comes with no small amount of ill grace for the Plaintiffs, who waited for a significant period of time to seek an injunction, to blame the costs the delay they seek would inflict on the County for proceeding with work properly authorized by the 404 permit.

D. Public Interest.

Horry County is the body politic that serves all the people of Horry County. All of the costs an injunction would inflict would be a loss of public funds of the people of Horry County. The risk of loss of life and property from the continued lack of reliable access for the communities along Highway 90 for emergency room care, EMS, fire and police services, particularly in a time of natural disaster, is a public interest of even greater importance. These

are not speculative losses, as Plaintiffs claim; these are losses the County will suffer if an injunction is imposed preventing the completion of the road.

The interests the Plaintiffs claim to be seeking to protect, however, are entirely speculative. There is no evidence there will be any loss of wildlife or diminishment of water quality. The evidence is that wetland functions will be improved by the project through the reconnection of the wetlands on either side of International Drive, which have been severed for many years by the road that was in place prior to the County's recent work under the 404 permit. There is no also no competent evidence that the Lewis Ocean Bay Heritage Preserve will be adversely affected by the road's construction along the southwest edge of the property. DNR's approval of the project is compelling evidence that there will be no such harm.

This Court has addressed the public interest requirement for a preliminary injunction in the context of a NEPA case previously in Hodges v. Abraham, 253 F.Supp.2d 846 (D.S.C. 2002) in which it said:

> The public interest is the final factor to consider in determining whether to grant or deny a preliminary injunction. Generally, the public interest is best served when an injunction is granted in favor of the party suffering the most harm by the denial or grant of the injunction. *See, e.g., Wisconsin v. Weinberger,* 745 F.2d 412, 426 (7th Cir.1984) (finding that even if there had been a NEPA violation, traditional equity principles militated against granting preliminary injunction because potential harm to Navy and national defense outweighed harm to the environment).

Plaintiffs acknowledge that the Supreme Court's Winter decision stands for the proposition that national defense outweighs environmental harm in the public interest analysis on a motion for preliminary injunction. However, public safety in the context of a road project has also been recognized as a factor of equal weight to environmental harm in assessing the public interest factor on a motion for a preliminary injunction in a NEPA case. Mooreforce, Inc. v. United States Department of Transportation, 243 F.Supp.2d 425 (M.D.N.C. 2003), in

which the court denied environmental plaintiffs' request for an injunction of construction of a road project holding that their claims of environmental harm did not outweigh the harm an injunction would cause to public safety in the form of automobile accidents which would be avoided by the project.

In this case, as noted above, the Plaintiffs' claims of irreparable environmental harm likely to result from construction of International Drive are weak. However, even in a case in which such proof were stronger, harm to certain discrete, limited parts of the environment does not outweigh substantial risks to public safety so as to tip the balance in favor of an injunction. The uncontested evidence in this case that delay of completion of International Drive is a matter of significant public safety – now confirmed by the Hurricane Matthew flooding. The balance of public interest in this case is decidedly in favor of denying the injunction and allowing the road to be completed.

BOND REQUEST

In the event the Court elects to issue an injunction preventing the County from continuing construction on the project, the County requests a bond be required of Plaintiffs pursuant to F.R.C.P. 65. The Declaration of David Gilreath indicates that should further construction of the road be enjoined, the County will suffer financial loss due to contractual obligations and otherwise unnecessary work that would have to be performed in the amount of $825,000. He also calculates that over a two year period of delay the cost of the project would grow by another $180,000. (Exhibit 4, Declaration of David Gilreath). Based on these facts, should the court order an injunction, the County requests that a bond of $1 million be required.

CONCLUSION

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

Respectfully submitted,

s/ Stan Barnett

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October 20, 2016
Mount Pleasant, South Carolina

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

vs.

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

CERTIFICATE OF SERVICE

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

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January 24, 2016