

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah B. Durden, Administrative Law Judge

Appellate Case No. 2017-001977

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SC Court of Appeals

South Carolina Coastal Conservation League,

vs.

South Carolina Department of Health and Environmental Control and
DBBO, LLC,

Appellants,

Respondents.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	
STATEMENT OF THE CASE	
OVERVIEW OF THE ADMINISTRATIVE PROCEEDINGS	
ARGUMENT	
Summary of Argument	
I. The ALC Erred in Concluding that the League Does Not Have Standing	
A. The League Established Article III Standing	
i. Injury from Further Loss of Dry-Sand Beach	
ii. Injury from Construction Activities	
B. The League is an Affected Person With Standing Under Section 44-1-60	
II. DHEC Failed to Exercise Discretion and the ALC’s Order Compounds that Error	
A. DHEC Failed to Exercise Discretion and Utilize Fixed Standards	
B. The ALC Compounded DHEC’s Failure by Erroneously Deeming Applicable Regulations Superseded, Even Though No Irreconcilable Conflict Exists	
III. The Budget Proviso Violates the State Constitution’s One Subject Clause	

TABLE OF AUTHORITIES

Page

CASES:

Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982)

Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315 (1984)

Amisub of S.C., Inc. v. S.C. Dep't of Health & Env'tl. Control, 407 S.C. 583, 757 S.E.2d 408 (2014)

Am. Petroleum Inst. v. S. C. Dep't of Revenue, 382 S.C. 572, 677 S.E.2d 16 (2009)

Ariz. Cent. for Law in Pub. Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (Ct. App. 1991)

ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 669 S.E.2d 337 (2008)

Bailey v. S.C. Dep't of Health & Env'tl. Control, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010)

Balloon Plantation v. Head Balloons Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App.1990)

Bauer v. S.C. State Hous. Auth., 271 S.C. 219, 246 S.E.2d 869 (1987)

Beaufort Cnty. v. S.C. State Election Comm'n, 395 S.C. 366, 718 S.E.2d 432 (2011)

Beaufort Realty Co., Inc. v. Beaufort Cnty., 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001)

Bodman v. State, 403 S.C. 60, 742 S.E.2d 363 (2013)

Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 413 S.E.2d 13 (1991)

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014)

Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 107 S. Ct. 750 (1987)

Colonial Life & Accident Ins. Co. v. S.C. Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908 (1958)

Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974)

Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985)

Dorman v. Dep't of Health & Envtl. Control, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002)

Douglass v. Watson, 186 S.C. 34, 195 S.E. 116 (1938)

Energy Research Found. v. Waddell, 295 S.C. 100, 367 S.E.2d 419 (1988)

Ex parte Georgetown Cnty. Water & Sewer Dist., 284 S.C. 466, 327 S.E.2d 654 (1985)

Fed. Election Comm'n. v. Akins, 524 U.S. 11, 118 S. Ct. 1777 (1998)

Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943)

Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942 (1968)

Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987)

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693 (2000)

Furman v. Willimon, 106 S.C. 159, 90 S.E. 700 (1916)

Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992)

Harty v. Luihn Four, Inc., 747 F. Supp. 2d 547 (E.D.N.C. 2010), aff'd, 453 F. App'x 347 (4th Cir. 2011)

Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980)

Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799 (1992)

Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992)

Home Health Servs., Inc. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 258, 379 S.E.2d. 734 (Ct. App. 1989)

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 97 S. Ct. 2434 (1977)

Inova Alexandria Hosp. v. Shalala, 244 F.3d 342 (4th Cir. 2001)

In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Haw. 228, 287 P.3d 129 (2012)

In re Water Use Permit Applications (Waiahole I), 94 Haw. 97, 9 P.3d 409 (2000)

Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001)

Keyserling v. Beasley, 322 S.C. 83, 470 S.E.2d 100 (1996)

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env'tl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014)

Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 131 Haw. 193, 317 P.3d 27 (2013)

Lujan v. Defs. of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992)

Maner v. Maner, 278 S.C. 377, 296 S.E.2d 533 (1982)

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 132 S. Ct. 2199 (2012)

McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003)

Mendoza v. Perez, 754 F.3d 1002 (D.C. Cir. 2014)

Miles Labs. v. Seignious, 30 F.Supp. 549 (E.D. S.C. 1939)

Milliken & Co. v. S.C. Dep't of Labor, 275 S.C. 264, 269 S.E.2d 763 (1980)

Mun. Ass'n of S.C. v. AT&T Commc'ns of S. States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004)

Nat'l Adver. Co., Inc. v. Mount Pleasant Bd. of Adjustment, 312 S.C. 397, 440 S.E.2d 875 (1994)

Paepcke v. Pub. Bldg. Comm'n of Chicago, 46 Ill.2d 330, 263 N.E.2d 11 (1970)

Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997)

Plowden v. Beattie, 185 S.C. 229, 193 S.E. 651 (1937)

Porter v. S.C. Pub. Serv. Comm'n, 327 S.C. 220, 489 S.E.2d 467 (1997)

Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984)

Pye v. U.S., 269 F.3d 459 (4th Cir. 2001)

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)

Schloss Poster Adver. Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939)

S.C. Pub. Serv. Auth. v. Citizens & S. Nat'l Bank of S.C., 300 S.C. 142, 386 S.E.2d 775
(1989)

S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988)

Sea Pines Ass'n for Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 550 S.E.2d 287
(2001)

Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)

Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361 (1972)

Sloan v. Greenville Cnty., 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003)

Smiley v. S.C. Dep't of Health & Env'tl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007)

Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168 (3rd Cir. 2000)

Soc'y of Prof'l Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984)

State ex rel. McLeod v. Mills, 256 S.C. 21, 180 S.E.2d 638 (1971)

State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004)

State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981)

Travelscape, LLC v. S.C. Dep't of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011)

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S. Ct.
2405 (1973)

U.S. v. Richardson, 418 U.S. 166, 94 S. Ct. 2940 (1974)

Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000)

Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197 (1975)

Whitmore v. Ark., 495 U.S. 149, 110 S. Ct. 1717 (1990)

Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 741 S.E.2d 515 (2013)

STATUTES:

S.C. Code Ann. §§ 48-39-10 et seq.

S.C. Code Ann. § 44-1-60

S.C. Code Ann. § 1-23-610(B)

S.C. Code Ann. § 61-6-185(A)

S.C. Const. art. III, § 17

S.C. Gen. Approp. Act (2014-2015), Part 1B, § 34, Proviso 34.55

S.C. Gen. Approp. Act (2015-2016), Part 1B, § 34, Proviso 34.52

REGULATIONS:

S.C. Coastal Management Program (CMP) Policies

S.C. Code Ann. Regs. 30-13.N

S.C. Code Ann. Regs. 30-15(F)

S.C. Code Ann. Regs. 61-15(103)(1)

OTHER AUTHORITIES:

2 Am. Jur. 2d Administrative Law § 48 (May 2017 Update)

Black's Law Dictionary, 6th Ed. (1990)

Black's Law Dictionary, 7th Ed. (1999)

Blumm, Michael; Schwartz, Thea, "Mono Lake and the Evolving Public Trust in Western Water Law," 37 Ariz. L. Rev. 701 (1995)

S.C. Law Review, Vol. 68, No. 5 (Spring 2017)

Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul. Env'tl. L. J. 287 (1993)

STATEMENT OF ISSUES ON APPEAL

- I. Whether the ALC Erred in Concluding that the League Does Not Have Article III Standing or Statutory Standing, Despite Its Member's Testimony That the Contested Critical Area Permit Authorizes Construction of a New Seawall Which Will Encroach Two Feet Onto the Public Trust Beach Which She Uses Four to Five Times a Month.**
- II. Whether DHEC Abused Its Discretion By Failing to Utilize Any Fixed Standards or Rules in Issuing the Contested Critical Area Permit and Instead Relying Solely on a Budget Proviso, Resulting in an Arbitrary and Capricious Decision.**
- III. Whether the ALC Compounded DHEC's Abuse of Discretion by Failing to Apply the Applicable Statutory and Regulation Provisions Which Do Not Irreconcilably Conflict With the Budget Proviso.**
- IV. Whether the Budget Proviso Authorizing DHEC to Issue a Critical Area Permit for a Seawall Violates the South Carolina Constitution's One Subject Clause Because It Is Not Reasonably and Inherently Related to the Raising and Spending of Money.**

STATEMENT OF THE CASE

This contested case stems from a Critical Area Permit issued under the South Carolina Budget Appropriations Act of 2014-2015 (Act No. 286), Part 1B, Section 34, Proviso 34.55 (page 3065 of the 2014 Acts and Joint Resolutions of the S.C. General Assembly) (the “budget proviso”).¹ On June 11, 2015, pursuant to the budget proviso, the South Carolina Department of Health and Environmental Control issued a Critical Area Permit and Coastal Zone Consistency Certification to DBBO, LLC, authorizing the construction of a 1800-foot timber seawall two feet seaward of an existing seawall on Debidue Beach in Georgetown County.

On June 26, 2015, the Coastal Conservation League (“League”) filed a request for final review conference with the DHEC board. On July 29, 2015, the DHEC board declined to conduct the review conference. On August 28, 2015, the League filed a request for contested case hearing in the Administrative Law Court (“ALC”). DBBO filed a motion for summary judgment on the basis that (1) DHEC was mandated to issue the permit pursuant to the budget proviso and it had no ability or authority to deny the permit and (2) that the League did not have standing. (R. pp. ____). The League filed a cross motion for summary judgment on the basis that the budget proviso granted DHEC discretion and that DHEC abused its discretion in failing to utilize any fixed standards in reviewing the permit. (R. pp. ____). On March 22, 2015, Administrative Law Judge Deborah B. Durden issued an Order granting partial summary judgment, concluding that the ALC did not have jurisdiction to determine the facial challenge to the validity of the budget proviso, and denying summary judgement on all other grounds.

¹ The General Assembly passed an identical proviso in the 2015-2016 General Appropriations Act, Proviso 34.52.

The ALC held a contested case hearing on May 24 - May 26, 2017, and issued its Final Order and Decision on August 23, 2017. On September 22, 2017 the League filed a Notice of Appeal with this Court.

OVERVIEW OF ADMINISTRATIVE PROCEEDINGS

The State of Debidue Beach

Debidue Beach is located within DeBordieu Colony, a private, gated community in Georgetown County. (CCL Ex. 1; Tr. 439-40). The public has no access to DeBordieu Colony and can only access Debidue Beach only from the ocean. (R.p. 38). Immediately downdrift of DeBordieu and the location of the seawall is “the most beautiful beach—the Hobcaw forested track,” which is owned by the Belle W. Baruch Foundation and is the site of ongoing research projects of the University of South Carolina and Clemson University for over 40 years. (Tr. 441, 531, 439, lines 23-24).

The beach at DeBordieu is “clearly an eroding shoreline, and there are a number of structures . . . that are further seaward than the general trend along the shoreline.” (Tr. 233, lines 7-11; CCL Ex. 8A). The beach has been eroding for at least the past few decades at a rate of up to 12 feet per year. (Tr. 256-59). The erosion rate is not uniform along the shoreline, according to both DBBO’s and the League’s experts. (Tr. 235-39, 461-62). Because of this ongoing erosion, DeBordieu periodically renourishes the beach; however, that sand does not stay in place, so continual renourishment is necessary. (Tr. 258-59). Renourishments are not permanent and need to be continually planned and executed to keep sand on the beach.² (Tr. 541). DeBordieu has had

²Paying for beach renourishment and any attendant structures like seawalls or groins, has been controversial within the private DeBordieu Colony. (Tr. 387-880). The homeowners living behind the seawall advocated for a funding mechanism to the HOA Board that would authorize

four nourishments – 1990, 1998, 2006 and 2015. (Tr. 481-82). The 2015 renourishment was conducted under a permit was that “active” in 2014 – a requirement of the budget proviso’s terms.

In 1971, prior to the Beachfront Management Act and its prohibition on new seawalls and bulkheads, the Debordieu Colony Community Association built a 4,500-foot long seawall or bulkhead.³ (Tr. 461; Stipulations). After renourishments, as the sand washes away in front of the seawall, the waves begin hitting and overtopping the seawall and beach access becomes increasingly limited due to loss of the dry sand beach. (Tr. 259). DBBO’s Fran Way explained that at one recent point “there was overtopping of the structure, where the waves and the water levels were high enough to erode behind the bulkhead.” (Tr. 499, lines 20-23).

As the ALC recognized, seawalls cause several types of erosion: passive loss (loss of beach over time as the ocean moves toward the structure); active loss (loss of sand caused when waves bounce against the structure and cause scour in front of the wall); and placement loss (loss caused as a result of the wall holding sand behind it and preventing it from feeding downdrift beaches). (Order, p. 8; Tr. 219-21, 241-45). Importantly, this erosion leads to loss of dry-sand beach: between beach renourishment projects, one often cannot walk along the beach in front of the seawall

the board to collect an annual assessment from all of the property owners to pay for the beach renourishment, including groins. (Tr. 387). The “battle” to pass the amendment was “very divisive to the community” and “gets pretty ugly every time.” (Tr. 387, lines 5-7). The HOA must obtain a 66.6% vote from the community to pass the assessment funding mechanism, which passed by a mere four votes out of 1,000. (Tr. 388). Mr. Sloan acknowledged that it was “not an easy thing to get done” because many in the community did not agree with the funding plan to prevent loss of the wall and “a bunch of houses.” (Tr. 388, lines 11-16; Tr. 411-12). Numerous community members residing full time in DeBordieu sent letters expressing their unhappiness with the funding amendment and plan for the houses behind the seawall. (Tr. 411-12).

³Bulkheads and seawalls are both shore-parallel hard erosion control structure and those terms are used interchangeably herein.

because there is no dry-sand beach between the seawall and the ocean. (Tr. 53, 393-94).

Renourishments occur every five to seven years (Tr. 382), thus every five to seven years the ocean will be so close to the seawall that public access will be eliminated. The ALC acknowledged this fact when referring to DBBO's Price Sloan's testimony that "[w]hen there has been no recent renourishment, the waves come up to, and beat on, the current wall." (Order, p. 7). Yet, the ALC rejected the notion that during these times, no dry-sand beach will be available.

The existing seawall juts out from the linear shoreline profile.⁴ (Order, pp. 10-11; Tr. 104). DBBO's Fran Way and the League's Dr. Young explained that the shoreline is now trying to equilibrate from its jutting location, and since the seawall is preventing that from happening, exacerbated erosion is occurring in front of the seawall and it is constantly under threat of erosion. (Tr. 235-39, 469-70). What is happening to Debidue Beach is "a classic example of a shoreline that's out of equilibrium with where nature wants that beach to be. The problem is that we're trying to hold a beach in place further seaward than the natural equilibrium for the shoreline would be, and it's very difficult to do." (Tr. 235, lines 12-17). Dr. Young explained that the shoreline is "really sitting too far seaward than it naturally would given all of the forces that are acting on" it. (Tr. 293, lines 8-13). A shoreline in equilibrium will generally be in a straight line: "nature likes to create straight shorelines if it can." (Tr. 293, lines 24-25). DBBO's expert agreed that the area in front of the 1,800-foot proposed seawall is frequently eroded and "knocked back because it's going to straighten," which means that it is "eroding that material back to try to re-equilibrate to existing conditions." (Tr. 470, line 10 & 15-16). If the seawall were not in place, then the shoreline would

⁴ The houses located behind the 1,800 foot proposed new seawall are seaward of the baseline, which represents DHEC's depiction of where the primary sand dune would be if the seawall were not in its present location. (Tr. 453-54).

be in equilibrium, i.e., a straight shoreline. (Tr. 293, 465, 470). Because the shoreline instead juts out where the seawall is located and proposed, the waves are constantly trying to knock it back. (Tr. 469-70).

The Proposed New Seawall

The existing 4,500-foot seawall along the southern portion of Debidue Beach predates the Beachfront Management Act's prohibition on such structures. (Tr. 434). Despite the prohibition, DBBO was created to obtain authorization to construct a new, 1,800-foot seawall in front of the southern-most portion of the existing wall, which is chronically exposed and subject to wave forces.⁵ (Tr. 434-35, Stipulations). DBBO unsuccessfully lobbied the legislature for an exemption from the Act's prohibition. (Order, p. 3). Instead, DBBO's lobbyist secured an exemption by way of a budget proviso. (Order, p. 3, Tr. 407-08).

This portion of the Appropriations Act for DHEC's budget states:

34.52. (DHEC: Seawall Reconstruction/Repair) In the current fiscal year, the Department of Health and Environmental Control may issue a special permit for the reconstruction or repair of an existing erosion control device of at least four thousand contiguous linear feet that is located landward of an area which the department has granted a permit authorizing a renourishment project that does not qualify for public funding and the permit is active as of July 1, 2014. The department may only issue the permit if the Previous seawall will be reconstructed or repaired with like material and the footprint of the replacement is no more than two feet from the footprint of the original. The department may charge a permit fee equal to the actual cost of issuing the permit.

2015 S.C. Appropriations Act, Part 1.B. § 34.1.

⁵There are 20 houses behind the 1,800 feet of seawall that would be constructed under the permit at issue. (Tr. 355). Some of the homeowners are doing their own repairs to the wall, which has resulted in Frankenstein-type repairs. (Tr. 503, 505, 549). The repairs have not been done the way an engineer like Mr. Way would design them. (Tr. 505). Moreover, even with the seawall in place, waves and water have overtopped the wall and come up to the houses located behind the wall. (Tr. 262-63).

Pursuant to the budget proviso, DBBO applied for and received a critical area permit from the Department to construct a new 1,800-foot seawall located two (2) feet further seaward than the existing wall on Debidue Beach. (CCL Exs. 1 & 3). The proposed new wall would result in the loss of 3,600 square feet of public trust property. (Tr. 246).

Importantly, the permit **does not include any beach renourishment**. DBBO was required to have a renourishment permit that was active as of July 1, 2014 in order to qualify to apply for the seawall. S.C. Budget Appropriations Act of 2014-2015 (Act No. 286), Part 1B, Section 34, Proviso 34.55. DeBordieu did have a renourishment permit that was active in 2014, and that renourishment occurred in 2015. (Order, p. 7; Tr. 87, 92, 361, 435-38). The ALC concluded that Cave will “gain beach” by way of this permit, even though no increase in the volume of sand, i.e., renourishment, is authorized or will occur by way of the contested permit. (Order, p. 20).

The new wall is not a replacement wall because the existing wall will “be left to deteriorate.” (Tr. 565, lines 4-5). Nor will the new wall have any bearing on the frequency with which DeBordieu will need to renourish its beaches in order to maintain dry-sand beach because the wall does not have any effect on keeping the sand seaward of it in place.⁶ (Tr. 565 & 569). While the new seawall may initially be buried under renourishment sand, the area in front of the proposed new seawall is undisputedly the most erosional part of Debidue Beach. Therefore, without question, the seawall will be exposed as the sand erodes from the beach in front of it, as has occurred repeatedly over time.

⁶ The ALC finding to the contrary that the seawall will extend the life of any renourishment is unsupported by the evidence, and even DBBO’s expert admits that. (Order, p. 14; Tr. 566-70). DBBO explained that *groins* would prolong the life of renourishment, not the seawall. (Tr. 382-84).

Indeed, the motivation behind the new seawall is “for additional protection . . . for those times before renourishment when the wall will be exposed.” (Tr. 408, lines 16-18). **Regardless of whether the proposed new seawall is built, renourishment will need to continue at the same pace** to protect the houses behind it, including Mr. Sloan’s house. (Tr. 409).

DBBO retained ATM as its engineering consultant. In 2005 ATM declared that the bulkhead was in “imminent danger of catastrophic failure,” but twelve years later the wall still stands. (Tr. 544). ATM indicated that the bulkhead is in fair condition with damage to individual members of the wall.⁷ (Tr. 543; DBBO Ex 2, p. ATM 12). In fact, ATM recommended that the existing seawall be repaired. (Tr. 291, DBBO Ex. 2). Specifically, ATM recommended that the cracked, broken and missing whales be replaced, sheeting repaired, if necessary, and broken piles removed and replaced. (Tr. 291, DBBO Ex. 2). Mr. Way testified that absent the budget proviso, the repairs recommended in 2010 could still be achieved today. (Tr. 551-552).

Indeed, the new seawall would not alleviate the waves hitting the wall and spraying into the houses. The seawall would not keep the ocean from coming close to the houses, as the ocean comes up very close to the houses between renourishments. (Tr. 377-78; DBBO Ex. 18). Those houses would only be protected and at best temporarily from wave action if the community continues to renourish the beach as it has done in the past and intends to continue in the future. (Tr. 263-64; ____).

The League’s Interests at Stake

⁷The damage to the wall results from its proximity to the mean high water line and the amount of vertical bulkhead exposure. (Tr. 535; DBBO Ex. 2). The closer the wall is to the mean high water line, the closer the wall is to wave action and the more of a beating the wall is going to take. (Tr. 536). In this way, a wall any closer to the ocean is going to be subject to more damage.

One of the League's members,⁸ Nancy Cave, lives in DeBordieu Colony, where she and her recently deceased husband have owned a home since 1993. (R.p. 37). The League is an environmental advocacy organization with over 4,000 members, whose purpose is "to find balance between community and nature," and to "protect our natural environment." (R.p. 40, lines 17-18 & 23-24). Specific to this case, the League has supported the Beachfront Management Act's prohibition on seawalls which harden the beach and impact the beach, the community, sea turtles, and other wildlife. (R.p. 43). Instead, as Ms. Cave explained, the League supports a "more natural approach" to ensure "that there is a beach in the future for all of us to enjoy, and certainly for me to enjoy, . . . I want to walk on the beach as a member of the league. I want to make [it so] that I can continue walking on the beach." (R.p. 43, line 17 – p. 44, line 3).

Ms. Cave testified that she loves "walking on the beach, walking my dog on the beach," which she does "four or five times a month." (R. p. 53, lines 15-18). She testified that walking on the beach is "wonderful . . . something very special and I enjoy it a great deal." (R.p. 55, lines 10-13). Debudie Beach is just over a mile long. (Tr. p. 55) Sometimes Ms. Cave walks south in the area of the proposed new seawall, sometimes she walks north, and sometimes she walks the entire length of the beach. (R.p. 53). Of Debidue Beach's 8,100 linear feet of shoreline, the wall is 4,500 feet and the permitted structure is 1,800 feet. (Stipulations; CCL Ex. 3). In other words, the permitted structure comprises 22% of the beach at Debidue from Pawleys Island all the way to Hobcaw. Although she does not always walk the exact same route every time, Ms. Cave regularly walks on all of the beach at DeBordieu, which is one mile long. (Tr. 55).

⁸Ms. Cave was the Director of the North Coast Office of the Coastal Conservation League for 15 years, and is currently working for the League as a part-time consultant. (R. pp. 39-40).

Ms. Cave testified that she can see the exposed portions of the seawall on the south end of the beach on her walks, and that she uses the beach in that area where the seawall is exposed. (Tr. p. 54; 91). Indeed, even DBBO's Price Sloan, whose house is near the southern most end of the seawall, testified that "I see Mrs. Cave's step-daughter out there quite often. They all use it." (Tr. 391, lines 13-14). Cave has personally observed significant erosion in front of the seawall and at the southern end of the seawall between renourishments, such that she could not walk on the beach in front of the seawall at high tide because the water came up to the seawall. (Tr. p. 54). Mr. Sloan confirmed that high tide "there is no beach access" due to the presence of the wall. (Tr. 393, line 25 – Tr. 394, line 1).

After construction, there will be a "hard new surface that is seaward of the existing seawall, and it will [be] blocking the active beach that—the public beach." (Tr. 57, lines 10-12). The new wall will be "stronger, and higher, and it is two feet onto the active beach." (Tr. P. 58, lines 16-17). Ms. Cave testified that as with the existing wall, the new wall will make it "sometimes impossible to walk in the area of the seawall," (Tr. 59, lines 8-9), but that because the new structure is "two feet onto the active beach, . . . it is taking away more beach."⁹ (Tr. 59, lines 17-18). And during construction of the seawall "it will make . . . it impossible to walk the beach in that area." (Tr. P 58, lines 21-23).

As a member of the League, Ms. Cave expects "the league to do everything that it can to stop the seawall" because, "as a member, I feel that the wall is going to inhibit my ability to use the beach, and it will have impacts going forward that will make it more and more difficult to use the

⁹Ms. Cave further testified that the area landward of the seawall is considered private property, and that even Debordieu community "we are asked not to walk on that area." (Tr. 103, lines 13-14).

beach, enjoy the beach, in the future.” (Tr. 60, lines 18-22). She explained that “the more beach that is taken the less room I have to walk on the beach and . . . then if my ability to walk the beach is curtailed or eliminated, then that is . . . not what I want and eliminates one of the reasons that . . . we are living in DeBordieu.” (Tr. 62, lines 5-11).

In addition to Ms. Cave, the League has two other members, Mr. Schofield and Mr. DeMent, who also submitted comments objecting to the project due to its impacts on their uses. (CCL Ex. 7).

ARGUMENT

Summary of Argument

The ALC’s analysis of both standing and the merits were tainted by deep misunderstandings of the facts and of the law.

First, the ALC erred in its application of the constitutional and statutory tests for standing. The ALC imposed quantitative specificity and substantiality requirements to injury-in-fact analysis that have no legal support and are contrary to a long line of South Carolina and federal law. Specifically, the ALC rejected a League member’s testimony that she walks on the beach four or five times a month, including the proposed seawall’s location. Moreover, the ALC overlooked the reality of the beach system: it is dynamic and always changing. And this case it is eroding.² Because the beach is eroding, even if the seawall were temporarily covered by renourishment sand—which is not required under the terms of the permit—it will eventually again be exposed. And when it is, the wall will be a further encroachment onto the public beach upon which League

²The erosional nature of this beach is what prompted the permit at issue. The ALC places emphasis on the cause of the erosion, which matters not.

member Nancy Cave walks.

The ALC acknowledged Cave “asserted that the permit would affect her walks on a public beach.” (Order, p. 12). And yet, the ALC dismissed that undisputed evidence, finding Cave did not “testify specifically” that she uses the affected area “on a regular basis.” (Order, p. 12). The ALC also faulted Ms. Cave for not demonstrating a “substantial” injury. (Order, p. 16). The ALC gave no indication of what would satisfy this newly-imposed standard of quantitative specificity or substantiality of use, but in any case, Cave testified that she lives in the DeBordieu and walks on Debidue beach four or five times a month, every month. Sometimes she walks south, where the wall is located. Sometimes she walks north. Sometimes she walks the entire beach. The beach at DeBordieu where she walks four to five times a month is only one mile long and the 1,800 feet of new wall will run along a significant portion of that beach. (Tr. 55). The seawall is not even a far from where Cave regularly accesses the beach. Indeed, she can see the beginning of the wall from the main community access point. Cave’s testimony on her use is neither “vague” nor “generalized,” as the ALC incorrectly characterized it. (Order, p. 12).

The ALC’s standing conclusion is contrary to a materially identical case in which the Supreme Court found an injury where an individual testified that he used the public beach on an almost daily basis for recreational, health, and aesthetic purposes, and that the permitted activity would impair those uses. Smiley v. S.C. Dep’t of Health & Envtl. Control, 374 S.C. 326, 649 S.E.2d 31 (2007).

Finally, the ALC’s order is premised on either a fundamental misunderstanding or wilful ignorance of the permitted project. This permit **only authorizes the construction of a seawall/bulkhead, not any beach renourishment**. This fundamental flaw undermines the basis

for the ALC's rulings on both standing and the merits.

Simply put, the ALC created a new, undefined standard for when a use is regular enough, and when it is substantial enough. This new standard is contrary to the federal standing test, as well as the South Carolina law adopting that federal test.

After its standing conclusion, the ALC gave scant analysis of how it determined that the permit could be upheld. The budget proviso undisputedly grants DHEC (and thus the ALC) with discretion in determining whether to issue the permit. Yet DHEC failed to apply any regulations in exercising its discretion, instead relying solely on the budget proviso in making its decision. The ALC compounded that error by failing to undertake an analysis to determine which statutory and regulatory provisions did not present an "irreconcilable conflict" such that they must be applied to the permit decision.

I. The ALC Erred in Concluding that the League Does Not Have Standing

The purpose of standing is to ensure that a party has a sufficient interest in the outcome of the litigation. In South Carolina, a party can acquire standing three ways: "(1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception." Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013) (citing ATC Inc. v. Charleston Cty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). The ALC ruled that the League had neither statutory nor constitutional standing (even though the ALC is far from an Article III court). The ALC was wrong.

As an initial matter, it is well established that Ms. Cave has a legally protected interest in the use of the public beach at Debidue.

South Carolina's beaches enjoy a special legal status, and members of the general public enjoy special legal rights in those beaches. The beaches of the State of South Carolina have been designated as part of the "critical area" regulated under the Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 through 48-39-360. The beaches below the mean high water mark are owned by the State and held in trust for the use and enjoyment of the people under the Public Trust Doctrine. McQueen v. South Carolina Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003); see also, South Carolina Coastal Management Program, pages IV-61 to IV-62. Under the Public Trust Doctrine, Nancy Cave has a legal right to walk her dog and otherwise recreate upon the public beaches of this state, including that portion of the public beach where the proposed new seawall would be constructed under the terms of the permit under appeal.

Indeed, under the Public Trust Doctrine, Ms. Cave has an "inalienable" legal right to use the beach:

The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). **Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.**

Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 127-28, 456 S.E.2d 397, 402 (1995) (emphasis added) (Syridon and LeBlanc, The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action, 6 Tul. Envtl. L. J. 287 (1993)).

Under the Public Trust Doctrine, therefore, the League and its members enjoy a legally-protected right to use the public beach affected by the DeBordieu seawall project. The public's

standing to enforce public trust purposes has long been recognized, and significant support exists in state courts for private citizens suits alleging state and local government violations of the public trust doctrine.¹ The recurring theme is “that a public trust claim can be raised by members of the public who are affected by potential harm to the public trust—a showing of injury-in-fact is not required for standing.” S.C. Law Review, Vol. 68, No. 5 (Spring 2017) (citing In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 287 P.3d 129, 183 (Haw. 2012). “The court reasons that a citizen’s interest in the public trust was a vested property interest and therefore, standing was based upon due process.” Id. at 141.

Where the public trust is at issue, “the common good is at stake, and this court is duty-bound to protect the public interest.” In re ‘Iao, 287 P.3d 129 (Haw. 2012); see also Arizona v. Cent. for Law in Pub. Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158, 168–69 (1991) (“Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public

¹See, e.g., Paepcke v. Pub. Bldg. Comm’n, 263 N.E.2d 11 (Ill. 1970) (public trust doctrine allows taxpayers to challenge conversion of city parks); Marks v. Whitney, 491 P.2d 374 (Cal. 1971) (member of general public has standing to request court to declare public trust easement on privately-held tidelands); Gewitz v. City of Long Beach, 330 N.Y.S.2d 495 (Sup. Ct. 1972) (state resident has standing to dispute city ordinance restricting beach access); United Plainsmen Ass’n v. N.D. State Water Conservation Comm’n 247 N.W.2d 457 (N.D. 1976) (public trust doctrine allows citizens to seek injunction on issuance of future water permits); Superior Pub. Rights, Inc. v. State Dep’t of Natural Res., 263 N.W.2d 290 (Mich. Ct. App. 1977) (nonprofit organization whose members were residents may seek to invalidate agreements that permitted private use of public trust lands); Sekirk-Priest Basin Ass’n v. State ex rel. Andrus, 899 P.2d 949 (Idaho 1995) (public trust doctrine conferred standing to environmental group to challenge timber sale on state lands); Center for Biological Diversity, Inc. v. PPL Group, Inc., 83 Cal. Rptr. 3d 588 (Ct. App. 2008) (private parties have standing to bring an action to enforce protection of wildlife because it is a public trust resource).

trust.... The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.”) As the Illinois Supreme Court noted:

If the “public trust” doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.

Paepcke v. Pub. Bldg. Comm’n, 263 N.E.2d 11, 18 (Ill. 1970).

A. The League Established Article III Standing

In Sea Pines Association v. South Carolina Department of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001), the South Carolina Supreme Court adopted the “constitutional standing” test for Article III courts announced in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992).¹ See also Sloan v. Greenville Cty., 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001).

The three-pronged test arising from Lujan is as follows:

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

Lujan, 112 S. Ct. at 2136 (internal citations omitted).

¹ The South Carolina Supreme Court’s rulings on “constitutional standing” in environmental cases have consistently followed the rulings of the United States Supreme Court and other federal courts. See, e.g., Sea Pines, 345 S.C. at 601, 550 S.E. 2d at 291 (citing Lujan, supra, and Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361 (1972)); Energy Research Found. v. Waddell, 295 S.C. 100, 102, 367 S.E.2d 419, 420 (1988) (citing Sierra Club v. Morton, supra, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S. Ct. 2405 (1973), and Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974)). Accordingly, decisions of the federal courts are pertinent to this case.

In Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc. 528 U.S. 167, 120 S. Ct. 693 (2000), the United States Supreme Court reaffirmed the long-standing principle that aesthetic and recreational interests can provide the basis for standing under the Lujan test:

We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons “for whom the aesthetic and recreational values of the area will be lessened” by the challenged activity.

528 U.S. 167, 183 (citing Sierra Club v. Morton, 405 U.S. 727, 735, 92 S. Ct. 1361, 1366 (1972), and Lujan, 504 U.S. at 562, 112 S. Ct. at 2137). The focus of the inquiry is **whether the plaintiff uses the affected area** and whether the values derived from that use will be lessened.¹³

In Smiley, the South Carolina Supreme Court made clear that interference with one's use and enjoyment of an affected area is sufficient to confer standing to challenge a DHEC permit decision. Smiley, 374 S.C. 326, 333, 649 S.E.2d 31, 34 (2007). As with this case, in Smiley, the affected area in question was the beach in which the public has a legally protected interest.

A plaintiff must generally have a “personal stake” in the subject matter of the case, such that the injury is not “merely a general interest common to all members of the public.” Sea Pines, 345 S.C. at 600, 550 S.E.2d at 291. The injury must be of a personal and particularized nature to the party bringing the action. Carnival Corp. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (citing Sea Pines, *supra*, (“In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way.”)). The fact that a plaintiff has a personal stake, once established, is not negated by the fact that others

¹³ The court in Pye noted that if those who are seeking to protect the environmental quality of the areas they use do not have standing, then “the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action.” Pye v. United States, 269 F.3d 457, 468 (4th Cir. 2001) (citing Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 176 (3rd Cir. 2000)).

may have similar interests or rights at stake; rather, the point is to ensure that the plaintiff is among the injured and has a stake in the outcome. Fed. Election Comm'n. v. Akins, 524 U.S. 11, 24, 118 S. Ct. 1777, 1786 (1988) (where a harm is concrete, though widely shared, the Court has found “injury in fact.”).

Moreover, as a plaintiff that is an association, the League may possess associational standing on behalf of its members. Hunt v. Washington State Apple Adver. Comm'n., 432 U.S. 333, 97 S. Ct. 2434 (1977).

In this case, Ms. Cave provided uncontradicted testimony regarding her use of the affected area, as well as the two ways that the project would harm that use. First, she testified that if the wall is constructed two feet seaward of the existing wall then it would harm her because “the more beach that is taken the less room I have to walk on the beach . . . if my ability to walk the beach is curtailed or eliminated” (Tr. 61, lines 5 to 11). Second, Mrs. Cave explained how the construction of the bulkhead on the beach would affect her use of the beach:

A: Well I can't imagine that you'll be able to walk down on the—south on the beach if there is a crane and heavy construction there. I don't know how you would do it. . . . I can't imagine that it would allow access.

Q: Will it affect your enjoyment of the beach?

A: Yes. It will not allow me to walk the beach. If I'm walking south on the beach, it won't allow me to do that.

(Tr. 56, line 19—57, line 4).

The ALC did not doubt that Ms. Cave walks Debidue four to five times a month. (Order, p. 5). Nor that she regularly walks along the beach where the new 1,800-foot seawall would be constructed. (Id.) The ALC simply found this testimony not personal or particularized enough and too “vague.” (Order, p. 12). In so doing, the ALC imposed a new and undefined

quantitative standard for injury which is unsupported by the law. The ALC was under the mistaken impression that Ms. Cave must state with precision the exact number of times per month that she walks the beach in the project area. The standing test under Lujan mandates no such meticulousness and precision in describing frequency of use. The test requires that an injury-in-fact “be concrete in both a qualitative and temporal sense.” Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). It seeks to preclude “some day intentions” and “remote possibilities” from forming the basis of injury, which are conjectural and hypothetical. See Warth v. Seldin, 422 U.S. 490, 506–08, 95 S. Ct. 2197, 2209–10, 45 L. Ed. 2d 343 (1975); Harty v. Luhn Four, Inc., 747 F. Supp. 2d 547, 552 (E.D.N.C. 2010), aff’d, 453 F. App’x 347 (4th Cir. 2011) (lack of definitive plans to use the area in the future and only desires to visit it are merely “some day” intentions (internal citations omitted)).

Here, Ms. Cave’s use of the beach is actual and concrete—and far from “some day intentions” or “remote possibilities”—notwithstanding precise quantitative data about how many of those four to five monthly walks take her along the seawall. She lives in DeBordieu and regularly walks on the one-mile long Debidue Beach. She can see the seawall from the public parking area. She walks either north or south, where the proposed wall would be built, and sometimes she walks the entire beach. That is all the law requires to show use of an affected area, nothing more. Sierra Club v. Morton.

i. Injury from Further Loss of Dry-Sand Beach

The ALC’s findings that the beach is eroding and the wall will be exposed again cannot be squared with its findings that the bulkhead will not present an incursion onto the public beach, but instead that there will be more beach to walk on (even though this permit involves no

renourishment).¹ The erosion in front of the wall is inevitable and undisputed. The eventual exposure of the bulkhead is similarly undisputed, as is the two-foot encroachment onto the public beach. Even if renourishment were included, sand covering the new seawall matters only so long as that sand remains in place; however, all of the testimony and evidence shows that the beach is and will continue to erode, ultimately causing the seawall to again be exposed on the public beach upon which Ms. Cave walks. As that happens, the wall will become increasingly more exposed on the public beach and there will be less beach to walk on, not more.

Bulkheads like the one proposed by DBBO seal off a certain amount of sand from the longshore transport system that maintains the whole beach. (Tr. 241, lines 2-4). This phenomenon, known as placement loss, essentially refers to the “amount of beach immediately removed from public access.” (Tr. 245, lines 5-6). Thus, “the simple fact that you’re building the structure on part of the public beach [means] . . . whatever is behind it is not available for the public to access. . . . any degree to which you move that structure seaward, you’re taking additional public beach and dry sand beach away.”¹⁴ (Tr. 245, lines 12-19).

¹The ALC’s conclusion that the beach is too eroded to walk on takes Cave’s testimony out of context and underscores the common theme of the ALC’s rationale: the beach is fixed in its location and the ALC will look at it in a single snapshot in time depending on how it best suits the desired outcome instead of looking at the beach as the dynamic (and eroding) system that it truly is.

¹⁴Viewing images over time, one observes that no dry-sand beach exists in front of the seawall, but does exist south of the seawall. (CCL Ex. 8). DBBO’s Price Sloan testified that prior to renourishments “even at low tide there was very little room to even walk” in front of the seawall. (Tr. 381, lines 4-5). According to Dr. Young, the seawall is unquestionably causing the loss of dry sand beach in front of it. (Tr. 243). Aerial images taken prior to the 2015 renourishment depict the loss of the dry sand beach about which Dr. Young testified. (CCL Ex. 8, Tr. 236-38). Dr. Young testified that he has no doubt that the existing bulkhead has caused a loss of the dry sand beach depicted in the photographs in Petitioner’s Exhibit 8. (Tr. 243). He testified that if the permitted structure is constructed, the loss of the dry sand beach will occur faster and earlier. (Tr. 243). Placement loss will be greater from the permitted structure because it will be two (2)

Dr. Young explained that in the past two years, much of the renourishment sand has been lost. (Tr. 238). He explained that “it's going to be quite difficult to keep that beach nourishment sand in front of a structure that's sitting that far out on the beach.” (Tr. 238, lines 7-10). He would expect renourishment sand to be lost “relatively quickly” because when “you try to hold the shoreline in place too far seaward out of equilibrium over a long period of time, the underwater portion of the beach . . . can actually get steeper with time.” (Tr. 238, lines 13-17). Additionally, Dr. Young explained that because the permitted structure is going to be further seaward onto the beach, all of the problems with beach loss—active loss, passive loss, and placement loss – are going to be worse. Moreover, seaward movement of a structure is inconsistent with the language and spirit of the CZMA.¹ (Tr. 239).

DBBO's expert Fran Way opined that the most recent renourishment project in 2015 caused accretion and growth both north and south on Debidue Beach. (Tr. 494-95). But he acknowledged that “sooner or later it does start eroding.” (Tr. 495, lines 21-22).

When it comes to assessing whether the permitted project will harm Ms. Cave's use, the ALC disregards DBBO's Fran Way, the League's Rob Young expert opinion, and Ms. Cave's testimony, that the permitted project would reduce the public's beach as a result of the two foot encroachment onto the beach for 1,800-foot length of the project (totaling 3,600 square feet).

feet closer to the ocean: “the amount of beach immediately removed from public access, will be greater with the new structure because it's constructed further seaward.” (Tr. 245, lines 5-8).

¹Dr. Young testified that the coastal management policies in the Act reflect sound coastal management because those policies prioritize the protection of the dry sand beach (Tr. 228-29); discourage putting new structures too close to the beach in harm's way and encourage retreat from the beach when practical (Tr. 216). (Tr. 229). He explained that what the “policy retreat means is that, first of all, you don't put anything new in harm's way, so first you do no harm.” (Tr. 216, lines 4-6).

The ALC's statements that the project will result in "[m]ore walkable beach than there is now or has often been in recent years," (Order, p. 5), reflects its misunderstanding of the nature of the property and the project itself. The property is public trust property on a shoreline that has been eroding for nearly 50 years. Sand is constantly being washed away and when it reaches the seawall the shoreline can no longer move which reduces the amount of dry sand beach. In addition, the project **does not** include renourishment or "strengthening" of the dune system on the public beach. In a footnote the ALC claimed that the "incursion into the two-foot space would be from the placement of new vegetation above grade" and that the "dune system on the beach"¹ would be strengthened. The permit does not include measures to strengthen the dune system, only backfill behind the new seawall that will be converted to private property.

Mr. Sloan agreed that renourishment will be necessary by 2020/2021 at which point it will "be absolutely necessary" because "that's when my wall will be most exposed." (Tr. 9-11). DBBO's Fran Way agreed that the wall becomes exposed between renourishment projects. (Tr. 560). He acknowledged that renourishment is "never permanent," "it's a temporary thing. And you have to continue to renourish." (Tr. 541, line 19 & Tr. 542, lines 2-3). He also agreed that "it won't be long before the bulkhead starts becoming exposed" on the southern end at a rate of one foot per year. (Tr. 55). As that renourishment sand washes away and bulkhead becomes exposed, less dry-sand beach in front of the wall will exist. (Tr. 542).

Indeed, Mr. Way calculated the loss of dry-sand beach as a result of the proposed new seawall/bulkhead. (Tr. 542, line 17). He determined that as a result of the new seawall being located two feet seaward, there would be 20 minutes a day less of dry-sand beach.² (Tr. 537).

¹As a practical matter, no dunes currently exist in the area of the proposed project.

²This loss of beach access is referred to as active loss. (Tr. 539).

That daily loss translates to 140 minutes a week, 7,300 minutes a year, where the dry-sand beach will be eliminated as a result of the new seawall. (Tr. 539). No dispute exists that as a result of the two-foot encroachment onto the public beach, less dry sand beach will be available.

The ALC recognized the seawall will “hold sand behind it . . . [which] is called placement loss because the trapped sand is unavailable to the natural processes . . . that carry sand to other portions of the coast.” (Order, p. 8). Fran Way conceded that there would be placement loss because the new wall will be two feet further seaward causing about 800 cubic yards of material to be retained behind the wall. (Tr. 519-20). Yet the ALC concluded “little to no additional loss of sand” would result from the new seawall. (Order, p. 8). The ALC dismissed the placement loss on the mistaken belief that “new sand will be brought in” and placed on the beach. (Order, p. 8). The ALC again ignored the realities that (1) no sand will be placed on the beach by way of this permit, (2) no evidence exists regarding when new sand might be placed on the beach outside of this permit, and (3) any sand that may be placed on the beach in the future will eventually wash away, leaving the new seawall exposed and encroaching an additional 3,600 square feet onto the beach. (Order, p. 8, Tr. 246; CCL Exs. 1 & 3). Indeed, Mr. Sloan stated that the beach “moves, and it moves daily.” (Tr. 394, line 15).

Then the ALC took it one step further, concluding the League lacks standing because, in the ALC’s view, the new seawall would improve the beach. The ALC’s conclusion that Ms. Cave can suffer no injury because “she will gain beach,” and that the project “will provide additional recreational beach” ignores the activity authorized by the permit at issue, along with the processes impacting the beach at Debidue, and specifically that this beach has been experiencing erosion for many decades. (Order, p. 13 & 20, Tr. 106). Instead, the ALC saw the

beach as static, which it undisputedly is not. The ALC's conclusion that a structure that impedes two feet onto the public beach will "add recreational beach" is unsupported and defies reality and logic. (Order, p. 21). While the seawall may be temporarily buried, it is located on an eroding beach. Ms. Cave explained that the seawall "might be completely covered for a moment in time . . . but . . . I don't see how that seawall will remain covered" because eventually the sand will wash away and expose the wall. (Tr. 93, lines 10-17).

The current wall was completely exposed in 2015 and partially exposed at the time of the hearing in 2017. Undoubtedly, the new wall will be exposed again at some point, and at that point it will be a further encroachment onto the public beach.

Moreover, the ALC's focus on the harm (or its perceived lack thereof) to the environment is a misapplication of the standing test. As succinctly put by the U.S. Supreme Court, the "relevant showing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits . . ." Friends of the Earth, 528 U.S. at 181, 120 S.Ct. at 704. The "fundamental aspect of standing" is that it focuses primarily on the party seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated." Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984) (quoting Flast v. Cohen, 392 U.S., at 99, 88 S.Ct., at 1952). Instead of focusing on Nancy Cave's testimony regarding how this project will effect her personally, the ALC erroneously focused on how the project will effect the beach in order to arrive at its desired result.

ii. **Injury from Construction Activities**

The ALC misapplied Bailey v. SCDHEC, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010). Bailey involved a challenge to a permit to modify a private recreational dock from a fixed dock to a floating dock. Bailey did not allege injury from the actual construction activities or the size, location or encroachment of the structure; indeed the footprint of the new structure would be identical to the existing structure. Id. at 2 & 7, 427 & 429. Instead, the alleged injury arose from Bailey's concern regarding his perceived change in use of the dock from private to commercial. Id. This case is easily distinguishable because the injury resulting from heavy equipment on the beach **preventing** use of the beach is not an "irritation[]" that "would stay the same," but would be an entirely new injury. Moreover, this permit authorizes a 3,600 square-foot encroachment onto the public beach, unlike the dock whose footprint would remain unchanged. (Tr. 246). Indeed, the ALC acknowledged that in Bailey, the permit "did not change any aspect of the dock's usage or footprint." (Order, p. 13 (citing Bailey, 388 S.C. at 7, 693 S.E.2d at 429)). That is not the case here. In this case, both the footprint and the height of the new seawall would change under the contested permit.

According to the public notice, construction will last six to nine months and heavy equipment will be on the beach, both seaward and landward of the new seawall, including heavy cranes to drive pilings into the sand. (CCL Ex. 1; Tr. 55-56). The heavy equipment "will obviously make it very difficult to walk on the beach." (Tr. 56, lines 9-10). Ms. Cave "can't imagine you'll be able to walk down on the beach if there is a crane and heavy construction there." (Tr. 56, lines 19-21). That heavy equipment and construction "will not allow [her] to walk the beach" where the bulkhead would be constructed. (Tr. 57, lines 2-3). Mr. Way stated

that the beach closure associated with the seawall construction “is comparable to the renourishment closures,” just with fewer pieces of equipment, but also that renourishment and bulkhead construction are two different types of activities requiring differing amounts of construction equipment and differing times. (Tr. 518, lines 15-17). DHEC acknowledged that the construction activity would impact use of the beach, but because it would be temporary it was of no concern. (Tr. 152). In other words, the construction activities associated with the seawall stand alone and are not concomitant with any renourishment that may occur in the future.

In determining that Ms. Cave would suffer no injury as a result of the construction activities—without any evidentiary support—the ALC assumed that the seawall and the renourishment are to occur simultaneously. (Order, p. 5). The permit authorizes a seawall, not renourishment. While the budget proviso only allows a seawall permit if the applicant has an “active” renourishment permit as of July 1, 2014, the renourishment authorized by a permit that was “active” in 2014 was completed in 2015. (Order, p. 7, Tr. 86-87, 92, 361, 435-38, Stipulations). DeBordieu currently has no active renourishment permit. No one denies that this project will entail heavy equipment for seawall construction on the beach, or that seawall construction will require the beach to be closed, thereby interfering with Ms. Cave’s use. (Tr. 55-57, 152, 518).

The ALC wrongly concluded that because Ms. Cave has suffered injury from beach closures in the past, she is somehow precluded from ever contesting similar injuries in the future. That is not and never has been the law. It is true that the present structure does at times adversely affect Ms. Cave’s use and enjoyment of the beach, but no dispute exists that the permitted structure would both entail construction that would completely prevent Cave’s use (albeit

temporary) and would then encroach two feet further onto the public beach upon which she recreates. In other words, the project creates two separate concrete, particularized injuries. In these ways, the complained of activities would *not* occur if the permitted activity were *not* authorized. The ALC noted that in Bailey “the complained of actions and issues would continue regardless of whether the permit was issued.” (Order, p. 13). In this case, the complained of actions (construction of a new seawall and encroachment onto the public trust beach) would not occur, but-for the permitted activity.

This case presents the same situation as in Smiley where “[i]nterference with [the petitioner’s] enjoyment of the beach, and his inability to use it” was sufficient to establish the requisite “injury in fact” to confer standing.¹ 374 S.C. at 333, 649 S.E.2d at 34. At issue in Smiley was a critical area permit issued by DHEC allowing periodic sand scraping on the public intertidal beach at Isle of Palms and whether the harm alleged by Mr. Smiley was sufficient to permit standing to challenge that activity. Id. at 328-29, 649 S.E.2d at 32. In reversing the lower courts that Smiley lacked an “injury in fact,” the Supreme Court provided that in the regulatory permitting context, the requisite “particularized” harm “means Smiley must be affected in a personal and individualized way by the permitting decision.” Id. at 329-30, 649 S.E.2d at 33.

In determining whether Smiley met the particularized and concrete requirements, the Supreme Court looked at Smiley’s testimony alleging that he regularly used the beach in the areas where the proposed sand scraping would occur for recreational and aesthetic purposes; that

¹The ALC misconstrued Smiley. The ALC focused on whether the project adds or removes sand from the beach in question. It specifically misinterpreted Smiley to say that the injury arises from the fact that in Smiley sand was being added to the beach, rather than removed from the beach. The ALC misses the point that the injury to Smiley included the fact that there would be heavy equipment on the beach which would (temporarily) prevent his use of the beach.

the intrusion of heavy equipment onto the public beach and consequent sand scraping would interfere with his ability to use the affected area and reduce his enjoyment of the beach; and that the sand scraping activity would have a detrimental effect on his aesthetic and recreational interests and reduce or obstruct his use of the beach. *Id.* at 330. The Court found Smiley's testimony was sufficient to meet all the requirements of "injury in fact" for purposes of standing – that the harm caused by construction activities blocking use was "actual and imminent," that there was a "concrete and particularized invasion," and that "a direct stake in the permitting decision" was demonstrated. *Id.* at 330-33, 649 S.E.2d at 33-34. In support, the Court quoted the following explanation from the United States Supreme Court:

"Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a \$5 fine and costs, . . . and a \$1.50 poll tax. . . . [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613. See also K. Davis, *Administrative Law Treatise* ss 22.09--5, 22.09--6 (Supp. 1970).

Id. at 332, 649 S.E.2d at 34 (quoting United States v. SCRAP, 412 U.S. 669 n.14, 93 S. Ct. 2405 n.14 (1973)). "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Id.* (quoting Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613).

Similarly, here, Mrs. Cave testified that she regularly uses and enjoys Debidue Beach in the areas in front of and to the sides of the existing seawall and where the proposed new wall will

be constructed; that the presence of heavy construction equipment on the public beach will negatively impact and prevent her use and enjoyment of the beach; and that the proposed new wall will negatively impact and prevent her use and enjoyment of the beach. (Tr. 53-61). This is precisely the type of “injury in fact” the Supreme Court held sufficient to confer standing in Smiley. If there is any difference between Smiley and this case, it is that the League faces more harm than Mr. Smiley because this permit authorizes a permanent incursion onto the public beach.

B. The League is an Affected Person With Standing Under Section 44-1-60

“Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation.” Youngblood v. S.C. Dep’t of Soc. Servs., 741 S.E.2d 515, 518 (S.C. 2013). In this case we have a statutory framework and a regulatory program that expressly recognize the rights of “affected persons” to seek administrative and judicial review of DHEC permit decisions. See S.C. Code Ann. §§ 44-1-60 and 48-39-10, et seq. Section 44-1-60(G) provides that “[a]n applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing.” Thus, the question the court must decide is whether the League qualifies as an “affected person” under the statute. The League should be able to establish statutory standing by explaining how its members are affected by DHEC’s decision to grant the contested authorizations.¹

The General Assembly has not defined “affected persons” in the context of Section 44-1-60, thus determining the scope of “affected persons” entitled to participate is an exercise in

¹Because the ALC is part of the state executive branch as opposed to a federal Article III court, statutory standing also has logical appeal.

statutory interpretation. Youngblood, 741 S.E.2d at 518. The ordinary meaning of “affected” denotes one who is acted upon, influenced or changed. E.g., Black’s Law Dictionary, 6th Ed. (1990) (defining “affect” as “[t]o act upon; influence; change . . .”). The statute’s intent is to allow those acted upon, influenced or changed by a DHEC decision to participate in the administrative process. In other contexts, the General Assembly has defined the universe of persons entitled participate in the administrative processes differently. In the Certificate of Need (“CON”) arena, “affected persons” are defined to include those residing within a geographic service area.¹ The statute governing alcohol licensing defines those entitled to contest licenses in the ALC as being those within the same county or a “five mile” radius.² Here, by contrast, “affected persons” is not defined by the statute, and should be construed in its ordinary meaning to include those influenced or changed by DHEC’s permitting of a new seawall on public trust beach upon which they recreate.

The ALC recognized that S.C. Code Ann. § 44-1-60 gives an “affected person” the right to file a contested case in the ALC and that the General Assembly did not define the term “affected party.” But rather than undertaking any analysis of that term, the ALC found that term “synonymous with the requirements of constitutional standing”³ without any legal support.

¹ See S.C. Code Ann. Regs. 61-15(103)(1)) (defining “affected persons” as those “residing in the geographic area to be served by the applicant” as well those in the area who provide similar services); Home Health Services, Inc. v. S.C. Dept. of Health & Env’tl. Control, 298 S.C. 258, 263 n.2, 379 S.E.2d. 734, 736 n.2 (Ct. App. 1989):

² See S.C. Code § 61-6-185(A) (providing that persons residing within the county in which a retail license requested or “within five miles” of the location may protest license and proceed to ALC).

³ To the extent that the regulation R. 30-6, which the ALC references, materially alters or adds to the statute by adding Article III standing requirements, it is void. Milliken and Co. v. S.C. Dep’t of Labor, 275 S.C. 264, 267-68, 269 S.E.2d 763 (1980) (“It is well settled that an administrative order which materially alters or adds to the law is void. The same principle applies to administrative rule-making.” (citations omitted); Society Of Professional Journalists v. Sexton,

(Order, p. 15). If the General Assembly intended for the constitutional test for standing to be applied in administrative proceedings, it could have used language to achieve that goal. It did not, instead only requiring a person to show that she is “affected” by a staff decision.

The ALC erred in failing to attempt to define the term using its ordinary meaning within the context of the statute. The statute allows “affected persons” to request DHEC Board review of staff decisions and then to request a contested case hearing with the ALC. In undertaking statutory interpretation, the ALC should ascertain the legislature’s intent from the plain language of the statute, State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004), and the language used must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Mun. Ass’n of S.C. v. AT&T Commc’ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Instead of undertaking the statutory interpretation, the ALC jumped to the question of Article III constitutional standing. It erred in doing so because the General Assembly has already included provision of participatory administrative rights to “affected persons,” which reflects a legislative determination that such participation should be available to the League if it wishes to invoke it to protect its rights. See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S.Ct. 2199, 2211 (2012) (existence of the administrative remedy demonstrates the legislature’s “evident intent” to make agency action reviewable.); Mendoza v. Perez, 754 F.3d 1002, 1110 (D.C. Cir. 2014) (citing Lujan, 504 U.S. 555, 572 n.7 (1992)).

283 S.C. 563, 567, 324 S.E.2d 313 (1984) (“Although a regulation has the force of law, it must fall when it alters or adds to a statute.”).

It is important to understand that “affected persons” is a limited universe of citizens. To be an “affected person,” a party must show injury within the zone of interests protected by the substantive statute underlying the administrative claims, thus foreclosing review where a party’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed” that the legislature intended to permit the action. Match-E-Be-Nash-She-Wish Band, 132 S.Ct. at 2211 (quoting Clarke v. Securities Industry Assn., 479 U.S. 388, 399 (1987)). Here, the League showed that it has injuries which fall squarely within the zone of interests protected by the law at issue: the Coastal Zone Management Act.¹ That law explicitly seeks to protect and preserve the dry sand beach and improve beach accessibility – the same rights that the League and its members seek to vindicate by way of this administrative challenge to a hard erosion control structure on the beach.

Moreover, in the context of a challenge to an agency permitting decision, our courts have found standing is satisfied where parties allege “an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members’ use and enjoyment” of an affected area. S.C. Wildlife Fed’n v. S.C. Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988); see also Smiley, 374 S.C. at 330, 649 S.E.2d at 34 (petitioner “must be affected in a personal and individualized way”).

Instead of undertaking this analysis, the ALC concluded that the statute provides an “additional test” to Article III’s standing, citing Match-E-Be-Nash-She-Wish.² (Order, p. 16). In

¹The General Assembly has previously found that hard armoring structures, like the seawall in question, increase vulnerability to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach. S.C. Code. Ann. § 48-39-250(5). See also S.C. Code Ann. § 48-39-250(1)(b) & (d), (2) – (6) & § 48-39-260(1), (3), (6).

²the U.S. Supreme Court explained that the federal APA’s “zone of interest” test:

the ALC's opinion, the bar is higher to seek review in the state administrative forum than the federal judicial forum.

Instead, what both Match-E-Be-Nash-She-Wish and United States v. Richardson, 418 U.S. 166, 94 S.Ct. 2940 (1974), stand for is that in federal Article III courts a party bringing suit under the federal APA (which cases are heard in federal district court) must also show that they are within the zone of interests protected by the federal statute. This “additional” requirement is not relevant here because Article III’s standing is an “irreducible minimum” requirement that must be satisfied in “cases or controversies” in federal court. Lujan at 560, 2136. The U.S. Constitution’s “irreducible minimum” requirements do not apply to state courts, much less the administrative forum.

Moreover, South Carolina courts recognize statutory standing as a separate and distinct means of obtaining standing and opening the courtroom door. Youngblood, 741 S.E.2d 515 (2013). This separate statutory standing test fits neatly within our state’s framework under which (1) the ALC is part of the executive branch, (2) the ALC is a creature of statute, and (3) both the ALC and DHEC’s organic statutes do not contain “case or controversy” language or anything else that tends to suggest the Lujan test for Article III standing applies to the ALC. Indeed, the ALC was never intended to have only the judicial power of federal Article III courts, or even our state

“is not meant to be especially demanding.” Clarke v. Securities Industry Assn., 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). We apply the test in keeping with Congress’s “evident intent” when enacting the APA “to make agency action presumptively reviewable.” *Ibid.* We do not require any “indication of congressional purpose to benefit the would-be plaintiff.” *Id.*, at 399–400, 107 S.Ct. 750.7 And we have always conspicuously included the word “arguably” in the test to indicate that the benefit of any doubt goes to the plaintiff.

Match-E-Be-Nash-She-Wish, 567 U.S. at 225, 132 S.Ct. at 2210 (2012).

Article V courts. To the contrary, it was meant to play several administrative agency roles as the General Assembly saw fit. Consequently, the legislature avoided a one-size-fits all standing rule for the ALC and decided who should have the ability to appear before the ALC in a particular situation and set that in a statute. In other words, determining who has standing before the ALC is controlled solely by the statute governing the applicable administrative process. In this case, that statute is Section 44-1-60(G).

The ALC cites Beaufort Realty in concluding that Ms. Cave has no interests that would be affected by the permitted activity because she has no “substantial” grievance. (Order, p. 16). First, substantiality is not a requirement under the Article III test – an “identifiable trifle” is sufficient to show injury. SCRAP, 412 U.S. at 669 n.14, 93 S.Ct. At 2405 n.14. Second, the ALC misreads Beaufort Realty and Sea Pines as cases arising as administrative appeals under DHEC’s enabling statute and preempting statutory standing. They did not. Statutory standing was not appropriate or even available in those cases.

The League agrees that a “mere interest” in a problem is insufficient to establish standing, but the League has gone beyond showing a “mere interest” in the condition of the beach at Debidue; it has shown that it has a member who walks her dog on that beach 4 or 5 times a month and who would be unable to do so when (1) construction is taking place on that beach or (2) the new seawall is encroaching onto the beach. It is hard to imagine who would be an “affected person” to challenge the issuance of this permit, if it is not a resident of the private, gated community that regularly uses the beach where the permitted activity would occur.

II. DHEC Failed to Exercise Discretion and the ALC’s Order Compounds that Error

A. DHEC Failed to Exercise Discretion and Utilize Fixed Standards

The language of the budget proviso provides that the Department “may issue a special permit for the reconstruction and repair of an existing erosion control device,” (2015 S.C. Appropriations Act, Part 1.B. §34.55), if and when an applicant meets certain criteria under the proviso. By its inclusion of the term “may,” the proviso does not mandate any action by DHEC, but rather gives it the discretion to issue or deny a permit authorizing the construction of a seawall. Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001) (“The use of the word “may” in a statute signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute”).

The ALC and DHEC agree that use of the word “may” in the budget proviso grants DHEC, and thus the ALC, with discretion in determining whether to issue the permit. (Order, p. 18; Tr. 139, 207). In exercising this discretion, the Department is obligated to utilize fixed standards or rules to arrive at its determination. Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). And the Department must use fixed standards which are specific in order to prevent the decision from being invalid and arbitrary. Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997).

Moreover, failure to exercise discretion amounts to an abuse of that discretion. Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (“When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.”); Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990). It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is

to exercise the discretion improperly. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981).

The fixed rules and standards governing permit applications are contained in the critical area regulations promulgated by DHEC pursuant to the CZMA. S.C. Code Ann. §§ 48-39-50, -130(B); Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488,490-91, 413 S.E.2d 13, 14 (1991). DHEC uses specific project standards contained in the regulations when it reviews critical area permits. (Tr. 132). In this case, DHEC did not use any of those regulatory standards, instead relying completely on the budget proviso.¹ (Tr. 129-32). Had the DHEC applied the regulatory standards, it would have denied the permit. (Tr. 134).

Instead, DHEC believes that the project specific standards are contained in the budget proviso itself, which contained the only criteria that the Department applied in its review.² (Tr. 129-30; 302-03). DHEC's Blair Williams testified:

¹Mr. Stout admitted that during his deposition he testified that the only standards he utilized in his review were those contained in the budget proviso. (Tr. 135-36). During the hearing he altered his testimony to state that the Department considered other regulatory provisions aside from the budget proviso only to the extent that a member of the public raised those provisions in a comment letter because, under the law, the Department is required to consider those public comment letters. (Tr. 136, 151).

²Indeed, it is undisputed that the Budget Proviso grants the Department discretion if an application meets those criteria. However, prior to the exercise of that discretion, the proviso's criteria must first be met. In other words, in order for DHEC to begin exercising its discretion in considering an application for the construction of a new seawall, the proposal must include: 1) an existing wall of at least 4,000 feet; 2) a renourishment project authorized by the Department seaward of the wall with an active permit status as of July 1, 2014 that does not qualify for public funding; 3) construction of the new wall using like material; and 4) construction of the new wall no more than two (2) feet from the existing wall. If those criteria are not met, DHEC has no opportunity to exercise its discretion. An application that meets these criteria, as was the case for DBBO's proposal, triggers the Department's discretionary decision-making. Samples, 329 S.C. at 112, 495 S.E.2d at 216; Fontaine, 291 S.C. at 538, 354 S.E.2d at 566; Smith, 276 S.C. at 498, 280 S.E.2d at 202.

Q: And so what are the laws that guided the Department in this case?

A: That would be the budget proviso and those requirements under the budget proviso.

(Tr. 309, lines 18-21). DHEC's Chris Stout testified:

Q: Now would you say that you applied a specific project standard to this permitting decision?

A: The specific standards for it came right from the budget proviso.

Tr. 153, lines 14-18).

DHEC only considered other regulatory standards if and when they were raised in comment letters. (Tr. 302, 304, 313, 319). This is because DHEC is required by law to consider comments submitted during the public comment period. (Tr. 304), S.C. Code Ann. § 44-1-60(D). The Department did not respond to any of the 20 comment letters submitted objecting to and/or raising concerns about the project. (Tr. 131-32).

Ultimately, the Department concluded that if the project met the criteria listed in the budget proviso, i.e., that it be reconstructed with like material and the footprint in no more than two feet from the original footprint, then "it **would** issue a critical area permit." (Tr. 306, lines 21-22). **Mr. Williams testified that as long as the project fit within the proviso, he could not envision a set of circumstances under which the seawall permit would be denied.** (Tr. 307).

"A statute which, in effect, gives an administrative body 'an absolute, unregulated, and undefined discretion' bestows arbitrary powers and is an unlawful delegation of legislative powers." Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (citing Bauer v. S.C. State Housing Auth., 271 S.C. 219, 246 S.E.2d 869 (1987)); see also Inova Alexandria Hosp. v. Shalala, 244 F.3d 342, 348 (4th Cir. 2001) ("[L]anguage allowing for

discretion does not create unlimited discretion”); 2 Am. Jur. 2d Administrative Law § 48 (May 2017 Update). Where an agency has discretion, it must exercise that discretion. Failure to do so is an abuse of discretion and an arbitrary and capricious agency action.

The ALC found that not a single one of the project specific regulations apply “since there is no normal regulatory provision for the rebuilding of a seawall.” (Order, p. 6). The critical area regulations contain specific project standards applicable to both hard erosion control devices and to “special permits.” The seawall permit is considered a “special permit” because it involves an activity seaward of the agency’s jurisdictional baseline. (Tr. 137). Special permits are subject to Regulation 30-15(F), but DHEC did not utilize any of these standards.¹ (Tr. 137, 149).

In Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997), the court considered an as-applied challenge to a permitting decision where the Community Appearance Board (CAB), a local agency, based its decision on the grounds of one section of an ordinance, which provided general criteria, but ignored the other section providing specific regulations the board was required to consider.²

The court ruled that the board “had failed to apply the [specific] criteria provided by § 604 of the CAB Ordinance in denying the permits and held a decision based solely on the CAB

¹Special permits are issued only when the property owner would have no reasonable use of his property or an overriding public interest exists. S.C. Code Ann. Regs. 30-15(F)_____. DHEC did not determine that the property owners would have no reasonable use and does not believe that the project would provide any overriding public benefit. (Tr. 147-48). SEE P. 147-8 DHEC did not consider the impacts that the structure would have on the protection and preservation of the dry sand beach, even though the structure would be closer to ocean than the existing structure and thereby impinging on the public beach. (Tr. 149).

²The permit was sought to construct a billboard, and the CAB’s authority to issue the permit was under a city ordinance which contained two relevant sections. § 601.2 contained general objectives, stating that the ordinance was designed to prevent “inharmonious development.” Peterson, 327 S.C. at 233, 489 S.E.2d at 631. On the other hand, § 604 contained specific requirements that were to be considered as additional standards.

Ordinance's objectives, § 601.2, resulted in an unconstitutional application of the ordinance, thus rendering City Council's decision arbitrary." *Id.* at 234, 632. The court elaborated:

To deny a permit based solely on the ordinance's objectives grants CAB and/or City Council overly broad discretion and allows them to arbitrarily decide whether to approve a proposed structure. The objectives neither provide notice to potential applicants of the criteria nor do they provide any objective standards... A decision based solely on these objectives is constitutionally infirm.

Id. (emphasis added). The court briefly addressed the ordinance, and decided the law itself was constitutional because it contained a list of specific requirements, but the application of the ordinance was unconstitutional because it did not consider those, and other specific requirements, and was made solely under the discretionary language of the statute. *Id.*

Peterson is similar to the case at hand, because DHEC, like CAB, relied solely on a general, discretionary statute while ignoring specific, objective fixed rules or standards. While DHEC asserts that the budget proviso contains specific standards, *Peterson* clearly states that *all* relevant specific criteria must be considered. The satisfaction of one requirement does not preclude the consideration of all other relevant regulations.

Standing alone, the budget proviso allows DHEC to issue one permit, and deny another permit in identical circumstances. DHEC's failure to exercise discretion in this case by failing to apply the applicable regulations is arbitrary and capricious and invalid as-applied. *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939) (finding city's denial of permit arbitrary because no objective standards guided the decision; instead, the decision was based on unfettered will of the city).

B. The ALC Compounded DHEC's Failure by Erroneously Deeming Applicable Regulations Superseded, Even Though No Irreconcilable Conflict Exists

The ALC compounded DHEC's failure by outright rejecting **any and all** of the project specific regulations, on the grounds that the budget proviso superceded them all. In determining whether a permanent statute is suspended, the court must look to the budget proviso juxtaposed with the permanent statute. Beaufort Cnty. v. S.C. State Election Comm'n, 395 S.C. 366, 371, 374, 718 S.E.2d 432, 435, 436 (2011). In this regard, there must be an "irreconcilable conflict" between the appropriations act and the permanent statute before a court will find the latter temporarily suspended. Amisub of S.C., Inc. v. S.C. Dep't of Health & Env'tl. Control, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014) (citing Plowden, 185 S.C. at 236, 193 S.E. at 654). "Thus, **only provisions of a permanent statute that conflict with the current budget provisos are suspended.**" Amisub, 407 S.C. at 598, 757 S.E.2d 416 (citing Beaufort Cty., 395 S.C. at 374, 718 S.E.2d at 436); State ex rel. McLeod v. Mills, 256 S.C. 21, 26, 180 S.E.2d 638, 640 (1971) (finding only the provisions of the permanent statute that conflicted with the budget provisos were suspended during the fiscal year).

In Beaufort County, the court discerned legislative intent from **both** the statute and the proviso. Portions of a statute which do not conflict with the proviso remain viable. Id. That is not what happened here. Instead of suspending only the provisions conflicting with the proviso – or even undertaking an analysis to assess where irreconcilable conflicts exist – the ALC categorically suspended any and all provisions that might possibly warrant denial, regardless of whether or not there was a direct or irreconcilable conflict.

The League concedes that Section 48-39-290(B)(2)(a) and Regulation 30-13.N. which govern erosion control devices and outright prohibit any new seawall pose an irreconcilable conflict with the budget proviso, which explicitly authorizes a new seawall. However, the conflict ends with those provisions. Numerous other provisions of the CZMA and the regulations provide fixed rules, but do not directly or irreconcilably conflict with the proviso.

For example, the “special permits” Regulation 30-15.F states that:

- (1) A structure cannot be constructed or reconstructed on a primary oceanfront dune or on the active beach, and in the event that the beach erodes so that in the future the permitted habitable structure is located on the active beach, the property owner agrees to remove the structure at his own expense.
- (2) There shall be no adverse impact on the stated policies of the Beachfront Management Act, including the policies protecting the sand dunes and preservation of the dry sand beach.
- (3) The granting of a special permit shall not create a situation contrary to the public health, safety or welfare.
- (4) In determining whether or not a permit is contrary to the public health, safety or welfare; the Department shall consider:
 - (a) whether or not the proposed structure would be constructed on renourished beach;
 - (b) the erosion rate at the site;
 - (c) how soon the structure will be located on the active beach;
 - (d) whether or not the proposed structure meets American National Standards Institute building standards; and/or
 - (e) the potential cumulative effect that similar structures will have upon the beach/dune system

In addition, an applicant must show no reasonable use of her property or an overriding public interest in order to obtain a “special permit” such as this.¹ S.C. Code Ann. Regs. 30-15.F.

¹DBBO has not shown that it or its members, who are beachfront homeowners where the proposed new seawall would be located, have no reasonable use of their properties. The members of DBBO presently have homes on the beach, which they are presently using and enjoying, as evidenced by the testimony of Price Sloan. (Tr. 349-400). On the second point,

No conflict exists with the statutory requirement that a project will have “no adverse impact on the stated policies of the Beachfront Management Act, including the policies protecting the sand dunes and preservation of the dry sand beach.” S.C. Code Ann. Regs. 30-15.F(2). DHEC’s Christopher Stout confirmed that his agency must consider this provision in reviewing special permits, and that he routinely does so. (Tr. 146). Mr. Stout further testified that preservation of the dry sand beach is one of the goals established by the General Assembly in passing the act. (Tr. 149). Yet Mr. Stout admitted that the Department did not consider the effect of the bulkhead structure on the goal of preserving the dry sand beach.¹ (Id.) And the ALC rejected the notion that it consider the same, on the basis of a direct conflict.²

A regulation is not in irreconcilable conflict simply because, as applied to the facts of a case, it may warrant against the project. Yet that is the crux of the ALC’s determination. When reasonably possible, statutes in apparent conflict should be interpreted to allow both to stand. Nat’l Adver. Co., Inc. v. Mt. Pleasant Bd. of Adjustment, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994); Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992); Powell v. Red Carpet Lounge, 280 S.C. 142, 145, 311 S.E.2d 719, 721 (1984). The Last Legislative Expression Rule “is purely an arbitrary rule of construction and is to be resorted to **only when there is clearly an irreconcilable conflict**, and all other means of interpretation have been exhausted.” Feldman v.

DHEC admitted that the proposed seawall would not provide an overriding public benefit. (Tr. 147-48).

¹On this question, Dr. Robert Young explained that the preservation of the dry sand beach is important for economic and recreational reasons, and further explained that the proposed bulkhead is inconsistent with the policies of retreat from the beach and preserving the dry sand beach. (Tr. 216, 219-22, 228-29). Dr. Young’s uncontradicted testimony is that the proposed bulkhead would result in a loss of the dry sand beach.

² The League submits that if the new seawall were constructed landward of the existing wall, the loss of dry-sand beach occasioned by the active, passive and placement loss from the permitted structure would not occur.

S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22, 24 (1943). “Where two statutes can be reconciled and are susceptible of a construction which will render both operative without doing violence to either, it is the duty of the court to so construe them.” Porter v. S.C. Pub. Serv. Comm'n, 327 S.C. 220, 224, 489 S.E.2d 467, 469 (1997).

The ALC should have undertaken an assessment of whether an irreconcilable conflict existed with all of the applicable statutory and regulatory provisions, and if so whether all other means of interpretation had been exhausted. It did not. Had it done so, it would have applied those provisions, and the special permit project standards, in particular, and determined that the project as designed two feet seaward of the existing structure eliminates rather than preserves the dry sand beach, for example.

Notwithstanding the specific prohibitions of Section 48-39-290, this Court may conclude that the budget proviso takes precedence; however, the budget proviso cannot also be read to supersede the numerous other provisions of the CZMA which do not present a direct, irreconcilable conflict, and which would be applicable to the project at hand. For instance, our State’s policy is to:

- “protect, preserve, restore and enhance the beach/dune system”;
- “severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies ... which will provide for the protection of the shoreline without long-term adverse effects;”
- “encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;” and

– “preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens . . .”

S.C. Code Ann. § 48-39-260(1), (3), (4), (6).

To effectuate these findings and policies, the CZMA established a forty-year policy of retreat from the shoreline.¹ S.C. Code Ann. § 48-39-280(A). The Act also requires that “critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people . . . the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of the [CZMA].” S.C. Code Ann. § 48-39-30(D); Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Env’tl. Control, 411 S.C. 16, 766 S.E.2d 707 (2014) (economic benefits to developer in use of critical area cannot override public’s interest in and use of critical area).

In addition, the CZMA requires DHEC to review the critical area permit at issue in this appeal for consistency with the Coastal Management Program (“CMP”). S.C. Code Ann. § 48-39-80(B)(11). For that reason, all of the policies of the CMP apply, even though the Department did not utilize any of those policies. In particular, the CMP requires the Department to consider whether an erosion control structure, like a revetment or bulkhead, would impede the public use of beaches below the mean high water line. CMP, Chapter IV-57.

DHEC did not consider any of these applicable laws, and the ALC undertook no analysis to determine whether there was an irreconcilable conflict and whether any reading of the laws could allow both to stand. The ALC agrees that it must apply the law as written, but it then

¹Dr. Young testified that constructing the proposed new bulkhead is not wise coastal management and, in fact, is inconsistent with the CZMA’s policy of retreat. (Tr. 246). Specifically, Dr. Young stated that “allowing anything to move seaward contradicts” the CZMA, and specifically the policy of retreat. (Tr. 246, lines 13-140).

concludes that policies of the Beachfront Management Act are “suspended for the 2014-15 fiscal year” by the proviso. (Order, p. 19). The ALC concludes that the regulatory standards applicable for “special permits” like the seawall permit at issue here, are not applicable to the seawall permit because they are “intended for permissible structures, and not erosion control devices.” (Order, p. 20). The ALC summarily concludes that these special permit regulations “do not apply in this case.” (Order, p. 20). The ALC’s logic is flawed. It cannot both be bound to “apply the law as written,” but then reject those laws simply because they might, as applied, require denial of the permit. Yet that is exactly what the ALC did here. The ALC sweepingly dismissed any and all regulations which might warrant against the new seawall, despite a lack of direct conflict.

III. The Budget Proviso Violates the State Constitution’s One Subject Clause

As a branch of the executive, the ALC did not reach the facial validity of the budget proviso, expressly recognizing its limitations as a branch of the executive; however, this Court has jurisdiction to make that determination. “ALJs [cannot] rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated... [M]erely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling.” Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) (also, claimant is not required to exhaust administrative remedies when challenging the constitutionality of a statute). Dorman v. Dep’t of Health & Env’tl. Control, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002). “Facial challenges to a statute or regulation . . . are legal questions that are properly raised for the first time on appeal.” Travelscape, LLC v. S.C. Dep’t of Revenue, 391 S.C. 89, 109, 705 S.E.2d 28, 39 (2011). The raises a facial challenge to the constitutionality of the budget proviso by way of this appeal.

The budget proviso allows a small handful of homeowners residing in DeBordieu Colony to be exempt from the Act's erosion control device prohibitions. 2015 S.C. Appropriations Act, Part 1.B. §34.1.¹ The language specifically targets DeBordieu Colony, as it is the only seawall which meets the proviso's requirements (i.e. length, funding, permit specifications). The budget proviso is in direct conflict with the CZMA and its express prohibition on seawalls. As such, any reliance on the budget proviso to override the clear language of the Act is misplaced and violates the South Carolina Constitution.

Article III, Section 17 of the South Carolina Constitution, commonly referred to as the One Subject Provision, states: "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. Art. III § 17 (1968). The purpose of the One Subject Provision are: (1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative "log-rolling";² and (3) to inform the people of the State of the matters with which the General Assembly concerns itself. Am. Petroleum Inst. v. S. C. Dep't of Rev., 382 S.C. 572, 576-77, 677 S.E.2d 16, 18 (2009) (citing S.C. Pub. Serv. Auth. v. Citizens and S. Nat'l Bank of S.C., 300 S.C. 142, 162, 386 S.E.2d 775, 786-87 (1989)).

The One Subject Provision prevents the General Assembly from engaging in the passage of misleading bills containing provisions not indicated in their titles and appraises the people of

¹This portion of the Appropriations Act for DHEC's budget is cited at p. 7 above.

²"Log rolling" is a "legislative practice of including several propositions in one measure ... so that the legislature ... will pass all of them, even though these propositions might not have passed if they had been submitted separately." Black's Law Dictionary 849 (7th ed.1999). To prevent this practice, our constitution requires that an act relate to only one subject. Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980).

the subject of the proposed legislation, thus giving them an opportunity to be heard if they so desire. Colonial Life & Accident Ins. Co. v. S.C. Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908 (1958). The constitutional provision prevents deception of the public, Miles Laboratories v. Seignious, 30 F.Supp. 549 (E.D. S.C. 1939), and prevents surreptitious legislation and the insertion of matters not germane to the general subject, Furman v. Willimon, 106 S.C. 159, 90 S.E. 700 (1916).

General appropriations acts, such as the one containing the budget proviso at issue here, are to have one “sole[]” subject: “to make appropriations to meet the ordinary expenses of state government and to direct the manner in which the funds are to be expended.” Ex parte Georgetown Cty. Water & Sewer Dist., 284 S.C. 466, 469, 327 S.E.2d 654, 656 (1985). Thus, appropriations bills comply with Article III, Section 17 if they are reasonably and inherently related to the raising and spending of money. Keyserling v. Beasley, 322 S.C. 83, 87, 470 S.E.2d 100, 102 (1996) (citing Hercules v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980)). Indeed, when reviewing the constitutionality of an appropriations act, the Court looks at “whether the challenged legislation reasonably and inherently relates to the raising and spending of tax monies.” Ex parte Georgetown Cnty. Water & Sewer Dist., 284 S.C. 466, 469, 327 S.E.2d 654, 656 (1985); see also Maner v. Maner, 278 S.C. 377, 382, 296 S.E.2d 533, 536 (1982). “The topics in the body of the Act should be kindred in nature and have a legitimate and natural association with the subject of the title, and if the provisions of the Act itself cannot be fairly construed as embraced within the title of the Act, then it is in conflict with the constitution.” Douglass v. Watson, 186 S.C. 34, 42, 195 S.E. 116, 119 (1938).

In the instant case, the budget proviso authorizing DHEC to exercise discretion in determining whether to issue a critical area permit for the construction of an erosion control device is not remotely germane to the state's budget, nor is it reasonably and inherently related to the raising and expenditure of monies. The phrase in the budget proviso providing that DHEC "may charge a permit fee" is misleadingly useless as DHEC already has authority to charge fees associated with critical area permits. S.C. Code Ann. § 48-39-145(A) ("The department may charge an administrative fee upon application for alteration of a critical area . . ."). Thus, the budget proviso has no impact on the State's ability to raise revenue.

At base, the budget proviso purports to alter prohibitions in the Act without actually amending the Act itself. Indeed, the budget proviso was passed after an attempt to amend the Act failed in the House of Representatives. (Order, p. 3, Tr. 407-08). Because the budget proviso violates the South Carolina Constitution, it must be invalidated as unconstitutional by this Court and cannot be relied upon by DHEC or the ALC.

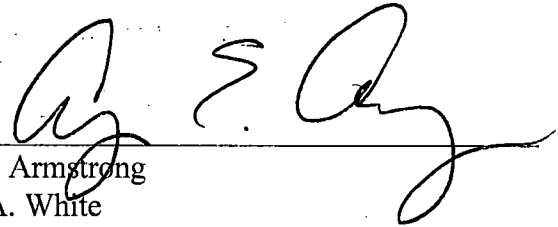
DHEC is prohibited from issuing decisions in violation of constitutional provisions pursuant to § 1-23-610(B). Because it issued a critical permit authorizing the construction of a seawall pursuant to an unconstitutional enactment, its decision violates Article III, Section 17 of the South Carolina Constitution.

CONCLUSION

WHEREFORE, the Appellant South Carolina Coastal Conservation League respectfully requests that this Court enter an Order reversing the Administrative Law Court's Final Order and Decision and finding that the Appellant has established both statutory and Article III standing and that the permit must be denied because the budget proviso violates the One Subject Clause of

the South Carolina Constitution or, alternatively, that the ALC erred in failing to apply the applicable statutory and regulatory provisions that do not irreconcilably conflict with the budget proviso.

Respectfully submitted,



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March 12, 2018

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah B. Durden, Administrative Law Judge

Appellate Case No. 2017-001977

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SC Court of Appeals

South Carolina Coastal Conservation League,

Appellants,

vs.

South Carolina Department of Health and Environmental Control and
DBBO, LLC,

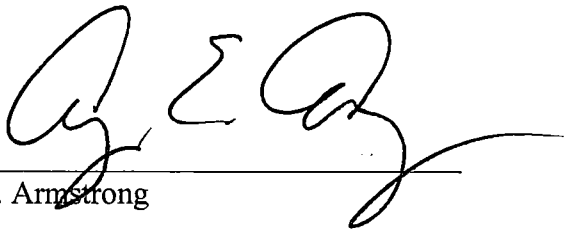
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Initial Brief and Designation of Matter on Respondents SCDHEC and DBBO by placing copies of same in the U.S. Mail addressed to:

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March 12, 2018



The South Carolina Environmental Law Project
Lawyers for the Wild Side of South Carolina

March 12, 2018

a 501c3
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Re: SC Coastal Conservation League v. SCDHEC and DBBO;
Appellate Case No. 2017-001977

Dear Ms. Kitchings:

Enclosed for filing please the original and one copy of the Appellant's Initial Brief and Designation of Matter, along with my certificate of service.

Please return a clocked-in copy in the self-addressed, stamped envelope provided.

Thank you very much for your kind cooperation and assistance.

Yours very truly,


Amy E. Armstrong

cc: Mary D. Shahid
Angelica M. Colwell
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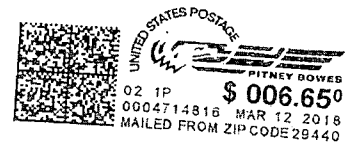
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