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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2016-001758

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

vs.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN CONCLUDING THAT SCDHEC PROPERLY CONSIDERED AND BY NOT CONSIDERING THE IMPACTS OF THE PROJECT ON WATER QUALITY AND WETLANDS IN LIGHT OF THE WEIGHT OF THE EVIDENCE SUCH THAT THE WATER QUALITY AND COASTAL ZONE CONSISTENCY CERTIFICATIONS WERE PROPERLY ISSUED?

2. DID THE TRIAL COURT ERR IN CONCLUDING THAT SCDHEC PROPERLY CONSIDERED AND BY NOT CONSIDERING THE IMPACTS OF THE PROJECT ON WILDLIFE IN LIGHT OF THE WEIGHT OF THE EVIDENCE SUCH THAT THE WATER QUALITY AND COASTAL ZONE CONSISTENCY CERTIFICATIONS WERE PROPERLY ISSUED?

3. DID THE TRIAL COURT ERR IN CONCLUDING THAT SCDHEC PROPERLY CONSIDERED AND BY NOT CONSIDERING THE INDIRECT AND CUMULATIVE IMPACTS OF THE PROJECT IN LIGHT OF THE WEIGHT OF THE EVIDENCE SUCH THAT THE WATER QUALITY AND COASTAL ZONE CONSISTENCY CERTIFICATIONS WERE PROPERLY ISSUED?

4. DID THE TRIAL COURT ERR IN CONCLUDING THAT SCDHEC PROPERLY CONSIDERED AND BY NOT CONSIDERING THE IMPACTS OF THE PROJECT ON LEWIS OCEAN BAY HERITAGE PRESERVE IN LIGHT OF THE WEIGHT OF THE EVIDENCE SUCH THAT THE WATER QUALITY AND COASTAL ZONE CONSISTENCY CERTIFICATIONS WERE PROPERLY ISSUED?

5. DID THE TRIAL COURT ERR IN CONCLUDING THAT ISSUES REGARDING THE WATER QUALITY AND COASTAL ZONE CONSISTENCY CERTIFICATIONS WERE RENDERED MOOT WHEN THE U. S. ARMY CORPS OF ENGINEERS ISSUED ITS SECTION 404 PERMIT?

I. STATEMENT OF THE CASE

This matter is an appeal of an Order of the South Carolina Administrative Law Court (ALC or the Court), the Honorable Ralph King Anderson, III, pursuant to a request for contested case hearing filed by Appellants, the South Carolina Coastal Conservation League (Coastal) and the South Carolina Wildlife Federation (Wildlife) upholding the issuance by the South Carolina Department of Health and Environmental Control (DHEC or Department) of a Section 401 Water Quality Certification (401 Certification) and a Coastal Zone Consistency Certification (CZC) to Respondent Horry County Public Works (Horry). DHEC issued a Notice of Department Decision (NODD) indicating the proposed certifications were to be issued on June 25, 2015, and a copy was sent to the United States Army Corps of Engineers (Corps). The certification process had been undertaken in response to a permit application that Horry submitted to the Corps seeking authorization pursuant to Section 404 of the Clean Water Act, 33 U.S.C. Sec. 1344, to impact 24.19 acres of freshwater wetlands, which are deemed under Corps regulations governing Section 404 permits to be "waters of the United States" requiring a permit before them may be lawfully filled, for expansion and paving of an existing unimproved dirt road known as International Drive located in Horry County, South Carolina. Although the certifications were prerequisites for the federal 404 permit, no separate state permit was required in order to fill the wetlands at issue in this case.

On July 10, 2015, Appellants requested, in accordance with the procedures set forth in S.C. Code Ann. § 44-1-60 et seq., a final review conference by the DHEC Board concerning the initial staff decision. The Board declined to conduct a final review of the staff decision by letter dated July 29, 2015, and Appellants subsequently filed a request for contested case hearing on August 28, 2015. The Court held a hearing on the merits on February 16, 17, 18, 22, and on March 15,

2016. Based on the evidence and arguments presented by the parties at this hearing, the ALC issued an Order on July 7, 2016 holding that both certifications were issued in accord with all applicable statutory and regulatory requirements. Appellants moved to have the ALC reconsider this Order so as to consider two policies contained in the S.C. Coastal Management Program (CMP). On July 26, 2016, the ALC issued an Order addressing those policies – CMP III-14.I(3) and III-73(E)(1) – and again upholding the issuance of the certifications.

On August 23, 2016, Appellants moved at the ALC for a stay of the Orders issued upholding the certifications. By this time, the Corps had issued the federal Section 404 permit, doing so on July 22, 2016. The permit incorporates conditions included in the DHEC certifications and these conditions thereby became conditions of the federal permit. Exhibit C to Horry County's Motion to Dismiss Appeal. On October 10, 2016, the ALC denied Appellants' motion for a stay holding that, as the Corps had issued its permit – which the court held was the regulatory action which authorized the activity Appellants were challenging – any issues related to the certifications were moot.

Also on August 23, 2016, Appellants filed a Notice of Appeal of the ALC's orders upholding the DHEC certifications. On November 7, 2016, Appellants filed a Petition for Order of Supersedeas asking this Court to stay the effect of the DHEC certifications. An Order of Supersedeas was issued on December 15, 2016 "to stay the issuance of two permits issued" by DHEC and to "prevent contested issues from becoming moot." By Order of December 20, 2016, the supersedeas Order was clarified to direct Horry County to "halt all work on the road project" pending resolution of the appeal. This directive was revised at the request of Horry County to permit compliance with storm water regulations requiring grassing of the project site so as to prevent water pollution in the form of sediment runoff. Horry County filed a Motion to Dismiss

the Appeal as Moot on December 17, 2016. The Court denied this Motion by Order on January 5, 2017.

In a parallel challenge to the Corps' Section 404 permit in United States District Court, Appellants sought a preliminary injunction preventing the County from performing work authorized by that permit. That motion was denied by the District Court on November 18, 2016. Exhibit D to Horry County's Motion to Dismiss the Appeal. The work the County performed prior to Appellants' federal suit (and prior to a Consent Temporary Restraining Order in that suit) and after denial of their motion for a preliminary injunction resulted in the road progressing by the date of the Supersedeas Order to the stage where all wetlands in the project right of way were filled and all vegetation had been cleared. Concrete and paving work on the project had not been commenced by that date.

II. STATEMENT OF FACTS

1. General Background

The site of the proposed road project sits on the footprint of the existing, unimproved, dirt road known as International Drive, with the exception of two locations where the proposed road deviates from the existing alignment. (R. pp. 1342-1369). The proposed project would involve paving a 5.6 mile length of four-lane road, impacting 24.19 acres of wetlands. (Id., Sections I & II). The existing International Drive is situated on the southwestern border of the Lewis Ocean Bay (LOB) Heritage Preserve, a Heritage Trust property owned and managed by the South Carolina Department of Natural Resources (DNR) comprising approximately ten thousand acres. (R. p. 1024). Private property abuts International Drive on the opposite side from LOB, and approximately half of the wetland impact projected for this project will be direct fill of wetlands on private property. (R. p. 253, lines 18-22).

The LOB property contains 23 Carolina Bays, and some portion of the current LOB has been managed by DNR since 1989.[1] (R. p. 1024). According to DNR's management document for LOB, the property was "established to protect the 23 Carolina Bays and the numerous carnivorous and sensitive plant species that occur in or on the edge of these bays." (R. p. 1023). In addition, the LOB has been managed as a habitat for the red-cockaded woodpecker[2] and several game species, including the black bear. (R. p. 1023).

The LOB property itself is surrounded on three sides by high volume traffic roads – namely Highway 90 to the northwest, Highway 22 to the northeast, and Highway 31 (running in rough parallel to Highway 17) to the southeast. (R. p. 1675). Horry sought an agreement for a Right of Way with DNR to allow expansion of International Drive in order to alleviate traffic congestion from the other traffic corridors in the area. (R. p. 1282). In June of 2013, Horry and DNR entered into a Right of Way Agreement allowing the expansion of the road.[3] (R. p. 1282). The Right of Way Agreement contains a number of provisions directed at management of the LOB. Specifically, the Right of Way Agreement requires Horry County to close International Drive to traffic to allow DNR to perform prescribed burning on the LOB, requires the construction of interstate fencing on both sides of the road, and requires the County to implement a 45 mile per hour maximum speed

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[1] DNR acquired the bulk of the LOB acreage from International Paper between 1989 and 1992. Additional tracts were added to LOB in 2006 and 2012. (R. p. 1373).

[2] As noted in the Stipulations, this case presents no justiciable issue with respect to the Red-Cockaded Woodpecker, a federally recognized endangered species that utilizes the LOB habitats. No material issue has been raised with respect to any other federally protected species. (R. p. 2099).

[3] Evidence was submitted by Appellants regarding a prior, 2010 Right of Way Agreement, and of the negotiations between SCDNR and Horry County to alter provisions of the 2010 Agreement to the 2013 version. However, undisputed testimony established that the 2013 Agreement was in place before DHEC staff took any action on the certification application in this case, and only the 2013 Agreement was considered by DHEC in its certification decisions. Therefore, while the 2010 Right of Way Agreement was admitted into evidence, its probative value is minimal with respect to the certification decisions at issue in this case. (R. pp. 1282, 1263).

limit on the road when expanded to four lanes. The fencing and speed limit requirements are presented in a section of the Right of Way Agreement titled Wildlife Considerations. (R. pp. 1286-1287).

In November of 2013, Horry submitted a Joint Notice and Application to the Corps and DHEC, along with application materials, requesting a federal permit to fill wetlands for the proposed project. (R. p. 1676). A prerequisite for federal permitting is the issuance of a 401 Certification by DHEC. Because the proposed activity would occur in the coastal zone, a CZC Certification was also required. During the application period, DHEC received comment letters from DNR, U.S. Fish and Wildlife, National Marine Fisheries, and the Appellants. (R. pp. 1383-1428).

2. Hydrology and Water Quality Impacts

Impacts to water quality are required considerations in both 401 and CZC decisions. Witnesses for the Respondents testified that the current, unpaved International Drive fragmented contiguous wetlands and contributed sediment runoff into adjacent wetlands. (R. pp. 305, line 4 – 306, line 14; pp. 347, line 7 – 348, line 17; pp. 724, line 5 – 727, line 10; pp. 840, line 5 - 843, line 3). The Appellants' bear expert, Joe Hamilton, concurred that a dirt road through otherwise contiguous wetlands would serve to fragment those wetlands. (R. pp. 545, line 12 – 546, line 22). The road plan for the proposed International Drive expansion calls for the installation of a number of culverts underneath the paved road, reconnecting fragmented wetlands. (R. pp. 305, line 4 – 307, line 24). Multiple witnesses – Blair Williams with DHEC, Mike Wooten, the Civil Engineer whose firm designed the project, and Britt Feldner, the wetlands consultant who assessed the wetlands on site and prepared the permit application and certification submittal – stated that the culverts could improve hydrology and water quality for those reconnected wetlands. (R. pp. 305,

line 4 – 307, line 24; pp. 629, line 7 – 630, line 15; pp. 635, line 6 – 636, line 5; pp. 760, line 1 – 761, line 1; pp. 844, line 6 – 845, line 14). Indeed, one of the experts called by Appellants, Dr. Dan Tufford, admitted that installing the culverts called for by the project plans would improve connectivity for the wetlands over their pre-project condition to the point that he was unable to say if construction of the road was a net plus or a net minus to wetlands. (R. pp. 269, line 8 – 272, line 4).

Multiple witnesses – Mike Wooten, Steve Gosnell, the civil engineer who heads the Horry County Public Works Department and is in charge of the County's storm water system, and Bart Baca, an expert in water quality – further testified that the proposed road, with a storm water pollution prevention plan and storm water Best Management Practices (BMPs), would eliminate existing sediment runoff from the dirt road into the adjacent wetlands, as well as eliminate hydrocarbon runoff to the maximum extent practicable. (R. pp. 600, line 1 – 604, line 19; pp. 726, line 9 -728, line 20; pp. 760, line – 761, line 1; pp. 849, line 8 - 851, line 24). DHEC's staff assessment for the 401 Certification noted that: "Water quality impacts from non-point sources will be minimized and should not contravene water quality standards or existing and classified uses of freshwater wetlands and tributaries ... if the applicant uses [BMPs] and is in compliance with SCDHEC administered MS4 and other stormwater permitting requirements during and after project construction to minimize erosion and migration of sediments." (R. pp. 1342, 1350-1351). The 401 Certification in this case would be conditioned on the implementation of such BMPs. (R. pp. 1342, 1368-1369). Although Appellants' water quality experts testified that negative water quality impacts would occur as a result of this project, these witnesses did not perform any sampling or monitoring of current water conditions, provide water quality data specific to this project, or quantify the extent or degree of impacts likely to occur. (R. pp 242, lines 15-18 and

264, lines 11-24). Instead, these witnesses merely testified to the general proposition that roads create runoff, which will inevitably impact wetlands. (R. pp. 264, line 11- 265, line 16). Despite this position, one of Appellants' experts, Dr. Dan Tufford, agreed that any water quality impact from the proposed road would at least be mitigated by the use of BMPs. (R. p. 255, lines 4-8). Two of Appellants' experts, Dan Tufford and Steve Gilbert, conceded that the proposed culverts may improve hydrologic connectivity of previously fragmented wetlands. (R. pp. 221, line 9 - 222, line 19; pp. 271, line 12 – 272, line 4).

Dr. Tufford, an expert for Appellants, stated that the only purely aquatic habitat he was aware of in LOB were streams, and that he was not aware of streams that were directly impacted by this project. (R. p 247, lines 9-21). While he testified that wetlands can function as an aquatic ecosystem while wet, his testimony was only that the functions and values of adjacent wetlands would be degraded by road construction, and he could not say to what extent such degradation would occur. (R. p. 244, lines 1-12. He conceded that the current road created a loss of connectivity and some negative impacts. (R. p. 256, lines 2-25). He also stated that, based on the addition of culverts called for in the proposed road plan, he was not prepared to say whether this project would result in a net gain or loss to wetland connectivity near International Drive. (R. pp. 271, line 12 – 272, line 4). In contrast, Horry's experts on storm water and water quality were specific in their conclusions, which were based in part on personal observations and familiarity with the existing road and storm water control generally. (R. p. 585, line 14 – 586, line 2; pp. 600, line 1 – 605, line 14; 722, line 6 – 728, line 20; p. 831, lines 9-13; pp. 840, line 5 – 842, line 10; pp. 850, line 10 – 851, line 24). Their testimony was properly accorded greater weight by the trial judge than the speculative opinions of Appellants' experts.

Mark Giffin, an employee of DHEC who testified to the 401 certification process involved in this case, echoed the findings contained in the Department's written staff assessment in stating that any water quality impacts from the proposed activity would be temporary, that the Department had reasonable assurance no water quality standards would be violated by the proposed activity, and that the proposed issuance of the 401 certification was – in all particulars – proper. (R. pp. 464, line 2 – 465, line 12).

3. Cumulative Impacts

Secondary and cumulative impacts are required considerations in both 401 and CZC certification decisions. The proposed road project calls for ten curb cuts along the private property side of the 5.6 mile road. (R. pp. 1342, 1362). The property on that side of International Drive is currently undeveloped, and is owned by two property owners. (R. pp. 1342, 1362). Giffin testified that he had no specific knowledge of any development plans in the area beyond the project that is the subject of this action. (R. p. 463, lines 1-21). DHEC witnesses testified that the possibility of future development was considered as part of their certification decisions. (R. pp. 290, lines 5-10, 427, lines 6-18). DHEC also testified that development could potentially take place on the private property adjacent to International Drive whether or not this project moved forward. (R. pp. 463, line 10 – 465, line 12). However, DHEC's staff assessment noted that "[a]lthough uplands exist within the adjacent private ownership, they are minimal, and non-conducive to extensive development." (R. pp. 1342, 1365).

Appellants argue that it is a certainty that 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 habitats. (R. pp. 209, line 12 -210, line 19). Appellants did not provide any evidence of a specific development proposed

now or for a foreseeable future date on the private property adjacent to International Drive, nor did their witnesses offer anything but pure speculation on what development might be likely. This untethered speculation is not sufficient to carry the burden which was Appellants' at trial.

Respondents' witnesses, by contrast, 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 in this very area, 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. (R. pp. 614, line 9 – 616, line 14; p. 639, lines 3-6; pp. 645, line 17 – 646, line 6). 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." (R. pp. 341, line 3 – 342, line 19; p. 463, lines 10-21; pp. 645, line 17 -646, line 6). As noted above, 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. (R. pp. 812, line 20 – 838, line 25; pp. 863, line 4 – 866, line 6). 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. (R. pp. 864, line 3 – 865, line 12). The only specific

and probative evidence supported the ALC's finding that significant secondary development of the property west of International Drive is highly unlikely.

4. Alternatives Analysis

Both the 401 and CZC process require consideration of feasible alternatives to the proposed activity which could accomplish the purpose of a given project. Under the 401 process, if there is a feasible alternative which reduces adverse consequences on water quality and classified uses, certification will be denied. S.C. Code Reg. 61-101(F)(5)(b). As part of the certification process in this case, Horry submitted an alternatives analysis to the Department which discussed a number of alternatives to the proposed International Drive project. (R. pp. 1446-1452; pp. 1648-1658; pp. 1676-1681; pp. 1823-1829) (Alternatives Analysis discussion). DHEC witnesses, Blair Williams and Mark Giffin, stated that they considered all information presented in the alternatives analysis, and requested additional information regarding possible alternatives, before determining that no feasible alternatives to the proposed project existed which would meet the project purpose and create less impact to wetlands. (R. pp. 321, line 4 – 325, line 17; pp. 457, line 2 - 459, line 1). Feldner, who structured the permit and certification application for the County, testified that the project design was based on avoiding and minimizing impacts to wetlands. (R. pp. 619, line 5 – 620, line 7). By using the existing road to the maximum extent possible, the chosen route reduced wetland impacts. (R. pp. 619, line 5 – 620, line 7).

The project purpose, as stated by Horry, is "relieving current and anticipated traffic congestion on the existing roadway network and to provide a secondary evacuation route for the residents of the fast growing Carolina Forest Community." (R. pp. 1342, 1351-1357). The undisputed evidence is that Highway 501, one of only two routes providing access to central county residents, is currently a "failed" highway and is among the most congested roads in South Carolina.

(R. p. 1628; pp. 856, line 3 – 857, line 5). Horry presented testimony that the proposed roadway would provide needed relief for local resident commuters by offering an alternative route to the current network of highly congested and well above capacity state highways. (R. pp. 1678-1681; p. 695, line 3-21; pp. 730, line 2 -732, line 21). It would also provide an additional route for emergency responders, cutting transportation times to local trauma centers for residents living near Highway 90 by one third or more. (R. pp. 686, line 14 – 691, line 14; pp. 697, line 17 – 698, line 10; pp. 730, line 2 - 732, line 21). Randy Webster, the current Emergency Management Director for Horry, as well as the former head of County EMS services, testified to the role the project would have in facilitating more rapid response times to residents, which would be potentially lifesaving given the severe congestion of existing routes. (R. pp. 686, line 14 – 691, line 14; pp. 730, line 2 -732, line 21). Testimony also indicated that the proposed road would remove a number of trash trucks from the major tourist traffic arteries by providing a more direct route to landfills and recycling centers. (R. 918, lines 5-18). A paved and expanded International Drive could also provide an additional hurricane evacuation route, access for fighting wildfires that the area is prone to, and additional access to critical services for residents during flooding events. (R. pp. 696, line 11 - 697, line 16; pp. 712, line 11 - 714, line 10; pp. 716, line 10 - 718, line 2).

Giffin testified that a project purpose must be reasonable and justified, and that DHEC had no information in this case which would call the project purpose and need as stated by the applicant into question. (R. p. 457, lines 2-6). Appellants themselves offered no evidence to contradict the testimony offered by Horry as to the project purpose and need, nor was any evidence offered to contradict Horry's testimony regarding road design or the traffic assessments and projections of future traffic discussed in the individual alternatives below.

Horry provided analysis for a no-build alternative, five (5) offsite alternatives, and five (5) onsite alternatives (including the proposed project). These alternatives were discussed via witness testimony and documents admitted into evidence. (R. pp. 1342, 1351-1357, 1648-1658).

Offsite Alternatives

The No-Build alternative consists of abandoning any plans for construction on International Drive, and leaving the road in its current unimproved condition. According to the Respondents, the No-Build alternative, while it represents the minimum additional direct impacts on wetlands, fails to address the purpose and need identified in the certification request. (R. p. 668, lines 2-24).

Offsite Alternative Number 1[4] consists of a new-built road, not utilizing the existing roadway footprint, directly through LOB property. This alternative would have a greater impact to wetlands than the proposed project, it would impact pristine wetlands rather than the already impaired wetlands adjacent to International Drive, it would have a potential adverse impact on eleven clusters of federally endangered Red Cockaded Woodpeckers, and a project bisecting LOB would be opposed by DNR. (R. pp. 1342, 1351-1357; pp. 670, line 11 - 671, line 12; pp. 740, line 17 - 741, line 13).

Offsite Alternative Number 2 consists of a new-built road, not utilizing the existing roadway footprint, directly through the private property southwest of the existing International Drive. This alternative would have a greater impact to wetlands than the proposed project, and it would impact pristine wetlands rather than the already impaired wetlands adjacent to International Drive. (R. pp. 1342, 1355-1356). This alternative also had the potential to create additional

[4] Numbering utilized in this section and summaries of specific alternatives are taken from Department Exhibit 11, Section III(B). (R. p. 1342).

impacts to protected species, and would increase the costs of acquiring the Right of Way for the project, and the costs of clearing the road footprint. (R. pp. 741, line 14 – 742, line 25).

Offsite Alternative Number 3 consists of following the current alignment of International Drive at its intersection with Highway 90, which would bisect an existing residential community known as the Truevine community. This alternative would displace residents in three existing dwellings, and substantially impact eight individual private properties. The proposed project elects to deviate from the existing alignment of International Drive at this community in order to avoid such impacts. (R. pp. 1342, 1356; pp. 671, line 14 – 673, line 9; pp. 742, line 3 – 743, line 6).

Offsite Alternative Number 4 consists of widening Highway 501. According to Horry, Highway 501 is slated for widening in 2018, but current traffic projections indicate it will return to its current level of congestion by 2035, and further expansion of the road beyond the currently planned construction is not practicable in the foreseeable future. (R. pp. 856, line 3 – 859, line 20). Wooten stated that 501 has bottlenecks at both Myrtle Beach and Conway, making any widening within that corridor of limited value. (R. pp. 858, line 15 – 859, line 20). Moreover, widening of 501 will be of limited benefit to some residents of the Carolina Forest Community due to the distance they would have to travel to access the highway. (R. pp. 743, line 7 – 745, line 19).

Offsite Alternative Number 5 consists of improvements to River Oaks Drive and Carolina Forest Boulevard, the main arterial roadways of the Carolina Forest Community. These roads serve local traffic in the residential community, and provide traffic outlets to the existing road networks (i.e., Highways 501, 31, and 22). While Horry stated that these roads will soon require additional improvement, those improvements do not address the need for additional commuter routes to the northwest of the Carolina Forest Community, or the need for additional routes for emergency responders. (R. pp. 1342, 1357; pp. 744, line 17 -745, line 19).

Onsite Alternatives

Onsite Alternative Number 1 is the proposed project. Horry represents that this "preferred alternative" is the alternative that meets the project purpose and presents the least environmental impacts. (R. pp. 1342, 1351-1357; pp. 730, line 2 – 737, line 2).

Onsite Alternative Number 2 consists of lowering the design speed of the road in order to reduce deviations from the existing alignment of International Drive. Road design information submitted by Horry indicates that, due to the overall character of the proposed road, drivers would be unlikely to conform to a posted speed lower than the 45 miles per hour currently proposed. Road design speeds are typically greater than the posted speed in order to make a road safe for emergency vehicles and the segment of the driving public that will exceed the posted limit. Thus, to be a safe road, International Drive must be designed to accommodate 60 mile per hour traffic despite the proposed posted limit of 45 mph. The existing alignment of International Drive would not support a 60 mile per hour design speed. The proposed alignment therefore deviates from the existing alignment to avoid a sharp curve, which would need to be navigated at approximately 25 miles per hour in its current configuration according to information provided by Horry. (R. pp. 1342, 1355-1356; pp. 756, line 3 - 757, line 16).

Onsite Alternative Number 3 consists of paving International Drive as a two lane road. (R. pp. 1342, 1356). Respondents' expert civil engineer, Mike Wooten, who was contracted to design the road indicated that the entire width of the right of way would need to be utilized regardless of the number of lanes paved, thus the impact would likely be the same (R. pp. 882, line 3 – 885, line 13). Consistent with DHEC's staff assessment, Horry presented evidence that a two lane road

would be at or near traffic capacity by the year 2035.[5] (R. p. 736, lines 6-23). Testimony was also presented that International Drive is anticipated to be heavily used by trash trucks, due to the proximity of the County solid waste landfill and recycling center to the Highway 90 end of the proposed road. (R. p. 918, lines 11-18).

Onsite Alternative Number 4 consists of reducing the median and shoulder widths from the proposed plan. The proposed plan includes a median of 26 feet with a 10 foot outside shoulder. A median and shoulder are required for this kind of roadway, and have a proven safety benefit in reducing the frequency of crashes. The median in the proposed project is already proposed to be less than the South Carolina Department of Transportation (SCDOT) standard design median of 36 feet. Additionally, the proposed project utilizes side slopes of 3:1 rather than SCDOT design standard of 6:1 in order to reduce the footprint of the right of way. (R. pp. 1342, 1354; pp. 1651-1652).

Onsite Alternative Number 5 consists of using guardrails in lieu of shoulders. Information submitted by Horry to the Department indicated that guardrails are generally used only when it is "not economically feasible to eliminate a hazard more dangerous than the guardrail itself." (R. pp. 1342, 1354; pp. 1652-1653). Shoulders and traversable side slopes provide a driver additional time to come to a safe stop as compared to a fixed object such as a guardrail.

The testimony of both the Department and Horry witnesses was that the "preferred alternative" met the project goals with the minimal impact. Appellants questioned Horry witnesses

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[5] It is worth noting that the International Drive paving project was originally proposed as part of a penny tax ballot initiative in Horry County in 2006, and construction did not begin until 2016 (and remains unfinished pending this appeal). It is entirely conceivable that, were Horry to pave only two lanes of International Drive under the current project, pre-construction efforts for the eventual needed expansion to four lanes would have to begin immediately after opening the two-lane road to vehicular traffic. (R. pp. 719, line 25 - 759, line 17; pp. 1676, 1680-1681, 1823, 1828-1829, 1446-1452, 1648-1658).

extensively on the onsite alternatives which had the potential to narrow the footprint of the road, but offered no direct evidence to contradict Horry with respect to the feasibility – or lack thereof – of these alternatives. Appellants' attorneys also questioned Horry and DHEC witnesses with respect to one alternative not analyzed in the application for certification: bridging the length of International Drive. Wooten testified that bridging for a project of this length would add approximately $20 million dollars to the overall cost. (R. p. 854, lines 8-19). Giffin stated that the Department did not request an analysis of a bridging alternative because bridging was not hydrologically necessary to avoid impacts to water quality when the proposed road included connective culverts. (R. pp. 439, line 11 - 440, line 11). Giffin also stated, based on his extensive experience analyzing and certifying road projects, that bridging would be prohibitively expensive (R. pp. 439, line 11 – 440, line 11). Appellants offered no direct evidence that bridging was a feasible alternative to the proposed project.

5. Geographic Areas of Particular Concern

For purposes of CZC analysis, DHEC considers the LOB to be a Geographic Area of Particular Concern ("GAPC") which is subject to specific considerations under the Coastal Management Program ("CMP"). (R. pp. 326, line 7 – 327, line 20). Specifically, the LOB is considered a GAPC under the CMP because it falls under the DNR administered Heritage Trust Program. (R. p. 1435). Blair Williams testified that the Department considered the priority of uses applicable to GAPCs, and determined that there was no significant impact to the LOB as a whole. (R. pp. 312, line 24 -313, line 21). Moreover, DHEC, as it was required to do, considered input from DNR, as the management authority over the LOB, and determined that the proposed project was consistent with management plan of the LOB, and would not "jeopardize the integrity of the Heritage Trust Program." (R. pp. 295, line 3 – 296, line 17; p. 300, lines 8-18; pp. 329, line 2 -330,

line 15; pp. 333, line 4 – 334, line 9). Williams noted that the Right of Way agreement between Horry County and DNR made specific provisions for management of the Heritage Trust property and for wildlife at LOB, and that DNR produced several written comments to DHEC with respect to this project, but did not indicate the project was at all inconsistent with the management or use of LOB. (R. pp. 333, line 4 – 334, line 9).

The management plan for LOB was admitted into evidence and is part of the record. (R. p. 1021). The management plan states that a primary objective of all Heritage Preserves is to "protect[] the natural or cultural character of [the] area or feature" for which the property was dedicated. In this case, LOB was purchased to protect a Carolina Bay/longleaf pine ecosystem and several species of flora and fauna, including the black bear. Wildlife considerations are discussed more fully below. While Daniel Tufford suggested the road project would directly impact Carolina Bays, he admitted that he had not conducted any wetlands delineation for this project. (R. pp. 260, line 12 - 261, line 9). Britt Feldner, on the other hand, who conducted on-the-ground wetlands delineation for this project, and who was required as part of Horry's submittal to the Corps to classify any impacted wetlands (including identifying whether they were Carolina Bays) testified that no Carolina Bays would be directly impacted by this project. (R. pp. 627, line 5 - 628, line 1).

As a secondary objective, the LOB is managed "to provide the maximum public usage ... which is compatible and consistent with the character of the area." Priority general public uses include hunting, fishing, wildlife or other natural resource observation, wildlife photography, environmental education and environmental interpretation. (R. p. 1023). Blair Williams testified that the project - a road directly adjacent to LOB - could increase public access and enjoyment of this Heritage Trust Property. (R. pp. 329, line 18 - 330, line 15). No direct evidence was presented that any of the priority general public uses of LOB would be disrupted or impacted by this project.

The Department's CZC analysis also required them to consider any feasible alternatives. In the context of the CMP, the term "feasible" includes "the concept of reasonableness and likelihood of success in achieving the project goal or purpose." See CMP at vi. As discussed above, the Department determined that no feasible alternatives to the proposed project existed. (R. pp. 321, line 8 – 326, line 6). Williams also testified that, as part of the CZC analysis, they determined that an overriding public interest existed for this project, and that the project minimized impacts. (R. pp. 321, line 8 – 326, line 6). The Department also examined the possibility of future development in the context of the general character of the area, and noted the general character of the area was a mix of residential and commercial development, with some privately owned forested areas, in addition to the LOB property itself. (R. pp. 291, line 2 – 293, line 12). The Department determined that future development could be consistent with that general character. (R. pp. 291, line 2 – 293, line 12).

Appellants' witnesses testified that the proposed project would degrade the functions and values of the wetlands in the immediate vicinity of the roadway, but could not quantify that degradation. (R. p. 244, lines 1-12). By contrast, Williams testified that that removal of the existing dirt road and replacing it with the proposed road with culverts, incorporating best management practices, could reestablish a hydrological connection between the wetlands and improve water quality. (R. p. 307, lines 16-24 and p. 312, line 1-18). As noted above, Horry's witnesses, Wooten and Feldner, as well as Appellants' own expert, Dr. Tufford, echoed Williams' testimony.

Williams further testified that after following the appropriate processes and evaluating the application and comments received as well as other required information; this project meets the requirements as set forth to certify this project consistent with the CMP. (R. p. 334, lines 2-9).

6. Wildlife

Both 401 and CZC decisions are guided in part by limited provisions related to impacts on wildlife.[6] Although evidence was presented that the LOB Heritage Preserve was intended as a protected habitat for a number of species of flora and fauna, the only species that was presented as an issue for the court to consider was the black bear.[7]

As noted in the CMP, "The South Carolina Department of Natural Resources is the principal state agency with statutory authority for the protection, management and conservation of wildlife and marine resources, including fish, game, non-game and endangered species." (R. p. 1432). DNR was provided a copy of the County's application packet and related materials at the outset of the application period, and DNR submitted comments back to the Department with respect to the proposed project. (R. pp. 295, line 3 – 296, line 17; pp. 316, line 7 – 318, line 9). Those comments did mention red-cockaded woodpeckers, but did not address any concerns with respect to the black bear. (R. pp. 1414 and 1421). The Department considered these comment letters, as well the 2013 Right of Way agreement submitted by Horry and signed by representatives of DNR, which included a section addressing "Wildlife Considerations," as part of its certification decisions. (R. 295, line 3 - 296, line 17; 300, lines 8-18). The Department determined that the project was consistent with the CMP based on the protections afforded in the 2013 Right of Way Agreement, and the lack of further comment from DNR.

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[6] As discussed in the Argument below, and for the reasons outlined there, wildlife concerns were only relevant to the CZC determination under the facts of this case.

[7] The Appellants' Prehearing Statement made reference to red-cockaded woodpeckers and a number of other rare species in addition to the black bear. However, the parties stipulated that there was no justiciable issue in this contested case related to the red-cockaded woodpecker. There was no substantial evidence of any potential impact on species other than black bears presented at trial.

DNR biologists maintain data on the number of unique black bears utilizing the LOB property. The highest population number in evidence in this case were from 2008, when hair snare results indicated use of LOB by 14 unique male bears, and 15 unique female bears. (R. p. 1226). In 2009, LOB suffered a massive wildfire, which spread into nearby developments and damaged or destroyed 76 homes. (R. pp. 691, line 15 - 693, line 19). Following the fire, DNR biologists noted a significant decrease in use of LOB by black bears. (R. pp. 361, line 5 – 362, line 21). According to DNR, the most recent hair snare results showed only 6 unique male bears and 4 unique female bears utilizing LOB in 2014.[8] (R. p. 1226). The number of documented bear road kills on the roads in the immediate vicinity of LOB dropped during the same period, from a high of 31 in 2007, to a low of 0 road kills documented in proximity of LOB in 2013. (R. p. 1228). In 2015, 6 road kills were documented in close proximity to LOB.

Appellants have proposed the use of "bear tunnels" in conjunction with high fences to provide an avenue for black bears to pass under International Drive. Alvin Taylor, testifying as Director of DNR, stated that he recommended the 2013 Right of Way Agreement to the DNR Board without such tunnels after internal discussion with DNR staff. (R. 368, line 9 – 374, line 19). The 2010 Right of Way Agreement between Horry and DNR included a provision for three bear tunnels, which Appellants now argue must be required for DHEC's certifications to be issued. However, DNR staff testified that by 2013, based on the bear population numbers seen following the 2009 fire, DNR no longer felt that bear tunnels were justified. (R. pp. 2065-2066). According

[8] Appellants challenged DNR's bear population numbers due to a change in sampling technique instituted in 2011. Nonetheless, DNR's Director testified that the agency's information was the best available, and DNR had no reason to doubt its accuracy. Appellants presented no evidence supporting a different population number, and Appellants' bear expert opined that he could not quantify the black bear population in LOB at any given time (R. pp. 523, line 9 – 524, line 19; pp. 526, line 9 – 527, line 17).

to Taylor, DNR viewed the project, subject to the requirements of the 2013 Right of Way Agreement, as sufficiently protective of black bears. (R. pp. 395, line 6 – 396, line 17). Taylor further stated that DNR believed the 45 mile per hour maximum speed limit required by the 2013 Right of Way Agreement would allow motorists sufficient time to see a bear in the roadway and avoid the bear. (R. pp. 371, line 25 – 374, line 19). He stated that high fences, such as those proposed by Appellants, had the potential to trap animals who entered from curb cuts or from either end of the fencing. (R. pp. 371, line 25 – 374, line 19). By contrast, highway fencing required by the 2013 Agreement would not trap animals, but would slow them down as they entered the roadway. (R. pp. 369, line 5 – 370, line 16).

This testimony was reiterated by Sam Chappalear, the regional coordinator for DNR overseeing LOB, who stated that high fences had the potential to cause a number of problems potentially resulting in bear fatalities, and that the ultimate continuity for bears' travel corridors would be to allow them to cross International Drive wherever they want. (R. pp. 2044-2048). Chappalear testified that this would best be accomplished by utilizing no fences, and enforcing a speed limit of 45 mph or less. (R. pp. 2044-2051). He further noted that, with the possibility of future development, any fixed location wildlife tunnel might eventually empty into a development, causing additional problematic human/wildlife interactions, and so a lower speed limit better ensures bears can access habitat on both sides of the road regardless of future development. (R. 2056-2057).

Appellants' bear expert, Joe Hamilton, testified that black bears could range within an area of tens of thousands of acres, and that there was no static population of bears living in LOB. (R. p. 482, lines 1-22 and p. 508, line 4-19). Rather, LOB habitat provided foraging opportunities for bears passing through the area, and individual bears inside LOB might be constantly changing. (R.

p. 548, lines 2-20). This was supported by statements of Chappalear that the population of bears in LOB was genetically linked to populations found in Carvers Bay, and in Green Swamp, North Carolina. (R. p. 2054). Hamilton also testified that, due to the private property on the southwest side of International Drive, and the need for access to that property, there could only be effective high fencing on the LOB side of the road, and that "one fence is a lot worse than having no fences." (R. 502, line 23 – 503, line 15). He suggested that the bears might need to be enticed to use tunnels if no fencing existed. (R. pp. 504, line 23 - 505, line 24; and 511, lines 6-23). He also agreed that lower "highway' fencing would slow animals entering the roadway, and that the 45 mph speed limit would ameliorate highway strikes. (R. pp. 530, line 4 – 534, line 14). Steve Gilbert, testifying for Appellants, also stated that bears may not use passageways if they are too long, and that the length of tunnel required to bypass a four-lane road project might be another obstacle to successfully employing the passages. (R. pp. 225, line 10 - 227, line 3). Gilbert agreed that resource agencies, such as U.S. Fish and Wildlife, and DNR, have greater expertise in issues under their jurisdiction (i.e., wildlife) than permitting agencies, such as DHEC. (R. p. 228, lines 9-24).

Hamilton agreed with DNR witnesses, Taylor and Chappalear, that the numbers of bears in Horry County generally are increasing, such that he would not object to the increase in the hunting season and/or allowable kills now being considered by DNR. (R. 520, line 18 – 522, line 25). Hamilton also agreed with Chappalear that there are a number of crossings under Highway 22 which could be used by bears to avoid climbing up the embankment on that roadway. (R. pp. 538, line 22 – 539, line 15). Despite this fact, Highway 22 has the second highest number of bear kills by vehicle collisions in the County. (R. p. 539, lines 6-15). Hamilton agreed that bears might choose not to use similar tunnels if they were placed under International Drive and rated the chances of their success as perhaps as low as 20%. (R. p. 537, lines 3-12). Hamilton also agreed

that a lower speed limit of 45 mph on International Drive would allow motorists to avoid hitting black bears in many, if not most, cases. (R. pp. 531, line 5 – 534, line 14).

The ALC concluded that the weight of the testimony did not support a conclusion that the bear population in Horry County is at risk today or will be at risk if the project is built. No sound testimony was offered that tunnels will be effective so as to avoid bear fatalities in vehicle collisions. Moreover, there was general agreement by the wildlife witnesses on both sides that a 45 mph speed limit would greatly reduce bear/vehicle collisions. Bart Baca, an expert for Respondents, testified that in Florida, a similar reduction in speed limit in the Keys has reduced vehicle kills of the Key Deer, an endangered species, to an extent that a population which was 50 ten years ago has now increased to 800. (R. pp. 606, line 4 – 607, line 3). No testimony was offered that indicates the road will render LOB any less desirable a habitat for the bear in terms of denning and food source than it is today. Finally, there was no testimony whatsoever that the project would lead to the elimination of the bear population in the area of the LOBP. That population is thriving today such that DNR, with the concurrence of the Appellants' bear expert, Hamilton, is preparing to lengthen the bear hunting season and increase the number of allowable kills during the season.

III. STANDARD OF REVIEW

In Murphy v. S.C. Dep't of Health and Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012), the Supreme Court, in a case involving challenge, like this one, to a 401 water quality certification, set forth the applicable standard of review as follows:

> "The Administrative Procedures Act establishes the standard of review this Court applies to appeals from the ALC. Section 1-23-610(D) of the South Carolina Code (2010) provides that the Court may reverse or modify the ALC's decision only if the substantive rights of a party have been prejudiced due to constitutional or statutory violations; an agency exceeding its authority; unlawful procedure; an error of law; a clearly erroneous view of evidence in the record; or an abuse of discretion. 'As to factual issues, judicial review of

administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence.' MRI at Belfair, LLC v. S.C. Dept. of Health & Envtl. Control, 379 S.C 1, 6, 664 S.E.2d 471, 474 (2008). When finding substantial evidence to support the ALC's decision, the Court need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion. Hill v. S.C. Dept. of Health & Envtl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010)."

Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence. Concerned Citizens Comm. for Ashley River v. S.C. Coastal Council, 310 S.C. 267, 423 S.E.2d 134 (1992); Palmetto Alliance, Inc. v. S.C. Public Service Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984).

IV. ARGUMENT

Appellants' argument on appeal suffers from two fundamental flaws. First, Appellants claim, in the face of a clearly contrary record, that the ALC "ignored" evidence supporting their claimed view of the facts. At the outset of their brief, they claim the ALC based its decision on "a scintilla of contested evidence from an unqualified witness testifying outside his scope of expertise." (Appellants' Brief, p. 22). The remaining 38 pages of Appellants' Brief are devoid of any identification of this witness, much less an explanation of how the single mystery witness was "outside his scope of expertise." In fact, the ALC's Order reflects in meticulous detail that Judge Anderson considered all the evidence before him, including that from some half dozen witnesses testifying for Respondents, all of whom were well within the areas of their knowledge and expertise. He weighed this evidence against the extremely thin evidence produced by Appellants, which was in nearly all cases unspecific, vague and not supported by any on site study or assessment. In light of the record before him and Judge Anderson's careful accounting of how he weighed all the evidence, the claim repeatedly leveled by Appellants in their brief that he did not

"adequately" consider impacts or failed to "consider the record as a whole" rings particularly hollow.

Second, Appellants mischaracterize and, in many cases, completely misstate the provisions of the regulations and policies which govern the two certification approvals at issue. Repeatedly, they translate a mandate to "consider" an impact as a total prohibition of a particular impact. This is particularly true with respect to impacts on Heritage Preserve property. Appellants completely disregard the clear requirement that DHEC defer to DNR on questions regarding the application of management plans for those properties like the LOBP and, similarly, that DHEC defer to DNR on matters regarding impacts to wildlife stocks. (R. pp. 1432 and 1435). Appellants would have, on the one hand, DHEC empowered to overrule DNR in its statutory role of manager of public trust properties, requiring DHEC to substitute its judgment, presumably based only on the evidence supplied to it by Appellants, for that of DNR. On the other hand, Appellants would tie the hands of DHEC so that it is forbidden to exercise judgment in evaluating certification requests, bound by a narrow reading of its regulations and policies. The record reflects that the ALC properly interpreted and applied all applicable regulations and policies in holding both certifications to have been properly issued.

The hearing before the ALC was a contested case hearing in which the Court served as the finder of fact and made a *de novo* determination regarding the matters in controversy. S.C. Code Ann. § 1-23-600(B) (Supp. 2015); Brown v S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002); *see also* Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). In such a case, while the ALC acts as the fact finder, due consideration is given to the experience, technical competence and specialized knowledge of the agency and its staff in evaluating the evidence. S.C. Code Ann. §§

1-23-330(4) (2005); 44-1-60(F)(2). Moreover, the ALC must give the same deference to the Department's interpretation of its statutes and regulations that a court in the judicial branch would. The "deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. An agency interpretation is entitled to deference unless it is arbitrary, capricious, or manifestly contrary to the statute." Kiawah Development Partners II v. SCDHEC, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014), citing Chevron USA, Inc. v. NRDC, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

As the trier of fact, the ALC may give testimony, including an expert's testimony, the weight the court determines it deserves. Florence Cnty. Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992), and may accept the testimony of one expert over that of another. S.C. Cable Television Ass'n v. S. Bell Te. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992).

The proper standard of proof to be applied by the ALC is a "preponderance of the evidence." Anonymous (M-156-90) v. State Bd. Of Med. Exam'rs, 329 S.C. 371, 375-76, 496 S.E.2d 17, 19 (1998); Nat'l Health Corp. v. Dep't of Health and Envtl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). Furthermore, the burden of proof is on the party asserting the affirmative of an issue. Leventis v. Dep't of Health and Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000). Appellants bore the burden in this case of proving that the Department's decision was in error under the statutory and regulatory standards. See Young v. S.C. Dep't of Health & Envtl. Control, 383 S.C. 452, 459, 680 S.E.2d 784, 788 (Ct. App. 2009) ("Young did not meet his burden to show OCRM disregarded the relevant statutory prerequisites when it considered the Millers' application."); Leventis, 340 S.C. at 133,530 S.E.2d at 651 (Ct. App. 2000) ("Both

Laidlaw and Sierra Club petitioned for review and thus both bore a burden of proof."); *See also*, Alex Sanders, et al., South Carolina Trial Handbook § 9:3 (1999) (holding that in civil cases, the burden of proof generally rests upon the party who asserts the affirmative on an issue).

Appellants failed to demonstrate by a preponderance of the evidence that the proposed road expansion and paving project is inconsistent either with the requirements of Reg. 61-101 or with the Coastal Zone Management Program.

A. DHEC and the ALC Adequately and Properly Considered the Impacts of the Project on Water Quality and Wetlands in Light of the Weight of the Evidence in Concluding that the Impacts Did Not Warrant Denial of Certification

1. 401 Water Quality Certification:

In South Carolina, the regulations that establish the policies and procedures for implementing Section 401 requirements for certifying that state and federal permitted projects are consistent with state water quality standards are codified at 8 S.C. Code Ann. Regs. 61-101 (2012). Additionally, 8 S.C. Code Ann. Regs. 61-101(F)(3) (2012) states the following:

> In assessing the water quality impacts of the project, the Department will address and consider the following factors:
>
> (a) Whether the activity is water dependent and the intended purpose of the activity;
>
> (b) Whether there are feasible alternatives to the activity;
>
> (c) All potential water quality impacts of the project, both direct and indirect, over the life of the project including:
>
> (1) Impact on existing and classified water uses;
>
> (2) Physical, chemical, and biological impacts, including cumulative impacts;
>
> (3) The effect on circulation patterns and water movement;
>
> (4) The cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

Subsections 5 states that "[c]ertification will be denied if:

(a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired;

(b) if there is a feasible alternative to the activity, which reduces adverse consequence on water quality and classified uses.

(c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species;

(d) 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[.]

These are the regulations which govern Appellants' challenge to the 401 Water Quality Certification for International Drive. The County, under those regulations, was required to provide "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Id.* 61-101(A)(4). A certification will also not be issued "unless the Department is assured appropriate and practical steps ... will be taken to minimize adverse impacts on water quality and the aquatic ecosystem." *Id.* 61-101(F)(6).

The Department determined that the proposed project would not permanently alter the aquatic ecosystem in the "vicinity" of the project such that its functions and values are eliminated or impaired. Appellants presented no evidence to contradict this determination. As an initial matter, the term "vicinity" is not defined within Reg. 61-101, but the term must necessarily include more than the immediate footprint of the project, or it would be impossible to obtain a certification under any circumstances. See Murphy v. S.C. Dep't of Health and Envtl. Control, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012). Thus, to the extent that direct fill of wetlands required for this expansion 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. Moreover, Appellants' 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.[9]

The ALC appropriately found more credible the testimony by Respondents' witnesses, including experts in water quality and wetlands – two senior DHEC staff, Giffin and Williams, and four others, Feldner, a very experienced wetlands consultant, and three storm water experts, Baca, Gosnell and Wooten, Wooten also being a wetlands expert – all of whom testified that the project would improve both water quality and wetland connectivity. One of Appellants' own experts, Dr. Tufford, admitted that placing culverts in the new road would so improve wetland connectivity, that he was unable to say whether the impacts to wetlands would be net positive or net negative. (R. pp. 269, line 8 - 272, line 4). To the extent Appellants' witnesses may have expressed different views on impacts to wetlands and water quality than Respondents' witnesses, this did not oblige the ALC to adopt Appellants' views. The testimony supporting DHEC's findings as to the lack of significant impacts to either wetlands or water quality was more than sufficient to sustain the ALC's decision upholding certification.[10]

As to impacts to water quality, the record establishes that the County provided reasonable assurances to the Department, in accordance with Reg. 61-101(A)(4), that water quality standards would not be violated by the proposed project. These assurances included the design of the storm

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[9] Appellants' description of the wetlands in the right of way of the project as "pristine or near pristine" is an extravagant exaggeration. No witness characterized any of these wetlands this way. The witness with the most experience with these wetlands (Appellants' witnesses had only a passing familiarity with the site) was Britt Feldner who described them as heavily impacted, fragmented wetlands, with only a few fully functional. (R. pp. 264, line 11 – 271, line 24; pp. 620, line 20 – 627, line 22).

[10] The court in Murphy v. S.C. Dep't of Health and Envtl. Control recounted the testimony of Dr. Tufford in that case. As in this case, his opinions were vague and unsubstantiated, without specific assessments, the Court noting that, "he acknowledged that ecosystems can adapt and that the nature and extent of the impact was difficult to determine without further study." 396 S.C. at 641, 723 S.E.2d at 196.

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.

For purposes of review of the Water Quality Certification, as detailed below, the County and DHEC satisfied the requirement to consider feasible alternatives and appropriately rejected alternatives that were not practicable, that did not satisfy the project purpose, and that had greater environmental impact than the preferred alternative. Appellants failed to demonstrate by a preponderance of the evidence that the proposed road project will negatively impact water quality. Appellants' experts had limited experience with the road prior to work on the project 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 Wooten or Baca, both experts with considerable experience in water quality generally and storm water in particular, or of Gosnell, an experienced engineer and the chief storm water official for Horry. Wooten and Gosnell have direct, personal experience with the road prior to work on the project and their testimony was that the sediment washing off of the current road after every rain is a serious problem. The ALC correctly found the testimony of Wooten, Gosnell and Baca to be competent and entitled to more weight than the unspecific and unsubstantiated opinions offered by Appellants' witnesses.

The weight of the testimony presented at trial supports a finding that the required storm water protections during road construction will eliminate storm water related pollution to the maximum extent practicable. Moreover, the elimination of the current dirt road will remove a source of sediment runoff presently impacting the 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 record was undisputed that wetland impacts were required to be mitigated through an extensive mitigation plan included in the County's permit application (as subsequently revised). (R. pp. 614, line 9 – 675, line 21; pp. 1446, 1648, 1676). There is no question that some 24.19 acres of wetlands are to be filled as part of construction of the project. Both the 401 water quality certification regulations and the CMP policies require that such work be certified only when there are no feasible alternatives. As explained below, the evidence was more than sufficient to support the ALC's finding that there were no feasible alternatives with less impacts than the County's preferred alternative which is the subject of the certifications at issue.

2. Coastal Zone Consistency Certification:

Appellants cited one CMP policy specifically dealing with water quality, CMP III-14.I(3) which provides,

> "In review and certification of permit applications in the coastal zone, the Coastal Council will be guided by the following general considerations (apply to erosion control and energy facility projects as well as activities covered under Resource Policies):
>
> (3) The extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds."

As the ALC held in his Reconsideration Order of July 26, 2016, the same analysis of the evidence with respect to the 401 Water Quality Certification applies to this CMP policy. The preponderance of the evidence establishes the fact that installation of culverts will improve the hydrology of the reconnected wetlands previously segmented by the old dirt road. In addition, Best Management Practices, "BMPs", will improve water quality which now suffered from the transport of sediment from the surface of the old dirt road into wetlands and streams. This evidence supports the Department's conclusion that CMP III-14.I(3) was satisfied. (R. p. 31).

Appellants also, belatedly, claimed that CMP III-73(E)(1) was not followed by the Department. This policy simply states that, "Project proposals which would require fill or other significant permanent alteration of a productive marsh will not be approved unless no feasible alternative exists or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized." As explained below, the evidence was sufficient to support the Department's conclusion that environmental impacts had been minimized, there were no feasible alternatives with less impacts and that, in any event, and the County's proposed project had an overriding public interest demonstrated.

B. DHEC and the ALC Adequately and Properly Considered the Impacts of the Project on Wildlife in Light of the Weight of the Evidence in Concluding that the Impacts Did Not Warrant Denial of Certification

1. 401 Water Quality Certification:

Regulation 61-101 makes only brief reference to wildlife considerations in subsection (F)(5)(c), which provides that "[c]ertification will be denied if the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species[.]" At the preliminary arguments stage, the ALC ruled that, as a matter of law, the plain meaning of the word "containing" controls this provision, and that black bears are not "contained" in waters, and are not within the scope of the Department's water quality certification regulation. To the extent that black bears are within the scope of *any* decision that is the subject of this appeal, the ALC held their relevance is limited to the Department's CZC decision. As noted in the Statements of Fact, the black bear is the only species at issue in this case and it was the only species about which any evidence was introduced by Appellants. There was no evidence that the proposed project would adversely impact waters containing state or federally recognized rare, threatened, or endangered species. (R. 2099).

2. Coastal Zone Consistency Certification:

CMP III-43 (See Department Exhibit 14; R. pp. 1432-1434) provides the Department with certification guidance related to impacts on Wildlife and Fisheries Management. It states:

> The following policies were developed by OCRM in conjunction with the [DNR] for inclusion in the S.C. Coastal Program.
>
> 1) In the coastal zone, including critical areas, OCRM issuance or review and certification of permit applications which would impact wildlife and fisheries resources will be based on the following policies:
>   a. Activities deemed, by OCRM in consultation with the [DNR], to have a significant negative impact on wildlife and fisheries resources, whether it be on the stocks themselves or their habitat, will not be approved unless overriding socio-economic considerations are involved. In reviewing permit applications relative to wildlife and fisheries resources, social and economic impacts as well as biological impacts will be considered.
>   b. Wildlife and fisheries stocks and populations should be maintained in a healthy and viable condition and these resources should be enhanced to the maximum extent possible.
>   c. Critical wildlife and fisheries habitat should be protected and enhanced to the extent possible.
>
> Management Authority
>
> The [DNR] is the principal state agency with statutory authority for the protection, management and conservation of wildlife and marine resources, including fish, game, non-game and endangered species. The Memorandum of Agreement between OCRM and [DNR] confirms the cooperative relationship between OCRM and [DNR] which has authority in the establishment, implementation, administration and enforcement of State game, fish, and shellfish laws.

CMP IV-1 also raises wildlife implications to the extent a particular GAPC's priority of use relates to the management of wildlife or wildlife habitat, as LOB's management plan would appear to indicate. However, CMP III-3, I.(8) recognizes that even projects which would pose a "significant impact" to a GAPC can be approved where "no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environmental impact is minimized." This is similar to the provisions of CMP III-43 relating to "overriding socio-economic considerations."

The testimony in the record is clear that DHEC consulted with DNR with respect to wildlife, and considered the provisions of the DNR/Horry Right of Way Agreement, as well as

DNR's silence on wildlife matters in the comment letters they provided. This Policy clearly requires DHEC to consult and cooperate with the natural resource agency with management authority over wildlife, and does not authorize DHEC to make a unilateral determination with respect to management of wildlife related to certification applications.

Appellants failed to meet their burden of proving a significant negative impact on wildlife stocks will result from this project. While Appellants presented evidence that bear tunnels *might* be used by bears to go under the road and thus reduce the number of bear/vehicle collisions, 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.

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, Appellants' bear expert, said that the tunnels at the project would be minimally effective - possibly as low as 20% effective. Conversely, Hamilton acknowledged that the 45 mph speed limit on International Drive required by the DNR agreement (and the permit) would in most cases allow motorists to avoid hitting a Black Bear. (R. pp. 531, line 4 – 534, line 14). 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. Appellants essentially want the County to build a $3 million experiment in animal behavior with

no reasonable assurance it would protect bears or motorists. By the Appellants' own expert's testimony, bear tunnels would be no more than a very expensive experiment.

Appellants' stated theory 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.[11] To further this theory, Appellants 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 Appellants cannot meet their burden of persuasion through innuendo alone.

Appellants are incorrect that there is no scientific evidence supporting a shift from the tunnels to a lower speed limit.[12] Chappalear testified that the lower population in LOB caused him to doubt the need for the tunnels. 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

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[11] It should be noted that the parties in this matter took the deposition of Deanna Ruth, the DNR employee with the most bear expertise who was directly involved in the studies that led to the 2010 agreement regarding bear tunnels. (R. pp. 2058-2059). Appellants did not call Ms. Ruth to testify at trial to attempt to establish whether or not DNR saw a scientific basis for the alternative protections in the 2013 agreement.

[12] Appellants' reliance on the claim by Steve Bennett, a long retired DNR employee who had nothing to do with anything related to the DNR/County agreement, the International Drive permit application and whose association with the LOB was many years ago is woefully misplaced. His claim that there was no scientific evidence to support DNR's decision to accept a low speed limit instead of bear tunnels was the purest of unsupported speculation. He also was admittedly without any expertise in any species other than salamanders and, therefore, has no ability to recognize appropriate scientific evidence on bear impacts even in the event it was placed before him.

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 which has a number of crossings under it equally usable by bears indicates that tunnels are of limited utility.

Despite Appellants' repeated accusations of undue influence in their Brief, the evidence was limited to mere suspicion as to DNR's motivation. Taylor and Chappalear, who were the primary DNR officials involved in coordinating the 2013 Agreement that omitted the tunnel requirement, testified their decision was not prompted by any improper influence. Taylor, the DNR Director, strongly refuted any suggestion his decision was politically motivated. (R. pp. 376, line 4 – 378, line 5; pp. 2080-2081).[13] Appellants' bear expert, Hamilton, himself a former DNR employee, clearly, unambiguously rejected any suggestion that Alvin Taylor would be "bought off" by anyone to make his decision. (R. pp. 543, line 15 – 544, line 9).

Even assuming Appellants were able to prove a significant negative impact on black bears was likely to occur as a result of this project, 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. Both the GAPC and Wildlife policies under the CMP state 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. The evidence in this case is overwhelming that Respondents minimized to the maximum extent practicable any negative environmental impacts. As explained below, the Department and the ALC appropriately

[13] Appellants put considerable weight on the testimony of Paul League, former DNR General Counsel, who said at one meeting DNR was, he felt, "browbeaten" by a member of the General Assembly. Mr. League's "feeling" about one meeting is hardly evidence. The testimony by Taylor that his decision was made solely on the conclusion of his staff, principally Chappalear, is the only probative evidence on this issue.

found that the proposed project is the only feasible alternative and has a significant, overriding public need.

C. DHEC and the ALC Adequately and Properly Considered the Indirect and Cumulative Impacts of the Project in Light of the Weight of the Evidence in Concluding that these Impacts did not Warrant Denial of Certification.

Both the 401 Water Quality Certification regulations and the CMP policies related to the International Drive certifications require that the Department consider cumulative impacts and indirect impacts likely to result from the project's construction. Appellants' single claim with respect to cumulative impacts is the thinly supported assertion that some, undefined projects on the private property which lies to the west of the proposed road will be the site of significant development and this development would necessarily result in further impacts to water quality and wetlands. The record, as detailed above under "Cumulative Impacts", simply does not support Appellants' argument. Their insistence that development which would result in significant additional impacts is utterly unsupported by anything other than speculation.

For instance, a retired federal employee who reviewed many permit applications wants to say that this experience permits him to opine that curb cuts on the road allowing access to the small areas of high/non-wetland on the adjacent property, will result in more development. This prediction was repeated by others of Appellants' witnesses. Appellants did not offer *any* analysis of the property where these ethereal future projects are forecast. Respondents on the other hand offered the testimony of Britt Feldner who testified that his assessment of the adjoining land was that is nearly all jurisdictional wetlands subject to the federal permitting requirement of Section 404 (his map of the extent of wetlands is attached to one of the County's submittals to the Corps of Engineers). (R. p. 1648; pp. 638, line 8 – 639, line 6). He also testified that it would be extremely difficult to secure permits for private development on this property. Mike Wooten

testified to the same facts as to the difficulty of securing permits for work in these wetlands and as to the very high cost. Wooten also testified that based on his knowledge of and experience with Horry County ordinances regarding development and with problems with utility service in such areas, that the possibility of development of these areas, even the high ground, was remote. (R. pp. 638, line 8 – 646, line 6; pp. 863, line 4 – 866, line 6).

On this evidence, the Department and the ALC were correct to conclude that there was proper evaluation of cumulative impacts from the project and that the threat of such impacts was not significant. As to indirect impacts of the project, the ALC and Department, as detailed above, fully evaluated all of the likely impacts of the project, including indirect ones, to both water quality and wetlands. The improvements to water quality and to wetlands, as testified to by Baca, Wooten, Gosnell and Feldner, from installation of culverts and removal of the old dirt road as a source of sediment run off, was more than sufficient to offset and negative impacts. BMPs, the record reflects, will minimize any pollutant runoff from the road once it is complete. Against this specific, expert testimony, the Appellants offered only generalizations, devoid of any quantification or even characterization of impacts and unsupported by any on site study. The evidence is more than sufficient to support the ALC's conclusion that the Department's consideration of indirect impacts was proper.

CMP III-3, I.(7) requires the Department to consider "The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." The Department testified directly on this point, and the Appellants offered no evidence that this was not considered by the Department. Instead, Appellants suggested that the presence of several curb cuts in the proposed road plan meant that widespread development inconsistent with the character of the area would inevitably take place. There is ample evidence

that the character of the area includes residential and commercial development, private forested land, and Heritage Trust Property, and that some future development would not inherently be inconsistent with the character of the area. Moreover, evidence showed that the uplands available for development on the private property tracts adjacent to LOB are exceedingly limited, and that any development impacting wetlands there would be subject to the same or a higher degree of regulatory scrutiny and environmental protection requirements than the proposed project.

D. DHEC and the ALC Properly and Adequately Considered Impacts to the Lewis Ocean Bay Heritage Preserve in Concluding that the Certifications Were Proper.

1. 401 Water Quality Certification

Reg. 61-101(F)(5)(d) provides that 401 certification will be denied if, "the proposed activity adversely affects special or unique habitats, such as National Wild and Scenic Rivers, National Estuarine Research Reserves or National Ecological Preserves, or designated State Scenic Rivers." Appellants spend considerable time in their Brief arguing that the LOB is such an area. The LOB is not one of the listed special or unique habitats in the regulation. The ALC correctly concluded that the wetlands to be impacted are not a "special or unique habitat" within the meaning of Reg. 61-101(F)(5)(d). While Appellants' 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 61-101, or that LOB otherwise met the regulatory meaning of the phrase "special or unique habitat." The testimony of Appellants' bear expert, Hamilton, was 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. (R. pp. 473, line 3 – 474, line 11; pp. 476, line 20 – 480, line 11; pp. 508, line 4 – 510, line 21; pp. 512, line 22 – 528, line 3). The

"uniqueness" of LOB comes from the high concentration of Carolina Bays within the preserve. The testimony of the County's witnesses, the only people to actually study the wetlands on the ground, was that no Carolina Bays would be impacted by this project. (R. pp. 624, line 5 – 628, line 1). To the extent LOB could qualify as a special or unique habitat within the meaning of Reg. 61-101, which is unclear, the Appellants failed to carry their burden of proving an adverse impact to that habitat. The only evidence introduced by Appellants, other than Hamilton's testimony that as to Black Bears the LOB was not unique, was vague, unspecific and unsubstantiated opinion testimony, not related to either data or on site evaluation. This opinion was general and lacking in the essentials for probative evidence.

2. Coastal Zone Consistency Certification

CMP III-3, I.(8) states:

> The extent and significance of negative impacts on Geographic Areas of Particular Concern (GAPCs). The determination of negative impacts will be made by OCRM in each case with reference to the priorities of use for the particular GAPC. 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.

The LOB is a GAPC specifically because it is a Heritage Trust property managed by DNR. (Department Exhibit 15, IV-6). While the Appellants have failed to carry their burden of proving a "significant impact" to the GAPC, they could not succeed on this particular claim even if such a significant impact were assumed to exist. Horry provided extensive evidence regarding the public interest in this project and both Horry and DHEC testified regarding the availability – or more precisely, the lack thereof – of feasible alternatives that were less impactful on the environment. Horry also testified at length regarding the efforts to minimize any substantial environmental impact. Ample evidence was presented that the project will use BMPs to minimize sediment and other pollutant runoff from storm water, will follow the existing alignment of the road wherever

possible, and will utilize a reduced right of way width from the design recommendations of SCDOT in order to reduce the wetlands impacts.

CMP III-3, I.(9) states:

> The extent and significance of impact on the following aspects of quality or quantity of these valuable coastal resources:
>
> i) unique natural areas - destruction of endangered wildlife or vegetation or of significant marine species (as identified in the Living Marine Resources segment), degradation of existing water quality standards;
>
> ii) public recreational lands - conversion of these lands to other uses without adequate replacement or compensation, interruption of existing public access, or degradation of environmental quality in these areas;
>
> iii) historic or archeological resources - irretrievable loss of sites identified as significant by the S.C. Institute of Archeology and Anthropology or the S.C. Department of Archives and History without reasonable opportunity for professional examination and/or excavation, or preservation.

Appellants presented testimony that the LOB is a "unique" area, due in part to the highly concentrated presence of Carolina Bays throughout the preserve. However, no evidence has been presented that the project would result in destruction of endangered wildlife or vegetation or of significant marine species. As noted above, Appellants' witnesses testified generally that roads create polluted runoff, but offered no specific data or conclusions regarding the type or degree of impact on water quality standards, nor did those experts offer any current data on existing water quality at the project site. Respondents' witnesses testified that required storm water controls would eliminate runoff into the adjacent wetlands to the maximum extent practicable.

LOB is held open to the public for recreational purposes, including hiking, hunting, bird watching, and general enjoyment. To the extent that a portion of the project footprint converts LOB acreage to other uses, adequate replacement or compensation is encompassed in the mitigation for those direct impacts to wetlands, and the parties have stipulated as to the adequacy of the mitigation proposed in this case. Also, the Department testified that the paving of

International Drive could improve public access to the LOB rather than disrupting public access. (R. p. 330, lines 6-15).

With regard to the final subsection of CMP III-3, I.(9), there is no evidence in the record pertaining to the project site as a site of significance as identified by the S.C. Institute of Archeology and Anthropology or the S.C. Department of Archives and History. Therefore subsection (iii) is not relevant to this contested case.

CMP IV-1(A) begins the department's Policy Guidance related to projects in Geographic Areas of Particular Concern (GAPCs), and provides specific guidance related to GAPCs which are Heritage Trust Properties (See Department Exhibit 15 at CMP IV-6). That Policy recognizes that the DNR and a Heritage Trust Advisory Board administer these areas, and states that a "major requirement of the [Heritage Trust] program is provision of management criteria.... A management plan must be developed for each property in the Heritage Trust." The priority of uses for Heritage Trust properties, as stated in the Policy, are:

1) Uses which are consistent with the management plan developed for each property.
2) Uses which allow public enjoyment of the area as long as the primary natural character of the area is not disrupted.
3) Uses which are compatible with the area's wildlife and wildlife management.

The Policy also states that '[p]rohibited uses are any which jeopardize the integrity of the Heritage Trust Program."

The management plan for LOB, discussed previously, states that a primary objective of all Heritage Preserves is to "protect[] the natural or cultural character of [the] area or feature" for which the property was dedicated. Witnesses representing DNR testified that the project is consistent with the management plan for LOB, and no evidence was presented that would support a finding that the proposed project would jeopardize the integrity of the Heritage Trust Program.

An accessible, public road would clearly improve public access to the area over the current, inaccessible dirt road. Finally, as discussed in more detail below, DNR witnesses – particularly Sam Chappalear – testified that the proposed project was compatible with local wildlife and wildlife management.

It is most significant that LOB is a property held and managed by DNR. The "high protection" Appellants argue that state law accords these areas is a protection vested *directly in DNR*. Management of these properties is to be pursuant to a Management Plan promulgated by DNR. There is no evidence in the record that any aspect of the International Drive Project as it incorporates a small portion of the edge of LOB violates any part of the Management Plan. (R. p. 1021). It was entirely appropriate for DHEC to defer to DNR regarding impacts to LOB and for the ALC to sustain this deference. The ALC properly found that the CZC determination in this case is consistent with all applicable portions of CMP Policy related to LOB.

Contrary to Appellants' statement that DHEC and the ALC did not consider priority of uses or the evidence of impacts to LOB, the ALC Order details exactly that consideration as did the testimony of the OCRM senior staff representative, Blair Williams. (R. pp. 312, line 19 - 313, line 6). The ALC Order's discussion of the LOB, including priority of uses is found at pages 22-25. (R. pp. 22-25). As they do on other issues in their Brief, Appellants fall into "attorney testimony" in the absence of any evidence in the record in an effort to bolster their claims that incorporation of the edge of the LOB into a portion of the right of way will adversely impact the priority of uses of LOB. There is no evidence at all of any adverse impact to uses of the LOB from the project. The evidence of relief to the congestion of Highway 90's access to other parts of Horry County does, however, constitute evidence that the LOB will benefit from faster access to firefighting units, the LOB being one of the most fire-prone areas in South Carolina. Better access

to the entrance to LOB by communities nearer the coast in Horry County, will contrary to Appellants' assertion, provide, as the ALC found, better access by the public to the LOB.

Appellants also mischaracterize the actual wording of the CMP policies related to LOB. They do not forbid anything, nor do they mandate any particular action. Perhaps most glaring is the utterly incorrect statement at page 43 of the Brief that III-14.I(9) "requires" adequate compensation for conversion of such areas to other uses. It plainly does not. The CMP policies simply require consideration of impacts to various aspects of GAPCs like LOB, the actual language of CMP III-4.I being "will be guided by the following considerations." The evidence is clear that DHEC and the ALC carefully considered each of the criteria spelled out in the CMP policies and followed the requirements of all applicable policies.

E. DHEC and the ALC Adequately and Properly Considered the Alternatives to the Project in Light of the Weight of the Evidence in Concluding that there was no Feasible Alternative Sufficient to Warrant Denial of Certification.

1. 401 Water Quality Certification Criteria

Under Regulation 61-101, certification should be denied if "there is a feasible alternative to the activity which reduces adverse consequences on water quality and classified uses." 25A S.C. Code. Ann. Regs. 61-101.F.5(b). There is no evidence contradicting the Department's determination that there is no "feasible" alternative to the proposed project. There is no definition of "feasible" within the context of Reg. 61-101 governing the Water Quality Certification. However, the interpretation by an agency of its own regulation is given great deference. Kiawah Development Partners, II v. S.C. Dep't of Health and Environmental Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). Based upon the vagueness of the regulation, which arises from a lack of regulatory definition of the term "feasible alternative," the South Carolina Supreme Court's adoption of a definition for this phrase in Murphy, *supra.* is controlling. In that case, the Court

affirmed the lower court's determination that the meaning of "feasible," when used in the context of a Section 401 Water Quality Certification, is equivalent to "practicable," a term utilized by the Corps of Engineers and by the EPA in its 404(b)(1) Guidelines. 396 S.C. at 643, 723 S.E.2d at 196.

2. Coastal Zone Consistency Certification Criteria

Like the 401 Water Quality Certification regulations, the CMP requires that projects filling wetlands or having significant impacts to wildlife stocks may still be certified if there are no feasible alternatives to the proposed alternative which meets the project purpose or if there are overriding socio-economic considerations. (CMP III-3.I(8); CMP III-43). For all intents and purposes, the alternatives analysis is the same for both certifications.

3. There Was no Evidence of any Feasible Alternative Which Meets the Project Purpose

The applicant in this case submitted an alternatives analysis for the project, and supplemented that analysis with additional information at the direct request of the Department. The unrefuted testimony of Horry's witnesses was 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. DHEC considered a total of 10 alternatives, 5 onsite and 5 offsite.

The only alternative suggested by Appellants that was not discussed in the applicant's submitted materials was a plan that called for bridging the length of International Drive. The ALC found based on the weight of 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. (R. p. 854, lines 9-19). Appellants offered no testimony at all on bridging's feasibility or cost.

Intertwined in the consideration of alternatives is the need for the preferred alternative. Where the project's purpose is to fulfill an important public need, the concept of "feasible" as to possible alternatives must include only those which fulfill the project purpose. Appellants make much of the fact that identifying a public need driven project purpose eliminates by necessity many options. That, however, is how any plan is developed. One must first know what the purpose of the project is and only those alternatives which fulfill that purpose are truly alternatives to be considered. In the environmental context, it then becomes important to try and select the one which is both feasible and involves the least negative impacts to the environment.

In this case, the testimony was *undisputed* that, as summarized above, Horry County faces a significant problem of traffic congestion in the Highway 90 communities. It is so bad that the Director of Public Works, Steve Gosnell, and the Director of Public Safety, both witnesses with many years' experience in both road functions and provision of emergency and public safety assistance, testified that the current situation constitutes a threat not just to public safety but to life for the residents of Highway 90. Provision of timely emergency health care, police and fire services to those people is hampered to a degree that the County considers it to be life threatening. The International Drive project is the County's answer to that problem. To the testimony about the public safety need for the project, the Appellants offered nothing in response. This is perhaps the most telling aspect of the record in this case.

DHEC's review of the alternatives was detailed and "hands on". The Department asked for consideration of more alternatives when it felt it was necessary and that is why so many were considered. That review revealed that the preferred alternative was the one that both met the project purpose and minimized environmental impacts.

Appellants offered no testimony from any person knowledgeable about highway design, routing, assessment as to congestion or use by emergency vehicles. They did nothing to actually evaluate the alternatives considered by the County and DHEC. The speculation in their brief about feasible alternatives is purely an attorney's creation. The suggestion that the dirt road is sufficient for emergency vehicles, or that it makes sense to build a two lane road knowing it will be overloaded in a few years, or that there is some – as yet undiscovered – way to widen Highway 501 to solve the County's problem is *utterly unsupported by any evidence at all.* Strangest of all is the suggestion at page 52 of Appellants' Brief that if only DHEC had performed a different sort of alternatives analysis it would have "revealed that reasonable alternatives exist." On its face, as it is not tied to any evidence, even incompetent evidence, it is not only strange, but a completely empty statement in terms of this appeal.

For purposes of review of both the Water Quality Certification and the Coastal Zone Consistency Certification, the DHEC 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.

F. Issuance of the Federal Section 404 Permit by the Army Corps of Engineers Rendered Challenge to the DHEC Certifications Moot

An alternate sustaining ground warranting affirmation of the decision of the ALC is that the challenge to the DHEC certifications was rendered moot once the Army Corps of Engineers issued its federal Section 404 permit on July 22, 2016.[14] In his Order denying Appellants' Motion to Stay, the ALC held that challenge to the certifications was mooted by issuance of the federal permit. His analysis was correct. "A case becomes moot when judgment, if rendered, will have

[14] In the Order denying the County's Motion to Dismiss this appeal as moot, the Court specifically invited briefing on the issue of mootness.

no practical legal affect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

Once the Army Corps of Engineers issued its Section 404 permit, those certifications had served their purpose under existing law. The conditions included in the certifications were incorporated into the federal permit and became *conditions of that permit*. (Exhibit B to Motion to Dismiss, Corps Permit). Once a state issues its certification pursuant to Section 401 of the Clean Water Act or the federal Coastal Zone Management Act, the state becomes an "interested bystander" lacking the authority to affect the federal permit. Puerto Rico Sun Oil v. EPA, 8 F.3d 73, 778-80 (1st Cir. 1993).

For state certifications to have legal status independent of the federal permit which is certified, the state legislature must so provide. That has not been done in South Carolina. Our Supreme Court held in Triska v. SCDHEC, 292 S.C. 190, 355 S.E.2d 531 (1987), that certifications are *not permits*. The fact that certifications can be the subject of a contested case does not render them the equivalent of permits. Nothing in any state appellate case has held differently. As Judge Anderson held in his Order Denying Stay in this case (Order of October 10, 2016 and Exhibit D to Appellants' Motion for Supersedeas), DHEC, at his request briefed him in advance of his ruling and explained that it was the agency's position that the certifications became moot once the federal permit was issued. Just as now, Judge Anderson noted that Appellants provided him no authority to the contrary. Following the Supreme Court's ruling in Kiawah Dev. Partners, II v. S.C.Dep't of Health and Envtl. Control, 411 S.C. 16, 32-34, 766 S.E.2d 707, 717-718 (2014), Judge Anderson not only followed his own analysis of the law regarding the limited nature of certifications, but gave what he said was required "deference to the Department's interpretation of its regulations." (R. pp. 42, 47). The more limited role of certifications is why they constitute what is called

"indirect" authority, as noted by Judge Anderson. This distinguishes them from "direct" authority found in permit requirements.

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

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

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

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

Similarly, the Supreme Court decision in Kiawah Dev. Partners, II is not only not "decisive" on the question of the role of DHEC certifications, it has nothing to say about that role at all. That case concerned DHEC's issuance of a critical area *direct permit* for an erosion control structure and not certification. The certifications being challenged are *entirely derivative of the federal permit* requirement, there being no state permit required for the International Drive project.

As DHEC has not established a "regulatory permitting program" requiring either a 401 Water Quality Certification of a Coastal Zone Management Consistency certification for the kind of wetlands fill being undertaken by the County in this case, the import of the certifications is confined to their role in the issuance of the federal permit. They are not independently enforceable.

If this Court were to rule that one or both certifications were improperly issued, this would not create a permit requirement rendering that work illegal under state law. The only permit required for the work is a federal permit. A State court, as Judge Anderson noted, does not have jurisdiction over that federal permit. Therefore, what actions the Army Corps of Engineers took with respect to issuing their permit are beyond the review of this or any State court.

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

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

Appellate Case No. 2016-001758

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

vs.

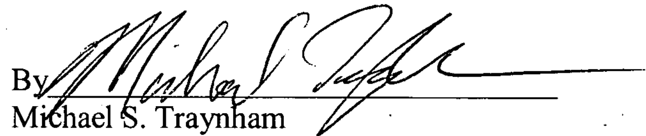
South Carolina Coastal Conservation League and South Carolina Wildlife Federation...Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

April 4, 2017

Respectfully submitted,



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