

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

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SC Court of Appeals

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.

INITIAL REPLY BRIEF OF APPELLANTS

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I. Standard of Review

Respondents' brief attempts to present this appeal as entirely a matter of contested facts, giving little or no attention to the legal errors at the center of Appellants' case. In point of fact, though, the ALC made several critical legal missteps, for which the "substantial evidence" standard relied upon by the Respondents does not control. Under the APA, while the ALC's factual findings should be affirmed if supported by substantial evidence, conclusions of law are reviewed *de novo* and "the Court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). A primary purpose of this reply brief is to bring this Court's attention back to the ALC's errors of law.

II. ALC's Decision is in Violation of Statutory and Regulatory Provisions

Both parties have laid out extensive reviews of testimony and evidence, and Appellants contend that these facts demonstrate areas where the ALC's findings in favor of the Respondents fly in the face of overwhelming contrary evidence. Even more readily apparent, though, are the instances where the ALC simply did not apply the relevant statutory or regulatory language, as doing necessarily would have led to contrary resolution of the case. These errors must be overturned as a matter of law.

A. Environmental Impacts to the Heritage Preserve have not been Minimized

As Appellants have previously emphasized, our Coastal Management Program ("CMP") provides decisive protection for a small set of particularly significant coastal resources, known as Geographic Areas of Particular Concern ("GAPC"). Specifically, under the CMP: "Applications which would significantly impact a GAPC **will not be approved** or certified unless there are no feasible

alternatives or an overriding public interest can be demonstrated, **and** any substantial environmental **impact is minimized.**” CMP at III-14.I.(8) (emphasis added). Lewis Ocean Bay Heritage Preserve (“LOBHP”) is a GAPC by virtue of its Heritage Preserve status, and this section of the CMP is therefore applicable.

The ALC undertakes no analysis of what it means to “significantly impact a GAPC” under this section. See (Final Order, p. 26). Note, though, that the language does not specify that only environmental impact should be considered or even that the impact has to be entirely negative. Had the ALC undertaken analysis of the language, it may have noted the following basic facts: 22 acres that were once LOBHP are now highway; approximately 12 acres that were once wetlands inside of LOBHP are now highway; part of LOBHP that was once an unusable sand path will now be busy five-land highway; and LOBHP is now bounded on all sides by major highways, with one of those highways being partially within its borders. If building a major highway in a GAPC does not constitute a “significant impact” to that GAPC for purposes of CMP III-14.I.(8), then the provision may as well not exist.

The ALC complicates its failure to define “significant impact” by shifting the burden of proving such impact, whatever it means, onto the Appellants: “Petitioners have failed to carry **their burden** of proving a ‘significant impact’ on the GAPC” (Final Order, p. 26 (emphasis added)). Contrary to the ALC’s burden shifting, it is the state’s burden—whether DHEC or the ALC—to assess the impact on LOBHP and determine it is significant for purposes of CMP III-14.I.(8), rather than the other way around. The ALC does not undertake such assessment in relation to CMP III-14.I.(8). Rather, the ALC fails to define “significant impact,” then concludes that CMP III-14.I.(8) does not apply because

the Appellants have not proven impact, but then the ALC applies the section anyway. See (Final Order, p. 26).

In applying CMP III-14.I.(8), the ALC failed to apply the unequivocal requirement that “any substantial environmental impact is **minimized**.” Note that the language does not require minimization of environmental impacts where “feasible” or “practicable,” nor does it provide that *some* mitigation or minimization measures must be undertaken. The unadulterated nature of this minimization command reflects the high regard given to GAPCs in the coastal zone: “[t]he areas included in this section are of such special importance and concern to South Carolina that the State has established regulatory and/or management controls over them.” CMP at p. IV-2.

In the face of an absolute requirement for minimization, the ALC’s reliance on the use BMPs—“best management practices” that are required for virtually every construction project disturbing ground in South Carolina—is out of place. See (Final Order, p. 26). The ALC notes some measures that Horry County took to reduce environmental impacts, but the Court doesn’t get anywhere close to applying the minimization requirement as written. See (*Id.*). The Court’s failure to apply the terms of CMP III-14.I.(8) is an error of law, which led to the Court failing to consider or require any number of additional measures that would lead to this project having fewer environmental impacts.

B. LOBHP Qualifies for Enhanced Protections Under the Water Quality Regs

Regulation R.61-101.F(5)(d) provides that Water Quality Certification “**will be denied** ... if the proposed activity adversely impacts special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers.” In direct conflict with other state statutory and regulatory language, the ALC ruled that

the habitat impacted by this project is not “special or unique.”

Our state’s Coastal Management Program document describes Geographic Areas of Particular Concern, like LOBHP, as follows:

“The areas included in this section are of such *special importance* and concern to South Carolina that the State has established regulatory and/or management controls over them.” CMP at p. IV-2 (emphasis added).

“The South Carolina Coastal Council has designated the Geographic Areas of Particular Concern discussed in this document because of their *unique importance* as natural, aesthetic, recreational, scientific, or economic resources in the coastal zone.” CMP at p. IV-3 (emphasis added).

The enabling statute authorizing the designation of Heritage Preserves, including LOBHP, also acknowledges that the purpose of such designation is to protect special and unique natural resources. See S.C. Code Ann. § 51-17-10, *et seq.* Indeed, the statutory definition of the program itself is based on that purpose: “The Heritage Trust Program” means the entire system established under this chapter to provide for the inventorying, preservation, use and management of unique and outstanding natural or cultural areas and features in this State.”

Lewis Ocean Bay Heritage Preserve is by very definition, from multiple sources of state law, a “special or unique habitat,” and the ALC’s failure to apply R.61-101.F(5)(d) on this basis is a legal error. The ALC arrives at this legal error through a couple of misconstructions, the first of which is applying an unduly narrow scope of review under R.61-101.F(5)(d). See (Final Order, p. 23). Rather than considering the wetlands destroyed by this project as an element of LOBHP or as an element of the Carolina bay/longleaf pine ecosystem in which they lie, the ALC and DHEC take as myopic of a view as possible, literally missing the forest for the trees. Any natural system, regardless of is

specialness or uniqueness, can be broken down into component parts so small that those parts become unremarkable. Any part of a National Seashore, for example, taken in isolation is just a patch of sand like many others. By isolating only the wetlands that are literally paved over by this project, and failing to consider the system of which those wetlands are a part, the ALC failed to apply the “special or unique habitat” language R.61-101.F(5)(d). While the impacted wetland may appear relatively ordinary when viewed under a microscopic lens, zooming out even slightly reveals their role within an extraordinary system.

The second misconception that led to the ALC’s failure to apply R.61-101.F(5)(d) was that it bound the definition of “special or unique habitat” tightly to the few examples listed in the regulation (“...such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers.”). See (Final Order, p. 23). It could not have been the intent to limit R.61-101.F(5)(d) in this manner, as doing so renders the provision practically meaningless. A review of the specifically designated examples is elucidating. For example, South Carolina only has a small part of one National Wild and Scenic River, the Chattooga, which skirts the most extreme northwest corner of the state. See <<https://www.rivers.gov/south-carolina.php>>. Of the state’s nearly 30,000 miles of river, only 41 miles of the Chattooga have this designation. Id. “National Ecological Preserve” is not even a designation bestowed in the United States, but the nearest equivalent might be national parks. South Carolina has only one. Similarly, there are only 29 National Estuarine Research Reserves in the country, and South Carolina has two. See <<https://coast.noaa.gov/nerrs/>>. By tightly construing “special or unique habitat” to that equivalent to the handful of examples listed, the ALC confines the applicability of R.61-101.F(5)(d) to just a few places in the state, most of which are

so highly protected from development that there would never be a need to apply the regulation in the first place. As evidenced by the language cited above from the CMP and Heritage Trust Act, our laws clearly contemplate that the special and unique habitats of our state are not so tightly drawn.

Whether heritage preserve properties qualify as special or unique habitat deserving the protections of R.61-101(F)5(d) is a question of law. Appellants offered extensive testimony on LOBHP's special and unique habitat from multiple experts. (See, e.g., Gilbert Testimony, Tr. Day 1, 117-127; Tufford Testimony, Tr. Day 1, 224-39, 247-48, 269-70.) No evidence was offered to the contrary. Mr Bennett, in particular, offered extensive testimony as to how LOBHP came to receive its special designation, which included describing in detail the various characteristics that make it worthy of the highest level of protection assigned to land held by the Department of Natural Resources. Mr Bennett studied the area and has been to LOBHP many times. (Bennett Testimony, Tr. Day 5, 28-42, 67-77, 86-87, 95-97.) Thus, his testimony was specific, substantiated, related to data and onsite evaluations, contrary to Respondents assertions. It is undisputed that 22 acres of natural area that are part of LOBHP would be taken and converted to road as part of this project. That road will fill wetlands in LOBHP, destroy plants and animal habitat in LOBHP, and fragment habitat for rare black bears in and around LOBHP. Those impacts justify denial of the Water Quality Certification under R.61-101(F)5(d).

C. The ALC's Complete Exclusion of Black Bears from Consideration under the Water Quality Certification was in Error

The ALC ruled unequivocally that this project's impact on black bears cannot be considered in relation to DHEC's Water Quality Certification. (Final Order, p. 23 ("To the extent that black bears

are within the scope of *any* decision that is the subject of this contested case, their relevance is limited to the Department's CZC decision.")). The ALC's legal conclusion on this point is in error, and the ALC's artificial limitation on the scope of analysis should be overturned.

Consideration of black bears is appropriate under several provisions of the Water Quality Certification regulation, R.61-101, including in the broad directive to assess "the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others." R.61-101.F(3)©. In interpreting a comparable "cumulative effects" provision from DHEC's critical area regulations, our Supreme Court rejected the narrow interpretation that only cumulative impacts within the regulated resource should be considered. Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 36, 766 S.E.2d 707, 719 (2014) ("the ALC erred in ... construing regulation 30-11-(C)(1) as not permitting consideration of upland impacts.") In other words, while it was the critical area impacts of the project that necessitated the DHEC approval, the directive to consider cumulative effects was broad enough to encompass related impacts outside of the critical area. Likewise, while it was the filling of wetlands that prompted the Water Quality Certification requirement here, the cumulative impacts of that activity should not be artificially limited to those occurring within the wetlands, so as to exclude impacts on black bears. Similarly, the broad directive in R.61-101.F(3)(b) to consider "whether there are feasible alternatives to the activity" must naturally encompass activities and impacts outside of the regulated wetlands, and impacts on black bears would be front and center to that analysis here.

The final leg in the ALC's artificial limitation on the scope of its Water Quality Certification analysis relates to R.61-101F(5)(c), which unequivocally provides that "[c]ertification **will be denied**"

if the proposed project “adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species.” S.C. Reg. 61-101F(5)(c) (emphasis added). Black bears are a “recognized rare, threatened, or endangered species,” and the decisive question then is whether they can be considered to be contained within the wetlands impacted by this project. The language in R.61-101F(5)(c) has never been tested in South Carolina courts.¹ “Contain” is not defined in the regulations, thus the first point of reference is the ordinary dictionary definition to interpret the statute. Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control, 411 S.C. 16, 30, 766 S.E.2d 707, 716 (2014) (quoting The American Heritage Dictionary). According to that definition, “contain” means “to have within; hold” or “to be capable of holding.” The American Heritage Dictionary 396 (4th Ed. 2000). Certainly black bears live within and among the impacted wetlands, as testified to at length before the ALC, and would seem to fit this ordinary definition of the regulatory language. Further support for this interpretation is apparent in the Clean Water Act itself, which creates the requirement for the state’s Water Quality Certification. The congressionally declared goal of the Clean Water Act is to achieve “water quality which provides for the protection and propagation of fish, shellfish, **and wildlife**.” 33 U.S.C. § 1251. In other words, the objectives of the Clean Water Act are not limited to the protection of aquatic species. That broad declaration, along with the specific language used in R.61-101F(5)(c),

¹ Similar statutory and regulatory language has been used in other states to protect mussels. See, e.g., Mississippi Sierra Club, Inc. v. Mississippi Dep’t of Envtl. Quality, 819 So. 2d 515, 526 (Miss. 2002) (“Furthermore, the Commission was aware of the existence of the endangered Pyramid Pigtoe Mussel in the Project area. WPC-1, ch. III, § IV(B)(3) requires that, if the proposed activity adversely impacts waters containing State or federally recognized threatened or endangered species, then the Department must deny certification of the project unless it is assured that adequate measures will be taken to protect it.”); Com. ex rel. State Water Control Bd. v. Appalachian Power Co., 9 Va. App. 254, 257, 386 S.E.2d 633, 634 (1989), on reh’g, 12 Va. App. 73, 402 S.E.2d 703 (1991).

reflect once again that the ALC's exclusion of black bears is contrary to law.

The circumstance might be different if wetlands were merely incidental to the life cycle of these bears, but that is certainly not the case here. Rather, these wetlands are critical as the denning location of the Black bears.² (Hamilton Testimony Tr. Day 3, 16:3-19:2, 68:21-24; Chappalear Depo. 24:22-25:12.). "Denning" is the hibernation-like state wherein the bears curl up and go dormant for about two months out of the year. Id. Given this role of the wetlands in the life cycle of the bears, the interpretation of black bears as "contained" within the wetlands is neither legally nor factually strained. The ALC's legal ruling that black bears are not to be considered within the scope of DHEC's Water Quality Certification is an error of law that must be reversed.³

D. This Project Permanently Alters the Aquatic Ecosystem in the Vicinity of the Project Such that its Functions and Values are Eliminated or Impaired

Respondents argue that this case is similar to Murphy v. S.C. Dep't of Health and Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012), where the court rejected the contention that vicinity of the area is confined to the project site. In this case, there is no dispute that the vicinity includes more than the project site, it includes the wetlands on either side of the road project that are connected to the wetlands to be filled. (Tr. Day 1 Tufford 242-252.) Dr. Tufford presented extensive testimony about the impacts to the ecosystem, as did Steve Gilbert who has expertise in the plants dependent upon that

² The Ninth Circuit has recognized the significant value of denning habitat for the protection of bears in an Endangered Species Act case. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544, 555 (9th Cir. 2016) (reasoning that denning habitat, not just actual existing dens, for polar bears must be considered in order to protect the future existence of the species).

³ Mr. Giffin, who was responsible for the water quality certification for DHEC, could not give one example of a species protected by this regulation. (Giffin Testimony Tr Day 2, 242, 277-79.)

ecosystem, and Joe Hamilton and Steve Bennett who have expertise in the animals dependent upon that ecosystem. (Appellants' Initial Brief, 7-11, 22-48.) The aquatic ecosystem in the vicinity of the area means the wetlands adjacent to the road project on both sides.

The evidence of impacts to wetland ecosystems was substantial, whereas the respondents presented no expert evidence on wetland ecosystems. (Appellants' Initial Brief 30-48.) Sediment transport would be controlled through stormwater BMPs and culverts under the road would provide some connectivity of water flow.⁴ Culverts do not connect entire ecosystems, just water, and that distinction is extremely important to this case. (Tufford Testimony, 271-72.) Even assuming, without conceding, that water quality in the vicinity would be improved through those culverts, the aquatic ecosystem certainly would not. There was no evidence presented by respondents that the ecosystem would improve. Furthermore, there was substantial evidence presented by appellants that the aquatic ecosystem would deteriorate. Currently, those wetlands in the vicinity of the project area are in pristine or near pristine condition, with fully functioning ecosystems.

Respondents try to boil down a complex system that includes dozens of acres of wetlands stretching several miles through pristine or near pristine habitat into a single issue: water connectivity. Respondents assert that improving connectivity improves water quality, and from there make the leap to say that means the aquatic ecosystem in the vicinity of the project will not be impaired. This leap is unsubstantiated because the only expert on wetland ecosystems testified extensively about the

⁴ Note that it is undisputed that best management practices (BMPs) will be used to minimize sedimentation into the wetlands adjacent to the road project. However, sedimentation will not be completely eliminated as an impact to adjacent wetlands. Furthermore, no other pollutants will be filtered from entering the wetlands adjacent to the road project through the stormwater BMPs.

detrimental impacts to those adjacent wetlands, those wetlands in the vicinity of the project area.

Without any evidence that the aquatic ecosystem, which does not exist in culvert pipes, would not be affected in the vicinity of the area, the ALC came to the arbitrary conclusion that the aquatic ecosystem in the vicinity of the area would not be impacted. The Final Order was even so deficient, as was the Respondents' brief, that it failed to define, even generally, what the vicinity of the area entailed for this project. (Final Order 18.) Furthermore, relying on a wetlands delineator, Mr. Feldner, who does not have expertise in wetland ecosystems, and who offered no opinion on the ecosystems is arbitrary and capricious.

E. LOBHP Management Plan Should Have Been Considered by DHEC Pursuant to CMP, and Proper Consideration would lead to rejection of the Proposed Project

DHEC did not review the Management Plan, did not make a determination about whether the project is consistent with the Plan, and did not ask DNR whether the project was consistent with the Plan. (Tr. Day 2, pp. 15-16). For its part, the ALC failed to take the long term approach to property management that would be consistent with the Management Plan, instead limiting its focus to snapshots of hair snare samples for black bears to determine that the species is not in LOBHP in great numbers. (Final Order, 12-13). Although the scientific viability of such comparison was called into question, even if it were true that black bear populations went down for a year in the preserve, that fact would not be a basis for destroying a portion of the LOBHP ecosystem. This is because, as explained in the plan and by numerous experts at the hearing, these ecotypes may be dynamic and shifting at certain points in time. (Pet. Exs. 17, 22 & 24; Tr. Day 3, p. 49, 52-53).

The ALC failed to evaluate or even acknowledge the priority of uses for LOBHP. (Final Order, *passim*). As stated in its management plan, the first and highest priority is “to protect a Carolina bay/longleaf pine (*Pinus palustris*) ecosystem complex that contains South Carolina’s best assemblage of Carolina bays, and to protect several rare species, including Venus’ fly trap (*Dionea muscipula*), savannah milkweed (*Asclepias pedicellata*), black bear (*Ursus americana*), and the federally endangered red-cockaded woodpecker (RCW, *Picoides borealis*).” (Lewis Ocean Bay Heritage Preserve Management Plan, 3; see also CMP IV-5 (listing the highest priority of uses to be those consistent with the management plan developed for each property)).

Instead of reconciling how taking 22 acres of preserve property and converting it from protected habitat to a paved roadway anticipated to have heavy usage could possibly be consistent with the highest priority of uses, the ALC skipped this priority completely. (Final Order, *passim*). In an attempt to consider the second priority for LOBHP, the ALC erroneously found that public access could be improved by the proposed road project. (Final Order p. 24). This finding is wholly unfounded in the evidence as, under the proposed project, the preserve will be fenced off from the road, there will not be any new public access points to LOBHP, and access to LOBHP is not a purpose of the project. Instead, a closer reading of the second priority reveals that the road project as proposed will be harmful and inconsistent with public usage.

The ALC found that DHEC considered the priority of uses of LOB when DHEC never read the Management Plan containing those priority of uses. Furthermore, neither DHEC nor the ALC Order discussed them in any detail. This is an error of law that, at the very least, deserves remand to the agency. Consistency with the priority of uses is a requirement in the CMP for issuing the CZC

certification.

F. An Alternative is Feasible within the meaning of CMP and 61-101 if it is Feasible for Twenty Years

Both the coastal zone consistency and water quality certifications require a finding of no feasible alternatives. R. 61-101 (F)(3)(b), (F)(4)(b), (F)(5)(b); CMP III-14(I)(8), III-22(1)(a), III-73(D)(1), III-73(E)(1), and II.B.(1)(a). DHEC defines feasibility to include the concept of reasonableness, which is assessed in terms of alternative locations or sites, alternative methods of design or construction, and the no action alternative. CMP v(8).

If there is a feasible alternative that would have less adverse results, then DHEC cannot certify the project. Appellants argue that there are several alternatives to this project, as discussed in their initial brief. However, the most blatantly obvious alternative available to Horry County is the one they designed about a decade ago. DHEC and Horry County admit there is an alternative that is feasible for twenty years: the two-lane road with three wildlife underpasses agreed to pursuant to the 2010 Contract. (Tr. Day 4 p. 259, Pet'r Ex. 10)

Horry County asserts, and DHEC agrees, that this alternative ultimately does not meet the project purpose because the proposed project would meet traffic needs for a longer period of time. The applicant can define the project purpose in a manner that forecloses alternatives. (Tr. Day 2 pp. 22, 250). In this case, the County incorporated an extra long-term need for the International Drive project into its defined purpose because of expected future development and corresponding congestion. (Tr. Day 2 p. 22). As a result, an alternative that would not entail the project moving forward was eliminated by the County as failing to meet the project purpose. (Tr. Day 2 pp. 22, 250). DHEC and

the ALC adopted the County's determination that a five-lane road was the only alternative with merit. The ALC recognized that the two-lane road would not reach capacity for twenty years. (Final Order, 9). Yet, the ALC erroneously concluded that such a time limit makes the road not feasible. (Final Order, 10).

Thus, Horry County has defined the project purpose so as to foreclose other alternatives, even those that would meet the project purpose, if they are not precisely what the County wants to do.

At some point, this Court must draw the line, otherwise the applicant will render alternatives analysis completely meaningless. The two-lane road with three wildlife underpasses is feasible because it will meet the project purpose for at least the next twenty years. (Final Order 9.) Even trusting the applicant and taking every assertion in their self-interested application materials at face value, that alternative must be feasible, because it is reasonable to build a road that will last for twenty years or more. The two-lane road with three wildlife underpasses is also less detrimental to the environment regarding all of the impacts of the project, from habitat fragmentation to aquatic ecosystems in the vicinity of the area. This alternative, which has been fully designed and engineered by the applicant, is a reasonable and obvious feasible alternative.

III. ALC's Factual Conclusions are not Supported by Substantial Evidence

In addition to the errors of law committed by the ALC, the extensive factual background laid out in Appellants' Initial Brief reflects that certain critical factual findings by the ALC were not supported by substantial evidence. The basis for that argument has been laid out thoroughly at this point, but the following issues require some clarification in light of the representations in the Respondents' brief.

A. The Existence of Bears

As to the ALC's findings of fact, the Appellants do allege that some of those findings were not supported by substantial evidence, as explained in their initial brief. Particularly troubling is the ALC's finding of two contradictory facts: that there is a healthy and growing population of black bears in and around LOBHP and that there are little or no black bears in and around LOBHP. There is certainly substantial evidence to support the existence of bears there, even after the fire in 2009. (McCown Report, Management Plan for LOBHP, Hamilton Testimony, Chappalear Deposition.) The Appellants are unaware of any case where this Court upheld contradictory findings of fact as both being supported by substantial evidence. Indeed, such a conclusion would be illogical. Respondents argue that bears do exist in their brief, despite presenting contrary evidence at the hearing. (Respondents Initial Brief pp.21-23.) Therefore, there is at least one factual finding not supported by substantial evidence in the ALC Order: that there are not black bears in and around LOBHP. (Final Order, pp. 12-13.)

B. Sam Chappalear and the Genesis of Wildlife Underpasses

Respondents rely heavily on deposition testimony of Sam Chappalear, a manager at DNR who did not testify in the hearing. (Respondents' Initial Brief 21-13, 36-37, 44) Mr. Chappalear was not qualified as an expert in anything. Furthermore, Mr. Chappalear explicitly denied having any expertise in black bears. Chappalear Depo. 12. Therefore, Mr. Chappalear is not qualified to opine as to wildlife underpasses. It is unclear why Respondents rely on his deposition so heavily when Mr. Chappalear was only referenced in passing in a footnote of the ALC's Final Order. His deposition is useful to provide some background on how DNR worked with bear experts to develop the map showing black bear crossings over International Drive attached to the 2010 contract, and how their position changed to

signing the 2013 contract after their own bear expert left and without further consultation with any bear experts. Chappalear Depo. 54-56, 59-60. This supports Appellants theory that there was no scientific basis for omitting wildlife underpasses from the project design.

IV. The Federal 404 Permit has not Mooted this Challenge

Respondents argue that this challenge is moot because the U.S. Army Corps of Engineers issued a 404 Permit for this project. These same arguments were previously made and rejected in Horry County's motion to dismiss. That DHEC would sign on to advocating for such an unprecedented limit of their own power and jurisdiction is baffling. The Court should reject this argument as there is no precedent or basis in statutory law to adopt a principle that would substantially limit the reach of the 401 Certification and CZC Certification programs going forward.

A. Respondents' Arguments are Contrary to Sound Precedent Supporting South Carolina's Retention of Jurisdiction

South Carolina courts have repeatedly retained jurisdiction over the state certifications at issue here, even after the corresponding federal permit has issued. A good example is the case of Murphy v. S.C. Dep't of Health & Env'tl. Control, which went all the way to our state Supreme Court. Just like this case, Murphy was a challenge to a 401 Certification granted by DHEC. See 396 S.C. 633, 636, 723 S.E.2d 191, 192 (2012). And just like this case, the Corps issued its Section 404 permit after DHEC issued its 401 Certification, and while the challenge to the 401 Certification was pending. Id. at 638, 723 S.E.2d 194. If Respondents' argument were correct, the 401 Certification and the Murphy case would have become moot when the Corps issued its federal permit. However, the Murphy case continued after issuance of the federal permit, with the Supreme Court considering whether DHEC

should have issued its 401 Certification, even though the federal permit had been issued and had not been challenged.⁵ Id. (“The issuance of this [Corps 404] permit has not been challenged.”). Indeed, the Supreme Court explicitly stated that the Corps’ issuance of its Section 404 permit was “not dispositive” to the Court’s 401 Certification analysis. Id. at 645, 723 S.E.2d at 198 (“Additionally, although the analysis of the Corps is not dispositive, because the Corps eventually issued the fill permit, it apparently concluded that the District had overcome these presumptions and established no practicable alternatives existed.”). In Murphy, our Supreme Court was recently confronted very directly with the scenario which Horry County has argued renders this case moot, and it was a non-issue. Our Supreme Court very clearly considers itself to have continuing jurisdiction and authority in relation to a DHEC 401 Certification, regardless of the status of the federal permit.

Another illustrative Clean Water Act case is Triska v. Dep’t of Health & Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987), wherein DHEC issued its 401 Certification, the Corps issued its federal permit, and the period for legal challenge passed for both. “[N]o one contested [DHEC’s] certification of the project.” Id. Two and one-half years later, though, DHEC attempted to revoke the 401 Certification *sua sponte*. Id. at 197, 355 S.E.2d at 537. The Supreme Court held that DHEC did not have that authority, but made very clear that the 401 Certification could have been revoked or modified as part of the legal appeals process: “It is the opinion of the Court that DHEC does not have statutory, regulatory or federal authority to suspend or revoke a 401 Certification after it has been granted by the agency **and the appeals process expired.**” Id. at 195, 355 S.E.2d at 534 (emphasis

⁵Here, the case for viability of the 401 Certification is actually even stronger, as the Corps’ 404 permit is currently under challenge in federal court.

added). The holding of Triska supports the conclusion that this appeal of the 401 Certification is not moot. Indeed, the very fact that DHEC would attempt to revoke its 401 Certification years after the Corps' Section 404 permit had been issued (as it did in Triska) demonstrates that the agency sees the 401 Certification as having continuing effect and viability.

Only several months ago, this Court operated similarly in a case involving a CZC Certification accompanying a Clean Water Act permit. See Bruning v. SCDHEC & Cat Island POA, Appellate Case No. 2014-002010, 2016 WL 6247005 (S.C. Ct. App. Oct. 26, 2016). The Clean Water Act stormwater permit had been issued for the project—and Horry County would have argued that the CWA permit then controlled, to the exclusion of the state certification—but this Court considered the propriety of the underlying CZC Certification. See id.

As was the case when Horry County made this argument in its motion to dismiss, the Appellants are able to cite controlling precedent in South Carolina for the proposition that the state retains jurisdiction over 401 Certifications even after a 404 Certification is issued, while the Respondents offer none. The only case that Respondents allege supports their theory was issued by the First Circuit, so it is not controlling, and, a careful reading of the case reveals that it actually does not stand for the proposition that a 401 Certification or CZC Certification becomes moot after a 404 Permit is issued.

Respondents cite Puerto Rico Sun Oil Co. v. U.S. E.P.A., 8 F.3d 73 (1st Cir. 1993), for the proposition that after issuing certifications the state becomes an “interested bystander,” without authority. (Respondent’s Initial Brief 49.) But in that case, the court actually did not find that *issuing* certifications made Puerto Rico an interested bystander, as Respondents assert. Sun Oil, 8 F.3d at 78.

To the contrary, the court's holding was to reverse the EPA for being arbitrary and capricious in failing to wait to consider the state's input for its permit when the certification was being reconsidered by the state. Id. at 81 ("All that we hold here is that EPA's decision to issue a permit in September 1990, adopting [the state's] certification but refusing to await [the state's] decision on reconsideration, produces a result that on the present record appears manifestly arbitrary and capricious.")⁶

Despite that holding, Sun Oil did recognize, in dicta, that EPA had the power to disregard untimely certifications by the state. Sun Oil, 8 F.3d at 78 ("EPA was entirely free, once Puerto Rico had ignored the clear deadlines for a final certification, to treat the Commonwealth as an interested bystander with no further veto authority. . . ."). This dicta from the First Circuit has not been adopted in the Fourth Circuit, and indeed the First Circuit subsequently refused to extend this perceived power of federal agencies to circumstances other than when it is "unquestionably true" that a state's action was untimely. FPL Energy Maine Hydro LLC v. F.E.R.C., 551 F.3d 58, 65 (1st Cir. 2008). Either way, in this case there was not untimely action by DHEC regarding certifications that would render them ineffective. Thus, this court would retain jurisdiction over the certifications, even if it First Circuit precedent were binding. Therefore, based upon all available controlling and persuasive authorities, this Court retains jurisdiction over the state certifications even after the issuance of a federal permit.

B. South Carolina Retains Jurisdiction to Enforce Coastal Zone Consistency Regardless of Federal Requirements

The CZC Certification requirement flows directly from an independent state statute that

⁶ Thus, following the logic of Sun Oil, it may be arbitrary and capricious for the Corps to adopt state certifications and simultaneously ignore the fact that those certifications are being reconsidered on appeal.

spawned a standalone state regulatory program. In 1978, the South Carolina legislature passed our Coastal Tidelands and Wetlands Act, S.C.Code Ann. § 48–39–10 *et seq.*, which required DHEC to develop a comprehensive coastal management program (the CMP) for our state’s “coastal zone.” See S.C.Code Ann. § 48–39–80, Spectre, LLC v. S.C. Dep’t of Health & Env’tl. Control, 386 S.C. 357, 360, 688 S.E.2d 844, 845 (2010). The Act further requires DHEC, in developing the CMP, to create a system whereby it reviewed all state and federal permits for compliance with our state coastal policies.⁷ Id. In other words, the CZC Certification at issue in this case is the product of an approval process created by state law (S.C.Code Ann. § 48–39–80), with such approval being granted or denied based entirely on state-level program and policies (the CMP). In that way, the CZC Certification is in no way derivative of the federal permit at issue in this case. Indeed, our Supreme Court has previously held exactly that. See Spectre, LLC, 386 S.C. at 368, 688 at 850 (rejecting the ALC’s finding that a CZC Certification is only required for properties over which the Corps has Clean Water Act jurisdiction and instead holding: “The language of the CMP sets forth broad jurisdiction over the coastal zone, thereby supporting DHEC’s interpretation of the CMP as applicable to the Spectre site.”).

Cooperative federalism is a keystone of environmental law. That is, while many major environmental laws are enacted on a federal level, those laws are most often effectuated and enforced

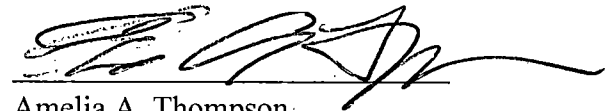
⁷Section 48-39-80 specifically states that: “The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter.” Under subsection 80(B)(11) the state has “*the authority to review all state and federal permit applications in the coastal zone*, and to certify that these do not contravene the management plan.” (Emphasis added). DHEC’s interpretation of these state law provisions resulted in the CZC Certification requirement. Spectre, LLC, 386 S.C. at 360, 688 S.E.2d at 845.

cooperatively at the federal, state and local levels. That is true, not just of the two environmental laws implicated in this appeal, but across the spectrum of the field of environmental law. The mootness argument advanced by Respondents strikes at the heart of this relationship, leaving the state's role in this collective environmental regulatory system as a hollow shell. For this reason and the ones preceding, this Court should reject Respondents' argument that issuance of the federal permit renders this appeal moot.⁸

V. Conclusion

For all of the reasons above and in Appellant's initial brief, we ask this Court to reverse DHEC's certifications and order restoration of the habitat along with costs and any other relief this Court deems appropriate.

Respectfully submitted,



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February 13, 2017

⁸A corollary to Respondents' mootness argument is the significance to which they assign the distinction between a "permit" and a "certification." (Respondents' Initial Brief 50-51.) No court has ever found that distinction to hold legal significance for jurisdictional purposes.

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

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SC Court of Appeals

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' Initial Reply Brief by placing copies of same in the U.S. Mail addressed to:

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SC Court of Appeals

RE: SC Coastal Conservation League and SC Wildlife
Federation v. SCDHEC and Horry County Public
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Appellate Case No. 2016-001758

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy
of the Appellants' Initial Reply Brief, along with my certificate of
service.

Please return a clocked-in copy in the enclosed, postage-
paid envelope. Thank you for your assistance.

Yours very truly,

Amelia A. Thompson

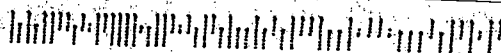
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