

21943

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellant Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic
Ansonborough Neighborhood Association, South Carolina Coastal Conservation League,
Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider
Foundation, and Charleston Communities for Cruise Control Appellants,

vs.

South Carolina State Ports Authority and South Carolina Department of Health and
Environmental Control..... Respondents.

RECORD ON APPEAL
VOLUME VII OF VII

J. Blanding Holman IV
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
Telephone: (843) 720-5270
Fax: (843) 414-7039

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie White
South Carolina Environmental Law Project
430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Fax: (843) 527-0540
Attorneys for the Appellants

Michael Gary Corley
1312 Augusta Street
Greenville, SC 29605
864-232-5870
Attorney for Appellant

Bradley D. Churdar
South Carolina Department of Health &
Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405
Attorney for Respondent DHEC

Randolph R. Lowell
Willoughby & Hoefer, P.A.
930 Richland Street

Philip L. Lawrence
General Counsel
South Carolina State Ports Authority
P.O. Box 22287
Charleston, SC 29413-2287
Attorneys for Respondent SPA

Chad Nicholas Johnston
PO Box 8416
Columbia SC 29202

Tracey Colton Green
PO Box 8416
Columbia, SC 29202-8416
803-252-3300
Attorneys for the Respondent SPA

Exhibit 1

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 13-ALJ-07-0056-CC

Preservation Society of Charleston,)
Historic Charleston Foundation,)
Historic Ansonborough Neighborhood)
Association, South Carolina Coastal)
Conservation League, Charlestowne)
Neighborhood Association,)
Charleston Chapter of the Surfrider)
Foundation and Charleston)
Communities for Cruise Control,)
)
Petitioners,)
)
v.)
)
South Carolina State Ports)
Authority and South Carolina)
Department of Health and)
Environmental Control,)
)
Respondents.)
-----)

ADMINISTRATIVE HEARING

Friday, September 6, 2013
10:03 a.m. - 1:19 p.m.

The hearing before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 6th day of September, 2013 before Amy G. Byrd, Court Reporter and Notary Public in and for the State of South Carolina.

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1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

R.003002

1 the other side. I've never seen anything like
2 this. I've never seen motions like this and I
3 don't think, from our perspective, that's the
4 way this case should be litigated. We
5 certainly will accept anything the court wishes
6 to do, but we do not think and I certainly,
7 sincerely do not believe this is the case for
8 it.

9 THE COURT: All right. I'm going to go back through
10 and read 44-1-60. You said the ---

11 MR. LEATH: Your Honor, 44-1-60F is where I think
12 we're coming from.

13 THE COURT: Well what I was going to do is -- I said
14 after this hearing I am going to go back
15 through and read every use of the word must.
16 From that perspective of -- given what you've
17 just talked about.

18 MR. LEATH: Thank you, Your Honor.

19 MS. ARMSTRONG - CROSS EXAMINATION - MOTION TO STRIKE
20 INFLAMMATORY REFERENCE:

21 MS. ARMSTRONG: Your Honor, can I just add ---

22 THE COURT: You certainly can.

23 MS. ARMSTRONG: --- a couple of points, since my
24 name has been raised.

25 THE COURT: I thought your name was on the ---

1 file sanctions. This sanction motion didn't
2 come out of the blue. They knew that this was
3 -- that this was a probable outcome if they
4 didn't withdraw the motion. So they had a
5 second chance to go back and review it and see
6 if they really wanted to do it. But on that I
7 will rest.

8 **THE COURT:** Thank you. Mr. Lowell took the position
9 on what sanctions would be levied and if I were
10 to determine sanctions should be levied, Mr.
11 Leath, would you like to respond to any of
12 that?

13 **MR. LEATH:** I would first of all hope that doesn't
14 happen, Your Honor. But if it did happen, I
15 think it should be some reasonable limitation
16 with regard to ---

17 **THE COURT:** Go ahead and drop the dismissal thing.
18 That's not on the table.

19 **MR. LEATH:** Right.

20 **THE COURT:** So move on.

21 **MR. LEATH:** But they would have to substantiate some
22 reasonable cross basis for filing their brief
23 opposing the motion, I would think. That's
24 what the court could award.

25 **THE COURT:** Right.

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R.003004

Exhibit 2

R.003005

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M. S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT CARROLL
CHAD N. JOHNSTON
JOHN W. ROBERTS
ANDREW J. D'ANTONI

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

November 15, 2013

VIA HAND DELIVERY

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, South Carolina 29201

Rc: *Preservation Society of Charleston v. S.C. State Ports Authority;*
Docket No. 13-ALJ-07-0056-CC

Dear Judge Anderson:

The purpose of this letter is to bring to the Court's attention a document recently received by the South Carolina State Ports Authority (Ports Authority) in response to its subpoena issued to Disher, Hamrick & Myers Residential, Inc. in the above-referenced matter. A copy of the referenced document is enclosed as Attachment A for your review. It is relevant to the issue of standing before the Court.

As your Honor is aware, the Cruise Opponents instituted the above-captioned action alleging, *inter alia*, that the cruise ships that frequent the Union Pier Terminal (UPT) have had a negative impact on property values of their members. The Cruise Opponents identified Carolyn W. Agnew as a potential witness in these proceedings concerning "air pollution," a "decrease in property values" resulting from cruise operations at UPT, and "airborne pollutants intruding into

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SC ADMIN. LAW COURT

R.003006

her home....”¹ Ms. Agnew is a key antagonist opposing cruise operations in Charleston, holding press conferences, maintaining a website, and attempting to collect anti-cruise forces to oppose redevelopment of UPT.

In a related action currently pending before the South Carolina Supreme Court, Ms. Agnew submitted a sworn affidavit dated January 24, 2012 (Affidavit)² attesting to alleged injuries she has suffered to person and property resulting from UPT cruise operations near her home located at 35-B Hasell Street, Charleston, South Carolina. Specifically, Ms. Agnew avers that she is concerned about the health risks associated with black soot, which she alleges is deposited on the exterior of her home as a result of cruise ship operations.³ Additionally, Ms. Agnew complains about excessive volume levels of onboard music and ship announcements, alleging that the cruise operations violate noise ordinances and negatively impact the enjoyment of her residential property.⁴ Of final note, Ms. Agnew asserts that “[s]everal real estate agents have told residents who want to sell homes that they must disclose that their home is adjacent to a home porting cruise operation because of the negative impacts of the cruise operation on the property.”⁵ The Affidavit was submitted to this Court by the Cruise Opponents for consideration in an August 19, 2013, filing and was attached to the Ports Authority’s Amended Prehearing Statement dated September 18, 2013.

Following your Honor’s November 8, 2013, Order denying the Cruise Opponents’ Motion to Quash Subpoena, the third party produced the enclosed State of South Carolina Residential Property Condition Disclosure Statement executed by Ms. Agnew on February 5, 2013 (Statement) in connection with the June 2013 sale of her home located at 35 Hasell Street.⁶ Pursuant to S.C. Code Ann. §§ 27-50-10 *et seq.*, owners of residential real estate are required to disclose to a purchaser any nuisances or environmental conditions affecting the property on or about the time of sale. Contrary to the assertions made in her Affidavit approximately one year prior, Ms. Agnew affirmatively maintained in the Statement that she had no knowledge of any

¹ Cruise Opponent CNA Resp. to First Set of Interrog., dated April 22, 2013; Cruise Opponent C4’s Resp to First Set of Interrog., dated April 22, 2013.

² Aff. of Carrie Agnew, Jan. 24, 2012, *Carnival Corp. v. Historic Ansonborough*, No. 2011-197468 (S.C. Sup. Ct. Original Jurisdiction Granted Jan. 11, 2012).

³ *Id.* at ¶6.

⁴ *Id.* at ¶¶7, 10.

⁵ *Id.* at ¶9.

⁶ Notably, Ms. Agnew purchased the property in November 2000 for \$469,000 and sold the property in June 2013 for \$745,000. Clearly an adjacent location to UPT has not caused any injury to Ms. Agnew.

The Honorable Ralph K. Anderson, III

November 15, 2013

Page 3

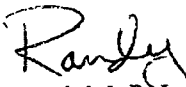
environmental contamination or hazards, including the presence of any hazardous or toxic materials, or of any nuisances, including noise, odor, smoke, etc., affecting the property.⁷

Ms. Agnew's assertions set forth in the Statement are relevant to the Court's consideration of its pending Motion to Dismiss for Lack of Standing and support our position that the Cruise Opponents have failed to demonstrate any element of standing. *See* Ports Authority Mot. to Dismiss for Lack of Standing. Ms. Agnew's allegations mirror the allegations of other affiants in similar locations. As the Court is assessing the credibility and viability of the claims and allegations of the Cruise Opponents in conjunction with the standing analysis, the flip-flopping of a leading Cruise Opponent witness, who executed a sworn affidavit submitted to the courts of this State claiming the existence of a nuisance to advance a position in litigation and then executed a property condition disclosure form affirmatively representing that no nuisance existed to sell her home, is particularly relevant and pertinent. This sort of duplicity has no place in the legal system and should not be countenanced by any court.

Thank you for your time and consideration of this matter.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Randolph R. Lowell

cc: Counsel of Record

⁷ Statement, p.3, ¶¶15-16.

EXHIBIT A



STATE OF SOUTH CAROLINA
RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT
INSTRUCTIONS TO PROPERTY OWNERS

1. South Carolina Code of Laws Ann., Title 27, Chapter 50, Article 1 requires that an owner of residential real estate (single-family homes and buildings with up to four dwelling units) shall provide to a purchaser this property condition disclosure statement which must be completed prior to signing a contract of sale. This disclosure statement must be provided in connection with the sale, exchange, option and sale under a lease with an option to purchase. This disclosure statement is not required for some transactions. A complete list of exemptions may be found in S.C. Code Ann., Section 27-50-30.
2. You must check one of the boxes for each of the questions on this form.
 - a. If you check "Yes" for any question, you must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator, or other expert or public agency. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in the report as long as you were not grossly negligent in obtaining or transmitting the information.
 - b. If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misrepresentation.
 - c. If you check "No Representation" for any question, you are stating that you are making no representation regarding the conditions or characteristics of the property, but you may have a duty to disclose even if you know, or should have known, of them. Please consult with an attorney to determine any potential liability you may have for checking this answer.
 - d. If you check "Yes" or "No" for any question and, subsequently, something happens to the property to render your statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly provide the purchaser a corrected statement or you may correct the problem.
3. If you are assisted in the sale of your property by a licensed real estate broker or salesperson, you remain solely responsible for completing and delivering this statement to the purchaser. The broker or salesperson must disclose any material facts about your property which he/she knows, or reasonably should know, regardless of your responses on this statement. You are to complete this form yourself and answer all questions truthfully and as fully as possible. Please consult with your attorney if you have any questions. By signing below you acknowledge that the failure to disclose known material information about the property may result in liability.
4. You must provide the completed statement to the purchaser prior to the time you and the purchaser sign a contract to purchase your property or as the contract otherwise provides. You should provide the purchaser a copy of this statement containing your signature and keep a copy signed by the purchaser for your records.

Property Address: <u>35 HASELL STREET UNIT B, CHARLESTON, SC 29401</u>	
Tax Map Number: <u>458-05-01-143</u>	
Initials/Date: Seller(s) <u>[Signature] 2-5-13</u>	Buyer(s) <u>[Signature]</u>
REV (1/1/13D)	Page 1 of 5

Disher Hamrick & Myers, Inc. 25 Cumberland Street Suite 120 Charleston, SC 29401
 Phone: (843) 577-4115 Fax: H Hamrick

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35 HASELL STREET

AS SELLER OF THE PROPERTY IDENTIFIED HEREIN, DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) OR CONDITION/CHARACTERISTIC WITH ANY OF THE FOLLOWING:

- | | Yes* | No | No Representation |
|--|--------------------------|-------------------------------------|--------------------------|
| 1. Foundation, slab, fireplaces/chimneys, floors, windows (including storm windows and screens), doors, ceilings, interior and exterior walls, attached garage, patio, deck, walkways, or other structural components including any modifications?
a. Siding: masonry ___ wood ___ composition/hardwood ___ vinyl ___ synthetic stucco ___ stucco ___
aluminum ___ masonite ___ cement-plank ___ other <u>Brick</u>
b. Approximate age of structure <u>170 yrs.</u> | ☐ | ☒ | ☐ |
| 2. Roof and gutters (leakage or other problem)?
a. Approximate age of roof covering <u>9</u>
b. Are you aware of any leaks during your ownership (or within the past 3 years, if your ownership exceeds 3 years)? | ☐ | ☐ | ☐ |
| 3. Water seepage, leakage, dampness or standing water or water intrusion from any source in any area of the structure? | ☐ | ☒ | ☐ |
| 4. Electrical system (outlets, wiring, panel, switches, fuses, circuit breakers, fixtures, etc)? | ☐ | ☒ | ☐ |
| 5. Plumbing system (pipes, fixtures, water heater, etc.)? | ☐ | ☒ | ☐ |
| 6. Heating and/or air conditioning? Approximate Age <u>15</u>
a. Heat source: furnace ___ heat pump ☒ baseboard ___ solar ___ other ___
b. Cooling source: central ☒ wall/window unit(s) ___ other ___
c. Fuel source: electricity ☒ natural gas ___ propane ___ oil ___ solar ___ other ___ | ☐ | ☐ | ☐ |
| ***If there is more than one system, please answer questions again on a separate page*** | | | |
| 7. Water supply (water quality, quantity, water pressure)?
a. water supply is: city/county ☒ community system ___ private well ___ other ___
b. water pipes are: copper ☒ galvanized ___ PVC/CPVC ___ polybutylene ___ combination ☒ other ___ | ☐ | ☒ | ☐ |
| 8. Sewer/septic system?
a. Type system: septic tank ___ community system ___ other ___
connected to city/county system ___ city/county system available ___ other ___
b. Does the system require a sewage lift pump? Yes ___ No ___
c. Has the septic system been serviced/pumped during your ownership? Yes ___ No ___ | ☐ | ☒ | ☐ |
| 9. Appliances (range/oven, attached microwave, hood/fan, dishwasher, disposal, icemaker, etc- contract may control what transfers) | ☐ | ☒ | ☐ |
| 10. Present infestation, or damage, WHICH HAS NOT BEEN REPAIRED from past infestation of wood destroying insects or organisms or dry rot or fungus?
Is there a termite bond or warranty? Yes ☒ No ___
Name of organization that treats property for organisms: <u>LED FORD</u>
If there is a termite bond or warranty, please provide/describe: expiration date <u>06/13</u>
transferable ☒ amount of transfer fee ___ What does bond/warrant cover? ___ Is it a repair bond? ___ Is it a retreatment bond only (i.e. no repair)? ___ Other info: ___ | ☐ | ☒ | ☐ |

Property Address: 35 HASELL STREET UNIT B, CHARLESTON, SC 29401Tax Map Number: 458-05-01-143Initials/Date: Seller(s) CA 2-25-13Buyer(s) Theresa J. Hall

Page 2 of 5

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35 HASELL STRE

- | | Yes* | No | No Representation |
|--|-------------------------------------|-------------------------------------|--------------------------|
| 11. Drainage, grading or stability of soil or retaining structure? | ☒ | ☒ | ☐ |
| a. Are you aware of any underground tanks or voids? | ☒ | ☒ | ☐ |
| b. Are you aware of any soil drains on the property? | ☐ | ☒ | ☐ |
| c. Are you aware of any sump pumps on the property? | ☐ | ☒ | ☐ |
| d. Are you aware of significant fill material on or below ground? | ☐ | ☒ | ☐ |
- If yes, describe tanks/voids or drains or pumps or material/amount: _____

12. Other built-in systems and fixtures ☐ ☒ ☐
 Mark below for any systems that have malfunctions or defects.
 See contract to determine if any systems below convey to new owner.
 central vacuum ☐ pool ☐ hot tub ☐ spa ☐ attic fan ☐ exhaust fan ☐ ceiling fan ☐ sump pump ☐
 irrigation system ☐ cable tv wiring or satellite dish ☐ security system ☐ fountain ☐ storage building ☐
 water filtration ☐ solar panels ☐ or other systems _____

13. During your ownership, or within the past five (5) years, if ownership exceeds five years, have there been any individual repairs in excess of \$500.00 (five hundred dollars) to any item checked in Questions 1-12?

* Explain: 2 Cisterns (?)

#13: Repaired Cracked Sewer line (part of condo regime)
Recoated roof to maintain Seal-A-Flex warranty

REGARDING THE PROPERTY IDENTIFIED HEREIN, INCLUDING THE LOT, OTHER IMPROVEMENTS, AND FIXTURES LOCATED THEREON, DO YOU HAVE KNOWLEDGE OF ANY:

14. Room additions or other structural changes made during your ownership? Yes* ☐ No ☒ No Representation ☐
15. Environmental hazards (substances, materials or products) including asbestos, formaldehyde, radon gas, methane gas, lead-based paint, underground storage tank, fuel oil, paint, PCBs, lead hazards, toxic mold, methamphetamine, methamphetamine byproducts, or other hazardous or toxic material (whether encapsulated or buried or covered), any contaminated soil or water, or other environmental contamination of property? Yes* ☐ No ☒ No Representation ☐
16. Nuisances (noise, odor, smoke, etc.) affecting the property? ☐ ☒ ☐
 Explain: _____
17. Previous damage caused by fire or smoke or water? ☐ ☒ ☐
18. Violations or variances of building codes, restrictive covenants, other land use restrictions or zoning ordinances that are applicable to the property? ☒ ☐ ☐
 Explain: EXTERIOR EASEMENT W/ HISTORIC CHARLESTON FOUNDATION
19. Restrictions to property use? (covenants, conditions, or deed) ☒ ☐ ☐
 If yes, are copies attached? available upon request
 If there is a regime fee or similar fee, who do you pay? To be set up by future owner with
 Explain: owner of 35-A unit

Property Address: 35 HASELL STREET UNIT A, CHARLESTON, SC 29401

Tax Map Number: 458-05-01-143

Initials/Date: Seller(s) DA 02.05.13

Buyer(s) Franklin J. Ball

Page 3 of 5

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35 HASELL STRE

- | | Yes* | No | No Representation |
|---|-------------------------------------|-------------------------------------|--------------------------|
| 20. Utility or other easements, shared driveways, party walls, erosion control (seawalls, rip-rap, etc), or encroachments from or on adjacent property? | ☒ | ☐ | ☐ |
| 21. Lawsuits, foreclosures, bankruptcy, tenancies, judgments, tax or other liens, proposed assessments or insurance issues, notice from any governmental agency, individual(s), or organization(s) that could affect title to the property? | ☐ | ☒ | ☐ |

If you choose to volunteer information about nearby issues that may or may not be in the public record yet, please report here: _____

22. If there is a dock, dam, retaining wall, or other structure requiring inspections, permits, etc., have such requirements been complied with in full? ☐ ☒ ☐
Are the documents attached? _____
23. If property includes a manufactured home, has it been legally converted to real property and the DMV title retired? ☐ ☒ ☐
Are the documents attached? _____
Explain: _____
24. Are there flood hazards or is the property in a federally-designated flood plain? ☒ ☐ ☐
If there is flood insurance for the property, what is the amount, time period, and coverage? Available upon request
Please describe any erosion and erosion control measures. _____
25. Are there rental, rental management, vacation rental or other lease contracts in place on the property at the time of closing? ☐ ☒ ☐
If there is a management company, please provide name and contact information: _____
26. Are there any outstanding charges owed by for gas, electric, water, sewerage, or garbage services provided to the property that are delinquent? ☐ ☒ ☐
Explain: _____

Answer any of the questions #27-40 that are applicable to this property.

- | | Yes* | No | No Representation | N/A |
|--|-------------------------------------|-------------------------------------|--------------------------|--------------------------|
| 27. Owners Association fees or common area expenses/assessments? | ☐ | ☒ | ☐ | ☐ |
| 28. Are there any resale or rental restrictions? | ☐ | ☒ | ☐ | ☐ |
| 29. Is Owners Association involved in current or anticipated litigation? | ☐ | ☒ | ☐ | ☐ |
| 30. Has Owners Association levied special or insurance assessments? | ☐ | ☒ | ☐ | ☐ |
| 31. Are there any guest, visitor, or animal restrictions? | ☐ | ☒ | ☐ | ☐ |
| 32. Does the property include assigned parking space(s)? | ☒ | ☐ | ☐ | ☐ |
| 33. Are keys required to access common or recreational areas? | ☒ | ☐ | ☐ | ☐ |
| 34. Is a copy of the Master Deed and Bylaws attached? | ☒ | ☐ | ☐ | ☐ |
| 35. Is a copy of the covenants, conditions, and restrictions attached? | ☒ | ☐ | ☐ | ☐ |
| 36. Is there a transfer fee levied to transfer the property? | ☐ | ☐ | ☐ | ☐ |
| 37. What are the Ownership Association dues? \$ _____ per _____ (month/year/etc.) | | | | |
| 38. What do the dues cover? _____ Is insurance included? _____ | | | | |
| 39. What is the name and contact information for the Owners Association? _____ | | | | |
| 40. Will any memberships transfer with the property? _____ Documentation attached? _____ | | | | |
- Explain: _____

Property Address: 35 HASELL STREET UNIT B, CHARLESTON, SC 29401

Tax Map Number: 458-05-01-143

Initials/Date: Seller(s) CA 2.5.13

Buyer(s) Therese H. Belle

Page 4 of 5

Peggy J. La Belle

***IF YOU ANSWERED "YES" TO ANY OF THE PREVIOUS QUESTIONS, PLEASE USE THE FOLLOWING SPACE FOR YOUR EXPLANATION AND ATTACH ANY RELEVANT PROFESSIONAL REPORTS OR ADDITIONAL INFORMATION.**

#32 2 off-street parking spaces

#34/35: Available upon request

Property Address: 35 HASSELL STREET UNIT B, CHARLESTON, SC 29401

Initials/Date: Seller(s) DA 2.5.13 Buyer(s)

To read the South Carolina Residential Property Condition Disclosure Act, (S.C. Code Ann. § 27-50-10 et seq.) please visit: <http://www.scsenatehouse.gov/code/t27c050.php>

This disclosure does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a sales agreement. The real estate licensee, whether acting as listing agent or selling agent, has no duty to inspect the onsite or offsite conditions of the property and any improvements.

Owner(s) Acknowledgement

Property Address: 35 HASSELL STREET UNIT B, CHARLESTON, SC 29401

The property is currently: owner-occupied ☒ leased ☐ in an estate ☐ in foreclosure ☐ vacant ☐ (If vacant, how long?) _____

Owner's Name(s): CAROLYN W. AGNEW

Owner(s) acknowledge having examined this statement before signing and that all information is true and correct as of the date signed.

Owner Signature: Carolyn W. Agnew Date: 2.5.13 Time: 1:30 PM

Owner Signature: _____ Date: _____ Time: _____

Purchaser(s) Acknowledgement

Purchaser(s) acknowledge receipt of a copy of this disclosure statement; that he/she has examined it before signing; that he/she understands that this is not a warranty by owner or owner's agent; that it is not a substitute for any inspections he/she may wish to obtain; and that the representations are made by the owner and not the owner's agent(s) or subagent(s). Purchaser(s) are encouraged to obtain his/her own inspection by a licensed home inspector or other professional.

Purchaser Signature: Peggy La Bella Date: 5/2/13 Time: 11:00

Purchaser Signature: Theresa La Bella Date: 5/2/13 Time: 11:00

Property Address: 35 HASSELL STREET UNIT B, CHARLESTON, SC 29401

Tax Map Number: 458-05-01-143

Initials/Date: Seller(s) DA 2.5.13

Buyer(s) Theresa La Bella

Page 5 of 5

Exhibit 3

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT CARROLL
CHAD N. JOHNSTON
JOHN W. ROBERTS

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TELEPHONE 252-3300
TELECOPIER 256-8082

*ALSO ADMITTED IN TX

March 6, 2013

VIA E-MAIL AND FACSIMILE

Amy Armstrong, Esquire
Michael G. Corley, Esquire
South Carolina Environmental Law Project
Post Office Box 1380
Pawley's Island, SC 29585

Jefferson Leath, Esquire
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Re: *Preservation Society of Charleston v. S.C. State Ports Authority*;
Docket No. 13-ALJ-07-0056-CC

Dear Amy, Michael, and Jeff:

I have received your filing letter and motion to remand dated February 27, 2013 requesting the above-captioned matter be remanded to the Department of Health and Environmental Control (DHEC) Board for a final review conference.

Aside from the inaccurate factual assertions, the motion has no basis or support in the law. In fact, the statute specifically and unambiguously enacts a process making a Board review conference *discretionary* with the Board—a process in which you and your clients have participated on numerous occasions. The statute specifically provides that the “if the Board declines in writing to schedule a final review conference or if a final review conference is not conducted,” then the “staff decision becomes the final agency decision.” S.C. Code Ann. § 44-1-60(F). The statute further provides that a request for contested case may be filed with the ALC within 30 days after “notice is mailed ... that the board declined to hold a final review conference.” S.C. Code Ann. § 44-1-60(G)(1). Given the clear statutory scheme, your participation in numerous matters following this same scheme, and the appellate opinions that recognize this discretionary process, the only purpose for this motion is delay and harassment.

R.003016

See Kiawah Development Partners, II v. S.C. Dep't of Health & Env'tl. Control, No. 2010-155629 (Feb. 27, 2013) (C.J. Toal) (reciting the DHEC Board's decision not to conduct a final review conference and according the DHEC staff decision deference); *Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision); *Town of Arcadia Lakes v. S.C. Dep't of Health & Env'tl. Control*, No. 2010-159446 (March 6, 2013) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC); *Dreher v. S.C. Dep't of Health & Env'tl. Control*, 399 S.C. 259, 730 S.E.2d 922 (Ct. App. 2012) (petition for cert pending) (noting the DHEC Board declined to hold a final review conference allowing the case to proceed to the ALC).

Accordingly, the Ports Authority requests withdrawal of the Motion to Remand. Should the motion not be withdrawn by the close of business on Monday, March 11, please consider this letter as consultation and notice that the Ports Authority may file a motion under Rule 72, RPALC, Rule 11, SCRCP, and the S.C. Frivolous Sanctions Proceedings Act, S.C. Code Ann. §§ 15-36-10 *et seq.*, for appropriate sanctions.

If you have any questions or would like to discuss this further, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Randolph R. Lowell

cc: Marshall Taylor, Esquire
Philip Lawrence, Esquire

Exhibit 4

R.003018

Subject: Re: Judge: Opponents have standing to challenge state permit for Charleston cruise terminal
(12/3/13 3:16 pm)

Date: Tuesday, December 3, 2013 4:50:21 PM ET

From: Evan R. Thompson

To: J. Randolph Pelzer, Margot Rose

CC: Mr. and Mrs. Stephen F. Gates, Jay Williams

It's possible he's following Judge Gergel on the standing issue. Thanks,
Randy. Evan

EVAN R. THOMPSON

Executive Director

PRESERVATION SOCIETY OF CHARLESTON

147 King Street

Post Office Box 521

Charleston SC 29402

P 843-722-4630 <<file:///localhost/tel/843-722-4630>>

F 843-723-4381 <<file:///localhost/tel/843-723-4381>>

www.PreservationSociety.org <<http://www.PreservationSociety.org/>>

Founded in 1920, the mission of the Preservation Society of Charleston is to inspire the involvement of all who dwell in the Lowcountry to honor and respect our material and cultural heritage.

On 12/3/13 4:35 PM; "J. Randolph Pelzer" <jrandolphpelzer@hotmail.com> wrote:

I would not get excited about this ruling. Many of us were hoping he would toss out the appeal on standing grounds so that he would not be in a position to enter a very harmful ruling on the merits after trial, which we fear he is inclined to do.

Sent from my iPad

On Dec 3, 2013, at 3:19 PM, "Margot Rose" <mtrose19@gmail.com> wrote:

<http://m.therepublic.com/view/story/05583449a09a41929f406600b5c5d864/SC-->

Charleston-Cruises

Margot Rose

(843) 830-0911

010373

R.003019

Exhibit 5



COASTAL
CONSERVATION
LEAGUE

December 31, 2012

In 2009, cruise ships called on Charleston 33 times. This year, 85 calls are scheduled, and the height of the cruise season, October and November, saw an average of three ship visits per week.

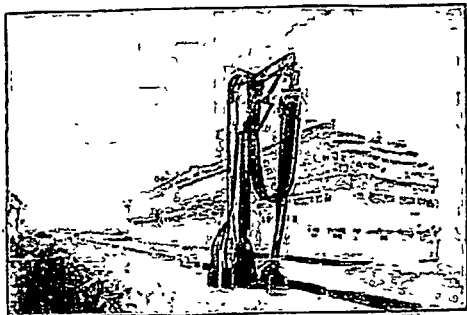
The presence of these looming visitors is impossible to ignore. As *The Guardian's* food journalist recently noted, in an otherwise glowing review of Charleston's cuisine, "a cruise liner parked in the [Charleston] harbor looms over the rooftops and spires like an ocean-going Godzilla." Even as Charleston earned the title of "Best City in the World" from the readers of *Condé Nast Traveler*, it was pointed out by voters that "the only sad thing that has happened to Charleston is allowing large cruise ships to dock in the historic district, which takes away from an otherwise peaceful experience."



Downtown residents and visitors cannot escape the unrelenting noise, the coastline blight, the emissions and the traffic. The benefits of cruise ships are modest, while the damage to our historic city is undeniable. Stephanie Meeks of the National Trust for Historic Preservation stated, "Without reasonable limitations, [cruise ship] impacts threaten the very character of this historic place."

For nearly three years, the Coastal Conservation League (CCL) has been spearheading an effort to impose sensible regulations on cruise ships that visit Charleston. Our demands are simple: limits on the size and number of ships; shoreside power; active monitoring and mitigation of water pollution. And, we seek a comprehensive evaluation of alternate terminal locations.

CCL is particularly concerned about air pollution resulting from the dramatic increase in cruise ship size and frequency. The State Ports Authority (SPA) claims that a new international regulation requiring all ships to burn cleaner fuel by 2015 will adequately address air quality concerns. However, even burning the cleanest fuel, a cruise ship idling at berth produces sulfur dioxide pollution equal to that of 34,000 idling trucks.



Cruise port cities such as Juneau, Los Angeles, Seattle, Vancouver, San Diego, San Francisco, and most recently, Brooklyn, have invested in shoreside power technology to eliminate the air pollution from idling cruise ships. We seek the same for Charleston."

The threats to our water quality are no less significant. Federal law currently permits cruise ships to discharge "treated"¹ sewage within three miles of shore. Raw sewage, untreated gray water², and ground-up garbage may be dumped once the ship is past three miles of shore. Cruise lines have a poor history of following even these lax laws. In 2002, Carnival agreed to pay an \$18 million fine for repeatedly discharging oily waste from their bilges. Because of this behavior and lack of proper federal oversight, cruise locales have begun implementing their own cruise standards. In Alaska, where the state has implemented its own set of pollution regulations on cruise visits, the past three years have been riddled with 35 violations from Carnival Corporation alone.

CCL has spent over \$296,000 in direct costs and staff time to address this serious threat to Charleston. First, we have educated and mobilized community groups to voice their support for regulations, launching a media campaign that has attained international coverage. Second, we have initiated legal proceedings to force Carnival Cruise Lines and the U.S. Army Corps of Engineers (USACE) to comply with applicable laws, and to prove that the City of Charleston can and should require the cleanest industry practices expected from all other businesses.

With your support, we have made outstanding progress. Community leaders, the media and our constituents support our requests, and we expect to conclude this effort over the next three years.

Mobilizing the Public

In 2009, CCL launched a grassroots movement that has produced nearly 1,400 activists, 631 Facebook followers, and the collaboration of three downtown neighborhood groups. To secure the support of these citizens, CCL staff presented to more than 32 community groups, and held a cruise ship forum in 2010, attracting more than 300 attendees. These advocates have made their voices heard through op-eds, and appearances at City Council meetings and other public gatherings. We

¹ "Treated" refers to sewage that has been exposed to the Marine Sanitation Device on board the ship—not that the effluent coming from the device is tested to ensure proper sanitation. In Alaska, a study was conducted to determine the effectiveness of these basic devices and found that what was pumped out of the device after "treatment" was actually more concentrated in pollutants than typical wastewater flowing into a land-based treatment system. Since 9/11, the Coast Guard has been saddled with additional Homeland Security duties and the US Government Accountability Office has found that Coast Guard inspectors "rarely have time during the scheduled ship examinations to inspect sewage treatment equipment or filter systems to see if they are working properly and filtering out potentially harmful contaminants."

² Gray water is wastewater from sinks, showers, galleys, laundry, and cleaning activities aboard a ship.

Continued on following page

have worked with the National Trust for Historic Preservation, the Historic Charleston Foundation, the Preservation Society of Charleston and the Committee to Save the City to build alliances that have amplified our voice and promoted awareness for the need for cruise ship regulation.

In 2012, South Carolina's Office of Ocean and Coastal Resource Management (OCRM) held two public hearings on the SPA's permit applications for structural changes to the proposed new passenger cruise terminal. Both applications requested approval to lay the groundwork for a new terminal equipped to accommodate two large ships at one time, and a passenger boarding ramp that can accommodate ships with 4,500 passenger capacity. These hearings offered citizens access to a state agency with the authority to prevent the construction of infrastructure designed to support an unchecked influx of cruise ships. CCL worked with hundreds of citizens who attended the hearings and submitted written comments on the permits.

CCL is an active partner in a nationwide network of cities grappling with the challenges of regulating the cruise ship industry in their communities. Members of CCL's staff have learned critical lessons from places like Portland, Maine, Key West, Florida and Juneau, Alaska, among other cities. We are now building relationships with other towns encountering similar challenges, including Savannah, Georgia.

The public network of cruise regulation advocates is unprecedented, and CCL continues to play a central role in educating the Charleston community and beyond.

CCL has worked diligently to supply local and statewide media with ongoing stories highlighting the necessity of regulating cruise ships in Charleston. It is safe to note that our news outlets, from the *Post and Courier* and *The State*, to local radio and television stations, understand the relevance of this initiative. Since 2009, over 200 news articles and videos have appeared locally, nationally, and even internationally, including a piece in *the Wall Street Journal* in April 2011, which documented CCL's lawsuit with Carnival.

Most people in the city and well beyond are now aware of the potential problems from uncontrolled cruise ship visitation and the importance of reasonable regulation.

The Legal Strategy

In 1979, Mayor Riley faced a challenge in the form of a rapidly increasing volume of tour buses in downtown Charleston. He noted "We absolutely have the power to help insure the quality of life for our residential areas...We must protect this residential area against an unreasonable degree of non-residential activities." Yet, faced with the proliferation of cruise ships in Charleston, an arguably similar issue, he claimed to lack the power to impose regulations on this new presence. In order to secure the simple, written regulations we seek, CCL sought to prove that the Mayor does, indeed, possess this power.

In June 2011, the Southern Environmental Law Center (SELC) filed suit, on behalf of CCL, Preservation Society of Charleston, Historic Ansonborough Neighborhood Association, and Charlestowne Neighborhood Association, claiming that Carnival Cruise Lines is in violation of certain

Continued on Reverse

city ordinances and a state law. The City of Charleston and SPA joined as defendants, aligning themselves with Carnival, in opposition to their own constituents. If we win this suit, we will have proven that the city is able to execute the regulations we are pursuing on behalf of Charleston.

We are currently awaiting the response of a State Supreme Court-appointed judge, who will recommend which claims will be presented to the Supreme Court.

This past summer, SELC filed federal suit on CCL and the Preservation Society's behalf, against the US Army Corps of Engineers (USACE), claiming that the USACE improperly classified the new 100,000 square-foot terminal as "maintenance" to avoid scrutiny of the project's impacts on historic resources and the environment.

CCL's legal strategy is to illuminate the facts in front of an unbiased arbiter in order to ultimately encourage local and state decision makers to wield their power to protect the quality of life in coastal South Carolina. Both the City of Charleston and the USACE possess this power. A positive outcome to these legal proceedings will allow CCL to hold both entities accountable for the role they play in mitigating the impact of cruise ships in Charleston.

Our supporters have contributed approximately \$60,000 toward the legal fees, consulting fees and internal staff time that we've dedicated to tackling this issue. This generosity has enabled us to advance our efforts, and it will enable us to secure our desired outcome.

This is a costly project, and we expect approximately \$90,000 in legal fees in the coming year. We will see this project through, despite the challenges and opposition we will continue to encounter.

It is our hope that you will make a special gift to CCL to help cover the costs associated with this initiative.

Enclosed is a reply form, for your convenience.

Sincerely,



Dana Beach

"Nature and Community in Balance"

P.O. Box 1861 • Beaufort, S.C. 29901-1861 • Telephone (843) 522-1800 • Fax (843) 525-1197
P.O. Box 1765 • Charleston, S.C. 29402-1765 • Telephone (843) 723-8035 • Fax (843) 723-8308
1001 Washington Street, 3rd Floor • Columbia, S.C. 29201 • Telephone (803) 771-7102 • Fax (803) 771-7103
P.O. Box 603 • Georgetown, S.C. 29442-0603 • Telephone (843) 545-0403 • Fax (843) 545-8854
www.CoastalConservationLeague.org • info@sccl.org

R.003024

Count me in! I'd like to support the Coastal Conservation League with a:

☐ New Membership ☐ Renewing Membership ☐ I am already an active member Please accept my special donation for _____

LIVE OAK SOCIETY		☐ Advocate.....\$250	☐ I am interested in learning more about making a planned gift to CCL.
☐ Coastal Guardian.....\$2,000 +	☐ Contributor.....\$100	☐ Supporter.....\$50	☐ I have already included CCL in my estate plans
☐ Coastal Partner.....\$1,000 - \$1,999	☐ Other.....		
☐ Coastal Benefactor.....\$500 - \$999			

With a membership of \$100 or more, you are eligible for the benefits of a QOL membership ☐ I would like to join QOL
QOL is a community of young individuals and families participating in outings designed to enrich appreciation and understanding of the Lowcountry (visit us at qolonline.org).

☐ I would like to give a CCL membership as a gift. This gift membership is for _____
☐ I would like to make a gift to CCL in honor/memory of _____

Please Choose a Payment Method:

☐ My check, payable to the Coastal Conservation League, is enclosed.
☐ Please charge \$_____ to my _____
☐ Visa ☐ MasterCard Account Number _____ Expires _____
Signature _____ Print Name _____

***All donations are tax-deductible to the fullest extent of the law.**

Please print: ☐ Please do not exchange my name with other organizations
☐ Check here if address is new
☐ Dr. ☐ Mrs.
☐ Ms. ☐ Mr.
☐ Mr. & Mrs.

Name(s) _____
Address _____
City _____ State _____ Zip _____
Home Phone: _____ Business Phone: _____
E-mail: _____

Please help us update our e-mail list.

Sign-up for E-mail Alerts: Receive e-mail alerts and updates on crucial issues facing the South Carolina coast, and **take action!**

Become a CCL member: Return your membership gift in this envelope or share it with a friend – if you already belong.

Help grow our CCL family!

To find out more information on CCL and how to get involved, please visit our website:
www.CoastalConservationLeague.org



Exhibit 6

**SOUTH CAROLINA
COASTAL CONSERVATION LEAGUE, INC.
CHARLESTON, SOUTH CAROLINA**

**AUDITED CONSOLIDATED FINANCIAL STATEMENTS
FOR THE YEAR ENDED DECEMBER 31, 2012**



**SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, INC.
CONSOLIDATED STATEMENT OF FINANCIAL POSITION
DECEMBER 31, 2012**

ASSETS

Current Assets

Cash and cash equivalents	\$ 1,085,736
Reimbursement and other receivables	27,558
Donated stock - trading securities	24,457
Promises to give, net of allowance of \$18,419	205,409
Prepaid expenses	30,197
Property held for sale	115,000
Total current assets	<u>1,488,357</u>

Non-current Assets

Cash and cash equivalents, designated for long-term use	119,966
Investments, designated for long-term use	6,891,136
Promises to give, net of allowance of \$20,032	230,356
Property and equipment, net of accumulated depreciation of \$300,873	996,791
Total non-current assets	<u>8,238,249</u>

Total assets	<u>\$ 9,726,606</u>
--------------	---------------------

LIABILITIES AND NET ASSETS

Current Liabilities

Accounts payable	\$ 95,884
Employee benefits payable	3,410
Accrued compensated absences	93,018
Total current liabilities	<u>192,312</u>

Non-current Liabilities

Promissory note payable	300,000
Total non-current liabilities	<u>300,000</u>

Total liabilities	<u>492,312</u>
-------------------	----------------

Net Assets

Unrestricted:	
Operating	1,393,644
Board designated	7,329,381
Total unrestricted net assets	<u>8,723,025</u>

Temporarily restricted net assets	<u>511,269</u>
-----------------------------------	----------------

Total net assets	<u>9,234,294</u>
------------------	------------------

Total liabilities and net assets	<u>\$ 9,726,606</u>
----------------------------------	---------------------

See accompanying notes to consolidated financial statements.

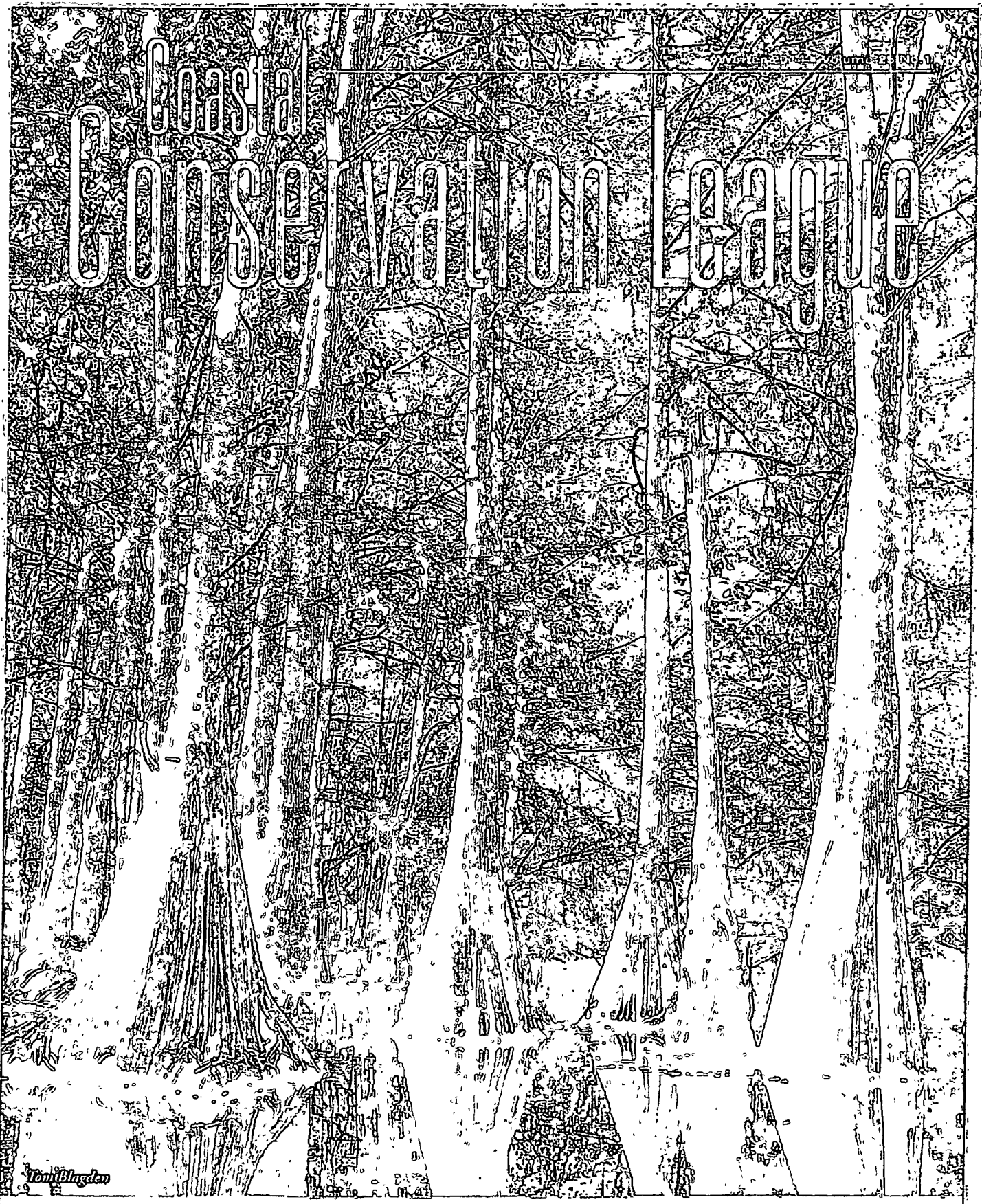
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, INC.
CONSOLIDATED STATEMENT OF ACTIVITIES
FOR THE YEAR ENDED DECEMBER 31, 2012

	<u>Operating</u>	<u>Unrestricted Designated</u>	<u>Total</u>	<u>Temporarily Restricted</u>	<u>Total</u>
Support and Revenue					
Contributions	\$ 3,471,044	\$ 760	\$ 3,471,804	\$ 344,997	\$ 3,816,801
Grants	822,020	-	822,020	-	822,020
Produce sales, net of cost of sales of \$220,543	54,482	-	54,482	-	54,482
Rents	27,702	-	27,702	-	27,702
Investment return	9,613	850,030	859,643	-	859,643
Other income	19,428	-	19,428	-	19,428
Total support and revenue	4,404,289	850,790	5,255,079	344,997	5,600,076
Net assets released from restriction	137,223	8,795	146,018	(146,018)	-
Total support and revenue and net assets released from restriction	4,541,512	859,585	5,401,097	198,979	5,600,076
Expenses					
Program services:					
Water and air quality	2,845,860	-	2,845,860	-	2,845,860
Land use planning	510,015	-	510,015	-	510,015
Climate and energy	340,293	-	340,293	-	340,293
Public education	125,778	-	125,778	-	125,778
Sustainable agriculture	565,094	-	565,094	-	565,094
Total program services	4,387,040	-	4,387,040	-	4,387,040
Supporting services:					
General and administrative	438,404	-	438,404	-	438,404
Fundraising	522,108	-	522,108	-	522,108
Total supporting services	960,512	-	960,512	-	960,512
Total expenses	5,347,552	-	5,347,552	-	5,347,552
Interfund transfers	512,964	(512,964)	-	-	-
Increase (decrease) in net assets	(293,076)	346,621	53,545	198,979	252,524
Net assets, beginning of year	1,686,720	6,982,760	8,669,480	312,290	8,981,770
Net assets, end of year	\$ 1,393,644	\$ 7,329,381	\$ 8,723,025	\$ 511,269	\$ 9,234,294

See accompanying notes to consolidated financial statements.

Exhibit 7

R.003030



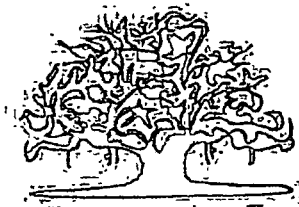
Coastal Conservation League

Tom Blagden

4 ~ Angel Oak Forever 7 ~ A Cleaner, Safer Waccamaw 10 ~ Grow With Us 14 ~ Bill McKibben 15 ~ Skimmer Watch

R.003031

Thank You!



LIVE OAK SOCIETY

Contributions Received from
December 1, 2012 - November 30, 2013

The Coastal Conservation League works very hard to ensure that all donor names are listed correctly; however, occasional mistakes do occur. Please contact Database Manager Nora Kravec at (843) 725-2057 with any questions or corrections.

\$10,000+

Anonymous (5)
Penny and Bill Agnew GF
Mr. Nathan Berry and Ms. Ceara Donnelley
Judith Haskell Brewer Fund GF
Frances P Bunnelle Foundation GF
Butler Conservation Fund, Inc.
Charlotte Caldwell and Jeffrey Schutz GF
Ceres Foundation, Inc. GF
The Chicago Community Foundation
Coastal Community Foundation
of South Carolina GF
Community Foundation of
West Georgia
Community Foundation Serving Richmond
and Central Virginia GF
Mr. and Mrs. Edwin H. Cooper III GF
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The Samuel Freeman Charitable Trust GF
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WestWind Foundation
Joe and Terry Williams
Yawkey Foundation
Stephen and Suzan Zoukas GF

\$5,000-\$9,999

Anonymous (3)
Mr. David Anderson GF
John and Jane Beach
Mr. John Benton and Mrs. Lea C.
Cabaniss Benton
Mr. J. Anderson Berty III
Mr. and Mrs. Charles B. Chitty
Mr. and Mrs. William C. Cleveland
The Colbert Family Fund of the Coastal
Community Foundation
Community Foundation of the
Lowcountry, Inc.
Mr. and Mrs. P. Steven Dopp
Mr. and Mrs. Martin G. Dudley
Mr. and Mrs. Berry Edwards
James L. Ferguson
Fuzzco
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Linda Katner
Mr. and Mrs. John E. Masaschi
Mrs. Frank McClain
Mr. and Mrs. W. Wallace
McDowell, Jr.
Mr. and Mrs. Edward C. Mitchell, Jr.
Mr. Arnold Nemirov
The Osprey Foundation
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Dr. Fred Pittman
Mrs. Joan C. Pittman
Dr. and Mrs. John H. Rashford
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Mrs. Anne Rivers Siddons and
Mr. Heyward Siddons
Mr. David Siddons
Mr. Richard Smith
Mr. Martin Smith
Mrs. Ryan and Erin Smith
Mr. and Mrs. Stanley Stevens
Mr. and Mrs. T. Paul Strickler
The Estate of Ms. Sarah Waring
Toomer
Vanguard Charitable Endowment
Program
Mr. and Mrs. Douglas C. Walker
West Marine Products GF
Mr. and Mrs. David A. Westerlund

Henry and Sylvia Yaschik
Foundation, Inc. GF
Ziff Properties Charleston

\$2,000-\$4,999

Anonymous (2)
Mr. and Mrs. William Applegate IV
Mr. and Mrs. William R. Barrett, Jr.
Virginia and Dana Beach GF
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Mrs. Margaret P. Blackmer GF
Mrs. Margaret N. Blackmer
Ms. Margaret F. Bridgforth
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Mr. and Mrs. John Crawford
Les Dames D'Escoffier International,
Charleston Chapter GF
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Mr. Jesse Colin Young
Michael and Megan Desrosiers GF
Mr. and Mrs. J. Henry Fair, Jr.
Mr. and Mrs. Walter L. Foulke
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Ms. Mary Louise Graff
Mr. and Mrs. Ed Harley
Mr. J. Drayton Hastie
Katharine and Winslow Hastie
Mr. and Mrs. Andrew L. Hawkins
Mr. David O. Haythe
James and Margaret Hoffman
Mr. Robert W. Foster, Sr.
Holly H. Hook and Dennis A. Graves
Mr. and Mrs. Patrick Ilderton
Mr. and Mrs. John Philip Kassebaum
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Bob and Jackie Lane
Mr. and Mrs. W. J. Leath, Jr.
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Lasca and Richard Lilly
Mr. Lorcan Lucy
Mrs. Janine Luka
Magnolia Plantation Foundation
Mr. and Mrs. Charles K. Marshall
Dr. and Mrs. Thomas R. Mather
Mr. and Mrs. Francis X. McCann
Mrs. John L. McCormick
Ms. Jamie Young McCulloch
Mr. and Mrs. Clay McCullough GF
Mr. and Mrs. James O. Mills
Morning Sun Foundation
Mr. and Mrs. Alan A. Moses
The New York Community Trust
Mr. Guy Paschal
Patagonia, Inc.
Charles and Celeste Patrick GF
Mr. and Mrs. David Paynter
Mr. and Mrs. Michael B. Prevost
The Prudential Foundation
Matching Gifts
Quinn Family Charitable GF
Mr. and Mrs. Brooks Quinn GF
Mrs. Charles D. Ravenel

Price R. and Flora A. Reid Foundation
Grace Jones Richardson Trust
John M. Rivers, Jr. Foundation, Inc.
Mr. John M. Rivers, Jr.
David W. and Susan G. Robinson
Foundation
Dr. H. Del Schutte, Jr.
Mr. and Mrs. Martin G. Skelly GF
Kaye S. Smith GF
Ms. Martha Jane Soltow
South Carolina State Ports Authority GF
William and Shanna Sullivan
The Sunshine Foundation
Mr. and Mrs. Jan S. Sowinski
Mr. and Mrs. Jacques S. Thénat GF
Gary and Mary Beth Thornhill
Susan and Trenholm Walker GF
Dr. Louis Wright and Mrs. Patricia
Giddens
Mr. and Mrs. Stephen J. Ziff GF

\$1,000-\$1,999

Anonymous (2)
AT & T GF
Ms. Carrie Agnew
Mr. J. Marshall Allen
Mr. and Mrs. Richard Almeida
Drs. T. Brantley and Penny Arneau
Mr. and Mrs. Dennis Baer
Mrs. Katrina Becker
Blackwater, LLC
Mr. and Mrs. Thomas P. Blagden, Jr.
Bailey Bolen and Carol Ervin GF
Mr. and Mrs. Daniel W. Boona III
Mr. and Mrs. John Burbage GF
Mr. and Mrs. Jack Burnett
Mr. and Mrs. Robert Burt
Dr. and Mrs. Robert W. Cain
Drs. John and Ruth Carter
Mr. and Mrs. Leigh Carter
The Cecil Family
Mr. and Mrs. Arnold B. Chace, Jr.
Mr. and Mrs. Richard L. Childs
Mr. Elliott S. Close
The Coca-Cola Company Matching
Gifts Program
Mr. and Mrs. Richard E. Coen
The Community Foundation of
Western North Carolina
Mr. and Mrs. John J. Cooney
Mr. and Mrs. Jeffrey A. Croft
Dr. and Mrs. Richard L. Cross
Dr. and Mrs. William F. Crosswell
Mr. Chris Davis
Mr. Eric Dodson
Mr. F. Read Dulany, Jr.
Ms. Margaret O. Fabri
Mr. David Farnen
Mr. H. McDonald Felder
Dr. Paula Feldman and
Mr. Peter Mugglestone
Mr. and Mrs. Peter Feldman
Mrs. Nancy B. Fetter

GF = GrowFood Carolina Donor

COASTAL CONSERVATION LEAGUE

18

R.003032

Live Oak Society

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston,)
Historic Ansonborough)
Neighborhood Association, South)
Carolina Coastal Conservation)
League, Charlestowne Neighborhood)
Association, Charleston Chapter of)
the Surfrider Foundation, and)
Charleston Communities for Cruise)
Control,)
Petitioners,)
v.)
South Carolina Department of Health)
and Environmental Control and)
South Carolina State Ports Authority,)
Respondents.)

Docket No. 13-ALJ-07-0056-CC

**PETITIONERS' REPLY IN SUPPORT
OF MOTION FOR
RECONSIDERATION OF ORDER
GRANTING SANCTIONS
AND FOR STAY**

ARGUMENT

The South Carolina State Ports Authority ("SPA") does nothing to refute the legal standard articulated in the Community Groups' motion, instead using its fall-back position of attacking the Groups. The now-familiar attack themes re-appear in its response: attacking Community Groups for having no basis to challenge SPA's permits while failing to acknowledge that SPA's federal permit for was invalidated by a federal court as unlawful; misleading and distracting the Court as to the facts; attempting to bind the Community Groups to statements of counsel made in wholly separate matters; citing case law from Iowa, Kansas and federal courts that is inapplicable and not binding on this Court; and failing to respond to or misconstruing case law that is applicable. None of this

is surprising given SPA's bullying tactics in this case, but SPA's response does nothing to refute the ample legal support for the Court to reconsider its Order granting sanctions based on proper application of the standard for "frivolous" actions.

I. Lack of Judicial Finality on Application of 44-1-60(F) Evidences a Basis in Law for the Motion to Remand

SPA's response supports the Petitioners' assertion that the motion to remand is not frivolous. SPA states that "no court or counsel had ever read the statute [§44-1-60(F)] that way." (Response p. 2). Indeed, the fact that no court had ever considered, much less rendered an opinion on, whether the language "a final review conference must be conducted by the board" means that the board is required to conduct a final review conference reinforces Petitioners' valid basis for seeking a ruling.¹ SPA does not cite to any appellate court opinion that could be construed as conclusive on this question. At best the statements in the cases cited by SPA appear to be *dicta*, generally explaining the mechanism or procedure by which a contested case arrived before the court, rather than elucidating the language of Section 44-1-60(F) and ruling on whether the DHEC Board "must" hear a matter, as the Petitioners contended the statute requires.

Similarly, counsel's "representations" in describing the procedural posture of an appellate case are not conclusive on the question or binding upon the parties. (Response p. 2). The fact that the Community Groups or their counsel have never challenged the DHEC Board's practice concerning Section 44-1-60(F) does not bind the Community

¹ Counterintuitively SPA argues that the fact that there has not been any decision finally determining the meaning of Section 44-1-60(F) "*supports*" its allegation that any motion seeking for such final determination must be frivolous. (Response p. 5).

Groups to DHEC's application in all future cases or obviate the need for judicial finality on the question.

SPA nevertheless suggests that the Court and the Petitioners must acquiesce in the *status quo* and that any challenge to that interpretation is automatically frivolous and subject to sanctions. (Response p. 2 & 4-5). That suggestion to acquiesce was recently rejected by our state's highest court in the case of *EAGLE v. DHEC and MRR Highway 92, LLC*, Opinion No. 27366 (March 12, 2014). As this Court is aware, DHEC's long-standing practice was to apply the first three criteria of Regulation 61-107.17 in determining whether a landfill was "needed." DHEC had *never* utilized the fourth criteria authorizing it to consider "additional factors" that bear upon the question of need. *Id.*, fn. 5. Yet this Court rejected DHEC and MRR's interpretation that DHEC was constrained by the first three criteria, choosing an application of the regulation that was inconsistent with the agency's application. That application of the regulation had never been challenged until EAGLE filed its request for contested case hearing. A similar situation exists here: the agency has applied Section 44-1-60 in a certain manner and its application had never been challenged until this case. While the Court in the present case has disagreed with Petitioners' interpretation of the statute and chose DHEC's view, that does not mean that Petitioners acted frivolously.

SPA misses the mark in stating that "opposing counsel had been implementing this review process (and its discretionary nature at the Board level) since its implementation in 2006." Response p. 4. Counsel for the Petitioners are not the ones who "implement" the review process. It is the DHEC Board that implements the review process under Section 44-1-60(F). The fact that counsel has not previously challenged

that implementation is not the same as counsel actually implementing that procedure themselves.²

SPA faults the Petitioners for not conducting a “factual investigation” or performing “adequate legal research” to confirm whether the arguments are warranted by existing law or a good faith argument for a change in the law. (Response p. 4). Yet, as discussed above, there is no existing law which affirmatively construes Section 44-1-60(F). The most that can be said is that, before the motion filed in this case, no party had ever directly questioned whether the DHEC Board violated Section 44-1-60(F) by declining to conduct a final review conference.

The fact that a law has been interpreted incorrectly is hardly a bar to challenging that interpretation in the present. Even SPA’s non-binding 9th Circuit case, *Christian v. Mattel, Inc.*, recognizes that a party need only have a “good faith argument” for requesting a “modification or reversal of existing law.” 286 F.3d 1118, 1127 (9th Cir.

² SPA has repeatedly cited the Charleston Naval Complex Marine Terminal case to this Court, but has neglected to mention two important realities of that case. First, the S.C. Supreme Court in that matter *reversed* the decision of the ALC finding that the Coastal Conservation League was not entitled to notice of a DHEC permitting decision. (The ALC’s position in that case was adopted in response to the request of the same counsel representing SPA in this case, who there sought (and here seeks) to remove and restrict the right of South Carolina citizens to challenge permitting decisions they believe are harmful and illegal.) Second, SPA has obscured the reality that, in that case, the DHEC Board in fact *undertook* its duty to conduct a Final Review Conference. Thus, in that case, there was no occasion for League counsel – much less any of the courts involved – to pass on the issue of whether the Board would have been required to conduct a review conference had it hypothetically chosen not to conduct one.

2002); *see* Response p. 4. Even assuming that the discretionary nature of the Board's duty to hold a review conference when requested was established as "existing law" – despite never having been directly litigated – the Community Groups made a good faith argument based on plain statutory language, reading "must" to mean "must," and that argument, if accepted, would trump any contrary DHEC interpretation.³

II. SPA Misleads and Distracts the Court as to the Facts

SPA takes statements made by counsel out of context to argue that Petitioners agree with this Court's decision to award sanctions. In every filing before this Court, including arguments made at the hearing on this particular motion, the Petitioners have consistently asserted that sanctions are not warranted for filing a motion to remand on the basis that "must" means "must." Following the language cited by SPA – in which Petitioners counsel stated that they would "certainly will accept anything the court wishes to do" – is the statement that "we do not think and I certainly, sincerely do not believe this is that case for it." This was nothing more than a statement that the Petitioners would comply with the Court's orders even while preserving their rights to seek reconsideration and appeal, should that be necessary.

SPA's citation to an email of a member of one of the Community Groups is also misleading. While SPA claims the email shows that the motion to remand was filed solely for the purpose of delay, Response p. 5, the email was sent on December 3, 2013,

³ *See Etiwan Fertilizer Co.*, 217 S.C. 354, 359 60 S.E.2d 682, 684 (1950); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." (citation omitted)).

nearly a year *after* the motion to remand was filed and could not and does not concern the motion or remove the good base basis for filing it. Of course, to the extent that SPA is arguing that all parties should be sanctioned for any motion that is ultimately denied by the Court, it should itself be sanctioned for filing a completely meritless motion to dismiss the present case for lack of standing. As this Court found, SPA's motion was based on a completely erroneous view of the law given the controlling statutes and case law. The filing of that meritless motion and the time spent responding to it and resolving it hardly hastened this case along, yet sanctions were not sought nor imposed by this Court.

SPA also misleads the Court by citing to a statement made by counsel that there had been "no discussion" with the clients concerning certain emails. Counsel's statement was made in response to SPA's allegations that the Community Groups' sole purpose in filing the motion to remand was "delay"; it was not a statement that counsel had not consulted with the clients prior to filing the motion to remand. In fact, consultation did take place, and counsel told the clients that there was a good faith basis for filing the motion.

Finally, the Coastal Conservation League is registered as a Charity with the Secretary of State and has received 501(c)(3) tax-exempt status from the Internal Revenue Service. Its financial assets as a non-profit are no more relevant to an inquiry of whether the motion to remand amounts to frivolous conduct than would be the hourly bills charged by SPA counsel in filing its various overlong pleadings in this case.

III. The Community Groups Have Sought a Stay

SPA correctly recites Rule 29(D)(3) that a motion to reconsider shall not stay the

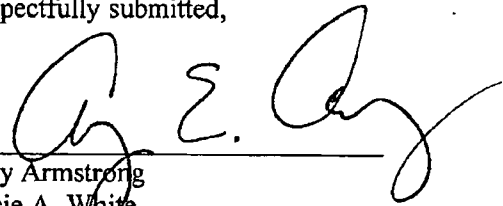
Order of an ALJ or compliance therewith, which is why the Community Groups motion requested both reconsideration of the Order and for a stay of its effect.

SPA's request for additional fees and interest for failure to obtain a stay of the sanctions award is peculiar given that it was responding to a Motion for Reconsideration and For Stay. Petitioners clearly have attempted to seek a stay of the Order, as well as exercised their right to have request that this Court review its decision in light of the proper legal standard.

CONCLUSION

For the reasons set forth above and in their Motion for Reconsideration and For Stay, the Petitioners respectfully request that this Court reverse its Order dated March 3, 2014 finding that sanctions were warranted or, alternatively, for a stay of the effect of that Order pending appeal.

Respectfully submitted,



Amy Armstrong
Jessie A. White
Michael G. Corley
South Carolina Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401

Counsel for Petitioners

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300

Charleston, SC 29401
P (843) 720-5270
F (843) 720-5240
bholman@selcsc.org

*Counsel for Preservation Society of
Charleston and Coastal Conservation
League*

April 8, 2014

Georgetown, SC

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Preservation Society of Charleston,)
Historic Ansonborough)
Neighborhood Association, South)
Carolina Coastal Conservation)
League, Charlestowne Neighborhood)
Association, Charleston Chapter of)
the Surfrider Foundation, and)
Charleston Communities for Cruise)
Control,)
Petitioners,)
v.)
South Carolina Department of Health)
and Environmental Control and South)
Carolina State Ports Authority,)
Respondents.)

Docket No. 13-ALJ-07-0056-CC

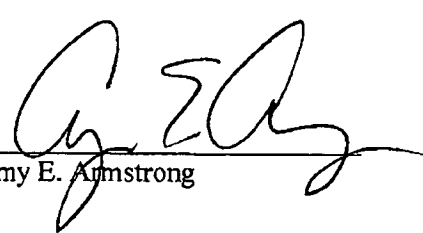
CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of April, 2014, served a copy of the foregoing Reply in Support of Motion for Reconsideration and For Stay upon all parties and counsel of record in the above-captioned case, via United States Mail, postage pre-paid, addressed as follows:

Randolph R. Lowell
Chad N. Johnston
Tracey Green
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, SC 29202-8416

Bradley D. Churdar
South Carolina Department of Health and
Environmental Control
1362 McMillan Avenue, Suite 400
North Charleston, SC 29405

Philip L. Lawrence
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287


Amy E. Armstrong

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 13-ALJ-07-0056-CC

Preservation Society of Charleston,)
Historic Charleston Foundation,)
Historic Ansonborough Neighborhood)
Association, South Carolina Coastal)
Conservation League, Charlestowne)
Neighborhood Association,)
Charleston Chapter of the Surfrider)
Foundation and Charleston)
Communities for Cruise Control,)

Petitioners,)

v.)

South Carolina State Ports)
Authority and South Carolina)
Department of Health and)
Environmental Control,)

Respondents.)
-----)

ADMINISTRATIVE HEARING

Friday, September 6, 2013
10:03 a.m. - 1:19 p.m.

The hearing before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 6th day of September, 2013 before Amy G. Byrd, Court Reporter and Notary Public in and for the State of South Carolina.

CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

R.003042

APPEARANCES:

Amy E. Armstrong, Esquire

South Carolina Environmental Law Project
430 Highmarket Street
Post Office Box 1380
Georgetown, South Carolina 29440
Attorney for Preservation Society of Charleston
and All Petitioners

Blan Holman, Esquire

Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, South Carolina 29401
Attorney for Preservation Society of Charleston
and All Petitioners

W. Jefferson Leath, Esquire

Leath, Bouch & Seekings, L.L.P.
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29401
Attorney for SC Coastal Conservation League

Randolph R. Lowell, Esquire

Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, South Carolina 29201
Attorney for South Carolina State Ports Authority

Chad N. Johnston, Esquire

Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, South Carolina 29201
Attorney for South Carolina State Ports Authority

Phillip L. Lawrence, Esquire

South Carolina State Ports Authority
P.O. Box 22287
Charleston, South Carolina 29413
Attorney for South Carolina State Ports Authority

Bradley D. Churdar, Esquire

SC Department of Health and Environmental Control
1362 McMillian Avenue
Charleston, South Carolina 29405
Attorney for SCDHEC/OCRM

CREEL COURT REPORTING, INC.

1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

R.003043

Also Present:
 Jamie A. White

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EXHIBITS

(No Exhibits were Marked for this Hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

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R.003044

1 **THE COURT:** All right. This is a motions hearing
2 for the Preservation Society of Charleston et
3 al petitioners versus South Carolina Department
4 of Health and Environmental Control and South
5 Carolina Ports Authority is the respondent.
6 The docket number is 13-ALJ-07-0056-CC. Mr.
7 Churdar has informed us that he is on his way.

8 **MS. LOWELL:** He's here, Your Honor.

9 **MR. CHURDAR:** Your Honor, I did actually make it on
10 time, I was just trying to be cautious.

11 **THE COURT:** Okay. I was going to say and may not
12 make it here on time. We took care of that
13 one. All right. Come on in.

14 **(Off the Record from 10:05 a.m. until 10:06 a.m.)**

15 **THE COURT:** I don't know who even goes first. I can
16 tell -- let me pull up one of my files.

17 **MS. ARMSTRONG:** Your Honor, I understood from an
18 email correspondence that you were going to
19 hear the Motions to Strike first?

20 **THE COURT:** All right.

21 **MR. LOWELL:** That's my understanding. I think --
22 based on the email exchange, my understanding
23 was the Motions to Strike first, then the
24 Motion for Sanctions and then the Motion to
25 Dismiss.

1 THE COURT: Okay.

2 MR. LOWELL: They are the moving party on the
3 Motions to Strike ---

4 THE COURT: All right.

5 MR. LOWELL: --- so they would be heard first and
6 then we would be first on the last two.

7 THE COURT: Well, if we're going to go down the
8 Motions to Strike path, the first one, I'll
9 just tell you up front, the Motion to Strike
10 cruise opponents, that one just doesn't seem
11 -- if this was a jury trial, I might could
12 understand that but I don't think any -- well,
13 the best way for me to put it is, I have no
14 visceral reaction for the term cruise
15 opponents. And just so that the record will be
16 clear, when I say visceral reaction, the phrase
17 cruise opponents does not invoke in me some
18 thought that they -- that phrase could be
19 individuals that are attached to that phrase
20 are individuals who have any kind of negative
21 connotations. I might add that I've never even
22 been on a cruise in my life so that -- there is
23 no feeling attached to cruises in my world. So
24 that one to me is just -- unless you're doing
25 it for a public consumption, from the Court's

1 perspective, it has absolutely no effect.

2 **MS. ARMSTRONG:** Your Honor, I certainly understand
3 that it may have no effect on you, but these
4 are all public records. Everything that's
5 filed in this Court is accessible to the public
6 and it does have an inflammatory reaction, a
7 visceral reaction to the public -- in the
8 public eye and so ---

9 **THE COURT:** How about ---

10 **MS. ARMSTRONG:** --- when we're using the term
11 opponents, then that's signifying something
12 that's just not accurate and so it's not only
13 not accurate, but it doesn't ---

14 **THE COURT:** Well, it is accurate. They are, I mean,
15 if you want to keep extending the phrase and
16 making it even bigger, it is opponents or
17 individuals that are opposed to big cruise
18 ships or whatever type of cruise ship that
19 we're dealing with, so this is only just a
20 little short version of that, is the way that
21 I interpreted it, so ---

22 **MS. ARMSTRONG:** Well, I think the way -- I think
23 that the way my clients hear it is it feels
24 like it's harassing because they have said all
25 along we want reasonable limitations on the

1 cruise industry and we're not opposed to all
2 cruise ship operations.

3 **THE COURT:** Well, it doesn't say all cruise
4 opponents.

5 **MS. ARMSTRONG:** That's the impression, I think ---

6 **THE COURT:** All right.

7 **MS. ARMSTRONG:** --- that people are left with and
8 that's the reason for the Motion.

9 **THE COURT:** Okay. All right. Anything else on
10 that?

11 **MS. ARMSTRONG:** That's all, Your Honor.

12 **THE COURT:** All right.

13 **MS. ARMSTRONG:** I understand that you don't want to
14 hear a whole lot of argument on it, but I feel
15 like my clients ---

16 **THE COURT:** Well, I ---

17 **MS. ARMSTRONG:** --- needs to be heard.

18 **THE COURT:** When I say I don't want to hear a whole
19 lot of argument, I mean, I'm telling you how I
20 -- my approach that I'm ready to hear your
21 argument once you understand my perspective.
22 So don't take me the wrong way on that, I'm not
23 cutting you off. All right. Let me see.

24 **MS. ARMSTRONG:** Your Honor, we haven't even gotten
25 -- we jumped right in and started talking about

1 the Motions.

2 **THE COURT:** Right.

3 **MR. HOLMAN:** Blan Holman, Your Honor, just to

4 introduce myself.

5 **THE COURT:** I know who you are.

6 **MR. HOLMAN:** Okay. This is Jeff Leath.

7 **THE COURT:** Okay. All right.

8 **MS. ARMSTRON:** Jessie White is new to my office,

9 Your Honor.

10 **THE COURT:** Well, welcome to the neighborhood.

11 **MS. WHITE:** Thank you, Your Honor.

12 **MR. LOWELL:** And on this side of the house, Randy

13 Lowell from Willoughby and Hoefer on behalf of

14 the Ports Authority.

15 **MR. JOHNSTON:** Chad Johnston on behalf of the Ports

16 Authority as well.

17 **MR. BARNES:** I'm Phillip Barnes, Your Honor, from

18 the Ports Authority.

19 **MR. CHURDER:** Brad Churder, as I previously

20 mentioned with the OCRM.

21 **THE COURT:** Okay. All right. Any response?

22 **MR. LOWELL:** Your Honor, I mean, quite simply we

23 frame cruise opponents as just factually

24 descriptive. I mean, we have petitioners who

25 are posing a permit for five pilings that would

1 be used for a cruise channel. And I understand
2 that they may disagree with the extent of how
3 they want to oppose cruise, but I mean it's
4 noninflammatory. When you look at the cases
5 that they site, the term cruise opponents isn't
6 even close to what the facts were in those
7 cases. So it's not inflammatory, it's not
8 harassing, it's just factually descriptive.

9 **THE COURT:** All right. Personally, I think you
10 could probably pick another phrase that would
11 be -- would invoke less reaction from their
12 side, but from a legal perspective, I don't --
13 I see your -- if I thought -- where I said my
14 perspective, you did make a point that I kind
15 of thought about and that is, if I would find
16 that it could be inflammatory for either me or
17 any of the other courts above me, I would agree
18 with you that -- but I don't see that. Maybe
19 it makes your clients feel like they are being
20 wrongly criticized, but from the legal
21 perspective at this point in time, I'm going to
22 deny that Motion. All right. So let's get
23 into striking exhibits.

24 **MS. ARMSTRONG:** Thank you, Your Honor.

25 **THE COURT:** Now, on that part, let me tell you how

1 I view that.

2 **MS. ARMSTRONG:** Pardon me?

3 **THE COURT:** Let me tell you how I am viewing that.

4 **MS. ARMSTRONG:** Okay.

5 **THE COURT:** In fact, I don't mind if you hit me with
6 a sur- reply.

7 **MS. ARMSTRONG:** Okay.

8 **THE COURT:** But you have a point on many of your --
9 the matters that you have raised, I think.
10 Especially, the newspaper articles and things
11 like that. In my history of being a judge
12 though I don't think I've ever had anybody seek
13 to strike the exhibits. They just ask the
14 Court to ignore them. And if I find that it's
15 not relevant or applicable, that's what I would
16 normally do. But you've made the motion so I
17 -- and I'll tell you that -- and just to go
18 ahead and address the sur-reply in this area,
19 I really thought that was a waste of my time at
20 this point in time. And the reason I say that
21 is I've first got to decide A, is it new. And
22 then B, am I going to consider it or strike it.
23 If that is the case, you don't need to reply to
24 it. Now, I know you that you have now made a
25 motion for me to do it, so you're setting

1 yourself up down the path that I don't rule in
2 your favor. But as far as right now is
3 concerned, at this hearing, I would like to
4 leave the reply or the sur-reply to another
5 day. Okie doke?

6 **MS. ARMSTRONG:** I understand, Your Honor. Thanks.
7 I would like to just kind of start with just a
8 little bit of background about who the
9 petitioners are in this case.

10 **THE COURT:** Well, I've read all the stuff.

11 **MS. ARMSTRONG - DIRECT EXAMINATION - MOTION TO**
12 **STRIKE EXHIBITS:**

13 **MS. ANDERSON:** Yeah, I understand you've read it and
14 I will be real brief, Your Honor.

15 **THE COURT:** Okay.

16 **MS. ARMSTRONG:** But I think just because it kind of
17 plays into why the Motion to Strike was filed
18 and the purpose behind that. And the purpose
19 is really, you know, we've got a very diverse
20 group of petitioners involved here. I often
21 don't agree on the same issue. There are
22 neighborhood groups, preservation groups,
23 environmental groups and what they have in
24 common, obviously, they all enjoy living in
25 Charleston and using and enjoying the resources

1 of Charleston and they want to continue to do
2 that. And where they all are aligned is the
3 concerns about air quality emissions, the
4 impacts on health, congestion and traffic,
5 impacts to historical resources and
6 architectural resources. And what they've done
7 is they've asked to be heard. They've asked to
8 be heard by DHEC and to be heard by the State
9 Ports Authority. And really, what they all
10 agree on is that the purpose of this review
11 process is to look at the best options for
12 making this the best terminal that it can be.
13 And they have some specific ideas about how
14 that can be accomplished. How air emissions
15 could be decreased, you know, plans for sort of
16 making the cruise operations and residents and
17 tourists and visitors and businesses be in
18 harmony in the City of Charleston and this is
19 a complex case. And there is a lot of
20 discovery that's in progress right now and the
21 petitioners are really learning and building
22 their case at this point. But SPA has been,
23 you know, very aggressively pushing -- pushing
24 it's plan. It really would preferred to have
25 no review and did not have any consideration of

1 the interested parties perspectives on how this
2 cruise terminal is constructed and what
3 ultimately flows from this project. And
4 really, the Motions to Dismiss are further
5 design to limit the group of this Court's
6 review and present the Court it's version of --
7 and it's theory of the case. And the reason
8 why we filed the Motion to Strike is because
9 what SPA is attempting to do with attaching all
10 of these, you know, 45 exhibits to the standing
11 motion, those exhibits are all related to
12 issues in dispute in this case. So while SPA
13 has framed it as an Motion to Dismiss for lack
14 of standing, what they've really done is put
15 the merits before this Court. It's presented
16 its own version of what the facts are in this
17 case, but ---

18 **THE COURT:** Now, when you say the merits, I mean,
19 were you -- by attaching affidavits, once we've
20 entered the affidavits in the Summary Judgement
21 Motion time frame -- now you're telling me that
22 -- or not time frame, excuse me, we moved for
23 a Motion to Dismiss to a Summary Judgement
24 pursuant to the law.

25 **MS. ARMSTRONG:** Right. That's the thing ---

1 **THE COURT:** Legally, that's what ---

2 **MS. ARMSTRONG:** That's what I believe that is what
3 they're trying to do. I mean that's what the
4 law says.

5 **THE COURT:** That's what's being done. I mean,
6 that's what the law is. Once you file
7 affidavits, the only instance where you can,
8 that I'm aware of, is where you can consider
9 affidavits in a Motion to Dismiss is
10 jurisdictional.

11 **MS. ARMSTRONG:** Right.

12 **THE COURT:** The law is clear on that. But other
13 than that, once you make -- once y'all and I
14 say the petitioners, once you file the
15 affidavits, you transition this into a Summary
16 Judgement issue. So there is a -- we are at
17 that place. I mean, that's not a determination
18 on the merits, I mean -- and Mr. Holman, you
19 can shake your head all you want, if you can
20 cite me the law where I'm wrong, I will gladly
21 reverse what I just said.

22 **MR. HOLMAN:** Okay. Your Honor ---

23 **THE COURT:** Yes.

24 **MR. HOLMAN:** If I may, just briefly, and I don't
25 want to get the cart ahead of the horse, but I

1 think that our position would be that the
2 respondent's Motion to Dismiss on standing,
3 there is case law that says it's a burden
4 shift, a production burden to the defendant,
5 I'm sorry, the plaintiff to show that there's
6 a basis for the allegations.

7 THE COURT: Yes.

8 MR. HOLMAN: And that does not convert it to ---

9 THE COURT: Is there case on that because I couldn't
10 find one.

11 MR. HOLMAN: Your Honor ---

12 THE COURT: Because I've been looking in the ---

13 MR. HOLMAN: Your Honor, I will give it to you.
14 That is our position and we have cited that and
15 the Supreme Court's has issued ---

16 THE COURT: So your position then is that -- is that
17 true of all the parties, that this is a
18 separate Motion to Dismiss and not a Summary
19 Judgement?

20 MR. LOWELL - CROSS EXAMINATION - MOTION TO STRIKE
21 EXHIBITS:

22 MR. LOWELL: I think that is true.

23 THE COURT: Okay.

24 MR. LOWELL: I think, but, there's a caveat.

25 THE COURT: Okay.

1 **MR. LOWELL:** Most of the cases that talk about
2 the, you know, the Motion to Dismiss as limited
3 to the pleadings and you can't consider the
4 other stuff is your run of the meal 12-B-6 or
5 it's failures ---

6 **THE COURT:** Well, I understand all that.

7 **MR. LOWELL:** But, I mean, there is, I mean, the
8 Woodward versus ---

9 **THE COURT:** Is that the one you're talking about Mr.
10 Holman?

11 **MR. HOLMAN:** No, Your Honor, it's not.

12 **THE COURT:** Okay. I'm sorry.

13 **MR. LOWELL:** The Court of Appeals said the Motion to
14 Dismiss may be supported by and the Court may
15 consider affidavits or other evidence proving
16 lack of jurisdiction.

17 **THE COURT:** But standing is ---

18 **MR. LOWELL:** Standing is justiciability.

19 **THE COURT:** Yeah.

20 **MR. LOWELL:** Which is ---

21 **THE COURT:** Which it is not jurisdiction.

22 **MR. LOWELL:** Well, it depends on which opinion you
23 want to read.

24 **THE COURT:** As a matter of fact, justiciability has
25 three components as I remember, rightness,

1 moveness and standing.

2 **MR. LOWELL:** That's correct.

3 **THE COURT:** And on the case law that I read said
4 that the jurisdictional issues for which you
5 could submit affidavits related -- that's the
6 personal jurisdiction type issues and are
7 probably subject matter too, but I just didn't
8 -- apparently I'm misconstruing both of y'all.

9 **MR. LOWELL:** Well, I've got ---

10 **THE COURT:** But if y'all have got -- I guess I could
11 deal with it later on, but on the other hand to
12 me understanding this particular issue relates
13 to how I'm going to proceed and view your
14 arguments for the rest of the day.

15 **MR. LOWELL:** Well, I think, I mean justiciability is
16 you have to establish justiciability to get in
17 the court room.

18 **THE COURT:** I understand that.

19 **MR. LOWELL:** I mean, it's the gatekeeper. So ---

20 **THE COURT:** But is it relevant?

21 **MR. LOWELL:** --- to determine standing and
22 justiciability issues, I mean I have never --
23 I don't want to say never. I have rarely seen
24 a challenge on standing that did not involve
25 consideration of affidavits, evidence,

1 documentary evidence. I mean, the federal case
2 law on this point -- and they talk about in the
3 context in a Motion to Dismiss and in the
4 context of a Motion for Summary Judgement, but
5 universally, the court can consider affidavits
6 and other evidence to determine whether
7 standing has been proven.

8 **THE COURT:** I understand that. All I'm trying to
9 determine is is it viewed as a Motion to
10 Dismiss where you are only looking just at the
11 allegations of the parties and nothing more or
12 is it viewed as something where there's -- I
13 could considers the affidavits, I'm considering
14 a factual determination or statement, so am I
15 moving toward a genuine evidentiary material
16 fact and that type of view regarding this
17 aspect of the case?

18 **MR. LOWELL:** Well, I think it's a substantive
19 analysis of the latter rather than the former.

20 **THE COURT:** Okay.

21 **MR. LOWELL:** I mean, it is -- and there is case law
22 that says the court can render findings of fact
23 to determine whether standing exists.

24 **THE COURT:** All right. Well, that takes me back to
25 Luian. To where it says, quote, that you can

1 consider standing at the completing stage and
2 the summary judgement stage and at the trial
3 stage and in each one of those stages, the
4 burdens and analysis of the court shifts.

5 **MR. LOWELL:** Shifts. It's like a sliding scale.

6 **THE COURT:** If that is true, if Luian is true in the
7 setting forth that then in the Motion to
8 Dismiss stage, which normally doesn't have
9 affidavits except in jurisdictional issues.
10 There would be a transitions when you get to
11 the affidavits. That's just the way I viewed
12 it since there were pretty different view
13 points.

14 **MR. LOWELL:** And in the end, I agree with that.
15 Judge, I'll try to be analytical but we're
16 beyond that.

17 **THE COURT:** Well, okay.

18 **MR. HOWELL:** Your Honor, if I just might, I think we
19 found the case ---

20 **THE COURT:** Yay.

21 **MR. HOLMAN:** I think the case is the Baird case and
22 not to dispute, I think Mr. Lowell teaches law
23 at the University of South Carolina, I do a
24 little teaching down at the College of
25 Charleston or the Charleston School of Law.

1 This issue comes up a lot and I think there is
2 a real ---

3 **THE COURT:** This issue?

4 **MR. HOLMAN:** Well, we teach -- I think he probably
5 teaches standing and ---

6 **THE COURT:** Oh, oh. Okay.

7 **MR. HOLMAN:** I think the view is that just because
8 there are affidavits introduced by a plaintiff
9 in response to a challenge to standing, it does
10 not confer a Motion to Dismiss into a Motion
11 for Summary Judgement and what's gone on here,
12 I think Mr. Lowell is correct that generally in
13 standing cases you'll often see at the summary
14 judgement stage you'll see evidence that is in
15 dispute. But in a Motion to Dismiss, it's more
16 of a burden shifting. That is if someone has
17 a loosely drawn complaint let's say they were
18 injured by something but they don't have
19 anything to back it up. The defendant makes a
20 Motion to Dismiss for lack of standing saying
21 that they haven't articulated what the injury
22 is, what the causation is or if it's
23 addressable. Then the burden shifts of
24 production to show that there's something to
25 back it up. So that's where the affidavits

1 come in on the part of the plaintiff responding
2 to a Motion to Dismiss for a lack of standing

3 ---

4 **THE COURT:** Okay.

5 **MR. HOLMAN:** --- and that doesn't convert.

6 **THE COURT:** All right. And the Baird case address
7 that?

8 **MR. HOLMAN:** I believe that's the South Carolina
9 case -- I think that -- Judge, we will get the
10 case law.

11 **THE COURT:** Well, I'm on West Law right now if you
12 will give me the cite.

13 **MS. ARMSTRONG:** 33-SC-519.

14 **THE COURT:** All right. I'll presume that I failed
15 to find the law and that y'all knew it better
16 than I. So, we'll just proceed. 33 - South
17 Carolina, what?

18 **MS. ARMSTRONG:** 333-SC-519.

19 **THE COURT:** Okay.

20 **MR. HOLMAN:** And Your Honor, I think the case law,
21 as Mr. Lowell says, is much more developed in
22 the federal context.

23 **THE COURT:** All right. Maybe I missed it. 33-SC --
24 maybe I typed it wrong.

25 **MS. ARMSTRONG:** 333.

1 **THE COURT:** 33-SC-333?

2 **MS. ARMSTRONG:** No, 3-3-3, SC-519.

3 **THE COURT:** Okay. That's all right. I just wanted
4 to find it. Okay. I'm there. I will look at
5 it as we go along. All right. With that said,
6 it's to your advantage if that's the way we're
7 going to look at it.

8 **MS. ARMSTRONG:** Right. And so that's why
9 Petitioner's came forward. There were some
10 allegations withstanding and with the request
11 for a contested case hearing with a statement
12 of course. In order to meet the -- our burden
13 of proving all of the elements of standing, we
14 came forward with affidavits that the Court
15 accepts in looking at the standing question on
16 a Motion to Dismiss. Now, when it gets -- when
17 we get to the Motion to Strike, the problem is
18 that those exhibits don't go to addressing
19 standing directly and you can't -- at this
20 Motion to Dismiss stage what we've got the law
21 on the screen right now is the courts take true
22 the allegations of the non-moving party and so
23 the factual disputes are resolved in our favor.
24 And so what SPA has done here is by putting
25 forth all these exhibits, have tried to dispute

1 the allegations even though the court affords
2 us the benefit of the doubt when we're making
3 allegations and it's just looking at the
4 sufficiency of the allegations made on standing
5 and instead what SPA has done here is try to
6 kind of balancing and allaying and asking the
7 court to make determinations on merits based
8 questions rather than standing. So, you know,
9 the case of U.S. Supreme Court of York v.
10 Sullivan talked about the purpose, for purposes
11 of ruling on a Motion to Dismiss, the Court
12 accepts as true all the allegations in the
13 complaint. And construes the complaint or the
14 allegations, in other words, you know, if they
15 were ---

16 **THE COURT:** Can I stop you just for a minute?

17 **MS. ARMSTRONG:** Sure.

18 **THE COURT:** Mr. Holman, I looked at the case.
19 You're going to need to get me more.

20 **MR. HOLMAN:** I understand, Your Honor.

21 **THE COURT:** Here's what the case says, please. This
22 case is very important because this is how I'm
23 going to know how to consider this case. It
24 says -- and I'll just read that part. The
25 allegations of the complainant are factually

1 sufficient under rule 8-A-1 that do not
2 permanently show subject matter jurisdiction.
3 That's what I was addressing earlier. The
4 Motion to Dismiss may be supported by and the
5 Court may consider affidavits or other
6 evidence proving lack of jurisdiction. Now,
7 there's where I went.

8 **MR. HOLMAN:** Your Honor, and as soon as I said that
9 we saw that it said affects matters of
10 jurisdiction. I will say to you that I am
11 unaware of a South Carolina case on this point.

12 **THE COURT:** Right.

13 **MR. HOLMAN:** Because I think it's not subject matter
14 jurisdiction as to the ---

15 **THE COURT:** It says defer in the federal law,
16 explain that to me.

17 **MR. HOLMAN:** Yes, Your Honor. And if it would be --
18 -

19 **THE COURT:** Well, all I'm saying in reviewing this
20 thing -- are both of y'all are in agreement,
21 y'all tell me the law is out there ---

22 **MR. HOLMAN:** Okay.

23 **THE COURT:** --- the point was that I have searched
24 South Carolina law ---

25 **MR. HOLMAN:** Right.

1 **THE COURT:** --- I didn't find it. I found this.

2 **MR. HOLMAN:** Right.

3 **THE COURT:** I've already read this.

4 **MR. HOLMAN:** Right.

5 **THE COURT:** And there was no ---

6 **MR. HOLMAN:** If you'd like to take a break, I bet we
7 could find the case.

8 **THE COURT:** No, I'm saying I want it later on.

9 **MR. HOLMAN:** Okay.

10 **THE COURT:** Okay. Go ahead Ms. Armstrong.

11 **MS. ARMSTRONG:** Your Honor, just a few more cases
12 that we cited in our brief the Toussaint versus
13 Ham case, a South Carolina case, that talks
14 about the allegations made about a claim that
15 in all reasonable inferences, reasonably
16 deducible there from are taken as true on a
17 Motion to Dismiss.

18 **THE COURT:** Okay.

19 **MS. ARMSTRONG:** So ---

20 **THE COURT:** And now that we're there, I understand
21 that.

22 **MS. ARMSTRONG:** Yes. And so, so that's where we
23 are. I think the court just looks at the
24 sufficiency of the allegations. Doesn't do a
25 weighing of the evidence and particularly here

1 where we've got exhibits that really go to the
2 merits of the case, that go to facts that are
3 to be in dispute, before the petitioners have
4 the opportunity to fully develop the facts and
5 learn all about the case so that we can have --
6 so that this court can make an informed
7 decision about what the merits are. That's why
8 we're asking for the Motion to Strike. The
9 case that's most on point is the Smiley versus
10 DHEC case. I know, Your Honor, is familiar
11 with that case and that case, that was also on
12 the Motion to Dismiss for lack of standing and
13 what the Supreme Court said in that case is
14 that the affidavit demonstrates that he has a
15 direct stake in determining decision and that's
16 sufficient for a standing allegation. But
17 there isn't this sort of weighing of the
18 evidence especially on merits based questions
19 to allow that standing. And I think we've kind
20 of, you know, hashed this out already, but just
21 one more case, Brown versus Environmental
22 Management and Research, you know, just
23 another South Carolina case that talks about
24 how Motions to Dismiss are resolved and they're
25 resolved in favor of the non-moving party when

1 they provide sufficient allegations.

2 **THE COURT:** Can you go back to the Smiley case and
3 read that again?

4 **MS. ARMSTRONG:** Sure.

5 **THE COURT:** And you said something about an
6 affidavit in that case?

7 **MS. ARMSTRONG:** Right, Smiley -- Mr. Smiley
8 submitted an affidavit in response to a Motion
9 to Dismiss and the court ---

10 **THE COURT:** The word affidavit doesn't come up in
11 that case at all. Well, we'll keep going down
12 that path.

13 **MS. ARMSTRONG:** That's -- that is, I mean, I'm not
14 sure why it's not showing up, but Smiley
15 submitted an affidavit. The affidavit itself
16 is cited in the Court's opinion.

17 **THE COURT:** All right. Maybe I will find it, but
18 I'm not finding it. Go ahead.

19 **MS. ARMSTRONG:** And so, Your Honor, you indicated at
20 the beginning of this argument that you would
21 be likely to just disregard this exhibits and
22 I guess the real problem ---

23 **THE COURT:** That's what we've done in the past.

24 **MS. ARMSTRONG:** Yes, and I understand that. I guess
25 that the concern that the petitioners have and

1 we've identified this in our reply is that ---
2 **THE COURT:** The reply or the sur-reply because I
3 haven't read the sur-reply.

4 **MS. ARMSTRONG:** Well, this is on the Motion to
5 Strike and so we did file it.

6 **THE COURT:** Oh, okay.

7 **MS. ARMSTRONG:** And we did file a motion, we filed
8 a reply.

9 **THE COURT:** Okay.

10 **MS. ARMSTRONG:** And I think one of the big problems
11 here is that this stuff, these exhibits have
12 not -- they will be part of the record on
13 appeal in this case because they are part of
14 the motion and attached these exhibits to a
15 motion ---

16 **THE COURT:** I read that.

17 **MS. ARMSTRONG:** --- and so the problem is that
18 you've got a lot of documents that might or
19 might not come in. This court may decide to
20 let them in, or may not decide to let them in.
21 But they're going to be in the record
22 nonetheless. And so ---

23 **THE COURT:** Well, they'll go in the record as
24 attached to a motion but not in the record as
25 a part of the merits.

1 **MS. ARMSTRONG:** Right. And the way that this case
2 is proceeded so far, I don't think it is
3 unrealistic to expect that those exhibits are
4 going to be referred to in an appellate
5 briefing if they're -- if they're not
6 ultimately allowed in under the rules of
7 evidence by the court.

8 **THE COURT:** Okay.

9 **MS. ARMSTRONG:** And so that is -- that is a concern.
10 They're also -- it's pretty voluminous. There
11 are 45 exhibits. Some of which are -- well, we
12 kind of fleshed this out a little bit already,
13 but some of which are just not going to meet
14 the requirements for the rules of evidence to
15 come in and we can go through those
16 individually if Your Honor wants, but we think
17 ---

18 **THE COURT:** Well, we don't want to, but I feel like
19 I may have to.

20 **MS. ARMSTRONG:** Yes.

21 **THE COURT:** Or I suppose we could group them. Is
22 there a way to group them?

23 **MS. ARMSTRONG:** Well, Mr. Lowell ---

24 **THE COURT:** Well the newspaper articles. Don't need
25 those. What's the next grouping?

1 **MS. ARMSTRONG:** Right. Well, I think that there are
2 some things that are already before the court.
3 Like the application ---

4 **THE COURT:** Yeah.

5 **MS. ARMSTRONG:** --- the permit, maps that were
6 attached to the permit itself. Those aren't
7 -- are already in. So, I don't know if there's
8 an easy way to group them. I mean, there's
9 certainly documents that Mr. Lowell referred to
10 them as DHEC file documents. Federal
11 administrative record documents. Newspaper
12 articles. And affidavits. And so I don't know
13 if there's a clear, easy way to do that.

14 **THE COURT:** Well, affidavits come in.

15 **MS. ARMSTRONG:** Right. And I think that ---

16 **THE COURT:** The implication thereof we've argued
17 about.

18 **MS. ARMSTRONG:** Yeah. Well, affidavits to establish
19 standing -- the affidavits that are submitted
20 by the Ports Authority would, if you would look
21 at, for example, the affidavit submitted by Jim
22 Newsome. One the one, he's getting to the
23 merits. The merit question that he's getting
24 to is saying we're going to operate -- we're
25 going to have cruise ship operations out of

1 Union Pier Terminal whether or not this permit
2 goes forward. Now, that statement contradicts
3 statements made in the Port Authority's own
4 permit application where they say this permit
5 is critical because they need to have a new
6 terminal. And so they're contradictory
7 statements that are put forth by the State
8 Ports Authority but the real problem is that
9 goes to the merits of the case. This isn't a
10 -- that's not a standing question.

11 **THE COURT:** Well ---

12 **MS. ARMSTRONG:** I mean, the allegations aren't ---

13 **THE COURT:** Don't consider the affidavit, but if
14 they make the allegation that the Court -- that
15 you don't -- you haven't established standing
16 because of that reason, isn't that the burden
17 shifting factor that Mr. Holman was referring
18 to? That once they make the allegation is it
19 upon you to present an affidavit that there is
20 a dispute in that regard, I don't know if
21 that's a dispute on your end, but the summary
22 judgement, but that you should offset that
23 allegation? Mr. Holman's getting back up.

24 **MR. HOLMAN:** Your Honor, I would just say that we've
25 done that in the sense that we've pointed to

1 the permit application of the State's Ports
2 Authority where they said they needed to build
3 a new terminal to comply with Homeland
4 Security. So we understand that their position
5 is now that they'll operate the cruise
6 terminal, they don't need to do anything with
7 it with or without a permit. They're, just, I
8 guess, doing this, well they've got \$35 million
9 in bond money for a reason. They want to
10 expand the cruise operations. But we have
11 responded by pointing on that very point on the
12 Homeland Security terminal need for terminal
13 upgrades, we have met the burden of production
14 there. Now, one day we'll get to dispute the
15 facts, I hope, about what exactly is needed and
16 we'll get a chance to depose through this
17 commission.

18 **THE COURT:** Okay. Go ahead.

19 **MS. ARMSTRONG:** So, I think that just makes the
20 point of that, of the affidavits not being ---

21 **THE COURT:** Needed.

22 **MS. ARMSTRONG:** Not needed.

23 **THE COURT:** All right.

24 **MS. ARMSTRONG:** I think as far as the Motion to
25 Strike the standing affidavits, we can move on

1 to the other Motion to Dismiss. The exhibits
2 attached to the Motion to Dismiss for sanctions
3 or if you want to hear from SPA on the standing
4 exhibits. How would you like to proceed?

5 **THE COURT:** I think I would like to group each one
6 so, in other words, if you're through on that
7 one then I'll hear from them.

8 **MS. ARMSTRONG:** Thank you, Your Honor.

9 **THE COURT:** All right.

10 **MR. JOHNSTON - CROSS EXAMINATION - MOTION TO STRIKE**
11 **EXHIBITS:**

12 **MR. JOHNSTON:** Your Honor, Chad Johnston on behalf
13 of the Ports Authority, responding in response
14 to the Motion to Strike and to the extent that
15 these arguments kind of bleed over into the
16 merits of our two pending motions and that
17 would defer to Mr. Lowell, who will be arguing
18 on those. But I think Your Honor hit the nail
19 on the head in the beginning that, you know,
20 the starting point for this court is pretty
21 easy. The exhibits to our two motions are in
22 the record. And they're filed and are part of
23 the court's consideration of our two motions.
24 It is up to the court then to give the due
25 weight and consideration that they are due and

1 I think that the counsel kind of candidly
2 admitted that their arguments with respect to
3 the evidentiary concerns on those exhibits were
4 not raised in their Motion to Strike. They did
5 not raise evidentiary concerns to the exhibits
6 in their Motion to Strike and I think because
7 of that, we're prohibited in arguing
8 evidentiary concerns at this stage.

9 **THE COURT:** Well, what is the law -- I'm familiar
10 with the law on striking evidence. But is
11 there any case law out there -- if I may ask
12 you that, but is there case law concerning
13 striking exhibits from a motion -- have you
14 ever read one?

15 **MR. JOHNSTON:** I have not.

16 **THE COURT:** Okay. I haven't. But then I didn't
17 know about the federal law on it. Okay.

18 **MR. JOHNSTON:** And I think as your court indicated
19 -- as you indicated, it's a part of the record
20 and ---

21 **THE COURT:** Well, if I indicated it, my court did.

22 **MR. JOHNSTON:** That's right. You can give it
23 whatever due consideration weight that it's
24 due. Your Honor, we would -- we think that
25 starting point is really kind of where we are.

1 Because they're filing, because we're in this
2 posture, the burden is on the first opponents
3 to make the argument that they should be
4 stricken for the record. Now, with respect to
5 both motions, they really only objected to
6 those exhibits on one ground and that was that
7 they were non-responsive to their responses and
8 therefore aren't relevant for this court's
9 consideration. And again, like I said, they
10 raised the evidentiary concerns, but not until
11 the reply. And that was actually in the
12 response to the Ports Authority taking the
13 affirmative step of laying out the foundation
14 for why they would be admitted. Of course,
15 we've already attached them to our motions so
16 we're not attempting to admit them in open
17 court. You know, we would submit, Your Honor,
18 that a general -- even if you consider the
19 evidentiary objection, a general objection on
20 the evidentiary concerns is not sufficient. We
21 would submit that courts in this state have
22 consistently held, and including the Supreme
23 Court, in the State V. Nickels, for example,
24 for a general objection on the evidence is
25 insufficient. That it has to be both

1 contemporaneous and with specificity to each
2 piece of evidence.

3 **THE COURT:** All right. That's in a hearing, I don't
4 know if that -- if that case law is pertinent
5 in here. It has to be raised at an appropriate
6 time -- timely with sufficient specifications
7 and -- where is that law I'm looking for? I
8 don't know if -- there are four requirements,
9 but again, that's for an evidentiary hearing.

10 **MR. JOHNSTON:** Sure. And we would submit that the
11 corollary here is that in their Motion to
12 Strike, which is their first attempt to address
13 the exhibits that we've attached, they would
14 have to get all of those checkpoints at that
15 time and they haven't done them. Now, we would
16 also submit on the evidentiary grounds that
17 they weren't raised on their notice of motion
18 and as a result, they can't argue before this
19 court.

20 **THE COURT:** Well, I'll let you make that argument.
21 Let's move on.

22 **MR. JOHNSTON:** Okay. With respect to the Motion to
23 Strike on our motion and reply on standing,
24 Your Honor, they basically put a page and a
25 half in their response attempting to strike the

1 25 exhibits to our motion and they're primarily
2 focused on this court's standard of review as
3 we've talked about already. Mr. Lowell is
4 going to address that primarily in his
5 argument. But sufficient to say, the cruise
6 opponents contention that this court is limited
7 to their pleadings and conclusory allegations
8 is that it simply is not consistent with the
9 case law of this state and not of this court.
10 We would submit that the case of Charleston
11 Endoscopy of this court is a good example.

12 **THE COURT:** Well, if I could just tell y'all, all of
13 y'all, you're free to cite a decision of this
14 court, but it has no precedential value. Now,
15 whatever the court cited, or that our court
16 cites, I will be interested if our court was
17 correct. I have the previous position of
18 actually reversing myself on one of my previous
19 orders so, you know, you may even cite an order
20 that I did and I may not agree with it
21 depending on the further development of the
22 law.

23 **MR. JOHNSTON:** If the court would find it
24 beneficial, I would be happy to hand that case
25 up.

1 **THE COURT:** Okay.

2 **MR. JOHNSTON:** In light of what you said, very
3 briefly, Your Honor, we think the Charleston
4 Endoscopy is analogous to this case because it
5 was a contested case hearing. It was brought
6 to challenge as a CON order of DHEC and this
7 Motion to Dismiss was filed shortly after the
8 contested case was filed by the petitioner and
9 I think that timing is pertinent in this case
10 because it challenged standing. And the court
11 found that when standing is challenged, the
12 court must examine the disputed facts and reach
13 a factual determination from the evidence. The
14 court held that it may consider affidavits and
15 other evidence proving the lack of jurisdiction
16 and that it must evaluate the jurisdictional
17 merits for itself and need not attach any
18 presumption of truthfulness to the non-moving
19 party's allegations. Ultimately, the
20 Charleston Endoscopy court found that its
21 standing was lacking and that injury in fact
22 was lacking. Your Honor, we will submit that
23 at any stage when standing is challenged, the
24 petitioner must still meet their burden, of the
25 burden of the three elements under Luian ---

1 **THE COURT:** Well, I agree with that.

2 **MR. JOHNSTON:** --- and that the moving party can put
3 forward affidavits or other evidence that
4 proves that they haven't met the three burdens
5 -- the three parts of Luian. As I already
6 argued, there's a single ground for these
7 motions to strike. It's that they weren't
8 responsive. But Your Honor, we think context
9 is important in this case. As counsel gave her
10 version of what's going on, you know, the
11 activity that was permitted by DHEC in this
12 case was five pilings and that's it. Those
13 five pile clusters are amongst hundreds of
14 other pile clusters under a concrete pad in an
15 existing -- under an warehouse structures.
16 It's a part of a 63 acre existing and fully
17 functioning marine terminal facility. And
18 what's not at issue in this contested case, we
19 would submit, is existing or future cruise
20 operations at Union Pier Terminal. Now, if you
21 read the contested case request from the cruise
22 opponents, they mention the permitted activity,
23 the five pilings, one time in their contested
24 case request. And to rebut, we think it's
25 necessary and we thought it was necessary in

1 our Motion to Dismiss on standing to put this
2 project and the permitted conduct in the proper
3 perspective for the court. We feel like the
4 exhibits all are relevant to that
5 demonstration. Now, in order to satisfy the
6 burden of standing, they have to show a
7 concrete and particularized injury in fact.
8 Must be derived and traceable to the permitted
9 activity. Not existing cruise operations and
10 it must be capable of redress from this court.
11 Mr. Lowell will, as I said, will get into that
12 more down the road. But if you ---

13 **THE COURT:** Can I ask you, if this is not a summary
14 judgement analysis, simply a Motion to Dismiss
15 analysis and the burden shifting as Mr. Holman
16 referred to occurs allowing the affidavits to
17 respond to your allegations, then what's before
18 me is simply the allegations. Okay. I don't
19 need all the other stuff. You're making the
20 allegations of which they need to respond. And
21 it's not a summary judgment so I'm not
22 considering genuine issues of material fact, so
23 why do I really need anything other than your
24 pleading and the motions?

25 **MR. JOHNSTON:** Your Honor, I think we're -- I think

1 that we're beyond the pleading stage.

2 **THE COURT:** Okay.

3 **MR. JOHNSTON:** And I think ---

4 **THE COURT:** Boy, I've got a moving target here.
5 Okay.

6 **MR. JOHNSTON:** Your Honor, I think in a situation
7 like this, you can never consider a -- this
8 sort of Motion to Dismiss on the lack of
9 standing or our Motion for Sanctions as a
10 summary judgement motion. I think that commits
11 a judgement on the merits, and not necessarily
12 a judgment that a party lacks standing to bring
13 a case and not a judgement on merits.

14 **THE COURT:** Yeah, I understand that.

15 **MR. JOHNSTON:** We would submit when the allegations
16 put forth in the complaint are challenged by --
17 -

18 **THE COURT:** Well. It's all right. Go ahead.

19 **MR. JOHNSTON:** When they're challenged, we think the
20 burden shifts, and we think that those shift to
21 the petitioners to show that they meet all
22 three standing elements and, again, I will
23 defer most of this to Mr. Lowell if ---

24 **THE COURT:** Yeah, all of this is mixed together?

25 **MR. JOHNSTON:** Yes, it does.

1 **THE COURT:** I understand that.

2 **MR. JOHNSTON:** Briefly, Your Honor, again, I think
3 it's up to the court because the exhibits have
4 been attached and are file to our motion. I
5 think it's up to the court to give them their
6 due weight and consideration if Your Honor
7 would allow us to submit those proposed orders
8 on the Motion to Strike, the exhibits to the
9 Motion to Dismiss for lack of standing, the
10 Ports Authority would be happy to do so.

11 **THE COURT:** All right. Do you wish to reply to that
12 argument right now?

13 **MS. ARMSTRONG:** I think -- yeah. Absolutely, Your
14 Honor. I think we may ---

15 **MR. HOLMAN:** May I find the case, Your Honor? It
16 may end up hurting us, but I think it sets up
17 the right standing.

18 **THE COURT:** All right.

19 **MR. HOLMAN:** Actually, the case is Hoss V. Sessions.

20 **THE COURT:** I was going to say, that I will go back.
21 Let me pull that up.

22 **MR. HOLMAN:** And all I've got is ---

23 **THE COURT:** So, Mr. Holman you're saying that ---

24 **MR. HOLMAN:** It's just, Your Honor ---

25 **THE COURT:** I may be partially right and you may be

1 partially right?

2 MR. HOLMAN: You're always right, Your Honor.

3 THE COURT: No.

4 MR. HOLMAN: But it seems that ---

5 THE COURT: The court has disagreed with you there.

6 MR. HOLMAN: It seems that the court's grappling
7 with this issue of what happens ---

8 THE COURT: Yes.

9 MR. HOLMAN: --- when there is a Motion to Dismiss
10 and there's evidence raised in opposition ---

11 THE COURT: Right.

12 MR. HOLMAN: --- and it kind of seems to map out the
13 option for the court.

14 THE COURT: Give me the cite.

15 MR. HOLMAN: Yes, sir. It's 266-USAPP-325. I'm
16 sorry, I've got a second cite. 835-F2nd-902.
17 And that's Haase, H-A-A-S-E versus Sessions.
18 D.C. Circuit, 1987.

19 THE COURT: I'm there.

20 MR. HOLMAN: I am unable to -- so maybe it's ---

21 THE COURT: I am at Greenberg versus -- so I'm not
22 sure. Give it to me one more time.

23 MR. HOLMAN: 835-F2nd ---

24 THE COURT: Wait, 835, that's what I thought.

25 MR. HOLMAN: 902.

1 THE COURT: Oh. Okay, 932. You said 902?

2 MR. HOLMAN: 902, yes, sir.

3 THE COURT: Okay. Haase versus Sessions. All
4 right. Thank you. You want to enlighten me
5 about what it ...

6 MR. HOLMAN: Your Honor, it seems to say -- it
7 surveys the surprisingly uncharted terrain
8 involving application of Rule 12B and 56 where
9 there's a Motion to Dismiss for standing.

10 THE COURT: That makes me feel better about it.

11 MR. HOLMAN: This is 1987, so maybe the terrain has
12 been a little more mapped out and I can't see
13 on this whether or not it's still good case
14 law, Your Honor. I don't know there's a big
15 yellow or red flag next to it.

16 THE COURT: We've got a yellow flag next to it.

17 MR. HOLMAN: Okay. Well there's -- it does go
18 through and say, you know, what the options are
19 for a court. And that just might be a vein
20 worth proceeding, Your Honor.

21 THE COURT: Okay.

22 MS. ARMSTRONG: Well, that may have -- I hope this
23 doesn't confuse the court anymore because it
24 sounded to me like where you were headed with
25 your questions, that you really were hitting

1 the heart of the motion on the head. I mean --

2 -

3 **THE COURT:** Well, I'm hitting it if I were relying
4 on the law right now.

5 **MS. ARMSTRONG:** Well, but I mean, what really makes
6 ---

7 **THE COURT:** By the way, you're right. The yellow
8 flag said that this agreed with the Thompson
9 Training LTD versus Allied Lineman. So, I'm
10 going to have to follow this path. Go ahead.

11 **MS. ARMSTRONG:** Well, Your Honor, I think what you
12 indicated was that, you know, at this point of
13 a Motion to Dismiss, it's just the allegations
14 that the court needs to look at. And we have
15 the burden of responding and putting forth
16 allegations that are sufficient to meet the
17 elements of standing and why does the court
18 need anything else. What that Charleston
19 Endoscopy Center case says, it cites Luian and
20 says that a party who's standing has been
21 challenged must respond with the manner and
22 degree of evidence required of the successive
23 stages of litigation. It's under B, production
24 of evidence. It's at the bottom of the page of
25 the case that Mr. Johnston just handed up.

1 There isn't anywhere in this case that I found
2 and I don't know -- I'm not aware of any cite
3 and I didn't hear SPA reference any cite for
4 the proposition that a motion can be
5 supplemented by the moving party to present
6 evidence that shows a lack of standing. Lack
7 of standing for meeting the elements of Luian.
8 So, the Endoscopy case, where it's like Luian,
9 it's also the same proposition that was cited
10 by the court of appeals in the town of Arcadia
11 Lakes, that the manner and degree of evidence
12 changes with each successive stage of the
13 litigation and we would assert that right now
14 we're at the pleading stage. I mean, the whole
15 problem of the exhibits is that this is
16 certainly a veiled attempt to argue the merits
17 of this case. So we'd like this court to
18 confine it to just to the question of standing
19 and given the Motion to Dismiss stage that
20 we're at right now and strike the exhibits that
21 are attached to the motion and the reply.

22 **THE COURT:** All right. Okay. I'm not going to rule
23 on that specifically, but I'll tell you what
24 I'm thinking about doing, at this point in
25 time, maybe y'all need that.. All right. The

1 issue at order is not striking the exhibits
2 because I just don't know if that's proper, but
3 I ask -- I asked the Ports Authority attorney.
4 But, Mr. Churder, I never heard from you, did
5 you have a position on any of this?

6 **MR. CHURDER:** Your Honor, not other than in
7 concurrence with the Ports Authority.

8 **THE COURT:** Okay. Do you have any case law where
9 there's even been a motion to the striking of
10 exhibits in a motion that one is not due to the
11 inflammatory nature of the exhibit as opposed
12 to the evidentiary aspects of the exhibit?
13 Because y'all are striking it based on the
14 probative value, the relevancy issues and all
15 of that type of -- do you know of a case that
16 has been addressed as ---

17 **MS. ARMSTRONG:** I don't, Your Honor.

18 **THE COURT:** Okay.

19 **MS. ARMSTRONG:** I don't. I would add ---

20 **THE COURT:** Because I just think the courts have
21 always presumed that it -- that the court gives
22 weight to whatever the exhibit is and serving
23 it would be -- I would hope the court would
24 have enough sense not to think that something
25 that was submitted in -- as an attachment in a

1 motion does not come in as proof in the
2 evidentiary hearing but ...

3 **MS. ARMSTRONG:** Well, I think, you know, the
4 petitioners have restrained themselves in
5 responding to the motions and have not tried to
6 burden the court with a lot of exhibits that we
7 believe show that -- show our take on the case
8 and present what we believe are the facts.
9 Now, these are things that need to be decided
10 in a merits hearing.

11 **THE COURT:** Yeah.

12 **MS. ARMSTRONG:** So we have not done that because we
13 don't believe it's proper. And if the court
14 decides that those kinds of things are going to
15 come in, then that's going to change the
16 petitioners presentation of the arguments in
17 this case ---

18 **THE COURT:** Right.

19 **MS. ARMSTRONG:** --- because petitioners are going to
20 want to have that same opportunity to lay sort
21 of a little ground work where we see this case
22 instead of the lopsided view that's been
23 presented of how SPA views this case.

24 **THE COURT:** Okay. All right. Well, I think I'm
25 going to stick with -- as I was viewing it in

1 terms of the law. At least, I mean, at this
2 point in time, about actually striking the
3 exhibits that I would issue an order that would
4 explain my position concerning the
5 consideration of the exhibits and I think that
6 that would accomplish, you know, your goals.
7 But we'll see.

8 **MS. ARMSTRONG:** So, if I understand it, it would be
9 your -- that it just may not be proper for the
10 court to strike exhibits but the consideration
11 that the court gives it in light of the fact
12 that we carry the burden of the allegations?

13 **THE COURT:** Well, in light of the fact that you --
14 that both parties are now telling me that I
15 can now -- I mean, I've had hard cases and I'm
16 under the assumption that that's how the law
17 went down and so I feel that in one path, that
18 I'm now picking a diversion path, potentially
19 ---

20 **MS. ARMSTRONG:** Yes, Your Honor.

21 **THE COURT:** --- but if it's simply allegations, they
22 make the allegation, you respond. I don't need
23 anything in support of the allegation, they can
24 make whatever allegation they wish. At this
25 stage of the game I don't know if they need

1 anything to support their allegations. Other
2 than if you were turn around and file a motion
3 for sanctions against them for making that
4 allegation, at that point we may need something
5 to support it. If that's the stage I'm at now
6 then that's the way I would view it.

7 **MS. ARMSTRONG:** Right. And Your Honor, I think
8 that's the way that the ALS has viewed it in
9 cases that I've been involved in numerous
10 times, standing challenges have been raised,
11 there's an allegation by the respondent.
12 Sometimes it's DHEC, sometimes it's the
13 applicant, that the petitioners don't have
14 standing and what the court's always accepted
15 is that for the allegation on the part of the
16 moving party that there's a lack of standing
17 and then affidavits from the non-moving party,
18 the petitioners, to establish standing. And
19 that's sort of the way practice has been and
20 so, you know, frankly, to have 45 exhibits
21 attached on a Motion to Dismiss for lack of
22 standing, I think is highly unusual. At least
23 as far as in my experience and practice on
24 these motions before this court.

25 **THE COURT:** Okay.

1 MR. LOWELL: Your Honor, if I could just offer a
2 couple of comments.

3 THE COURT: You may. I let Mr. Holman do it.

4 MR. LOWELL: I mean, I think we are -- that we are
5 slightly past just the pleading stage from the
6 stand point of, we are in discovery. A lot of
7 those exhibits are -- came from the discovery
8 that has been traded between the parties. So,
9 I mean, this isn't a standing motion to
10 straight out of the box where all you have is
11 a complaint and answer. Which is sometimes
12 what you see in the federal court. And this
13 goes back to what Your Honor was talking about
14 earlier with the successive stages of
15 litigation.

16 THE COURT: Yeah, and I don't want to cut you off
17 now, but we're slightly in a different posture.
18 I'm not aware of motion hearings where you're
19 like -- we're moving from a pleadings type
20 motion to a slightly different -- we're getting
21 close to summary judgement but we're not quite
22 there consideration by the court.

23 MR. LOWELL: Well and that's where the
24 justiciability issue is slightly different than
25 the way we typically see it in a 12-B-6 or the

1 12-B-1.

2 **THE COURT:** Well ---

3 **MR. LOWELL:** Let me look for the court's cite. It's
4 413-F3rd-451. And this is at ---

5 **THE COURT:** Hang on. Let me get there. 413 ...

6 **MR. LOWELL:** F3rd.

7 **THE COURT:** Let me change my time frames.

8 **MR. LOWELL:** 459 is the pinpoint cite. And that's
9 the 4th Circuit in 2005. When a defendant
10 raises standing as the basis for a motion under
11 12-B-1 to dismiss, the district court may
12 consider evidence outside of the pleadings.
13 The middle district of Alabama in the Benefield
14 case, which is 270-FRD-640 at 646. 2010,
15 quote, once a defendant proffers evidence which
16 calls a plaintiff's standing into question, the
17 presumption of correctness that we accord to a
18 complaints allegations falls away and the
19 plaintiff bears the burden of coming forward
20 with competent truth that standing exhibits.

21 **THE COURT:** Now, that's the plaintiff?

22 **MR. LEATH:** The plaintiff has the burden of coming
23 back. But that's after the defendant proffers
24 evidence calling their standing into question.
25 And some of our exhibits affirmatively

1 demonstrate that they can't meet the standing
2 test. Also, I'll put it out that some of those
3 exhibits are less on the standing and more
4 towards the political question, because the
5 political question is not a justiciability
6 component and those exhibits are going to
7 demonstrate that this is a political question
8 and non-justiciable. And I'll argue that very
9 briefly if Your Honor will allow it.

10 **THE COURT:** Yeah, because you're going to have to do
11 a great job to get that one.

12 **MR. LEATH:** But on this point about the
13 consideration of the evidence and the standard,
14 would it be beneficial from the point of both
15 parties if both parties gave a four or five
16 page memo laying out what we think the case law
17 is and the what the standard is?

18 **THE COURT:** Yes.

19 **MR. LEATH:** Okay.

20 **THE COURT:** It would be.

21 **MR. LOWELL:** By next Friday?

22 **THE COURT:** And it would be beneficial for me to
23 know which of the exhibits you believe were
24 pertinent to the -- I mean, I'm killing you on
25 the record, I know that. I'd say it would be

1 pertinent -- I could go through the motion and
2 identify the exhibits that you relate to that
3 as far as the Motion to Dismiss on standing and
4 those or related to the -- your political
5 question.

6 **MR. LOWELL:** As part of our supplemental briefing
7 next week, we can group those and tie them into
8 those two arguments.

9 **THE COURT:** Okay. Are you okay with that Ms.
10 Armstrong?

11 **MS. ARMSTRONG:** Yes, Your Honor.

12 **THE COURT:** All right. With that said, let's move
13 to the next motion.

14 **MS. ARMSTRONG:** I think we will be extremely brief
15 on this motion. The Motion to Dismiss, the
16 exhibits attached to them rely on the sanctions
17 motion. And basically, the motion, you know,
18 we believe that they should be stricken because
19 they really present new evidence and things
20 that the petitioners haven't had an opportunity
21 to respond to. Certainly we would have if they
22 were in the motion and believe that they are
23 taken out of context and that the petitioners
24 could put them into the proper context. If the
25 court allows us to by following a sur-reply,

1 now, you could -- you can -- we see it sort of
2 as an either or, you know, as an either or.
3 Either the court should disregard the new
4 evidence that's presented or allow the
5 petitioners an opportunity to respond to those
6 exhibits.

7 **THE COURT:** All right. On that, there's simply --
8 all of those were emails, right?

9 **MS. ARMSTRONG:** Correct. Your Honor.

10 **THE COURT:** Okay. They're emails that -- I don't
11 know if they've been authenticated and they're
12 out of court statements.

13 **MR. LOWELL:** Your Honor, they produced them.

14 **THE COURT:** They produced them?

15 **MR. LOWELL:** I mean, they produced all of those
16 documents in discovery.

17 **MS. ARMSTRONG:** That doesn't get around the hearsay.
18 The hearsay problem and I think we also raised
19 in our motion -- well, the timing and the dates
20 of these emails that were, you know, several --
21 two or three years ago. But I think that the
22 main thing is in reality, they are hearsay,
23 they don't fall within any ---

24 **THE COURT:** Well, I can just those together and deal
25 with them without hearing them. I don't want

1 to hear argument related to those at this point
2 in time. I'm most probably not going to
3 consider them. But I will address that in a
4 subsequent order. I will say -- well, I will
5 address it and make a comment in reference to
6 the sanctions issue. All right. Do you wish
7 to respond to that?

8 **MR. JOHNSTON:** No, Your Honor, just briefly. We
9 felt like ---

10 **THE COURT:** No, Your Honor, just briefly? I'm just
11 picking at you, go ahead.

12 **MR. JOHNSTON:** Well, Your Honor, we would suggest
13 that their motivations were put front and
14 center in their response and we were simply
15 attaching those exhibits to show that in fact
16 their motivations in filing the Motion to
17 Dismiss was precisely why we filed our motion
18 for sanction. We felt that it was frivolous
19 and we felt the delay and think that those
20 exhibits demonstrate that. So that's why ---

21 **THE COURT:** Well see -- and that's -- when he made
22 his quick argument, the way I viewed those
23 emails is there's two elements of the
24 sanctions. One is frivolous and the other is
25 undue delay. I can certainly consider an order

1 to grant sanctions based on whether it was
2 frivolous or not. To me that's the most
3 pertinent point. And that's how I'm viewing
4 that at this point and time. Those will most
5 likely not be considered. We'll move on to the
6 next motion. We've passed the striking ones,
7 right?

8 **MS. ARMSTRONG:** Yes, Your Honor. And the only other
9 motion, we've already covered, that was the
10 inflammatory reference.

11 **THE COURT:** Yeah. Okay. All right.

12 **MR. HOLMAN:** Can we have a five minute recess for a
13 computer change?

14 **THE COURT:** All right. Okay.

15 (A short break was taken from 11:09 a.m. until
16 11:19 a.m.)

17 **MR. LOWELL - DIRECT EXAMINATION - MOTION TO STRIKE**
18 **INFLAMMATORY REFERENCE:**

19 **MR. LOWELL:** Your Honor, may it please the court,
20 Randy Lowell on behalf of the Port's Authority.
21 I'm going to keep my argument fairly brief.
22 This has been fairly briefed, I know the
23 Court's reviewed it. But I do want to hit a
24 couple highlights.

25 **THE COURT:** Okay. I could use the highlights. I

1 just looked at the case law before I came in.

2 **MR. LOWELL:** Yes, sir.

3 **THE COURT:** And the problem I got with that case is
4 that it says when a defendant raises standing
5 as a basis for a Motion to Dismiss for lack of
6 subject matter jurisdiction the district court
7 may consider evidence outside of the pleadings
8 for summary judgement. So it's kind along the
9 lines of Beard. Now, I'm going to let y'all
10 brief over that.

11 **MR. LOWELL:** And we dropped a full note in one of
12 our filings about the subject matter
13 jurisdiction, how that term is used very
14 loosely in this concept.

15 **THE COURT:** Yeah, I saw that but I didn't buy it.
16 Maybe y'all ---

17 **MR. HOLMAN:** Yeah, how about they get behind it?

18 **THE COURT:** Well, I'll have to rethink that. So
19 y'all are -- since y'all are both heading down
20 the same path then both of y'all should be able
21 to do that then.

22 **MR. LOWELL:** Well, I think there was a court of
23 appeals decision brought by someone you know
24 very well ---

25 **THE COURT:** Yes.

1 **MR. LOWELL:** --- who makes that fundamental
2 distinction. So ---

3 **THE COURT:** Well, boy, we argue a lot.

4 **MR. LOWELL:** I don't know if that's going to help me
5 or hurt me to cite that case. As for the
6 sanctions motion, the cruise opponents filed a
7 motion for remand of the board which is
8 frivolous and solely for the purpose of delay.
9 Under Rule 72, Rule 11, the federal sanctions
10 proceedings act, this court has the ability to
11 sanction them. Now, the standard is a
12 reasonable attorney standard under the
13 sanctions act which means they can be
14 sanctioned for, among other things, a
15 reasonable attorney presented with the same
16 circumstances would believe that the motion is
17 frivolous and imposed for merely delay or
18 merely brought for any purpose other than
19 securing proper adjudication of the claim.
20 When you look at 44-1-60, this is really just
21 a matter of basic reading comprehension. When
22 you read that statute in toto, it clearly sets
23 forth the discretionary standard with the DHEC
24 Board. Since that process has been in place
25 since 2006 I am unaware of any lawyer who has

1 ever argued that board review is mandatory
2 until this motion was filed. And that includes
3 opposing counsel who has been through that
4 process several times. They made that argument
5 with that DHEC board when they requested a
6 review. It wasn't in the pre-hearing
7 statement. As a matter of fact, the League and
8 it's counsel, including opposing counsel in
9 this case, told the Supreme Court, the board
10 has the option of conducting a conference or
11 not after request for review is made. Now, the
12 League's delay tactics are becoming infamous.
13 In the oral argument in the Kiawah Development
14 rehearing in June, Chief Justice Toal said this
15 is a gamble we get into so many times. Folks
16 who really oppose any development and they use
17 this process to delay a decision they are not
18 in favor of. And then later, she noted the
19 Coastal Conservation League opposes most of the
20 that DHEC is involved in. Delay is the
21 cornerstone of their litigation strategy and
22 it's demonstrated by their own statements.
23 Those are the emails that we attached to the
24 motion and we did so to demonstrate that
25 they've been contemplating how to delay and

1 stall and stop this project from day one. And
2 then they talk about, you know, these emails
3 are in the past and some of them are back in
4 May of 2011. Well, the first of the three
5 lawsuits filed to stop the cruise terminal was
6 filed in June of 2011.

7 **THE COURT:** In considering delay, if someone brings
8 a legitimate argument and a complaint or a
9 result of that argument is delay, then that
10 would not necessarily be something I would
11 consider. It would only be, if the argument of
12 the delay is sought from ---

13 **MR. LOWELL:** Well, I think ---

14 **THE COURT:** --- frivolous grounds. In other words,
15 what I'm trying to -- in this instance is
16 frivolous still a component of delay? And if
17 it is, why do I need to consider it, the delay,
18 in my arguments? Why don't I just consider
19 whether it is frivolous?

20 **MR. LOWELL:** Well, I think you can view them
21 independently.

22 **THE COURT:** Well, that's why I'm asking.

23 **MR. LOWELL:** They can be sanctioned for frivolity or
24 they can be sanctioned for merely interposing
25 something for delay. Here you've got a motion

1 for remand. The whole purpose was that they
2 were trying to get it kicked back to the DHEC
3 Board was to slow down this process, stop it.
4 If it's back at the DHEC Board ---

5 **THE COURT:** Well, I'm getting at your emails. When
6 you commented about the emails, the emails were
7 statements were made about slowing the project
8 down or slowing the project down for what
9 reason? Was it slow it down just solely for
10 the purposes of slowing it down or is it
11 slowing it down for the purpose of that for
12 which we wish to litigate? And that's what I'm
13 getting at. Those emails, even if I were to
14 consider them, and I have yet to decide that.
15 I don't know whether they make the point about
16 the purpose of the delay. Because -- and I
17 don't know if it's in -- I know it is in our
18 Rules where the court could use the phraseology
19 solely for the purpose of delay. And I think
20 that when they use solely that it has many
21 meanings and it's purposeful because it's
22 saying that you didn't bring the action just --
23 delay wasn't the result of bringing the
24 actions, it was only brought for the purpose of
25 delay. And I believe you catch -- were any of

1 those emails that you gave me, solely for
2 purposes of delay? Now, I don't know if that's
3 enough for an opinion, but I think it would be
4 underpinning of that argument because if that
5 was true then you could say anybody who brings
6 litigation that results in delay could be
7 sanctioned and that is obviously not true.

8 **MR. LOWELL:** Well, I concur that, I mean, just
9 because somebody files a motion that there is
10 an inherent delay in litigation.

11 **THE COURT:** Yeah. Yes, there is.

12 **MR. LOWELL:** But, there's a line out there were
13 folks are taking actions, filing motions trying
14 to get stuff remanded back to the DHEC Board to
15 basically make it sit. I mean, I can't file a
16 motion to stay -- well, I mean I could here to
17 go ahead and move forward to implement the
18 terminal, the terminal litigation, but I can't
19 at the DHEC Board. I mean, it is a way to put
20 it on hold. Now, what the other emails
21 indicate, that are in other filings before the
22 court is, I mean this is all about leverage.
23 I mean, it was we want to slow this thing down
24 and force them to come sit at the table with
25 us. That's what this is all about. And that's

1 the whole reason they did it. It wasn't to
2 prevail on the merits. It was we want to sit
3 them down because if we can cause enough
4 problems for them and delay it long enough,
5 then they're going to come around and
6 compromise.

7 **THE COURT:** Well, that -- it is what I'm questioning
8 about. It in quotes. Because the it was the
9 litigation of the implied case and not the it
10 of this motion.

11 **MR. LOWELL:** Well, it could be either or both. I
12 mean, I think -- I am not trying to argue that
13 they do not have -- except for the standing,
14 that they don't have a right to file --

15 **THE COURT:** Well, I ---

16 **MR. LOWELL:** --- a request for the contested case or
17 the issues of permit.

18 **THE COURT:** You misconstrued my point. What I was
19 getting at is, if you are indeed correct, that
20 the it is bringing this case, does that it
21 relate to this particular motion that you're
22 asking sanctions for? That's what I was
23 getting at.

24 **MR. LOWELL:** Yes, it does. Because if they get it
25 remanded back to DHEC then we're just in a

1 perpetual -- it's just going to sit. That's
2 their whole point. Even if it gets back to the
3 DHEC Board, that's just -- that's another three
4 to six months possible delay before we're back
5 up here.

6 **THE COURT:** Okay.

7 **MR. LOWELL:** Now, when you look at the statute and
8 you start to switch gears from the delay more
9 to the frivolous nature of just making the
10 claim in and of itself, this court only devoted
11 57 lines of the order to addressing the remand
12 argument. Thirty-six of that was citing the
13 actual statute and case law. So there's only
14 21 lines of analysis that's devoted to this
15 motion for remand and that's probably even too
16 much. As the court noted ---

17 **THE COURT:** I would like to know who ordered that.

18 **MR. LOWELL:** --- by stating that the board can
19 decline to consider a request, Section 44-1-
20 60F, obviously recognizes the existence of
21 discretion. When the statute is read as a
22 whole, it is clear the board has the discretion
23 to decline to conduct a final review
24 conference. No reasonable attorney is going to
25 file a motion when the statutory language is

1 obvious and clear. What makes it obvious and
2 clear? Even setting aside the statutory
3 language itself, this court has repeatedly held
4 that the DHEC Board review process is
5 discretionary. Judge McLeod has two orders
6 which we cite and I know Your Honor has
7 reversed yourself in the past, but you have
8 three -- at least three orders that
9 specifically hold the boards review is
10 discretionary, not a matter of right. The
11 appellate courts, if you look at their case
12 law, the Court of Appeals and the Supreme Court
13 when they were citing procedural history, they
14 talk about the board declining to conduct a
15 final review conference. If that was somehow
16 illegal or contrary to statute, one would think
17 somebody would have raised that by now or the
18 court would have raised it or responded. So a
19 reasonable attorney, would read the whole
20 statute, research the ALC orders, especially
21 those of the presiding judge in this case who
22 has said at least three times that review is
23 discretionary, look at the appellate case law,
24 all of which discusses the fact that board
25 review is discretionary. Finding the obvious

1 and clear answer that no remand is available,
2 you don't file the motion. They can't claim
3 that they were preserving the issue for review
4 for appeal. They pretty much conceded in the
5 response for the Motion for Sanctions that Your
6 Honor was right. And frankly, why would they
7 need to preserve it for appeal? If it wasn't
8 granted and there was no delay that can be
9 attached to it. Now, they make the argument
10 that they needed more information out of the
11 DHEC file. Well A, they had not seen the DHEC
12 file when they filed the Motion for Remand.
13 That was produced by DHEC on April 26th, just
14 prior to this court issuing its order. I also
15 find it a little ironic that they want to keep
16 out all of the exhibits that were in the DHEC
17 file from this court's consideration on the
18 motion, but at the same time they're arguing
19 that they need to get back to DHEC to beef up
20 that DHEC file. But the bottom line is, no
21 reasonable attorney is going to file this
22 motion. The law is clear, the statute is
23 clear. The case law from this court is clear.
24 So we would ask that the court dismiss the case
25 on that basis. However, alternatively, because

1 I recognize that dismissal is probably on the
2 extreme end of the sanction the court may want
3 to consider ---

4 **THE COURT:** You may want to cite case law on that
5 too, Mr. Lowell.

6 **MR. LOWELL:** They should reimburse the Ports
7 Authority for the fees and costs of having to
8 defend against that motion. Or even if you
9 want to cut it down finer than that, given that
10 the League and opposing counsel told the
11 Supreme Court, affirmatively represented that
12 the DHEC Board process was discretionary, the
13 League and counsel should pay for the attorney
14 fees and costs for the Ports Authority.

15 **THE COURT:** All right.

16 **MR. LEATH - CROSS EXAMINATION - MOTION TO STRIKE**
17 **INFLAMMATORY REFERENCE:**

18 **MR. LEATH:** Your Honor, I'm Jack Leath and this is
19 my first time in your court.

20 **THE COURT:** Welcome.

21 **MR. LEATH:** And I lack familiarity with this type of
22 procedure. What I will tell you is that I've
23 been a lawyer an awful long time. I've never
24 been involved in a sanction motion before and
25 never filed one.

1 **THE COURT:** I don't think I've ever had one. Can I
2 stop you?

3 **MR. LEATH:** Yes, sir.

4 **THE COURT:** I'm going to tell you right up front,
5 since I'm the judge and I'm going to issue a
6 decision on this, to me, you're going to have
7 to convince me that it's not frivolous because
8 at this point in time, I view that as -- at
9 this point, I can properly do something and
10 I'll consult my staff and make sure I'm not
11 missing the point, but I think we all viewed it
12 as frivolous from the get go. So, I need to be
13 convinced. Although, when I say that, that's
14 the motion. I have a lot of respect for Ms.
15 Armstrong. In the past, I've had objections
16 where she's actually -- when she heard the
17 objection, she just did the proper thing. So
18 when I say, at this point in time, I don't know
19 what, you know, what may have influenced her or
20 if she was the one filing, I don't know if she
21 was the issuer or not, and that won't change as
22 a result of this at all. But I'm considering
23 whether this motion, in this was frivolous, you
24 know, so convince me.

25 **MR. LEATH:** Well, I can't speak for her. I did not

1 file this motion. What I will give the court
2 is ---

3 **THE COURT:** Well, what I want to know is whether the
4 motion was frivolous or not.

5 **MR. LEATH:** I don't believe it is frivolous, Your
6 Honor. I don't believe so. There's no
7 question from the briefing that's happened, and
8 this is what I have learned because I'm not, as
9 I mentioned to you, a person who has practiced
10 in this particular court, is that there's some
11 precedent about how these things are handled in
12 terms of developing the record here at the
13 Administrative Law Court. What seems to me to
14 be the case was that there was a very clear
15 ambiguity in this statute and there's some
16 mandatory language about a DHEC review.
17 Secondly, the record as it was established
18 ---

19 **THE COURT:** Well, what language did you say was --
20 that said there was a mandatory DHEC review?

21 **MR. LEATH:** I think that the language that we put in
22 our brief, it's -- I think 44-1-60F seemed to
23 have language that has must in it. Or must
24 take certain action. It seemed to me and it
25 seems to me now, especially if one takes a look

1 at how the two sections of the statute could be
2 read together, that there's at least a
3 reasonable argument that the drafters intended
4 to have the full board weigh in on one of these
5 applications, especially in a case like this
6 where there's a lot of public interest in it.
7 And where the staff's decision seems to be
8 filled with a lot of conclusory and unsupported
9 comments. We also thought -- I thought, and I
10 think now, that it's always better to come up
11 in a review in court, as a respondent or rather
12 than an appellant, on a full record. I can
13 tell you this, there's no question that this
14 motion was not imposed for delay. There was no
15 thought to that. There was no discussion with
16 any of these clients. I've never seen any of
17 those emails. I don't think that these folks
18 have either. There is no reason whatsoever for
19 delay. What there was, was an attempt to get
20 a better record fleshed out, a better decision,
21 one quite frankly, that I think this group of
22 folks would want, would win before DHEC Board
23 review. And I think that's a reasonable thing
24 to ask for. I think as an advocate, that's a
25 reasonable thing to ask for. Certainly not

1 imposed for delay. Hasn't caused any delay.
2 So what I did was, we've got the sanctions
3 motion understanding there was a reasonable
4 lawyers standard. I turned it over to a couple
5 of people that are knowledgeable. One guy,
6 Johnny Linton, who is next door. He's probably
7 won every order one can win and my partner Tim
8 Bouch who shared Jean Toal's ethics review and
9 rewrote Professional Responsibility Rules as
10 well as was counsel of record in the Bons
11 Sequer sanctions case and have them say, look,
12 is this a reasonable thing for them to have
13 done. Both of those affidavits said yes, it
14 was reasonable, not frivolous and it was not
15 imposed for delay. Was there perhaps a mistake
16 made? You could go either way on that. But
17 that is not the basis for sanctions.
18 Sanctions, at least in my experience, are very
19 rare and they are governed ---

20 **THE COURT:** Well, it would be rare for me.

21 **MR. LEATH:** Well, they're rare for a reason. And
22 the reason is because the typical reported
23 sanctions decision has the concept of bad
24 intent attached to it. Bad action, bad intent.

25 **THE COURT:** I don't agree with you. It may have the

1 concept to some people. The phrase that I'm
2 considering today is frivolous.

3 **MR. LEATH:** And I would say, Your Honor ---

4 **THE COURT:** So zero in on that one.

5 **MR. LEATH:** I would say under the test, the
6 reasonable lawyer test, the frivolous
7 proceeding is always attached to the concept of
8 doing it for an ulterior purpose or ulterior
9 motive. Not by making a mistake. Not by
10 saying okay, maybe this isn't the way the
11 appeal should be handled. But doing it for
12 ulterior motive. Every one of the phrases in
13 the sanctions act, in the cases, point to this
14 notion that you're doing something for ulterior
15 motive or for a wrong motive. The same type of
16 concept for threatening criminal sanctions in
17 order to get civil advantage. That type of
18 thing. Not simply making a mistake. It has to
19 do with bad motive and bad intent. And I can
20 tell this court with absolute confidence that's
21 not the case here. Not the case. And we have
22 briefed this very fully and I do not think this
23 is sanctionable. I hate to see this type
24 practice, Your Honor. I've been involved with
25 the Ports Authority for more than 30 years on

1 the other side. I've never seen anything like
2 this. I've never seen motions like this and I
3 don't think, from our perspective, that's the
4 way this case should be litigated. We
5 certainly will accept anything the court wishes
6 to do, but we do not think and I certainly,
7 sincerely do not believe this is the case for
8 it.

9 **THE COURT:** All right. I'm going to go back through
10 and read 44-1-60. You said the ---

11 **MR. LEATH:** Your Honor, 44-1-60F is where I think
12 we're coming from.

13 **THE COURT:** Well what I was going to do is -- I said
14 after this hearing I am going to go back
15 through and read every use of the word must.
16 From that perspective of -- given what you've
17 just talked about.

18 **MR. LEATH:** Thank you, Your Honor.

19 **MS. ARMSTRONG - CROSS EXAMINATION - MOTION TO STRIKE**
20 **INFLAMMATORY REFERENCE:**

21 **MS. ARMSTRONG:** Your Honor, can I just add ---

22 **THE COURT:** You certainly can.

23 **MS. ARMSTRONG:** --- a couple of points, since my
24 name has been raised.

25 **THE COURT:** I thought your name was on the ---

1 **MS. ARMSTRONG:** It was on the pleading ---

2 **THE COURT:** Okay.

3 **MS. ARMSTRONG:** --- but in the context of arguments
4 made in the Supreme Court and briefings.

5 **THE COURT:** Oh, okay.

6 **MS. ARMSTRONG:** I think is what I would just like to
7 address briefly. I mean the statements that
8 were referred to by Mr. Lowell were not -- that
9 was never an argument. I don't -- counsel
10 didn't actually argue on interpretation or
11 another -- over another. It was an explanation
12 of what had happened and how we got to where we
13 were procedurally. And so I think, you know,
14 from our perspective, it had never actually
15 been litigated. The issue has never been
16 squarely before the court to decide. I have
17 been practicing or operating under a certain
18 manner of how we handle these cases. But that
19 doesn't mean it's necessarily the right way and
20 when -- when co-counsel brought this, what
21 about this must means must. And I didn't have
22 a good answer for him. That's -- I think
23 that's what -- I think that was what the
24 motivation behind the motion. And while I
25 heard Your Honor refer to the motion as, you

1 know, when you received it in your office as
2 frivolous ---

3 **THE COURT:** Yeah.

4 **MS. ARMSTRONG:** I think there's a difference
5 between, you know, frivolous and just
6 disagreeing with the legal position the parties
7 are taking and so I think that's an important
8 distinction and I hope the court ---

9 **THE COURT:** Do you know if the case law has ever
10 fleshed out the definition as the court -- Mr.
11 Leath, thinks perhaps, you know, an ulterior
12 motive to the phrase frivolous. And to me,
13 when I said the things about you -- the phrase
14 frivolous is just -- I'll look at it to see --
15 well, based on Webster's definition of it, is
16 it's something that just, to me, that just
17 didn't have sufficient merit to be worthy
18 consideration. And we may disagree about the
19 term at that level. But do you know any case
20 law that would give a better explanation of
21 what is interpreted as frivolous?

22 **MR. LEATH:** Your Honor, if I could comment on it ---

23 **THE COURT:** Yes, you may.

24 **MR. LEATH:** --- because I wrote a brief. The cases
25 that are cited by the Ports Authority and that

1 we cite, do, I think, take the position as I've
2 enunciated to the court that there is more to
3 the filing of whatever paper it is. Whatever
4 type pleading. Not just a motion. Than simply
5 the document itself being logged or being a
6 mistake.

7 **THE COURT:** I understand that.

8 **MR. LEATH:** All of the cases -- all of the cases,
9 especially the one involving the lawyer, have
10 to do with someone having an improper purpose
11 and improper motive. And I think the court
12 will find that in looking at them. I think
13 parties are free to file a wrong paper. I
14 think they are.

15 **THE COURT:** Well, I ---

16 **MR. LEATH:** Otherwise there will be a chilling
17 effect on any organization. Maybe we filed a
18 wrong paper here, but it was not filed with any
19 bad intent or ulterior motive.

20 **THE COURT:** Well, Mr. Leath, see when you say that
21 the case law, there are instances where that
22 has occurred, that doesn't mean that in me
23 analyzing this case, that all instances of
24 thereafter must be that way, that just means in
25 the past that's what they've considered. I

1 looked up the definition, and I'll pull it up
2 again, you know, from Marion Webster's when I
3 was trying to evaluate is, and it said of
4 little weight or importance. That's how I view
5 it. It was not judgmental, it was judging the
6 arguments that were presented.

7 **MR. LEATH:** I think perhaps, Your Honor, that
8 definition could be applied to human conduct.
9 That is the notion of frivolity would fit that
10 definition. In a legal filing of documents,
11 context however, the case law on sanctions, if
12 you take a look at what the Port's Authority
13 has cited and what we have cited, the sanctions
14 under the rules, under the sanctions act, all
15 do, I think the court will find, have to do
16 with ulterior motive and bad actions. I do not
17 think that the notion of frivolity, in the
18 sense of being right or incorrect, is
19 sanctionable conduct. Very respectfully.

20 **THE COURT:** Well, I'll tell you, if your view point
21 is correct, you win. That's ---

22 **MR. LEATH:** Very respectfully, I believe that's what
23 the court will find in studying these cases.

24 **THE COURT:** All right. Mr. Lowell?

25 **MR. LOWELL:** Your Honor, briefly, I mean, frivolous

1 as so meritless that no reasonable attorney is
2 going to go file that. And my definition of
3 frivolous more closely lines of what the court
4 says of often that the -- well, we know the
5 dictionary definition. But as far as the
6 actual process of the board, the full DHEC
7 Board did weigh in and they did weigh in by
8 declining the final review conference, which is
9 exactly what the statute says, if the board
10 declines in writing to decline the final review
11 conference. Then you come here. I mean, the
12 statute is crystal clear. There's no
13 ambiguity. Especially when you look at the way
14 we've been doing this. And are familiar with
15 the process. Which they are. I mean, and Mr.
16 Leath was on the brief of the Supreme Court
17 where there was an exploratory note of how this
18 process works and it says the DHEC rules are
19 discretionary. On top of that, I would point
20 out we did send in -- I sent a letter to Ms.
21 Armstrong saying we, the Port's Authority views
22 this motion as frivolous. So, you know, we
23 want you to reconsider whether you really want
24 to file this or not because if you don't -- if
25 you don't withdrawal the motion, we're going to

1 file sanctions. This sanction motion didn't
2 come out of the blue. They knew that this was
3 -- that this was a probable outcome if they
4 didn't withdraw the motion. So they had a
5 second chance to go back and review it and see
6 if they really wanted to do it. But on that I
7 will rest.

8 **THE COURT:** Thank you. Mr. Lowell took the position
9 on what sanctions would be levied and if I were
10 to determine sanctions should be levied, Mr.
11 Leath, would you like to respond to any of
12 that?

13 **MR. LEATH:** I would first of all hope that doesn't
14 happen, Your Honor. But if it did happen, I
15 think it should be some reasonable limitation
16 with regard to ---

17 **THE COURT:** Go ahead and drop the dismissal thing.
18 That's not on the table.

19 **MR. LEATH:** Right.

20 **THE COURT:** So move on.

21 **MR. LEATH:** But they would have to substantiate some
22 reasonable cross basis for filing their brief
23 opposing the motion, I would think. That's
24 what the court could award.

25 **THE COURT:** Right.

1 MR. LEATH: And some reasonable hourly rate.

2 THE COURT: Okay. All right. Glad we got that
3 done. What's next? The Motion to Dismiss?

4 MR. LOWELL: Yes, Your Honor, for lack of standing.

5 THE COURT: Okay.

6 MR. LOWELL - DIRECT EXAMINATION - MOTION TO DISMISS:

7 MR. LOWELL: Given the discussion that we had
8 earlier about the standard review and what you
9 can consider. I am actually going to try to
10 keep this fairly short. Especially given that
11 there's been a motion, a response, a reply, a
12 sur-reply and a response to the sur-reply
13 that's already been filled.

14 THE COURT: Well, I haven't read any of the sur-
15 replies or responses to sur-replies, so -- at
16 that point I was taking -- like I said earlier,
17 if I don't get to the point that I'm going to
18 consider the evidence, I'm not going to move
19 further. If I decide to consider it I think it
20 may be warranted but -- so that's all I have to
21 say.

22 MR. LOWELL: Well, even if you look at just the
23 motion, the response and the reply ---

24 THE COURT: Yeah.

25 MR. LOWELL: --- there's plenty of meat there ---

1 THE COURT: Okay.

2 MR. LOWELL: --- filed by all the parties.

3 THE COURT: Okay.

4 MR. LOWELL: The Union Pier Terminal is a fully
5 operational marine terminal. This is a picture
6 of the Union Pier Terminal. What you see in
7 the background is actually the Carnival
8 Fantasy. That's the cruise ship that the
9 cruise opponents would prefer not to see at the
10 Union Pier Terminal ever again. The cruise
11 terminal is next to that. The white roofed
12 building is building 322. That is the building
13 that the Port's Authority proposes to renovate
14 and move those cruise terminal operations there
15 and it's currently used for cargo, that the
16 cargo vessel in the foreground, the grey cargo
17 vessel is actually a car carrier, which is the
18 great bulk of cargo that is typically used at
19 Union Pier. That cruise terminal was -- became
20 operational in 1973. There have been cruise
21 ships calling on that terminal every year since
22 1973. So the entirety of this project, the
23 redevelopment project, is to move the cruise
24 operations from the south end to the north end
25 which is a little less than 600 yards. But

1 this is all within the exact same Union Pier
2 Terminal footprint. Now, the contested case
3 request has challenged the permit issued by
4 DHEC and the permitted activity was for five
5 pile clusters. This is a map that's attached
6 to the permit that's been issued. What you can
7 see is every single one of those dots
8 represents a pile cluster that is underneath
9 Union Pier. Those five rectangular marks on
10 the right hand side is where the proposed pile
11 clusters are going to be placed. Those pile
12 clusters, the reason the pile clusters are
13 necessary is to support escalators and
14 elevators in the renovated building. That's
15 it. So, the permit activity is the
16 installation of those five clusters among
17 thousands that already exist on the UPT. This
18 is a picture underneath UPT. Each one of those
19 columns represents a pile cluster, just so Your
20 Honor has a context of what we're actually
21 talking about. So the permit would allow the
22 installation of five more piling clusters in
23 addition to everything that's underneath here.
24 Now, for standing, standing is a irreducible
25 constitutional amendment. The Supreme Court

1 has adopted the Luian decision of the United
2 States Supreme Court. They have the burden to
3 satisfy every single element of standing. In
4 this case, we submit that they can't satisfy
5 any of the elements of standing. When it comes
6 to injury in fact, I will just briefly say that
7 we believe that the allegations that we see in
8 the contested case pre-hearing statement and
9 all of the affidavits are really just
10 generalized grievances about the existing
11 operations of the cruise industry.

12 **THE COURT:** Now, let me stop you here so I can be
13 clear on how I am to view this. And
14 unfortunately, I'm going down that path again.
15 But I say we could, it's unfortunate, but I'm
16 going to ask you about Kiawah because that's
17 similar to what -- a good analysis here.

18 **MR. LOWELL:** It is.

19 **THE COURT:** And Kiawah, of course, is set forth and
20 you can consider issues that were made in the
21 opinion of Justice Kittredge, I believe, set
22 forth. Now, at least modifying stuff and it
23 being in consideration again, but not the final
24 thing.

25 **MR. LOWELL:** If where Your Honor is going is that

1 there is ---

2 **THE COURT:** Well ---

3 **MR. LOWELL:** --- that there's a general proposition
4 we can examine more that what's critical ---

5 **THE COURT:** Yeah.

6 **MR. LOWELL:** My first point on Kiawah is ---

7 **THE COURT:** That's exactly the fact that is opening
8 up standing further under that theory I asked
9 about.

10 **MR. HOLMAN:** I have an answer for that later down
11 the road.

12 **THE COURT:** Okay.

13 **MR. HOLMAN:** Which means that this issue on whether
14 you can examine it or not frankly is irrelevant
15 to whether they have standing or not. However,
16 going back to Kiawah Development, the opinion
17 that has been issued is subject to review.

18 **THE COURT:** Right.

19 **MR. LOWELL:** I mean, they argued that in June, so
20 that opinion is not binding and valid case law
21 in the state of South Carolina today.

22 **THE COURT:** All right.

23 **MR. LOWELL:** But that does tie into traceability to
24 some extent. One of the arguments of no
25 traceability is that everything -- even if you

1 accept all of the injuries they assert in their
2 affidavits, none of them are directly traceable
3 to the five pilings. What they're complaining
4 about are existing cruise operations. They're
5 complaining about the alleged soot that's on
6 their terraces today. They're alleging about
7 the noise that they experience today. That's
8 already existing operations with the cruise as
9 is on the south end of the terminal. That
10 doesn't have anything to do with the actual
11 permitted activity here. As a matter of fact,
12 when you look at Sea Pines, what it talks about
13 is the injury has to be fairly traceable to the
14 challenged action of the defendant. Everything
15 their complaining about is what Carnival is
16 doing. They've got a lawsuit pending against
17 Carnival for all of these same things. This
18 isn't Port's Authority. Port's Authority just
19 builds the terminal. All of their alleged
20 injuries are coming out of Carnival. So none
21 of this is traceable to either the five piling
22 clusters or the terminal all together. Now,
23 what they say is well, it could be expanding
24 cruise operations. That's really where the
25 injury is. Well, expanding cruise operations

1 can happen at the south end just like they
2 could happen at the north end. In the case
3 that is directly on point is the Bailey case.
4 The Bailey case ---

5 **THE COURT:** Do you have a traceable issue about
6 that?

7 **MR. LOWELL:** Sir?

8 **THE COURT:** Do you have a traceable issue up there?

9 **MR. LOWELL:** Yes, sir.

10 **THE COURT:** Okay.

11 **MR. LOWELL:** And traceability kind of bleeds into
12 the addressability component ---

13 **THE COURT:** Right.

14 **MR. LOWELL:** --- and the Bailey case is frankly
15 dispositive of this entire standing issue. The
16 landowner in Bailey challenged a modification
17 for a permit to enable on the grounds that the
18 permit facilitated and continued and expanded
19 use of the dock by boats. That is exactly the
20 same allegation that the cruise opponents are
21 making in this case. The ALC, Judge Geathers,
22 dismissed for lack of standing finding there
23 was no causal connection between the alleged
24 injury and the permitted conversion of the
25 docks. He said quote, the boats have been

1 docked there for years and they will be
2 continued to be docked there regardless of the
3 permitting decision. The potential of having
4 boats mooring at the dock would still exist.
5 And the Court of Appeals affirmed Judge
6 Gather's order. They affirmed that analysis.
7 Here we have the exact same thing. The cruise
8 ships have been calling on UPT continuously
9 since 1973. If this permit is denied, they're
10 still going to call on UPT at the south end of
11 the terminal. So where as in Bailey you had --
12 there was going to be a fixed dock or a
13 floating dock, here you have a cruise terminal
14 that's either on the south end or it's going to
15 be on the north end. They can stay at the
16 present location. Now, I heard an earlier
17 argument well, that isn't what the Port's
18 Authority said before. The Port's Authority
19 has been entirely consistent on this point.
20 The preferred plan A, is to renovate building
21 322, move those cruise operations up to the
22 north end of the terminal, keep the south end
23 of the terminal and essentially convert it to
24 public and private use. Plan B, is just to
25 renovate the existing terminal. Renovating the

1 existing terminal to satisfy the federal
2 security conditions of customs and border
3 protection, we could do that at the existing
4 terminal. It's a little more difficult. It's
5 not as environmentally friendly. All the
6 injuries that they're complaining about, as far
7 as traffic and even air emissions, those
8 actually get mitigated under the Port's
9 Authority's plan. When you move the cruise
10 terminal up to the north end and redevelop the
11 south end you eliminate part of this. Those
12 air emissions go away. All the air emissions
13 associated with the rail locomotives, because
14 there was direct on the lot rail access there,
15 those go away. When you talk about traffic,
16 there's a traffic plan on the north end there.

17 **THE COURT:** Have that as an allegation? I'm sorry,
18 stupid question.

19 **MR. LOWELL:** That is the -- the Peter Layman
20 affidavit ---

21 **THE COURT:** Yeah.

22 **MR. LOWELL:** --- that we've provided lays this out.
23 One of his exhibits is the actual concept plan
24 that the Port's Authority is operating under.
25 All of this is covered in the concept plan that

1 Peter Layman has testified to. The other key
2 point that Peter Layman talked about is we are
3 having cruise, that's it. If this permit is
4 denied, you're going to have cruise on the
5 south end of the terminal. You know, we've got
6 a plan B. We've got to renovate that existing
7 terminal and that's what this law demonstrates.
8 And this is part of the courts administrative
9 record and this is part of the presentation
10 that Jim Newsome and Joe Riley have given in
11 the past. And I mean this is entirely
12 consistent. They're saying look, our plan A,
13 what we want to do to help the city, to
14 eliminate some of these complaints folks have,
15 is to renovate the north end, move the cruise
16 up there and use the south end for green space.
17 We want to use the south end for private and
18 public development. That's what the plan is.
19 But, if that doesn't happen, that doesn't mean
20 cruises go away. Cruise is going to be on the
21 south end. What that means is, all of the
22 injuries that they continue to complain about
23 are still going to exist. If they're trying to
24 mitigate -- well, actually what they say on
25 page 24 of their response, is the cruise

1 opponents do not argue that Union Pier will
2 cease operating as a marine terminal if the
3 permitted issue is denied, but rather seek only
4 to mitigate the adverse consequences they are
5 experiencing. Well, if this permit is denied,
6 they're not going to achieve that. I mean, all
7 of those injuries are going to continue. It's
8 not going to get better. If anything, it could
9 potentially get worse if those numbers ramp up.
10 Assuming that they want to -- or assuming the
11 business is there. Which actually brings me to
12 another point. Part of what we're complaining
13 about here are independent third part actions.
14 Carnival is -- I mean, what they are
15 complaining about are emissions from Carnival
16 cruise ships and everything associated with
17 Carnival cruise. Well, you know, whether
18 Carnival calls on this and whether cruise
19 operations expand, whether they contract, all
20 of that are third party business decisions.
21 There is nothing that this court can do to
22 impact that. This court cannot -- I mean,
23 Carnival is not a party. This court can't
24 order Carnival to put in scrubbers. They can't
25 order Carnival on anything related to the water

1 and air emissions that they are complaining
2 about. I mean, whether Carnival wants to dock
3 here or not or port here or not, is completely
4 separate, apart and independent of this
5 proceeding.

6 **THE COURT:** Well, that's my struggle with it. The
7 Kiawah type reasoning, is that if it says you
8 can consider that which effects beyond the
9 specific area of concern and the outcome, in
10 other words, then you could consider --- well,
11 where does it end?

12 **MR. LOWELL:** Well they -- even if -- even if this
13 court rewrote the permits to impose all of
14 those conditions, that doesn't mean that the
15 Port's Authority has to follow them. We just
16 keep the terminal as is on the south end. I
17 mean, there's no mandate that we actually
18 implement the permit. We walk away from the
19 permit if we chose to do so because we believe
20 it is too erroneous and doesn't fit in the
21 vision and the expectations of what is
22 currently out there. So, you know, regardless
23 of what this court could do and what they may
24 be able to accomplish even in a complete
25 denial, they're not going to get the

1 redressability that they want. It's not going
2 to impact all the injuries. All of their
3 affidavits are, we are being impacted today.
4 We have soot today. We have noise today. It's
5 the cruise operations. That's what we're
6 complaining about. That's all of their
7 affidavits. All of their affidavits really go
8 to injury in fact. There is maybe one
9 affidavit that I can recall that even mentions
10 traceability. But the bottom line is, the Sea
11 Pines case says that it has to be likely that
12 their injuries will be redressed by a favorable
13 decision. The U.S. Supreme Court says that
14 there must be a substantial likelihood that the
15 request for relief will remedy the alleged
16 injury in fact. All of their injuries in fact
17 are based on the existing cruise line
18 operations. That's going to continue
19 regardless of what this court does. So there
20 is no redressability in this case. As a matter
21 of fact, by implementing or by denying the
22 permit and keeping them on the south end, it's
23 actually worse. We can mitigate those
24 experiences, where we remove those cargo
25 vessels, less noise, less air emissions, less

1 traffic congestion. The bottom line is there
2 are only two options here that are currently on
3 the table. We have cruise on the north or we
4 have cruise on the south. That's it. Under
5 either scenario, their injuries are going to
6 exist to the extent that they want to allege
7 them on the cruise operations. I mean, Peter
8 Layman's affidavit is clear. Regardless of
9 whether it is north or south, cruise operations
10 are going to be similar scope and size,
11 frequency of vessel calls, size of the cruise
12 vessels, that's not a variable that's dependent
13 on whether they're on one side of the terminal
14 or another. It doesn't matter. Those are all
15 conditions and concerns that are outside the
16 purview of this permit. Even under the Kiawah
17 Development case.

18 **THE COURT:** If I were to find in your favor the
19 redressability, I think you used -- yeah. Does
20 redressability work here? I never looked it
21 up?

22 **MR. LOWELL:** Redressability, yes, Your Honor.

23 **THE COURT:** All right.

24 **MR. LOWELL:** If it's good enough for the U.S.
25 Supreme Court, it's good enough for me.

1 **THE COURT:** All right. To do so, I would have to
2 consider the affidavit of ---

3 **MR. LOWELL:** Peter Layman.

4 **THE COURT:** Peter Layman?

5 **MR. LOWELL:** Yes, sir.

6 **THE COURT:** Okay.

7 **MR. LOWELL:** Which, I mean, everybody has got
8 affidavits in there.

9 **THE COURT:** Yeah.

10 **MR. LOWELL:** I mean, even if you didn't consider
11 everything else for whatever reason Your Honor
12 may want, I mean, affidavits are sworn
13 testimony.

14 **THE COURT:** Yeah.

15 **MR. LOWELL:** That's evidence.

16 **THE COURT:** Okay.

17 **MR. LOWELL:** But I think, when you look at the
18 Bailey case and when you look at the Sea Pines
19 case, that those cases mandate dismissal based
20 on redressability. I don't think this court
21 has a choice.

22 **THE COURT:** All right. Any other agreements on
23 standing os the associated standings?

24 **MR. LOWELL:** Now, on the associational standing, I
25 would say we don't think they can meet any of

1 the three prongs of the Hunt test. We reached
2 that and I'm happy to rest on the brief on that
3 point.

4 **THE COURT:** All right.

5 **MR. LOWELL:** Giving Your Honors prior indication on
6 the civil request, I will address it in brief
7 on that as well.

8 **THE COURT:** All right.

9 **MS. ARMSTRONG - CROSS EXAMINATION - MOTION TO**
10 **DISMISS:**

11 **MS. ARMSTRONG:** Your Honor, when you concluded the
12 arguments on the Motion to Strike the exhibits,
13 I indicated that we would probably, if you
14 decided not to rule in our favor or withheld
15 the ruling, would like to put this case into a
16 little bit more perspective from the
17 petitioner's point of view. So I think what
18 I'd like to do is have Mr. Holman sort of give
19 that, kind of lay that foundation since a lot
20 of the questions that are raised now before the
21 court on this standing motion really relate to
22 merits based questions. And then I will handle
23 legal arguments after that.

24 **THE COURT:** All right.

25 **MS. ARMSTRONG:** I guess we may need a break so that

1 we can switch the computers.

2 **THE COURT:** Okay. Do we want a lunch break or are
3 we going to be finishing up in about an hour?

4 **MS. ARMSTRONG:** I think that we can -- I'm content
5 to continue on.

6 **THE COURT:** All right. I am.

7 **MS. ARMSTRONG:** Yeah, that's fine.

8 **MR. LOWELL:** That's fair.

9 **THE COURT:** All right. We'll take a quick break.

10 Al

11 (A short break was taken from 12:07 p.m. until
12 12:16 p.m.)

13 **THE COURT:** All right.

14 **MR. HOLMAN - CROSS EXAMINATION - MOTION TO DISMISS:**

15 **MR. HOLMAN:** I need to be reoriented sometimes,
16 especially on a long hearing like this one.
17 May it please the court, I'm Blan Holman, here
18 to give a little perspective or a lot of
19 perspective in this case and also some comments
20 about some other parallel cases. I am of
21 counsel and I am a lawyer in those cases and
22 should Your Honor have any questions about them
23 I'll be glad to answer them including the
24 matter pending before the state Supreme Court
25 which was filed against Carnival Cruise Lines.

1 Mr. Lowell mentioned it. He said it was about
2 the cruise terminal and it's actually -- that
3 is directly at Carnival and not about the SPA.
4 But to roll back a little bit on perspective --
5 to understand where the petitioners are coming
6 from. The Union Pier Terminal before 2010 did
7 not serve as the home base for cruise ships,
8 year around home base for cruise ships. That
9 never happened until then. That's the big
10 development that has caused the trouble in
11 Charleston because a home base operation means
12 that the ship is there 2,000 to 3,000 people
13 get off, 2,000 to 3,000 people have to get on.
14 That's where they have to get on the boat
15 because the cruise comes back and the same
16 thing happens again. Supplies on, trash off.
17 Port of call visits -- before 2010, port of
18 call visits typically where a ship is out on
19 some other itinerary stops, people walk around
20 town, get back on the ship and leave. And so
21 that's what happened in 2010 and that is what
22 Carnival has been doing and that is what the
23 new cruise terminal is built to accommodate.
24 So that was the announcement of the new cruise
25 terminal happening and frankly, it was, you

1 know, the citizens were faced with a situation
2 where it was kind of like we are going to
3 relocate this cruise terminal and open up for
4 some development on Union Pier property and if
5 you get in the way, it's not going to happen
6 and that's going to remain an industrial blight
7 in this area and citizens had concerns. And a
8 lot of them involve air pollution and this is
9 just from a newspaper article from a doctor
10 saying burning diesel fuel creates pollution
11 that harms people's health.

12 **THE COURT:** Well, earlier I said I wasn't going to
13 consider newspaper articles.

14 **MR. HOLMAN:** Okay. Well, we can move on.

15 **THE COURT:** Let's just move on. I'm staying off all
16 of these. I've studied all of these.

17 **MR. HOLMAN:** Well, the science, Your Honor, the
18 science has ferreted it out and so we can move
19 on. And what the citizens have done is suggest
20 solutions. And one of them is called shore
21 side power. And very briefly, what that means
22 is instead of burning fuel while the ship is
23 parked at the terminal it would plug in. And
24 other cruise -- they do that at other cruise
25 terminals in Brooklyn, for example, where

1 Carnival operates ships. And so the citizens
2 said can we do that here? And the response
3 they got from Byron Miller was, you know, it's
4 a nice bumper sticker, but unless you're going
5 to pay for it, we're not even going to look at
6 it. You know, it's not worth it. So the
7 citizens have continued to press that and have
8 done their own analysis, which will be part of
9 this case, Your Honor. If we survive the
10 Motion to Dismiss, to show that there are
11 things that could be done that are feasible to
12 make this cruise terminal have less effect on
13 people's health and their families that live
14 near the new terminal, the host terminal. So,
15 for example, cruise power here, this is a
16 report that we're working on that we're going
17 to be submitting to you as a part of this case.
18 It shows that if you plug in one of these
19 ships, you reduce air pollution. Especially in
20 2019, which is kind of a key time frame because
21 then cleaner fuel will be used by the ships.
22 But the bigger ships, 3500 passengers, that's
23 what the new terminal can accommodate, 3500
24 passengers. Carnival Fantasy has 2,000
25 passengers. The new cruise terminal size can

1 handle home base 3500 passengers. So, almost
2 twice. Bigger ship, more fuel. More savings
3 if you plug in and use shore side power.
4 That's the kind of solution and alternative
5 that the petitioners want to have considered
6 and they don't -- it wasn't considered. In
7 this case, they said they looked at it, we
8 think they didn't really look at it in the kind
9 of detail that should have been studied. They
10 did study it and what that did was cursory and
11 was wrong. DHEC took their word for it.

12 **THE COURT:** So that I can be clear, you're saying
13 that the current terminal will not accommodate
14 the 3,500 passenger ship?

15 **MR. HOLMAN:** Your Honor, I'm not certain about that.

16 **THE COURT:** Okay.

17 **MR. HOLMAN:** But what I know is they currently
18 accommodate 2,000 passenger ships and they have
19 to use tents. And you heard Mr. Lowell say,
20 hey, we can do this the hard way or the easy
21 way. You know, their affidavit says if we
22 don't get the permit for the new terminal,
23 we'll just continue using the old terminal, but
24 he also had to acknowledge that they would have
25 to do some work. He said it would be

1 environmentally worse at the existing terminal.
2 That's because they would have to expand. It
3 was built in 1973 and it's, I think, about
4 35,000 square feet, if that, 15,000 square
5 feet. They have tents set up and that is part
6 of the security problem because the Department
7 of Homeland Security says you can't operate an
8 international cruise terminal where there's not
9 enough room for security personnel to check
10 things. We need a new terminal. You've been
11 operating provisionally saying that you're
12 going to build a new terminal. They're either
13 going to have to build a new terminal based on
14 where they are or this one. So it's just not
15 correct that they could just continue operating
16 at infinitum without doing anything. They have
17 said in the permit application that they are
18 pursuing this option because they think it is
19 superior to rebuilding the terminal where it
20 is. We dispute that. That is part of the
21 case. So we think the remedy here would be ---

22 **THE COURT:** You dispute that -- so I can be clear.

23 **MR. HOLMAN:** Well, there are a number of things we
24 dispute there.

25 **THE COURT:** I'm just following up on that sentence.

1 **MR. HOLMAN:** Yes, sir, Your Honor.

2 **THE COURT:** That and then finish it out.

3 **MR. HOLMAN:** We will -- let's just say we dispute
4 that it's obvious that if they continue cruise
5 operations at the existing terminal, that would
6 be environmentally worse than the new terminal.
7 For example, if they can't host 3500 passenger
8 ships at the existing terminal, then there's
9 going to be the Carnival Fantasy, which, you
10 know, given that it has significant impacts,
11 but those are less impacts than a 3500
12 passenger ship. So if they stay with the
13 existing cruise terminal and couldn't have a
14 3500 passenger ship, then the impacts would be
15 less.

16 **THE COURT:** Is there anything in your response that
17 tells me, and we're talking about standing, that
18 a 2200 passenger ship causes less impact than a
19 3500 passenger ship? Is that in there?

20 **MR. HOLMAN:** Right.

21 **THE COURT:** I just don't know if I can presume that
22 ---

23 **MR. HOLMAN:** Right.

24 **THE COURT:** --- I don't know what ---

25 **MR. HOLMAN:** Your Honor ---

1 **THE COURT:** I guess it could logically ---

2 **MR. HOLMAN:** That would be the view, and Ms.
3 Armstrong is going to get into the exact
4 arguments on those merits. But, certainly, the
5 bigger the ship, the more engines, the more
6 emissions, the more pollution, the people, the
7 more traffic which leads to another area of
8 concern which is the traffic. Which is a well
9 known concern in a very small area of Charleston
10 where you're putting a thousand slugs of
11 vehicles in the middle of the day. It's not
12 just -- you know, this is right downtown, this
13 is where the ship is docking, right next to
14 these neighborhoods and you can -- this is the
15 study that Mr. Lowell had up on the screen, from
16 their own concept study. This is the projection
17 of the traffic from the 3500 passenger ship so
18 you can see that there's 800 debark vehicles,
19 that's when people get off the ship, and then
20 there's 800, up to 800 embark vehicles. You can
21 see the trucks, the city trailers and all that
22 kind of stuff, so we're talking upwards of 2,000
23 vehicles every home base visit. So that's right
24 down town and these are legitimate concerns and
25 they have alternatives and options to reduce

1 those impacts and we would like them to
2 demonstrate that through the court. It would
3 include possibly moving the terminal. Examine
4 putting it at the Columbus Street Terminal,
5 which is a 1000 yards north on the peninsula.
6 Okay? But they say it's not possible. We think
7 it is possible. It is a disputed issue of fact.
8 And that is something, should we succeed on
9 merits, we would readdress some of the injury.
10 And I just wanted to provide that kind of global
11 overview and also answer any questions. I'll
12 let you know that I am prepared to answer any
13 questions about the Carnival case or about the
14 federal case which is also ongoing here but now
15 I would like to turn it over to my learned
16 colleague, Ms. Armstrong to talk about the
17 specific issue to the standing.

18 **THE COURT:** All right.

19 **MS. ARMSTRONG - RE-CROSS EXAMINATION - MOTION TO**
20 **DISMISS:**

21 **MS. ARMSTRONG:** Your Honor, I'm going to also --
22 I've got a lot more in here that I really need
23 to cover, but I wanted to be thorough because I
24 wasn't sure how detailed Mr. Lowell was going to
25 be in his arguments. I think the -- one of the

1 most telling things about the arguments and
2 briefs that SPA has put forward is that none of
3 them have referred to the Smiley case. And
4 Smiley is the case where standing is raised on
5 a Motion to Dismiss and decided in favor of
6 Smiley because of the allegations made in the
7 affidavits. The cases that are cited and relied
8 on primarily by SPA, the Town of Arcadia Lakes
9 case, the Bailey case, those cases were decided
10 after there was a full merits hearing. And so
11 some of these issues that Mr. Holman just talked
12 about, where there are contested facts, that
13 will -- those issues are going to come out when
14 this court has a full opportunity to hear all of
15 the evidence. And until then, the allegations
16 are sufficient. So what this court really needs
17 to look to is the allegations. I think that Mr.
18 Lowell did reference the generalized grievance
19 and that these were basically inferring that if
20 it's general interest, it's not sufficient for
21 standing and the Sierra Club versus Norton is a
22 seminal case on standing that really says that
23 even if they are widely shared, as long there is
24 concrete particularized injury -- we'll get into
25 some of those right now. Just some of the

1 testimony that's in the affidavits, Christina
2 Dodd talked about the soot that she's been
3 experiencing on her house that didn't start
4 until the cruise ships began coming into the
5 Union Pier in 2010.

6 **THE COURT:** Can I ask you to stop it there?

7 **MS. ARMSTRONG:** Sure.

8 **THE COURT:** Because that's part of my struggle ---

9 **MS. ARMSTRONG:** Okay.

10 **THE COURT:** --- is you've got Christina Dodd's
11 comments. Where is there anything in your
12 submissions that sets forth that the new cruise
13 line is going to cause further expansion of
14 soot?

15 **MS. ARMSTRONG:** Well, all of the allegations.

16 **THE COURT:** Wait a minute. It says for the past two
17 years, I've been finding soot on my windowsills.
18 I've got it all in my notes too.

19 **MS. ARMSTRONG:** Yes, sir.

20 **THE COURT:** It doesn't -- I am to presume that it
21 comes from the cruise ships, but I -- I left
22 with that presumption and not -- not a
23 determination of that. I don't want to
24 speculate.

25 **MS. ARMSTRONG:** Right. I don't think that this

1 court needs to make a determination on that.
2 This isn't the merits hearing.

3 **THE COURT:** Right. No, it's not.

4 **MS. ARMSTRONG:** Yeah, so I think ---

5 **THE COURT:** I'm just looking at her injuries.

6 **MS. ARMSTRONG:** --- you look to the allegations and
7 I think one of -- one of the the key affidavits
8 Tommie Robertson, who says that she sits on her
9 balcony, that right now is a little bit farther
10 away from the existing terminal, the new
11 terminal is going to be even closer to her house
12 ---

13 **THE COURT:** Right, but ---

14 **MS. ARMSTRONG:** --- and she will be able to throw a
15 stone into where the new terminal is.

16 **THE COURT:** --- I think she survives. When I look
17 at all these different -- well, the one thing
18 that hasn't been discussed here is some of these
19 individuals may have standing and some may not.
20 And that's what I need to understand. What's
21 the lady's name just for reference?

22 **MS. ARMSTRONG:** Tommie Robertson. She sat on her
23 balcony and said ---

24 **THE COURT:** She's the closest one? She's got the
25 strongest case. Because she -- and also, she's

1 the one where the terminal would actually move
2 closer to her home, correct?

3 **MS. ARMSTRONG:** That's correct, Your Honor.

4 **THE COURT:** Okay. Well, I was asking about Ms.
5 Dodd.

6 **MS. ARMSTRONG:** And Ms. Dodd made allegations that
7 she -- she drew the correlation for the last two
8 years since, you know, and Mr. Holman just
9 discussed that, the fact that the Carnival
10 cruise ships have been operating at Union Pier
11 for the last, little over two years. And it's
12 been since that time that she's experienced this
13 soot problem that she -- the new terminal, she
14 does make the allegation that the new terminal
15 is going to make the problems worse and I think
16 that it's logical for the court to draw the
17 conclusion that if there are 2000 people leaving
18 on a cruise ship right now and 3500 can be on a
19 cruise ship at a new terminal, that you're going
20 to have more people, which is going to add more
21 congestion and there's going to be more traffic.
22 I mean it's just -- it's really, you know, it's
23 not a leap in logic at all to recognize that
24 there are going to be more impacts. People,
25 traffic, that you're going to have a bigger ship

1 that's going to be burning more fuel. It's the
2 fuel that releases these emissions and you have
3 more fuel being burned, you're going to have
4 more emissions and so those are -- I believe all
5 contained within the allegations. And Ms. Lane
6 was another client who talked about her impact
7 on her quality of life. She goes as far as
8 talking about the fact that she grew up in
9 Charleston, she decided to become an architect
10 because she was moved by the architecture in
11 downtown Charleston. She's got her office and
12 her home within blocks of the Union Pier
13 facility, but it actually has caused harm to her
14 business because engineers, other architects,
15 consultants, designers, clients, have a
16 difficult time making it in to her office to be
17 able to conduct business because of the volume
18 of traffic that she's actually had some of these
19 contractors call her and say let us know when
20 the cruise ships are in town because we can't
21 get into your office then and that -- you know,
22 she does the same correlation that if there are
23 more -- if there are larger ships -- and Mr.
24 Holman didn't mention that there is a
25 possibility of more ships being able to port at

1 the new facility whereas right now there is only
2 one ship that can be -- one ship that's there at
3 a time, there's a potential for two ships to be
4 ported at the new facility at one time. So, you
5 would not only have more ships, you have larger
6 ships that will have more people driving into
7 the terminal and causing more congestion and
8 making it even more difficult for her to conduct
9 business. So, I think those are allegations
10 that, you know, are kind of -- identified, put
11 some of them onto the screen about her business
12 with standing itself or even more harm as a
13 result of the permitted activity. You know,
14 Tommie Robertson, we've already talked about her
15 and her being able to see the smoke, when it
16 comes out of the ship, sitting on her dock or on
17 her back porch and then, you know, almost
18 immediately having a difficult time breathing.
19 And so these things are going to be obviously
20 points that we're going to draw connections to
21 more carefully, or in more detail, when we are
22 at the point of presenting the merits of the
23 case. And that's part of what we're doing
24 through discovery is developing and getting the
25 pieces of evidence that we need to present the

1 full picture to this court. But right now these
2 are the allegations and I think that the
3 allegations, I believe under the Luian standard,
4 absolutely meet the burden that the plaintiffs,
5 the petitioners have to show in this case. Go
6 back. I mean, just addressing the idea that the
7 petitioners are opposed to all cruise
8 operations, Ms. Robertson even went as far as
9 saying she's not opposed to cruise ships, but
10 believes that there needs to be some enforceable
11 limits and protections. And so some of those
12 enforceable limits and protections would include
13 things like shore power, a condition which this
14 court could require as a condition of the
15 permitted activity that would redress some of
16 the injuries that have been alleged. Where
17 parking is for the new site, right now, all the
18 parking is right downtown right on the
19 peninsula, on seven acres on the Union Pier
20 Terminal property. If there was off site
21 parking, that wasn't in such a congested area,
22 that could be incorporated into a permit.
23 Limitations on the number and size of ships.
24 Right now they are voluntary. Now, if SPA would
25 agree to make that a mandatory condition, then

1 that could go to alleviate some of the concerns
2 that have been raised, but there is no -- that's
3 not a binding limitation in any fashion and so
4 that's one of the other allegations that the
5 petitioners rest on for causing harm. Steven
6 Gates also talked about the reason why he
7 purchased his home in downtown Charleston. It's
8 enjoying the sense of pace, the walkability,
9 being able to get around easily and the charm of
10 the city and then he directly draws the
11 correlation between when Carnival Fantasy began
12 operating in the City of Charleston and talks
13 about how it detracts from his enjoyment of the
14 historic qualities of Charleston and his
15 livability. His ability to walk around, get
16 around, to drive around. The reasons that he
17 bought his home in that area have been -- have
18 been harmed already and I think he continues
19 that in his affidavit that those concerns will
20 be exacerbated when there are more ships that
21 are bringing in more passengers and having more
22 increased emissions. I just kind of laid out
23 sort of a summary of what all the injuries that
24 we're looking at and I don't think we -- we
25 don't need to necessarily belabor those any

1 further. I think that the Court's point on
2 Kiawah and raising that is -- while the
3 ultimate, the decision in that case goes to the
4 merits, what, under the regulations is the court
5 able to consider. And I think it's certainly
6 telling that if DHEC can considers impacts
7 outside of the critical area in making its
8 regulatory decision, then it -- which isn't
9 really a merits based question, then the injury
10 doesn't necessarily need to be tied to success
11 on the merits. And that's what the case really
12 said. That these are two independent inquiries,
13 you don't have to prove success on the merits in
14 order to meet the standing requirements. And as
15 far as Kiawah is concerned, I understand that
16 Mr. Lowell phrased it as not a binding decision,
17 we agree. It's on rehearing. We don't have any
18 decision from the court. But there is one thing
19 that is clear. In both decisions, two times
20 there have been a majority, you know, first a
21 four person majority and now the dissent and the
22 concurring opinion of Justice Kittredge that did
23 say we've got -- OCRM does have to look at
24 impacts outside the critical area and really
25 broaden the scope of the agency's review. You

1 know, in the alternative SPA is arguing you
2 can't take that kind of a broad view, you can
3 only look at just these five pilings and that's
4 all you can look at Court. And if that -- if
5 that's taking to it's logical conclusion, and
6 there's not going to be anybody who could ever
7 challenge this permit or any other permit in the
8 critical area because it's only looking at a
9 very -- taking a very narrow view of just that
10 actual one thing that's occurring instead of
11 looking at what all the ramifications are, what
12 the direct impacts are that are going to result,
13 but for that permitted activity in the critical
14 area. Let's see. We talked about this , you
15 know, the fairly traceable, the Smiley case
16 identified that as one of the standards that
17 needed to be fairly traceable to the challenged
18 activity. There have been a number of cases
19 that talked about what that looks like. The
20 Duke Power case is one that we cited that
21 adopted a but for analysis. It talked about
22 several of the immediate adverse effects of the
23 nuclear plants, including the environmental and
24 the aesthetic consequences of the type of
25 harmful effect that has been deemed adequate in

1 prior cases. And so, that court continued that
2 the injuries in fact had nothing to do with the
3 claims on the merits and the court found that no
4 such nexus was required. The court just merely
5 looked at the fact that the Price Anderson Act
6 would increase the likelihood of the nuclear
7 power plants being constructed and that was --
8 that was sufficient and the alleged harms as a
9 result of the construction of nuclear power
10 plants. Then Smiley talked about fairly
11 traceable in the challenged activity and not the
12 result of some third party not before the court.
13 You know, I know that -- I understand that SPA
14 has argued that Carnival's actions are the
15 actions of a third party not before the court.

16 **THE COURT:** Say that again?

17 **MS. ARMSTRONG:** SPA has alleged that the injuries
18 we're complaining of are caused by Carnival and
19 Carnival is a third party not before the court.

20 **THE COURT:** All right.

21 **MS. ARMSTRONG:** I think that is inconsistent with
22 the Duke -- it is inconsistent with the Duke
23 Power case because Duke Power adopted this but
24 for analysis and Carnival could not operate,
25 could not run cruise ships in Charleston without

1 an operable terminal somewhere in Charleston.
2 And there are many scenarios where, under which
3 they could operate but all of them are going to
4 require a permit. Either the permit that's
5 being challenged right now to relocate and
6 construct a new terminal. If terminal
7 operations were going to continue at the
8 existing site, it would have to require new
9 permitting and new construction, over -- also
10 over a new physical area. So there isn't a
11 scenario under which they could just continue
12 operating and causing the harms that are alleged
13 by the petitioners without some -- without SPA,
14 without DHEC authorizing some activity to SPA
15 for construction. So that's the fairly
16 traceable part. It's, you know, far different
17 from cases that are cited in SPA's brief that
18 talk about policy decisions and for example, the
19 Doe versus Obama case where the court said the
20 connection between injury and a policy decision
21 is purely speculative. Here, there's not a
22 policy. This isn't a decision. It is a
23 permitting decision. And this permit is
24 directly necessary for SPA to continue operating
25 the cruise ship terminal and for Carnival to be

1 able to use those -- use that facility. I think
2 that I made a few notes on redressability, but
3 I believe Mr. Holman did touch those -- touch on
4 those. The requirements that this court could
5 impose such as shore power being required and so
6 what we have here is a permit that is the link
7 between the continued operations and no
8 operation. We also have an expanded facility
9 that's going to ---

10 **THE COURT:** When you say that shore power, was that
11 part of an affidavit?

12 **MS. ARMSTRONG:** Well, the shore power, I mean,
13 that's been something that's alleged -- that's
14 been alleged in our pre-hearing statement, that
15 it is before the court, yes. And so we -- I
16 think -- would you back up just like one more,
17 maybe. Okay.

18 **MS. WHITE:** Sorry.

19 **MS. ARMSTRONG:** That's okay. So, you know, there
20 were a couple other cases that talked about, you
21 know, the merits. Which is another -- which is
22 what you're asking about, and what I'm getting
23 at again, is whether we could, you have to prove
24 the merits and why these questions of the merits
25 are really ---

1 **THE COURT:** And I was asking you if it was alleged?
2 **MS. ARMSTRONG:** Alleged. Yeah, so, there are
3 allegations that there are options for reducing
4 emissions such as shore side power. So I guess
5 we don't need, you know, we've already touched
6 on the idea that you don't have to prove the
7 merit to the case in order to establish
8 standing. That was also in the Fourth Circuit
9 case, Cooke County and then, I think, another
10 pointed case that we cited in our brief was
11 Friends of the Earth versus Laidlaw that talks
12 about the relevant showing the injury, not
13 injury to the environment, in other words, not
14 an injury that was caused to the critical area
15 by driving of the pilings, but injury to the
16 actual plaintiff. We cited the case of Allen v.
17 Wright which I think simply explains this
18 traceable connection or having a fairly
19 traceable connection and what the court said was
20 that imposing an undefined, clearly more
21 rigorous standard for redressability for reasons
22 unrelated to the causal nexus between injury and
23 a challenge conduct can only encourage
24 undisciplined ad hoc litigation, a result that
25 would be avoided if the court just considered

1 justiciability of the issues rather than using
2 those issues to obviate the standing analysis.
3 And so that's, we believe, what SPA is
4 attempting to do, which is why we gave the court
5 a little bit of the explanation of what -- of
6 how we believe that the justiciability, the
7 issues will come down, but really what the Court
8 needs to look to is this sufficiency of the
9 allegations and we've gone through some of those
10 and I think it was the affidavits that will show
11 that there have been sufficient allegations made
12 in the pleadings. And I don't -- I don't think
13 I need to go through the rest of these, but if
14 the court has any, you know, concerns we
15 certainly would like to address them, but it has
16 been fully briefed and we just ask that the
17 court deny the Motion to Dismiss and find that
18 the petitioners made sufficient allegations of
19 standing.

20 **THE COURT:** What about the issue of the
21 associational standing and the purposes of the
22 organizational standing? I looked through that
23 and I do have some questions on that.

24 **MS. ARMSTRONG:** Well, it's ---

25 **THE COURT:** I'm looking, at least -- the phraseology

1 that the court or the Preservation Society or
2 the Port Authority used, in looking at their
3 purposes that you've provided for the different
4 organizations, it was raising the question about
5 whether they have standing. If I could hear the
6 purpose of the organization. Can you explain
7 all those to me?

8 **MS. ARMSTRONG:** So you're talking about the HUNT
9 test?

10 **THE COURT:** Yes.

11 **MS. ARMSTRONG:** And the --

12 **THE COURT:** I'm talking about the descent, but the
13 HUNT test -- are you saying that is an invalid
14 test or not?

15 **MS. ARMSTRONG:** I think the HUNT test is the right
16 test.

17 **THE COURT:** Okay.

18 **MS. ARMSTRONG:** And the HUNT test looks at, you
19 know, an organization can bring a suit, has
20 standing as long as any one of it's members has
21 standing. So, it only needs but one member to
22 meet that test.

23 **THE COURT:** Well, does that -- does the standing of
24 the one member have to also fall under the
25 umbrella of the purpose of the organization?

1 **MS. ARMSTRONG:** Well, that's a second -- I think
2 that is a second -- a separate and a second
3 distinct factor which is that the suit -- tat
4 the goal is sought is to be germane to the
5 organization's purpose. Right, that is correct.

6 **THE COURT:** Well ---

7 **MS. ARMSTRONG:** And I think -- do you want me to get
8 specifically into the ---

9 **THE COURT:** Unfortunately, I do.

10 **MS. ARMSTRONG:** Yeah. So, I think these are all
11 laid out in our request for a contested case
12 hearing. We've laid out the purposes of these
13 organizations and some of these organizations
14 purposes are contained in affidavits. I know
15 that the affidavit of Steve Gates talks about
16 the goals and the purposes of the Charlestowne
17 Neighborhood Association and seeking and keep
18 the neighborhood informed and be active and
19 participate in activities that will effect the
20 members of the organization and so the
21 allegations are -- draw that -- have a direct
22 connection. Because they explain quality of
23 life issues facing a person, a member of the
24 association that is directly affected by the
25 ongoing activities and will be affected by the

1 future activities. But as far as the
2 Preservation Society of Charleston and Historic
3 Charleston Foundation, Virginia Lane testified
4 about the architecture and the impacts on you
5 know, viewing and enjoying those resources.
6 Those are the kind of resources that the
7 historic preservation groups seek to protect and
8 preserve. Their goals are to ensure that the
9 historic and architectural qualities of
10 Charleston, that make it a national historic
11 register site, are preserved and protected. And
12 so their interests are in ensuring that those
13 resources are not diminished by larger --
14 potentially larger and more cruise ships coming
15 into the area by harmful emissions that are put
16 out when the cruise ships are at port and that
17 those kinds of activities. So that's -- those
18 purposes are, you know, fairly broad and
19 certainly encompass activities that have direct
20 impacts on cultural and historic resources. We
21 talk about the Coastal Conservation League and
22 the Surfrider Foundation have goals of
23 protecting air quality and water quality and
24 protecting the human environment and advocating
25 for laws, plain use of environmental decisions.

1 And so the League, you know, has historically
2 before this court appeared many times and those
3 are the purposes of the organization and all of
4 ---

5 **THE COURT:** How does water quality emissions
6 effected?

7 **MS. ARMSTRONG:** Well, I think water quality comes --
8 and we will see how far we get into it when we
9 have the merits hearings on this case, but the
10 cruise ships that operate by way having a cruise
11 ship in terminal facility in Charleston, they
12 have what is called gray water and their sewage
13 or their waste water is discharged into the
14 ocean. It's not -- it doesn't come to a water
15 treatment plant, it's actually discharged. And
16 where that water is discharged comes close to
17 the shore it's discharged whether it's -- there
18 are certain federal requirements ---

19 **THE COURT:** So if I could stop you?

20 **MS. ARMSTRONG:** Sure.

21 **THE COURT:** Would be that -- would your position be
22 that -- because I did come in here with a
23 different concept, as I told you earlier. That
24 at this stage, the allegations are sufficient to
25 take you forward, depending on the outcome is

1 and that, so far to me, I would have standing
2 eventually. But if you don't established
3 sufficient nexus but at this point in time
4 you're taking the position that you've got
5 standing based on the new allegations.

6 **MS. ARMSTRONG:** Yes, Your Honor.

7 **THE COURT:** And one more time, if you could
8 summarize it. Now, Mr. Lowell's argument
9 centered on traceability and redressability.
10 But the redressability, if you could respond to
11 that. And I know you already did it, but I want
12 ---

13 **MS. ARMSTRONG:** Right.

14 **THE COURT:** But I want to hear it one more time.

15 **MS. ARMSTRONG:** What I understand SPA's argument on
16 redressability to be is that this court cannot
17 -- I mean, ultimately redressability goes to
18 whether this court can fashion a remedy. That's
19 what redressability is.

20 **THE COURT:** Fashion a remedy that would address the
21 injury that you alleged occurred.

22 **MS. ARMSTRONG:** Yes. Absolutely. And it is tied to
23 traceability. And so I think what we would say
24 as far as redressability, if the court agrees
25 with us, for example, that a way to decrease the

1 harmful emissions, to decrease what people are
2 breathing in like, Tommie Robertson, and her
3 lungs hurt and when she doesn't feel well from
4 breathing in emissions that this court could
5 take that and weigh it and decide that the way
6 the operations are allowed to continue under the
7 permit which would be using the same fuel that
8 they are using right now, the diesel fuel, as
9 opposed to a power source, shore side power,
10 plugging in the ships rather than running them
11 on diesel fuel, would actually lower the
12 emissions then this court could do a couple of
13 things. There's been some debate in the Kiawah
14 case about what the extent of the ALJ's
15 authority when it comes to the modification of
16 a permit. But, Your Honor, certainly taking the
17 position that the court, if it sees a way to
18 fashion a remedy, than it can so impose those
19 kinds of conditions. And so a condition that
20 shore power be a requirement of this permit,
21 that would help redress the air emissions
22 problem. A condition that the voluntary
23 management plan, that's actually an attachment
24 to the permit, but is termed voluntary, is a
25 condition that the limits -- limitations on the

1 size and number of ships in that plan are
2 binding. That would absolutely go to redressing
3 some of the harms because it would ensure
4 limitations on the size and the number of ships.
5 So there are a host of other alternatives and of
6 course the court could always remand the case
7 back to DHEC to figure out ways to implement
8 some of these, but I think some of these
9 concerns. But I think the court can certainly
10 redress them with conditions on the permit.

11 **THE COURT:** All right.

12 **MS. ARMSTRONG:** And you know, taking it just a
13 little bit further, if the court decided that,
14 you know, agreed with the position that maybe
15 there wasn't an adequate, feasible alternatives
16 analysis with relation to the location of this
17 terminal, then the court absolutely would be
18 able to send -- remand this case back to DHEC in
19 order to do -- in order to require a truth of
20 feasibility analysis looking at alternative site
21 locations and designs for this terminal and that
22 certainly would also be a way to redress some of
23 the injuries alleged by the petitioner.

24 **THE COURT:** All right. Mr. Lowell?

25 **MR. LOWELL - RE-DIRECT EXAMINATION - MOTION TO**

DISMISS:

MR. LOWELL: There's just no redressability here. Here's the problem. This court cannot order cruise operations to be moved to the Columbus Street Terminal. This court cannot order the cessation of cruise terminal operations on the south end of the terminal. This court just doesn't have that authority. This court is limited to this DHEC permit. Now, redressability usually is not an issue that's argued in standing and the reason is because generally it's a new permit for a new project. So obviously denying a permit is going to stop that project which is going to stop whatever those injuries are. But that isn't the case here. All of their injuries that they allege in all of their affidavits are based on the existing cruise operations. And that just isn't going to change. And we talk about merits and all of that, but the bottom line is, there is no discovery and no merits trial in the world that's going to change the fact that the Port's Authority can keep cruise operations on the south end of the terminal. Now, I said ---

THE COURT: Can I stop you?

1 MR. LOWELL: Sure.

2 THE COURT: They're making allegations that if the
3 permit is granted, that they will suffer greater
4 harm from the soot and the noise and the
5 traffic. I mean, that's their allegation. At
6 this stage, if I consider only allegations at
7 this point, why would that not be something that
8 could be redressable if I deny the permit? I
9 mean, their allegation is that if you grant the
10 permit, these bad things are going to happen.

11 MR. LOWELL: Their allegations are based on the
12 existing operations. And their allegation is
13 that this permit allows for the continuation and
14 possibly more. Now, you know, they may raise
15 the question of I don't know if the south end
16 can accommodate a 3500 passenger, well of course
17 it can. I mean, when you look at the picture,
18 you have a huge railroad cargo vessel and the
19 Carnival Fantasy both docked at the same pier.
20 I mean, we are not changing the boundaries of
21 the Union Pier Terminal. The Union Pier
22 Terminal has been there and has been operating
23 before they even designated this as a historic
24 district. Mr. Holman made the comment that home
25 porting began in 2010 and frankly, I'm not sure

1 that's correct. I think the home porting had
2 been at the cruise terminal, UPT, prior to 2010
3 with a different cruise line. So I'm not sure
4 that's accurate and I haven't seen any
5 supporting evidence for them to make that
6 statement. Or for the statement that the south
7 end couldn't accommodate a bigger ship. That's
8 all just speculation, conjecture and nothing in
9 any of the affidavits or any evidence that
10 they've made, or frankly even in the
11 allegations, that would cover all that. But to
12 your point, that goes to alleged injury in fact.
13 There was case law which cuts both ways about
14 whether an increased injury, which is what
15 they're trying to allege, satisfies the injury
16 in fact requirement. In fact, part of the
17 reason they're making that allegation is because
18 we would make the claim on injury in fact that
19 this is exactly what's going on today. So, but
20 that's all just the alleged injury in fact
21 component. It doesn't have anything to do with
22 redressability. Everything that we're doing
23 today, all of their affidavits are keyed off of
24 what happens today. You know, their entire
25 PowerPoint presentation, well there's traffic.

1 The affidavits, I can't meet my significant
2 other for lunch because of the traffic. If this
3 permit is denied, that's going to stay. All of
4 those injuries are going to stay. The CST, as
5 I indicated, this court can't order the Port's
6 Authority to move cruise operations to the
7 Columbus Street Terminal. You can't cease or
8 order the cessation of the cruise operations on
9 the south end. This is exactly what happened in
10 Bailey. These are analogous facts to Bailey and
11 the Court of Appeals affirmed, Judge Geathers
12 who said if it's going to be there before and
13 it's going to be there after, then I really
14 can't give you anything. The Friends of the
15 Earth versus ---

16 **THE COURT:** Let me stop you. Don't lose your place.
17 If I was to go through their allegations and
18 their affidavits, and I find that in those
19 affidavits they make allegations about a future
20 increased impact, then have they established
21 standing at this point to go forward? Not to
22 win the case, but to go forward?

23 **MR. LOWELL:** No. They may have established an
24 injury in fact, but they have not established
25 redressability. It's not a cessation of the

1 injury. They don't -- they have to benefit in
2 a tangible way from the court's intervention.
3 Everything that's in their affidavits talks
4 about continuing operations. That's it. I mean
5 they just don't want the cruise ships there.
6 And Your Honor asked the question about Tommie
7 Robertson and they talked about, you know, her
8 affidavit, you know, if the cruise ship moves up
9 there and there terminal is there, she's close
10 enough to throw a rock. She's close enough to
11 throw a rock on Union Pier Terminal today. I
12 mean the cargo vessels are already docking
13 there. Your Honor made the point about the soot
14 emissions. Well, the League actually tried to
15 connect the soot that they were finding in the
16 city to the Carnival cruise ship and they
17 couldn't do it. In one of the emails we
18 attached to one of our filings is a copy of
19 Katie Zimmerman, which even acknowledges that
20 they could not connect the soot to the cruise
21 ships. I mean, we're talking about diesel
22 emissions -- offer of diesel emissions, I mean,
23 the cruise ships constitute to less than five
24 percent of the business at the Port's Authority.
25 You have cargo vessels in there all the time.

1 Those guys are in burning diesel fuel. There's
2 just no way to connect those two things
3 together. And if Tommie Robertson is closer to
4 the north end of the terminal and as you can
5 tell by the picture, that's where the cargo
6 vessels are. There's no way to tell whether the
7 soot on her piazza is coming from a cargo vessel
8 or the cruise vessel or some other ship that
9 happens to be going by in the harbor. You just
10 can't make that connection. That ---

11 **THE COURT:** Well, Mr. Lowell, what I've had -- if I
12 was to consider factually at this point and
13 time, I would see your point. But if I'm only
14 considering allegations and she makes the
15 allegation that matters are going to be worse --
16 -

17 **MR. LOWELL:** Right.

18 **THE COURT:** --- then -- and you make that allegation
19 and the issue is okay, she's made the allegation
20 it's going to be worse if the terminal is
21 granted because of whatever impact to her, then
22 under that theory it would be redressable
23 because you could just not grant the terminal.
24 The point you're making is more toward the
25 ultimate merits of the case and I'm asking the

1 question ---

2 **MR. LOWELL:** Your Honor, I don't think they are. I
3 mean Peter Layman's affidavit was pretty clear
4 that the cruise terminal operations continuing
5 on the south end and, I mean, your question
6 about the increased injury, that was the only
7 allegations that was made in the Bailey case and
8 the Court of Appeals said it wasn't enough. And
9 this is the exact same issue. I mean, that was
10 a fixed versus a floating dock for boats to moor
11 on. And one of the allegations for standing was
12 there's going to be more boats, this is going to
13 turn into a commercial marina and one of the
14 allegations was if we have increased traffic and
15 if it's a floating dock, that means the larger
16 ships because it was a 53 foot vessel that could
17 be docked there and this is all in the order
18 from Judge Geathers, that they dock there and
19 the higher frequency and that they feared for
20 their children swimming in the river and they
21 could be run over by the boat. None of that was
22 sufficient to establish standing in the Bailey
23 case.

24 **THE COURT:** Right.

25 **MR. LOWELL:** And I know they don't like Bailey.

1 They pretty much ignored Bailey in their
2 response, but I don't think this court has that
3 luxury. I mean, it's a Court of Appeals
4 decision. I know all the orders around here,
5 even Judge Geathers' order in that case can be
6 persuasive or not as you may deem it
7 appropriate, but when the Court of Appeals has
8 exactly an analogous facts and says there is no
9 standing here because this is not redressable,
10 because the activity can continue even if we
11 deny the permit, I just don't see how the court
12 can get around what the Court of Appeals has
13 said.

14 **THE COURT:** So you're saying they ignored Bailey and
15 they're saying you ignored Smiley, so ---

16 **MR. LOWELL:** Well, you know, I mean, all the quotes
17 they had from Smiley was nothing but Smiley
18 quoting either Luian or Sea Pines. That's the
19 test. Now, the real issue in Smiley was is a
20 temporary injury sufficient to constitute an
21 injury in fact for standing and the lower court
22 had said, and it was this court, that said it's
23 not. It's a temporary injury, you don't have
24 standing. And the real holding of the Supreme
25 Court was that it didn't matter if it's

1 temporary or if it's permanent. If it is an
2 injury in fact, then that's sufficient to
3 satisfy standing. I mean, the other reason on
4 this causal connection thing is they filed suit
5 against Carnival Cruise Lines because Carnival
6 Cruise Lines is the one responsible for all the
7 emissions. In the water and in the air. That's
8 why they sued Carnival Cruise Lines. Their
9 injuries stem from those cruise operations by
10 the Carnival Cruise Lines. The other issue
11 there is and we talk about this in our briefings
12 is the Doe v. Obama case. You talk about this
13 traceability and typically the traceability is
14 all the action of the same person. But here,
15 you've got a break in that causal chain. You've
16 got a break in the traceability. And that's
17 what those cases talk about. If there's a third
18 party who can come in here and be responsible
19 and break that chain, then you don't have
20 traceability.

21 **THE COURT:** Well, these third parties can come in or
22 there's a break in the chain because the third
23 party is not here?

24 **MR. LOWELL:** Both.

25 **THE COURT:** I missed the first one, but I understand

1 the second one.

2 **MR. LOWELL:** Well, the Doe v. Obama case is a Fourth
3 Circuit case so it's a little closer to home and
4 it walks through that analysis and they held
5 that standing was not sufficient. On your point
6 about Tommie Robertson and how individualized
7 that was and the associational standing, you
8 know, the three parts of the associational
9 standing is one, members have got to have
10 standing. Two, it's got to be germane to the
11 organization and three, individual participation
12 isn't required. It's the only way and
13 association has standing. If the harm to Ms.
14 Robertson is so individualized and
15 particularized that it would require her
16 participation, then those member organizations
17 don't have standing. And this is what Justice
18 Hearn and Justice Kittredge talked about in the
19 dissent of the Smith Land Company case. And
20 they flat out said if one member has standing,
21 that's not enough. That injury has to flow from
22 the membership entrance. And that's absent
23 here. And I know they're going to say well,
24 that's a dissenting opinion. That doesn't
25 matter. But what's important is, that three

1 judge, three justice majority opinion didn't
2 discuss this at all. It's not like you have
3 three justices who are saying no and two
4 dissenting justices who are saying yes. Three
5 justices of the majority did not address this.
6 They said it wasn't preserved for review.
7 Justice Hearn disagreed and she and Justice
8 Kittredge would have found the associational
9 standing was lacking in the Smith Lane case. So
10 of the two justices who analyzed it, two
11 justices said the associational standing was
12 lacking and they do that on the third prong of
13 the HUNT test. Ms. Armstrong made the comment
14 that any other option would require a permit and
15 that's just not true. If they renovate the
16 existing terminal, there is a very strong
17 argument that no authorization from DHEC is
18 required. And that's because the terminal was
19 built and constructed in 1973. It became
20 operational in 73, it was constructed prior to
21 that, the cruise terminal. The critical area
22 permit came into play in 1977 and there's a
23 grand fathering provision. This is issue has
24 actually been litigated by the Port's Authority
25 with the Coastal Counsel back in 1978 and it was

1 held that the Wando Welch terminal was grand
2 fathered in procedurally. So, the way that
3 statute reads, I don't think the Port's
4 Authority would need any additional permit from
5 DHEC to be able to renovate that terminal and
6 drive additional pilings. But even if it did,
7 that is a separate permit matter which would
8 have it's own issues and that would be a
9 completely separate and independent matter from
10 what we have here today. That has nothing to do
11 with what this court can rule. This court has
12 to only address the permit that's in front of it
13 today. So whether they're right or wrong or
14 whether I'm right or wrong about whether it
15 would require an additional permit, has nothing
16 to do with whether it's redressable. The Bailey
17 case and the Sea Pines case -- because the
18 Supreme Court ruled at Sea Pines that the
19 petitioners did not have standing because of
20 redressability. And what they, you know, what
21 they did in that case it was about culling the
22 deer and the court said, even if -- whether I do
23 it this way or I do it this way, the deer
24 population is still reduced. So there's no
25 redressability here. Because under any

1 scenario, the deer population is going to be
2 reduced and it's the same thing here. Under any
3 scenario you've got cruise operations. You've
4 got cruise ships. You've got cruise emissions.
5 There is no redressability through this permit
6 to remedy the injuries that they have alleged.

7 **THE COURT:** Well, is that.

8 **MR. HOLMAN:** Can I just briefly follow up, Your
9 Honor?

10 **THE COURT:** Well, if you do, he gets the last shot
11 at you.

12 **MR. HOLMAN - RE-CROSS EXAMINATION - MOTION TO**
13 **DISMISS:**

14 **MR. HOLMAN:** Okay. That's fine. Just, Your Honor,
15 I ask whether the allegations increased injury
16 from bigger ships and I just wanted to quote
17 from page six of the request from contested
18 case. The existing facilities without -- this
19 our allegation. Existing facilities were not
20 designed to serve as a home base for large
21 modern cruise vessels, i.e., those having 2500
22 passengers or more and without significant
23 alteration and refurbishment, these structures
24 do not meet the operational secure requirements
25 for operations going forward. The new cruise

1 terminal authorized by DHEC, by the DHEC
2 decision would enable cruise ship operations by
3 Carnival to continue and indeed expand both the
4 number and size of ships. Carnival Fantasy
5 currently utilizes the Union Pier facility with
6 a capacity of 2000 passengers and ten decks.
7 The next generation of cruise ships has a
8 capacity of 3600 passengers and 15 decks.
9 Paragraph 19, because the proposed operation
10 will enable cruise operations to continue and
11 expand, impacts beyond the critical area itself
12 include harmful air emissions and SO2 and other
13 pollutants increase the truck and car traffic,
14 increased noise and congestion, decreased
15 property values and other adverse health
16 impacts. So, Your Honor, I believe that we have
17 correctly alleged that the standing operations
18 -- that this facility will enable expanded
19 cruise ship operations and impacts and that is
20 the injury -- that is one of the injuries and it
21 is redressable by this court. Touching on the
22 Doe versus Obama case and this motion that the
23 Port's Authority in this case is not responsible
24 at all for the actions of third parties like
25 Carnival Cruise Lines. I think that on the face

1 of it, that argument just is hard to believe.
2 If you imagine in the ABC case, that I think
3 the ALC still deals with sometimes, if a bar
4 owner wanted to get an ABC license and a
5 neighbor challenged that, under Mr. Lowell's
6 theory, the bar owner could say you know what,
7 I know you don't like my bar but the problem is
8 the drunk people that come in and out of it.
9 And so you don't have standing to challenge
10 that. You need to take it up with the drunk
11 people. That's not the way the law works and
12 the Doe versus -- and we wouldn't want it to
13 work that way. Doe versus Obama is totally
14 different fact situation where essentially the
15 government, there's an executive order that
16 allowed for now there to be research done on
17 stem cell material and the embryo -- the people
18 representing the embryo sued saying well, this
19 will increase the use of these embryos and
20 people will decide to let research to be done on
21 them and that will harm the embryos and the
22 court said, you know, that's not really going to
23 effect those third parties whether or not they
24 decide what to do with the embryos because they
25 are independent actors and that's a phrase I

1 haven't heard yet from this side of the room.
2 But the test was the independent actions of
3 third parties. Carnival Cruise Lines docking at
4 a terminal or any cruise line docking at a
5 terminal that is designed to facilitate it is
6 built for only one reason. To enable these
7 cruise ships to be there and have a home base
8 there, that's not an independent third party, so
9 it is ---

10 **THE COURT:** So to rephrase what you're saying is,
11 you think that I can consider Carnival Cruise
12 Lines impacts because it's dependent upon the
13 terminal?

14 **MR. HOLMAN:** That's right. The Port's Authority
15 can't wash their hands and pretend like they're
16 building a cruise terminal that cruise ships
17 just independently happen to come to. They're
18 not building a building that incidentally
19 there's cruise traffic. It's a cruise terminal.
20 And so it just -- common sense would say and the
21 law supports that these cases about -- the cases
22 that have been cited, the Simon case, those are
23 all tax cases, tax policy cases. They're not
24 permitting cases and I think when you think
25 about permitting for facilities specifically

1 designed and justified the terms of attaching
2 cruise ships, to say that you can't consider the
3 impacts of those cruise ships for purposes of
4 injury in the standing analysis just doesn't
5 quite hold up.

6 **THE COURT:** Okay. Mr. Lowell?

7 **MR. LOWELL - RE-DIRECT EXAMINATION - MOTION TO**
8 **DISMISS:**

9 **MR. LOWELL:** Here's the sworn testimony of Peter
10 Layman. Paragraph 11, of his affidavit.
11 Regardless of whether cruise operations occur on
12 the south end or the north end of the UPT, those
13 cruise operations will not be affected by the
14 location, including, for example, the frequency
15 of and the size of cruise vessels that can be
16 birthed. So again; it doesn't matter if the
17 cruise ships get bigger in five years. It
18 doesn't matter if instead of 88 there's 104 or
19 120. It is completely irrelevant as to whether
20 it's on the north end or the south end. All of
21 these increased and exacerbated injuries,
22 because there is going to be more or they are
23 going to be bigger, is completely irrelevant to
24 whether they are on the north end or the south
25 end because you're going to have those exact

1 same impacts on the south end if this permit
2 gets denied. And that's the reason that
3 redressability is completely absent in this
4 case.

5 **THE COURT:** All right. Well, I would like this
6 thing to be over. Except there is a motion to --
7 do you want to address that?

8 **MR. LOWELL:** I'm happy for you to rule on the
9 filings.

10 **MS. ARMSTRONG:** We have an opportunity for reply
11 that hasn't expired.

12 **THE COURT:** Oh, okay. Well good.

13 **MR. LOWELL:** Would you like to consider proposed
14 orders?

15 **THE COURT:** I would probably prefer to just think
16 about it and get -- and tell y'all when I would
17 like to have the propose orders filed.

18 **MR. LOWELL:** Okay.

19 **THE COURT:** And then we'll go down that path because
20 as it stands now, nobody is winning outright on
21 anything. Thank y'all for your time.

22 **MR. HOLMAN:** One more thing, Your Honor. Just on the
23 supplemental briefing that we talked about
24 earlier. Are there any guidelines on -- would
25 you like it by next Friday? Do you care about

1 that?

2 **THE COURT:** Yes, I do care about that. I can answer
3 that question. Is Friday okay with both sides?

4 **MR. LOWELL:** I think we can do that by next Friday.

5 **MR. HOLMAN:** We have a summary judgement in the
6 federal permit cruise, on this very matter on
7 Thursday of next week, Your Honor, and if the
8 court would be willing to give us extra time
9 into the next week, I would very much personally
10 appreciate it since I will be ---

11 **THE COURT:** Now, you brought up next Friday and now
12 you want to move it.

13 **MR. HOLMAN:** Well, I think he mentioned next Friday
14 first.

15 **THE COURT:** No, I'm just kidding.

16 **MR. HOLMAN:** I'm asking for permission to go into
17 the next week, just because next week is going
18 to be a rough one for me. But if the court
19 wants it next Friday, we will get it.

20 **THE COURT:** Oh, no.

21 **MR. LOWELL:** I've got no problem with pushing it
22 back.

23 **THE COURT:** Okay.

24 **MR. HOLMAN:** So maybe the Wednesday following?

25 **THE COURT:** That's fine with me.

1 **MR. HOLMAN:** Okay. Very good. Thank you, Your
2 Honor.

3 **THE COURT:** Thank you.

4 (There being no further questions, the deposition
5 concluded at 1:19 p.m.)
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Transcript of the Testimony of
**PRESERVATION SOCIETY OF CHARLESTON V.
SCDHEC**

Date: January 9, 2014



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Fax: (803) 799-5668
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1 STATE OF SOUTH CAROLINA 2 ADMINISTRATIVE LAW COURT DIVISION 3 Docket No 13-ALJ-07-0056-CC 4 Preservation Society of Charleston,) 5 Historic Charleston Foundation,) 6 Historic Ansonborough Neighborhood) 7 Association, South Carolina Coastal) 8 Conservation League, Charlestowne) 9 Neighborhood Association, Charlesto) 10 Chapter of the Surfrider Foundation) 11 and Charleston Communities for) 12 Cruise Control,) 13 Petitioners,) 14 v) 15 South Carolina Department of Health) 16 and Environmental Control, South) 17 Carolina State Ports Authority,) 18 Respondents) 19 PRETRIAL CONFERENCE 20 ***** 21 Thursday, January 9, 2014 22 2:00 p m - 2:51 p m. 23 The pretrial conference before the Honorable 24 Ralph King Anderson, III, was taken at the Edgar A 25 Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 9th day of January, 2014 before Cassandra E Vance, Court Reporter and Notary Public in and for the State of South Carolina. 26 APPEARANCES 27 J. Blanding Holman, Esquire 28 Amy E Armstrong, Esquire 29 Jessie A White, Esquire 30 Southern Environmental Law Center 31 43 Broad Street, Suite 300 32 Charleston, South Carolina 29401 33 Attorneys for the Petitioners 34 Randolph R Lowell, Esquire 35 Willoughby & Hofer, P A 36 930 Richland Street 37 Columbia, South Carolina 29201 38 Attorney for Respondent SC SPA 39 Philip L. Lawrence, Esquire 40 South Carolina State Ports Authority 41 Post Office Box 22287 42 Charleston, South Carolina 29413-2287 43 Attorney for Respondent SC SPA 44 Bradley D Churdar, Esquire 45 Office of General Counsel 46 South Carolina Department of Health and 47 Environmental Control 48 1362 McMullan Avenue, Ste 400 49 Charleston, South Carolina 29405-2047 50 Attorney for Respondent SC DHEC 51 INDEX PAGE 52 Certificate 43 53 EXHIBITS 54 Court's Exhibit Number One 42 55 (Schedule) 56 (All exhibits were retained by Judge Anderson.)	1 THE COURT: All right. I've got my list of 2 outstanding motions in front of me. Who wants 3 to go and -- or do y'all want me to run the 4 show? 5 MR. LOWELL: Well, I've got a list of outstanding 6 motions, too. Maybe I just want to be sure 7 that my list is the same as your list. 8 THE COURT: Well, that's a good idea. 9 MR. LOWELL: On my list, there are Motions to Strike 10 that were filed that weren't ruled upon, but I 11 would guess that given the Order of Dismissal, 12 those Motions to Strike are moot. 13 THE COURT: Well, they were in my mind. 14 MR. LOWELL: That's -- I just -- I think that's 15 probably right. The way the Order of Dismissal 16 was written and what it was based on would 17 render those motions moot -- 18 THE COURT: Yeah. 19 MR. LOWELL: -- so they really don't need to be 20 disposed of. 21 THE COURT: Yeah. 22 MR. LOWELL: Then there's the Motion for Sanctions 23 for which the proposed order is pending. 24 THE COURT: That, I'll tell you -- the only thing 25 that's been holding me up on that -- and I went 1 back and looked at the rule again. Is it 2 15 -- 15 -- what was the statute you made -- it 3 wasn't under 15-77-300. It was under 15-6? 4 MR. LOWELL: I honestly don't recall the site off 5 the top of my head. 6 THE COURT: Well, that particular provision of law 7 had a provision in there that set forth -- let 8 me pull it up so I ... 9 15-36-10 had a provision in it where -- it set 10 forth that -- at least it indicated that the 11 sanction order would not be issued until the 12 termination of the case. 13 But then I went back and looked and looking at 14 that statute in the context of wherein it 15 stated that -- the aforementioned provision, it 16 appears that that probably is more applicable 17 to situations of which it was a trial and you 18 were doing -- making the motion as the result 19 of the whole case being frivolously filed, as 20 opposed to a component of the case being 21 frivolously filed. But that was what was 22 holding me up, was my cogitation thereon. 23 MR. LOWELL: Well, I think in Circuit Court, the 24 typical general practice would be at the end -- 25 THE COURT: Yeah.

1 (Pages 1 to 4)

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Page 5 1 MR. LOWELL: -- of the case, you file a motion for 2 sanctions after everything is done. But when 3 we look at Rule 72, it seems to specifically -- 4 I mean, you can specifically get sanctions for 5 a motion. 6 THE COURT: I know that. 7 MR. LOWELL: So . 8 THE COURT: It appeared to me that you made your 9 motion citing 15-36-10 as opposed to 72. But 10 am I wrong on that? I'll have to go back and 11 look at that 12 MR. LOWELL: The motion was made pursuant -- 13 THE COURT: Well, it was made with 272 but employing 14 the theory of Title 15. 15 MR. LOWELL: Which is reflected in the notes to 16 Rule 72 -- 17 THE COURT: Okay. Okay. 18 MR. LOWELL: -- which talks about -- 19 THE COURT: Yeah. 20 MR. LOWELL: -- you can look to the frivolous 21 sanctions proceedings act in determining 22 whether sanctions are warranted under Rule 72. 23 THE COURT: And I was pretty well already where 24 you're talking about, anyway, thinking about 25 it. So that motion may be more sooner	Page 7 1 within your discretion, but I think legally you 2 could go that direction. 3 THE COURT: Yeah 4 MR. LOWELL: You're not mandated to go their 5 direction just because of that statute, but it 6 is within Your Honor's discretion. 7 THE COURT: Well, most of the time I don't like to 8 dance in my discretion in gray areas So I'm 9 not so sure about the clarity of that, so I may 10 choose not to dance there. All right. 11 MR. LOWELL: Then on my list, I've got three other 12 motions that are -- 13 THE COURT: Oh, let me get back to the list. All 14 right. The Motion to Strike we've taken care 15 of. 16 MR. LOWELL: Right. The Motion for Sanctions we've 17 discussed and then I've got three other motions 18 that are more recent, which is -- 19 THE COURT: I've got four. 20 MR. LOWELL: All right. 21 THE COURT: One of them's not yours, so ... 22 MR. LOWELL: Well -- okay. I was looking at the 23 Motion for Partial Summary Judgment on the 401 24 certification, which is currently being 25 briefed.
Page 6 1 forthcoming. 2 I don't -- Ms. Armstrong made the point about 3 granting Ports Authority the additional amount 4 of preparing the proposed order or something. 5 MS. ARMSTRONG: It's -- 6 THE COURT: I kind of agree with her on that, so 7 that's where I'm leaning on that. 8 MS. ARMSTRONG: We cited 15-36-10(G), that it's the 9 grant -- you grant relief in the form of 10 attorney's fees for defense of the motion. So, 11 in other words, the Motion to Remand -- 12 THE COURT: Yeah. 13 MS. ARMSTRONG: -- not fees for filing the Motion 14 for Sanctions and defending that Motion for 15 Sanctions. 16 MR. LOWELL: Well, that statute also talks about you 17 can also recover damages that you suffer -- 18 THE COURT: Well -- 19 MR. LOWELL: -- which I would -- 20 THE COURT: -- it's in my discretion. 21 MR. LOWELL: And it is in your discretion. 22 THE COURT: When I said that I'm leaning toward her 23 way, it's not necessarily statutorily. It's 24 more of a discretionary. 25 MR. LOWELL: I -- I agree and concur that it's	Page 8 1 THE COURT: Correct. 2 MR. LOWELL: And there's some dispute about how to 3 calculate the ten- and five-day agreement on 4 the response and the reply time. Then I've 5 also got the Motion for Summary Judgment for 6 Lack of Standing -- 7 THE COURT: Uh-huh (affirmative response). 8 MR. LOWELL: -- which is currently being briefed. 9 And then the Motion to Reopen Discovery, which 10 is currently being briefed. 11 THE COURT: Okay. And the Motion for 12 Reconsideration of the Order to Dismiss. 13 MR. LOWELL: And orders outstanding, I understood 14 from your email that you were -- 15 THE COURT: Well -- 16 MR. LOWELL: -- denying that. 17 THE COURT: -- I have finished cogitating that and 18 now that we're on the record, I was going to 19 set forth on the record that I have considered 20 it, thoroughly, thought about it, but I hereby 21 deny that motion 22 MR. LOWELL: Okay. So the record transcript will 23 serve as your order in that case? 24 THE COURT: That -- I imagine -- I'm not consulting 25 y'all on that, but I assume that you don't have

2 (Pages 5 to 8)

Page 9	Page 11
1 a problem with that. 2 MS. ARMSTRONG: That's fine, Your Honor. 3 THE COURT: All right. On the Motion to Expand 4 Discovery, I'm about to a decision on that one 5 and I'm leaning toward not. But were y'all -- 6 but y'all haven't responded yet. No, no, 7 you -- 8 MR. LOWELL: We've responded -- 9 THE COURT: -- made your motion. 10 MR. LOWELL: They get to reply. 11 THE COURT: The reply. I was going to save you the 12 trouble of replying, but if you ... 13 MR. HOLMAN: If I might, Your Honor. 14 THE COURT: Yeah. 15 MR. HOLMAN: Bland Holman for the Preservation 16 Society and the Conservation League. And just 17 having seen the response, just if it would 18 provide a little more context, it was either 19 yesterday or the day before we received the 20 ninth supplemental production of documents; 21 that's 2000 pages. And that's on top of 8,000 22 pages, so we now have 10,000 pages. 23 And I think the reason that we've gone slow -- 24 the outstanding discovery would be depositions, 25 focus depositions, would be to now that we've	1 which, to me, is more reflective or even more 2 reflective of a failure to properly, 3 expeditiously take care of discovery in the 4 matter. 5 Because by doing -- making the motion after a 6 Summary Judgment Motion is filed, you're 7 inherently putting off the Summary Judgment 8 Motion and, in fact, forcing the Court to deny 9 a motion because it would ultimately be a 10 denial of that motion until Summary Judgment is 11 complete, because I'm not going to grant or 12 review a Summary Judgment Motion when discovery 13 is outstanding. 14 So, in all deference to y'all, I just think in 15 this case -- because I try to give lawyers 16 latitude, but with consideration of all those 17 components, that -- this weighs heavily against 18 you in opening up discovery. 19 Now, it is -- lawyers all the time supplement 20 discovery all the way up to the day of trial; 21 that's not unusual. That doesn't -- that's not 22 a reason necessarily to open up discovery, 23 unless they supplement discovery with something 24 that creates a brand new issue that you had 25 previously conducted discovery for that you
Page 10	Page 12
1 got -- I'm not sure we have all the documents, 2 but hopefully we're getting towards the end of 3 having all the documents, that we would need 4 those before we conduct the depositions so that 5 we don't have to reopen depositions. 6 THE COURT: Well, my problem is threefold. I didn't 7 write it down. So when I was thinking about 8 this was, number one, from the outset of this 9 case, there's been -- and when I say this, I 10 want to be careful. 11 There have been allegations made about this 12 case being brought for delay. And that -- so 13 when I say that, I'm not saying that I find 14 those allegations valid, but they've been made. 15 And that, to me, would put a reasonable 16 attorney on notice to make extra precautions to 17 make sure that they are expeditious in their 18 discovery. 19 Secondly, the Motion for -- to Expand Discovery 20 is made after the time has run for the 21 discovery, which, to me, is reflective of not 22 good cause and that's not reflective of lack of 23 proper cause, I guess. 24 And then, finally, the motion is made even 25 after a Summary Judgment Motion has been filed,	1 were unaware of and that would warrant 2 discovery. But that, to me, you would open the 3 discovery up in a narrow frame of that which 4 you had been surprised about. 5 So, I tell you all that to say, right now I 6 think you're -- you're running uphill, but if 7 you want to do a reply, I'll still allow you to 8 do that. 9 MR. HOLMAN: Yeah, I think we would appreciate the 10 opportunity -- 11 THE COURT: Okay. 12 MR. HOLMAN: -- to file a formal reply -- 13 THE COURT: Okay. 14 MR. HOLMAN: -- and just say, you know, that it's 15 true that this was made after the Summary 16 Judgment -- 17 MS ARMSTRONG: That is -- I'm sorry, Bland. 18 MR. HOLMAN: What's that? 19 MS. ARMSTRONG: It was not. We filed our Motion to 20 Expand Discovery on -- 21 THE COURT: Oh, you did? 22 MS ARMSTRONG: -- on December 23rd. The Motions 23 for Summary Judgment were filed on the 27th. 24 MR. HOLMAN: On the 27th, that's right. 25 THE COURT: Okay. Well, then --

3 (Pages 9 to 12)

Page 13 1 MR. HOLMAN: And the other thing I would just add is 2 that, as Your Honor's well aware, we have a 3 tremendous amount of briefing on dispositive 4 motions throughout the fall, Motions to 5 Dismiss -- 6 THE COURT: I know. 7 MR. HOLMAN: -- Motion to Vacate, Motion to -- 8 THE COURT: But I have lawyers all the time in cases 9 where we've got dispositive motions being 10 conducted who -- who conduct discovery and 11 complete discovery. So that is not unusual in 12 the least. 13 And if it was something that was unusual or 14 warranted making an effort to -- or warranted 15 seeking to expand discovery, it should have 16 been made at that time to put everyone on 17 notice. 18 It's just -- I've never seen in all my years of 19 practice anybody make a Motion to Expand 20 Discovery at this belated stage. 21 MR. HOLMAN: Well -- and I agree that it may -- it 22 could be uncommon, but this case -- 23 THE COURT: No, no, just because it's uncommon 24 doesn't mean I'm not going to do it. 25 MR. HOLMAN: Right. I just --	Page 15 1 there are these pending motions, I think the 2 notion was that it might be viewed as improper 3 even -- or as -- viewed as scant to conduct 4 depositions when you have these dispositive 5 motions underway. I'm just explaining to you 6 what the theory was. 7 THE COURT: You didn't notify me of that previously 8 and I think I had a -- didn't have we a -- we 9 had a scheduling conference or something about 10 that, about discovery at the outset of this 11 case? 12 MR. HOLMAN: Before those motions. 13 THE COURT: Yeah. 14 MR. HOLMAN: Before the motions were filed. 15 And the other thing would be that this -- in 16 terms of prejudice at this point, if we all 17 agree that the hearing date needs to be put 18 off, that a limited time to conduct limited 19 depositions would not prejudice any party. But 20 we will be glad to further -- 21 THE COURT: I'll let you brief that. 22 MR. HOLMAN: -- submit that in our reply. 23 THE COURT: I'll let you respond to that. 24 MR. LOWELL: Well, just very briefly, so the record 25 actually accurately reflects what happened. On
Page 14 1 THE COURT: But there's the other facets of -- 2 MR. HOLMAN: Uh-huh (affirmatively responds). 3 THE COURT: -- good cause that I have to consider. 4 MR. HOLMAN: This case -- 5 THE COURT: Because it's multifaceted. 6 MR. HOLMAN: This case is a -- I would venture to 7 say is one of the more complicated cases that 8 may come through the ALC in terms of the volume 9 of records; 10,000 pages in production and ... 10 THE COURT: Have you ever been in a CON case? 11 MR. HOLMAN: Not yet. Not yet. 12 THE COURT: Well, until you get into one of those 13 case, you might want to the withhold judgment 14 on that. 15 MR. HOLMAN: Okay. Well -- and I imagine, sir, that 16 the litigants in those cases are, perhaps, a 17 little better funded than some of the litigants 18 in this case. 19 THE COURT: Well, I don't know how well-funded you 20 are because I don't know anything about your 21 funding. I do imagine that you are right, that 22 they are well-funded. 23 MR. HOLMAN: Well -- and so the point of -- the 24 point of perhaps going slow on some aspects 25 of -- costly aspects of discovery would be, if	Page 16 1 December, I believe it was 18th, the Ports 2 Authority informed the Court and opposing 3 counsel that we were filing Motions for Summary 4 Judgment. So everybody knew that we were 5 filing Motions for Summary Judgment. So the 6 Motion to Reopen Discovery was filed after they 7 were aware that those Summary Judgment Motions 8 were on the verge of being filed 9 And then as far as the discovery itself, 10 there's -- there's nothing easy or simple or 11 focused about ten depositions. Because I don't 12 know that Your Honor can actually open 13 discovery just to let them take ten 14 depositions. 15 THE COURT: Oh, that would be holding -- 16 MR. LOWELL: It's just going to reopen the whole 17 thing. 18 Now, as far as the volume of documents, I mean, 19 this -- there are other cases at this court 20 that are much more complicated and have a much 21 higher degree of volume of documents than what 22 this case requires or dictates. And we do 23 continue to supplement our discovery 24 production. We continue to do that. 25 THE COURT: Well, I'll agree -- I've had CON cases

4 (Pages 13 to 16)

Page 17	Page 19
1 where honestly I think the exhibits could go to 2 the ceiling? Close to it. My court reporter 3 has had the fun of dealing with that, so ... 4 MR. LOWELL: And I've had fun dealing with some of 5 those CON cases, as well. 6 But, you know, this case isn't going to benefit 7 from depositions. I mean, where we are, we've 8 done all the -- 9 THE COURT: Well, I'm not making my decision on 10 that, whether it could or could not benefit, 11 because I don't know. My decision is going to 12 be based on my evaluation of good cause. But 13 you were going down that path fine until you 14 hit that last little shot. 15 MR. LOWELL: Well, we -- you know, discovery had 16 been discussed and we briefed that in the 17 response and laid out exactly all the 18 discussions that have gone on. I mean, the 19 Court had previously indicated that you wanted 20 it done in four months. And we had 21 indicated -- 22 THE COURT: That's what -- okay. Well ... 23 MR. LOWELL: And in an -- there was an email 24 exchange where we were continuing the very 25 first hearing date from November. And then in	1 So when you add on those five days for mailing 2 that everybody is permitted under the rules, 3 then the dates for those responses -- 4 THE COURT: And, actually -- I'm looking at my staff 5 attorney behind you -- he is correct, rule 6 three, so .. I don't know why we did that in 7 rule three. It's not logical to me, but 8 we've -- it's since been done. 9 MR. LOWELL: We can -- we can revisit that next 10 year. But for now, it's in there. So, by my 11 calculations, their response is due Tuesday, 12 January 21st and my reply is due Wednesday, 13 February 5th, assuming that they mailed their 14 response, which is what everybody has been 15 doing to date. 16 On the Motion for Summary Judgment for Lack of 17 Standing, they have not asked for an extension 18 of time. Under the current rule, their time to 19 respond is Monday. 20 Now, you know, I know -- I recall 21 Ms. Armstrong's email about it, 78 pages, but 22 actually she also made the point in there that 23 a lot of this has already been briefed. 24 I mean, this is really the Motion to Dismiss 25 for Lack of Standing with many of those same
Page 18	Page 20
1 that exchange, the Court indicated that you 2 believed it could be done in four months. We 3 had indicated in the prehearing statement eight 4 to nine. We're pass that point now. 5 Nobody raised this issue of "we need more 6 discovery and we've got to take depositions" 7 until it was the eve of trial. We had put 8 everybody on notice, we're filing the Motion 9 for Summary Judgment, and it's just a tactic to 10 kick that can down the road. 11 THE COURT: Well, I'm not going to make a judgment 12 on that, either, but -- all right. So with 13 that said, I'll hear your response and then 14 make a decision. 15 Now, on -- so that leaves us the only two 16 things left -- or actually three; I'm adding 17 another one -- is the two Summary Judgment 18 Motions, whether we just do briefing or have a 19 hearing on those. And, secondly, or thirdly, 20 because those are the two -- is what do we do 21 about the hearing date, so ... 22 MR. LOWELL: Well, we had -- on the timing of the 23 briefing on the Motion for Partial Summary 24 Judgment, there was an agreement between 25 counsel for a ten-day and five-day extension.	1 arguments. It's part two based on the 2 rationale of the Denial of the Motion to 3 Dismiss. 4 So there's nothing in there that's new or 5 exciting. We've all already been through this 6 before, so this is really round two. 7 Nonetheless, I can certainly understand that 8 they would want an extension of time and, you 9 know, I'd be willing to consent to an extension 10 to the same dates that are on the Partial 11 Summary Judgment, which would be January 21 and 12 then February 5th for us to reply. 13 THE COURT: What -- I mean, just -- if I could ask 14 you from a point of judicial expediency, why 15 don't we just go ahead and try the case? I'm 16 just asking. And ... 17 MR. LOWELL: Well, you know -- 18 THE COURT: I mean -- 19 MR. LOWELL: -- we believe that the Summary Judgment 20 Motion for standing has valid legs. 21 THE COURT: Yeah. 22 MR. LOWELL: And, obviously, if you grant that, then 23 we don't need to spend the time, money and 24 resources prepping for a contested case 25 hearing.

5 (Pages 17 to 20)

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1 THE COURT: Okay.
 2 MR. LOWELL: And that's -- so, for our perspective,
 3 I mean, that -- that is a validly-based motion
 4 and if it's granted, then it's going to save
 5 everybody a lot of time and money.
 6 THE COURT: Okay.
 7 MR. LOWELL: And --
 8 THE COURT: Of course, there is a component of
 9 standing. At each level of trial, you have a
 10 further evaluation of standing, at least in my
 11 view of this case and I know you disagree.
 12 At the Motion to Dismiss Stage, it was
 13 allegations. At the Summary Judgment Motion,
 14 it is genuine issue of material fact. But at
 15 the trial stage, I get to evaluate the
 16 credibility of the witnesses and determine
 17 based on my evaluation of their credibility
 18 whether those allegations made by the witnesses
 19 are reflective of a legitimate reason for
 20 standing.
 21 So, I mean, just ...
 22 MR. LOWELL: Well, it is -- I mean, the case law is
 23 clear. You have to maintain standing --
 24 THE COURT: I know.
 25 MR. LOWELL: -- at every stage of the suit and the

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1 bar does raise a little bit at each stage and
 2 we don't think they can satisfy --
 3 THE COURT: The bar raises for one party and lowers
 4 for the others.
 5 MR. LOWELL: That's right.
 6 Now, as far as, you know, scheduling this whole
 7 thing out, I sat down this morning and tried to
 8 come up with some dates to knock out when the
 9 discovery or the production would actually end,
 10 a potential hearing date in June, prehearing
 11 motions back from that, exhibit exchange,
 12 witness exchange, challenges to experts'
 13 qualifications. I tried to put all that in
 14 there so I can hand these out, just for
 15 consideration.
 16 And, Your Honor, unfortunately for me, I have
 17 a two-week period in February which are
 18 basically dead for me. I'm going to be out of
 19 pocket the last two weeks of February.
 20 THE COURT: And what's going to occur in those two
 21 weeks? Because I just want it on the record.
 22 MR. LOWELL: You're going to make me put it on the
 23 record?
 24 THE COURT: Yes, sir.
 25 MR. LOWELL: I'm getting married.

Page 23

1 THE COURT: All right. I want the record to reflect
 2 that he is getting married and he referred to
 3 those two weeks as "being dead" for him.
 4 MR. HOLMAN: It's a lifetime.
 5 THE COURT: Mr. Holman has extended that period to
 6 infinity, but --
 7 MR. LAWRENCE: It's a new boss
 8 MR. LOWELL: That's right
 9 THE COURT: All right
 10 (Off the Record)
 11 THE COURT: I'm available then, but my law clerk
 12 tells me we're going to just check the
 13 schedule. But what do y'all say about this
 14 before we even go further down this path? And
 15 then I'll get to you next.
 16 MR. CHURDAR: Sure.
 17 THE COURT: I'm not forgetting you.
 18 MS. ARMSTRONG: You mean as far as the schedule
 19 that's -- that we just --
 20 THE COURT: That he just gave me I didn't --
 21 MS. ARMSTRONG: -- that we're looking at? I mean,
 22 I guess we don't have any -- you know, any
 23 problem just kind of glancing at this, not
 24 looking at, you know, our calendars, you know,
 25 to make sure that there are any conflicts. But

Page 24

1 it looks -- it looks fine. It just -- I think
 2 that it makes sense -- you raised the question
 3 about, you know, why don't we just hear all
 4 these on -- these issues raised on Summary
 5 Judgment Motions at the trial of this case,
 6 which, you know, we think would be an
 7 appropriate way for the Court to handle it and
 8 we can just fold all these issues into a
 9 motion -- into our proposed orders and have
 10 one, you know, final ruling on everything, if
 11 the Court wanted to handle it that way.
 12 THE COURT: Well, y'all --
 13 MS. ARMSTRONG: Otherwise, the other -- the other
 14 thing that jumps out at us is that this gives
 15 us plenty of time to get depositions taken
 16 pretty quickly. I mean ...
 17 If we're having -- you know, basically they're
 18 saying all requests for production shall be
 19 served no later than March. That gives us a
 20 time frame that we could conduct depositions.
 21 THE COURT: All right. Well, it kills the Summary
 22 Judgment Motion and starts me all over again,
 23 though.
 24 MR. LOWELL: No, I mean, it's -- they're --
 25 THE COURT: Well, I was -- let me -- I was asking

6 (Pages 21 to 24)

Page 25

1 her. That was not -- if that sounded
2 declarative, it was a declarative
3 interrogatory.
4 MS. ARMSTRONG: You're asking -- you're --
5 THE COURT: In other words, a declarative statement
6 is statement. A declarative interrogatory is
7 a statement that sounds like a statement but is
8 a question So that's what I'm getting at. I
9 was asking you a question.
10 MS. ARMSTRONG: Okay. I'm sorry, I missed the
11 question, Your Honor.
12 THE COURT: I forgot it. I think it was -- oh,
13 would that not kill the Summary Judgment
14 Motions and start it all over again?
15 MS. ARMSTRONG: I -- you know ...
16 MR. HOLMAN: It seems like the response date could
17 be pushed back. I don't know if they would --
18 have to -- would need to refile -- let's just
19 suppose there were depositions. Would you want
20 the ability to refile Summary Judgment Motions?
21 MR. LOWELL: Sure.
22 THE COURT: Well, I --
23 MR. LOWELL: But --
24 THE COURT: If there's depositions, I assume there
25 would be more -- there would be further facts

Page 26

1 that may be ...
2 MR. HOLMAN: That's right, Your Honor. But, I mean,
3 you can file a Summary Judgment Motion at any
4 time in the case before discovery is closed,
5 so -- I mean, it's kind of up to the movement.
6 THE COURT: Yeah. Well, under our new rule, now
7 it's 30 days out, but --
8 MR. LOWELL: Yeah.
9 THE COURT: -- I'll concede that up to 30 days
10 before the hearing.
11 MR. LOWELL: I mean, this -- this wasn't for new
12 requests for production. This was -- I mean,
13 what the date is -- that March 7th date is to
14 respond --
15 THE COURT: Well, I know it may not be that, but
16 they're saying, you know, you're opening the
17 door, so ...
18 MR. LOWELL: Well, I mean, you know, what I was
19 trying to do is put an end date on the
20 production of those documents so everybody can
21 move forward with the rest.
22 I mean, I can eliminate that date and we can
23 continue to supplement all the way up to the
24 day of trial, just as Your Honor indicated.
25 I mean, we are going through our file

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1 systematically and we're getting much closer.
2 And, frankly, part of the reason that date's
3 out as far as it is, is because of my personal
4 schedule and my personal calendar.
5 THE COURT: Yeah.
6 MR. LOWELL: I could have rolled that date back
7 and -- but we don't need to do depositions --
8 depositions aren't going to help, because they
9 talk about time to get it -- ten depositions.
10 If you open up for everybody, you're looking at
11 20 depositions. Prepping witnesses, getting
12 documents ready, you're not doing 20
13 depositions in this time period. It's just not
14 going to happen. It's not realistic.
15 THE COURT: Okay.
16 MR. LOWELL: And for the pending Motion for Summary
17 Judgment, everybody's filed affidavits. I
18 mean, that's proper on the Motion of Summary
19 Judgment, anyway.
20 So let's go ahead and roll up Summary Judgment
21 Motions. It's been filed. We're waiting on
22 their response. We'll file our reply. Let's
23 argue it, see whether we really have to go down
24 the contested case road or not. But discovery
25 isn't going to help -- more discovery isn't

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1 going to help on any of that.
2 THE COURT: Well, let me go out and just think about
3 this and I'll come back, if y'all don't mind
4 giving me a few moments to think about it.
5 Oh, wait a second. I'm sorry, I haven't heard
6 from you.
7 MR. CHURDAR: On the proposed schedule?
8 THE COURT: Yeah.
9 MR. CHURDAR: I would not object to this.
10 THE COURT: Oh, okay. Made that easy.
11 MR. LOWELL: And, Your Honor, I'll also -- this
12 proposed schedule is based on no additional
13 discovery.
14 THE COURT: I presumed that.
15 (Off the record from 2:29 p.m. to 2:35 p.m.)
16 THE COURT: All right. I don't know if I'm even
17 crystal clear on what I want to do right --
18 after coming in here, because I'm pretty well
19 ready -- I wanted move forward with this case.
20 You said y'all are ready to move forward?
21 MR. HOLMAN: On which aspect, sir?
22 THE COURT: On this case, you -- y'all ready for the
23 trial?
24 MS. ARMSTRONG: We're not ready for the trial.
25 We're ready to -- I mean, we are ready to

7 (Pages 25 to 28)

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1 start -- I mean, we want to prepare for trial. 2 Right now, we've been like in the process of 3 briefing motions. 4 THE COURT: In other words, I said something about 5 why don't we just go ahead and try the case and 6 I thought y'all shook your heads. 7 MR. HOLMAN: Well, I -- as you know, our position is 8 we'd like -- we think we -- 9 THE COURT: Oh, expand discovery. 10 MR. HOLMAN: Discovery -- 11 THE COURT: Okay. 12 MR. HOLMAN: -- to respond to the documents that 13 keep pouring in. 14 THE COURT: Well ... 15 MR. HOLMAN: And, also, Your Honor, I might just say 16 that I think -- we don't -- I don't think we've 17 got a privilege log. 18 Have we traded privilege logs? 19 MR. LOWELL: No. 20 MR. HOLMAN: So it seems like there may be some 21 issues there. 22 THE COURT: Well, I'll tell you what, then. I'm 23 going to just go with this proposed schedule 24 that's been placed in front of me and 25 incorporate it into the -- is it an exhibit?	1 21st to respond on a Motion for Summary 2 Judgment on Standing, which I understand SPA 3 consents to; if we could just have that cleared 4 up today. 5 THE COURT: That's fine 6 MS. ARMSTRONG: Okay. 7 MR. LOWELL: We consent. 8 THE COURT: All right. Finally, if I do deny the 9 Motion to Expand Discovery, I will say this: 10 Given the thrill I have of reading all the 11 motions that have been made in this case, you 12 do not know how this pains me to say, but -- 13 because I'm opening up another potential 14 motion -- and that is, if the supplements to 15 the discovery that occur after the time frame 16 for discovery to end occur, I -- and those 17 supplements from Ports Authority surprise you 18 and present a matter that you were not aware 19 of, I will entertain a response on that. So 20 I'm trying to be fair in this -- is what I'm 21 getting at here. I don't want to just shackle 22 you. 23 MR. HOLMAN: Right. Your Honor, if I might follow 24 up on that, because a somewhat-related issue is 25 on our Motion to Vacate and the Court's order
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1 I'll mark it as Court's Exhibit One and -- I 2 won't mark it. I'll ask my court reporter to 3 mark it. 4 (Off the Record) 5 THE COURT: This doesn't call for any time frame for 6 the Summary Judgment Motion to be heard. I 7 presume that you're assuming that I'm going to 8 make the decision without a hearing. 9 MR. LOWELL: I wasn't necessarily making that 10 assumption. Part of the reason I left that out 11 was just because I wasn't sure -- they hadn't 12 asked for an extension on the time to respond, 13 so -- but, I mean, for the record, I'm fine if 14 Your Honor just disposes of it just on briefing 15 rather than having a hearing. 16 MS. ARMSTRONG: Judge Anderson, if we could clear up 17 one thing. We've got an extension till January 18 21st on our response to the Motion for Partial 19 Summary Judgment. And we were kind of holding 20 off on asking for more time on the Motion for 21 Summary Judgment on Standing to see sort of how 22 this Court might handle the Motion Expanding 23 Discovery. 24 But I think just after what we've heard today, 25 if we could have that extension until January	1 on that where -- 2 THE COURT: Which I presume you do not agree with. 3 MR. HOLMAN: Well, I want to just flag an issue that 4 the Court's order seemed to recognize, that it 5 was ruling at that time, subject to there may 6 be other factual issues and, Your Honor, I 7 point out that that involves, from our 8 perspective -- 9 THE COURT: Well, that -- the Motion to Vacate is -- 10 or the Order to Vacate is made at a time frame 11 in a case that's -- when I said multifaceted on 12 whatever it was earlier -- certainly in this 13 case, there's more than one moving parts and 14 some of the moving parts aren't in front of me, 15 so ... 16 MR. HOLMAN: I was just following up on this point 17 of if there's a newly arising issue where 18 fairness might counsel for expanding discovery. 19 With respect to DHEC's actions on the 401 that 20 was implicitly part of this certification, we 21 would like some discovery on that and that is 22 an issue that was not -- didn't emerge until 23 very recently. 24 So, for example, was the Bureau of Water staff 25 actually involved at all? At all. What is the

8 (Pages 29 to 32)

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1 practice when there's a 401 water quality
 2 certification in the critical area permit?
 3 THE COURT: I'm not -- what is your question? Can
 4 you make a motion in that regard?
 5 MR. HOLMAN: Well, I just would -- wanted to let the
 6 Court know that -- appreciating your point
 7 about fairness and late arising, if there's
 8 some disclosure that presents a new issue, that
 9 this was an issue that in some ways
 10 wasn't -- we respectfully disagree with the
 11 Ports Authority on how -- and DHEC's position
 12 in this case in terms of how the 401 is
 13 implicitly part of the critical area permit.
 14 And on appeal, we intend to argue that what the
 15 law requires is that there's been this
 16 consultation with Bureau of Water staff and we
 17 think that did not occur and we think we should
 18 have the ability to test that. And it's not
 19 something we could have anticipated months ago
 20 because they were operating under the color of
 21 a nationwide permit that was vacated.
 22 MR. LOWELL: Well, first -- and I understand they're
 23 going to argue that on appeal, but they didn't
 24 ask for reconsideration of this Court's
 25 decision. So as we sit here today, and as long

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1 as we're in this case, that permit is a 401
 2 certification.
 3 Two, as to discovery, DHEC has produced their
 4 entire regulatory file on this permit. That's
 5 it. There's no other piece of paper in their
 6 file that they're going to be able to provide
 7 that somehow additional discovery based on
 8 this.
 9 So, I mean, Mr. Churdar can correct me if I'm
 10 wrong, but the DHEC file has been produced.
 11 They've got all of DHEC's documents.
 12 MR. CHURDAR: Yes, that's true. That is true, Your
 13 Honor.
 14 THE COURT: Okay.
 15 MR. HOLMAN: And I don't know if anything was
 16 withheld or deemed privileged. All email and
 17 everything is in there?
 18 We received one of the Bureau's -- I guess it
 19 was the Bureau's production was attached to
 20 your Motion for Summary Judgment? Is that
 21 right? Is there a separate -- has there been
 22 a separate -- do you know?
 23 MR. CHURDAR: Well, what is --
 24 MR. HOLMAN: Has there been a separate production by
 25 the Bureau -- the Board, sorry -- the Board of

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1 Health and Environmental Control. There's --
 2 MR. LOWELL: There's been -- there is a DHEC
 3 production from the Board; that is the board
 4 record.
 5 MR. HOLMAN: Uh-huh (affirmative response).
 6 MR. LOWELL: There was another production that is
 7 DHEC staff and their analysis of the permit.
 8 The regulatory file for this permit has been
 9 produced.
 10 MR. HOLMAN: Okay. I'm asking about the Board's
 11 file. It was labeled B-H-E-C?
 12 MR. LOWELL: Yes.
 13 MR. HOLMAN: Okay. That was -- has that been
 14 produced other than attached to a Summary
 15 Judgment Motion?
 16 MR. LOWELL: Yes.
 17 MR. HOLMAN: Okay. I don't recall seeing that.
 18 But, Your Honor, to respond to what Mr. Lowell
 19 said about this Court's order, I'm just going
 20 to read from page seven.
 21 "At this stage of the litigation, there's not
 22 sufficient evidence for this Court to determine
 23 the extent of DHEC's review or the procedures
 24 that were followed in issuing the permit."
 25 "Moreover, in presenting their challenge to

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1 DHEC's determination, Petitioners can certainly
 2 dispute whether review of this matter should
 3 have -- should be based in part on the 401
 4 certification associated with the nationwide
 5 permit, three, or the critical area permit and
 6 certification."
 7 "The ALC can then determine based on the facts
 8 of this case in keeping with its de novo review
 9 what is the appropriate scope of review for
 10 this project and whether it complies with the
 11 standards."
 12 So, Your Honor, we read that --
 13 THE COURT: I'm going to take the -- the Supreme
 14 Court just recently had a decision where -- I
 15 can't remember was it -- the criminal case, I
 16 think, and it came back up to them again, same
 17 case, and they took the opportunity to explain
 18 their intent in the original decision in
 19 the -- in that case.
 20 So, following that theory, I'm going to take
 21 the opportunity now to explain what I meant --
 22 MR. HOLMAN: Okay.
 23 THE COURT: -- in that language.
 24 In that language, what I was referring to is,
 25 it's a de novo hearing. So when we get to the

9 (Pages 33 to 36)

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1 hearing stage, you can certainly challenge and
 2 question the witnesses regarding all that --
 3 those particular areas, is what I was getting
 4 at.
 5 The stage we're at now, I don't know all the
 6 facts. But we can be at a stage down the road
 7 where the facts are going to come out.
 8 And I think that -- I'll have to get it
 9 entirely in its context, but I think that's
 10 what I was referring to there, was the ultimate
 11 hearing in this matter and at that particular
 12 time, we can explore all the avenues of the
 13 case.
 14 MR. HOLMAN: And, Your Honor, I guess our view would
 15 be that we think we may be entitled to Summary
 16 Judgment on that issue, that as a factual --
 17 THE COURT: You can make a motion, so ...
 18 MR. HOLMAN: Well, we haven't had the chance to have
 19 discovery on the facts underlying it because
 20 the theory of the implicit 401 didn't come up
 21 in this case until later. That's the problem.
 22 MR. LOWELL: Well, Your Honor --
 23 MR. HOLMAN: Because they're proceeding under the
 24 color of a 401 nationwide permit --
 25 THE COURT: The theory of implicit 401

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1 didn't -- that's an interesting thought. Maybe
 2 it didn't come up for you, but came up for
 3 them.
 4 So, under that theory of discovery, what you're
 5 saying is that if I presume an interpretation
 6 of the law and proceed down that path and I
 7 subsequently find out that the Court views the
 8 interpretation different than I, that I should
 9 be allowed to reopen discovery and start all
 10 anew because now I have obtained the epiphany
 11 that there is a different interpretation from
 12 that which I held previously.
 13 MR. HOLMAN: And, Your Honor, that's not what I'm
 14 saying.
 15 THE COURT: Okay.
 16 MR. HOLMAN: That's absolutely not what I'm saying.
 17 THE COURT: Okay. Well, then I missed it.
 18 MR. HOLMAN: What I'm saying is that, these folks
 19 were proceeding under the color of the 401
 20 certification that came with the nationwide
 21 permit
 22 THE COURT: Okay. All right.
 23 MR. HOLMAN: It was kicked out. They changed
 24 theories. They claimed that this had been
 25 implicitly done beforehand and we would like to

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1 talk to DHEC and find out if that was done.
 2 Mr. Lowell said everything in DHEC's record has
 3 been produced. There's not any -- not a single
 4 indication that any Bureau of Water staff was
 5 involved whatsoever in the evaluation of the
 6 critical area permit or this application at
 7 all.
 8 THE COURT: Okay. You want to respond --
 9 MR. LOWELL: Well --
 10 THE COURT: Now I get your point; sorry I didn't
 11 earlier.
 12 MR. LOWELL: Well, one, we have a Motion for Partial
 13 Summary Judgment on the 401 certification
 14 issue, because our theory is they don't get to
 15 raise the 401 law because they've waived it.
 16 Because this idea -- I mean, it was a two-track
 17 permit approach. And, frankly, if their theory
 18 from day one was that the nationwide permit
 19 never applied, which meant there was no 401,
 20 then they were on notice by asserting that
 21 theory that this critical area served as the
 22 401 because that's what the law says, which is
 23 what your order reflects.
 24 But, you know, frankly, if you grant our Motion
 25 for Partial Summary Judgment, we don't need to

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1 worry about this, because they've waived their
 2 right to challenge the 401 certification
 3 portion.
 4 Even if not, we don't need discovery; that's
 5 what the de novo contested case hearing is for.
 6 I mean, I don't know why they think they need
 7 to come in and conduct more discovery for the
 8 absence of paper in a file.
 9 I mean, you would think that they'd be happy
 10 with that, so now they can come argue, "Hey, it
 11 was never evaluated." But the bottom line is,
 12 that's all irrelevant because in a de novo
 13 contested case, Your Honor can consider
 14 whatever evidence is presented and make your
 15 own determination about whether it satisfies
 16 that criteria or not.
 17 MR. HOLMAN: And we would just say, if we are -- we
 18 think we should win on Summary Judgment. And
 19 "de novo," I think, sometimes gets thrown
 20 around in a way that might suggest that what
 21 DHEC did didn't matter. And we think it very
 22 much matters, what DHEC did. Because if, as we
 23 think, they didn't consult with Bureau of Water
 24 staff in issuing the critical area permit, then
 25 that permit should be set aside.

10 (Pages 37 to 40)

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1 THE COURT: I'll kind of go a little bit different
 2 than that, Mr. Holman, in that you're right, de
 3 novo -- I would agree with your interpretation
 4 that "de novo" does matter. Or you said
 5 doesn't matter.
 6 MR. HOLMAN: That what DHEC did matters.
 7 THE COURT: Yeah, that what DHEC did does matter.
 8 But I think that what DHEC did come out in the
 9 hearing The issue that I still have to
 10 decide -- and I'm not going to make the comment
 11 one way or the other on -- is whether there
 12 would be warranted down the road limited
 13 discovery in this one narrow issue. But I
 14 would have to come to the belief that you were
 15 not aware of the potential consideration of
 16 this issue beforehand. So I --
 17 MR. HOLMAN: I just wanted to flag it for, Your
 18 Honor
 19 THE COURT: You have so flagged.
 20 MR. HOLMAN: Thank you.
 21 THE COURT: All right. Anything else? I think
 22 we're threw. Thank y'all for your time.
 23 (Off the Record)
 24 THE COURT: Oh, twice, I've already -- did I -- I
 25 incorporated this into the record. Did I say

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1 that I was going to adopt it?
 2 MR. HOLMAN: That was understood.
 3 MR. LOWELL: I don't know if you explicitly said
 4 that, but that's what I understood.
 5 THE COURT: Yeah. Well, I don't like implicit. So
 6 I'll go with explicit. At this point in time,
 7 I'm adopting it.
 8 (Off the Record)
 9 THE COURT: We'll go with the presumption on that
 10 one. My law clerks says, "So we're canceling
 11 the hearing for January 27th?" That
 12 presumption I think is pretty obvious, but --
 13 all right. Now anything else?
 14 MR. HOLMAN: Nothing from the Petitioners.
 15 THE COURT: All right. Thank y'all for your time.
 16 (The proceedings concluded at 2:51 p.m.)
 17 (Court's Exhibit Number One was marked and admitted
 18 after the hearing concluded.)

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WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW
930 RICHLAND STREET
P.O. BOX 8416
COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT FELDER
CHAD N. JOHNSTON
JOHN W. ROBERTS

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

January 7, 2013

VIA HAND DELIVERY

Members of the Board
c/o The Honorable Lisa L. Longshore
Clerk to the Board
S.C. Dep't of Health & Envtl. Control
2600 Bull Street
Columbia, S.C. 29201

RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL
2013 JAN - 7 PM 12:36
CLERK, BOARD OF CHEC

Re: Request for Final Review, P/N OCRM-12-054-B (Historic Charleston Foundation)

Dear Members of the Board:

The South Carolina Ports Authority (Ports Authority) files this response to the request for final review (RFR) filed on or about January 2, 2013, by the Historic Charleston Foundation (HCF). In short, the project application was thoroughly vetted by OCRM staff, HCF has raised no issues for consideration, and all indications are that HCF intends on pursuing this matter further in a request for a contested case hearing before the South Carolina Administrative Law Court (ALC) in continuation of their ongoing crusade against cruise business.¹ Therefore, the Ports Authority respectfully requests that the Board decline to conduct a final review conference to allow the parties to move forward to the ALC in the most expeditious manner possible.

The HCF request is notable in its lack of raising any issue for this Board to review. Instead, the request for review reads more like a request for information under the Freedom of Information Act (FOIA). Specifically, HCF appears to seek the information that the Ports Authority provided to OCRM and may be found in the OCRM permitting file. See HCF Request at 1 ("HCF would like to know if the [Ports Authority] has submitted the requested information...."), 2 ("Since we have not

¹ Note that Carnival Cruise Lines has suspended long-term contract discussions with the Ports Authority until the litigation is resolved. It appears that HCF intends to delay as long as possible in the hopes of destroying the cruise business in Charleston. Of course, if this tactic is successful, the Union Pier Terminal will continue to be used as a cargo terminal with more ships, more traffic, and more rail than the cruise operations generate.

seen any studies or data produced by the [Ports Authority] or OCRM....").² In other words, HCF acknowledges that it lacks any information or knowledge to raise any specific objection to the permit. Of course, from HCF's perspective, such information actually is irrelevant. Whatever analysis may have been conducted, because that analysis resulted in the issuance of the permit, the analysis is, from HCF's view, deficient. Only analysis that would have resulted in the denial of the permit would have been sufficient to HCF (even though denial would result in more environmental impacts). These non-substantive requests do not merit a hearing of the Board.

This RFR, along with the companion request filed by the South Carolina Environmental Law Project (SCELP) on behalf of other entities (collectively, Opponents), constitute the third and fourth legal actions filed on behalf of these same entities in their longstanding and continuing attempt to prevent cruise ship vessels from calling on the Port of Charleston.³ The Opponents already have actions pending before the South Carolina Supreme Court and the Federal District Court attacking the cruise business in Charleston, and, relevant to HCF, whose professed mission is to preserve historic Charleston, the federal lawsuit specifically targets historic preservation issues.

In their efforts to block this capital improvement project by the Ports Authority, Opponents continue to ignore an inconvenient truth. **Charleston, and specifically the Union Pier property owned and operated by the Ports Authority, has accommodated passenger vessel calls for over 100 years.** In fact, passenger vessels, including cruise vessels, have called on the Union Pier passenger facility every year since 1973 (prior to the area's historic designation in 1977). The reality that Opponents would prefer this Board disregard is that passenger cruise vessels called on Union Pier and Charleston in the past, they do so today, and irrespective of the ultimate determination on this pending Permit, passenger cruise vessels will continue to call on Union Pier and Charleston in the future.

More importantly, the relocation of cruise operations from the south end of the Union Pier Terminal to the north end of the terminal addresses the only real issue that the vast majority of Charlestonians have with the cruise business: traffic. Should the permit be reversed, then the existing traffic patterns will be maintained and there will be additional rail and truck traffic generated from the use of the north end of the Union Pier Terminal to handle cargo (in addition to the continued use of the south end of the terminal as a cruise terminal). In other words, the issuance of the permit provides for an overall reduction in annual vessel calls at Union Pier Terminal through the removal of cargo vessel and rail operations, which also means an overall reduction of environmental impacts from operations at Union Pier Terminal. **Ironically, what the Opponents fail to understand and appreciate is that denial or reversal of the permit results in greater environmental and community impacts than terminal operations after installation of the permitted pilings.**

² For example, HCF wants to know if the Ports Authority responded to OCRM's June 29, 2012 information request. As reflected in the OCRM Technical Summary Review dated December 17, 2012, on July 26, 2012 "the requested information was received." If HCF wanted to review the information, it has been available for over five months if only HCF had submitted a FOIA request.

³ This response incorporates by reference the Ports Authority's response to the SCELP's request for final review on behalf of other challengers.

Furthermore, it is essential to understand what the permit is and what it is not. Currently, the Union Pier cruise passenger facilities are located on the southern end of the terminal footprint. The Ports Authority's proposed capital improvement project involves renovating a warehouse located on an existing piled wharf at the northern end of the Union Pier Terminal footprint, Building 322, and relocating the cruise passenger facilities, in their entirety, to the repurposed Building 322. See Exhibit A, Map of Union Pier Terminal footprint. The activity allegedly "triggering" OCRM permitting jurisdiction in this renovation and repurposing project is the planned installation of five pile clusters driven into the marl within the existing footprint (in addition to the approximately 1,008 existing pilings under Building 322 alone) the installation of three elevators and two escalators in the renovated Building 322.

Thus, the permitted project is for pile clusters to provide additional support for an existing structure within the existing footprint of an already developed marine terminal. See Exhibit B, Map of Pile Clusters. The entirety of the effect of this project is that current cruise operations will be relocated less than 600 yards to the north in a renovated warehouse, still within the existing boundary of the Union Pier Terminal footprint. This project enables the relocation of existing operations and current capabilities. See Exhibit C, OCRM Technical Summary of Review, dated Dec. 17, 2012 ("The existing commercial pier is a [Ports Authority] pier. It is also a permitted/grandfathered structure with permitted/grandfathered activities (including cruise ship operations), that will be modified within the existing pier footprint.").

While the permitted activity simply aids the retrofit and repurpose of an existing cargo warehouse, which is both economically efficient and an environmentally sustainable reuse, the larger plan of Union Pier redevelopment will see the demolition of older warehouses and facilities on the southern end of the Terminal, where the cruise passenger facilities are currently located, and allow for the potential restoration of the natural waterfront and establishment of approximately 35 acres of public green spaces and private commercial and residential units (which is larger than the 27 acre footprint of the north end cruise terminal operations).

Further, in anticipation of the move of cruise facilities to the northern end of the base, most existing cargo operations have been relocated to another Ports Authority terminal facility. In addition to the decrease in emissions at the Union Pier Terminal as a result of this relocation, this has the added benefit of ceasing rail operations to Union Pier Terminal, which blocked vehicular traffic on a daily basis. The result of these relocations and the additional traffic management plan is that the relocated cruise passenger facility will result in no increase in traffic and will reduce the current route congestion. Exhibit D, Comparison Traffic Diagram. However, should the north end not be utilized for cruise operations, it will continue its use for cargo operations, increasing air emissions and traffic congestion beyond what would exist for cruise operations.

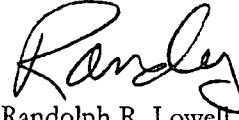
As this RFR appears to be nothing more than a broader litigation strategy of Opponents across several courts and venues, it is in the best interest of the Ports Authority and DHEC for a speedy resolution from the courts, and the Ports Authority respectfully requests that the Board decline conducting a Final Review Conference in this matter.

The Honorable Lisa L. Longshore
January 7, 2013
Page 4 of 4

Thank you for your time and consideration. If you have any questions, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.



Randolph R. Lowell

Enclosures

cc: Bradley Churdar, Esquire
Mr. Winslow Hastie
Philip L. Lawrence, Esquire
Ms. Barbara Melvin

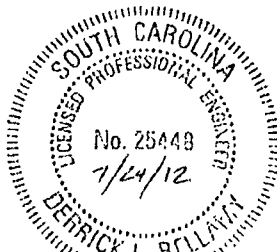
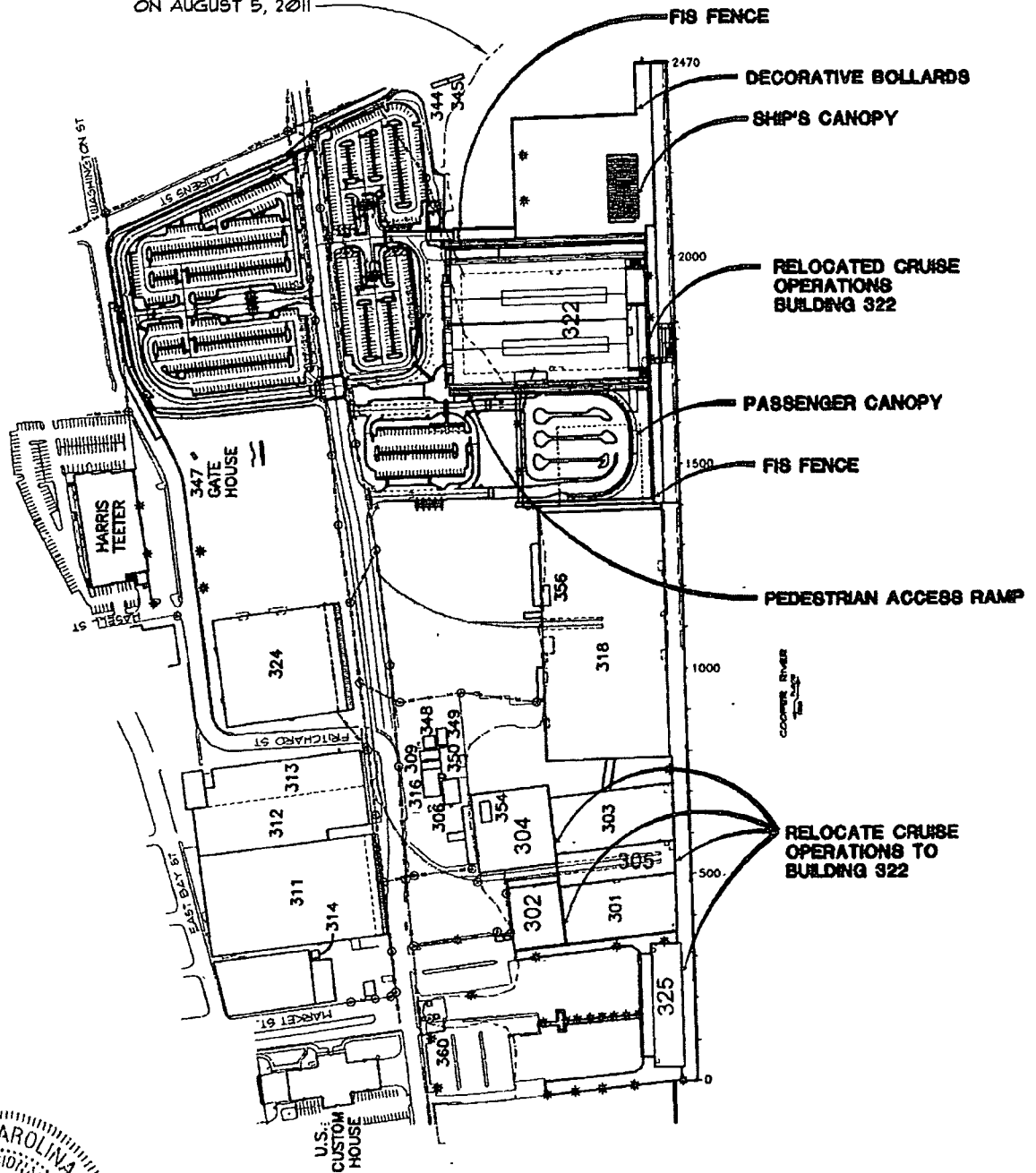
R.003211

TABLE OF EXHIBITS

Exhibit Number	Document Name
Exhibit A	Map of Union Pier Terminal
Exhibit B	Map of Pile Clusters
Exhibit C	OCRM Technical Summary of Review (Dec. 17, 2012)
Exhibit D	Comparison Traffic Diagram

EXHIBIT A

DHEC/OCRM CRITICAL LINE
LOCATED JUNE 2011
APPROVED BY S. BROOKS
ON AUGUST 5, 2011



Derrick L. Bellamy



SCALE IN FEET

NEW BUILDING LOCATION PLAN UNION PIER TERMINAL

South Carolina State **PORTS AUTHORITY**
176 CONCORD STREET
P.O. BOX 22287
CHARLESTON, S.C. 29413-2287

PROJECT NO.: CIF11E006B
FILE NAME: Upcplp3
DATE: MARCH 2012
SHEET: 3 OF 11

R.003214

EXHIBIT C

EXHIBIT B

**Regulatory Programs Division Decision Document
Impact Assessment for COMMERCIAL DOCK
Office of Ocean and Coastal Resource Management – SCDHEC**

TECHNICAL SUMMARY OF REVIEW

Permit Name: South Carolina State Ports Authority – Union Pier
Decision: _____

Permit: _____
Permit with Conditions: X
Deny: _____

I. Background Information:

Database ID# 75114

Permit Number: OCRM-12-054-B

P/N Date: March 23, 2012 Date Received: April 27, 2012

Permit Type: Joint Other Agency Permits: SCDHEC-BOW & Corps
County: Charleston Water Body: Charleston Harbor/Cooper River
Location Description: On and adjacent to Cooper River at 32 Washington Street (Future 180 Concord Street), South Carolina State Ports Authority ~ Union Pier Terminal, Charleston, Charleston County, South Carolina. TMS#: 459-00-00-009.

II. Project Description and Stated Purpose:

Description:

The work as proposed and shown on the attached plans consists of making improvements to an existing waterfront building. Specifically, the applicant seeks to install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. The pilings will be constructed within the existing footprint of pile supported Building #322. Additionally, additional structural changes are proposed to be made to building 322 and the construction of two covered staging areas designed to handle passengers, luggage, and loading & unloading of ship supplies.

Purpose: The purpose of the overall project is to facilitate the relocation of the cruise passenger facility to Building #322

III. Summary of Public and Agency Comments (List by name, date & comment summary; if none, so indicate):

Federal Agencies: **None**

State Agencies **SCSPA – NOBJ**
SCDNR – NOBJ

Local Agencies: **None**

Public Comment (Include all names from Public Hearing): **See the attached list**

Adjoining Property Owners (Include all names of those who commented
See the attached list

IV. Environmental Assessment:

A Describe the coastal resources (i.e., vegetation, habitat, etc.), which will be impacted:

Open water areas beneath an existing wharf and existing building over the water.

B. Watershed and vicinity information (include watershed name & size, classification; any impaired waters listed within impaired parameter; and shellfish status)

The proposed work will be situated within Shellfish Management Area 10B, which is classified as "Prohibited."

1) Vicinity information (include information on developments within watershed within 3 mile radius):
Site is located at an existing SCSPA commercial pier. This area of the Cooper River historically has been utilized directly and indirectly by commercial maritime shipping industry for many years, including the cruise ship industry. The area is currently surrounded by other commercial entities.

2) Existing system stressors (i.e. shellfish closures, 303d):

The proposed work will be situated within Shellfish Management Area 10B, which is classified as "Prohibited."

C. GAPC Review (List any GAPC's present on or adjacent to project site, include agency comments; attach GIS printout; and outline treatment methods)

There are no known endangered species, or SCORE sites resources at this site. The site is adjacent to the "Old and Historic Charleston" district and is designated as a GAPC. The SCSPA Union Pier is also designated as a GAPC.

D Name and approximate width of water body: **The Cooper River**

V. Policy Assessment:

A. Regulatory History.

1) Previous OCRM authorizations (land disturbance, Federal cert):
SC STATE PORTS AUTHORITY 90-4T-172-P
FLEET LANDING RESTAURANT, LLC OCRM-04-339-R
SC STATE PORTS AUTHORITY 99-1P-261-P-C

- 2) Previous Enforcements (is project in compliance w/all previous permits, etc): **None**
- 3) Master Plans (dock, archaeological, wetland). **No**
- 4) Date of O & M: **N/A**
- 5) Navigable tributary crossings proposed: **None**
- 6) Property frontage at highground and water, offsets these lines: **N/A. The existing commercial pier is a SC State Port Authority pier. It is also a permitted/grandfathered structure with permitted/grandfathered activities (including cruise ship operations), that will be modified within the existing pier footprint.**
- 7) Community or public marina: **Commercial Pier**
- 8) Water quality sampling/monitoring program required: **No.**
- 9) Stormwater permit submitted or approved for highground dev: **No. Facility is an existing commercial pier with buildings that have been approved in the past.**
- 10) Bathroom numbers: **N/A. Facility is an existing commercial pier.**
- 11) Dock masters office location and number. **No.**
- 12) SAMP restrictions. **N/A**
- 13) NERRS review area: **N/A**
- 14) Deed restrictions: **N/A**
- 15) Wetland delineation approved by ACOE: **N/A**
- 16) Development plan and parking approved by local government: **N/A**
- 17) Valid critical area line certified: **Yes**
- 18) Marsh ownership claims **None**

B Applicable Regulations and Policies (list those that apply only):

- 1) CZMA:
 - Approval or denial of permits; appeal to council** 48-39-150
 - Legislative declaration of state policy** 48-39-30
 - Legislative declaration of findings** 48-39-20
- 2) Regulations (General Guidelines, Further Guidelines, Specific Project Standards):
 - Mitigation Criteria** R.30-4(G)(2)
 - General Considerations** R.30-11(B)
 - Further Guidelines** R.30-11(C)

R.30-12(A)(4) The following standards in addition to those in R.30-12(A)(1) apply to construction of commercial docks that are not marinas

R.30-12(E) Marinas, including commercial and community docks with more than 250 linear feet of effective docking space.

R.30-12(F)(2)(d) Transportation

- 3) CZ Policies (Management Program Document):

Policies for Port Facilities

- 1) New port development should take place in existing industrialized areas where sufficient support facilities are available including public utilities, rail and highway transportation access, and navigational channels which are already maintained, unless there are no feasible alternatives or an overriding public interest can be demonstrated, and any substantial environment damage can be minimized.
- 2) Port development should occur in areas that have adequate high ground (non-wetland) acreage for proposed current development and near-term expansion plans, and related facilities. Port development should be located in areas where the filling of productive salt, brackish or freshwater wetlands will not be required or can be minimized. If site preparation does require filling in these wetlands, it must be clearly demonstrated that no other feasible alternatives exist or an overriding public interest can be demonstrated, and any substantial environment damage can be minimized.
- 3) To the extent feasible, port development and expansion should locate on existing channels so that the need for initial and maintenance dredging can be minimized.
- 4) New port development that will require maintenance dredging must identify adequate upland (non-wetland) spoil areas, ocean disposal, or other environmentally-acceptable alternative disposal techniques to meet the long-term demands for spoil disposal.
- 5) Port areas must provide for the handling of dangerous and volatile cargoes and materials in relatively isolated or restricted areas, so that in the event of accident, measures can be implemented to contain any spills or other contamination with minimal environmental damage and limited threat to the health, safety and welfare of the public.
- 6) Wharves, piers, mooring dolphins and other port-related structures should not restrict or block navigation or alter the natural pattern of water currents.
- 7) Proposed port development or expansion and operation must meet existing air and water quality standards, as regulated by the Federal Environmental Protection Agency and the South Carolina Department of Health and Environmental Control.
- 8) Port facilities developed by the State Ports Authority (SPA), as well as by private developers, must be sited, constructed and operated in a manner that is consistent with local and State development

objectives as set forth in public documents such as comprehensive plans, zoning ordinances and performance standards.

- 9) Potential negative impacts on navigation which might restrict port and harbor activities in the area will be considered in evaluation of permits for marinas, docks and piers, transportation facilities (especially bridges), cables and pipelines and other relevant activities.
- 10) Port development or expansion plans must include provision for necessary breakwater or other wake protection measures along major navigable ship channels where appropriate in order to reduce erosion damage. These structures must be in compliance with other applicable policies and Rules and Regulations.
- 11) All bulkheads associated with a port area must meet the policies as stated in the Erosion Control Program [Chapter IV(C)].
- 12) All dredging and dredge spoil disposal policies, as stated in VIII (A) and (B) of the Resource Policies will be applied to port activities.
- 13) All piers and dockage must meet the policy requirements as stated in VI (C) of the Resource Policies.
- 14) Transportation projects associated with port development must follow the transportation policies stated in II (B)-(E) of the Resource Policies.
- 15) The policies for manufacturing will apply to port development and related industrial development (III (D) of the Resource Policies).

CZMP II - 1
CZMP II, Section II(A)
CZMP III - 5 General Considerations
CZMP III - 14 at I(7)
CZMP III - 14(8)
CZMP III - 19
CZMP III - 20
CZMP III - 22
CZMP IV

Priority of Uses

The following are the uses of priority for all state ports created and operated by the South Carolina State Ports Authority (SPA) beginning with the use of highest priority:

- 1) Uses which require water access or uses for which the water orientation is the central purpose of the activity, such as maritime shipping, fishing, marine industry, and recreational boating. Included in the uses of highest priority for state ports are provisions to assure safety within the ports. These water-dependent uses should have no prudent or feasible alternative;
- 2) Water-related uses which do not reduce or degrade the natural value or resources within the port,
- 3) Nonwater-dependent or nonwater-related uses which retain future flexibility of the port for water-dependent needs.

Designated Sites

The South Carolina Ports Authority owns and manages the following facilities, which are designated as GAPCs: Beaufort County: Port Royal-State Pier 21; Charleston County: Port of Charleston, Georgetown County: State Piers 31 and 32

C Does the project contravene any coastal zone regulations?

(If No, skip to section VII, if Yes, complete Section VI)

YES

X NO

VI. Modifications for bringing the project into compliance with regulations:

A Modifications required to minimize impacts (list avoidance & minimization measures; buffers; size and/or use restrictions; additional treatment measures; deed restrictions; and agency agreements)

See attached Special Conditions

B. If Permit is denied, explain contraventions of regulations and/or Coastal Zone Management Program
N/A

VII. Field assessment by: Steven Brooks/Blair Williams June 13, 2012

(Name)

(Date)

VIII: Reviewed By:

1 Project Manager

Steven Brooks

12/17/12

(Signature)

(Date)

2 Section Manager

Blair Williams

12/17/12

(Signature)

(Date)

IX. Notes:

Previously, this project was advertised on public notice on March 9th and March 23rd as a proposal to install 5 pilings, consisting of a 16" precast pile, driven into the marl to support three elevators and two escalators. On April 18, 2012, A public hearing was held at the Sterett Hall Auditorium. Subsequently, DHEC-OCRM met with the SC State Ports Authority on July 18, 2012 to discuss additional information that was requested in a letter dated June 29, 2012. At the end of the meeting, it was agreed the SPA would be submitting the additional information as requested. On July 26, 2012, the requested information was received. The application was re-noticed on August 3, 2012 and the comment period was extended to September 2, 2012.

This project was re-public noticed to include proposed modifications consisting of additional structural changes that are to be made to building 322 and the construction of two covered staging areas. A second public hearing was held on Wednesday, September 19, 2012 at 6:00 pm at the Sterett Hall Auditorium. The record of the public hearing was kept open until October 10, 2012, in order to receive any additional comments.

LONGTERM CUMULATIVE AFFECTS

R.30-11(C)(1) The extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area. The long-range cumulative effect of this project will not have any substantive impact to any type of development because development in this area has already been established and completed. Additionally, the long-range cumulative effect of this project will not have any substantive impact to the general character of the area because the general character of this area has been for more than a century an existing commercial pier that is a SC State Port Authority pier with grandfathered activities that include cargo and cruise ship operations.

This is an activity that would be occurring on an existing commercial pier that is a SC State Port Authority pier. The activity (cruise ship operation) currently exists on this facility and is considered grandfathered at this pier.

NEW LOCATION POTENTIAL IMPACT A DESIGNATED HISTORIC AREA

The Union Pier facility is adjacent to the "Old and Historic Charleston" district. The "Old and Historic Charleston" district was listed on the National Register of Historic Places in 1978 for its architectural integrity. The SC State Ports Authority is not undertaking any new activity that would threaten the architectural integrity of this historic district. The Port of Charleston and the historic district have co-existed for many years. In light of the afore-mentioned, it has been determined that there would be no potential adverse effect on the adjacent historic district.

CRUISE SHIP CALLS AFTER SHIFT TO NEW TERMINAL

The South Carolina State Ports Authority (SCSPA) has committed to a very responsible voluntary Cruise Management Plan to manage the number of cruise ship calls per year. The operations for the new passenger cruise facility at Union Pier Terminal will be conducted in accordance with the Voluntary Cruise Management Plan. The SCSPA will include the Department in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".

AIR EMISSIONS

Air quality for vessel mobile source is governed by international treaty and federal regulation (MARPOL Annex VI), and Congressional adoption of that treaty. Regulatory authority is under the federal EPA and U.S. Coast Guard.

The cruise ships that will call at this facility are not equipped to connect with shore power. Shore power is prohibitively expensive infrastructure. Shore power is extremely costly, and is usually required only in areas that face air quality challenges. Charleston does not face the air quality challenges.

There will be a reduction in cruise ship related emissions on Union Pier as a result of the implementation of the North American Emission Control Area (ECA), which began in August of this year and will be completely implemented by August 2015. All cruise ships will be required to use lower sulfur fuel as a result of the directives of the North American Emission Control Area (ECA). Emissions will be decreased even further once construction has been completed for the passenger cruise terminal, as this will eliminate emissions associated with shuttling cruise passengers to and from the current offsite parking area and emissions associated with dropping off and picking up baggage, and processing passengers and vehicles near the cruise ship. Additionally, to further mitigate air emissions, the SCSPA has agreed that the space remaining on the south end of the terminal would not be re-utilized to handle cargo. The space remaining on the south end of the terminal would be redeveloped and reunited with the City of Charleston.

In summary, the applicant's request is permissible by law. The proposed work is in line with the general character of the surrounding area. Based on the foregoing, SCDHEC issued a permit authorizing the installation 5 pilings, additional structural changes to building 322, and the installation of two covered staging areas. These activities were issued with the following special conditions:

1. Provided that operations for the new passenger cruise facility at Union Pier Terminal is conducted in accordance with the attached Voluntary Cruise Management Plan (Attachment A). If there are any future changes proposed to the Voluntary Cruise Management Plan, the Department must be included in the notification process as outlined on the second page of the Voluntary Cruise Management Plan titled "Clarification Process of City Consultation Regarding Cruise Management Plan Alteration".
2. Provided that the construction detailed in this permit does not begin until after the Memorandum of Agreement, dated March 26, 2007 (as amended), between the State Ports Authority and the SCDHEC has been revised and finalized.
3. Provided that the SPA requires its contractors, for the activities addressed under this permit, to:
 - a. perform work in compliance with all applicable local, state, and federal environmental laws and requirements.
 - b. use low emission vehicles that conform to the federal Tier 2 or higher emissions standards for all nonroad equipment between 100 and 750 horsepower.
 - c. turn off construction equipment and vehicles not in active use.
 - d. implement dust control using the best management practices that may include, but not be limited to, water spraying, applying mulch and establishing vegetation, applying polymers, and spraying tackifiers in compliance with state and federal environmental regulations.
 - e. require that all diesel vehicles, construction equipment and generators on site use ultra-low sulfur diesel (15 ppm), a biodiesel blend approved by the original engine or equipment manufacturer with sulfur content of 15 ppm or less, or other clean burning alternative fuel such as propane, where such fuel is commercially and reasonably available.
4. Provided that any disturbed critical area adjacent to the construction site be restored to original contours and conditions upon project completion.
5. Once the project is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment.
6. Provided that an as-built survey of the modified terminal facility must be submitted to the Department within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the new terminal facility, and must list the starting and ending coordinates of the new terminal facility in the SC State Plane Coordinate System, which can be obtained by survey-grade Global Positioning

System equipment.

7. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

X. Attachments Required:

GIS Review (See Section IV.C. above)
Site Photographs

SC State Ports Authority OCRM-12-054-B

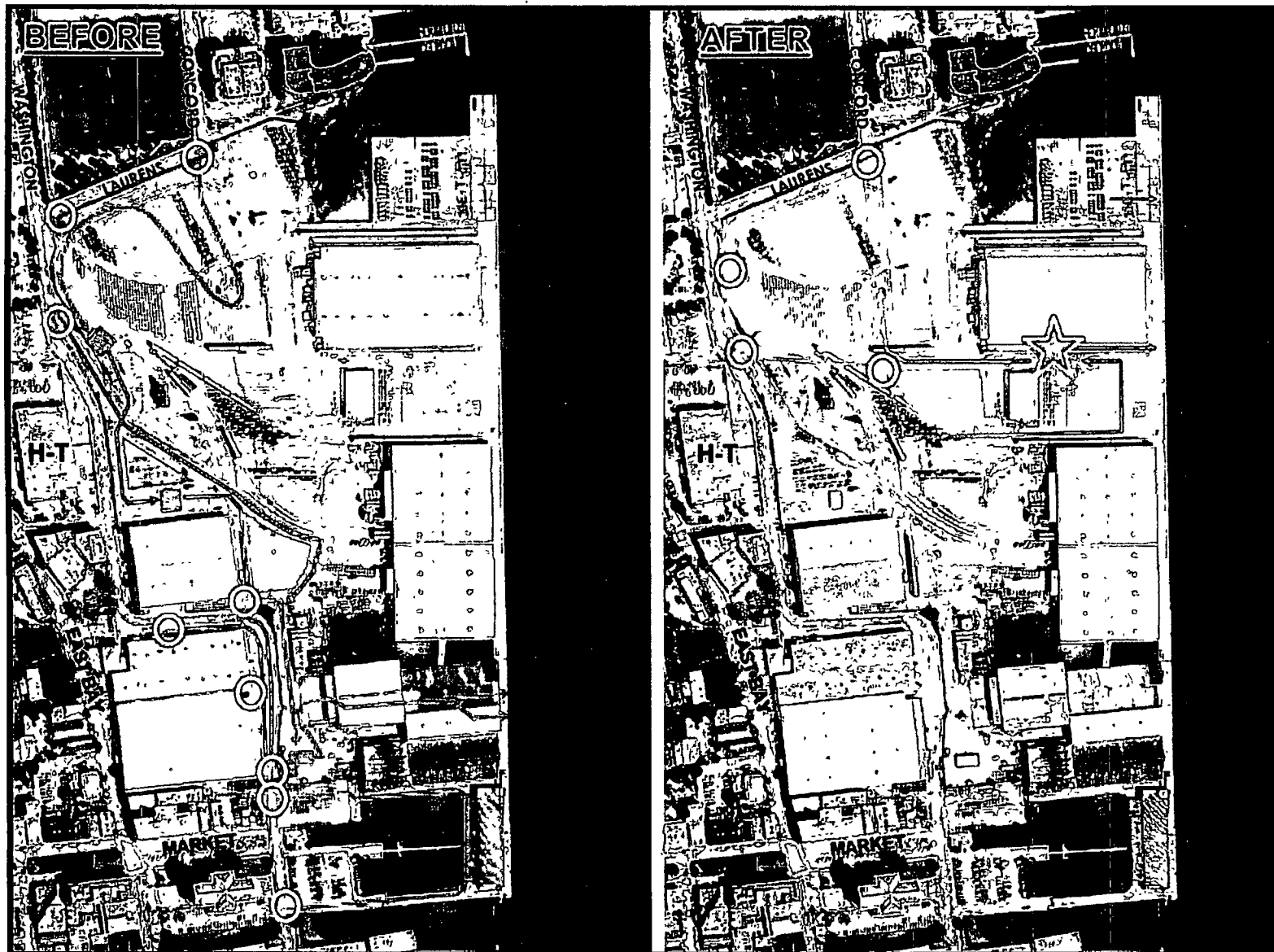


0 0.05 0.1 0.2 Miles

- Base Line
- Set Back Line
- Critical Area
 - Enforcement
 - CA_Permit_12
 - CA_Permit_09-11
 - CA_Permit_05-08
 - CA_Permit_01-04
 - CA_Permit_02-00
 - CA_Permit_00-01
 - CA_Mant_Repair
 - OCRM_Marinas
- Claimed Marsh
- Dock Master Plans
- Endangered_Species_Pts
- PIPING_PLOVER_HABITAT (USFWS)
- SCORE Sites
- SFMS
- DNR_Marinas
- Boat_Ramps
- Salt/Fresh Water Line
- SRFAC Sites
- COBRAS
- LIVE OYSTER
- DEAD SHELL DEPOSITS
- Shellfish Lease/Permit Areas
- Civil War Earthworks
- Archaeological Points
- Archaeological Polys
- Historic Structures
- Historic Features
- Historic Areas
- National Register Points
- National Register Polys
- Restricted NR Points
- Restricted NR Polys
- Cultural Resource Survey Lines
- Cultural Resource Survey Polys
- Add AMP_94-03
- AMP
- Chicora Sites
- Above Ground Storage Tanks
- Leaking UST
- UST
- CERCLA
 - Not Listed on 303d List, Not Within TMDL
 - Listed on 303d List
 - Listed on 303d List, Within TMDL
 - Not Listed on 303d List, Within a TMDL
- FISH MONITORING STATIONS
- APPROVED TMDL SITES
- Federally Protected
- Privately Protected
- State Protected
- ACE_BASIN_TASKFORCE_BOUNDARY
- NERR
- Edisto Island Trust
- FED_ADMIN_LAND
- Streets
- Parcels
- Coastal Zone Counties
- char06se.jp2
- RGB
 - Red_Band_1
 - Green_Band_2
 - Blue_Band_3

R.00327

EXHIBIT D



In the "Before" (shown on the left), the end of North & South Market is closed, a portion of Washington St., Pritchard St., and Concord St. is closed during cruise operations. In the "After" (shown on the right), these streets are open. The only street closure anticipated is the portion of Concord St. within the Union Pier Terminal footprint that is closed today.

R.003229

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P O BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M. S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
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CHAD N. JOHNSTON
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*ALSO ADMITTED IN TX

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TELECOPIER 256-8062

January 7, 2013

VIA HAND DELIVERY

Members of the Board
c/o The Honorable Lisa L. Longshore
Clerk to the Board
S.C. Dep't of Health & Env'tl. Control
2600 Bull Street
Columbia, S.C. 29201

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& ENVIRONMENTAL CONTROL
2013 JAN - 7 PM 12:36
OFFICE OF GENERAL COUNSEL
ADMINISTRATION
CLEAN BOARD OF DHEC

Re: Request for Final Review, P/N OCRM-12-054-B (Preservation Society, *et al.*)

Dear Members of the Board:

The South Carolina Ports Authority (Ports Authority) files this response to the request for final review (RFR) filed on or about January 2, 2013, by the Preservation Society, Charleston Communities for Cruise Control, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, the Charlestowne Neighborhood Association, Anson House Condominium Association, and the Charleston Chapter of the Surfrider Foundation (collectively, along with other requester Historic Charleston Foundation, referred to as Opponents). As explained below, the issues posed by Opponents have been thoroughly vetted by OCRM staff, Opponents have raised no new issues for consideration, and all indications are that Opponents intend on pursuing this matter further in a request for a contested case hearing before the South Carolina Administrative Law Court (ALC) in continuation of their ongoing crusade against cruise business.¹ Therefore, the Ports Authority respectfully requests that the Board decline to conduct a

¹ Note that Carnival Cruise Lines has suspended long-term contract discussions with the Ports Authority until the litigation is resolved. It appears that the Opponents intend to delay and throw up as many roadblocks as possible in the hopes of destroying the cruise business in Charleston. Of course, as discussed herein, if this tactic is successful, the Union Pier Terminal will continue to be used as a cargo terminal with more ships, more traffic, and more rail than the cruise operations generate. Exhibit A, Affidavit of James I. Newsome, III, dated Aug. 22, 2011, ¶11 ("Carnival has now suspended further action on the long-term contract discussions unless and until this lawsuit is expeditiously ended."); Exhibit B, Affidavit of Arnaldo Perez, dated July 2011, ¶5 (pending litigation makes it "difficult for Carnival Cruise Lines to justify the long term arrangement proposed" by the Ports Authority).

final review conference to allow the parties to move forward to the ALC in the most expeditious manner possible.

This RFR, along with the companion request filed by the Historic Charleston Foundation, constitute the third and fourth legal actions filed on behalf of these same parties in their longstanding and continuing attempt to prevent cruise ship vessels from calling on the Port of Charleston. The Opponents already have actions pending before the South Carolina Supreme Court and the Federal District Court attacking cruise ship calls in Charleston, and, relevant to the Preservation Society, whose professed mission is to preserve and protect historic Charleston, the federal lawsuit specifically targets historic preservation issues.

In their efforts to block this capital improvement project by the Ports Authority, Opponents continue to ignore an inconvenient truth: **Charleston, and specifically the Union Pier property owned and operated by the Ports Authority, has accommodated passenger vessel calls for over 100 years.** In fact, passenger vessels, including cruise vessels, have called on the Union Pier passenger facility every year since 1973 (prior to the area's historic designation in 1977). Exhibit A, Affidavit of James I. Newsome, III, dated Aug. 22, 2011, ¶7. Further, Carnival Cruise Lines, the subject of much of Opponents' ire, first directed cruise vessels to Union Pier in 1994, and it began to do so regularly, continuing to present day, in 1999. Exhibit B, Affidavit of Arnaldo Perez, dated July 2011, ¶3. The reality that Opponents would prefer this Board disregard is that vessels called on Union Pier and Charleston in the past, they do so today, and irrespective of the ultimate determination on this pending Permit, vessels will continue to call on Union Pier and Charleston in the future.

More importantly, as explained below, the relocation of cruise operations from the south end of the Union Pier Terminal to the north end of the terminal addresses the only real complaint that the vast majority of Charlestonians have with the cruise business: traffic. Should the permit be reversed, then the existing traffic patterns will be maintained and there will be additional rail and truck traffic generated from the use of the north end of the Union Pier Terminal to handle cargo (in addition to the likely continued use of the south end of the terminal as a cruise terminal).

Furthermore, it is essential to understand what the permit is and what it is not. Currently, the Union Pier cruise passenger facilities are located on the southern end of the terminal footprint. The Ports Authority's proposed capital improvement project involves renovating a warehouse located on an existing piled wharf at the northern end of the Union Pier Terminal footprint, Building 322, and relocating the cruise passenger facilities, in their entirety, to the repurposed Building 322. See Exhibit C, Map of Union Pier Terminal footprint. The activity allegedly triggering OCRM permitting jurisdiction in this renovation and repurposing project is the planned installation of five pile clusters driven into the marl within the existing footprint (in addition to the approximately 1,008 existing pilings under Building 322 alone) for the installation of three elevators and two escalators in the renovated Building 322. Exhibit D, Map of Pile Clusters. For the purpose of context, below is a picture of rows of existing pile clusters beneath Building 322.



Five pile clusters added to the approximately 1,008 existing pile clusters under Building 322 and thousands of others under the wharves led the U.S. Army Corps of Engineers to conclude that "[o]nce installed the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure." Exhibit E, Corps Mem. For Record, SAC-2003-13026, dated April 20, 2012.

In other words, the permitted project is for pile clusters to provide additional support for an existing structure, within the existing footprint of an already developed marine terminal. As OCRM noted, the "existing commercial pier is a [Ports Authority] pier. It is also a permitted/grandfathered structure with permitted/grandfathered activities (including cruise ship operations), that will be modified within the existing pier footprint." Exhibit F, OCRM Technical Summary of Review, dated Dec. 17, 2012; see Exhibit E, Corps Mem. For Record, SAC-2003-13026, dated April 20, 2012 ("[T]he renovation of Building 322 to consolidate existing activities at Union Pier and to increase the efficiency of the existing passenger facility is not considered a 'change in use'."). The entirety of the effect of this project is that current cruise operations will be moved to a location less than 600 yards to the north in a renovated warehouse, still within the existing boundary of the Union Pier Terminal footprint. Thus, this project is a relocation of existing operations and current capabilities.

Also, the additional pilings and renovation of the existing building are necessary to bring the facilities into compliance with current terminal security requirements mandated by Federal Law and under the oversight of the United States Customs and Border Protection (CBP). In 2007, the Ports Authority entered into a Memorandum of Understanding with the CBP for the conditional approval of ongoing cruise operations on a continuing trial basis, which has since been renewed annually, with the understanding that a passenger terminal facility with improved security would be needed for continued operations. See Exhibit E, Corps Mem. For Record, SAC-2003-13026, dated April 20,

2012 (The “proposed renovations to Building 322 are considered minor deviations in the existing structure’s configuration **that are required to comply with Federal regulations and current terminal security requirements that were established after September 11, 2001.**”) (emphasis added).

Further, in anticipation of the move of cruise operations to the northern end of the base, most existing berth facilities which were used for cargo operations, and which handled upwards of 200 cargo vessel calls a year, have been relocated to another Port Authority terminal facility. In addition to the decrease in emissions at the Union Pier Terminal as a result of this relocation, the relocation of cruise operations would have the added benefit of ceasing rail operations to Union Pier Terminal, which blocked vehicular traffic on a daily basis. The result of these relocations and the additional traffic management plan is that the relocated cruise passenger facility will result in no increase in traffic and will reduce the current route congestion. Exhibit G, Comparison Traffic Diagram. In fact, the traffic management plan projects a simpler, more efficient traffic environment than what currently exists. However, should the north end not be utilized for cruise operations, it will continue its use for cargo operations, increasing air emissions and traffic beyond what would exist for cruise operations.

To further illustrate the benefits that will be achieved with this capital improvement project, the following table illustrates the positive environmental and community impacts the relocation of cruise vessel operations will have when compared side-by-side with the forecasted cruise and cargo operations at Union Pier if the status quo is maintained.

<u>OCRM AND PORTS AUTHORITY</u>	<u>OPPONENTS</u>
<u>Relocation</u> of Operations to Northern End of Union Pier Terminal (UPT)	<u>Status Quo</u> and Projected Growth if Cruise Operations Maintained on Southern End
Cruise vessel calls voluntarily limited to 104 per calendar year.	Cruise vessel calls voluntarily limited to 104 per calendar year.
UPT will no longer receive cargo ships.	UPT receives over 200 cargo vessels per year, at an average of 4 per week.
Rail access to the northern end of UPT will cease	Fully operational rail spur to UPT which causes daily at-grade vehicular blockage.
Implementation of a traffic management plan, which more quickly facilitates and disperses maritime cruise traffic from City streets.	Continued existing road closures due to location of cruise terminal operations at southern end of UPT.
Restoration and re-use of southern end of UPT.	Continued use of all of UPT for cruise vessel operations on the south and cargo on the north.

Charleston Mayor Joe Riley explains the practical and positive impact of the differences reflected in this table of the “with permit” scenario.

When the new terminal is completed, street closures now occurring when vessels embark from Charleston will cease, and the Ports Authority will make available for redevelopment some 35 acres along the Cooper River waterfront. The redevelopment of Union Pier poses an extraordinary, once in forever opportunity for the City and the State. Under the redevelopment plan, streets will be reconstructed, view corridors reopened, new parks constructed and eyesores removed. The plan will create opportunities for additional places for people to live and work in the City. Properties which are now bordered by chain link or barbed wire fencing will be opened and lined with trees and shrubs. And, public access to the water's edge will be restored and preserved.

Exhibit H, Affidavit of Joseph P. Riley, Jr., dated Aug. 22, 2011, ¶6.

The footprint of the relocated cruise operation stays within the existing terminal boundary. While the permitted activity simply aids the retrofit and repurpose of an existing cargo warehouse, an activity which is both economically efficient and environmentally sustainable, the larger plan of Union Pier redevelopment will see the demolition of older warehouses and facilities on the southern end of the Terminal, where the cruise passenger operations are currently located, and allow for the potential restoration of the natural waterfront and establishment of public green spaces and private commercial and residential units of approximately 35 acres—larger than the 27 acre footprint of the northern end of the terminal to be used for cruise operations. In other words, the larger redevelopment plan aids economic development in Charleston—a prospect of interest to the vast majority of Charlestonians. Mayor Riley has testified that in 2010 the cruise business generated approximately \$35 million and over 400 jobs. Exhibit H, Affidavit of Joseph P. Riley, Jr., dated Aug. 22, 2011, ¶4. A 2011 impact study concluded that the planned relocation of the cruise operations would lead to \$43 economic million in local output or impact and create 336 jobs. Center for Business Research, Charleston Metro Chamber of Commerce, Economic Impact Study (March 2011). Indeed, the South Carolina General Assembly passed a Concurrent Resolution expressing “their thanks for Carnival Cruise Lines’ contributions to the economic well-being of South Carolina and for the company’s commitment to operating in a balanced manner that is sensitive to the environment.” Senate Bill 968 (June 21, 2011).

As an act of good faith and stewardship, the Ports Authority also proffered, and ultimately entered into, a Voluntary Cruise Management Plan with the City of Charleston that was adopted by OCRM as a special condition of the permit. This demonstrates the efforts of the Ports Authority to be a responsible citizen of the City of Charleston, and goes well beyond the undertakings of any major global port with such diverse maritime commerce. As a part of the Voluntary Cruise Management Plan, the Ports Authority voluntarily agreed to:

- i. Limit the number of passenger cruise ship calls on Union Pier to 104 annually.
- ii. Host no more than one ship at a time at the Union Pier cruise terminal.
- iii. Design the renovated terminal facility at the northern end of Union Pier to accommodate ships consistent with the size and profile that have called on Charleston in the past.

- iv. Enter into a Traffic Management Plan to remove maritime cruise traffic from the City streets as soon as possible, as well as continued coordination with the Charleston City Police Department and the City Special Events Committee.
- v. Continued commitment to contribute an allocation to the DASH Downtown Shuttle Program, which provides free shuttle rides to those traveling in the downtown areas of the City.

Id. Notwithstanding these good faith efforts of the Ports Authority, and OCRM's thorough review of the permit application, which resulted in special conditions imposed through the permit, Opponents contend OCRM's staff decision was made in violation of applicable statutes, regulations and rules.² While the Opponents' RFR is cloaked in the appearance of a challenge on the merits, at issue is the larger war being waged by Opponents against the cruise industry.³ At bottom, Opponents are anti-cruise, and this permit represents one of many battlefronts against the industry in Charleston.

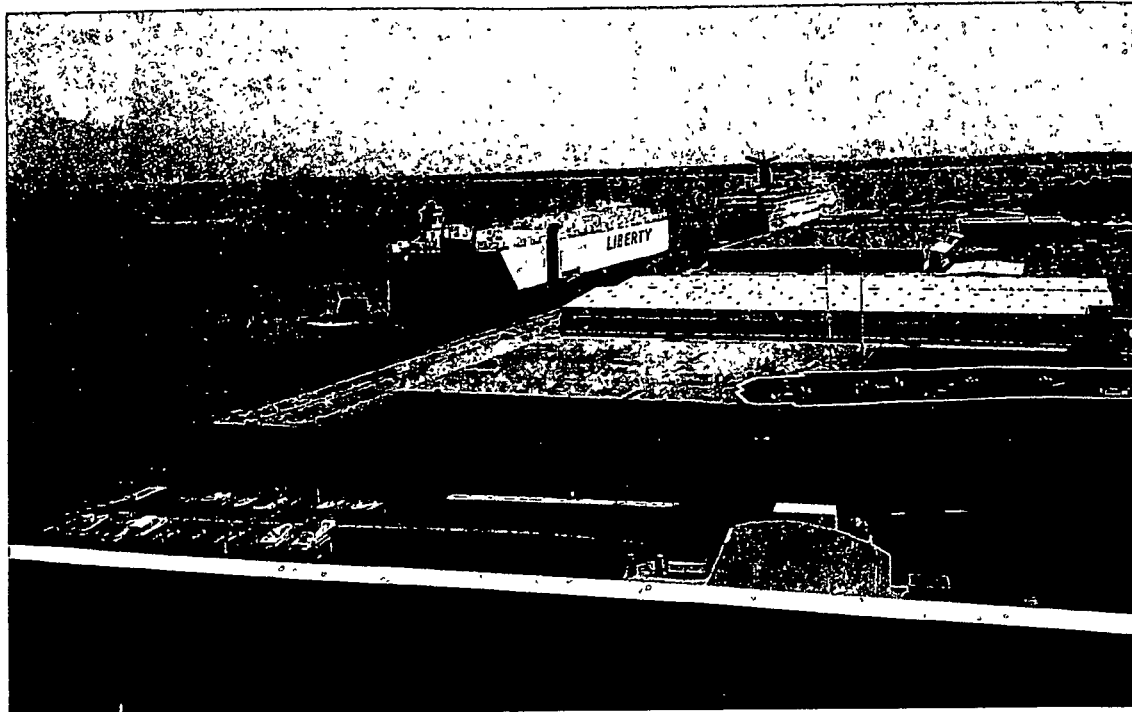
In furtherance of that endeavor, Opponents raise a handful of issues with the Permit—none of which have any merit and are wholly unsupported by facts. While this response is not the appropriate vehicle for a detailed refutation of each allegation, a couple of points suffice to demonstrate the lack of substance of the Opponents' claims. The Opponents claim, for example, that long-term cumulative impacts were inadequately reviewed. However, as OCRM demonstrates in the section of its technical review memorandum entitled "Longterm Cumulative Affects," there are no substantive cumulative impacts because this a developed area—and an area developed for maritime purposes—and "the general character of this area has been for more than a century an existing commercial pier ... with grandfathered activities that include cargo and cruise ship operations. Exhibit F, OCRM Technical Summary of Review, dated Dec. 17, 2012. Moreover, the Opponents claim that the cruise ships are "enormous when compared to the historic scale of shipping on Charleston's waterfront." However, below is a picture of the Union Pier Terminal with the Carnival Fantasy cruise ship in the farthest berth and a cargo ship (car carrier) berthed in the foreground. (Building 322 is the white-roofed warehouse near the cargo ship.) It is clear that these ships are not disproportionate in size or scale, and much larger ships than the pictured cargo ship

² Opponents also rely extensively on the South Carolina Supreme Court preliminary opinion Kiawah Development Partners, II v. S.C. Dep't Health and Envtl. Control, 2011 WL 5840326 (2011). However, despite the fact that Opponents' counsel is counsel of record in that case, Opponents should have disclosed to the Board that this case has been reheard by the Supreme Court and no subsequent opinion has been issued. In other words, **the entire decision and language relied upon by the Opponents is not the current law in South Carolina.** Rather, the case is still pending on appeal. Christy v. Christy, 317 S.C. 145, 452 S.E.2d 1 (Ct. App. 1995) (a case is not finally disposed of until the remittitur is sent to the lower court). Therefore, reliance on the holdings in furtherance of Opponents' arguments to the Board, is entirely inappropriate and should be disregarded.

³ For example, as for the supposed complaints about noise and pollution, none existed until the Ports Authority proposed moving the cruise operations from one end of the terminal to the other. In an affidavit from the Director of Livability Division of the City of Charleston dated August 22, 2011, the Director testified that he had "consulted the police department and reviewed the records of the Livability Division regarding complaints pertaining to noise or pollution from passenger ships that call at Union Pier and as of the date of the Affidavit, there have been none." Exhibit I, Affidavit of Daniel Riccio dated Aug. 22, 2011.

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below call on the Port of Charleston. The Opponents' claim is simply inaccurate and unsupported by any facts.



As this RFR appears to be nothing more than a broader litigation strategy of Opponents across several courts and venues, it is in the best interest of the Ports Authority, DHEC, Charleston, and the State of South Carolina for a speedy resolution from the courts, and the Ports Authority respectfully requests that the Board decline conducting a Final Review Conference in this matter so this matter may proceed directly to the ALC for disposition to allow this project—which has a positive net gain for both the economy and the environment—move forward.

Thank you for your time and consideration. If you have any questions, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

A handwritten signature in dark ink, appearing to read "Randall" or "Randolph".

Randolph R. Lowell

Enclosures

cc: Amy E. Armstrong, Esquire
Philip L. Lawrence, Esquire
Ms. Barbara Melvin
Bradley Churdar, Esquire

R.003236

TABLE OF EXHIBITS

Exhibit Number	Document Name
Exhibit A	Affidavit of James I. Newsome, III (Aug. 22, 2011)
Exhibit B	Affidavit of Arnaldo Perez (July 2011)
Exhibit C	Map of Union Pier Terminal
Exhibit D	Map of Pile Clusters
Exhibit E	Corps Mem. For Record, SAC-2003-13026 (Apr. 20, 2012)
Exhibit F	OCRM Technical Summary of Review (Dec. 17, 2012)
Exhibit G	Comparison Traffic Diagram
Exhibit H	Affidavit of Joseph P. Riley, Jr. (Aug. 22, 2011)
Exhibit I	Affidavit of Daniel Riccio (Aug. 22, 2011)

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2011-CP-10-4139
	)	
HISTORIC ANSONBOROUGH	)	
NEIGHBORHOOD ASSOCIATION,	)	
CHARLESTOWNE NEIGHBORHOOD	)	
ASSOCIATION, COASTAL	)	
CONSERVATION LEAGUE, AND	)	
PRESERVATION SOCIETY OF	)	
CHARLESTON,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF ARNALDO PEREZ
	)	
vs.	)	
	)	
CARNIVAL CORPORATION, d/b/a	)	
CARNIVAL CRUISE LINES,	)	
	)	
Defendant.	)	

PERSONALLY appeared before me, Arnaldo Perez, who, being duly sworn, says:

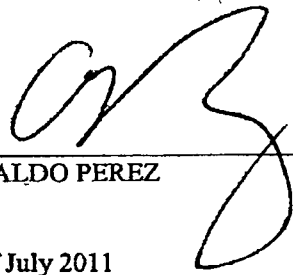
1. I am employed by Defendant Carnival Corporation ("Carnival") as a Senior Vice President and General Counsel.
2. Carnival, through its operating division, Carnival Cruise Lines, is in the business of owning and operating passenger cruise vessels which take passengers to various port destinations in the Caribbean, the United States and elsewhere.
3. Carnival Cruise Lines has from time to time operated cruises from the Port of Charleston, South Carolina, since 1999. In 2010, Carnival greatly increased its involvement with the Port of Charleston by making Charleston, and specifically the Union Pier terminal facility, the home port of the cruise ship *Carnival Fantasy*. Since that time, the *Carnival Fantasy* has operated approximately 80 cruises from Charleston, taking approximately 185,000 passengers on cruises to the Bahamas, Grand Turk and Bermuda.

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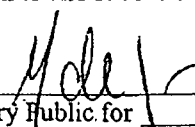
4. Carnival is aware of plans by the South Carolina State Ports Authority ("SCSPA") to redevelop the Union Pier port terminal facility and construct a new, modern passenger terminal. Carnival agrees that the improvements planned by SCSPA would greatly enhance Charleston's attractiveness as an embarkation and destination point for cruises and would also improve the flow of pedestrian and vehicular traffic in and around the proposed passenger terminal.

5. Carnival has been engaged in discussions with the SCSPA over an agreement contemplating Carnival Cruise Lines' long term use of the planned passenger terminal at Union Pier. Carnival is excited about the prospect of such an arrangement and believes it could be very advantageous both to Carnival and to the City of Charleston. Carnival has, however, recently been sued by a group of plaintiffs who allege that its operations at Union Pier violate various local zoning ordinances and state laws. While Carnival does not believe the lawsuit has any merit, the prospect of a lengthy court battle and the possibility, however remote, of a determination that Carnival Cruise Lines' use of Union Pier is unlawful, make it difficult for Carnival Cruise Lines to justify the long term arrangement proposed by SCSPA. Carnival Cruise Lines has communicated its reservations to SCSPA in the course of their ongoing negotiations.

FURTHER, AFFIANT SAITH NOT.


ARNALDO PEREZ

Sworn to and subscribed before me, this ____ day of July 2011


Notary Public for _____
My Commission expires: _____



MARTHA DE ZAYAS
MY COMMISSION # EE 024310
EXPIRES: September 8, 2014
Bonded Thru Budget Notary Services

EXHIBIT E

CESAC-RD-SP
Application: SAC-2003-13026

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Memorandum Documenting Nationwide Permit/Regional General Permit Verification

Applicant: South Carolina State Ports Authority

Reviewer: Nathaniel I. Ball

Date of Review: April 18, 2012

On-Site review: ☐ Yes ☒ No **Off-Site Review:** ☒ Yes ☐ No

Project Location (Waterway, Section, Township, Range, City, County, State): Union Pier Terminal is located near the intersection of Market Street and Washington Street in Charleston, South Carolina.

Pre-Construction Notification Receipt Date: January 27, 2012 **Complete?** ☐ Yes ☒ No

Additional Information Requested Date: February 15, 2012, March 15, 2012, and April 5, 2012. The Corps requested additional information about the avoidance and minimization of potential impacts to waters of the United States, the method for installing the additional pilings, and clarification about the limits of waters of the United States on the project site.

Pre-Construction Notification Complete Date: April 16, 2012

Waters of the US: The existing pile supported deck and wharf are located in the Cooper River, a navigable water of the United States.

Authority: ☒ Section 10 ☐ Section 404 ☐ Section 103

Project Description (Describe activities in waters of the U.S. considered for verification): The proposed activities in waters of the United States consist of the installation of additional pilings underneath a portion of a previously permitted pile supported wharf at Union Pier. The existing wharf is 2,470 feet long and includes several buildings that are currently used to support commercial shipping activities (break bulk cargo, Ro-Ro, passengers, etc). As described below, the SCSPA has operated a passenger facility at Union Pier for more than 40 years. Therefore, the renovation of Building 322 to consolidate existing activities at Union Pier and to increase the efficiency of the existing passenger facility is not considered a "change in use".

With regard to Nationwide Permit 3 (NWP 3), the existing wharf is considered a currently serviceable structure and the additional pilings and the proposed renovations to Building 322 are considered minor deviations in the existing structure's configuration that are required to comply with Federal regulations and current terminal security requirements that were established after September 11, 2001. In addition, renovating an existing building at Union Pier avoids and minimizes potential impacts to waters of the United States and will enable the SCSPA to continue operating the existing passenger facility at Union Pier while the necessary improvements are being constructed.

CESAC-RD-SP

SUBJECT: Department of the Army Memorandum Documenting Nationwide Permit/Regional General Permit Verification for the Above-Numbered Permit Application

Site Assessment (Describe the present land use, cover type, and a qualitative assessment of the aquatic resources): The project site is developed as Union Pier Terminal and has been used for different types of commercial shipping for more than 100 years. The existing marine terminal has 2,470 linear feet of continuous pile supported wharf and berth space. The proposed pilings will be located **underneath** Building 322. This portion of Union Pier was redeveloped between 35 and 40 years ago. In order to construct this portion of the existing pile supported structure and Building 322, the SCSPA removed old pilings and structures and dredged approximately 50,000 cubic yards of dredged material, which was shifted back and forth across the project site to provide access for construction and pile driving equipment. The existing structure is operated and maintained by the SCSPA to meet the commercial shipping needs of their customers. The SCSPA maintains the existing berth at a depth of -45 feet Mean Low Water (MLW).

Type of Permit Requested: NWP 3

RGP #

Pre-construction Notification Required: ☒ Yes ☐ No Although the proposed activities in waters of the United States are considered minor, pre-construction notification is required because Union Pier Terminal is located adjacent to the Charleston Harbor Federal Navigation Project.

Waiver required to begin work (see GC 31 (a)(2) as applied to appropriate NWPs):

☐ Yes ☒ No

Rationale:

Coordination with Agencies/Tribes Needed: ☐ Yes ☒ No Date.

Resolution:

Commenting Agencies:

Coordination Needed/Required: ☐ Yes ☒ No

(If yes, check appropriate agency(s))

US Fish and Wildlife Service ☐

US Environmental Protection Agency ☐

National Marine Fisheries Service ☐

State Agency (list commenting state agencies) ☐

State Historic Preservation Office ☐

Other. ☐

Substantive Issues Raised and Corps Resolution (Consideration of Comments):

Compliance with Other Federal Laws (If specific law is not applicable write N/A; however, you must provide an 'effects' determination):

a) Endangered Species Act:

Name of species present: The following species are known to occur in Charleston County, South Carolina: West Indian manatee (*Trichechus manatus*), Kemp's ridley sea turtle (*Lepidochelys kempi*), Leatherback sea turtle (*Dermochelys coriacea*), Loggerhead sea turtle (*Caretta caretta*), Green sea turtle (*Chelonia mydas*), Shortnose sturgeon (*Acipenser brevirostrum*), and Atlantic sturgeon (*Acipenser oxyrinchus*)

Potential or Critical Habitat present: The proposed pilings are located underneath a pile supported wharf at an existing commercial shipping facility. The project site is not considered potential or critical habitat for any of the species that are identified above.

Effects determination: No Effect

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Date of Service(s) concurrence: N/A

Basis for "no effect" determination. The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources or the available habitat underneath the existing wharf. According to the SCSPA, the pilings will be placed rather than dropped into the water to avoid potential impacts to marine life in the water column. Once installed the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure. Therefore, the installation of these additional pilings is expected to have "no effect" on Federally listed threatened or endangered species that are known to occur in Charleston Harbor.

Additional information (describe steps taken to address concerns, as needed):

b) Magnuson-Stevens Act (Essential Fish Habitat):

Name of species present: The estuarine substrates, water column, and estuarine waters near the project site are considered Essential Fish Habitat (EFH) for white shrimp (*Litopenaeus setiferus*), brown shrimp (*Farfantepenaeus aztecus*), adult summer flounder (*Parichthys dentatus*), and adult and juvenile blue fish (*Pomatomus saltatrix*).

Effects determination (Is this a project that "may adversely affect essential fish habitat?"). No Effect

Date of Service(s) concurrence: N/A

Basis for "no effect" determination: The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The proposed pilings will be installed using land based equipment and will have a negligible impact on aquatic resources, estuarine waters, or the available habitat that is located underneath the existing wharf. In addition, the actual footprint of the additional pilings represents a very small area among the thousands of pilings that are already located underneath the existing pile supported structure. Therefore, the installation of these additional pilings is expected to have "no effect" on EFH.

Additional information (Describe steps taken to address concerns, as needed):

c) Section 106 of the National Historic Preservation Act.

Known site present ☐ yes ☒ no

Survey required/conducted: ☐ yes ☒ no

Effects determination: No Potential to Cause Effect

Rationale The proposed activities in waters of the United States consist of installing additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The DA permit (SAC-72-10-087-Revised) that authorized the construction of this portion of the wharf at Union Pier Terminal authorized the removal of old pilings and the excavation and backfilling of dredged material within the footprint of the structure. In order to provide both flotation and access for construction and pile driving equipment, approximately 50,000 cubic yards of dredged material was shifted back and forth across the project site during the construction of the existing structure.

As described above, the shallow open waters underneath the existing structure were disturbed by previous construction activities on the project site during the 1970s. According to our records, the entire pile supported wharf and the support facilities that are located on top of this structure have been extensively modified by previous work, including reconstruction, renovation, and/or extension at different times over the past 50 years. The existing wharf and Building 322, where the proposed

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SUBJECT: Department of the Army Memorandum Documenting Nationwide Permit/Regional General Permit Verification for the Above-Numbered Permit Application

pilings will be located, is approximately 40 years old and is not considered eligible for the National Register of Historic Places.

The Corps acknowledges that a lawsuit has been filed in state court against Carnival Corporation, D/B/A Carnival Cruise Lines regarding the operation of the existing passenger terminal at Union Pier. In addition, the plaintiffs in the above referenced case have submitted "a request to be notified as consulting parties pertaining to any Section 106 review relating to Federal funding or permitting with respect to the Union Pier Cruise Terminal in Charleston, South Carolina." This request was submitted to several Federal agencies, including the Corps. Specifically, the plaintiffs expressed an interest in the preservation of historic properties that are located near the project site. However, for the reasons which follow, the Corps has determined that there is no potential to cause effects on historic properties and that no project-specific consultation is required under Section 106.

In accordance with the Standard Operating Procedures for the Regulatory Program dated July 2009, the Corps used 33 CFR 325 Appendix C, the Revised Interim Guidance for Implementing Appendix C dated April 25, 2005, and the Clarification of the Revised Interim Guidance for Implementing Appendix C dated January 31, 2007 to determine the "permit area" for the proposed project. As described in the Revised Interim Guidance, "(t)he limits of the 'permit area' are constrained by the extent of Federal Control and responsibility over a particular project (i.e., the undertaking)." In this case, the proposed "undertaking" consists of the installation of additional pilings in waters of the United States underneath an existing, previously permitted pile supported wharf.

Similar to maintenance dredging, the installation of additional pilings underneath an existing wharf and the renovation of existing buildings that are located on a previously permitted pile supported structure, such as Building 322 at Union Pier, are considered maintenance activities. The "permit area" for this type of project is limited to the footprint of the proposed activities in waters of the United States. Therefore, the Corps' evaluation focuses on the footprint of the proposed pilings and any potential impacts associated with the installation of the additional pilings because of the limited scale and magnitude of the proposed undertaking.

Direct impacts associated with the installation of the additional pilings will occur underneath the existing wharf and have no potential to cause effects to historic properties pursuant to 36 CFR 800.3(a)(1). As described above, the Corps recognizes that Union Pier is located adjacent to historic properties, such as the U.S. Customs House. However, effects associated with the installation of additional pilings, such as noise associated with construction or pile driving equipment, will be short-term and negligible, and, therefore, will not directly or indirectly alter the listing or eligibility characteristics of any historic properties. Existing conditions on or near the proposed undertaking include busy city streets, an existing railroad spur, and the operation of an existing commercial shipping facility. In sum, the installation of additional pilings underneath an existing (and extensively modified) wharf is understood to be the type of activity that is of such limited nature and scope that it has no potential to cause effects to historic properties in or outside of the "permit area," even if such properties were deemed to be present within the permit area.

Date consultation complete (if necessary). N/A

Additional information (Describe steps taken to address concerns, as needed):

d) Section 401 Water Quality Certification. The effective date for the 2012 Nationwide Permits is March 19, 2012. At this time, the S.C. Department of Health and Environmental Control has not certified the new NWP's. Therefore, an individual Section 401 Water Quality Certification is required.

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Individual certification required: ☒ yes ☐ no A special condition of this NWP requires the permittee to obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations prior to beginning the authorized work.

☐ Issued ☐ Waived ☐ Denied

e) Coastal Zone Management Act: The effective date for the 2012 Nationwide Permits is March 19, 2012. At this time, the S.C. Department of Health and Environmental Control has not certified the new NWPs. Therefore, an individual Coastal Zone Consistency Determination and/or a Critical Area Permit is required.

Individual certification required: ☒ yes ☐ no A special condition of this NWP requires the permittee to obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations prior to beginning the authorized work.

☐ Issued ☐ Waived ☐ Denied

Additional information (optional).

f) Wild and Scenic Rivers Act:

Project located on designated or "study" river: ☐ yes ☒ no

Managing Agency:

Date written determination provided that the project will not adversely affect the Wild and Scenic

River designation or study status:

Additional information (optional):

g) Other

Special Conditions Required (include rationale for each required condition/explanation for requiring no special conditions): ☒ yes ☐ no The existing pile supported wharf and the additional pilings are located within navigable waters of the United States. Therefore, the following special conditions will be included in the Nationwide Permit verification letter:

That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful and knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

That the permittee agrees to provide all contractors associated with construction of the authorized activity a copy of the permit and drawings. A copy of the permit will be available at the construction site at all times.

That the permittee shall submit a signed compliance certification to the Corps within 60 days following completion of the authorized work and any required mitigation. The certification will include:

1. A copy of this permit;
2. A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;
3. A statement that any required mitigation was completed in accordance with the permit conditions;
4. The signature of the permittee certifying the completion of the work and

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mitigation.

The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

It is recognized that this structure is to be constructed on/or adjacent to an area subject to a prism and/or disposal easement held by the United States in perpetuity in conjunction with a Congressionally authorized project for the maintenance and improvement of Charleston Harbor. This permit does not convey any property rights either in real estate or material or any exclusive use privileges; nor does it relinquish any right the United States has for the use of its easement or the maintenance and future widening or deepening of Charleston Harbor pursuant to its easement rights.

It is understood and agreed that if the District Commander determines this structure shall in any way in the future conflict with the improvement, operation, maintenance and widening or deepening of Charleston Harbor, the owners themselves, their heirs, successors and assigns will remove said structure within 45 days from the date that written notice is given by the District Commander, and there shall be no entitlement to compensation from the United States for damage or injury.

Conveyance of this permit applies only to the structure authorized and does not authorize the construction of any permanent structure or any structure suitable for habitation or any utility leading either to permanent structures suitable for habitation or to permanent structures within the bounds of areas on which the Corps of Engineers enjoys easement rights.

That permittee agrees that no permanent structures, beyond those authorized by this document, will be placed on the prism easement or on any adjacent disposal easement without written approval of the District Commander.

That the Secretary of the Army, representing the United States of America, hereby consents to the herein authorized facilities or structures to be located on or across easement lands vested in the United States of America for the construction and operation of Charleston Harbor. The permittee shall not engage in any act which may interfere with or abridge the easement interests of the United States, except those specifically authorized herein.

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Compensatory Mitigation Determination: Has the applicant avoided and minimized impacts to the maximum extent practicable? ☒ yes ☐ no If "NO", Explain:

- (1) Is compensatory mitigation required for unavoidable impacts to jurisdictional aquatic resources to reduce the individual and cumulative adverse environmental effects to a minimal level?

☐ yes ☒ no [If "no," do not complete the rest of this section and include an explanation of why not here] The proposed project consists of the installation of additional pilings underneath an existing pile supported wharf at a commercial shipping facility. The potential impact to waters of the United States would affect a small area underneath an existing structure, and the additional pilings will be installed among thousands of pilings that are already located underneath this previously permitted structure. Therefore, compensatory mitigation is not required.

Is the impact in the service area of an approved mitigation bank? ☐ yes ☐ no

- i. Does the mitigation bank have appropriate number and resource type of credits available? ☐ yes ☐ no

- (2) Is the impact in the service area of an approved in-lieu fee program? ☐ yes ☐ no

- i. Does the in-lieu fee program have appropriate number and resource type of credits available? ☐ yes ☐ no

- (3) Check the selected compensatory mitigation option(s):

- ☐ mitigation bank credits
☐ in-lieu fee program credits
☐ permittee-responsible mitigation under a watershed approach
☐ permittee-responsible mitigation, on-site and in-kind
☐ permittee-responsible mitigation, off-site and out-of-kind

- (4) If a selected compensatory mitigation option deviates from the order of the options presented in §332.3(b)(2)-(6), explain why the selected compensatory mitigation option is environmentally preferable. Address the criteria provided in §332.3(a)(1) (i.e., the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project):

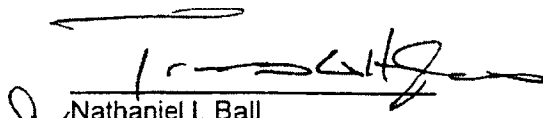
CESAC-RD-SP

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District Engineer's Decision:

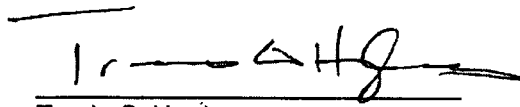
The proposed activity would result in no more than minimal individual and cumulative adverse environmental effects and would not be contrary to the public interest.

PREPARED BY:


Nathaniel I. Ball
Project Manager

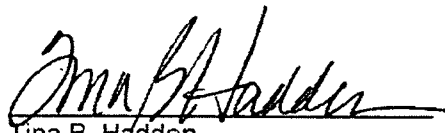
20 April 2012
Date

REVIEWED BY:


Travis G. Hughes
Chief, Special Projects Branch
Regulatory Division

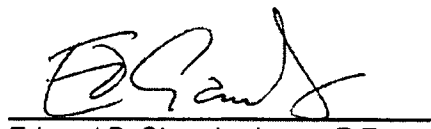
20 April 2012
Date

REVIEWED BY:


Tina B. Hadden
Chief, Regulatory Division

20 April 2012
Date

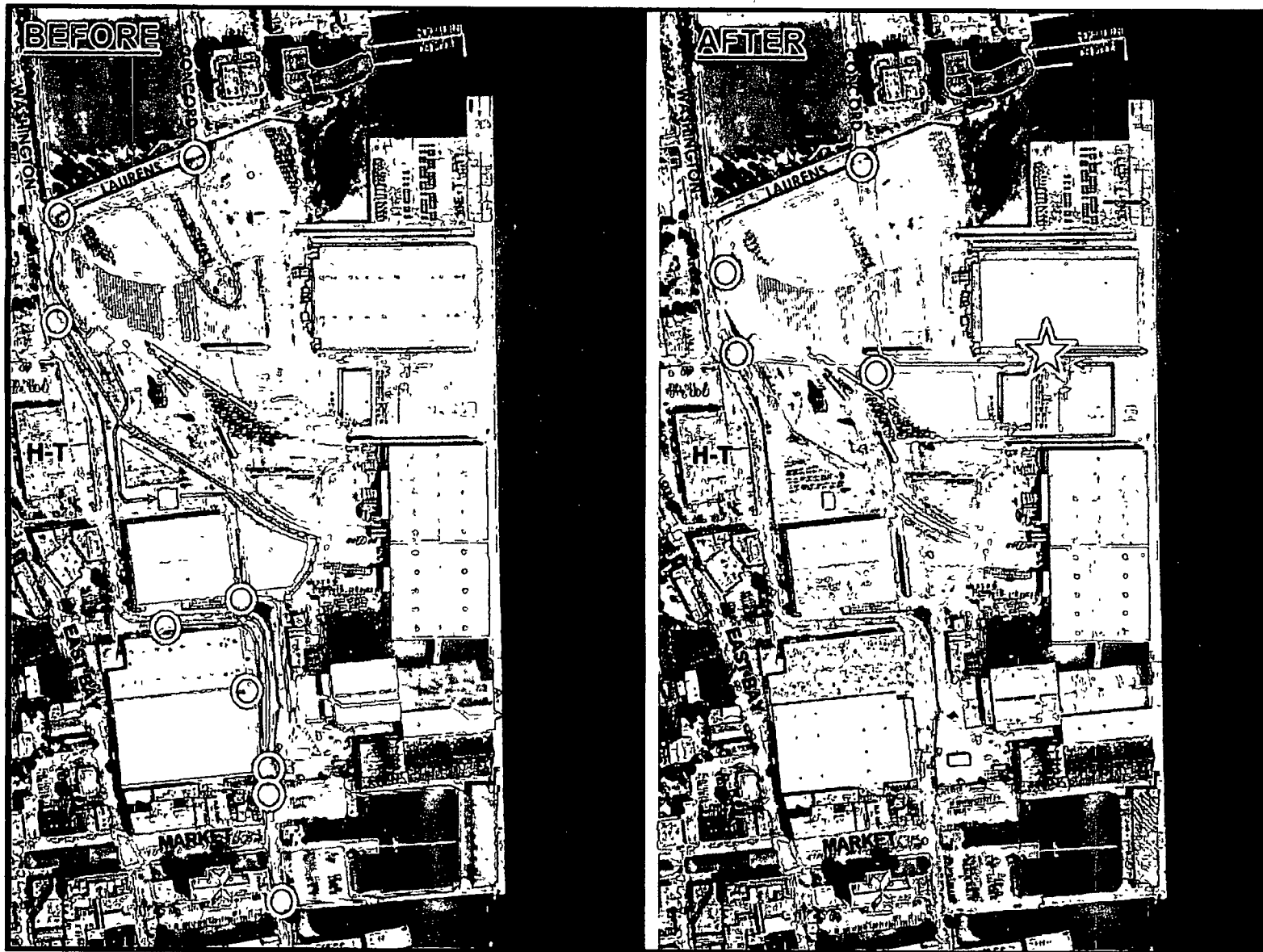
APPROVED BY:


Edward P. Chamberlayne, P.E.
Lieutenant Colonel, U.S. Army
Commander and District Engineer

20 APR 12
Date

EXHIBIT G

R.003250



In the "Before" (shown on the left), the end of North & South Market is closed, a portion of Washington St., Pritchard St., and Concord St. is closed during cruise operations. In the "After" (shown on the right), these streets are open. The only street closure anticipated is the portion of Concord St. within the Union Pier Terminal footprint that is closed today.

R.003251

EXHIBIT I

R.003252

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2011-CP-10-4139
	)	
HISTORIC ANSONBOROUGH	)	
NEIGHBORHOOD ASSOCIATION,	)	
CHARLESTOWNE NEIGHBORHOOD	)	
ASSOCIATION, COASTAL	)	
CONSERVATION LEAGUE, AND	)	AFFIDAVIT OF DANIEL RICCIO
PRESERVATION SOCIETY OF	)	
CHARLESTON,	)	
	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
CARNIVAL CORPORATION, d/b/a	)	
CARNIVAL CRUISE LINES,	)	
	)	
Defendant,	)	
and	)	
	)	
SOUTH CAROLINA STATE PORTS	)	
AUTHORITY; AND THE CITY OF	)	
CHARLESTON,	)	
	)	
Intervening Defendants.	)	
	)	

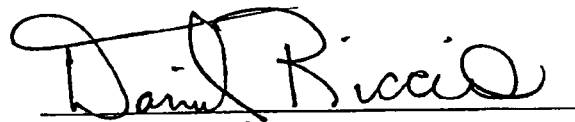
PERSONALLY, appeared before me the undersigned who, being duly sworn, deposes and says:

1. My name is Daniel Riccio. I am the director of Livability Division of the City of Charleston Department of Planning, Preservation and Sustainability. In 2002, the City of Charleston created, as part of its municipal court system, a livability court. I was assigned as a police officer and supervised the court from January 2002 until October 2007. From October 2007 until my retirement, I served on the City Police force. In 2010, after I retired from the police department, I was hired by the City of Charleston as the Director of the Livability Division. The purpose of the livability court is to hear cases arising under City ordinances that have a direct bearing on the quality of residential life in the City. Cases before the court concern issues related to noise, sanitation, tourism management, animal control

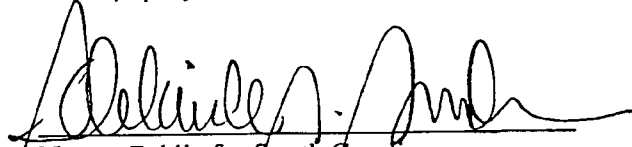
and the like. My division responds to complaints of these natures, issues citations and, when applicable, assists in the prosecution of matters before the court.

2. Over the years, the Livability Division has fielded many complaints and issued many citations for violations of the City's noise ordinance. I have consulted the police department and reviewed the records of the Livability Division regarding complaints pertaining to noise or pollution from passenger ships that call at Union Pier and as of the date of the Affidavit, there have been none.

FURTHER YOUR DEPONENT SAITH NOT.


DANIEL RICCIO

Sworn to and subscribed before me,
this ~~2nd~~ day of August 2011.


Notary Public for South Carolina
My Commission Expires: 2/1/15

rec 9/30

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
TRACEY C. GREEN
BENJAMIN P. MUSTIAN
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT CARROLL
CHAD N. JOHNSTON
JOHN W. ROBERTS
ANDREW J. D'ANTONI

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

*ALSO ADMITTED IN TX

September 26, 2013

VIA HAND DELIVERY

The Honorable Ralph K. Anderson, III
Chief Administrative Law Judge
S.C. Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, S.C. 29201

Re: *Preservation Society of Charleston v. S.C. State Ports Authority*,
Docket No. 13-ALJ-07-0056-CC

Dear Judge Anderson:

This letter is submitted to address supplemental memorandum submitted to the Court by the Cruise Opponents on September 18, 2013. During the hearing on the Ports Authority's Motion to Dismiss for Lack of Standing (Motion) on September 6, 2013, the Court requested a supplemental briefing from the parties with respect to the discrete issue of the Court's scope of review in evaluating the Motion, and specifically the Court's ability to consider affidavits and exhibits submitted by all parties beyond the "pleadings" of this contested case. The supplemental brief submitted by the Cruise Opponents goes well beyond the Court's request and raises new arguments and issues that are not only beyond the scope delineated by the Court but are also improper. These include a brand new "special" redressability standard (*i.e.*, none), a brand new "due process" claim, and re-argument of the motions to strike against the review of the evidence proffered by the Ports Authority that affirmatively demonstrates that the standing in this case is absent.

The Cruise Opponents first argue that an order from a federal district court in a parallel case they brought to challenge a permit from the U.S. Army Corps of Engineers (Corps) somehow acts to estop this Court's consideration of standing under South Carolina law. In this respect, their supplemental brief exhibits a fundamental misunderstanding of the difference between the contested case pending before this Court, which is necessarily a challenge to the merits of the permit issued by DHEC, and the procedural challenge initiated by the same parties in district court under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) pursuant to the Federal Administrative Procedure Act. *See Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-cv-2942-RMG. As this Court is aware, NEPA and NHPA actions are procedural

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SC ADMIN LAW COURT

R.003255

challenges to projects, where-in the challenging party alleges that the participating Federal agency has not complied with the proper evaluation and process. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005) ("NEPA is a procedural statute...."). By contrast, this contested case is a *de novo* trial in which the permit application is evaluated in the first instance upon a review of the evidence compiled and presented by the parties. *See, e.g., Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) (citing *Blizzard v. Miller*, 412 S.E.2d 406 (1991)).

Further, the district court devoted two paragraphs to standing. There is no substantive analysis and no findings of fact. Indeed, the Cruise Opponents filed an administrative challenge to the Corps' permit, which limited the scope of review by the district court to the administrative record.

In a case involving review of a final agency action under the Administrative Procedure Act, 5 U.S.C. § 706, however, the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record. Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."

Sierra Club v. Mainella, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006) (internal citations omitted); *Neighborhood Assistance Corp. of Am. v. Consumer Fin. Prot. Bureau*, 907 F. Supp. 2d 112, 123 (D.D.C. 2012) ("When ruling on a summary judgment motion in a case involving final review of an agency action under the APA, the standards of Federal Rule of Civil Procedure 56(c) do not apply because of the limited role of the court in reviewing the administrative record. Summary judgment serves as a mechanism for deciding, as a matter of law, whether the administrative record supports the agency action and whether the agency action is consistent with the APA standard of review."); *Black Dog Outfitters, Inc. v. Idaho Outfitters & Guides Licensing Bd.*, 873 F. Supp. 2d 1290, 1295 (D. Idaho 2012) ("Judicial review of administrative agency decisions under the Administrative Procedures Act ... is based on the administrative record compiled by the agency—not on independent fact-finding by the district court.").

The district court lacked the advantage that this Court has through an examination and consideration of additional evidence, including the sworn and undisputed testimony of Peter Lehman.¹ This Court is not limited to an administrative record review, as this Court renders the final agency decision on behalf of the Executive. Moreover, the federal Order is subject to appeal and is not final or fully litigated until that appeals process has run its course, and thus collateral estoppel

¹ While counsel for the Cruise Opponents may dispute the affidavit, counsel's argument is not testimony and the Cruise Opponents have failed to offer any competent rebuttal evidence—leaving undisputed Mr. Lehman's testimony that cruise calls may increase in frequency and the ships increase in size regardless of whether cruise operates from the existing terminal or a new terminal as undisputed evidence before the Court on that matter. *See, e.g., Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence").

cannot be applied in this case as a matter of law. Additionally, the Cruise Opponents go to great lengths in their supplemental brief to distinguish federal justiciability from South Carolina jurisprudence,² so by their own argument a district court order based on federal justiciability law is inapplicable to this proceeding. See *DEMA v. Tenet Physician Servs.-Hilton*, 678 S.E.2d 430, 433 (2009) (“Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.”); *Johnston v. S.C. Dep’t of Labor & Licensing*, 617 S.E.2d 363, 364-65 (2005) (holding subject matter jurisdiction is “the power to hear and determine cases of the general class”); *Murray v. S.C. Dep’t of Health & Envtl. Control*, 97-ALJ-07-0262-CC, 1997 WL 586859 (S.C. Admin. L. Ct. Aug. 28, 1997) (“The Division does possess statutory authority to hear the class of cases to which the instant matter belongs. However, while the Petitioners’ lack of standing does not deprive the Division of subject matter jurisdiction, it does deprive the Petitioners of the opportunity to properly invoke that jurisdiction.”).

Indeed, it is not the standing issue in the ALC that is collaterally estopped. Rather, should this contested case result in a final decision from the ALC on the merits, it is the Cruise Opponents who would be collaterally estopped by a finding of this Court that would act to preclude any additional challenges to federal administrative record, should the Corps include the trial transcript and record from this proceeding in its own administrative record on remand from the district court. The analytical framework for the federal agency review on remand is encompassed in the analytical framework for the state agency review as well, so a favorable decision from this Court would necessarily preclude the Cruise Opponents from litigating the same issues in federal court. *Bennett v. S.C. Dep’t of Corr.*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) (“This Court has repeatedly held that, under the doctrines of *res judicata* and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action.”) (citing *Earle v. Aycock*, 276 S.C. 471, 279 S.E.2d 614 (1981) (dealing specifically with relitigation in circuit court of issues previously decided by the State Grievance Committee)); *St. Philip’s Episcopal Church v. S.C. Alcoholic Beverage Control Comm’n*, 285 S.C. 335, 339, 329 S.E.2d 454, 456 (Ct. App. 1985) (holding collateral estoppel “principles are also applicable to a final decision of an administrative agency”); see *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966)); see *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006) (citing *Jones v. Securities Exchange Comm’n*, 115 F.3d 1173, 1178 (4th Cir. 1997)) (“[A]s we have observed, findings of fact made during administrative adjudications are to be accorded the same collateral estoppel effect they would receive if made by a court.”); *Dawson v. State Law Enforcement Div.*, Case No. 3:91-1403-17, 1992 WL 208967 (D.S.C. 1992) (unpublished); *Sierra Club v. Block*, 576 F. Supp. 959 (D. Or. 1983). Thus, should the Ports Authority prevail in this contested case litigation, practically and legally it should similarly prevail in any subsequent additional challenge to the Corps’ permit.

² The Cruise Opponents also raise a new argument related to a “public importance” exception to the standing requirement. However, the public supports the Ports Authority, as evidenced by the support of the public officials who are accountable to the electorate as opposed to a vocal minority that would abolish cruise altogether.

Further, they claim “statutory” standing. However, the statute provides for a challenge by an “affected person,” which “is essentially synonymous with traditional standing requirements.” *O’Sullivan v. S.C. Dep’t of Health & Envtl. Control*, 01-ALJ-07-0491-CC, 2002 WL 203928 (S.C. Admin. L. Ct. Jan. 18, 2002).

The Cruise Opponents then attempt to create from whole cloth a new, "special" standard for redressability that does not exist in this State's jurisprudence. This brand new argument—which does not appear in any of the prior filings—argues for a "special redressability standard" that, in essence, nullifies the requirement. However, the Cruise Opponents have confused administrative review under federal law with that under South Carolina law.³ The cases relied upon by the Cruise Opponents are *judicial* review cases involving *limited record review* under the Federal APA. That is completely different from the current situation, which involves an executive agency's contested case proceeding prior to judicial review.

Nonetheless, even in federal cases involving environmental challenges under the Federal APA, the federal courts have applied the "irreducible minimum" of justiciability (*e.g.*, redressability) to dismiss cases. "A court will deny standing if it finds it cannot provide relief that will remedy the injury to the plaintiff because the decision to carry out requested action is in the agency's discretion, where the agency's action would not necessarily redress the plaintiff's injury, or where the necessary relief depends on the actions of third parties that are not assured." Daniel Mandelker, *NEPA Law and Litig.* § 4:19 (2013) (citing *Wyoming Timber Industry Ass'n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245 (D. Wyo. 2000) (agency had discretion to offer timber sales); *Fund For Animals v. Babbitt*, 2 F. Supp. 2d 570 (D. Vt. 1997), *aff'd*, 152 F.3d 918 (2d Cir. 1998) (decision to hold moose hunt); *State ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992) (court cannot require agency to offer coal to generate royalties lost to state by land exchange); *Ash Creek Min. Co. v. Lujan*, 969 F.2d 868 (10th Cir. 1992) (injury claimed is loss of opportunity to engage in competitive leasing, which court cannot order); *Rattlesnake Coalition v. U.S. Envtl. Protection Agency*, 509 F.3d 1095 (9th Cir. 2007) (requested relief could no longer be granted because waste treatment plant upgrade was already complete and federal funds had been expended); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993) (relief would not result in greater availability of timber to harvest); *Citizens Alert Regarding The Env't v. Leavitt*, 355 F. Supp. 2d 366 (D.D.C. 2005) (requested relief could no longer be granted pursuant to final terms and conditions of federal grant for sewage pipeline construction); *One Thousand Friends of Iowa v. Mineta*, 250 F. Supp. 2d 1064 (S.D. Iowa 2002) (agency's obligation to

³ In fact, the Cruise Opponents' theory is contrary to the holding of the United States Supreme Court.

When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (internal citations omitted) (emphasis added).

consider environmental justice was not judicially enforceable); *Fund For Animals v. Babbitt*, 2 F. Supp. 2d 570 (D. Vt. 1997), *judgment aff'd*, 152 F.3d 918 (2d Cir. 1998) (action completed); *Broadened Horizons Riverkeepers v. U.S. Army Corps of Eng'rs*, 8 F. Supp. 2d 730 (E.D. Tenn. 1998) (not redressable when injury caused by third parties); *California Forestry Ass'n v. Thomas*, 936 F. Supp. 13 (D.D.C. 1996); *Nuclear Information and Resource Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941 (9th Cir. 2006) (another agency whose regulations also applied to challenged activity might decide not to amend them even if the court granted relief against the defendant); *U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20 (D.C. Cir. 2000); *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp. 2d 142 (D.D.C. 2011) (no redressability because power plant might proceed with construction even if agency loan guarantee were enjoined); *San Joaquin River Group Auth. v. National Marine Fisheries Serv.*, 819 F. Supp. 2d 1077 (E.D. Cal. 2011) (irrigation groups alleging that adoption of salmon protection measures would adversely affect water rights administered by state agency); *Reudiger v. U.S. Forest Serv.*, 427 F. Supp. 2d 974 (D. Or. 2005) (timber harvest might take place even in the absence of Forest Service special use permit).

This is exactly the situation here. The Ports Authority retains the discretion to continue with cruise operations at the existing terminal, which is the basis for the injury found in all of the Cruise Opponents' affidavits, and therefore none of the alleged injuries are redressable by this Court. In fact, they have filed claims against Carnival alleging the same injuries, as it is the cruise ship rather than the terminal that creates the harms alleged by the Cruise Opponents. Thus, there is nothing this Court can order to remediate the injuries alleged by cruise operations at the Union Pier Terminal, as this Court is without authority to order the Ports Authority to cease all cruise operations.

Further, Cruise Opponents for the first time contend that their due process rights would be violated by a finding that they lack standing to bring this contested case, because it would resolve factual issues prior to discovery. Although Cruise Opponents have already filed a responsive brief, a motion to strike (in which they argued the merits), and a motion for leave to file a sur-reply to the Motion (in which they made all of the substantive arguments for which they sought leave to file the sur-reply), this argument contending a violation of Cruise Opponents' due process rights has not been raised in any substantive filing with the Court until their supplemental memorandum. As a party may not advance new argument in either an oral argument or a reply which was not argued in the substantive brief filed with the Court, *e.g.*, *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989), a corollary may certainly be drawn to the situation here, where the Court did not invite the parties to re-brief this issues involved in the Motion, but instead requested limited briefing on the discrete issue of the Court's consideration of extraneous exhibits in this context. Notwithstanding, the Court should disregard Cruise Opponents' due process "argument," as the supplemental memorandum does nothing more than throw out the term in a conclusory fashion, advancing no substantive argument as to how any right has been abridged. *See* Richard H. Seamon & Hon. Paige J. Gossett, *Administrative Agencies: General Concepts & Principles*, in S.C. Administrative Practice and Procedure 33 (2d ed. S.C. Bar 2008) (explaining that due process should not be invoked carelessly as they "are claimed much more often than proved"); *cf. Dismukes v. Haskethorn*, 802 F. Supp. 1442, 1445 n.8 (N.D. Miss. 1992) ("Oftentimes, alleged due process violations are of a dubious quality. Plaintiffs with weak constitutional claims invariably couch their complaints in the due process clause. The practice is so frequent that some in the federal judiciary, borrowing the words of Samuel Johnson, refer to due process as 'the last refuge of scoundrels.'").

The Honorable Ralph K. Anderson, III
September 26, 2013

Ultimately, the Cruise Opponents confuse what they *want* the law to be with what the law *is*. Consideration of the Ports Authority's evidence is appropriate under the law. Considering only Peter Lehman's affidavit,⁴ under the binding South Carolina precedent of *Bailey* and *Sea Pines*, this Court is bound to find that redressability is absent and must dismiss this matter for lack of standing. It is left to the Supreme Court to reverse or modify the holdings in *Bailey* and *Sea Pines*, and the facts of this case fall squarely within the analysis of each of those decisions.

Very truly yours,

WILLOUGHBY & HGEFER, P.A.



Randolph R. Lowell

cc: Amy Armstrong, Esquire
Jefferson Leath, Esquire
J. Blanding Holman, Esquire
Bradley D. Churdar, Esquire
Philip Lawrence, Esquire
(All via U.S. and Electronic Mail)

⁴ There is no additional testimony or fact development that can dispute Mr. Lehman's testimony that cruise calls will continue at the existing terminal even if the pending permit is reversed or modified. The size and frequency of cruise ships may increase *today*, subject to the voluntary management plan. These actions are solely within the discretion of the Ports Authority.

From: [Blan Holman](#)
To: [Jessica Foster](#)
Subject: FW: Preservation Society of Charleston et al v. SCDHEC and SCSPA, 13-ALJ-07-0056-CC
Date: Thursday, April 09, 2015 3:00 23 PM

Blan Holman
Southern Environmental Law Center
463 King St. - Suite B
Charleston, SC 29403

p. 843 720 5270
www.southernenvironment.org

From: Harvin Fair [hfair@scal.c.net]
Sent: Monday, October 07, 2013 4:22 PM
To: Randy Lowell
Cc: Kelly Rainsford; Amy Armstrong; Chad N. Johnston; Churdar, Bradley; Denise Crawford; Blan Holman; Jefferson Leath; Michael Corley; Philip L. Lawrence
Subject: Preservation Society of Charleston et al v. SCDHEC and SCSPA, 13-ALJ-07-0056-CC

Randy,

Please prepare a proposed order on the Motion for Sanctions (Motion). Please reference SCALC Rule 72 regarding Sanctions for Frivolous Cases. The Order should grant relief in the form of attorneys fees for defense of the Motion. In addition, the Order shall require that Respondent support the request for reasonable attorneys fees with supporting affidavit.

Thank you for your attention to this matter.

Sincerely,

Harvin Fair
Law clerk to the Honorable Ralph King Anderson, III
office phone 803-734-6409



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

November 27, 2013

The Honorable Ralph K. Anderson, III
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Re: *Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation and Charleston Communities for Cruise Control v. SCDHEC and South Carolina State Ports Authority*
Docket No.: 13-ALJ-07-0056-CC

Dear Judge Anderson:

The Department concurs with the South Carolina State Ports Authority's (SPA) analysis in the *Memorandum In Opposition To Cruise Opponents' Motion To Vacate*. However, the Department does not concur that the third and fourth conclusions on page nineteen of SPA's Memorandum are a logical application of the law to the facts of this case.

By copy of this letter I am serving all parties of record.

Sincerely,

Bradley D. Churdar
Chief Counsel

BDC/mdc

cc: Amy E. Armstrong, Esquire
Michael G. Corley, Esquire
Jefferson Leath, Esquire
Randolph R. Lowell, Esquire

21680

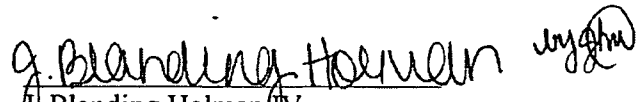
SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Office of General Counsel

Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405 • Phone: (843) 953-0200 • Fax: (843) 953-0201 • www.scdhec.gov

R.003262

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 13, 2015


J. Blanding Holman IV

Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
Telephone: (843) 720-5270
Fax: (843) 414-7039

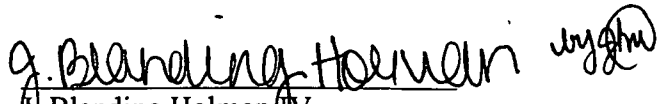
Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Mailing Address: Post Office Box 1380
Pawleys Island, SC 29585
Physical Address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Fax: (843) 527-0540

Attorneys for the Appellants

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 13, 2015


J. Blanding Holman

Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
Telephone: (843) 720-5270
Fax: (843) 414-7039

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Mailing Address: Post Office Box 1380
Pawleys Island, SC 29585
Physical Address: 430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Fax: (843) 527-0540

Attorneys for the Appellants

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Appellant Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough
Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne
Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston
Communities for Cruise Control..... Appellants,
vs.

South Carolina State Ports Authority and South Carolina Department of Health and
Environmental Control..... Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the Record on Appeal on Respondents S.C. State Ports
Authority and SC DHEC by placing copies of same in the U.S. Mail addressed to:

Randolph R. Lowell, Esq.
Willoughby & Hoefer, PA
930 Richland Street
Columbia, SC 29202

Philip L. Lawrence, Esq.
General Counsel
S.C. State Ports Authority
Post Office Box 22287
Charleston, SC 29413-2287

Bradley Churdar, Esq.
SC DHEC/OCRM
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Charleston, SC
April 13, 2015


J. Blanding Holman IV