STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No. 2017-001554

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Court of Appeals

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

Of Which Town of Arcadia Lakes is the Appellant/Respondent,

vs.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

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RECORD ON APPEAL
VOLUME II OF IV

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June 7, 2018

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

PETITION FOR WRIT OF CERTIORARI

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July 11, 2013

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CERTIFICATE OF COUNSEL

Pursuant to SCRAP, Rule 242(d)(1), counsel for Petitioners certifies that a Petition for Rehearing was filed with the Court of Appeals in the case of Town of Arcadia Lakes, et al. v. SCDHEC and Roper Pond, LLC, Opinion No. 5095, on March 21, 2013. (Shearouse Adv. Sht. No. 11 at 38-55). The Court of Appeals withdrew its Opinion dated March 6, 2013, substituted and refiled a new Opinion on June 12, 2013. Op. No. 5095 (Shearouse Adv. Sht. No. 29 at 110-127).

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals erroneously apply this Court's well-established standards on standing by:

A. failing to confer standing despite Petitioners aesthetic and recreational interests in viewing the lily pad pond whose excavation is authorized by the challenged permit when Smiley v. DHEC, 374 S.C. 326, 649 S.E.2d 31 (2007) and Sea Pines v. SCDNR, 345 S.C. 594, 550 S.E.2d 287 (2001) both hold that purely aesthetic and recreational interests give rise to judicially cognizable injury in fact;

B. Injecting a new requirement that a Plaintiff must have a property interest in the area where the challenged activity is located; and

C. Requiring proof on the merits or proof of a future violation in order to establish a causal connection between the injury and the challenged activity, despite the fact that the challenged activity in this case is a permit authorizing the excavation of the lily pad pond that Petitioners enjoy viewing?

II. When the Court of Appeals Agreed with Petitioners that DHEC's Scope of Review Requires it to Consider the "Overall Project" and Not Just the Area Covered by the Nationwide Permit, Did it Err in Failing to Remand the Decision to DHEC With Instructions to Consider the Impacts of the "Overall Project" in Light of Information that Waters of the State – the Lily Pad Pond – Would Be Impacted Beyond Impacts Authorized Under the Nationwide Permit?

III. Did the Court Err in Concluding that Roper Pond Has Valid 401 Certification When the Project Includes Impacts Beyond Those Authorized by the Nationwide Permit and DHEC's 401 Certification of that Permit and When DHEC Undertook No Review of Those Impacts?

IV. Did the Court Err in Concluding that Coverage Under the State Stormwater General Permit Was Proper When DHEC Did Not Review or Consider Impacts to Waters of the State Resulting in Roper Pond Not Having a Valid 401 Certification or Valid 404 Permit, as Required for Coverage Under the General Permit?

STATEMENT OF THE CASE

This case presents issues of standing in environmental cases and the scope of the South Carolina Department of Health and Environmental Control's ("DHEC") authority to review impacts to waters of the State. The Court of Appeals issued an Opinion with two errors of law that warrant review by this Court pursuant to SCACR Rule 242.

First, the Opinion contradicts this Court's well-established law on standing in environmental cases by (1) injecting a new requirement that a Plaintiff have a property interest in the area over which the challenged activity will occur to establish an injury-in-fact, (2) injecting a requirement for causal connection that a Plaintiff prove success on the merits, or a future violation and (3) finding aesthetic and recreational interests insufficient to confer standing.

Second, the Opinion addresses a novel issue of law in holding that DHEC's scope of review under the 401 water quality certification project is limited to review only of impacts that are regulated by the United States Army Corps of Engineers ("Corps") under the Clean Water Act. The Court of Appeals first agrees with Petitioners that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by an NWP, but then fails to apply its conclusions to the certification and General Permit coverage at issue in this appeal. The result is that DHEC's scope of review under the 401 certification program is identical to the Corps' scope of review under the Clean Water Act.

Background

This case arises from Roper Pond, LLC's proposal to construct a high density apartment complex on a tract of land consisting of 12.75 acres, including 1.8 acres of wetlands and waters identified by the Corps of Engineers as falling under the jurisdiction of the Clean Water Act. (R. pp. 534-541; 542-548; 555-562). A majority of the jurisdictional area consists of a pond, known as the "lily pad pond" or "Roper Pond," which is located on Trenholm Road and is adjacent to the

Town of Arcadia Lakes. (R. pp. 534-541; 542-548; 555-562). The pond drains through a pipe under Trenholm Road into Cary Lake, a portion of which lies within the Town of Arcadia Lakes. (R. pp. 534-541; 542-548; 555-562).

In order to undertake the proposed multi-family residential construction activities on the 12.75 acre tract, Roper Pond, LLC, has to obtain a number of approvals from DHEC and the Corps. One of those approvals is a DHEC stormwater permit for land-disturbing activities. *See* 24 S.C. Code Ann. Regs. § 61-9.122.26(c). DHEC issued a general stormwater permit entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" ("NPDES General Permit") and Roper Pond, LLC, sought approval under this NPDES General Permit.

To obtain approval under the NPDES General Permit, Roper Pond, LLC submitted a Notice of Intent ("NOI") for Stormwater Discharges. (R. pp. 549-550) The NOI requires the applicant to identify all jurisdictional wetlands in the project area, whether there will be any impacts to those wetlands, and the amount of wetlands proposed to be impacted. Roper Pond's consultant left the line identifying the area to be dredged or excavated blank, even though he admits that the project includes dredging. (R. pp. 553-554; 467-468).

Critically, the NPDES General Permit requires an applicant to obtain any required wetlands permit before DHEC will grant coverage under the NPDES General Permit. The wetlands permit is a Clean Water Act §404 permit, which is required if an applicant proposes to place fill material in wetlands that are waters of the U.S[1]. 33 U.S.C.A. § 1344(a). The Corps §404 permit in turn

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[1]The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC's review authority over waters of the State derives from the Pollution Control Act, the 401 water

triggers the requirement for a §401 Water Qualify Certification from DHEC that the §404 Permit is consistent with the §401 water quality regulations and State water quality standards. *See* 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, *et seq.*

The Clean Water Act also authorizes categories of general permits under § 404 called Nationwide Permits ("NWP") for certain activities deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). DHEC issued 401 water quality certifications for the NWPs. The certifications included general conditions that must be met in order for the DHEC 401 certification to be valid and the NWP to be effective. (R. p. 563; S.C. Code Ann. Reg. 61-101.A.). **The general conditions of that certification require DHEC to consider the "over proposed project," including "all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by the NWP." (R. p. 563). The general conditions say that "Impacts to . . . adjacent waterbodies or wetlands resulting from the activity will be considered during the review of these actions."** (R. p. 563).

For the Corps 404 permit to be issued and effective, the project must have a DHEC 401 certification. Where an NWP is involved, DHEC must affirmatively certify that the project meets the general conditions of its 401 certification in order for the project to have an approved and effective Section 404 Nationwide Permit. An approved and effective 404 permit is necessary for coverage under the NPDES General Permit. The General Permit conditions expressly require that any Corps of Engineers 404 permit required under the CWA be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487).

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quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.

The Petitioners challenge the issuance of the storm water permit and corresponding coverage under the NPDES permit based on Roper Pond, LLC's failure to meet all of the requirements for coverage under the NPDES permit program, including its failure to comply with the general conditions of DHEC's 401 certification and failure to obtain the appropriate State approvals for dredging and excavation of an on-site pond.

A hearing was conducted on September 4-5, 2009, in the Administrative Law Court ("ALC"). Administrative Law Judge John D. McLeod issued a final order and decision on January 21, 2010, affirming the DHEC decision and ruling that the Petitioners lacked standing to maintain this action. The Petitioners filed a Motion to Reconsider and For Stay on February 1, 2010. On March 23, 2010, and the ALC issued an Order for Temporary Stay pending a decision on the Motion to Reconsider. On April 1, 2010, the ALC issued an Order Denying Motion for Reconsideration and For Stay.

On April 20, 2010, Petitioners filed a Notice of Appeal. The Court of Appeals heard oral arguments on May 8, 2012 and issued Opinion No. 5095 on March 6, 2013, affirming the ALC's Order. The Appellants filed a Petition for Rehearing on March 21, 2013. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion on June 12, 2013.

Pursuant to Rule 242, SCACR the Appellants Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown respectfully petition this Court for a Writ of Certiorari to review the Court of Appeals' Opinion No. 5059, dated June 12, 2013.

SUMMARY OF ARGUMENT

The Appellants respectfully submit that Certiorari is warranted in this case for two reasons. First, the Court of Appeals Opinion is in direct conflict with prior decisions of this Court on Article III standing. Second, the Court of Appeals Opinion addresses a novel question of law, specifically whether DHEC is required to review impacts to waters of the State beyond the impacts authorized by a Clean Water Act General Permit.

The Court of Appeals' Opinion directly contradicts South Carolina Supreme Court and United States Supreme Court decisions on standing, which will likely have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their neighborhoods. The Opinion injects a new requirement for injury in fact that a Plaintiff have a property interest in the area over which the challenged activity will occur. The Opinion further injects a requirement for causal connection that a Plaintiff prove the merits or a future violation.[2] Neither of these standards have been applied by any court, indeed, both federal and South Carolina courts hold the contrary.

The Court of Appeals' Opinion also addresses a novel issue of law regarding the scope of DHEC's authority to review impacts to waters of the State when those impacts are not regulated by the Corps under the Clean Water Act. The Court of Appeals agrees with Petitioners' arguments that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by an NWP, but then fails to apply its conclusions to the certification and General Permit coverage at issue in this appeal.

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[2]This new standard of proving success on the merits or a future permit violation as a prerequisite to standing has already been cited in a Motion to Dismiss for Lack of Standing filed in the case of Preservation Society of Charleston v. S.C. State Ports Authority, Docket No. 13-ALJ-07-0056-CC, on July 1, 2013.

ARGUMENT

I. The Lower Court's Opinion Contradicts the Law of Standing Adopted by this Court

This Court has adopted the three-pronged federal test for standing enunciated in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130 (1992), 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 traceable to the challenged action of the defendant, and not the 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. Smiley v. DHEC & Wild Dunes Community Assn., 374 S.C. 326, 332, 649 S.E.2d 31, 32 (2007); Sea Pines Association for the Protection of Wildlife, Inc. v. S.C. Department of Natural Resources, 345 S.C. 594, 550 S.E. 2d 287 (2001). The Court of Appeals decision is inconsistent with this well-established test in that it creates out of thin air new requirements for standing that have never been adopted by this Court or any federal court.

A. The Court Injects a New Test for Injury-in-Fact

The lower court cites the correct test for standing, but then, in a rather confusing opinion, injects a new requirement that an Appellant must have a property interest in order to establish an injury-in-fact. The court first recites all of the injuries described Linda Jackson, Elaine Starr and Richard Thomas, Town Mayor, acknowledging that the Petitioners will suffer some injury-in-fact[3],

[3]"The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC **to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.**" (Shearouse Adv.Sht. No. 29 at 122).

but then concludes that the Petitioners complaints **"primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact."**[4] (Shearouse Adv. Sht. No. 29 at 123) (emphasis added). The result is an opinion that diverges from this Court's holding that a plaintiff's injuries may stem from aesthetic interest in viewing private property. S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); see also Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998).

The lower court cites to the "visual appeal of Roper Pond" discussed by Mrs. Jackson. (Shearhouse Adv. Sht. No. 29 at 122). The court acknowledges that Mrs. Jackson's aesthetic and recreational interests are exactly the type of injury that courts have found sufficient to establish standing. (Id.) Indeed, Mrs. Jackson testified that she has walked or run past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (R. p. 373). She described the pond as "absolutely beautiful." (R. p. 374).

Elaine Starr, who lives on Cary Lake testified that she also enjoyed viewing the lily pad pond and said it is "absolutely gorgeous." (R. p. 400). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic part of the community. (R. pp. 400; 413). She testified that if the pond is dredged there will be loss of a lot of life in the sediment itself and the lilies she enjoys seeing will not be there. (R. p. 401).

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[4]Interestingly, when it comes to Elaine Starr's testimony, the Court overlooks the fact that Mrs. Starr, who lives on Cary Lake and is a member of the Cary Lake Homeowners Association, who owns Cary Lake, which is the receiving water body for Roper Pond's stormwater.

The lower court appears to recognize that aesthetic and recreational interests are sufficient to establish an injury-in-fact in citing Sea Pines, but then inexplicably it inserts a new standard requiring Plaintiffs to have property rights in the areas over which an environmental permit is sought, citing Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974). Costanzo stands for the proposition that an injury in fact cannot be *assumed* when the challenge involves private property. But in this case, Petitioners did not expect the court to *assume* anything. Rather, the Petitioners put forth evidence of injury in fact in the form of harm to recreational and aesthetic interests, similar to that alleged in Smiley v. SCDHEC, 374 S.C. 326, 649 S.E.2d 31 (2007); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003). Even the court in Costanzo noted that the "claimed injury need not be great or substantial; an '**identifiable trifle**', if actual and genuine, gives rise to standing." Id. at 501 (citing SCRAP, 412 U.S. 669, 687-689, n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

Not only did the Petitioners identify harm to their aesthetic and recreational interests, they went on to describe even more injuries that would result directly from the development project at issue in this appeal: degraded water quality as a result of the project; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental quality of the Town; and increased crime, traffic and congestion as a result of the project. Certainly these allegations are more than an "identifiable trifle" needed for standing, but

instead the lower court equates these allegations of harm with a requirement for proof on the merits or proof of a permit violation. See Section II below.

The lower court applies the same requirement to the Town, rejecting the Town's interest in protecting Cary Lake, based on the fact that "the Town ha[s] no ownership interest in Cary Lake."[5] (Shearhouse Adv.Sht. No. 29 at 121). The addition of this new, heightened standard for injury in fact contradicts numerous South Carolina appellate court decisions, as well as Fourth Circuit and U.S. Supreme Court cases adopted in South Carolina, finding standing on nearly identical allegations of harm to aesthetic or recreational interests.

In contrast to the lower court's holding, South Carolina courts have found environmental plaintiffs to have standing, despite the fact that an activity occurs on another's private property. In S.C. Wildlife Fed'n v. S.C. Coastal Council, the Court held that the appellants adequately alleged an individualized injury in the adverse effect of a certification decision on their members' use and enjoyment of wetlands proposed for dredging on a private development site. 296 S.C. 187, 371 S.E.2d 521 (1988). In Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), the Court held that plaintiffs that live adjacent to a privately owned wetland had standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife. 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998). In Spectre v. DHEC, the Court upheld Appellants challenge to the filling of 32 acres of "isolated" wetlands on private property. 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

Further, our courts have long held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In Smiley the Supreme Court held that a

[5] Further, the lower court adopts, and does not correct, the ALJ's exclusive reliance on whether the Town possesses an ownership interest in Cary Lake and Roper Pond. See Final Brief, p. 41.

plaintiff must make claims as to "use and enjoyment" of an affected area. Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007).

The lower court's holding that Petitioners' lack of property right or interests in Roper Pond (or Cary Lake) precludes an injury in fact is not only contrary to the law of standing, it leads to the result that only those with property interests have standing. The practical effect of the Opinion is that only the Applicant/site owner would have standing to challenge this project. That cannot and has never been the law in South Carolina.

B. As to the Town, the Court Further Misapprehends Injury in Fact

In addition to imposing the same property right requirement on the Town, the Court further misconstrues the law of standing as applied to municipalities by applying an analysis than is not supported by case law.

While few cases in South Carolina have addressed the law of standing as applied to municipalities, the lower court cites to Glaze v. Grooms, 324 S.C. 249 (Ct. App. 1996) for its holding that a "municipality must allege an infringement of its own proprietary interests and statutory rights" distinct from that of its individual citizens. (Shearhouse Adv. Sht. No. 29 at 120). Neither Glaze nor any other South Carolina case Petitioners have been able to uncover expands on exactly what it means for a municipality to suffer infringement of a "proprietary interest" or "statutory right" distinct from its citizens. However, reference to other jurisdictions that have applied these standing principles under circumstances similar to the ones at hand make clear that the Town's allegations are sufficient to establish an injury in fact.

"The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. **The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets.**" City of Sausalito v. O'Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (emphasis added). The court in City of Sausalito reached this conclusion while noting, the same as South Carolina courts, that a municipality could not simply assert the interests of its citizens and instead only had standing to protect its own "proprietary interests." Id. at 1197. In elaborating on the type of interests that are sufficient to confer standing on a municipality the court noted as follows:

> We have recognized that a municipality has an interest in, inter alia, its ability to **enforce land-use and health regulations**, *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), and its **powers of revenue collection and taxation**, *Colorado River*, 776 F.2d at 848-49. A municipality also has a proprietary interest in **protecting its natural resources from harm**. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002), amending 271 F.3d 911(9th Cir. 2001). We have also found constitutionally sufficient injury to proprietary interests where "**land management practices of federal land could affect adjacent [city]-owned land.**" *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir.1995) (internal quotation marks and citation omitted).

Id. at 1198 (emphasis added).

The lower court recites the Town's allegations that fall in line neatly with these proprietary interests. The Town's interest in "protecting the environmental quality of Cary Lake" and its interest in "maintaining its character and desirable attributes, including aesthetic appeal" are aimed at protecting natural resources from harm. (Shearhouse Adv. Sht. No. 29 at 120-121). The Town's testimony that there would be a "diminution of property values within the Town" is

an interest in its powers of revenue and tax collection. Id. The Town's interest in its "ability to comply with federal law" is an interest in application and enforcement of land use regulations. Id. Each of the injuries recited by the lower court are sufficient to establish an injury-in-fact.

The lower court dismisses the Town's stated interest in its ability to comply with federal law, specifically the Clean Water Act's requirements for municipalities to obtain permits for discharges. The court's brief analysis in a footnote on page 121 of the Opinion fails to uncover the Town's obligations under the CWA. The Town operates a Municipal Separate Stormwater System ("MS4") that necessitates an NPDES permit and requires compliance with NPDES standards and limitations. See (R. pp. 828, 844). The Town is legally required to prevent pollution from its MS4,[6] which includes runoff entering its storm drains and pipesfrom Roper

[6]Contrary to the lower court's conclusion, the Town is required to have an NPDES stormwater permit that imposes a continuing duty to comply with certain standards and limitations, and subjects the town to liability/responsibility if it fails to do so. 33 U.S.C. § 1342(p)(4) ("the Administrator shall establish regulations setting forth the permit application requirements for [MS4] stormwater discharges . . . Any such permit shall provide for compliance as expeditiously as practicable").

Under the Clean Water Act, MS4s fall under the definition of "point sources." See 33 U.S.C. § 1362(14). The CWA prohibits the discharge of any pollutant from a "point source" into the navigable waters of the United States unless the point source is covered by an NPDES permit. See, 33 U.S.C. §§ 1311(a), 1362(12)(A)); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999). MS4s are no exception – a municipality operating an MS4 that discharges into navigable waters must comply with the NPDES permit program. See, 33 U.S.C. § 1342. Particularly, an NPDES permit requires its holder, the municipality, to comply with certain effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and discharge requirements. See, 33 U.S.C. §§ 1342(a), 1311, 1312, 1314, 1316, 1317, 1318, 1343. The project at issued in this case has the distinct potential to detrimentally impact the Town's ability to comply with those standards and limitations. When an MS4 operating municipality does not comply with the NPDES requirements, that municipality is subject to suit and liability under the CWA, which can be initiated by either the government or private citizens. See, e.g., Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519 (5th Cir. 2008); Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011).

Further, as to an MS4, the CWA "does not distinguish between those who add and those

Pond's development. See (R. pp. 828). The lower court misapprehends the relationship between the challenged project and the Town's CWA obligations. In arguing standing to this Court, the Town asserted its interest in complying with federal law, specifically the Town's Clean Water Act NPDES permit, exactly the type of interest identified in City of Sausalito v. O'Neill.

C. Causal Connection Does Not Require Proof on Merits or Proof of a Potential Future Violation

In this case, the causal component of standing requires that "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." Smiley v. S. Carolina Dep't of Health & Envtl. Control, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992)). In this case, the conduct complained of is the excavation and dredging of Roper Pond without any DHEC review or approval. That excavation is "fairly traceable" to the challenged activity, which is approval of Roper Pond's construction activities – including excavation of the pond – under the NPDES General Permit. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). Instead of applying this "but for" analysis, the lower court's opinion requires that the Petitioners' injury in fact be fairly traceable to a violation

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who convey what is added by others—the Act is indifferent to the originator of water pollution." Natural Res. Def. Council, 673 F.3d at 900. In other words, if stormwater from Roper Pond causes the Town's MS4 to be noncompliant, the Town itself is liable. The court plainly overlooks the Town's responsibility under the Clean Water Act's NPDES program.

or noncompliance on the part of Roper Pond. In short, the Opinion requires that the Petitioners prove the merits of the case in order to prove standing. That is not and has never been the law.

In the oft-cited case of Flast v. Cohen, the United States Supreme Court explained that "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution; accordingly, emphasis . . . is on whether party . . . has personal stake in outcome of controversy and whether dispute touches upon legal relations of parties having adverse legal interest." Flast v. Cohen, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L. Ed. 2d 947 (1968). The "relevant showing . . . is not injury to the environment but injury to the plaintiff." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

The Petitioners offered testimony that when the pond is excavated, as will happen under the permitted project, their enjoyment in viewing the pond and related activities would be eliminated. (R. p. 374-376 & 401). But instead of assessing those injuries, the lower court rejected them held that Petitioners to establish a causal connection the Petitioners must prove that there will be a violation of the challenged permit, that the "Best Management Practices" are inadequate, or that there would be mismanagement of the project. (Shearhouse Adv. Sht. 121, 123). Proof of the merits of this case or a future violation is a wholly separate issue from whether the activities that are part of the challenged project – in this case the excavation of the pond – bear a causal connection to the Petitioners' injury in fact.

Two United States Supreme Court opinions explain the distinction between a plaintiff's injury in fact and proof of violations or inadequacy of a permit. In Allen v. Wright, the U.S. Supreme Court explained the distinction as follows:

> **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,"** (citing United States v. Richardson, 418 U.S. 166, 174, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (quoting Flast, 392 U.S., at 99, 88 S.Ct., at 1952). The strength of the plaintiff's interest in the outcome has nothing to do with whether the relief it seeks would intrude upon the prerogatives of other branches of government; the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing. **Imposing an undefined but clearly more rigorous standard for redressability for reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation**, a result that would be avoided if the Court straightforwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.

Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984).

The court's misapplication of the causation principle is further illustrated by analogy to a similar case. In Duke Power Co. v. Carolina Envtl. Study Group, Inc., the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to $560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged

the constitutionality of that Act. Id. at 67. For purposes of standing, the plaintiffs asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. Id. at 73-74. First, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." Id. at 73. Rather, "several of the 'immediate' adverse effects'" of the nuclear plants, including "environmental and aesthetic consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." Id. at 73-74. In the same way, while the Petitioners have asserted immediate adverse effects resulting from completion of the permitted activity, i.e., excavation of the pond leading to loss of aesthetic enjoyment.

As to causation, the Duke Power Court applied a **but-for standard.** Id. at 74-75. The plaintiffs position on causation was that but for the Act's limitation on liability, the nuclear plants would not be constructed, and the "immediate adverse effects" would then not occur. Id. at 74. The Court found a "substantial likelihood" of this "but for" relationship, and upheld causation and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs' standing. **The plaintiffs' injuries in fact had nothing to do with the plaintiff's constitutional claims, and the Court found that no such nexus was required.** Id. at 78. In the same way, the Petitioners have identified aesthetic and recreational injuries that would not occur but for the permit at issue in this case. Those injuries form a sufficient basis for standing, apart from any reference to the merits of the case.

Instead of applying this but for analysis, the court instead sets a new standard of requiring Petitioners to prove success on the merits (or that a violation of the permit is certain to occur) to meet the causal connection. Proof of the merits of the case is a wholly separate question from whether the activities facilitated by the challenged permit, including excavation of the pond, will lead to injury in fact.[7] Mrs. Jackson and Mrs. Starr testified that if the pond were excavated, their enjoyment in viewing the pond would be gone. (R. pp. 374-376 & 401). The Town asserted its interests in the attractiveness of the Town based on the aesthetics of the lily pad pond upon entering the Town (R. pp. 822-23). These aesthetic and recreational injuries have a but-for causal connection to the permit at issue in this case – if the permit stands, the pond will be excavated and these "immediate adverse effects" will occur.

The requisite causal connection is established through uncontroverted evidence that the lily pads and wildlife will be eliminated by the excavation of the pond, coupled with the asserted use and enjoyment of viewing the pond and its wildlife. There is a direct link between the excavation of the pond and the injuries complained of by Mrs. Jackson, Mrs. Starr, and Mr. Thomas, i.e., loss or decrease of aesthetic and recreational interests.

Similarly, when assessing Mrs. Starr's testimony, the Court applies a heightened test for demonstrating a "causal connection," stating that "granting coverage for Roper Pond

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[7]When the bar for standing is set too high, the line between the three-part injury, causation, and redress analysis and the merits of a plaintiff's case becomes indistinguishable. Plaintiffs are left in the unfortunate position of having to prove that they will win on the merits of their case just to show that they have standing to litigate their claim in the first place. Nigel Cooney, Without A Leg to Stand on: The Merger of Article III Standing and Merits in Environmental Cases, 23 Wash. U. J.L. & Pol'y 175, 197 (2007).

Apartments under the State General Permit" would not "cause an actual or imminent injury." (Shearhouse Adv. Sheet at 51). In so doing, the Court is requiring the exact type of nexus between merits and injury-in-fact that was flatly rejected in Duke Power Co. v. Carolina Envtl. Study Group, Inc.. 438 U.S. at 78.

A plaintiff need only show that he or she will suffer some "identifiable trifle" of injury. In applying this standard, the court in Pye v. U.S. noted that if "**the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this ... grant.**" 269 F.3d 459, 468 (4th Cir. 2001) (citing Society Hill Towers Owners' Assn. v. Rendell, 210 F.3d 168, 176 (3rd Cir. 2000)). 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." Id.

Standing in Pye was not based on the regulatory or technical sufficiency of the permitted activity, but rather on a but for relationship between the permitted activity and the alleged harm. Id. at 468-69. Similarly, in this case the Petitioners do not need to offer evidence on the technical sufficiency of the SWPPP in order to establish an injury in fact, they merely need to make allegations of any injury that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Smiley v. South Carolina Dept. of Health and Environmental Control, 374 S.C. 326, 649 S.E.2d 31 (2007)

(citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992). Petitioners did just that by alleging that they enjoy and benefit from viewing the pond and observing wildlife, and that if the pond were excavated as will occur by way of this challenged decision, their benefit and enjoyment would be lessened.

II. Validity of the 401 Certification and General Permit Coverage

A. The Court Failed to Apply DHEC's 401 Certification of the NWP to Excavation of the Pond

The Court characterizes the Petitioners' argument as contending that "the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was *not disclosed* when Roper Pond applied to the Corps for a 404 permit."[8] (Shearhouse Adv. Sht. No. 29 at 124) (emphasis added). The lower court misapprehended Petitioners' argument. The basis of the Petitioners' legal challenge is not simply that Roper Pond failed to disclose the excavation, though this had this deficiency not occurred DHEC would have had the information regarding the overall impacts. Rather, Petitioners assert that 1) the NWPs only cover certain clearly defined activities; 2) DHEC's NWP certifications further limit those activities by requiring projects to comply with general conditions; 3) in order to receive coverage under DHEC's NWP certification the **activity must be limited to the impacts authorized by that certification and must meet the general**

[8] Appellants suggest that the failure to disclose requested information on a permit application where the applicant certifies that the "information in this packet is complete and accurate" at a minimum casts doubt on the credibility of this witness as it relates to statements made regarding this application process. (R.pp. 553-54).

conditions; 4) the general conditions require DHEC to review the "overall project," not review of "only the land area directly impacted by the NWP;" and 5) when the impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly do in this case, they are not covered by DHEC's NWP certification.

The lower court clearly recognizes DHEC's broad authority to review impacts that go beyond those authorized by the specific NWP in concluding that DHEC must review the "overall project proposed" by the developer. (Shearhouse Adv. Sht. No. 29 at 124). The Court states that

> DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement **that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.**

Indeed, DHEC agrees that alterations or impacts to wetlands and waters beyond those defined in the NWPs are not covered by DHEC's 401 certifications of NWPs. (R. p. 607, line 21 - R. p. 608, line 3).

In order to determine whether a project meets the conditions of DHEC's NWP certification, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not. (R.p. 617). The General Conditions of the NWP certifications, and Regulations 61-68 and 61-101,[9] require DHEC to review impacts beyond those authorized by the

[9]Regulation 61-10 requires DHEC to consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts . . ." S.C. Code Ann. Reg. 61-101.F.(3). Regulation 61-68 water quality standards require DHEC to"maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." S.C. Code Ann. Reg. 61-68.A.(4).

specific NWP, specifically excavation of the pond. The lower court effectively agrees with that argument, but fails to give it effect.

B. The Court Agrees with Petitioners that the General Conditions of the 401 Certification Authorize DHEC to Review the "Overall Project," Including Excavation of the Pond, But Overlooks the Legal Effect of Its Conclusion

The lower court's Opinion correctly notes that DHEC's 401 certifications for those general permits, or Nationwide Permits, "include general conditions that a given project must meet, including the requirements that DHEC . . . would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity."[10] (Shearouse Adv.Sht. No. 29 at 113). The Opinion also cites the Corps of Engineers' requirement that in order for the project to be valid under NWP 39, it "had to comply with the general conditions of the NWP, regional conditions, and **certain special conditions**, . . . including 'all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification' . . ." (Id. at 114-15). The court agrees with Petitioners in holding that DHEC is required to "review the 'overall project proposed by a single owner/developer,' 'includ[ing] all land within the project bound by single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'"[11] (Shearouse Adv. Sht. No. 29 at 124). The court further

[10] The Court takes a limited view of the "activity," apparently interpreting "activity" to mean only the fill, yet the General Permit Coverage is a Stomrwater Permit for construction activities, and is not limited to review of wetland fill. In addition, the Water Qaulity Certification Regulations, and the conditions of the 401 Certifications, require a broad review to include considerations beyond simply the wetland fill.

[11] This Court's statement that "the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit" (Shearhouse Adv. Sht. at 54), is in direct conflict with the Court's conclusion that DHEC must look at the overall project

agrees with the Petitioners "that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available," as required by the certification conditions. (Id.) Then the court's Opinion fails to take the next logical step, which is that Roper Pond does not qualify for NWP certification because its project includes impacts on the overall project site that exceed the NWP certification and that it thus fails to comply with the NWP certification.[12]

But instead of taking the next logical step, the Opinion begins a discussion of federal law, and appears to make the assumption that because no Clean Water Act approval is needed for excavation of the lily pad pond, there is no requirements for State review and approval. The lower court is correct that the Petitioners have never alleged that a 404 CWA permit is needed for excavation. Clean Water Act authority is not at issue in this case. The South Carolina Supreme Court has directly addressed the question of whether State authority to regulate wetlands and waters exceeds Federal regulation under the Clean Water Act, and has expressly ruled that "federal [CWA] jurisdiction is not essential to [State] consistency review." Spectre, LLC v. S. Carolina Dept. of Health & Envtl. Control, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010). While Spectre involved DHEC's regulatory authority under the S.C. Coastal Zone Management Act and this case presents the question of DHEC's regulatory authority under the

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site, not just the lands covered by the NWP, and that it failed to do so.

[12]Even DHEC admits that a "specific determination" is required to insure that a project meets the conditions of its NWP certification. (R. p. 609). If a project does not meet the specific and general conditions of the NWP certification, Hightower said DHEC requires an individual certification. (R. p. 253).

S.C. Pollution Control Act, the parallel is that our Supreme Court has expressly ruled that South Carolina law can and does give DHEC broader regulatory authority than the Clean Water Act.

The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC has broader review authority over waters of the State that derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.[13] And in this case, the conditions of DHEC's NWP certification expressly retain the agency's authority to review those impacts.

The court simply overlooks this argument – and novel question – that the DHEC NWP certification is broader than the Corps NWP approval. The Opinion points out that Petitioners have not argued that alterations to the pond resulted from filling of the wetlands, and the court is correct. This statement shows a fundamental misunderstanding of how the 404 and 401 programs relate to each other. The are two separate regulatory programs with two separate regulatory criteria and, in this case, two separate sets of conditions imposed on NWPs by each agency. Indeed, the Clean Water Act Section 1341(a)(1) cited in the Opinion specifically states that the

[13]Even DHEC's Chuck Hightower testified that the Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (R. p. 252; R. 61-101.F). Dr. Reice provided uncontested testimony that it will take ten years for the community to reestablish after the major disturbance, describing in detail the types of impacts that will result from the excavation on pp. 12-14 of Appellants Final Brief.

State must certify that a discharge complies with "applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."[14] 33 U.S.C. § 1341(a)(1). The Clean Water Act states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). Yet that is exactly what the ALC and the lower court have done – allow the Corps' NWP to act as a limitation on DHEC's authority to require compliance with State water quality requirements, despite the CWA's clear language that it not be construed to limit State's authority to include additional water quality requirements.

The lower court acknowledges that DHEC did not conduct the overall review required by the NWP certification conditions, but does not hold DHEC accountable for its failure. If DHEC does not conduct some review to ensure that the project meets the conditions of the NWP 401 Water Quality Certification, and DHEC does not consider "all land within the project boundary under single ownership," then the conditions applicable to the NWPs will be rendered superfluous.[15]

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[14]Section 1313 requires states to adopt water quality standards, and DHEC has promulgated those regulations in S.C. Code Ann. Reg. 61-68. 33 U.S.C. § 1313. DHEC also promulgated water quality certification regulations at S.C. Code Ann. Reg. 61-101.

[15]As a practical matter, DHEC could, in theory look at the Joint Federal and State Application and determine, if an applicant was forthright, whether the project exceeded DHEC's certification authorization. Through that process DHEC could determine when it need to conduct an individual certification review because the project exceed what was authorized by the NWP certifications, as it should have done in this case.

The fact that the lower court agrees that DHEC does have authority to review the "overall project" should warrant reversal of ALJ's conclusion to the contrary (holding that DHEC has no authority to review the excavation portion of the project[16]) (ALC Order, R. p. 30). In addition to the internal conflict within the ALC's Order, there is a direct conflict between the ALC's Order and the lower court's Opinion on the question of DHEC's authority.

Given the lower court's agreement that DHEC is required to review the overall project, including all lands within the project area and not just the specific land impacted by the NWP, and the court's agreement that DHEC failed to undertake this review, the court should have further concluded that the project fails to comply with the 401 Certification of NWP 39 and remanded the case back to DHEC to undertake a review of the impacts resulting from excavation of the lily pad pond and impose any conditions necessary to protect water quality and the aquatic ecosystem of that State waterbody.

C. The Lower Court Arrives at a Nonsensical Conclusion that Roper Pond is the Proper Party to Object to Its Compliance or Noncompliance with DHEC's General Conditions

The lower court cites to DHEC's general conditions that "Roper was required to (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts." (Shearouse Adv. Sht. No. 29 at 125). The court's recitation of these two general

[16]The ALJ's conclusion is in conflict with his finding that an individual 404 permit and accompanying 401 Water Quality Certification is required if a proposed activity does not meet the conditions of the 401 Water Quality Certification for the NWP. (R. p. 15, FF #27).

conditions is accurate, but it's conclusion on how these conditions are applied and by whom they are enforced is entirely without logic or reason. The court states that "Roper, as owner of the property on which the pond is located,[17] would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts." The court seems to recognize that it would be an "illogical position" to place Roper Pond as the fox guarding the hen house, but then fails to undertake the logical analysis of who would be the party to object to impacts or require compensation. It should go without saying, but DHEC has the authority to ensure compliance with those conditions, to ensure that Roper is avoiding and minimizing impacts and to require compensation for unavoidable impacts. And when DHEC fails to ensure compliance with the conditions, Petitioners, as persons with a personal stake in the aesthetic and other qualities of the area, have the right to seek administrative and judicial review of the permitted activity.

D. The Lower Court Overlooks the Requirement for a Certification Decision

It is precisely because DHEC was required to undertake some review of the "overall project proposed by" the developer, including review of "all land within the project boundary under single ownership," which is not confined to "the land area directly impacted by each NWP request, DHEC necessarily had to arrive at some decision regarding compliance with those NWP certification conditions. DHEC's failure to conduct the review, make a formal determination of

[17]Petitioners note that even in discussing the merits the court continues to misplace reliance on ownership of the property.

whether the project meets the NWP conditions and qualifies for coverage and issue a certification letter is fatal, and Roper Pond thus lacks 401 certification.

E. The Lower Court's Conclusions Overlook the Implications on the Stormwater General Permit Coverage

Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."[18] (R. p. 487) **If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.**" (R. pp. 555-562). The NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487). Because the project did not qualify for coverage under DHEC's NWP certification, it was not entitled to coverage under the General Permit. Thus, the Court erred in failing to conclude that DHEC improperly granted coverage under the General Permit for its failure to comply with the conditions of the NWP certification and consider the "overall project," specifically the excavation of the pond.

CONCLUSION

[18] On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

WHEREFORE, the Petitioners respectfully request that this Court issue a Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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July 12, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

v.

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

RESPONDENT ROPER POND, LLC'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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September 11, 2013

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COUNTER-QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE DREDGING AND EXCAVATION OF THE POND WAS NOT AN IMPACT TO BE REVIEWED BY DHEC IN CONNECTION WITH THE GRANT OF COVERAGE UNDER THE STATE GENERAL PERMIT FOR CONSTRUCTION ACTIVITIES?**

II. **DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE PROPOSED PROJECT HAD A 401 CERTIFICATION FOR COVERAGE UNDER NWP 29?**

III. **IS THE COURT OF APPEALS' RULING ON STANDING CONSISTENT WITH WELL-ESTABLISHED LAW ON THE REQUIREMENT TO PRESENT EVIDENCE TO ESTABLISH STANDING?**

INTRODUCTION

Respondent Roper Pond, LLC ("Roper Pond") is the owner of approximately 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Property"). This case involves two separate authorizations by Respondent South Carolina Department of Health and Environmental Control ("DHEC") in connection with Roper Pond's construction of a multi-family residential housing development on this Property ("Proposed Project"). By letter dated December 15, 2008, DHEC granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), authorizing land-disturbing activities on 9.6 acres of the Property in association with the Proposed Project. The Proposed Project also required the filling of 0.075 acres of jurisdiction wetlands. Roper Pond provided the required notice to the U.S. Army Corps of Engineers ("Corps") to conduct this activity under a Nationwide Permit. DHEC had previously issued a 401 water quality certification for this Nationwide Permit in 2007 with general conditions which became conditions of the Nationwide Permit.

At issue in this case are these two separate DHEC authorizations—the grant of coverage to Roper Pond under the State General Permit and the 401 water quality certification for the Nationwide Permit to fill 0.075 acres of jurisdictional wetlands on the Property. While Petitioners argue that these two separate and distinct DHEC decisions are interdependent with respect to Roper Pond's Proposed Project, there is simply no statutory or regulatory basis for this argument. In this case, DHEC's authorization to grant coverage to Roper Pond under the State General Permit does not require a Corps permit as a prerequisite to such authorization. Moreover, the 401 water quality certification for the Nationwide Permit authorizing Roper Pond to fill 0.075 acres of jurisdictional wetlands on the Property was issued in 2007. Any alleged failure to satisfy a condition of the 401 water quality certification would be subject to the authority of the Corps since any such condition becomes a condition of the Nationwide Permit issued by the Corps. The Corps was aware of the excavation of the Pond when it found the Proposed Project would result in minimal individual and cumulative environmental effects and therefore could proceed under Nationwide Permit 29.

Petitioners' Petition for a Writ of Certiorari does not satisfy the grounds for certiorari review. The Court of Appeals was unanimous in its decision affirming the Administrative Law Court ("ALC"). Contrary to Petitioners' assertion, this case presents no novel question of law because the federal and state law governing DHEC's decisions in this case is clear and well-established. Additionally, while Petitioners argue that the Court of Appeals' decision contradicts the well-established law on standing in environmental cases, the Court of Appeals correctly applied the three-prong test for standing set forth in *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C.

594, 603, 550 S.E.2d 287, 292 (2001), and subsequent rulings by this Court. Petitioners advocate an interpretation of the law which confers standing in environmental cases in a manner which presumes an injury in fact and imposes no burden to satisfy the remaining prongs of the test. For the reasons set forth below, Roper Pond respectfully asks this Court to deny the Petition.

COUNTER-STATEMENT OF THE CASE[1]

This case involves DHEC's grant of coverage under the State General Permit to conduct land-disturbing activities on 9.6 acres of the Property in connection with construction of the Proposed Project. The Property is outside the corporate limits of the Town of Arcadia Lakes in an unincorporated area of Richland County. (R. p. 864). The Property includes 1.80 acres of jurisdictional wetlands and a pond ("Pond"). The Pond is man-made pond wholly within the boundaries of the Property. (R. pp. 464, 540). The Pond is approximately five feet deep at its deepest point. (Tr. p. 230, ll. 3-6, R. p. 361). The plan for the Proposed Project required the filling of 0.075 acres of jurisdiction wetlands on the Property. The Corps confirmed that this activity was authorized under a Nationwide Permit. (R. p. 760). Additionally, the stormwater management plan for the Proposed Project included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (R. p. 196). Neither DHEC nor the Corps require a permit for dredging of the Pond for this use.

A. Coverage under State General Permit

State regulations require a permit for stormwater discharges from land-disturbing activities associated with the Proposed Project. 24 S.C. CODE ANN. REGS. § 61-9.122.26(c). DHEC administers this permitting program pursuant to 24 S.C. CODE ANN. REGS. § 61-

[1] Additional citations to facts in the record are included in the Argument section of this Return.

9.122.26 *et seq* ("State NPDES Regulations") and 26 S.C. CODE ANN. REGS. § 72-300 *et seq*. ("State Stormwater Regulations"). Section 61-9.122.28(a)(2) of the State NPDES Regulations authorizes DHEC to issue general permits for discharges for categories or subcategories of storm water point sources. 24 S.C. CODE ANN. REGS. § 61-9.122.28(a)(2)(i). On August 1, 2006, DHEC re-issued the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("State General Permit"). (R. p. 481). The State General Permit covers discharges from the commencement of construction activities until final stabilization of the construction site. (R. pp. 191, 481).

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project pursuant to the provisions of the State General Permit. Roper Pond also submitted its storm water pollution prevention plan ("SWPPP") to DHEC as required by the State General Permit and the State Stormwater Regulations. (R. pp. 663-759). Jill Stewart, a licensed professional engineer in South Carolina and Manager of the DHEC's Stormwater Permitting Section, conducted the review of Roper Pond's SWPPPP. Under the State Stormwater Regulations, the SWPPP must address both the quality and the quantity of the stormwater runoff associated with a proposed project. 26 S.C. S.C. CODE ANN. REGS. § 72-307(C). In reviewing a SWPPP, the reviewing entity assesses the proposed best management practices ("BMPs") to determine if those measures are adequate to meet the requirements of the State Stormwater Regulations and the State General Permit. The SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the State General Permit. (R. pp. 205-06). The SWPPP

approved by DHEC for the Proposed Project utilized a number of BMPs to control erosion and sedimentation during construction. (R. pp. 194-95). Ms. Stewart testified that the Roper Pond SWPPP, with the revisions requested by DHEC, complied with the requirements of the State General Permit and the State Stormwater Regulations. (R. pp. 188-89, 202).

Although coverage under the State General Permit terminates once the site is stabilized following the conclusion of construction activities, Section 3.4(F) of the State General Permit requires the applicant to include "a description of all post-construction storm water management measures that will be installed during a construction process to control pollutants and storm water after the construction operations have been completed." (R. p. 498). Roper Pond's post-construction stormwater design exceeded the requirements of the State Stormwater Regulations. (R. pp. 198-99). The State Stormwater Regulations also require an applicant to demonstrate that the development of the site does not result in a post-construction stormwater runoff rate that is greater than the pre-construction stormwater runoff rate. 26 S.C. CODE ANN. REGS. § 72-307(C)(4)(a). Roper Pond provided DHEC with pre-construction and post-construction runoff rates for the two-year 24-hour duration storm event and the ten-year 24-hour duration storm event in order to demonstrate that the design for development of the site met this regulatory requirement. (R. pp. 195-96). The approved design included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (R. p. 196). Both the State General Permit and the State Stormwater Regulations allow an existing pond to be used for control of the post-construction stormwater runoff rate on a developed site. (R. p. 180). By letter dated December 15, 2008, DHEC granted Roper Pond coverage under the State General Permit for stormwater discharges associated with construction of the Proposed

Project.

B. Corps Permit for Filling of Wetlands

The Proposed Project included the filling of 0.075 acres of jurisdictional wetlands in an area upland of the Pond. The Corps administers the permitting program for filling of wetlands under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.*, ("Clean Water Act"). 33 U.S.C.A. § 1344. Pursuant to Section 404 of the Clean Water Act, a Corps permit is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C.A. § 1344(a). Section 404 of the Act authorizes Corps to "issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C.A. § 1344(e)(1). On March 12, 2007, the Corps published the final decision to re-issue Nationwide Permits, including Nationwide Permit 29 for Residential Developments ("NWP 29") and Nationwide Permit 39 ("NWP 39") for Commercial and Institutional Developments in the Federal Register. 72 FR 11092-01 (11123) (R. p. 243). Both NWP 29 and NWP 39 authorize the fill of up to 0.10 acres of jurisdictional wetlands. (R. p. 271).

Pursuant to Section 330.4 of the Corps Regulations, a state water quality certification is required prior to re-issuance of a Nationwide Permit. 33 C.F.R. § 330.4(c)(1). DHEC issued its 401 Water Quality Certification for the 2007 Nationwide Permits in accordance with 25A S.C. CODE ANN. REGS. § 61-101 ("State Water Quality Certification Regulations"). (R. pp. 249-50). DHEC determined that the certification of these Nationwide Permits was appropriate in light of the requirements of the Water Quality Certification Regulations

because the activities authorized under the Permits would have minimal individual or cumulative impacts. (R. pp. 249-50). Accordingly, in 2007 DHEC issued a 401 Water Quality Certification for a number of Nationwide Permits, including NWP 29 and NWP 39, with certain general conditions. (R. pp. 248-49, 273). Pre-construction notification to DHEC is not required under the 401 Water Quality Certifications for either NWP 29 or NWP 39. (R. pp. 264-66, 274).

George Whatley, the wetlands scientist for Roper Pond, consulted with the design engineers for the Proposed Project to minimize the impacts to wetlands and to prepare a Corps submittal for authorization to fill jurisdictional wetlands as required by Section 404 of the Clean Water Act. (R. p. 430). On May 5, 2008, Mr. Whatley submitted a pre-construction notification ("PCN") to the Corps to fill 0.075 acres of jurisdictional wetlands under a Nationwide Permit. (R. p. 762). The PCN for the Proposed Project did not specify a particular Nationwide Permit under which the activities would be conducted. (R. pp. 440, 762). By letter to Mr. Whatley dated September 9, 2008, the Corps verified that "the activity meets the terms and conditions of Department of Army Nationwide Permit(s) #39." (R. p. 555). In early 2009, Mr. Whatley contacted Colt Bowles of the Corps to request clarification on the verification of the PCN for activities under NWP 39 for Commercial and Institutional Development instead of NWP 29 for Residential Development. (R. pp. 441-43, 780). By letter to Mr. Whatley dated February 25, 2009, the Corps verified that the fill of 0.075 acres in association with the Proposed Project was authorized under NWP 29. (R. p. 760).

Charles Hightower, Section Manager of DHEC's 401 Wetlands Section, testified that the filling of 0.075 acres as proposed by Roper Pond conforms to the conditions of the 401 Water Quality Certifications for both NWP 29 and NWP 39. (R. pp. 264, 267). Mr.

Hightower further testified that an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of an applicable NWP and the corresponding 401 Water Quality Certification issued by DHEC for the NWP. (R. pp. 252-53; 287-88; 295).

C. **The Petitioners**

Petitioners in this case are the Town of Arcadia Lakes, residents of Kaminer Station, a residential subdivision which borders the Roper Pond Property, and residents of the Cary Lake subdivision. The Property lies outside of the corporate limits of the Town of Arcadia Lakes ("Town"). (R. p. 380). The Town contends that the Proposed Project will cause harm to the environmental interests of the town because Roper Pond drains into Cary Lake and the Town is responsible for the water flowing into Cary Lake. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (R. pp. 824-25). The Town has no ownership interest in Cary Lake. (R. p. 825). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (R. pp. 825-26). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (R. pp. 827-30). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (R. pp. 827-30). The Town has never budgeted any funds for the maintenance of repair for any of the seven lakes within its corporate limits. (R. pp. 830-31).

The Kaminer Station Subdivision is adjacent to the Roper Pond Property and hydraulically upgradient of the Roper Pond Property. (R. pp. 372-73, 256-57, 387-88). Ms. Linda Jackson, a resident of the Kaminer Station Subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. (R. pp. 374-77). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (R. p. 385). Ms. Jackson testified that any negative impacts to

Cary Lake would be the result of Roper Pond's failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (R. pp. 381-82).

Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (R. p. 394). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (R. p. 395). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (R. p. 395). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (R. pp. 408-11). Ms. Starr testified that she had not reviewed the SWPPP for the Proposed Project. (R. p. 407). Ms. Starr testified that any development in the area would exacerbate the condition of Cary Lake. (R. p. 408). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the SWPPP approved by DHEC is implemented as designed. *Id.* Ms. Starr testified that she believed that any increase in density of the Property would have a detrimental impact because the impervious surfaces, such as the roof tops, garages, pavement, and sidewalks, would increase the rate of stormwater runoff. (R. pp. 408-12).

ARGUMENT

While Petitioners acknowledge that excavation of the Pond does not require a 404 permit from the Corps, Petitioners nonetheless argue that DHEC's decision to grant coverage under the General Storm Permit requires a review by DHEC to determine whether the conditions of the 2007 certification of NWP 29 have been satisfied. Contrary to Petitioners' contentions, the Court correctly held that no additional 404 permit or 401 water quality certifications were required prior to DHEC's grant of coverage to Roper Pond under the State General Permit. While the State General Permit includes a condition that a Corps permit be

issued prior to DHEC's grant of coverage under the State General Permit, such condition is expressly limited to a Corps permit required for "permanent or temporary storm water control structures." As Petitioners have acknowledged, there is no Corps permit required for the excavation of the Pond to control the post-construction stormwater runoff rate on the Property. As such, a determination of whether the conditions of the 401 water quality certification for the NWP 29 have been satisfied is not a consideration in DHEC's decision to grant coverage to Roper Pond under the State General Permit. With respect to the 401 water quality certification for NWP 29 authorizing Roper Pond to fill 0.075 acres of jurisdictional wetlands, the Court of Appeals correctly found that the Proposed Project had 401 certification for coverage under NWP 29. Finally, the Court of Appeals applied the well-established test for standing and correctly held that Petitioners failed to meet their burden to establish all three prongs of that test.

I. THE COURT CORRECTLY HELD THAT NO ADDITIONAL 404 PERMITS OR 401 CERTIFICATIONS WERE REQUIRED PRIOR TO DHEC'S DECISION TO GRANT ROPER POND COVERAGE UNDER THE STATE GENERAL PERMIT.

Petitioners assert that DHEC's grant of coverage under the State General Permit was not proper because Section 2.1(C) of the State General Permit requires that "any Corps of Engineers permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (Petition, p. 24) (emphasis in original). Section 2.1(C) of the State General Permit provides as follows:

> If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may no grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective.

(R. p. 487) (emphasis added). Relying on this provision of the State General Permit, Petitioners assert that "[b]ecause the project did not qualify for coverage under DHEC's NWP

certification, it is not entitled to coverage under the General Permit." (Petition, p. 24). Contrary to the Petitioners' assertions, NWP 29 authorizing Roper Pond to fill 0.075 acres of wetlands is not a requirement of Section 2.1(C) of the State General Permit Petitioners. Section 2.1(C) of the State General Permit addresses only Corps permitting required for "permanent or temporary storm water control structures." Roper Pond provided notice to Corps for coverage under NWP 29 to authorize the filling of 0.075 acres of jurisdictional wetlands for construction of buildings and sidewalks—not storm water control structures. (R. p. 553). There is simply no basis for Petitioner's contention that certification of NWP 29 was a prerequisite to DHEC's decision on coverage pursuant to Section 2.1(C) of the State General Permit.

Moreover, Section 2.1(C) of the State General Permit does not create an obligation to obtain a 404 permit where none is required under Section 404 of the Clean Water Act. Petitioners argued to the Court of Appeal that the Pond was used by Roper Pond as a water control structure and thus required a 404 permit from the Corps. The Court of Appeals correctly held that the issue had not been preserved for appeal. (Shearouse Adv. Sht. 26 at 126). However, even if it had been so preserved, the argument nonetheless fails. Section 2.1(C) of the State General Permit cannot create a requirement for a Corps permit were none is required by the federal statutes. Indeed, Petitioners have repeatedly conceded that no 404 permit is required for the excavation of the Pond. (Petition, pp. 19, 20). Yet, Petitioners continue to argue in a circular manner that DHEC improperly granted Roper Pond coverage under the State General Permit because Roper Pond did not have the Corps permitting as required by that Permit: "In turn, DHEC's NPDES General Permit expressly requires that any Corps 404 permit required under the CWA be issued and effective prior to DHEC granting

coverage under the NDPES General Permit. (R. p. 487). In short, 401 certification is required for a 404 permit, and a 404 permit is required for a Stormwater NPDES General Permit." (Petition, pp. 3-4) (emphasis in original). However, it is undisputed that the only activity in connection with the Property which is regulated under Section 404 of the Clean Water Act is the proposed filling of the 0.075 acres of wetlands in connection with the construction of buildings and sidewalks. This permitting requirement is not subject to the conditions of Section 2.1(C) of the State General Permit. Therefore, any alleged deficiency related to the water quality certification for NWP 29 is not a consideration in DHEC's grant of coverage under the State General Permit and is not a legitimate basis for challenging such decision.

Moreover, Petitioners' challenge to DHEC's grant of coverage to Roper Pond under the State General Permit rested solely on their contention that Roper Pond failed to secure a Corps permit as required pursuant to Section 2.1(C) of the State General Permit. Petitioners failed to present any evidence regarding the sufficiency of the BMPs under the SWPPP approved by DHEC. Petitioners' only expert did not even review the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (R. pp. 332-33, 342). In fact, none of Petitionerss' witnesses reviewed the State General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (R. pp. 332-33, 407). Accordingly, the Court of Appeals correctly held that DHEC properly granted Roper Pond coverage under the State General Permit to conduct land-disturbing activities in connection with the Proposed Project.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE PROPOSED PROJECT HAD 401 CERTIFICATION FOR COVERAGE UNDER NWP 29.

The Court of Appeals correctly held that DHEC had issued a water quality certification in 2007 for the activities authorized by NWP 29 and found that DHEC's

certification of NWP 29 was sufficient for Roper Pond to undertake the proposed filling of the 0.075 acres of wetlands without further approval from DHEC. (Shearouse Adv. Sht. 26 at 125). Accordingly, there is no merit to Petitioners' assertion that Roper Pond's authorization to conduct such activities was not authorized by NWP 29 because there was no 401 certification for activities to be conducted under NWP 29.

The Corps issued NWP 29 in 2007, authorizing those insignificant impacts described therein. DHEC issued the 401 water quality certification for NWP 29 in 2007 with certain limited general conditions. The only requirement for authorization to fill the 0.075 acres of wetlands under the NWP was pre-construction notification to the Corps. As the Court correctly held:

> The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

(Shearouse Adv. Sht. 26 at 125). This holding acknowledges that DHEC had already issued a 401 certification for projects authorized under NWP 29. NWP 29 did not require further action or approvals by DHEC for activities within the scope of those authorized by NWP 29. As the Court of Appeals noted, the Corps was aware of the excavation of the Pond when it "determined that the project would result in 'minimal individual and cumulative environmental effects' and met the conditions of NWP 29." (Shearouse Adv. Sht. 26 at 124). As discussed below, pursuant to Corps Regulations and the State Water Quality Certification Regulations, the Corps—not DHEC—is the regulatory agency authorized to review a notification to proceed under a Nationwide Permit and to determine whether the proposed activity is consistent with the conditions of that Nationwide Permit.

Any conditions of a 401 Water Quality Certification issued by DHEC become a condition of the Corps permit. 33 C.F.R. § 330.4(c); *see also* S.C. CODE ANN. REGS. § 61-101(H)(1) ("Any certification condition is intended to become a condition of the Federal or State license or permit as specified in Federal or State law."). Pursuant to the Corps Regulations, the Corps district engineer has the discretionary authority to determine whether an activity complies with the conditions of the Nationwide Permit and whether the activities would have more than minimal impacts. 33 C.F.R. § 330.4(d). The Corps district engineer has the authority to modify the Nationwide Permit or to require an individual permit for the proposed activity. *Id.* Likewise, the State Water Quality Certification Regulations acknowledge that the agency issuing the permit is authorized to enforce the conditions of the permit: "Certification conditions which are included as conditions of such license or permit are subject to enforcement mechanisms available to the Federal or State agency issuing the license or permit." 25A S.C. CODE ANN. REGS. § 61-101.H.2 (emphasis added).[2] Although DHEC may impose conditions on its issuance of the 401 water quality certification for a Nationwide Permit, or any other federal permit affecting water quality, the authority to enforce those conditions is held by the Corps—the agency issuing the Nationwide Permit.

Finally, Petitioners contend that "DHEC has broader review authority over the waters of the State that derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68." (Petition, p. 20). Again, this argument disregards DHEC's regulation of the Roper Pond project. The State General Permit authorizing stormwater discharges in connection with the Proposed Project is issued pursuant to the Pollution Control Act and authorizes the discharge of pollutants from

[2] In this case the agency issuing the license or permit would be the Corps, not DHEC, as DHEC is merely certifying the Corps permit.

stormwater associated with construction activities related to the Roper Pond project. (R. p. 689). Additionally, the proposed filling of the 0.075 acres of wetlands pursuant to NWP 29 is authorized by DHEC pursuant to the 2007 water quality certification. Except for the filling of the 0.075 acres of wetlands, Petitioners concede that no other 404 permit is required for the project. As such, no other water quality certification is required. Moreover, no other permit or approval from DHEC is required. In short, DHEC and the Corps have issued all required permits for Roper Pond project. DHEC has fully asserted its regulatory authority over the construction of Proposed Project pursuant to the State General Permit and all applicable state and federal statutes and regulations.

III. THE COURT'S RULING ON STANDING IS CONSISTENT WITH WELL-ESTABLISHED LAW ON THE REQUIREMENT TO OFFER EVIDENCE SUFFICIENT TO ESTABLISH STANDING.

Petitioners contend that the Court's ruling creates a new test for establishing standing. To the contrary, the ALC and the Court of Appeals correctly applied the well-established law on standing and found that the Petitioners failed to present evidence to demonstrate an injury in fact causally connected to the action challenged by Petitioners. Petitioners' contention that the Court of Appeals improperly applied well-established law on standing is based on Petitioners' failure to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial. Contrary to Petitioners' assertions, the Court of Appeals' ruling does not require the Petitioners to prove success on the merits. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme stated the three-prong standing test and held that the plaintiff bears the burden of establishing each prong of this test. 504 U.S. at 561 (citations omitted). The Court further explained that this burden increases with each stage of litigation such that "at the final stage, those facts (if controverted) must be

'supported adequately by the evidence adduced at trial.'" *Id.* (citation omitted). The Court of Appeals thus applied the proper standard in finding that evidence presented at trial, including the lack of evidence presented at trial by Petitioners, supported the ALC's ruling that the Petitioners failed to satisfy the requirements of standing to challenge DHEC's decisions related to Roper Pond's Proposed Project.

Petitioners further assert that the Court "injects a new requirement that a plaintiff must have a property interest in order to establish an injury-in-fact." (Petition, p. 6). Petitioners contend that "[t]he lower court's holding that Petitioners' lack of property right or interests in Roper Pond (or Cary Lake) precludes an injury in fact is not only contrary to the law of standing, it leads to the result that only those with property interests have standing." (Petition, p. 9). Petitioners mischaracterize the Court of Appeals' consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case. For example, Petitioners assert that the Town has standing because of its responsibility for the environmental quality of Cary Lake. However, the evidence on the record does not support this assertion. Cary Lake is privately owned and maintained by the Cary Lake Homeowners Association. (R. pp. 824-25). The Town has no ownership interest in Cary Lake. (R. p. 825). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (R. pp. 825-26). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (R. pp. 827-30). The Town does not now have and has never had Town funds budgeted for the maintenance or repair of Cary Lake. (R. pp. 827-30). The Town has never budgeted any funds for the maintenance of repair for any of the seven lakes within its corporate limits. (R. pp. 830-31). As such, the absence of a property interest in Cary Lake is an appropriate consideration in the

determination of the Town's claim to standing for alleged injuries related to the environmental condition of Cary Lake.

Similarly, Petitioners contend that the Court of Appeals interpreted the proprietary interests required for the Town's standing under *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996), too narrowly. However, in holding that the Town failed to satisfy the requirements of standing, the Court of Appeals did not reach the issue of whether the interests asserted by the Town were "'proprietary' or not." (Shearouse Adv. Sht. 26 at 121). The Court of Appeals found that the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "were 'fairly traceable to the challenged action in this case." *Id.* Petitioners further contend that Town's requirements to "prevent pollution within its MS4" under the Clean Water Act is sufficient to demonstrate standing. (Petition, pp. 11-12). However, the evidence on the record does not support this contention. Indeed, Richard Thomas, Mayor of the Town, testified that the Town has delegated its responsibility for compliance with its MS4 requirements to Richland County through an intergovernmental agreement. (R. p. 845). The regulations governing MS4 permit requirements expressly provide for the Town's delegation of its compliance requirement to another MS4 through an intergovernmental agreement. As such, Petitioners' assertion that the Town's MS4 requirements support standing is contrary to the evidence on the record.

Similarly, the Court of Appeals correctly held that Petitioners failed to present evidence of an injury in fact as the result of increased sedimentation in Cary Lake from the Proposed Project. Citing to the evidence on the record, the Court of Appeals found that the current increased sedimentation in Cary Lake of which Petitioners complained was the result of "prior occurrences involving possible mismanagement" and noted that Petitioners offered

"no evidence that the project at issue here would lead to similar results." (Shearouse Adv. Sht. 26 at 123). Indeed, as the Court of Appeals noted, Elaine Starr, who testified on behalf of the Cary Lake Petitioners, "admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments." (Shearouse Adv. Sht. 26 at 123). Additionally, Petitioners contend that Ms. Starr has standing to assert an injury to Cary Lake as an owner because she is a member of the Cary Lake Homeowner Association. (Petition, p. 7, fn. 1). However, there is no evidence on the record regarding the nature of the governance or ownership of common elements under the control of the incorporated association. Accordingly, this argument could not have been considered by the Court of Appeals.

With respect to the Kaminer Station Petitioners, the Court of Appeals upheld the ALC's ruling on standing "to the extent that it found that Petitioners have failed to establish an injury that would be traceable to the permitting decision." (Shearouse Adv. Sht. 26 at 122). Contrary to Petitioners' assertions, the Court of Appeals did not hold that the aesthetic interest of the Kaminer Station could not be an injury in fact. Instead, the Court of Appeals affirmed the ALC's determination that the Kaminer Station Petitioners failed to offer evidence of a causal connection between the injuries alleged and the permitting decision at issue in this case:

> When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's

> inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

(Shearouse Adv. Sht. 26 at 122-23). Fundamental to this ruling is the recognition of the conduct complained of in this action—i.e., DHEC's approval of the SWPPP and authorization of coverage to Roper Pond under the State General Permit. Most, if not all, of Petitioners' alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance with the approved SWPPP and the State General Permit. With respect to these allegations, the potential injuries alleged would not be caused by the issuance of coverage under the State General Permit, but by a failure to comply with the DHEC-approved SWPPP and the State General Permit. Moreover, as the Court of Appeals correctly held, Petitioners failed to offer any evidence that "BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." (Shearouse Adv. Sht. 26 at 121). Indeed, Petitioners' only expert had never seen the approved SWPPP and offered no opinion regarding the sufficiency, or lack thereof, of the BMPs in the approval SWPPP.

Petitioners rely on the holding in *Smiley* for the holding that generalized aesthetic and recreational interests are sufficient to confer standing. However, *Smiley* can be easily distinguished from this case. The petitioner in *Smiley* challenging the beach renourishment project, alleging an injury based on the interruption of his use to a "**public** beach on the Isle of Palms." *Smiley v. South Carolina Dep't of Health and Envtl. Control*, 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007) (emphasis added). Such is not the case here. The Court of Appeals correctly recognizes that the Pond on the Roper Pond property is a man-made pond wholly within the boundaries of the Property. Citing to the holding in *Conservation Council of N.C.*

v. Costanzo, 505 F.2d 498 (4th Cir. 1974), the Court notes that an injury in fact will not be assumed when property at issue is privately owned. In *Costanzo*, the Fourth Circuit held as follows:

> To the extent that standing is predicated upon plaintiffs' recreational use as either a licensee or a trespasser, this Court finds little difficulty in holding that they have suffered no injury due to any impairment of their use of the highlands. There is no indication that Carolina Cape Fear Corporation will permit a continuation of such use and without the possibility of future use, the challenged construction cannot harm the plaintiffs.

Id. at 502. The Kaminer Station Petitioners offered no evidence that they had previously used the Roper Pond property for recreational purposes and make no claim to have the right or expectation of permission to do so in the future. Accordingly, unlike the plaintiff in *Smiley*, Petitioners cannot claim a recreational injury resulting from the land-disturbing activities on the Roper Pond property. Petitioners also cite to *Spectre, LLC v. South Carolina Department of Health and Environmental Control* as a case allowing a "challenge to the filling of 32 acres of 'isolated' wetlands on private party." (Petition at p. 7 (citing *Spectre, LLC v. South Carolina Dep't of Health and Envtl. Control,* 386 S.C. 357, 361, 688 S.E.2d 844, 846 (2010)). However, the party challenging DHEC's action in *Spectre* was the property owner who had been denied a permit to fill wetlands on its property. While third-parties intervened in the action, the holding does not address these third parties' right to intervene, the standard for which would have been determined pursuant to Rule 24, SCRCP.

Additionally, Petitioners oversimplify the test for standing based on a claim to an aesthetic and recreational interest in the challenged action. In *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), the Fourth Circuit Court of Appeals examined the requirement for standing based on aesthetic or recreational interests:

> In most kinds of litigation, there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile

> accident or a party to a breached contract bears the kind of claim that he may press in court. In other sorts of cases, however, the nexus between the legal claim and the individual asserting the claim may not be so self-evident. Standing inquiry in environmental cases, for example, must reflect the context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, however, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 705, 145 L.Ed.2d 610 (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-63, 112 S.Ct. 2130 (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. 1361 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society ... deserving of legal protection through the judicial process."); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (interest supporting standing "may reflect aesthetic, conservational, and recreational as well as economic values" (internal quotation marks omitted)). But because these and other noneconomic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured." *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361. If it were otherwise, the Article III case or controversy requirement would be reduced to a meaningless formality.
>
> Courts must therefore examine the allegations in such cases "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. **Such scrutiny is necessary to filter the truly afflicted from the abstractly distressed.** Courts discharge this duty by asking such questions as: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Id.* If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.

Id. at 154-55 (emphasis added). Petitioners interpret aesthetic interest so broadly as to confer standing on any party who has "enjoyed viewing" the property which is the general subject of the challenged action. Moreover, Petitioners have failed to present evidence as to how the DHEC decision at issue in this case negatively impacts its enjoyment of viewing the Roper

Pond property in an actionable manner. Accepting Petitioners' standing argument would suggest that they could assert standing if Roper Pond constructed a fence obstructing the view of the pond from the public roadway; however, such action would clearly not be actionable. Indeed, Petitioners' claims to potential harm resulting from any deprivation of the enjoyment of the view of Roper Pond can be no more than a claim of being "abstractly distressed." Petitioners' interpretation of the test for standing based on aesthetic interests would unquestionably reduce the standing requirement "to a meaningless formality."

Additionally, Petitioners advocate a broad interpretation of the requirement for demonstrating a causal connection between the alleged injuries and the proposed development. Citing to the United States Supreme Court holding in *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), Petitioners contend that "but-for standard" should be applied to causation under the test for the standing. (Petition, p. 14). In *Duke Power Company*, individuals who lived and worked in proximity to the sites of two planned nuclear power plants filed suit against Nuclear Regulatory Commission, challenging the constitutionality of the Price-Anderson Ac. *Id.* at 62. The Act set a monetary cap on damages recoverable in consequence of nuclear accidents. The plaintiffs asserted a number of injuries resulting from the construction of the power plants, including exposure to radiation, thermal impacts to two lakes used for recreational purposes, reduction in property values, and fear of exposure to radiation and nuclear accident. *Id.* at 73. While the Court did not determine whether all the alleged injuries were "sufficiently concrete to satisfy constitution requirements," the Court held that "it is enough that several of the 'immediate' adverse effects were found to harm appellees." *Id.* At trial, the plaintiffs have put forth testimony from Duke Power officials at the trial level to demonstrate that they would have had to consider

withdrawing their plans for the new nuclear plants in the absence of the act. *Id.* at 76-77. Based on that testimony, the district court "discerned a 'but for' causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, 'and the construction of the nuclear plants which the [appellees] view as a threat to them.'" *Id.* at 74. In upholding the district court's finding of standing, the Court held that the "but for" determination supporting the finding of standing was not clearly erroneous. *Id.* at 73-74, fn. 19. This could hardly be characterized at the adoption of a "but for" standard on the second prong of the standing test. Moreover, while concurring in the judgment, Justices Stewart and Stevens wrote separately on the standing issue—in particular, criticizing the "but for" standard. *Id.* at 95, 102-103. Therefore, contrary to the Petitioners' assertion, it cannot be stated that the *Duke Power* Court adopted a "but for" standard for standing. The Court merely held that the district court's "but for" finding was not clearly erroneous. Based on the strong arguments in the concurring opinions, it certainly cannot be argued that a "but for" standard as to the second prong of the standing test was adopted by the Court. As such, there is no basis for the application of a "but for" standard in this case.

Petitioners further contend that the Court of Appeals disregards the other injuries alleged: "degraded water quality as a result of the project; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental quality of the Town; and increased crime, traffic and congestion as a result of the project." (Petition, p. 8-9). With respect to allegations regarding the character of the Town, property values, and increased crime and traffic, Petitioners offered no credible evidence that the proposed development would result in the harm alleged. These concerns are

nothing more than mere speculation based on the perceived character and behavior of the residents of the multi-family residential development to be constructed. More significantly, such allegations are clearly unrelated to DHEC's decision at issue in this case, and therefore, not an injury in fact which is causally connected to the challenged agency action.

To the extent that Petitioners have alleged injuries which are at least generally related to DHEC's grant of coverage to Roper Pond under the State General Permit, the Court of Appeals noted that the Petitioners' expert failed to opine that the land-disturbing activities authorized under the State General Permit would adversely impact Roper Pond:

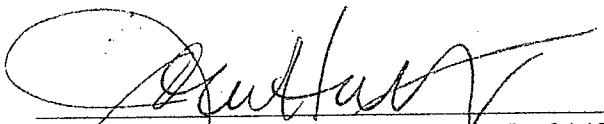
> When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

(Shearouse Adv. Sht. 26 at 117). As both the ALC and the Court of Appeals recognized, Petitioners failed to present any evidence that the activities authorized by the DHEC decision at issue in this case would result in the injuries alleged by Petitioners. Under South Carolina and federal case law, Petitioners bear the burden of proof at trial to present such evidence. The Court of Appeals correctly held that Petitioners failed to meet this burden.

CONCLUSION

For the forgoing reasons, Respondent Roper Pond, LLC respectfully requests that the Court deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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September 11, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

v.

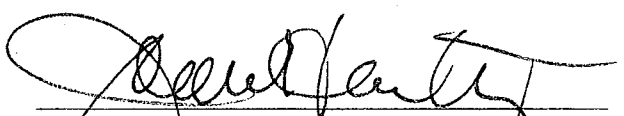
South Carolina Department of Health and Environmental Control and
Roper Pond, LLC . . . . . Respondents.

PROOF OF SERVICE

I certify that I have served Respondent Roper Pond, LLC's Return to the Petition for Writ of Certiorari on all parties by depositing a copy of it in the United States Mail, postage prepaid, on September 11, 2013 addressed to their attorneys of record, as indicated below:

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September 11, 2013

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Lawyers for the Wild Side of South Carolina

October 8, 2013

a 501c3
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RE: Town of Arcadia Lakes, et al. v. SCDHEC & Roper Pond

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven (7) copies of the Petitioners' Reply to the Respondents' Return to the Petition for Certiorari, along with my certificate of service in the above-referenced case.

Please return a clocked-in copy of the Reply in the enclosed postage-paid envelope.

Thank you very much for your kind cooperation and assistance.

A strategy no doubt intended to diminish the import of the Court of Appeals' unprecedented holding that the Petitioners' interests in the lily pad pond are insufficient because that pond is on private property.

Very truly yours,

Amy Armstrong

cc: W. Thomas Lavender, Jr., Esquire
Stephen Hightower, Esquire

OUR MISSION *To protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.*

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

PETITIONERS' REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

The Respondents have filed Returns that add confusion, rather than clarity, to the Court of Appeals' already disjointed Opinion, highlighting the need for this Court to accept Certiorari. The Petitioners submit this Reply to the issues raised in those Returns.

I. OPINION ESTABLISHES INCONSISTENT STANDING PRECEDENT

The Respondents' Returns do not rebut the thrust of the Petitioners' argument on standing: that without this Court's intervention, the Court of Appeals' opinion in this case will establish a

distinctly inconsistent precedent that has the potential to throw this Court's carefully-crafted standing jurisprudence into turmoil. Only Respondent Roper Pond, LLC ("Roper Pond") actually addresses the Petitioners' arguments on standing, and its Return goes out of the way to avoid and misdirect from the core error in the Court of Appeals' opinion. In short, Roper Pond does its best to pretend that impacts to the lilly pad pond (and the Petitioners' injuries related thereto) do not exist.

A. Dredging of the Lilly Pad Pond Provides a non-Speculative Basis for Standing

To be clear, this case primarily involves impacts to two separate bodies of water: Cary Lake and the lily pad pond (also known as roper pond). The lily pad pond is actually on the construction site, and proposed modifications to that pond are a main part of what prompted the need for the approvals at issue in this case. (R. pp. 534-41; 542-48; 555-62). Water drains out of Roper Pond, under Trenholm Road, into Cary Lake. While the individual Petitioners testified about their concerns for both water bodies, it is the project's impact on the lily pad pond that serves as the thrust of the individual Petitioners' basis for standing in this case. See Petition for Writ of Certiorari, pp. 7-8, 15-16.

i. Roper Pond Ignores Impacts to the Lily Pad Pond[1]

As to the lily pad pond, the evidence of record establishes: that we have a scenic lily pad pond located in immediate proximity to where the individual Petitioners reside (R. pp. 534-41); that the pond was in clear view from the adjacent public sidewalk and road (R. p. 373); that individual Petitioners regularly walked/jogged/ drove by the pond to enjoy its beauty (R. pp. 373,

[1]The Court of Appeals acknowledges impacts to the lily pad pond but dismisses them on property ownership grounds, as discussed below.

400); that individual Petitioners regularly enjoyed viewing flora and fauna in the pond (R. p. 401); and that the DHEC approvals at issue in this case authorize a dredging and deepening project that will change the character of the pond (R. pp. 534-41; 542-48; 555-62). Neither Respondents' Return seriously disputes any of these points, which together read as a basic recipe for environmental standing. Putting aside for the moment some of the ancillary standing issues that have arisen in this case, the Court of Appeals' rejection of the individual Petitioners' standing under this factual scenario represents a serious departure from both state and federal standing precedent and warrants this Court's intervention.

Not even Roper Pond disputes that the lily pad pond will be (and in fact has been) dredged and deepened under the DHEC approvals at issue here. Rather, Roper Pond's primary strategy is diversion. In particular, Roper Pond's Return either ignores impacts to the lily pad pond or treats them as interchangeable with impacts to Cary Lake. First, Roper Pond attempts to tie the Petitioners' standing testimony exclusively to Cary Lake, without mention of the lily pad pond. See Return, pp. 8-9. In relation to Linda Jackson's testimony, during which she discussed her enjoyment of the lily pad pond at length, Roper Pond only briefly notes her statements that *Cary Lake* is privately owned, has no public access, and will be negatively impacted only if Roper Pond's violates the permit terms.[2] Id. An issue which is consistently avoided in Roper Pond's Return is that the lily pad pond absolutely will be negatively impacted (in terms of the Petitioners' use and enjoyment) without a permit violation. In fact, the very purpose of the approvals at issue in this case is to facilitate that "negative impact" to the lily pad pond through dredging and excavating.

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[2]This is Roper Pond's characterization of the testimony, not the Petitioners'.

Roper Pond then purportedly recounts the testimony of Elaine Starr, who lives on Cary Lake, only it neglects to mention any of Ms. Starr's testimony on the lily pad pond. She has enjoyed viewing the lily pad pond and said it is "absolutely gorgeous." (R. p. 400). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic party of the community. (R. p. 400, 413). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged. (R. p. 401). In short, the version of testimony portrayed in Roper Pond's Return evades the fact that the lily pad pond is/was an important local landmark and that destruction of the pond is the primary reason for most of the Petitioners' involvement in this case.

From evasion to misstatement, Roper Pond consistently puts forward the argument that "[m]ost, if not all, of Petitioners' alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance with the . . . Permit." Return, p. 19. Again, dredging and deepening of the lily pad pond is a function of the permit and has nothing to do with mismanagement of sediment and erosion control (a violation of permit terms). The only way Roper Pond's argument is even potentially accurate is if impacts to the lily pad pond are ignored in favor of testimony exclusively about Cary Lake, which is exactly what Roper Pond does in its presentation of the argument. See Return, pp. 17-19. In trying to make the Petitioners' objections to this project about anything other than the lily pad pond, Roper Pond ignores the Petitioners' most readily identifiable, easily demonstrable injury. A strategy no doubt intended to diminish the import of the Court of Appeals' unprecedented holding that the Petitioners' interests in the lily pad pond are insufficient because that pond is on private property.

ii. Impacts to the Lily Pad Pond Result in More than "Abstract Distress"

When Roper Pond does get around to acknowledging the lily pad pond, it briefly and weakly dismisses the Petitioners' interests in that pond as nothing more than "abstract distress." Return, p. 21-22. In doing so, Roper Pond block quotes a portion of the Fourth Circuit's opinion in Friends of the Earth, Inc. V. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) that in fact strongly supports standing for the Petitioners' based on their interest in the lily pad pond. That block quote contains the following relevant language: "The Supreme Court has made it clear that [aesthetic and recreational interests] may be vindicated in the federal courts"; "**purely aesthetic interest is cognizable for purposes of standing**"; "effect on '**recreational, aesthetic**, and economic interests' is cognizable injury for purposes of standing"; and "**Aesthetic and environmental** well-being, like economic well-being, are important ingredients of the quality of life in our society . . . **deserving of legal protection through the judicial process.**" (emphasis added). Id. at 154-55.

Despite having just quoted this language, Roper Pond concludes with little explanation that, in this case, the Petitioners recreational and aesthetic interests in the lily pad pond fall in the category of "abstract distress." Return, p. 22. Part of this conclusion rests on Roper Pond's aforementioned effort to interchange the impacts to the lily pad pond with those to Cary Lake. The fate of the lily pad pond – dredging, deepening, and conversion into a stormwater retention pond – is in no way abstract. Further, the Petitioners in this case have testified that they live adjacent to the lily pad pond (R. pp. 394), that they have enjoyed viewing the pond nearly everyday for 37 years (R. p. 373), and that the pond serves as an important part of their community (R. pp. 400, 413). Relying on Pye, Smiley, and even the Gaston Copper case cited by Roper Pond, the Petitioners

submit that these interests far exceed those that this Court, the Fourth Circuit and other courts have lumped into the category of "abstract distress."

The Petitioners have focused on the individual Petitioners' interest in the lily pad pond to the exclusion of other bases for standing, only in the hopes that viewing this relationship in isolation will highlight what is practically a textbook case of environmental standing. The battle for consistent environmental standing results has been hard fought by this Court, and a precedent of this nature stands to throw turbulence onto that relatively stable body of law.

B. The Court of Appeals Improperly Rejected the Petitioners' Aesthetic and Recreational Interests Based on Property Ownership

Roper Pond first states that the Petitioners mischaracterize the Court of Appeals' holding on the requirement for a property interest; later though, Roper Pond makes arguments in support of the very same property interest requirement imposed by the Court of Appeals. Roper Pond's Return is inconsistent and incorrect on both counts.

Roper Pond contends that the "Petitioners mischaracterize the Court of Appeals' consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case." Return, p. 16. In support, Roper Pond attempts to present the Court of Appeals' property interest inquiry as occurring entirely in the context of the Town's interest in Cary Lake. Return, p. 16-17. A review of the Court of Appeals' Opinion reveals this presentation to be patently inaccurate and merely a continuation of Roper Pond's efforts to obscure the individual Petitioners' legitimate interests in the lily pad pond. The Court of Appeals leaves no room to misinterpret or mischaracterize its imposition of a property interest requirement.

Specifically, Roper Pond's obfuscation cannot overcome the plain analysis in the Court of Appeals' Opinion, which dismisses the individual Petitioners' aesthetic and recreational interests in the lily pad pond because the pond is on private property. After determining that the Town does not have standing, the Court of Appeals moved on to the individual Petitioners residing in the Kaminer Station subdivision, noting that "concerns reflecting aesthetic or recreational interests have been recognized as 'judicially cognizable injur[ies] in fact.'" (Shearhouse Adv. Sht. No. 26 at 122). However, citing Costanzo, the court identifies a distinction when that aesthetic or recreational interest is in another's private property. Id. The Court of Appeals sums up its consideration of the Kaminer Station Petitioners' injury-in-fact as follows: "Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants." Id. In short, the Court of Appeals determines that the Kaminer Station Petitioners do not have an injury-in-fact because the lily pad pond is on private property, and the court then moves on to consider the causation element of standing. See, Id. In its discussion of standing for the individual Petitioners' residing in the Cary Lake subdivision, the court's reliance on a property interest requirement is even more unmistakable. The court holds: "Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact." Id. at 123 It is nearly impossible to mischaracterize this plain statement.

The Court of Appeals' novel imposition of a property interest requirement is wrong for all the reasons noted in the Petition. See, Petition, pp. 7-9. There can be no debate, however, that the court did impose such a requirement on the *individual petitioners* in relation to *the lily pad pond*

and Cary Lake. Roper Pond's assertion to the contrary is merely an effort to disguise the court's misapplication of law.

Paradoxically, Roper Pond later attempts to hedge its bet by arguing in favor of the Court of Appeals' faulty property interest requirement. In distinguishing the Smiley case, Roper Pond puts particular emphasis on the fact that Smiley's aesthetic and recreational interests were in a "**public**" area, while the Petitioners' interest is in a lily pad pond on private property. Return, p. 19. Similarly, in distinguishing the Spectre case, Roper Pond emphasizes that it was a "property owner" whose standing was at issue. Id. Roper Pond is arguing for the same property interest requirement imposed by the Court of Appeals, under the same misinterpretation of Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974).

Notably, contrary to how it is put forward by the Court of Appeals and Roper Pond, the standing inquiry in Costanzo turned on property access, not property ownership. Particularly, that case considered the standing of groups to challenge construction on private property they had previously accessed as either a licensee or trespasser. Id. at 501-02. The Fourth Circuit's holding rested on the fact that the parties asserting standing no longer had a right to access the property; ownership of the property was only secondarily implicated as it related to access. Id. The situation here is inapposite. The individual Petitioners will still walk, run and drive by the lily pad pond and have visual access thereto; only their view will be diminished and their opportunity to see certain flora and faunal will be lost. These are the exact type of interests routinely found to serve as a basis for environmental standing. As outlined in the Petition, the scope of an environmental plaintiff's aesthetic and recreational interest has been significantly refined since 1974, and certainly

that interest no longer rests on physical access, much less ownership.[3]

The Court of Appeals' Opinion provides a springboard from which the argument can easily be made that an environmental plaintiff's aesthetic and environmental interests can only serve as a basis for standing when accompanied by a property interest. The potential implications for environmental plaintiffs in the State are immense. Regardless, without this Court's intervention, lower courts will likely face this argument in nearly every case where aesthetic and recreational interests are implicated.

C. Sufficiency of Evidence on Standing

Roper Pond's lead argument on standing is that the Petitioners fail "to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial." Return, p. 15. Roper Pond quickly moves on from this argument and never explains exactly what it sees as Petitioners' evidentiary failures. First of all, as it relates to the question of standing, the Petitioners know of no more "sufficient," definitive form of evidence than the testimony of the Petitioners themselves, which was offered at length during the trial of this case. Secondly, as argued in the Petition and this Reply, and as evident from the Opinion itself, the Court of Appeals' denial of standing, especially as it relates to the individual Petitioners and to the lily pad pond, turns on faulty application of law, not failure of evidence.

---

[3]Roper Pond faults the fact the individual Petitioners have never made use of the actual property on which the lily pond sits. Return, p. 19. South Carolina has never required that an environmental plaintiff actually physically occupy a property to have an aesthetic or recreational interest therein. See, e.g., S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 371 S.E.2d 521 (1988); see also Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

II. MERITS OF THIS CASE PRESENT IMPORTANT QUESTION ON STATE ENVIRONMENTAL AUTHORITY

Just like with standing, Roper Pond does its best to distract from the central question on the merits of this case by interjecting extraneous legal issues and mischaracterizing the Petitioners' arguments. DHEC's Return, though, quickly brings that question back into focus when it notes at the outset of its arguments that: "*Since the Corps did not have regulatory authority* to cover the excavation of the pond, the Department did not require an individual 401 certification for the [nationwide permit]." DHEC Return, p. 9 (emphasis added). This justification offered by DHEC demonstrates its mistaken understanding that its 401 certification review, once triggered, is limited to the scope of the U.S. Army Corps of Engineers' ("Corps") Clean Water Act ("CWA") regulatory authority. In this case, DHEC's misunderstanding has resulted in significant impacts to a water of the State (the lily pad pond) that effectively occur beyond the reach of South Carolina's water quality regulations.

A. DHEC has Authority to Apply its own Certification Conditions

Roper Pond argues that when DHEC conditionally certified the Corps' Nationwide Permits ("NWPs") in 2007, DHEC lost the ability to assess or determine whether a proposed NWP project meets those conditions. See Roper Return, p. 2. Specific to this case, Roper Pond believes that when DHEC certified the NWPs with the general condition that "**SCDHEC considers** . . . the overall project proposed . . . includ[ing] all land within the project boundary," DHEC then lost the ability to consider the overall project proposed, turning over that authority exclusively to the Corps. (emphasis added); See Roper Return, p. 14. The logical result of Respondent's argument would be that DHEC does not and cannot ever individually review a NWP project for compliance

with the certification conditions, much less the water quality standards. There is no factual or legal basis for this position.

On the contrary, DHEC's Chuck Hightower testified that DHEC does review NWP projects and issues a certification letter if it finds that the project satisfies the terms of DHEC's NWP certification. (R. pp. 251-262). If the NWP general and special conditions have been met, thereby qualifying the project for coverage under DHEC's Water Quality Certification, the applicant may proceed. But if they have not been met, Hightower said DHEC requires an individual certification. (R. p. 253).

What Roper Pond advocates, and the Court of Appeals sanctions, is for the citizens of South Carolina to trust that the Federal government, through the Corps, will ensure that State certification conditions are met in order to qualify for coverage under the State's NWP certification. Under Roper Pond's conception, if the State certification conditions are not met, the Corps presumably then transfers authority back to DHEC through some unknown mechanism so that DHEC can conduct an individual certification review. The Petitioners are not aware of any instance where the Corps has informed DHEC that DHEC's own certification conditions are not met, warranting individual certification review.

In making its argument on this point, Roper Pond relies on DHEC regulation R.61-101.H, which covers "*enforcement* of certification decisions and conditions." See 25A S.C. Code Ann. Regs. 61-101.H (emphasis added). Roper Pond fails to account for the important distinction between *making* a certification decision and *enforcing* a certification decision. Regulation R.61-101.H.2 does provide for the possibility that the Corps' "enforcement mechanisms" will be used to

enforce DHEC's certification conditions.[4] Roper Pond though makes the stark extrapolation from this language that because the Corps has authority to *enforce* the terms of a certification decision, the Corps has sole authority to actually make a certification decision. On the contrary, while the Corps may have authority to bring enforcement measures, nothing in R.61-101.H limits DHEC's authority to make a certification decision by reviewing a proposed project's compliance with its certification conditions.

B. DHEC has Authority to Apply its own Certification Conditions Broadly

DHEC does not adopt Roper Pond's position that the Agency has turned over all authority to determine compliance with its own NWP certification conditions, but DHEC does argue for limiting the scope of its conditions. In particular, while DHEC acknowledges that this Court has previously found that state authority to regulate wetlands and waters extends beyond Federal regulation under the CWA, DHEC argues that in the legal context involved here, applicable state law does not warrant a similar extension. See, DHEC Return, p. 13. While the Petitioners have previously noted the broad scope of DHEC's Water Quality Certification Regulations, DHEC's contrary position warrants elaboration on the issue.

In promulgating the Water Quality Certification Regulations, the General Assembly gave DHEC broad authority to review any "alterations to the aquatic ecosystem in the vicinity of the project," "adverse consequences on water quality," "all potential water quality impacts of the project, both direct and indirect, over the life of the project," and the "physical, chemical and biological impacts, including cumulative impacts." S.C. Code Ann. Regs. 61-101.F.3. & 61-

[4]Note that the regulation also provides that: "The Department may conduct inspections for deter mining compliance with certification conditions." See R.61-101.H.3.

101.F.5. The plain language of these regulations make it abundantly clear that the legislature intended DHEC's certification scope of review, once triggered, to include all water quality impacts stemming from a proposed project, regardless of the Corps' regulatory authority. The NWP certification conditions that are undisputedly applicable to this proposed project were issued under the authority of these broad provisions. Respondents' arguments that certification review is limited only to activities regulated by the Corps contravenes the plain language of the certification regulations and has no basis in law. It is true that a Corps 404 permit is what triggers the need for a 401 water quality certification, but once certification is triggered DHEC has authority to consider, and in fact does consider, impacts beyond those regulated by the Corps. (R. pp. 251-52).

C. DHEC Misapprehends the Deference Owed its Interpretation of its own Certification Decision

DHEC maintains that: "The Court of Appeals decision should also be upheld because it comports with the Department's interpretation of the water quality certification it issued for NWP 29," adding that "[o]nly the staff has the institutional knowledge necessary to place the language [of the general conditions] into context." DHEC Return, p. 15, 17. DHEC is arguing that it is owed deference on interpretation of its own permitting decision. The type of deference advocated for by DHEC has no precedent.

DHEC cites cases wherein agencies are accorded deference on interpretation of their own enabling statute and regulations, and it argues that the same deference is owed to "the Departments's interpretation of the certification that it placed on all NWPs." Id., p. 16. The mistake in this logic is that DHEC's conditional NWP certification is a basic permitting decision, just like any other individual 401 certification review, and it has no regulatory or statutory significance. See, R.61-101.A.3. While the ALC's interpretation of that permitting decision is

entitled to some deference by virtue of South Carolina Administrative Procedures Act, certainly DHEC's post hoc rationalization giving staff's opinion of how a permit condition should be interpreted in a particular permitting decision receives no additional deference. See, S.C. Code Ann. § 1-23-610. If DHEC's argument on deference were accepted, DHEC would receive deference in every legal challenge where it took a position in defense of its own permitting decision. Obviously such is not the state of the law.

D. Petitioners do not Argue that the Stormwater Permit Creates Requirement for a Corps Permit

The Petitioners have never argued that the stormwater permit – the NPDES General Permit – "create[s] a requirement for a Corps permit where none is required by the federal statutes." Roper Return, p. 11. While Roper Pond attributes that argument to the Petitioners, and then offers opposition to the purported argument, the Petitioners' position has always been that the stormwater permit merely *reflects* the requirement for the Corps 404 permit.

Specifically, approval for coverage under the NPDES General Permit expressly requires the applicant to obtain any necessary 404 permit first. In this case, a 404 permit is necessary for the filling of 0.075 acres of the 1.8 acres of jurisdictional wetlands on the property. In order to obtain a 404 permit, the applicant must have a 401 water quality certification. The stormwater permit does not *create* the requirement for a 404 permit and 401 certification, but given that a 404 permit is required for the project, that 404 permit and the attendant 401 certification must be obtained before stormwater coverage.

As a further point of clarification, the Petitioners have never argued that a federal Clean Water Act 404 permit is required for the dredging and excavation of the lily pad pond. Rather, states are responsible for enforcing water quality standards on intrastate waters, of which the lily

pad is one. 33 U.S.C. § 1319(a). It is through the 401 certification program that States ensure compliance with State water quality standards. See, e.g.,PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 114 S.Ct. 1900 (1994).

The Petitioners submit that these efforts to cloud the merits being presented for this Court's consideration can be remedied by reference to the Petition for Writ of Certiorari, which presents a distinct question of State environmental authority: whether DHEC is required to consider (through individual 401 Certification) significant aquatic impacts of the proposed project beyond the Corps' 404 authority, in particular the dredging and excavation of the lily pad pond.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court issue a Writ of Certiorari to the Court of Appeals, hear this appeal and reverse the opinion of the lower court.

Respectfully submitted,

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Georgetown, South Carolina

October 8, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Petitioner's Reply to Respondents' Return to Petition for Certiorari upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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Joan W. Hartley, Esquire
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Stephen Hightower, Esquire
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Columbia, SC 29201

Amy Armstrong

October 8, 2013

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S AMENDED PETITION FOR ATTORNEYS' FEES AND COSTS AND FOR SANCTIONS PURSUANT TO RULE 72, SCRPALC**

Pursuant to S.C. CODE ANN. § 15-77-300 and in accordance with the Court's Order dated May 11, 2010, Respondent Roper Pond, LLC's ("Roper Pond") hereby moves this Court for an order directing the Petitioner Town of Arcadia Lakes ("Town") to pay to Roper Pond its attorneys' fees and cost incurred in this matter, including fees and costs incurred during the appeal before the Court of Appeals, in the amount of $162,559. In the alternative, Roper Pond moves the Court for an order awarding Roper Pond $695,404 for attorneys' fees and costs, including fees and costs incurred during the appeal before the Court of Appeals, and the costs associated with delay of the planned development of the Roper Pond property on Trenholm Road in Richland County ("Property") as sanctions pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

The grounds for this petitioner for fees and costs pursuant to S.C. CODE ANN. § 15-77-300 are:

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SC ADMIN. LAW COURT

1. Roper Pond is a prevailing party in this matter as the Court's Final Order and Decision filed January 21, 2010, and the denial of Petitioners' Motion to Reconsider on March 23, 2010, upheld the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC") to grant Roper Pond coverage under Permit No. SCR100000, NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit");

2. The Town acted without substantial justification in bringing this action challenging DHEC's decision to grant coverage to Roper Pond under the Construction General Permit, and in fact, this Court held that the Town lacked standing to bring such action, and;

3. There are no special circumstances that would make an attorneys' fee award unjust.

4. On April 19, 2010, Roper Pond filed its Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, on the above-stated grounds. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, in abeyance pending the resolution of Petitioners' appeal. The Order further provided that within thirty days of the resolution of the appeal, Roper Pond could file a revised Petition for Attorneys' Fees and supporting affidavit to include fees and costs incurred during the appeal before the Court of Appeals. On June 12, 2013, the Court of Appeals issued Opinion No. 5095, affirming this Court's Final Order and Decision on standing and the substantive ruling on the Department's decision to grant Roper Pond coverage under the Construction General Permit. Roper Pond is therefore also entitled to attorneys' fees and costs incurred in the appeal before the Court of Appeals.

Additionally, or in the alternative, Roper Pond asks the Court to award attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRALC, on the grounds that Petitioners' challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was frivolous and/or taken solely for the purpose of delay.

This petition is supported by the applicable law, the pleadings, motions, and memoranda on file in this case, the discovery conducted in this case, the testimony and evidence presented at the hearing on the merits, and the Memorandum of Law in Support of Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, filed and served on April 19, 2010, the Affidavit of W. Thomas Lavender, Jr., filed and served herewith, and the following supporting affidavits which were filed with Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, dated April 19, 2010 ("April 19, 2010 Petition"): Affidavit of Joan W. Hartley (Exhibit A to the April 19, 2010 Petition), Affidavit of Charles C. Mickel (Exhibit C to the April 19, 2010 Petition), and Affidavit of Matthew H. Mundy (Exhibit D to the April 19, 2010 Petition).

W. Thomas Lavender, Jr. (SC Bar No. 3143)
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Attorneys for Respondent
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July 12, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No.: 09-ALC-07-0069-CC **AFFIDAVIT OF W. THOMAS LAVENDER, JR.**

PERSONALLY APPEARED BEFORE ME, W. Thomas Lavender, Jr., who, being duly sworn, swears and deposes that if he were called as a witness in the above-entitled action he would truthfully and accurately testify as follows:

1. I am an attorney licensed to practice law in the State of South Carolina and a member in the law firm of Nexsen Pruet, LLC (hereafter "the Firm"), 1230 Main Street, Columbia, South Carolina 29201. I graduated from the University of South Carolina School of Law in 1976. I am admitted to practice before all South Carolina Courts, the Federal Court of the District of South Carolina, the Fourth Circuit Courts of Appeals and the United States Supreme Court.

2. The Firm represents Respondent Roper Pond, LLC ("Roper Pond"), in the above-captioned action. I am familiar with this file and the number of hours spent and expenses incurred in the representation of Roper Pond in this matter.

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JUL 12 2013
SC ADMIN. LAW COURT

3. I have reviewed the timekeeping records maintained by Nexsen Pruet in the regular course of business in this file. Those records and reports reflect the individual entries by specific attorneys that describe each attorney's activity and the amount of time spent on each activity for the representation of Roper Pond.

4. In accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through March 19, 2010:

W. Thomas Lavender, Jr.	91.9 hours at $370/hour	=	$ 34,003.00
Henry W. Brown	13.8 hours at $330/hour	=	$ 4,554.00
Joan Hartley	291.7 hours at $220/hour	=	$ 64,174.00

5. Since March 19, 2010, in accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through July 12, 2013:

W. Thomas Lavender, Jr.	53.70 hours at $382/hour	=	$ 20,513.00
Joan Hartley	147.20 hours at $215/hour	=	$ 31,648.00

6. The total fees incurred by Respondent through July 12, 2013, in this matter are $154,744.00. Additionally, costs incurred in connection with the Firm's representation of the Respondent total $ 7815.

FURTHER AFFIANT SAYETH NOT.

W. Thomas Lavender Jr.

SWORN and subscribed to before me

this 12th day of July, 2012

Felicia W. Turner (L.S.)

Notary Public for State of S.C.

My commission expires 12/17/2018

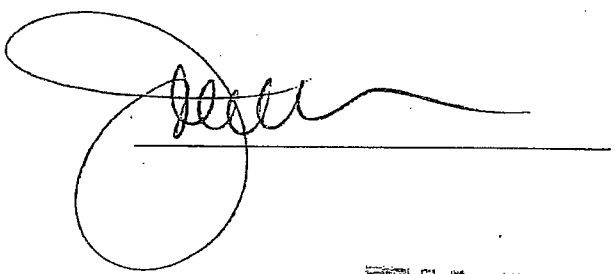
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

This is to certify that Respondent Roper Pond, LLC's Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC and Affidavit of W. Thomas Lavender, Jr., have been served on counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 12th day of July, 2012:

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FILED
JUL 12 2013
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

BRIEF OF PETITIONERS ON WRIT OF CERTIORARI

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October 2, 2014

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33 U.S.C.A. § 1344 ..... 7, 8

S.C. Code Ann. § 48-1-10, *et seq.* 8

S.C. Code Ann. § 44-1-60 (Supp. 2012) 18

OTHER AUTHORITIES

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S.C. Code Ann. Regs. § R.61-101 ..... 8, 40, 41, 43, 44

STATEMENT OF ISSUES ON APPEAL

I. Did the Court of Appeals Erroneously Apply this Court's Well-Established Requirements for Standing by:

A. Failing to Conclude that Petitioners' Aesthetic and Recreational Interests in Viewing the Lily Pad Pond whose Excavation is Authorized by the Challenged Permit Gives Rise to a Judicially Cognizable Injury-in-Fact under *Smiley v. DHEC* and *Sea Pines v. SCDNR*, which Both Hold that Purely Aesthetic and Recreational Interests are Sufficient to Establish Injury-in-Fact?;

B. Injecting a New Requirement that a Plaintiff Must Have a Property Interest in the Area where the Challenged Activity is Located to Establish an Injury-in-Fact?; and

C. Requiring Proof on the Merits or Proof of a Future Permit Violation in order to Establish a Causal Connection for Purposes of Standing, Despite the Fact that the Challenged Activity in this case is a Permit Authorizing the Excavation of the Lily Pad Pond that Petitioners Enjoy Viewing?

II. When the Court of Appeals Agreed with Petitioners that DHEC's Scope of Review Requires it to Consider the "Overall Project" and not just the area covered by the Nationwide Permit, did it err in failing to remand the decision to DHEC with instructions to consider the impacts of the "Overall Project," especially in light of information that impacts to the Lily Pad Pond, as a Water of the State, were not included in DHEC's Nationwide Permit review?

III. Did the Court err in concluding that Roper Pond has valid 401 Certification when the project includes impacts beyond those reviewed and authorized by the Nationwide Permit and DHEC's 401 Certification of that permit?

IV. Did the Court of Appeals Err in Concluding that Coverage Under the State Stormwater General Permit Was Proper When DHEC Did Not Review or Consider Impacts to Waters of the State Resulting in Roper Pond Not Having a Valid 401 Certification or Valid 404 Permit, as Required for Coverage Under the General Permit?

STATEMENT OF THE CASE

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC ("Roper Pond"). Roper Pond requested the storm water permit and coverage under the NPDES permit to build a high density apartment complex on a 12.75 acre tract that includes 1.8 acres of wetlands, lying immediately adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The Petitioners challenge the storm water permit and corresponding coverage under the NPDES permit because Roper Pond's project fails to meet all of the legal requirements for those authorizations, including the requirement to obtain the appropriate State approvals for dredging and excavation of an on-site pond.

A hearing was conducted on September 4-5, 2009, in the Administrative Law Court. Administrative Law Judge John D. McLeod issued a final order and decision on January 21, 2010, affirming the DHEC decision and ruling that the Petitioners lacked standing to maintain this action. The Petitioners filed a Motion to Reconsider and For Stay on February 1, 2010. A hearing on the motion was held on March 23, 2010. Also on March 23, 2010, the Administrative Law Court issued an Order for Temporary Stay pending a decision on the Motion to Reconsider. On April 1, 2010, the Administrative Law Court issued an Order Denying Motion for Reconsideration and For Stay.

On April 20, 2010, Petitioners filed a Notice of Appeal. The Court of Appeals heard oral arguments on May 8, 2012 and issued an Opinion on March 6, 2013, affirming

the ALC's Order. The Appellants filed a Petition for Rehearing on March 21, 2013. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion.

On July 12, 2013, the Petitioners filed a Petition for Writ of Certiorari, which was granted by this Court's Order of August 22, 2014.

ARGUMENT

Summary of Argument

This case presents issues of environmental standing and the scope of the South Carolina Department of Health and Environmental Control's authority to review water quality impacts to waters of the State.

The Court of Appeal's Opinion contradicts this Court's well-established law on standing in environmental cases by: (1) creating a new requirement that a Plaintiff must have a property interest in the property where the challenged activity will occur in order to establish an injury-in-fact; (2) requiring that a Plaintiff must prove success on the merits or a future permit violation to establish a causal connection between the injury and the challenged activity; and (3) dismissing aesthetic and recreational interests as insufficient to confer standing. The Court of Appeals' Opinion is in direct conflict with prior standing decisions of this Court, which make it plain that a Plaintiff may challenge state agency authorizations for activities that occur on another's property if those activities injure the Plaintiff's recreational or even aesthetic interests. The ALC erroneously confused the gatekeeping role of standing – i.e., a test for whether a citizen has sufficient stake to challenge state action to grant a particular administrative authorization – with the

subsequent step of resolving the merits of the challenge the citizens seeks to bring. In effect, the ALC has made it harder to challenge a faulty DHEC permit for a major, polluting project than it would be to challenge a corner store's liquor license.

The new, unjustifiably burdensome requirements for standing that a Plaintiff have a property interest in the area over which the challenged activity will occur, as well as prove either the merits or a future permit violation, are a significant divergence from well-established standing law.[1] Neither of these standards has been applied by this State's appellate courts or any federal court, and, indeed, both federal and South Carolina courts hold the contrary. Instead these new requirements muddy the waters of this state's carefully crafted standing law and will likely have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their communities.

On the merits, the Opinion inconsistently addresses the question of DHEC's scope of review under the Section 401 water quality certification program. The Court of Appeals first agrees with Petitioners that DHEC has broad authority, and indeed is required to consider the "overall project," including impacts beyond those specifically authorized by a United States Army Corps of Engineers ("Corps") permit, but then arrives at a conclusion which limits DHEC's scope of review under the 401 certification program to the Corps' scope of review under the CWA. The lower court's conclusion is contrary to this Court's

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This new standard of proving success on the merits or a future permit violation as a prerequisite to standing has already been cited by the Administrative Law Court in granting a motion for summary judgment for lack of standing in the case of *Preservation Society of Charleston, et al. v. S.C. State Ports Authority*, Docket No. 13-ALJ-07-0056-CC, filed April 11, 2014.

prior interpretations of state versus federal jurisdiction of waters, holding that DHEC is required to review impacts to waters of the State beyond those governed under the Federal Clean Water Act. *Spectre v. DHEC*, 386 S.C. 357, 688 S.E.2d 844 (2010); *Georgetown County LWV v. Smith Land Co. Inc.*, 393 S.C. 350, 713 S.E.2d 287 (2011).

The Court of Appeals agrees with Petitioners' arguments that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by a Corps Nationwide Permit, but then fails to apply its conclusions to the certification and General Permit coverage at issue in this appeal.

Overview of the Case

Roper Pond, LLC's Proposed Residential Development Project

Roper Pond, LLC, owns 12.75 acres of property which includes 1.8 acres of wetlands and waters of the United States delineated by the U.S. Army Corps of Engineers as being protected under the federal Clean Water Act. (App. pp. 546-553; 554-560; 567-574). A majority of this jurisdictional water consists of a pond, known as the "lily pad pond" or "Roper Pond," depicted on plans submitted by Roper Pond, LLC. (App. pp. 546-553; 554-560; 567-574). The Roper Pond property and the lily pad pond are located on Trenholm Road directly adjacent to the Town of Arcadia Lakes. The pond is visible from Trenholm Road when entering the Town of Arcadia Lakes and is covered in lily pads. (R. pp. 931-35). The pond drains through a pipe under Trenholm Road directly into Cary Lake, a portion of which lies within the Town of Arcadia Lakes. (App. pp. 546-553; 554-560; 567-574).

As part of its development, Roper Pond, LLC sought authorization to fill 0.075 acres of wetlands for a road crossing and a building pad. (App. pp. 567-574). Roper Pond, LLC, plans also included dredging and excavation of all of the lily pad pond, which is the majority of the remaining 1.8 acres of federally jurisdictional wetlands on the property. Roper Pond, LLC, seeks to use the lily pad pond as a storm water treatment facility, namely a retention pond.

Summary of Permitting Requirements for the Proposed Residential Development

In order to undertake the proposed multi-family residential construction activities on the 12.75 acre tract, Roper Pond, LLC, has to obtain a number of approvals from the S.C. Department of Health and Environmental Control ("DHEC") and the U.S. Army Corps of Engineers. One of those approvals is a DHEC stormwater permit for land-disturbing activities in connection with the proposed residential development.[2] *See* 24 S.C. Code Ann. Regs. § 61-9.122.26(c). Regulation 61-9.122.28(a)(2) authorizes DHEC to issue general

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Prior to conducting any land-disturbing activities, an applicant must apply for a stormwater permit from DHEC. DHEC issues the stormwater permit in the form of granting coverage under the NPDES General Permit for Storm Water Discharges for Small and Large Construction Activities, as in the case of Roper Pond, LLC's permit.

Section 402 of the Clean Water Act established the NPDES program and delegates authority to the States to operate the NPDES permit program. The NPDES program is the Clean Water Act's permitting system for both point and nonpoint sources of pollution. In this case, we are dealing with a permit for nonpoint source pollution in the form of stormwater and other runoff from the Roper Pond construction site.

Construction activities that disturb more than one acre are regulated under the NPDES stormwater permit program. S.C. Code Ann. Regs. § R.61-9.122.26(b)(15). Operators of these regulated construction sites are required to obtain coverage under a state NPDES permit, also called a stormwater permit. S.C. Code Ann. Regs. § R.61-9.122.26(a)(9)(B). This portion of the Clean Water Act was enacted based on recognition that stormwater runoff had become a primary source of water pollution in many areas of the country. The purpose of the NPDES stormwater permit requirement is to ensure that operators of construction sites implement stormwater pollution control measures.

stormwater permits for discharges for categories of stormwater sources. On August 1, 2006, DHEC issued such a permit, Permit No. SCR100000, entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" pursuant to Regulation 61-9.122.28(a)(2). To have a valid stormwater permit, the residential construction activities proposed by Roper Pond, LLC require approval under this NPDES General Permit for Storm Water Discharges (hereinafter "NPDES General Permit").

Roper Pond, LLC submitted a Notice of Intent for Stormwater Discharges seeking approval for coverage under the NPDES General Permit for its land-disturbing activities. (App. pp. 561-562). The Notice of Intent requires the applicant to identify all jurisdictional wetlands in the project area, whether there will be any impacts to those wetlands from the project, and the amount of wetlands proposed to be impacted.

Critically, the NPDES General Permit requires an applicant to obtain any required wetlands permit before DHEC will grant coverage under the NPDES General Permit.

The wetlands permit is a Clean Water Act §404 permit from the U.S. Army Corps of Engineers ("Corps"), which is triggered if an applicant proposes to place fill material in wetlands that are waters of the U.S. 33 U.S.C.A. § 1344(a). The Corps §404 permit in turn triggers the requirement for a §401 Water Quality Certification from DHEC that the §404 Permit is consistent with the §401 water quality regulations and State water quality standards. *See* 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, *et seq.* DHEC Regulations 61-101 govern the process and standards DHEC must follow and apply in its 401 certification review. S.C. Code Ann. Regulation 61-101.A.(2) states that "no Federal

license or permit is to be granted until such [401 water quality] certification is obtained." *See also* 33 U.S.C. § 1341.

The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC's review authority over waters of the State derives from the Pollution Control Act at § 48-1-10, *et seq.*, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.

The Clean Water Act also authorizes categories of general permits under § 404 called Nationwide Permits for certain activities deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). If a proposed project falls under one of these NWPs, the Corps will not undertake an individual 404 review. Specific to this case, the U.S. Army Corps of Engineers issued Nationwide Permits #29 and #39 on March 12, 2007. 72 FR 11092 (11123). Nationwide Permit #29 applies to residential developments and Nationwide Permit #39 applies to commercial and institutional developments.

DHEC may issue 401 water quality certifications for Nationwide Permits, and it did so on May 11, 2007 for NWPs #29 and #39, along with a number of other NWPs not relevant to this appeal. The certifications included general conditions that must be met in order for the DHEC §401 water quality certification to be valid and the Nationwide Permits to be effective. (App. p. 585; S.C. Code Ann. Reg. 61-101.A). The general conditions of that certification require DHEC to consider the "overall proposed project," including "all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by the NWP." (App. p. 585). The general conditions say

that "Impacts to . . . adjacent waterbodies or wetlands resulting from the activity will be considered during the review of these actions." (App. p. 585).

In summary, for the Corps § 404 permit to be issued and effective, the project must have a DHEC 401 water quality certification. In this case, where there is a Clean Water Act § 404 Nationwide Permit for which DHEC has issued a 401 water quality certification with conditions, the project must meet the conditions of DHEC's NWP 401 water quality certification in order to qualify for coverage under that NWP certification. (App. p. 585). To qualify for coverage and have an approved and effective Section 404 Nationwide Permit, DHEC must determine that the project meets its Section 401 water quality certification general conditions.

Again, the NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (App. p. 499). Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."[3] (App. p. 499)

Neither a §404 NWP nor a §401 water quality certification of the NWP were properly issued to Roper Pond, LLC prior to DHEC's approval under the NPDES General

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On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

Permit. And the Roper Pond project does not qualify for NWP 401 certification because the dredging and excavation were not disclosed in its application nor considered by DHEC in reviewing the project for compliance with the general conditions of the NWP 401 certification.

There are 1.8 acres of wetlands and waters of the United States on the subject property. As part of its development plans, Roper Pond, LLC, proposed to fill 0.075 acres of these wetlands and to dredge and excavate the lily pad pond, which composes the majority of the 1.8 acres of wetlands. Roper Pond, LLC, sought approval to fill those 0.075 acres of wetlands under the Corps' 404 NWP program; however, Roper Pond, LLC, did not properly disclose the dredging and excavation of the pond in its joint application and did not seek or obtain the requisite approval for the dredging and excavation activities from DHEC.

In this case, DHEC did not conduct a review to ensure that its 401 certification conditions of the Nationwide Permit had been met. Indeed the project fails to meet those qualifying conditions. Because of this failure Roper Pond does not have a valid 401 water quality certification for its Nationwide Permit. DHEC granted coverage under the NPDES General Permit despite the fact that Roper Pond, LLC, did not have that certification – a fatal flaw in the permit at issue.

The ALJ and Court of Appeals compounded DHEC's error by upholding the DHEC decision and by concluding that DHEC has no authority to consider water quality impacts resulting from the dredging and excavation of the pond.

DHEC's Review of the Proposed Project

Roper Pond, LLC, submitted two applications – one to DHEC's storm water department seeking coverage under the NPDES General Permit, and one to the Corps and to DHEC's 401 water quality certification department seeking approvals under a Nationwide Permit and certification. Both of these applications were required because Roper Pond, LLC, needed both a stormwater permit and a 404 wetlands permit and certification.

Jill Stewart is the manager of the Stormwater Permitting Section at the S.C. Department of Health and Environmental Control ("DHEC"). She received the application from Roper Pond, LLC, seeking coverage under the NPDES General Permit in connection with a multi-family residential development. (App. pp. 167; 561-562).

Roper Pond, LLC's consultant, George Whatley of BP Barber, submitted Roper Pond, LLC's other application to the Corps and DHEC seeking approval of wetland impacts in the form of a Corps 404 Nationwide Permit and DHEC 401 certification of that NWP. The application identified 0.075 acres of wetland impacts. (App. pp. 565-566). Chuck Hightower in DHEC's 401 water quality certification program reviewed this 404/401 application. The application did not identify any impacts to the lily pad pond. (App. pp. 565-566). The application did not identify any dredging or excavation on the subject property. (App. pp. 565-566). In fact, at the time that George Whatley submitted the 404/401 application, he was not even aware that the applicant intended to excavate the pond. (App. p. 444). When he filled out the application, Whatley left the line identifying the area to be dredged or excavated blank, even though he admits that under the developer's plan dredging is included. (App. pp. 565-566; 479-480).

Roper Pond, LLC, eventually submitted engineered plans to DHEC's stormwater section showing that, in fact, it intended to make alterations to the pond. (App. p. 170). The alterations included excavation and dredging of the lily pad pond and lowering the water level and outfall structure to allow use of the pond for stormwater detention. (App. pp. 592-593).

In issuing a stormwater permit, Ms. Stewart did not evaluate impacts to the pond or water quality resulting from the excavation. (App. p. 173). She said she just assumed the project "was in compliance with the standards and therefore [would] have no impact on the pond." (App. p. 173, lines 12-14). Ms. Stewart was operating under the assumption that DHEC's 401 water quality certification section had issued a water quality certification, based on a letter she received from the 401 section. (App. p. 171). When Ms. Stewart asked Roper Pond's consultant, BP Barber, whether excavation of the pond was covered under Nationwide Permit 39, the wetlands consultant "stated that lowering of the water surface elevation is included and covered under the Nationwide Permit 39." (App. pp. 172-173; 563-564; 933). Further, she specifically asked Roper Pond, LLC, whether impacts to the lily pad pond were covered under the 401 section's approval, and was told that impacts to the pond were included in the 401 certification approval. (App. pp. 563-564; 171). Rather than determining whether there was an effective Corps permit with 401 water quality certification, Ms. Stewart relied on statements made by the applicant that there was full approval and improperly issued coverage under the NPDES General Permit. (App. p. 184).

Ms. Stewart admitted that she does not know whether excavation of the pond will cause sedimentation. (App. p. 233). She does not know whether any Best Management

Practices will be used during excavation of the pond. (App. p. 233). She does not know what kind of discharge structure will be used during pond excavation. (App. p. 233). She does not know what will happen with the material dredged from the pond. (App. pp. 233-234). She does not know how excavation of the pond will affect the aquatic fauna and flora in the pond. (App. p. 234). And she does not know how excavation of the pond will affect the wetlands upstream from the pond. (*Id.*)

Charles Hightower has been the section manager of DHEC's 401 water quality certification program since November, 2007. (App. pp. 240-241). Mr. Hightower reviewed the Roper Pond, LLC's joint state and federal application to impact waters of the U.S seeking a 404 permit and 401 certification. He said that Roper Pond, LLC, applied for permission only to fill in 0.075 acres of federally jurisdictional wetlands. (App. p. 241; pp. 565-566). It did not ask for permission to impact any other wetlands or waters. (App. pp. 565-566).

As part of this 404 wetlands permit application, the Corps also requires a Pre-Construction Notification ("PCN") as a condition of Nationwide Permit #29 and #39. Based on the PCN submitted by Roper Pond, LLC, the Army Corps of Engineers issued a letter that the project meets the Corps' terms and conditions of NWP #39. (App. pp. 243; 567-574). The drawings attached to the Corps' PCN response letter depict only impacts to the 0.075 acres of wetlands proposed to be filled. (App. pp. 567-574). DHEC received the PCN and the Corps letter and then issued its water quality certification letter for NWP #39. The water quality certification letter is the only document related to DHEC's determination of whether the project meets the general conditions of its 401 water quality certification of the NWP. Impacts to the 0.075 acres of wetlands were the only impacts that DHEC

reviewed in making its certification decision on NWP #39. (App. p. 250). Mr. Whatley only notified the Corps of the dredging and excavation at some point after the application was submitted. (App. p. 480). DHEC did not consider impacts that would result from excavation of the lily pad pond because those impacts were not disclosed in the application. (App. p. 260).

The Corps initially approved the Roper Pond, LLC project under the wrong Nationwide Permit. Nationwide Permit #39 applies to commercial and institutional developments. (App. p. 253). Because the Roper Pond proposal is neither a commercial nor an institutional development, NWP #39 does not apply. Later, at Roper Pond, LLC's request, the Corps issued a letter approving the project under NWP #29, which covers residential developments. (App. p. 254). Although DHEC received a copy of the NWP #29 approval, DHEC did not issue a 401 certification authorization letter for the Roper Pond project under Corps Nationwide Permit #29. (App. pp. 254; 266). Mr. Hightower said that DHEC has to make a "specific determination" to insure that a project qualifies for the NWP 401 certification before it issues a certification letter. (App. p. 629). When asked why DHEC did not issue a certification letter on the NWP #29 approval, Hightower said that "we should have sent another [certification] letter," but that "we did not do it." (App. p. 268, lines 8-11).

In short, DHEC issued a flawed certification approval for Roper Pond, LLC's first NWP, which the Corps approved in error. When the Corps corrected its error and approved the project under the applicable NWP, DHEC conducted no review to determine whether the project qualified for its NWP 401 certification, nor did it issue a certification letter.

In its letter responding to Roper Pond, LLC's Pre-construction Notification letter, the Corps stated, in bold print, that "**Prior to beginning the authorized work, the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations, i.e., 401 water quality certifications . . . If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.**" (App. pp. 567-74). Because DHEC did not issue a certification letter stating that the project meets its conditions to qualify for coverage under NWP #29, Roper Pond, LLC did not obtain and provide the Corps with such certification.

Mr. Hightower admitted that DHEC's 401 water quality certification section never reviewed nor authorized impacts to the lily pad pond. (App. p. 257, lines 5-13). The Court of Appeals confirmed the affirmative requirement for review of impacts to the lily pad pond: "DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity." *Town of Arcadia Lakes v. S. Carolina Dep't of Health & Envtl. Control*, 404 S.C. 515, 522, 745 S.E.2d 385, 389 (Ct. App. 2013).

Water Quality Impacts Resulting from Excavation of the Lily Pad Pond

The Petitioners asked Seth Reice, a Professor of Ecology and Biology at the University of North Carolina, to assess the impacts on water quality and the pond. Dr. Reice testified as an expert in aquatic ecology. (App. pp. 310-12). He made a site visit on June 3, 2009. (App. p. 313). He looked at biodiversity, which is a measure of the distribution and variety of organisms, and the ecological health of the pond. He observed

that the pond is filled with water lilies that are aquatic plants growing about three to four feet above the bottom of the pond. (App. pp. 314-15). He took water samples and bottom samples to look at water chemistry and aquatic organisms living in the pond. (App. p. 316). He also caught some fish in the pond. (App. p. 316).

Dr. Reice examined the oxygen, salinity, conductivity, and pH of the pond water samples. (App. pp. 320-21). He said the water was very clear and clean with low pollutants. (App. p. 322). He also took the bottom samples back to his lab and identified the organisms he found living in the sediments. (App. pp. 319-20). He described the numerous organisms he identified and opined that "the presence of two species of fish and an assortment of benthic predators strongly implies that Roper Pond is a functioning aquatic system." (App. p. 325, lines 15-18). He said that "all the niches that you would expect in a pond are filled there now with the species that are present." (App. p. 359, lines 1-3). Looking at the entire system, Dr. Reice is convinced that the pond is a healthy system. (App. p. 326).

Dr. Reice said that if the pond level is dropped through excavation, the margin of the pond will be exposed to air and most of the organisms that live there will die. (App. p. 329). Organisms living in the dredged material will all die. (App. p. 359). He said it would take about ten years for the community to reestablish after the major disturbance. (App. p. 330). But even after a community reestablishes, it will not be the same type of community that exists there now because the chance that the same species will colonize the pond is "quite small." (App. pp. 329-30).

Dr. Reice also said that the upstream wetlands will be impacted. The area is in equilibrium now, but once the pond level is dropped, the wetland area will decrease. (App. p. 329). The wetland size will decrease because once the water level is lowered, upstream water will flow more rapidly downstream, drying out and removing a large amount of the upstream wetland. (App. pp. 329-30).

None of this testimony was contradicted.

In addition to the physical and chemical qualities of the water that he measured, Dr. Reice said that in order to assess the impacts of altering the pond, there are other factors that need to be evaluated. He said one would want to know the history of the pond, how it was formed, how long it has been there, the rate of sediment accumulation, how the excavation will be conducted and the extent of the excavation, as well as the nutrient loads coming into the pond. (App. p. 365-67). DHEC did not assess impacts using any of these factors.

DHEC's failure to perform the proper review in accordance with its NWP 401 certification and the applicable regulations, and failure to issue any approval of the impacts of the excavation, means that DHEC has not issued a certification of Roper Pond's NWP # 29. Without a proper certification, Roper Pond lacks the required state approval that is an express prerequisite to the storm water permit and coverage under the NPDES General Permit.

I. The Court of Appeals Erred in Denying the Petitioners Standing

A. Overview of Standing Law

In South Carolina there are three ways in which a party can acquire standing: "(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 South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). "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. Department of Social Services*, 402 S.C. 311, 317,741 S.E.2d 515, 518 (2013)).

In this case, South Carolina Code Section 44-1-60 provides that an applicant, permittee, licensee, or "affected person" may invoke an administrative process to have a DHEC staff decision reviewed by the DHEC Board and then the Administrative Law Court as a contested case hearing. S.C. Code Ann. § 44-1-60(F)(2) – 60(G) (Supp. 2012). This remedy is available for all DHEC decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions. S.C. Code Ann. § 44-1-60(A) – 60(G) (Supp. 2012). The question in this case is whether the Petitioners qualify as "affected parties" under the statute. Here, the statute is clear that the Petitioners should be able to establish statutory standing by alleging they are affected persons and are challenging DHEC's decision to grant the contested authorizations.

In the context of a challenge to an agency permitting decision, 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. *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988).

The Petitioners submit that the statutory term "affected person" turns more on the injury element than traceability and redressability, since the statute uses the term "affected person" to delineate the universe of citizens entitled to notice of a DHEC decision and to invoke administrative review of it. By proscribing in detail the administrative procedure for those "affected" by a DHEC decision, the statute presumes that the provided procedure could and would provide redress. Notwithstanding their statutory standing as "affected persons," however, the Petitioners satisfy all three elements of Article III standing.

In *Sea Pines Association v. S.C. Dept. of Natural Resources,* 345 S.C. 594, 550 S.E.2d 287 (2001), this 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).[4] *See also Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (2003); *Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). The three-pronged test arising from *Lujan* is as follows:

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[4] 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 Association for the Protection of Wildlife, Inc. v. S.C Department of Natural Resources*, 345 S.C. 594, 550 S.E. 2d 287 (2001), *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) and *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Energy Research Foundation v. Waddell,* 295 S.C. 100, 367 S.E.2d 419 (1988), *citing Sierra Club, supra., United States v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), and *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498 (4th Cir.1974). Accordingly, decisions of the federal courts are pertinent to this case.

> 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).

In assessing whether a party has standing, this Court held that "one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003) (citing *Charleston County Sch. Dist. v. Charleston County Election Comm'n,* 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999)). This Court has also held that an "affected person" must satisfy the "injury" requirement of Article III standing, i.e., the injury must be concrete and particularized, and actual or imminent. *Smiley v. S. Carolina Dept. of Health & Envtl. Control*, 374 S.C. 326, 649 S.E.2d 31 (2007).

Our courts have held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In *Smiley* the Supreme Court held that a plaintiff must make claims as to "use and enjoyment" of an affected area. *Smiley*, 374 S.C. 326, 333, 649 S.E.2d 31 (2007). The court in *Pye v. U.S.* reaffirmed the principle that "aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff's standing." 269 F.3d 459, 469 (4th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000); *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 73-4,

98 S.Ct. 2620 (1978)). 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. U.S.*, 269 F.3d 459, 468 (4th Cir. 2001) (citing *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir. 2000)).

Commonality of Injury Does Not Defeat Standing

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." *Florence Morning New, Inc. v. Building Comm'n.*, 265 S.C. 389, 218 S.E.2d 881 (1975) (quoting *Ex parte Levitt*, 302 U.S. 633 (1937)). The injury must be of a personal nature to the party bringing the action. *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 639-40, 528 S.E.2d 647, 650 (1999) (citing *Citizens for Lee County v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992)). The fact that a plaintiff has a personal stake, once established, is not negated by the fact that others may have similar interests or rights at stake. The point is to ensure that the plaintiff is among the injured and has a stake in the outcome. In this case, the Court of Appeals failed to recognize or respect case law holding that an injury that is sufficiently personal to a specific individual to give the individual standing to sue is not defeated because the plaintiff is not the only person, or even one of a few, so effected. *Federal Election Comm'n. v. Akins*, 524 U.S. 11, 118 S. Ct. 1777 (1988) (where a harm is concrete, though widely shared, the Court has found "injury in fact."). As the United States Supreme Court stated in *Sierra Club v. Morton*, not all citizens suffer an impact from a project affecting publicly owned or open resources:

> The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.

405 U.S. at 735, 92 S. Ct. at 1366. The difference between those who have standing and those who do not, the Court concluded, was actual use of the affected area.

"Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 734. The principles from *Sierra Club v. Morton* have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that "[w]hile it is true that the Court has stressed that a generalized grievance shared by the population at large cannot be a basis for standing, . . . it is equally true that merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . ***So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury.***" *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted). *See also, Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, concurring) ("injury to all is injury to none" theory would "deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation."); *U.S. v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973) ("To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.").

In this case it matters not whether others share the injuries alleged by the Petitioners, it matters only that these Petitioners themselves will suffer an injury to their aesthetic and recreational interests. However, in this case, the Court of Appeals failed to give proper consideration to case law indicating that an injury can be common to a great many members of the public, and still be sufficiently personal to a specific individual to give the individual standing to sue. *See Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

B. The Petitioners' Evidence of Aesthetic and Recreational Harm Far Exceeds the Minimal Showing Needed

In *Smiley v. DHEC* and *Energy Research Found. v. Waddell*, 295 S.C. 100, 367 S.E.2d 419 (1988), this Court cited with approval the United States Supreme Court's decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* , 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973). In *SCRAP*, the court stated that the injury required for standing purposes need not be a substantial injury, an identifiable trifle will suffice:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "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. (Internal citations omitted).

The "identifiable trifle" standard was also re-affirmed by the Fourth Circuit in *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 2000): "the claimed injury 'need not be large, an identifiable trifle will suffice.'" 204 F.3d 149, 156, *quoting Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). *See also, Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498 (4th Cir.1974).

The lower court loses sight of the fact that a plaintiff need only show that he or she will suffer some "identifiable trifle" of injury. In applying this standard, the court in *Pye v. U.S.* noted that if **"the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this ... grant."** 269 F.3d 459, 468 (4th Cir. 2001) (citing *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir. 2000)). 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." Id.

The Petitioners Linda and Robert Jackson live on Kaminer Road, which is adjacent to the lily pad pond and Roper Pond, LLC's property. Ms. Jackson has walked or run past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (App. p. 379). She testified the pond is very special to the community and it is "absolutely beautiful." (App. p. 380). She also walks around Cary Lake, which is downstream from the lily pad pond. (App. p. 381). She has seen sedimentation and garbage coming from upstream, as well as witnessed flooding

associated with stormwater problems in that area. (App. p. 381). She testified that if the pond were excavated, her use and enjoyment of seeing the pond would be adversely affected. (App. p. 382). She is also concerned about more sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired. (App. p. 382-83). Ms. Jackson knows the other Petitioners, has participated in community meetings regarding the proposed project, and said that the other Petitioners share her concerns.[5] (App. p. 385).

As to the Kaminer Station Petitioners that live upstream of the lily pad pond, Dr. Reice's uncontroverted testimony is that the upstream wetlands would be impacted as a result of the dredging and excavation of the pond. (App. 385). Once the pond is dredged and the water level dropped, as indicated by the permit, the upstream wetland area will decrease. (App. pp. 329-30).

Elaine and Gene Starr have lived on Sandy Shore Road, which is on Cary Lake, for 38 years. (App. p. 400). The Starrs swim, water ski, boat and fish with first their four children and now their grandchildren on Cary Lake. (App. p. 401). Ms. Starr testified that the water in Cary Lake is not as clear as it used to be due to sedimentation in the lake. (App. p. 401).

Ms. Starr said that based on her experience living on Cary Lake, a residential development will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit. (App. pp. 413-14). The ALC acknowledged Ms. Starr's testimony that the proposed project would "negatively impact Cary Lake even if the SWPPP approved by the Department is implemented as designed" and that "increased density . . . would have a detrimental impact . . ." (App. p. 29). She said that "if you

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5 The Parties stipulated that Mrs. Jackson's testimony would be representative of the Kaminer Station Petitioners.

change the whole landscape, then you'll have a problem" with stormwater, which is her primary concern. (App. p. 418, lines 13-14).

Ms. Starr has also enjoys viewing the lily pad pond and said it is "absolutely gorgeous." (App. p. 4406, lines 7-8). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic part of the community. (App. pp. 406, lines 12-13; 419). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged, resulting in a loss of her aesthetic interests in viewing the pond. (App. p. 406-08).

The Kaminer Station and Cary Lake Petitioners testified that their ability to enjoy recreational activities, along with their aesthetic interests, would be harmed by the proposed project. The Court of Appeals erred in dismissing these injuries as "speculative." The Petitioners use and enjoy the affected area on a daily basis and planned to do so in the future. These uses cannot be equated with the speculative "'some day' intentions" to visit endangered wildlife species halfway around the world that the Court had held insufficient to show injury in fact in *Lujan v. Defenders of Wildlife*. 528 U.S. 167, 184, 120 S.Ct. 693, 705-706 (2000).

Not only did the Petitioners identify harm to their aesthetic and recreational interests in viewing the lily pad pond, they went on to describe even more injuries that would result directly from the development project at issue in this appeal: degraded water quality as a result of the project; degradation and loss of upstream wetlands; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental

quality of the Town; and increased crime, traffic and congestion as a result of the project. These allegations are far beyond any "identifiable trifle" needed for standing.

C. The Court Imposed an Erroneous Property-Ownership Test for Establishing Injury-in-Fact

The court of appeals cited the correct test for standing, but then confusingly injected a new requirement that a plaintiff must have a property interest in order to establish an injury-in-fact. There is no basis for that holding, and the court's departure from binding precedent was clear and reversible legal error. The court first recited all of the injuries described Linda Jackson, Elaine Starr and Richard Thomas, Town Mayor, acknowledging the Petitioners' injuries. The court cited to the "visual appeal of Roper Pond" discussed by Mrs. Jackson and acknowledges that Mrs. Jackson's aesthetic and recreational interests are exactly the type of injury that courts have found sufficient to establish standing. *Id.* However, the court of appeals then discounts those findings, contending that these complaints **"primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact."**[6] *Town of Arcadia Lakes* at 533. (emphasis added). The lower court applies the same requirement to the Town, rejecting the Town's interest in protecting Cary Lake, based on the fact that "the Town ha[s] no ownership interest in Cary Lake."[7] *Id.* at 520. Neither the United States Supreme Court nor this Court have ever held

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[6] Even applying this incorrect standard, when it comes to Elaine Starr's testimony, the Court overlooks the fact that Elaine Starr lives on Cary Lake and is a member of the Cary Lake Homeowners Association, who owns Cary Lake, the receiving water body for Roper Pond's stormwater. In other words, Ms. Starr does have an ownership interest in Cary Lake, even though that property interest is not a necessary element to establish standing.

[7] The Town's proof of harm is discussed in detail in Section I.D. below. The lower court

that a plaintiff's injuries cannot stem from activities that occur on private land. To the contrary, actions on private land can and do give rise to injuries to neighboring and nearby citizens and property owners, and that injury suffices to support standing. *See, e.g., S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

In contrast to the lower court's holding, South Carolina courts have found environmental plaintiffs to have standing, despite the fact that an activity occurs on another's private property. In *S.C. Wildlife Fed'n v. S.C. Coastal Council*, the Court held that the appellants adequately alleged an individualized injury in the adverse effect of a certification decision on their members' use and enjoyment of wetlands proposed for dredging on a private development site. 296 S.C. 187, 371 S.E.2d 521 (1988). In *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision),* the Court held that plaintiffs that live adjacent to a privately owned wetland had standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife. 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998). In *Spectre v. DHEC*, the Court upheld Appellants challenge to the filling of 32 acres of "isolated" wetlands on private property. 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

The lower court's holding that Petitioners' lack of property right or interests in Roper Pond (or Cary Lake) precludes an injury in fact is not only contrary to the law of standing, but also it leads to the result that only those with property interests in the affected area have standing. The practical effect of the Opinion is that only the permit applicant/site owner would

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adopts, and does not correct, the ALJ's exclusive reliance on whether the Town possesses an ownership interest in Cary Lake and Roper Pond. See Final Brief, App. 995.

have standing to challenge this project. That cannot be and has never been the law in South Carolina.[8]

D. The Court of Appeals Erred in Creating a "Proprietary Rights" Requirement for Municipal Standing

In addition to imposing the same property right requirement on the Town, the Court of Appeals cites to *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996) for its holding that a "municipality must allege an infringement of its own proprietary interests and statutory rights" distinct from that of its individual citizens. *Town of Arcadia Lakes* at 530. Neither *Glaze* nor any

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[8] The lower court appears to recognize that aesthetic and recreational interests are sufficient to establish an injury-in-fact in citing *Sea Pines*, but it then inexplicably inserts a new standard requiring Plaintiffs to have property rights in the areas over which an environmental permit is sought, citing *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974). *Costanzo* stands for the proposition that an injury in fact cannot be *assumed* when the challenge involves private property owned by a party other than the plaintiff. But in this case, Petitioners did not expect the court to *assume* anything. Rather, the Petitioners put forth evidence of injury in fact in the form of harm to recreational and aesthetic interests, similar to that alleged in *Smiley v. SCDHEC*, 374 S.C. 326, 649 S.E.2d 31 (2007); *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001), *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000), and *American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003). The lower court cites to, but summarily dismisses, these recreational and aesthetic interests in the pond and associated water quality.

Costanzo is further distinguished because that court found that the individuals' use of privately owned *highland* was insufficient to confer standing because there is no guarantee that the owner would continue to allow access to that highland; however, the court remanded the case to the district court for a determination of whether the use of the lowland/submerged areas would be adversely affected. Here, the claimed use and enjoyment is in viewing submerged areas which are given treated as special resources under state and federal law. Importantly, the court in *Costanzo* noted that the "claimed injury need not be great or substantial; an '**identifiable trifle**', if actual and genuine, gives rise to standing." Id. at 501 (citing *SCRAP*, 412 U.S. 669, 687-689, n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

other South Carolina case Petitioners have been able to uncover explains what it would mean for a municipality to suffer infringement of a "proprietary interest" or "statutory right" distinct from its citizens. However, reference to other jurisdictions that have applied these standing principles under circumstances similar to the ones at hand make clear that the Town's allegations are sufficient to establish an injury in fact.

"The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. "The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004). In elaborating on the type of interests that are sufficient to confer standing on a municipality the court noted as follows:

> [A] municipality has an interest in, inter alia, its ability to **enforce land-use and health regulations,** *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), and its **powers of revenue collection and taxation,** *Colorado River*, 776 F.2d at 848-49. A municipality also has a proprietary interest in **protecting its natural resources from harm.** *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002), amending 271 F.3d 911(9th Cir. 2001). We have also found constitutionally sufficient injury to proprietary interests where "**land management practices of federal land could affect adjacent [city]-owned land.**" *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

Id. at 1198 (emphasis added).

Here, the interests of the Town of Arcadia Lakes – even as recited by the Court of Appeals – match those very interests, whether they be termed "proprietary" or not. The

Town's interest in "protecting the environmental quality of Cary Lake" and its interest in "maintaining its character and desirable attributes, including aesthetic appeal" are aimed at protecting natural resources from harm. The Town's testimony that there would be a "diminution of property values within the Town" is an interest in its powers of revenue and tax collection. The Town's interest in its "ability to comply with federal law" is an interest in application and enforcement of land use regulations. Each of the injuries dismissed by the lower court are sufficient to establish an injury in fact.

The lower court's casual dismissal of the Town's sworn concerns about the project's impact on the Town's ability to comply with federal law is especially troubling. The Town operates a Municipal Separate Stormwater System ("MS4") that necessitates an NPDES permit and requires compliance with NPDES standards and limitations. (App. pp. 840; 856). The Town is legally required to prevent pollution within its MS4,[9] which includes runoff entering its storm drains and pipes from Roper Pond's development. (App. pp. 840). The court misapprehends the relationship between the challenged project and the Town's CWA

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See 33 U.S.C. § 1342(p)(4) ("the Administrator shall establish regulations setting forth the permit application requirements for [MS4] stormwater discharges . . . Any such permit shall provide for compliance as expeditiously as practicable"); *see also* 33 U.S.C. §§ 1311, 1312, 1314, 1316, 1317, 1318, 1342, 1343, 1362. When an MS4 operating municipality does not comply with the NPDES requirements, that municipality is subject to suit and liability under the CWA, which can be initiated by either the government or private citizens. *See, e.g., Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008); *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011).

obligations, and thereby dismisses exactly the type of interest identified in *City of Sausalito v. O'Neill.*

E. Causal Connection Does Not Require Proof on Merits or Proof of a Potential Future Violation

The causation component of standing requires that "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." *Smiley v. S. Carolina Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992)). In this case, the conduct complained of is DHEC's issuance of coverage under the stormwater General Permit which authorizes the land-disturbing construction activities. The loss of aesthetic enjoyment in viewing the lily pad pond is "fairly traceable" to the challenged activity in that DHEC's approval of Roper Pond's construction activities under the NPDES General Permit includes excavation of the pond. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). But for DHEC's decision to grant coverage under the NPDES stormwater General Permit to Roper Pond, the dredging and excavation of the lily pad pond would not occur.

In concluding that the Kaminer Station Petitioners "have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint," the Court of Appeals' inquiry turns on whether the land-disturbing activities would be "managed

properly," rather than evaluating the impact of the "conduct giving rise to their complaint," i.e., the dredging and excavation of the lily pad pond. (App. 1214). That in itself was error, since the Petitioners presented uncontroverted evidence that the dredging and excavation would cause them injury.

Instead of applying this traceability analysis, the lower court's opinion requires that the Petitioners' injury in fact result from a future permit violation or noncompliance on the part of Roper Pond. This contested case is not about a permit violation; it is a challenge to an agency decision to grant a permit in the first instance. The lower court erroneously focuses on lack of proof of mismanagement or a violation of a permit, neither of which is an issue.

Two United States Supreme Court opinions explain the distinction between a plaintiff's injury in fact and proof of violations, inadequacy of a permit or the merits of an agency's decision. In *Allen v. Wright*, the U.S. Supreme Court explained the distinction as follows:

> **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,"** (citing *United States v. Richardson*, 418 U.S. 166, 174, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (quoting *Flast*, 392 U.S., at 99, 88 S.Ct., at 1952). . . . the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing. **Imposing an undefined but clearly more rigorous standard for redressability for**

> **reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation**, a result that would be avoided if the Court straight-forwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.

Allen v. Wright, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984).

As succinctly put in another U.S. Supreme Court case, 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, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

Although the Petitioners presented testimony showing declines in water quality from previous construction projects that caused sedimentation in Cary Lake, the court unilaterally discounted these harms as being due to "possible mismanagement" in the past. *Town of Arcadia Lakes* at 534. This turns the standing analysis on its head and requires a standing plaintiff to *disprove* all possible confounding factors that could result in a reasonably anticipated injury *not* coming to pass. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84, 120 S. Ct. 693, 705, 145 L. Ed. 2d 610 (U.S.S.C. 2000) ("affiant members' **reasonable concerns** about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests" sufficient to establish injury in fact); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387,

394 (4th Cir. 2011) (Plaintiff "established an injury in fact by asserting a reasonable fear and concern about the effects of the facility's discharge on his use and enjoyment of his lake").

By failing to focus its inquiry on the conduct giving rise to the complaint and instead requiring proof on the merits of the case the Court of Appeals set an impossible standard for establishing a causal connection – one that is entirely unsupported by relevant case law. The focus of the injury is the degradation of a prized and often admired nearby aesthetic naturalized feature – a lily pad pond – due to activities authorized by DHEC authorizations in this case.

The Court applied a similarly erroneous standard to the Town, finding a lack of traceability because Petitioners failed to prove that Best Management Practices ("BMPs") envisioned by the Stormwater Pollution Prevent Plan ("SWPPP") were inadequate to prevent sediment from leaving the construction site. *Town of Arcadia Lakes* at 531. The BMPs are required as part of the permit at issue, though the adequacy of the BMPs has never been an issue in dispute. Ms. Starr testified that based on her experience living on Cary Lake, a residential development will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit and attendant BMPs. (R. pp. 407-408). Town does not have to prove a future violation of a permit requirement that is not in dispute in order to demonstrate an injury in fact. *Allen v. Wright*, 468 U.S. 737, 791-92, 104 S. Ct. 3315, 3345-46, 82 L. Ed. 2d 556 (1984). To require proof on the merits or a violation prior to its occurrence imposes "an undefined but clearly more rigorous standard for

redressability unrelated to the causal nexus." *Id.*

The court's misapplication of the "fairly traceable" standard is further illustrated by analogy to similar cases. In *Friends of the Earth, Inc., v. Gaston Copper Recycling Corp. (Gaston I)*, the Fourth Circuit held that a plaintiff established an injury in fact by asserting a reasonable fear and concern about the effects of a smelting facility's discharge on his use and enjoyment of his lake, which was located four miles downstream of Gaston's facility. 204 F.3d 149 (4th Cir. 2000). The plaintiffs were not required to present evidence of actual harm to the environment so long as a direct nexus existed between the plaintiffs and the "area of environmental impairment." 204 F.3d at 159. In addressing traceability the court stated that the plaintiffs do not have to prove with scientific certainty that the defendant's discharges resulted in harm to the plaintiffs. *Id.* (citing *Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 n. 7 (4th Cir.1992)). "If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement—even where, as here, the asserted cause of action does not itself require such proof." *Id.* at 161.

In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to $560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. *Id.* at 67. For purposes of standing, the plaintiffs

asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. *Id.* at 73-74. First, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were "sufficiently concrete to satisfy constitutional requirements." *Id.* at 73. Rather, "several of the 'immediate' adverse effects'" of the nuclear plants, including "environmental and aesthetic consequences" were of "the type of harmful effect which has been deemed adequate in prior cases." *Id.* at 73-74. In the same way, Petitioners have asserted immediate adverse effects resulting from completion of the permitted activity, i.e., excavation of the pond leading to loss of aesthetic enjoyment.

As to the fairly traceable requirement, the *Duke Power* Court applied the but-for standard. *Id.* at 74-75. The plaintiffs position on causation was that but for the Act's limitation on liability, the nuclear plants would not be constructed, and the "immediate adverse effects" would then not occur. *Id.* at 74. The Court found a "substantial likelihood" of this "but for" relationship, and upheld the causal connection and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs' standing. **The plaintiffs' injuries in fact had nothing to do with the plaintiff's claims on the merits, and the Court found that no such nexus was required.** *Id.* at 78. In the same way, the Petitioners in this case have identified aesthetic and recreational injuries that would not occur but for the permit at issue in this case. Those injuries form a sufficient basis for standing, apart from any analysis of the merits of the case.

Mrs. Jackson and Mrs. Starr testified that if the pond were excavated, their enjoyment in viewing the pond would be gone. (App. pp. 380-82 & 407). The Town asserted its interests in the attractiveness of the Town based on the aesthetics of the lily pad pond upon entering the Town, which surrounds the project site on three sides. (App. pp. 834-35). These aesthetic and recreational injuries have a but-for causal connection to the permit at issue in this case – the permit authorizing the land-disturbing activity, which includes the excavation and dredging of the pond, leads to the "immediate adverse effects" of loss of aesthetic and recreational enjoyment. The requisite causal connection is established through uncontroverted evidence that the lily pads and wildlife will be eliminated by the excavation of the pond, coupled with the use and enjoyment of viewing the pond and its wildlife that will be lost. There is a direct link between the excavation of the pond and the injuries complained of by Mrs. Jackson, Mrs. Starr, and Mr. Thomas, i.e., loss or decrease of aesthetic and recreational interests, among other interests such as water quality, Clean Water Act's obligations for municipalities, property values and the like.

Similarly, standing in *Pye* was not based on the regulatory or technical propriety of the permitted activity, but rather the fact that the claimed injury would be fairly traceable to the permitted activity. *Id.* at 468-69. In this case the Petitioners need not offer evidence on the technical insufficiency of Roper Pond's stormwater plan in order to establish an injury in fact; they simply need to prove an injury that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the

court." *Smiley v. DHEC*, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing *Lujan*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992)). Petitioners did just that by presenting uncontradicted testimony that they enjoy and benefit from viewing the pond and observing wildlife, and that if the pond were excavated as will occur by way of this challenged decision, their benefit and enjoyment would be lessened.

II. Validity of the 401 Certification and General Permit Coverage

As to the merits of the case, the Petitioners assert that: 1) the NWPs only cover certain clearly defined activities; 2) DHEC's 401 certifications of the NWPs provide additional limitations, including general conditions; 3) in order to receive coverage under DHEC's certifications the **activity must be limited to the impacts authorized by that certification and must meet the general conditions**; 4) the general conditions require DHEC to review the "overall project," not "only the land area directly impacted by the NWP;" and 5) when a project's impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly do in this case, they are not covered by DHEC's NWP certification.

The lower court's conclusions are based on a confusion between the federal Nationwide Permit review and the state's separate NWP 401 water quality certification review. The two programs require each agency to conduct its own review to determine whether the proposed project qualifies for coverage under the respective federal and state programs.

A. The Court Agrees with Petitioners that the General Conditions of the 401 Certification Authorize DHEC to Review the "Overall Project," Including Excavation of the Pond, But Overlooks the Legal Effect of Its Conclusion

The lower court clearly recognizes DHEC's broad authority to review impacts that go beyond those authorized by the specific NWP in concluding that DHEC must review the "overall project proposed" by the developer. *Town of Arcadia Lakes at* 395, 534. The Court states that:

> DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement **that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.**

Town of Arcadia Lakes at 522, 389.

The lower court also concludes that "the general conditions for water quality certification require DHEC to review the 'overall project proposed by a single owner/developer,' 'includes all land within the project bound under single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'" *Town of Arcadia Lakes* at 534, 395. In order to determine whether a project meets the conditions of DHEC's NWP certification, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not. (App. p. 629). The General Conditions of the NWP certifications, and Regulations 61-68 and 61-101,[10] require DHEC to review impacts beyond

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those authorized by the specific NWP, specifically excavation of the pond. The court agrees "that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site." *Town of Arcadia Lakes* at 534, 395. The fact that DHEC was not aware that Roper Pond intended to dredge and excavate the lily pad pond at the time it issues its certification authorization letter is undisputed. The lower court also cites the Corps' requirement that in order for the project to be valid under NWP 39, it "had to comply with the general conditions of the NWP, regional conditions, and **certain special conditions**, . . . including 'all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification' . . ." *Id.* at 524, 389.

The court should have taken the next logical step, and conclude that Roper Pond does not qualify for NWP certification because its project includes impacts on the overall project site that exceed the NWP certification and that were not reviewed by DHEC.[11] Instead, the Court inexplicably concludes that "Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both

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Regulation 61-101 requires DHEC to consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts . . ." S.C. Code Ann. Reg. 61-101.F.(3). Regulation 61-68 water quality standards require DHEC to"maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." S.C. Code Ann. Reg. 61-68.A.(4).

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Even DHEC admits that a "specific determination" is required to insure that a project meets the conditions of its NWP certification. (App. p. 629). If a project does not meet the conditions of the NWP certification DHEC requires an individual certification. (R. p. 253).

NWP 29 and NWP 39 . . . because the requisite conditions had been met." *Town of Arcadia Lakes* at 526, 390-91. The court's ruling is fundamentally flawed in that it concludes that DHEC's review authority extends beyond the mere filling of wetlands, but fails to give effect to that conclusion.

The lower court provides no analysis as to why DHEC's failure to undertake a review of all impacts to waters and wetlands does not warrant a remand to DHEC to undertake that broader review (or a determination that DHEC improperly granted coverage under the General Permit for lack of a valid 401 certification), instead ending abruptly with a brief discussion of federal requirements. Notwithstanding the lack of analysis, it appears that the court determined that because the Clean Water Act only covers filling wetlands, DHEC's review of impacts to "all land within the project," not just the "land area directly impacted by each NWP request" is necessarily constrained by that CWA jurisdiction. In other words, the court determined that because no CWA approval is needed for excavation of the lily pad pond, there is no requirement for State review and approval. If DHEC's review of the project were constrained by CWA jurisdiction, there would be no need for it to impose requirements for broader review in its NWP general conditions nor to issue a 401 certification at all.

The lower court is correct in that the CWA permit is not needed for excavation. However, this Court has directly addressed the question of whether State authority to regulate wetlands and waters exceeds Federal regulation under the CWA, and has expressly ruled that "federal [CWA] jurisdiction is not essential to [State] consistency review." *Spectre, LLC v. S.*

Carolina Dept. of Health & Envtl. Control, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010); *Georgetown Cnty. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 352-53, 713 S.E.2d 287, 288 (2011) (Corps' jurisdiction "has no impact on DHEC's ability, as a state agency" to regulate waters of the State). While *Spectre* involved DHEC's regulatory authority under the S.C. Coastal Zone Management Act and this case presents the question of DHEC's regulatory authority under the S.C. Pollution Control Act, the parallel is that this Court has expressly ruled that the South Carolina General Assembly can and has given DHEC broader regulatory authority than Congress gave to the Corps in passing the CWA.

The dredging and excavation of wetlands are not typically activities regulated under Section 404 of the CWA unless there is a discharge of dredged materials into waters of the U.S.; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on or limited by the Corps' jurisdiction. Rather, DHEC's broader review authority over waters of the State derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.[12] And in this case, the conditions of DHEC's NWP certification expressly retain the agency's authority to review those impacts. The lower court simply fails to give effect to this

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Even DHEC's Chuck Hightower testified that the Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (App. p. 257; R. 61-101.F). Dr. Reice provided uncontested testimony that it will take ten years for the community to reestablish after the major disturbance, describing in detail the types of impacts that will result from the excavation on pp. 12-14 of Appellants Final Brief in the Court of Appeals.

authority.

The Opinion points out that Petitioners have not argued that alterations to the pond resulted from filling of the wetlands, and the court is correct. This statement shows a fundamental misunderstanding of how the 404 and 401 programs relate to each other. They are two separate regulatory programs with two separate regulatory criteria and, in this case, present two separate sets of conditions imposed on NWPs by each agency.

Indeed, the CWA Section 1341(a)(1) cited in the Opinion specifically states that the State must certify that a discharge complies with "applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."[13] 33 U.S.C. § 1341(a)(1). The CWA further states that "[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements." 33 U.S.C. § 1341(b). Yet that is exactly what the ALC and the lower court have done – allow the Corps' NWP to act as a limitation on DHEC's authority to require compliance with State water quality requirements, despite the CWA's clear language that it not be construed as such.

The lower court acknowledges that DHEC did not conduct the overall review required by the NWP certification conditions, but does not hold DHEC accountable for its failure. If

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Section 1313 requires states to adopt water quality standards, and DHEC has promulgated those regulations in S.C. Code Ann. Reg. 61-68. 33 U.S.C. § 1313. DHEC also promulgated water quality certification regulations at S.C. Code Ann. Reg. 61-101.

DHEC does not conduct some review to ensure that the project meets the conditions of the NWP 401 Water Quality Certification, and DHEC does not consider "all land within the project boundary under single ownership," then the conditions applicable to the NWPs will be rendered superfluous.

The fact that the lower court agrees that DHEC does have authority to review the "overall project" should warrant reversal of its conclusion to the contrary (holding that DHEC has no authority to review the excavation portion of the project). Given the lower court's agreement that DHEC is required to review the overall project, including all lands within the project area and not just the specific land impacted by the NWP, and the court's agreement that DHEC failed to undertake this review, the court should have further concluded that the project fails to comply with the 401 Certification of NWP 39 and remanded the case back to DHEC to undertake a review of the impacts resulting from excavation of the lily pad pond and to impose any conditions necessary to protect water quality and the aquatic ecosystem of that State waterbody.

B. The Court of Appeals' Conclusion that Roper Pond Has a Valid 401 Certification is Not Supported by Its Previous Conclusion that DHEC's Certification Requires a Broader Review

The court's conclusion that DHEC's "authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit" cannot be squared with its previous conclusion that "that no one at DHEC undertook a complete examination of the

impact of the project on all waters and wetlands at the project site." *Town of Arcadia Lakes v. DHEC*, 404 S.C. 515, 534-35, 745 S.E.2d 385, 395-96 (Ct. App. 2013).

DHEC's Chuck Hightower said that DHEC has to make a "specific determination" to insure that a project qualifies for the NWP 401 certification before it issues a certification letter. (App. p. 621). The water quality certification letter is the only document related to DHEC's determination of whether the project meets the general conditions of its 401 water quality certification. Because only filling of the 0.075 acres of wetlands was disclosed in the application at the time that DHEC reviewed it, DHEC did not and could not consider impacts that would result from excavation of the lily pad pond. (App. p. 260). Roper Pond's failure to disclose the impacts of dredging and excavating a nearly 1.8 acre pond deprived DHEC of the ability to make a determination of whether the project qualified for coverage under its NWP 401 certification. Since the time of the application, it is clear that there are significantly more impacts than initially disclosed; that DHEC did not review or consider those impacts; and that those impacts go beyond what is authorized under DHEC's NWP 401 certification. For these reasons, Roper Pond does not have a valid 401 certification which is a pre-requisite to a valid 404 permit necessary for coverage under the stormwater General Permit at issue in this appeal.

C. The Court of Appeals Arrives at the Illogical Conclusion that Roper Pond is the Proper Party to Object to Its Own Compliance or Noncompliance with DHEC's General Conditions

The lower court cites to DHEC's general conditions that "Roper was required to (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts." *Town of Arcadia Lakes* at 535, 395. The court's recitation of these two general conditions is accurate, but its conclusion on how these conditions are applied and by whom they are enforced is entirely without logic or reason. The court states that "Roper, as owner of the property on which the pond is located,[14] would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts." The court seems to recognize that it would be an "illogical position" to place Roper Pond as the fox guarding the hen house, but then fails to undertake the logical analysis of who would be the party to object to impacts or require compensation.

It should go without saying, but DHEC has the authority to ensure compliance with those conditions, to ensure that Roper is avoiding and minimizing impacts and to require compensation for unavoidable impacts. Roper has the burden of demonstrating avoidance and minimization, not objecting that avoidance and minimization has not been achieved. That

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[14] Petitioners note that even in discussing the merits the court continues to misplace reliance on ownership of the property.

determination lies squarely with DHEC and if DHEC makes an erroneous determination the Petitioners are those adversely affected parties to whom the APA gives the right to seek redress through the administrative process. And when DHEC fails to ensure compliance with the conditions, Petitioners, as persons with a personal stake in the aesthetic and other qualities of the area, have the right to seek administrative and judicial review of the permitted activity.

D. The Lower Court Overlooks the Requirement for a Certification Decision

The failure to make a determination of whether the project qualifies for coverage under the 401 Certification for NWP 29 and consider the pond dredging is central to the Petitioners' case. Instead, the lower court focuses on the fact that DHEC never issued a letter to Roper Pond concluding that the project qualified for the 401 Certification of the NWP, but assumed that the project does in fact qualify with that Certification, despite its previous conclusion that the general conditions of the Certification require DHEC to undertake a review of the impacts beyond those authorized by the NWP – an action that DHEC plainly did not undertake. The Court's opinion recognizes as much by agreeing "that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site." *Town of Arcadia Lakes* at 534, 395.

It is precisely because DHEC was required to undertake some review of the "overall project proposed by" the developer, including review of "all land within the project boundary under single ownership," which is not confined to "the land area directly impacted by each NWP request, that DHEC necessarily had to arrive at some decision regarding compliance

with those NWP certification conditions. DHEC's failure to conduct the review, make a determination of whether the project meets the NWP conditions and qualifies for coverage and issue a certification letter is fatal, and Roper Pond thus lacks 401 certification.

E. The Lower Court's Conclusions Overlook the Implications on the Stormwater General Permit Coverage

Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."[15] (App. p. 499) **If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.**" (App. p. 567). The NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (App. p. 499). Because the project did not qualify for coverage under DHEC's NWP certification, it was not entitled to coverage under the General Permit. Thus, the Court erred in failing to conclude that DHEC

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15 On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

improperly granted coverage under the General Permit for its failure to comply with the conditions of the NWP certification and consider the "overall project," specifically the excavation of the pond.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court reverse the opinion of the Court of Appeals and conclude that the Petitioners are affected parties entitled to administrative review of the agency decision at hand; that the Petitioners have established Article III standing; and that the DHEC decision to grant NPDES stormwater general permit coverage to Roper Pond was in error for failure to review or consider water quality impacts resulting from the dredging of the lily pad pond.

Respectfully submitted,

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October 2, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

REPLY BRIEF OF PETITIONERS ON WRIT OF CERTIORARI

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ARGUMENT

I. The Court of Appeals Opinion Applies and Adopts and Erroneous Standard for Standing

A. Petitioners Have Statutory Standing

Standing can be raised at any time, even *sua sponte* by the Court. *Plyler v. Moore*, 129 F.3d 728, 731 n. 6 (4th Cir.1997) (holding that issues regarding subject-matter jurisdiction "may be raised at any time by either party or sua sponte by this court"); *Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1038 (4th Cir.1995) ("Because objections to standing are jurisdictional in nature, they may be raised at any time, . . . even if raised for the first time on appeal . . ." (internal citations omitted)). If a lower court addresses one type of standing, or standing for only part of the case, an appellate court may still decide different aspects of standing than the lower court. *See, e.g., Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 534-35, 737 S.E.2d 830, 838-39 (2012) (deciding constitutional standing on appeal, where lower court had only decided statutory standing).

Respondent Roper Pond raised the issue of standing in its proposed order, which was adopted by the Administrative Law Court.[1] Roper Pond now argues that the Petitioners are foreclosed from asserting their statutory standing because it is not preserved for review. (Brief, p. 28). However, the court always retains jurisdiction to determine standing. *Benham v. City of Charlotte*, N.C., 635 F.3d 129, 134 (4th Cir. 2011). Thus, the question of Petitioner's statutory standing under Section 44-1-60, is a question of law properly before this Court.

Petitioners have statutory standing, as more fully discussed in their opening brief on

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[1]DHEC has not adopted Roper Pond's position on Petitioners' standing, electing not to take a position on the standing issue. (DHEC Brief, p. 3).

certiorari. (Pet. Brief, pp. 18-39). While the class of "affected persons" entitled to review of a DHEC decision may be large, that is exactly what the General Assembly authorized in promulgating Section 44-1-60. Indeed, citizens who are directly affected by governmental actions are afforded protections through their ability to challenge those actions. *See, generally, Pye v. U.S.*, 269 F.3d 459 (4th Cir. 2001). In this case, the challenge to the governmental action is brought by the individuals and municipality most directly impacted by Roper Pond's project – its neighbors. The law requires that these *neighbors* be given notice of proposed actions occurring on adjacent property and as adjacent owners they are the persons most likely to be affected by the project. *Pye*, 269 F.3d at 468.

B. Petitioners Have Article III Standing

The record contains multiple instances where Petitioners have established facts necessary to prove standing. The Court of Appeals simply applied an incorrect legal standard to these fact. But rather than address the correct standard, Roper Pond's brief devolves into a dispute about select pieces of the evidence. As to the lily pad pond, the evidence of record establishes: that we have a scenic lily pad pond located in immediate proximity to where the individual Petitioners reside (App. pp. 378-80); that the pond was in clear view from the adjacent public sidewalk and road (App. p. 380); that individual Petitioners regularly walked/jogged/drove by the pond to enjoy its beauty (App. pp. 379-80, 406; 419); that individual Petitioners regularly enjoyed viewing flora and fauna in the pond (App. pp. 380, 406); and that the DHEC approvals at issue in this case authorize a dredging and deepening project that will change the character of the pond (Roper Brief, pp. 6 & 18). Neither Respondent seriously disputes any of these points, which together read as a basic recipe for environmental standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130

(1992).

The Court of Appeals' rejection of the individual Petitioners' standing under this factual scenario represents a serious departure from both state and federal standing precedent. In this Section, the Petitioners have focused on the individuals' interest in the lily pad pond to the exclusion of other bases for standing, only in the hopes that viewing this relationship in isolation will highlight what is practically a textbook case of environmental standing. The battle for consistent environmental standing results has been hard fought by this Court, and a precedent of this nature stands to throw turbulence onto that relatively stable body of law.

Petitioners will now address some of the ancillary standing issues that have arisen in this case.

i. Petitioners Do Not Have to Prove the Merits to Establish Injury in Fact

Despite its statements to the contrary, Roper Pond and the Court of Appeals equate proof of standing allegations at trial with proof on the merits of the case. Roper Pond cites to a lack of "evidence of an injury in fact *as the result of increased sedimentation in Cary Lake*." (Brief, p. 32). And Roper cites to the Court of Appeals' opinion that there was a lack of evidence on whether the "BMPs . . . were inadequate to prevent sediment from leaving the construction site." (Brief, p. 35, *Town of Arcadia*, 404 S.C. at 531, 745, S.E.2d at 393). Whether or not the project will result in increased sedimentation and whether or not the BMPs are adequate are, clearly, questions related to the merits of the case. The injury need not arise from the adequacy or sufficiency of technical requirements, but rather must be the result of the "conduct complained of," which, in this case, is the DHEC authorization that allows the dredging of the pond as part of the land-disturbing activities. *Smiley v. DHEC*, 374 S.C. 326, 649 S.E.2d 31 (2007).

Roper Pond (Brief, p. 33) and the Court of Appeals reject the standard that "reasonable concerns about the effect" of an activity are sufficient to establish injury in fact. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84, 120 S. Ct. 693, 705, 145 L. Ed. 2d 610 (U.S.S.C. 2000) ("affiant members' **reasonable concerns** about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests" sufficient to establish injury in fact); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 394 (4th Cir. 2011) (Plaintiff "established an injury in fact by asserting a reasonable fear and concern about the effects of the facility's discharge on his use and enjoyment of his lake").

Mrs. Starr testified to her reasonable concerns about sedimentation based on her personal observation and scientific background that increased impervious surfaces like roofs, roads and driveways, increase stormwater runoff, sedimentation and erosion. (App. 414-418). Her personal observations were used to explain the reasonable basis for her concerns, not to establish standing emanating from prior injuries. Moreover, Mrs. Starr's testimony was that increased runoff would occur, regardless of whether or not a violation occurs – the harm would come simply from increased density. (App. 414). The Court of Appeals failed to apply this "reasonable concern" standard, instead requiring Mrs. Starr to prove that sedimentation would absolutely occur. The ruling erroneously elevates the standing inquiry to an inquiry on the merits of the case, i.e., whether the stormwater plan is sufficient to prevent sedimentation.

Equating proof of standing allegations with proof on the merits is the misapplication of standing law presently before this Court.

ii. Injury Can Be Shared by Many and Still Be Particularized

Roper Pond takes issue with *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31

L.Ed.2d 636 (1972), because a broad class of citizens may all have standing. Roper Pond makes the sweeping statement that all injuries identified by the Petitioners are "common to all members of the public," but fails to explain or provide support for this statement. (Brief, p. 32). Yet Roper Pond never identifies any evidence that all members of the public walk around the lily pad pond on an almost daily basis, that they all enjoy viewing the lily pads and wildlife in and around the pond, and that their use and enjoyment would be diminished by dredging the lily pad pond.[2] The record contains testimony on each of these points by Mrs. Starr and Mrs. Jackson and that testimony is sufficient to show harm particularized to them.[3] (App. 379-385; 400-401; 406-408). Indeed, *Sierra Club v. Morton* recognizes "the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process," and mere disagreement with a landmark standing case does not negate its applicability. *Id.* at 734.

As the Town is a party in its governmental capacity, harm particularized to it is necessarily

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[2]Roper Pond relies heavily on *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n.*, 407 S.C. 67, 753 S.E.2d 846 (2014). In *Carnival*, this Court found the injury in fact element of standing to be lacking because the plaintiffs alleged only a generalized grievance, equating their claim to a general complaint against the government more appropriately remedied through the legislative branch. *Id.* at 81. This case is not one where a group of associations are bringing generalized grievances as in *Carnival*. *Id.* at 75-76. This Court in *Carnival* contrasted the plaintiffs' claims with those that "an adjacent or neighboring property owner" would have. *Id.* at 79. This Court stated that a neighbor would have standing for certain zoning claims. Here, Petitioners are neighbors with particularized injuries that are not suffered by the population at large. Furthermore, Petitioners do not seek a change in zoning laws that could be accomplished through the political process, but seek administrative review of an agency decision which they contend is erroneous.

[3]"[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733-35, 128 S. Ct. 2759, 2768-69, 171 L. Ed. 2d 737 (2008) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

going to look different than harm to an individual. Roper Pond recites some of the Town's injuries (Brief, p. 30), but fails to recognize that the degradation of the character of the Town and diminished property values in the Town are particularized to the Town, i.e., they are not particularized to another municipality in some other part of the state not adjacent to the project site.

Roper Pond also dismisses the Town's obligations under the Clean Water Act to comply with the NPDES requirements. *See* 33 U.S.C. §§ 1319; 40 C.F.R. 122.26 & 122.34. If the Town does not comply with the requirements, it is subject to suit and liability under the CWA, which can be initiated by either the government or private citizens. 33 U.S.C. §1342; *See, e.g., Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008); *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880 (9th Cir. 2011). Roper Pond implies that because the Town has delegated some part of its responsibilities to Richland County under an "intergovernmental agreement," the Town no longer has to comply with the CWA requirements. First, the reference to the "intergovernmental agreement" was made in passing by the Town's Mayor. The agreement is not in evidence, making it impossible to deduce the import of that agreement on the Town's CWA obligations. Second, and more importantly, Roper fails to cite to any legal support for the assertion that the Town can be relieved of its obligations by agreement.

iii. The Injuries Are Fairly Traceable to DHEC's Decision

To the extent that the Court of Appeals addressed traceability, it failed to apply the standard for determining whether the injuries were traceable to the challenged decision. Assuming Ms. Jackson's aesthetic interests in viewing the lily pad pond is a cognizable interest, the fact that the Department decision at issue in this appeal authorizes land disturbing activities, and specifically dredging the pond, which is part of the "approved design" for the stormwater

management plan, plainly establishes traceability. (Roper Brief, p. 6). There is no intervening action that would cause destruction of the lily pads as the excavation of the pond is authorized under the stormwater permit approved by the Department. Roper Pond admits that "the stormwater management plan for the Proposed Project included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate." (Roper Brief, p. 4, citing App. p. 202).

Roper Pond asserts that most of Petitioners' "alleged injuries in support of standing would result from Roper Pond's failure to manage sediment and erosion control in accordance" with the permit.[4] (Brief, p. 34). To the contrary, Petitioners are not bringing an enforcement action or alleging a violation of the permit (Roper Brief, p. 34), rather they are challenging the permit itself based on the land disturbing activities it authorizes which will result in a variety of injuries.

iv. Property Ownership is Not Part of the Standing Analysis

The Court of Appeals' Opinion dismisses the individual Petitioners' aesthetic and recreational interests in the lily pad pond because the pond is on private property. After determining that the Town does not have standing, the Court of Appeals moved on to the individual Petitioners residing in the Kaminer Station subdivision, noting that "concerns reflecting aesthetic or recreational interests have been recognized as 'judicially cognizable injur[ies] in fact.'" *Town of Arcadia Lakes v. S. Carolina Dep't of Health & Envtl. Control*, 404 S.C. 515, 531, 745 S.E.2d 385, 394 (Ct. App. 2013). However, citing *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974), the court identifies a distinction when that aesthetic or recreational

[4]This assertion continues the proof on the merits standard for standing erroneously adopted by the lower court. DHEC regulation R.61-101.H covers "enforcement of certification decisions and conditions." *See* 25A S.C. Code Ann. Regs. 61-101.H.

interest is in another's private property. *Id.* The Court of Appeals sums up its consideration of the Kaminer Station Petitioners' injury-in-fact as follows: "Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants." *Id.* In short, the Court of Appeals determines that the Kaminer Station Petitioners do not have an injury-in-fact because the lily pad pond is on private property, and the court then moves on to consider the fairly traceable element of standing. *See, Id.* In its discussion of standing for the individual Petitioners' residing in the Cary Lake subdivision, the court's reliance on a property interest requirement is even more unmistakable. The court holds: "Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact." *Id.* at 123.

The Court of Appeals' novel imposition of a property interest requirement is wrong for all the reasons noted in the Petitioners' opening brief. (Pet. Brief, pp. 27-29). There can be no debate, however, that the court did impose such a requirement on the *individual petitioners* in relation to *the lily pad pond* and Cary Lake.

Roper Pond first states that the Petitioners mischaracterize the Court of Appeals' holding on the requirement for a property interest. Roper Pond contends that the "Petitioners mischaracterize the Court of Appeals' consideration of the fact that Roper Pond and Cary Lake are privately owned in the context of specific findings that the Petitioners failed to demonstrate standing in this case." (Brief, p. 35). In support, Roper Pond attempts to present the Court of Appeals' property interest inquiry as occurring entirely in the context of the Town's interest in Cary Lake. (Brief, pp. 35-36). A review of the Court of Appeals' Opinion reveals this presentation

to be patently inaccurate and merely a continuation of Roper Pond's efforts to obscure the individual Petitioners' legitimate interests in the lily pad pond. The Court of Appeals leaves no room to misinterpret or mischaracterize its imposition of a property interest requirement.

Roper Pond's assertion to the contrary is merely an effort to disguise the court's misapplication of law.

Paradoxically, Roper Pond later attempts to hedge its bet by arguing in favor of the Court of Appeals' faulty property interest requirement. In distinguishing the *Smiley* case, Roper Pond puts particular emphasis on the fact that Smiley's aesthetic and recreational interests were in a "public" area, while the Petitioners' interest is in a lily pad pond on private property. (Brief, p. 37). Similarly, in distinguishing the *Spectre* case, Roper Pond emphasizes that it was a "property owner" whose standing was at issue. *Id.* Roper Pond is arguing for the same property interest requirement imposed by the Court of Appeals, under the same misinterpretation of *Conservation Council of N.C. v. Costanzo*, 505 F.2d 498 (4th Cir. 1974).

Notably, contrary to how it is put forward by the Court of Appeals and Roper Pond, the standing inquiry in *Costanzo* turned on property access, not property ownership. Particularly, that case considered the standing of groups to challenge construction on private property they had previously accessed as either a licensee or trespasser. *Id.* at 501-02. The Fourth Circuit's holding rested on the fact that the parties asserting standing no longer had a right to access the property; ownership of the property was only secondarily implicated as it related to access. *Id.* The situation here is inapposite. The individual Petitioners will still walk, run and drive by the lily pad pond and have visual access thereto; only their view will be diminished and their opportunity to see certain flora and fauna will be lost. These are the exact type of interests routinely found to serve as a basis for environmental standing. As outlined in the Petitioners' opening brief, the scope of an

environmental plaintiff's aesthetic and recreational interest has been significantly refined since 1974, and certainly that interest no longer rests on physical access, much less ownership.[5]

v. Petitioners Presented Sufficient Evidence of Injury

Roper Pond's argument on standing is that the Petitioners fail "to recognize the distinction between the sufficiency of allegations to support standing at the pleading stage and the requirement to offer sufficient evidence to prove such allegations at trial." (Brief, p. 29). Roper Pond quickly moves on from this argument and never explains exactly what it sees as Petitioners' evidentiary failures. First of all, as it relates to the question of standing, the Petitioners know of no more "sufficient," definitive form of evidence than the testimony of the Petitioners themselves, which was offered at length during the trial of this case. Secondly, and as evident from the Opinion itself, the Court of Appeals' denial of standing, especially as it relates to the individual Petitioners and to the lily pad pond, turns on faulty application of law, not failure of evidence.

Roper Pond dismisses (as did the Court of Appeals) undisputed evidence regarding impacts to the Town's character and diminished property values. South Carolina's general rule is that a landowner, who is familiar with his property and its value, is allowed to give his estimate as to the value of the land and damages thereto, even though he is not an expert. *South Carolina State Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970). "The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; . . ." *Seaboard Coast Line R. R. v. Harrelson*, 262 S.C. 43, 46, 202 S.E.2d 4, 5 (1974) (citing 3

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[5]Roper Pond faults the fact the individual Petitioners have never made use of the actual property on which the lily pond sits. (Brief, p. 37). South Carolina has never required that an environmental plaintiff actually physically occupy a property to have an aesthetic or recreational interest therein. See, e.g., *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); see also *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998).

Wigmore, Evidence s 716 (Chadbourn Rev. 1970)). Neither the lower court nor Roper Pond cite to any authority allowing disregard of the Petitioners testimony regarding diminution in property values nor any evidence contradicting the Petitioners testimony on that point.

When Roper Pond does get around to acknowledging the lily pad pond, it briefly and weakly dismisses the Petitioners' interests in that pond as nothing more than "abstract distress." (Brief, pp. 38-39). In doing so, Roper Pond block quotes a portion of the Fourth Circuit's opinion in *Friends of the Earth, Inc. V. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) that in fact strongly supports standing for the Petitioners' based on their interest in the lily pad pond. That block quote contains the following relevant language: "The Supreme Court has made it clear that [aesthetic and recreational interests] may be vindicated in the federal courts"; "**purely aesthetic interest is cognizable for purposes of standing**"; "effect on '**recreational, aesthetic**, and economic interests' is cognizable injury for purposes of standing"; and "**Aesthetic and environmental** well-being, like economic well-being, are important ingredients of the quality of life in our society . . . **deserving of legal protection through the judicial process.**" (emphasis added). *Id.* at 154-55.

The fate of the lily pad pond – dredging, deepening, and conversion into a stormwater retention pond – is in no way abstract. Further, the Petitioners in this case have testified that they live adjacent to the lily pad pond (App. pp. 378-79), that they have enjoyed viewing the pond nearly everyday for 37 years (App. pp. 379-80), and that the pond serves as an important part of their community (App. pp. 406-8, 419). In this case, it is hard to imagine any plaintiff would have standing to challenge Roper Pond's permit, if not the Petitioners who live adjacent to the proposed project. *See Pye v. U.S.*, 269 F.3d 459, 468 (4th Cir. 2001) ("if the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that

anyone would have standing to oppose this ... grant.")

II. Roper Pond's Project Fails to Comply With the Legal Requirements

Both Respondents misunderstand Petitioners' arguments. The argument is not that Roper needs a federal permit for dredging waters of the United States (Roper Brief, p. 18); but rather that DHEC's certification authority, once triggered, extends to consideration of the dredging activity and that the dredging of the pond is included in and requires a state stormwater permit.[6] Petitioners' assertion that Roper Pond does not have a 401 Certification is premised on its failure to meet all of the conditions for qualifying under the NWP Certification. DHEC's Chuck Hightower confirmed that an individual 401 Certification is required if a proposed activity does not meet the conditions of the applicable NWP. (App. pp.258-59; 292-94; 301).

Petitioners argument can be summarized as follows:

1. Roper Pond must have a 404 permit to fill in wetlands.

2. Roper Pond's 404 permit must have a 401 Water Quality Certification from DHEC.

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[6]Both briefs discuss whether or not a permit is needed for dredging the pond. (See Roper Brief, pp. 11-13; 15-18). While there is no dispute that a CWA Section 404 permit from the Corps is not required for activities in Waters of the United States, ***the pond dredging does require a state permit***. Specifically, the Stormwater and Sediment Reduction Act requires an applicant to obtain a permit from DHEC prior to proceeding with any land disturbing activities. Section 48-14-30(A) states that "Unless exempted, no person may engage in a land disturbing activity without first submitting a stormwater management and sediment control plan to the appropriate implementing agency and obtaining a permit to proceed." Section 48-14-20(8) defines "Land disturbing activity" as "any use of the land by any person that results in a change in the natural cover or topography that may cause erosion and contribute to sediment and alter the quality and quantity of stormwater runoff." There is no dispute that excavating the pond will change the natural cover and topography and will, at a minimum, alter the quantity of runoff, since it was designed to "provide additional storage volume." (Roper Brief, p. 4). Roper acknowledges that the "approved design included dredging the existing Pond" and that "the use of the existing Pond as a post-construction water control device was in the stormwater design . . . as reviewed and approved . . . through DHEC's grant of coverage under the State General Permit." (Roper Brief, pp. 6 & 18).

3. DHEC's 401 Certification of NWPs requires Roper to meet certain conditions in order to qualify for coverage under the NWP Certification.

4. DHEC's NWP Certification can only be used for fill activities covered by the NWP.

5. DHEC's General Condition #1 requires it to consider impacts to waters and wetlands beyond just the wetland fill authorized under the Corps NWP, to include the "overall project site," not just the "land area directly impacted by [the] NWP."

6. The project will impact waters and wetlands that exceed those identified in the NWP, but DHEC did not consider any wetland impacts on the project site beyond the fill.

7. Because the project includes impacts to waters beyond those authorized under the NWP, Roper does not qualify for coverage under the NWP Certification, does not have the required 401 Certification and, thus, does not have a valid 404 permit.

8. Because Roper does not have a valid, effective 404 permit, it does not qualify for stormwater permit coverage from DHEC.

Roper Pond's arguments that an approved 404 permit and attendant 401 certification are not prerequisites to coverage under the Stormwater General Permit are disingenuous. The stormwater regulations require an applicant to have **all necessary federal and state permits** prior to implementation of a stormwater plan. Regulation 72-307.C.(7) states that "Where existing wetlands are intended as a component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained." Section 2.1(C) of the State General Permit includes some notification, but as indicated on DHEC's website, it is not required to provide that notification because it is a regulatory requirement. (App. p.576).

DHEC identifies an important component of the Nationwide permitting process: NWPs are only approved after public notice and an opportunity to comment and request a public hearing are provided under 33 C.F.R. 330.1(c). (DHEC Brief, p. 4). When DHEC reviewed the NWPs for consistency, the public was notified that the NWPs and DHEC's certification covered only those activities specifically identified in the NWP.

The requirement that an applicant submit a Preconstruction Notification ("PCN") to the Corps prior to undertaking any construction activity under NWP 29 or 39 was part of the NWP that DHEC certified. Thus, DHEC knew that it would receive a copy of the PCN for activities under NWP 29 and 39 and would be able to determine whether the project qualified for NWP coverage. (App. p. 287-88) Additionally, DHEC receives and reviews the application seeking approval under the NWP and DHEC's certification of that NWP. (App. 241-42). The application, if accurately completed, would notify DHEC of all impacts to waters of the State, whether the applicant is seeking NWP coverage and whether there are any impacts to wetlands or waters that are not included under the NWP coverage (such as excavation and dredging). (App. 241-42, 565-66).

Roper Pond asserts that DHEC review of the project would render NWPs meaningless (Brief, p. 24). But DHEC review ensures that only impacts to wetlands approved under the NWP certification will occur; activities impacting wetlands beyond those identified and authorized under the NWP certification would not qualify for NWP Certification coverage. If NWPs can be issued without DHEC determining whether the project is consistent with and meets all of its conditions to qualify for coverage under its 401 certification, then DHEC's conditions become essentially meaningless. Petitioners do not contend that the Department's scope of review for NWP Certifications is the same scope of review for Individual Certifications. For projects that do not propose impacts beyond those authorized by the NWP, DHEC would have no additional impacts to

consider and the project would proceed expeditiously. But where, as here, the Department has an application indicating that there will be impacts to waters beyond those identified in the NWP, it has a duty to consider those impacts under the conditions of its Certification.

Roper admits that the 401 Water Quality Certification ("WQC") issued for the NWP contains "general conditions which become conditions of the NWP." (Roper brief, p. 3). Roper acknowledges that the permittee must comply with these conditions. (Roper brief, p. 3). Roper claims that the project does comply with all of the general conditions. *Id.* The Court of Appeals ruling is to the contrary, agreeing with Petitioners that DHEC must "consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity." *Town of Arcadia Lakes* at 404 S.C. at 522, 745 S.E.2d at 389.

A. DHEC has Authority to Apply its own Certification Conditions

Roper Pond argues that when DHEC conditionally certified the Corps' NWPs in 2007, DHEC lost the ability to assess or determine whether a proposed NWP project meets those conditions. (Roper brief, pp. 3 & 19). Specific to this case, Roper Pond believes that when DHEC certified the NWPs with General Condition #1 that "SCDHEC considers . . . the overall project proposed . . . includ[ing] all land within the project boundary," DHEC then lost the ability to consider the overall project proposed, turning over that authority exclusively to the Corps. (emphasis added) (Roper Brief, pp. 20 & 25). The logical result of Respondent's argument would be that DHEC does not and cannot ever individually review a NWP project for compliance with the certification conditions, much less the water quality standards. Roper Pond cites no legal authority for its bold position, only pointing to regulations which give the enforcement authority to the agency issuing the permit. (Brief, p. 26, citing R. 61-101.H.2). These regulatory provisions refer to *enforcement*. Here were are simply talking about a determination as to whether a project

qualifies for coverage under an NWP Certification, not enforcement of that permit.

Contrary to Roper Pond's position that DHEC cannot review NWP projects, DHEC's Chuck Hightower testified that DHEC does review NWP projects and issues a certification letter if it finds that the project satisfies the terms of DHEC's NWP certification. (App. pp. 251-268). If the NWP general and special conditions have been met, thereby qualifying the project for coverage under DHEC's WQC, the applicant may proceed. But if they have not been met, Hightower said DHEC requires an individual certification. (App. p. 259, lines 6-8: "**If it doesn't meet one of the specific or general conditions, then we're required to go get an individual permit**"). DHEC admits that a "specific determination" is required to insure that a project meets the conditions of its NWP certification. (App. p. 629). If a project does not meet the conditions of the NWP certification DHEC requires an individual certification. (App. p. 259).

What Roper Pond advocates, and the Court of Appeals sanctions, is for the citizens of South Carolina to trust that the Federal government, through the Corps, will ensure that State certification conditions are met in order to qualify for coverage under the State's NWP certification. Under Roper Pond's conception, if the State certification conditions are not met, the Corps presumably then transfers authority back to DHEC through some unknown mechanism so that DHEC can conduct an individual certification review. The Petitioners are not aware of any instance where the Corps has informed DHEC that DHEC's own certification conditions are not met, warranting individual certification review.

In making its argument on this point, Roper Pond relies on DHEC regulation R.61-101.H, which covers "*enforcement* of certification decisions and conditions." *See* 25A S.C. Code Ann. Regs. 61-101.H (emphasis added) (Roper Brief, p. 26). Roper Pond fails to account for the important distinction between *making* a certification decision and *enforcing* a certification

decision. Regulation R.61-101.H.2 does provide for the possibility that the Corps' "enforcement mechanisms" will be used to enforce DHEC's certification conditions.[7] Roper Pond though makes the stark extrapolation from this language that because the Corps has authority to *enforce* the terms of a certification decision, the Corps has sole authority to actually make a certification decision. On the contrary, while the Corps may have authority to bring enforcement measures, nothing in R.61-101.H limits DHEC's authority to make a certification decision by reviewing a proposed project's compliance with its certification conditions.

B. DHEC's Review is Not Limited to Federal Jurisdiction

Petitioners agree that DHEC's 401 certification program derives from the Clean Water Act (DHEC Brief, p. 14); however DHEC and Roper's position (Roper Brief, p. 11-12) that DHEC's "review criteria" are limited by the CWA has no legal support and is inconsistent with the regulations themselves. Regulation 61-101 requires DHEC to consider **"all potential water quality impacts of the project**, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts . . ." as well as "the aquatic ecosystem in the vicinity of the project." S.C. Code Ann. Reg. 61-101.F.(3) & F.(5)(a) (emphasis added). Indeed, Mr. Hightower testified that these regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (App. p. 257; R. 61-101.F).

Petitioners' argument flows logically from the regulations and is supported by the evidence: DHEC has broader review authority than the Corps; General Condition #1 of the NWP Certification reflects this broad review authority; General Condition #1 directs DHEC to consider

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[7]Note that the regulation also provides that: "The Department may conduct inspections for determining compliance with certification conditions." *See* R.61-101.H.3.

all water quality impacts resulting from the project, not just those resulting from the NWP activity; the project has impacts beyond the NWP activity; securing NWP certification is contingent on compliance with all of the conditions of that certification; the project does not comply with all of the conditions; the project does not qualify for coverage under DHEC's NWP certification; the project does not have a valid 404 permit; and thus the project does not qualify for the stormwater permit coverage at issue in this case.

C. DHEC's Interpretation of Its Permit is Not Entitled to Deference

DHEC argues that it is owed deference on its interpretation of its own permitting decision, as well as its interpretation of the "NWP certification process." (DHEC Brief, pp. 12-13 & 17-19). The type of deference advocated for by DHEC has no precedent.

DHEC cites cases wherein agencies are accorded deference on interpretation of their own enabling statute and regulations, and it argues that the same deference is owed to "the Departments's interpretation of General Condition #1, . . . which it placed on the certifications of the 2007 NWPs." (Brief, p. 17). The mistake in this logic is that DHEC's conditional NWP certification is a basic permitting decision, just like any other individual 401 certification review, and it has no regulatory or statutory significance. See, R.61-101.A.3. While the ALC's interpretation of that permitting decision is entitled to some deference by virtue of South Carolina Administrative Procedures Act, certainly DHEC's post hoc rationalization giving staff's opinion of how a permit condition should be interpreted in a particular permitting decision receives no additional deference. See, S.C. Code Ann. § 1-23-610. If DHEC's argument on deference were accepted, DHEC would receive deference in every legal challenge where it took a position in defense of its own permitting decision. Obviously such is not the state of the law.

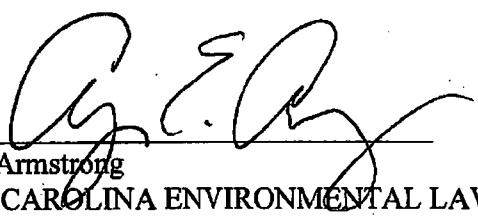
D. DHEC's Assertion that this Case is Moot Because the NWPs Have Been Reissued Since this Case was Filed is Without Merit

The expiration of NWP in 29 under which this project was authorized does not render this case moot. This Court can and should apply the law, and specifically the NWP certification, as it existed at the time the project was authorized by the agency. The Petitioners more fully address this argument in their Response to DHEC's Motion to Supplement.

CONCLUSION

WHEREFORE, the Petitioners respectfully request that this Court reverse the opinion of the Court of Appeals consistent with the relief sought in its opening brief.

Respectfully submitted,



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Attorney for the Petitioners

Georgetown, South Carolina

November 18, 2014

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S SECOND AMENDED PETITION FOR ATTORNEYS' FEES AND COSTS AND FOR SANCTIONS PURSUANT TO RULE 72, SCRPALC**

Pursuant to S.C. CODE ANN. § 15-77-300 and in accordance with the Court's Order dated May 11, 2010, Respondent Roper Pond, LLC's ("Roper Pond") hereby moves this Court for an order directing the Petitioner Town of Arcadia Lakes ("Town") to pay to Roper Pond its attorneys' fees and cost in the amount of $205,283 which were incurred in this matter, including fees and costs incurred during the appeal before the Court of Appeals and on the petition for writ of certiorari to the Supreme Court. In the alternative, Roper Pond moves the Court for an order awarding Roper Pond $205,283 for attorneys' fees and costs incurred in this matter and $661,984 for the costs associated with delay of the planned development of the Roper Pond property on Trenholm Road in Richland County ("Property") as sanctions pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

The grounds for this petition for fees and costs pursuant to S.C. CODE ANN. § 15-77-300 are:

1. Roper Pond is a prevailing party in this matter as the Court's Final Order and Decision filed January 21, 2010, and the denial of Petitioners' Motion to Reconsider on March 23, 2010, upheld the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC") to grant Roper Pond coverage under Permit No. SCR100000, NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit");

2. The Town acted without substantial justification in bringing this action challenging DHEC's decision to grant coverage to Roper Pond under the Construction General Permit, and in fact, this Court and the Court of Appeals held that the Town lacked standing to bring such action, and;

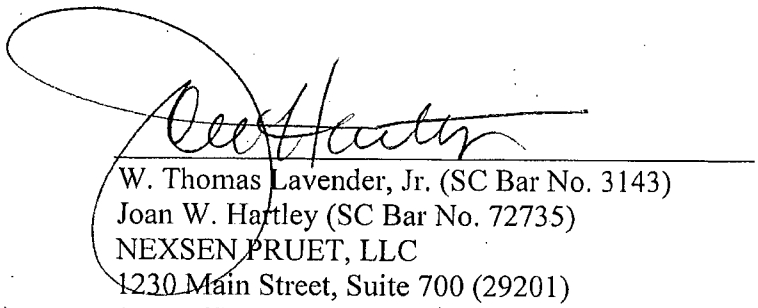
3. There are no special circumstances that would make an attorneys' fee award unjust.

4. On April 19, 2010, Roper Pond filed its Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, on the above-stated grounds. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, in abeyance pending the resolution of Petitioners' appeal. The Order further provided that within thirty days of the resolution of the appeal, Roper Pond could file a revised Petition for Attorneys' Fees and supporting affidavit to include fees and costs incurred during the appeal before the Court of Appeals. On June 12, 2013, the Court of Appeals issued Opinion No. 5095, affirming this Court's Final Order and Decision on standing and the substantive ruling on the Department's decision to grant Roper Pond coverage under the Construction General Permit. On July 12, 2013, Petitioners filed a petition for Writ of Certiorari to the Supreme Court. On August 22, 2014, the Supreme Court issued an Order, granting

Petitioners' Petition for a Writ of Certiorari. The Supreme Court heard oral arguments on March 18, 2015. On April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. On April 28, 2015, the Clerk of the Supreme Court remitted the case to this Court along with a copy of a the Supreme Court's dismissal and the decision of the Court of Appeals.

Roper Pond is entitled to attorneys' fees and costs incurred in the appeal before the Court of Appeals. Additionally, or in the alternative, Roper Pond asks the Court to award attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRALC, on the grounds that Petitioners' challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was frivolous and/or taken solely for the purpose of delay.

This petition is supported by the applicable law, the pleadings, motions, and memoranda on file in this case, the discovery conducted in this case, the testimony and evidence presented at the hearing on the merits, the record before the Court of Appeals and the Supreme Court, the Memorandum of Law in Support of Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, and the affidavits attached hereto.



W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
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Attorneys for Respondent
Roper Pond, LLC

May 28, 2013
Columbia, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No.: 09-ALC-07-0069-CC **AFFIDAVIT OF JOAN W. HARTLEY**

PERSONALLY APPEARED BEFORE ME, Joan W. Hartley, who, being duly sworn, swears and deposes that if he were called as a witness in the above-entitled action he would truthfully and accurately testify as follows:

1. I am special counsel in the law firm of Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina 29201. I am an attorney of record in the above-captioned case, and I submit this affidavit in support of Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, in this matter.

2. On May 20, 2009, Respondent Roper Pond, LLC served a subpoena on SCANA Corporation, a copy of which is attached hereto as Exhibit 1. Attached hereto are true and correct copies of the following documents which were produced by SCANA Corporation in response to the May 20, 2009 subponea:

Exhibit 2: August 23, 2008 emails regarding "Affidavits (Who, What, When, Where, and Why from parties solicited)" and Bates labeled SCANA – 0070 – 0072;

Exhibit 3: December 17-19, 2008 emails regarding "Rick Thomas – Roper Pond Project Request" and Bates labeled SCANA – 0896 – 0897;

Exhibit 4: December 17, 2008 email regarding "Roper Pond Appeal-DOT" and Bates labeled SCANA – 0867;

Exhibit 5: October 28-29, 2008 emails regarding "Follow-up – Roper Pond Apartments" and Bates labeled SCANA – 0652 - 0653;

Exhibit 6: October 5, 2008 email with attachment regarding "letter kaminer sta" and Bates labeled SCANA – 0583 - 0585;

Exhibit 7: October 2, 2008 emails with attachment regarding "Roper Latest revised revision" and Bates labeled SCANA – 0500 – 0503;

Exhibit 8: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0697;

Exhibit 9: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0698;

Exhibit 10: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0699;

Exhibit 11: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0701;

Exhibit 12: November 7, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0704;

Exhibit 13: December 30, 2008 emails with attached regarding "(no subject)" and Bates labeled SCANA – 0906 - 0908;

Exhibit 14: October 2, 2008 email regarding "Roper Planning Comm Revision #2" and Bates labeled SCANA – 0496.

3. On August 19, 2009 Respondent Roper Pond, LLC deposed Richard W. Thomas, Jr., the Rule 30 (b)(6) designee for Petitioner Town of Arcadia Lakes. This deposition was admitted at trial as Petitioners' Exhibit 1. Attached hereto are true and correct copies of the following documents which were exhibits to this deposition:

Exhibit 15: December 17, 2008 email regarding "Roper Pond Apartments" - Exhibit 5 to the Deposition of Richard W. Thomas, Jr..

Exhibit 16: October 2, 2008 Resolution of the Town of Arcadia Lakes - Exhibit 6 to the Deposition of Richard W. Thomas, Jr..

4. The following are true and accurate copies of filings and submittal to this Court and the Supreme Court in this matter.

Exhibit 17: Brief of Petitioners on Writ of Certiorari filed on October 2, 2014;

Exhibit 18: Brief of Amicus Curiae South Carolina Wildlife Federation in Support of Petitioners' Standing;

Exhibit 19: Petitioners' Proposed Final Order emailed to this Court on December 3, 2009.

FURTHER AFFIANT SAYETH NOT.

Joan W. Hartley

SWORN and subscribed to before me

this 28th day of May, 2015

_____(L.S.)

Notary Public

My commission expires 4/12/23

Exhibit 1

NOTE: Exhibits 1 - 16 are identical to Exhibits 1 - 16 of Petition for Attorneys Fees located at R. pp. 285-334 and are not reproduced here.

Exhibit 17

NOTE: Exhibit 17 is the Brief of Petitioner on Certiorari and is located at R. pp. 536-591 and not reproduced here.

Exhibit 18

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

BRIEF OF AMICUS CURIAE SOUTH CAROLINA WILDLIFE FEDERATION IN SUPPORT OF PETITIONERS' STANDING

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January 29, 2015

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INTRODUCTION

The South Carolina Wildlife Federation is a nonprofit membership organization with vital interests in protecting natural resources throughout the State of South Carolina. The Federation was founded in 1931 to advocate for wildlife, habitat and the environment, educate citizens in the conservation ethic, and support outdoor traditions. The Federation is actively engaged in proceedings involving the review of permitting decisions made by the South Carolina Department of Health and Environmental Control (DHEC), and has long-standing interests in its right to review DHEC decisions under S.C. Code Ann. § 44-1-60.

The Federation submits this Brief to assist the Court in clarifying the class of persons who qualify as "affected persons" entitled to invoke administrative review procedures set forth in S.C. Code Ann. § 44-1-60. The tools of statutory interpretation—the statute itself, this Court's precedent, and analogous cases from other jurisdictions—support construing the term "affected persons" to include persons injured by the challenged agency action, so long as those persons' interest is within the zone of interests protected by the statute. The Court should use this case to clarify the limited class of persons entitled to invoke administrative review of DHEC permitting decisions, which is a source of ongoing confusion in South Carolina tribunals.

The court below applied an incorrect standard in deciding whether the parties seeking administrative review were entitled to invoke the procedures of Section 44-1-60. Instead of focusing on whether those parties were "affected persons" entitled to review by the DHEC Board or the Administrative Law Court, the court answered a different question, whether those parties had "constitutional" standing, one of the standing tests

employed by South Carolina courts to determine if a party has sufficient stake to bring a *judicial* action. As discussed below, while the term "affected person" is best understood to share an element in common with constitutional standing – the requirement that a party be injured by the challenged action – the court below erred in imposing additional restrictive criteria, including property ownership and the need to show that the alleged agency failure would "cause" damage to the environment, such that the invoked review procedure would necessarily result in avoiding that damage altogether.

As a constitutional matter, a court may not alter the statutorily-defined category of citizens entitled to invoke a statutorily-created administrative review scheme. The administrative scheme here is available to all parties "affected" by a DHEC permitting decision. This Court's precedent, along with precedent from other jurisdictions, supports defining the term "affected" to mean a party injured by the DHEC decision, so long as that injured interest falls within the scope of interests protected by the statute that empowers DHEC to issue the particular approval in question. Requiring more – or less – of a party to invoke an administrative scheme created by statute is a decision left to the General Assembly. Whether a party would later have standing sufficient to invoke judicial review of the administrative procedure is a distinct, but related question; the court below erred in failing to distinguish those concepts, and in doing so, contravened clear legislative intent.

Because the distinction between administrative review by statute and judicial standing appears to be an area of ongoing confusion in South Carolina, the Court should take this opportunity to clarify for bench, bar, and public what the term "affected person" means in the context of administrative review of DHEC permitting decisions.

DISCUSSION

I. The statutory term "affected persons" means a party injured by a DHEC permitting decision, where that injury falls within the zone of interest protected by the underlying statute.

In South Carolina, it is well settled that the General Assembly can create a "new right with its remedy" and "vest in some board or person power to adjudicate all matters arising under the statute." *See State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929). Here the General Assembly did just that. It provided that any "affected person" can seek review of a DHEC staff permitting decision before the DHEC Board and the S.C. Administrative Law Court. S.C. Code Ann. § 44-1-60 (E), (F), (G). Judicial review occurs after the administrative procedure is exhausted. S.C. Code Ann. § 1-23-380.

The question in this case is whether the Petitioners were "affected persons" within the meaning of Section 44-1-60 entitled to invoke the administrative review procedure provided by that statute. The court below, in the course of finding that the Petitioners were not entitled to invoke the administrative review procedure, applied the wrong standard. Among other things, it failed to engage in the most fundamental task at hand: interpreting the term "affected person" to determine if the Petitioners qualified.

Section 44-1-60 does not define "affected persons." Petitioners contend that they are "affected persons" because they establish "an individualized injury in the adverse effect of a specific [agency] decision . . . on their . . . use and enjoyment" of Roper Pond and its related environment. Br. of Pet'rs at 18-19 (*quoting S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988)). Respondent Roper Pond, LLC does not offer its own interpretation of what "affected persons" means or when someone may fit that statutory class, but argues that the Petitioners'

characterization of "affected persons" is too broad, contending that it would allow "any party" to challenge a DHEC decision "regardless of whether such party is personally affected by the decision or has recognized interest in that decision," so as to "completely eliminate any requirement to establish standing." Br. of Resp't. Roper Pond, LLC at 28-29.

The definition of "affected person" under Section 44-1-60 appears to be an issue of first impression before this Court. However, the ability of "affected" and "aggrieved" persons to challenge agency action has been exhaustively addressed by other jurisdictions. That case law and the statute itself support defining "affected persons" under Section 44-1-60 as a limited class of persons who can demonstrate that the challenged agency action injures their concrete interests, so long as those interests are within the zone of interests protected by the statute.

Both state and the federal courts interpret the phrase "affected" or "aggrieved" person as a term-of-art, embodying the general principle that a party make seek review of agency action if that action will injure the party's concrete interest protected by the statute that authorizes the agency action. For example, Justice Scalia, writing for the Supreme Court of United States, explained:

> The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts. The terms 'adversely affected' and 'aggrieved,' alone or in combination, have a long history in federal administrative law, dating back at least to the Federal Communications Act of 1934. They were already familiar terms in 1946, when they were embodied within the judicial review provision of the Administrative Procedure Act (APA), 5 U.S.C. § 702, which entitles '[a] person ... adversely affected or aggrieved by agency action within the meaning of a relevant statute' to judicial review. In that provision, the qualification 'within the meaning of a relevant statute' is not an addition to what 'adversely affected or aggrieved' alone conveys; but is rather an

> acknowledgment of the fact that what constitutes adverse effect or aggrievement varies from statute to statute. As the United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act put it, 'The determination of who is 'adversely affected or aggrieved . . . within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question.

Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126-27 (1995) (internal citations omitted). State courts have used similar principles to interpret their own statutes authorizing "affected" or "aggrieved" persons to seek review of state agency action before an administrative law judge or other administrative tribunal.[1]

Limiting review to those with injury prohibits parties from "raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that

[1] *See, e.g., Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res., Div. of Envtl. Mgmt.*, 337 N.C. 569, 584, 589, 447 S.E.2d 768, 777, 780 (N.C. 1994) (finding Petitioner is a "person aggrieved" pursuant to statute with "the right to commence an administrative hearing to resolve a dispute with an agency" because Petitioner "alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit."); *Ctr. for a Sustainable Coast, Inc. v. Turner*, 324 Ga. App. 762, 763-64, 751 S.E.2d 555, 558 (Ga. Ct. App. 2013) ("Any person who is aggrieved or adversely affected by any order or action of the director shall . . . have a right to a hearing before an administrative law judge" and "A party is 'aggrieved or adversely affected' if the challenged action has caused or will cause them injury in fact and where the injury is to an interest within the zone of interests to be protected or regulated by the statutes that the director is empowered to administer and enforce.") (*quoting* Ga. Code Ann. § 12–2–2(c)(2)(A), (3)(A)).

no more directly and tangibly benefits him than it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

This Court has acknowledged that "'a concrete and particularized invasion' of a legally protected interest . . . distinguish[es] 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." *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007) (*quoting U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)). For this reason, this Court has stated that "'[i]njury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved.'" *Id.* Thus, the relationship between the terms is this: "affected persons" are those who can show "injury-in-fact," which in the context of agency action is "injury to a concrete interest protected by the statute that authorizes the agency action."

The statute itself suggests the same interpretation. "Determining whether a statute confers standing is an exercise in statutory interpretation," *Youngblood v. S.C. Dept. of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013), and "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature," *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).[2]

---

[2] Because the issue in this case is whether a party qualifies to invoke and participate in an administrative review procedure, the term "standing" may be a misnomer, since it typically refers to a party's entitlement to judicial review. To the extent the term applies, however, this case concerns "statutory standing" under South Carolina precedent, rather than the other sources of standing. In this state, a party may establish standing in any one of three ways: statutory standing, constitutional standing, or public importance standing. *ATC South Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). "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*, 402 S.C. at 317, 741 S.E.2d at 518. Statutory standing is an independently sufficient means of establishing standing, separate and distinct from the

This Court effectuates the intent of the legislature by giving "the words found in the statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* The plain and ordinary meaning of a person who is "affected" by agency action is a person who is injured by agency action. *E.g.*, Black's Law Dictionary 57 (6th Ed. 1990) (defining "affect" as "[t]o act upon; influence; change . . . often used in the sense of acting injuriously upon persons and things.").

Related administrative review provisions in South Carolina law support this interpretation as well. *See Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) ("statutes which are part of the same legislative scheme should be read together."). With regard to DHEC Certificates of Need for medical facilities, S.C. Code Ann. § 44-7-130 defines the class of "affected persons" able to seek invoke Administrative Law Court review to include any "person residing within the geographic area served or to be served by the applicant" as well as "persons who pay for health services in the health service area in which the project is to be located." The statute governing liquor licensing, S.C. Code Ann. § 61-6-185, authorizes persons residing within the county or "within five miles" of the location requesting the liquor license to seek review of the licensing decision before the Administrative Law Court.

Whereas in those statutes the General Assembly defined the class of persons entitled to administrative review of agency decisions using functional and geographic proxies for injury within the statute's zone of interest, in the case of Section 44-1-60 the General Assembly allowed any "affected" person to participate. Where the General

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elements of constitutional standing. *See id.* ("When no statute confers standing, the elements of constitutional standing must be met."). As discussed above, whether this case involves standing or not, it hinges on the statutory term "affected person."

Assembly defines the class of citizens entitled to invoke the legislatively established administrative procedure, it would be inappropriate for a court to alter those qualifications. As noted earlier, the General Assembly may create a "new right with its remedy" and "vest in some board or person power to adjudicate all matters arising under the statute." *See State v. Moorer*, 152 S.C. 455, 150 S.E. 269, 274 (1929). Accordingly, where the General Assembly has said that a person living within five miles of a proposed liquor store can invoke a legislatively-prescribed administrative remedy, a court could not limit that remedy to only those living within four miles, or two. Likewise, a court could not deprive a person who qualifies to invoke a procedure of his or her right to invoke that procedure because the court views the procedure itself as futile or otherwise objectionable as a policy matter. *See Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be.") (Internal citations omitted). The only question is whether a party satisfies the statutory requirement to invoke the statutorily-provided administrative process.

With respect to Section 44-1-60, the General Assembly provided administrative procedures to "affected persons." It would be improper to circumscribe the universe of qualifying persons further with additional qualifications, such as the "causation" or "redressability" elements of federal Article III standing, which have been used by South

Carolina courts in determining whether a party has "constitutional" standing.[3] Imposing those requirements would be akin to limiting administrative review for alcohol licenses to those who live four miles away rather than five miles, effectively rendering the statutory definition surplusage.

The "General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law," and courts are to interpret statutes so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881. If a person must show the elements of constitutional standing when "no statute confers standing," *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518, but must also still show constitutional standing to be an "affected person" under Section 44-1-60, then the word "affected" is superfluous. The better reading – given the text, context, purpose, and generally accepted approach to language such as this in other jurisdictions – is that "affected persons" under Section 44-1-60 is a limited class of persons who would be injured by the challenged agency action, and whose injury is within the zone of interests protected by statute. The statutory scheme that creates an administrative remedy for such persons presumes that remedy is worthwhile for them; superimposing separate "constitutional" standing requirements, like a requirement to show that the procedure will in fact result in the outcome desired by the party, would oppose legislative intent and overstep the judicial branch's constitutional role.

[3] The term constitutional standing can be a confusing one, since it is used by South Carolina courts, organized under the South Carolina Constitution, to incorporate standards employed by *federal* courts in determining the scope of their uniquely limited authority under the "Case and Controversy Clause" of the United States Constitution. U.S. Const. art. III, § 2, cl. 1.

II. Defining "affected persons" as persons injured by the challenged agency action fits with this Court's precedent.

A straightforward reading of "affected persons" under S.C. Code Ann. § 44-1-60 as persons who would be injured by the challenged agency action, and whose injury is within the zone of interests protected by statute, is consistent with this Court's prior decisions.

In *South Carolina Wildlife Federation v. South Carolina Coastal Council*, environmental groups challenged a decision of the Coastal Council certifying that a federal permit allowing a residential developer to dredge wetlands was consistent with South Carolina's water protection laws. 296 S.C. 187, 189, 371 S.E.2d 521, 522 (1988). The groups alleged that the Council had not properly followed its own procedures in issuing the certification. *Id.* The builder of the residential development argued that the environmental groups did not have standing to challenge the Coastal Council's certification. *Id.*, 296 S.C. at 190, 371 S.E.2d at 523.

This Court held that the environmental groups had standing because the groups "ha[d] alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands." *Id.* This holding fits with the general approach of focusing on injury to a specific interest within the zone of interests protected by statute. The environmental groups in that case illustrated injury to a concrete interest specific to their members: their use and enjoyment of the fish and wildlife of the wetlands. *Id.*, 296 S.C.at 189, 371 S.E.2d at 522. That aesthetic and recreational interest was protected by the Coastal Council's Coastal Management Plan, which prohibited "permanent alteration of valuable wetlands habitats" without following specific procedures that the groups alleged the

Council had not followed. *Id.* "These allegations," this Court found, "are sufficient to show standing." *Id.*, 296 S.C. at 190, 371 S.E.2d at 523.

Like the petitioners in *South Carolina Wildlife Federation*, Petitioners in this case appear to "have alleged an individualized injury in the adverse effect of a specific decision of [DHEC] on their . . . use and enjoyment of . . . the wetlands . . . sufficient to show standing." *Id.* Petitioners allege that their ability to participate in administrative review stems from their concrete interest in the aesthetic and recreational enjoyment of Roper Pond and Cary Lake, which they say they routinely use and enjoy. *See* Pet'rs Br. at 23-27. Petitioners are said to include individuals who live adjacent to Roper Pond and Cary Lake, who regularly enjoy the flora and aesthetic value of Roper Pond as a healthy wetland ecosystem and regularly swim, fish, and appreciate the waters of Cary Lake, which flow from Roper Pond.

These interests fall within the zone of interests protected by the South Carolina Pollution Control Act ("PCA"), which authorizes the 401 Certification procedure challenged by the Petitioners in this case.[4] The PCA declares the "public policy of the State to maintain reasonable standards of purity of the air and water resources of the State" for the benefit of the "public health, safety and welfare of its citizens." S.C. Code

[4] DHEC promulgated its 401 Certification regulations, numbered Regulation 61-101, under the statutory authority of "Sections 48-1-30 and 48-1-50 of the" South Carolina Pollution Control Act, which generally authorize DHEC to "promulgate regulations to implement this [Act]," to "develop a general comprehensive program for the abatement, control and prevention of air and water pollution," and "[t]ake all action necessary or appropriate to secure to this State the benefits of the Federal Water Pollution Control Act [better known as the Clean Water Act] and any and all other Federal and State acts concerning air and water pollution control." The 401 Certification procedure and the water quality standards are also mandated by the federal Clean Water Act. *See* 33 U.S.C. § 1341. The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Ann. § 48-1-20. The PCA directs DHEC to "adopt standards and determine what qualities and properties of water and air shall indicate a polluted condition," and to promulgate those standards as "part of the rules and regulations of the Department." S.C. Code Ann. § 48-1-40. Pursuant to this command, DHEC promulgated water quality standards "to maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna and to provide for recreation in and on the water." S.C. Code Ann. Regs. § 61-68.A(4). Also under the authority of the PCA, DHEC promulgated the 401 Certification procedure to protect those standards by ensuring that any activity receiving a federal permit "will be conducted in a manner which will not violate applicable water quality standards regulations." S.C. Code Ann. Regs. § 61-101.A(4). The right to administrative review in Section 44-1-60 applies to "[a]ll department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department," which includes the 401 Certification and all other DHEC authorizations at issue in this case. S.C. Code Ann. § 44-1-60(A).

Thus, the PCA encompasses the interests put forth by the Petitioners in enjoying and recreating in and around Roper Pond and Cary Lake. The Act intends DHEC's 401 Certification procedure to guard those interests, which hinge on protection of the state's valuable water resources. Petitioners' interest appears to separate their interest from a disinterested party's generalized grievance because, unlike a disinterested party, Petitioners apparently live next to, enjoy, and use the waters of Roper Pond and Cary Lake. Thus, Petitioners appear to have shown that they are "injured in fact by agency action and that the interest [t]he[y] seek[] to vindicate is arguably within the 'zone of

interests to be protected or regulated by the statute' in question." *Newport News Shipbuilding*, 514 U.S. at 127. Petitioners need show no more to qualify as "affected persons" under Section 44-1-60. *Cf. S.C. Wildlife Fed'n*, 296 S.C. at 190, 371 S.E.2d at 523.

III. The Court of Appeals erred in failing to construe the term "affected persons" and applying a standard inconsistent with this Court's precedent.

The Court of Appeals' standing analysis is incompatible with the statute and this Court's major decisions giving citizens with injuries within the zone of interests protected by statute a right to challenge environmental permits. In *South Carolina Wildlife Federation*, for example, this Court did not require the environmental groups in that case to prove with any certainty that requiring the Coastal Council to follow its procedures would result in stopping the residential development or protecting the wetlands. Here, however, the Court of Appeals required the Petitioners to prove that seeking review of DHEC's water quality procedures will result in better water quality in Roper Pond and Cary Lake. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 531-33, 745 S.E.2d 385, 393-95 (Ct. App. 2013). While that may be ultimately what Petitioners want, that is not what they need to show to qualify as "affected" persons who may invoke the review procedures provided by Section 44-1-60. If they qualify as affected persons, they may seek to enforce the procedures that protect the water quality of Roper Pond and Cary Lake regardless of whether, in judicial eyes, the administrative procedure is likely to result in better water quality. As with the liquor licensing example, a court must apply the criteria set forth by the General Assembly for invoking the procedure enacted by the General Assembly; it may not question the efficacy or project

the outcome of the enacted procedural remedy in determining whether a statutorily entitled party may invoke it.

The Court of Appeals also erred in requiring the Petitioners to show some type of property interest in order to show an interest sufficient for standing. *Id.*, 404 S.C. at 531-33, 745 S.E.2d at 393-95. Neither this Court nor any other courts require a property interest to illustrate a concrete interest and establish injury-in-fact, even outside the constitutional standing context. "The injury in fact requirement is designed to ensure that the litigant has a concrete and particularized interest distinct from the interest held by the public at large. That the litigant's interest must be greater than that of the public at large does not imply that the interest must be a substantive right sounding in property or contract." *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). Even courts applying the Article III standing test have "never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest." *Id.*

This is true in South Carolina as well, where courts have consistently found that a plaintiff's aesthetic or recreational enjoyment in property that plaintiff has no property right is sufficient to establish a concrete interest and injury-in-fact. For example, in *South Carolina Wildlife Federation*, this Court did not require the environmental groups to show a property interest in the wetlands in order to show a concrete interest sufficient for standing to challenge the agency's decision. 296 S.C. at 190, 371 S.E.2d at 523. This Court and the Court of Appeals have reached the same result in numerous other cases. *See Smiley*, 374 S.C. at 333, 649 S.E.2d at 34 (finding standing based upon a plaintiff's

alleged aesthetic and recreational enjoyment of a public beach); *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601-02, 550 S.E.2d 287, 291-92 (2001) (finding that individual residents of a "5,280 acre private, suburban community" established a concrete interest in the aesthetic and recreational enjoyment of viewing deer beyond their own property). *See also, e.g., Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 565, 505 S.E.2d 598, 605 (Ct. App. 1998) (aff'd in part and rev'd on other grounds by *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002)) ("Matthews claims an individual injury in the adverse effect of this specific decision of the Agency on her use and enjoyment of the Wetland, which lies adjacent to her residence. Our supreme court has found this interest to be sufficient to provide standing. . . . Matthews is not the owner of the Wetland. She has no economic interest which is directly affected by the issuance of a consistency certificate. Matthews' individual interest is her enjoyment of the wildlife and habitat.") (internal citation omitted).

Just as a property interest is not needed to show injury in the constitutional standing context, there is no basis for requiring it for a party to qualify as an "affected" person under Section 44-1-60. As earlier discussed, the zone of interests protected by the underlying law here are not property interests alone, as the PCA and water quality standards encompass injury to environmental, aesthetic, and health concerns. *See also* S.C. Const. art. I, § 22.

Similarly, the Court of Appeals' decision does not square with *Smiley v. South Carolina Department of Health & Environmental Control*, which focused on the injury element of constitutional standing. 374 S.C. 326, 333, 649 S.E.2d 31, 34 (2007). Like

this case, *Smiley* is a permit appeal case. The plaintiff sought to appeal a permit issued by DHEC that allowed excavation of a public beach. *Id.*, 374 S.C. at 328-30, 649 S.E.2d at 32-34. Both DHEC and the developer argued that the plaintiff did not have standing to challenge the permit before the Administrative Law Court. *Id.* at 374 S.C. at 329, 649 S.E.2d at 32. The Administrative Law Court, the Coastal Zone Management Appellate Panel, the Circuit Court, and the Court of Appeals all agreed, finding that the plaintiff could not establish injury sufficient for standing. *Id.* at 374 S.C. at 329-30, 649 S.E.2d at 33.

This Court reversed the Court of Appeals, holding that the plaintiff had adequately established injury to his "use and enjoyment" of the beach, specifically "jogging on the flat hard public beach." *Id.* at 374 S.C. at 332-33, 649 S.E.2d at 34. Relying on the principle that "'[i]njury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and . . . 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," this Court held that "[t]he averments in [plaintiff's] affidavit that he recreates and views nature on the beach on an almost daily basis is a sufficient allegation of" a "'concrete and particularized invasion' of a legally protected interest" sufficient to establish injury for standing to appeal the DHEC permit to the Administrative Law Court. *Id.*

The General Assembly enacted the Section 44-1-60 in 2006. Although this Court heard *Smiley* in 2007, that case was governed by law as it existed prior to the legislative change, so Section 44-1-60 was not before the Court. *See Smiley*, 374 S.C. at 329, 649 S.E.2d at 32 n.2. Since then, this Court has not addressed the statutory right to

administrative review under Section 44-1-60. However, both *Smiley* and *South Carolina Wildlife Federation* support finding that Petitioners in this case are "affected persons" under Section 44-1-60 because they are among the limited class of persons who can demonstrate that the challenged agency action will injure their interest within the zone of interests protected by statute.

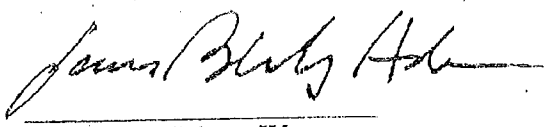
CONCLUSION

This case presents an opportunity for this Court to clarify the requirements to be an "affected person" under Section 44-1-60. Statutory text and structure, combined with precedent from this Court and others, support defining that term to encompass persons injured by agency action where their injury falls within the compass of interests protected by the statute that authorizes the agency action, here the S.C. Pollution Control Act.

For these reasons, and for the reasons stated in Petitioners' Brief, this Court should reverse the decisions of the Court of Appeals and the Administrative Law Court, and find that Petitioners were entitled to invoke administrative review of DHEC's authorizations as "affected persons" under S.C. Code Ann. § 44-1-60.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,



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Charleston, SC

January 29th, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

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

vs.

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

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the Brief of *Amicus Curiae* South Carolina Wildlife Federation In Support of Petitioners' Standing upon counsel for Respondents and Petitioners by placing same in the United States Mail, First Class Postage Prepaid, addressed as follows:

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January 29th, 2015

Exhibit 19

Hartley, Joan W.

From: Amy Armstrong <amy@scelp.org>
Sent: Thursday, December 03, 2009 6:46 PM
To: Anthony Goldman
Cc: Hartley, Joan W.; Lavender, Tommy; Stephen Hightower; Stephen Hightower; Jimmy Chandler
Subject: Town of Arcadia Lakes, et al. v. DHEC & Roper Pond
Attachments: Proposed Order Final.doc; Proposed Order Final.doc

Anthony:

I am attaching the Petitioners' proposed order in word format. Hard copies of the proposed order were filed and served today via US mail.

Thanks,
Amy
--

Amy E. Armstrong
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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **ORDER**

Appearances:

James S. Chandler, Jr., Esquire and Amy E. Armstrong, Esquire for the Petitioners

W. Thomas Lavender, Esquire and Joan W. Hartley, Esquire for the Respondent Roper Pond, LLC

Stephen P. Hightower, Esquire and Roger P. Hall, Esquire for the Respondent DHEC

STATEMENT OF THE CASE

This contested case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and grant coverage under the National Pollutant Discharge Elimination System or NPDES Permit for Storm Water Discharges from Large and Small Construction Activities, SCR100000 to Roper Pond, LLC. Roper Pond, LLC, requested the stormwater permit and coverage under the NPDES permit in connection with the development of a high density apartment complex on a tract of land consisting of 12.75 acres

lying immediately adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The Petitioners challenge the issuance of the permit and coverage under the NPDES permit.

A hearing was conducted on September 4-5, 2009, before this Court. Based on the testimony, evidence, and the applicable law, this Court reverses the Department's decision.

DISCUSSION

The Petitioners presented five witnesses: Jill Stewart, Charles Hightower, Seth Reice, Linda Jackson, and Elaine Starr. Roper Pond, LLC, called one witness, George Whatley. DHEC called no witnesses (Jill Stewart and Charles Hightower are DHEC employees).

Jill Stewart is the manager of the Stormwater Permitting Section at the S.C. Department of Health and Environmental Control ("DHEC"). She received an application from Roper Pond, LLC, seeking a stormwater permit and coverage under the NPDES General Permit for Large and Small Construction Activities in connection with a multi-family residential development. (Tr. 30; Pet. Ex. 6). The proposed residential development site is 12.75 acres. The site contains wetlands and waters which are subject to the jurisdiction of the U.S. Army Corps of Engineers pursuant to the Clean Water Act. (Pet. Exs. 4 & 5, Tr. 32-33). These jurisdictional wetlands and waters include a lily pad pond, known as Roper Pond, that is depicted on plans submitted by Roper Pond, LLC. Roper Pond is considered a wetland or water of the United States subject to Clean Water Act jurisdiction. (Pet. Exs. 4, 5 & 10).

Roper Pond, LLC's consultant, George Whatley of BP Barber, submitted the joint application to the Corps and DHEC seeking approval of wetland impacts. (Pet. Ex. 9). The application identified 0.075 acres of wetland impacts. (Pet. Ex. 9). The impacts include the filling of 0.075 acres of wetlands in connection with the construction of a building and a

sidewalk. The application did not identify any impacts to the lily pad pond. (Pet. Ex. 9). At the time that George Whatley submitted the joint application, he was not even aware that the applicant intended to excavate the pond. (Tr. 307). When he filled out the application, Whatley left the line identifying the area to be dredged or excavated blank, even though he admits that under the developer's current plan there will be dredging. (Pet. Ex. 9, Tr. 336-37). Mr. Whatley was also unaware that DHEC had expressed concerns about whether the pond excavation was included in the Nationwide Permit under which Roper Pond, LLC, is seeking coverage. (Tr. 308).

Roper Pond, LLC, eventually submitted engineered plans to DHEC showing alterations to the pond. (Tr. 33). The alterations include excavation or dredging of the lily pad pond and lowering the water level and outfall structure to allow use of the pond for stormwater detention. (Deposition Tr. J. Stewart, pp. 7-8). Ms. Stewart said that lakes are often dredged to remove the sediment when those lakes are used for sediment control. (Tr. 67). The development plans do not call for Roper Pond to be used for sediment control. (Tr. 67). Rather, the plans call for the pond to be used as a water control structure. (Tr. 93). If the plans are approved, the pond will have a greater volume of discharge after construction of the multi-family residential development. (Tr. 93).

Ms. Stewart did not evaluate impacts to the pond or water quality resulting from the excavation. (Tr. 36). She said she just assumed the project "was in compliance with the standards and therefore have no impact on the pond." (Tr. 36, lines 12-14). Ms. Stewart was operating under the assumption that DHEC's 401 water quality certification section had issued a water quality certification, based on a letter she received from the 401 section. (Tr. 34). She

specifically asked Roper Pond, LLC, whether impacts to the lily pad-pond were covered under the 401 section's approval, and they told her that impacts to the pond were included in the 401 certification approval. (Pet. Ex. 8, Tr. 34). When Ms. Stewart asked Roper Pond's consultant, BP Barber, whether excavation of the pond was covered under Nationwide Permit 39, the wetlands consultant "stated that lowering of the water surface elevation is included and covered under the Nationwide Permit 39." (Tr. 35-36; Pet. Exs. 7 & 8). Rather than determining whether there was an effective Corps permit with 401 water quality certification, Ms. Stewart relied on statements made by the applicant that there was full approval. (Tr. 47).

The NPDES General Permit under which Ms. Stewart granted coverage for the Roper Pond project specifically states that it "does not authorize discharges that DHEC, prior to authorization under this permit, determines will cause, have the reasonable potential to cause or contribute to a violation of any applicable water quality standard." (Pet. Ex. 3, p. 3, para. C.3.). The water quality standards that the project must comply with are found in Regulation 61-68 and require the maintenance and propagation of a balanced, indigenous aquatic community of fauna and flora. (S.C. Code Ann. Regs. 61-68.A.(4)). Ms. Stewart never evaluated whether the pond excavation was consistent with those water quality standards. (Tr. 38-39).

The NPDES permit also expressly requires that any Corps of Engineers 404 permit be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (Pet. Ex. 3, p. 4). The Corps requires DHEC to provide a copy of the state certification in order for the Corps 404 permit to be effective. (Pet. Exs. 10 & 11). Documents available on DHEC's website describing the process for obtaining NPDES coverage also confirm that a Corps permit must be obtained prior to NPDES coverage. (Pet. Ex. 22).

DHEC can do an individual stormwater permit review, rather than granting coverage under the NPDES General Permit if it chooses to do so. (Tr. 92). But Ms. Stewart said that in the 5 years she's been at DHEC, the agency has never issued an individual stormwater permit. (Tr. 92).

Ms. Stewart was unaware of any DHEC stormwater regulation that would prohibit the dredging of the lily pad pond. (Tr. 85-86). But she could speak only for her permitting program, the stormwater program. (Tr. 95). Her permitting program addresses land disturbances, not disturbances within waters of the state or waters of the United States. (Tr. 94). She said that other agency permits, certifications or approvals that may be required for the pond excavation are beyond the scope of her review. (Tr. 95).

Ms. Stewart admitted that she does not know whether excavation of the pond will cause sedimentation. (Tr. 96). She does not know whether any Best Management Practices will be used during excavation of the pond. (Tr. 96). She does not know what kind of discharge structure will be used during pond excavation. (Tr. 96). She does not know what will happen with the material dredged from the pond. (Tr. 96-97). She does not know how excavation of the pond will affect the aquatic fauna and flora in the pond. (Tr. 97). And she does not know how excavation of the pond will affect the wetlands upstream from the pond. (Tr. 97).

Charles Hightower has been the section manager of DHEC's 401 water quality certification program since November, 2007. (Tr. 103-04). Mr. Hightower reviewed the Roper Pond proposal. He said that Roper Pond, LLC, applied for permission only to fill in 0.075 acres of federally jurisdictional wetlands. (Tr. 104; Pet. Ex. 9). It did not ask for permission to impact any other wetlands or waters. (Pet. Ex. 9).

Based on the Pre-Construction Notification ("PCN") submitted by Roper Pond, LLC, the Army Corps of Engineers issued a letter that the project meets the terms and conditions of NWP # 39. (Tr. 106; Pet. Ex. 10). The drawings attached to the Corps' PCN response letter depict only impacts to the 0.075 acres of wetlands proposed to be filled. (Pet. Ex. 10). DHEC received the PCN and the Corps letter and then issued it water quality certification letter for NWP #39. Impacts to the 0.075 acres of wetlands were the only impacts that DHEC reviewed in making its certification decision. (Tr. 113). DHEC did not consider impacts that would result from excavation of the lily pad pond. (Tr. 123).

Nationwide Permit #39 applies to commercial and institutional developments. (Tr. 116). Because the Roper Pond proposal is neither a commercial nor an institutional development, NWP #39 does not apply. Later, at Roper Pond's request, the Corps issued a letter approving the project under NWP #29, which covers residential developments. (Tr. 117). Although DHEC received a copy of the NWP #29 approval, DHEC did not issue a certification authorization letter for the Roper Pond project under Corps Nationwide Permit #29. (Tr. 117; 129). Mr. Hightower said that DHEC has to make a "specific determination" to insure that a project meets the 401 certification before it issues a certification letter. (Deposition Tr. C. Hightower, p. 17). When asked why DHEC didn't issue a letter on the NWP #29 approval, Hightower said that "we should have sent another [certification] letter," but that "we did not do it." (Tr. 131, lines 8-11).

In its letter responding to Roper Pond, LLC's Pre-construction Notification letter, the Corps stated, in bold print, that "Prior to beginning the authorized work, the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations, i.e., 401 water quality certifications . . . If the permittee fails to obtain his

necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act." (Pet. Ex. 10).

Mr. Whatley said that Roper Pond LLC, had received a letter from DHEC notifying it that the agency had reviewed the project and issued a certification for NWP #39, in compliance with the Corps notification requirement. (Tr. 343). But at the time of that review, Mr. Whatley had not notified DHEC that the applicant was proposing to dredge or excavate the pond. (Tr. 343). He only notified the Corps of the dredging and excavation at some point after the application was submitted. (Tr. 343).

Mr. Hightower said that DHEC's 401 water quality certification section never reviewed nor authorized impacts to the lily pad pond. (Tr. 132, lines 5-13).

DHEC 401 Water Quality Certification of Corps Nationwide Permits

The Corps issued Nationwide Permits in 2007 covering certain activities in wetlands or waters of the United States deemed to be insubstantial. The NWPs authorized only the very specific activities described in the NPWs and set forth specific requirements for authorization under those NWPs. When the Corps issued the Nationwide Permits, DHEC issued a public notice of its proposed decision to issue certifications of the activities authorized under the Nationwide Permits. (Tr. 118). Only those impacts that were specifically identified in the Corps NWPs were put on public notice. (Tr. 118).

DHEC issued 401 water quality certifications for some of the Nationwide Permits. (Tr. 113). When DHEC issued its 401 certifications, those certifications applied only to impacts specifically identified in the Nationwide Permits. (Tr. 113). Any alterations or impacts to wetlands beyond those defined in the NWPs were not covered by DHEC's 401 certifications of

NWPs. (Deposition Tr. C. Hightower, p. 11, lines 8-10).

In some of the NWPs, the Corps also included specific requirements for approval under an NWP. For NWP #29, the Corps required that the applicant provide a Pre-construction Notification ("PCN") to the Corps prior to undertaking any activity. DHEC's certification of NWP #29 was issued based on the express Corps condition that a PCN be provided. When the Corps receives a Pre-construction Notification of work authorized by NWP #29, the Corps in turn provides the PCN to DHEC, thus giving DHEC an opportunity to review the project prior to any construction activity. (Tr. 150-51). The Corps' standard letter approving a project under NWP #29 includes a statement, in bold print, that no work can proceed until the applicant provides a copy of DHEC's certification. (Pet. Ex. 10).

In addition to the Corps' conditions and requirements for the NWPs, when DHEC issued its 401 water quality certifications for the Nationwide Permits, it included General Conditions applicable to all NWPs that were being certified. (Pet. Ex. 12). The first general condition requires DHEC to review the "overall project" proposed by an applicant and includes "all land within the project boundary . . . It is not interpreted to mean only the land area directly impacted by each NWP request." (Pet. Ex. 12, para. 1, emphasis added). DHEC must also consider impacts to "adjacent waterbodies or wetlands resulting from an activity" that go beyond what is authorized under the NWP. (Pet. Ex. 12, para. 1.).

DHEC's certification of the activities authorized under the NWPs and its general conditions applicable to the NWPs are consistent with the manner in which DHEC reviews individual Corps 404 permits. (Tr. 120-21). When DHEC conducts an individual certification review of an individual Corps 404 permit, it looks at all water quality impacts, including water

quality impacts beyond those identified in the 404 permit. (Tr. 120-21).

In conducting its review, DHEC is bound by the 401 water quality regulations, R. 61-101. According to Mr. Hightower, those regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (Tr. 121; R. 61-101.F). Mr. Hightower admitted that DHEC is not "locked into" its NWP certification determination simply because part of a project falls under a Nationwide Permit (Tr. 146). He said that DHEC could have taken other steps, such as requiring public notice and an individual 401 review, if it wanted to. (Tr. 146). In this case, however, DHEC did not take any steps to assess the water quality impacts resulting from excavation of the pond. (Tr. 122). Mr. Hightower did not look at where the spoil disposal would go. (Tr. 123). He did not look at whether any Best Management Practices would be used during excavation. (Tr. 123). He did not look at how excavation was going to affect the aquatic life in the pond. (Tr. 123). He did not look at the impacts excavation would have on existing and classified water uses. (Tr. 123-24). And he did not look at whether the excavation would have impacts on upstream wetlands. (Tr. 125).

Mr. Hightower testified that he believes that DHEC has no regulatory authority over the excavation of Roper Pond. Likewise, Mr. Whatley gave opinions related to the U.S. Army Corps of Engineers' jurisdiction over dredging and excavation in waters of the U.S. This testimony was allowed at trial over Petitioners' objection. The testimony, however, is of no value in determining a conclusion of law – specifically, DHEC's regulatory authority over the excavation of the pond in question. The determination of legal conclusions in within the exclusive province of the court, and requires review of the applicable statues and regulations, not testimony. *See*

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978); *Catawba Indian Tribe of SC v. The State of SC*, 372 S.C. 519, 642 S.E.2d 751 (2007).

Water Quality Impacts Resulting from Excavation of the Lily Pad Pond

As noted above, DHEC did not conduct any review of the impacts to the lily pad pond or water quality resulting from excavation and lowering of the pond.

The Petitioners asked Seth Reice, a Professor of Ecology and Biology at the University of North Carolina, to assess the impacts on water quality and the pond. Dr. Reice testified as an expert in aquatic ecology. (Tr. 173-75). He made a site visit on June 3, 2009. (Tr. 176). He looked at biodiversity, which is a measure of the distribution and variety of organisms, and the ecological health of the pond. He observed that the pond is filled with water lilies that are aquatic plants growing about three to four feet above the bottom of the pond. (Tr. 178). He took water samples and bottom samples to look at water chemistry and aquatic organisms living in the pond. (Tr. 179). He also caught some fish in the pond. (Tr. 179).

Dr. Reice examined the oxygen, salinity, conductivity, and pH of the pond water samples. (Tr. 183-84). He said the water was very clear and clean with low pollutants. (Tr. 185). He also took the bottom samples back to his lab and identified the organisms he found living in the sediments. (Tr. 182-83). He described the numerous organisms he identified and opined that "the presence of two species of fish and an assortment of benthic predators strongly implies that Roper Pond is a functioning aquatic system." (Tr. 188, lines 15-18). He said that "all the niches that you would expect in a pond are filled there now with the species that are present." (Tr. 222, lines 1-3). Looking at the entire system, Dr. Reice is convinced that the pond is a healthy

system. (Tr. 189).

Dr. Reice said that if the pond level is dropped through excavation, the margin of the pond will be exposed to air and most of the organisms that live there will die. (Tr. 192). Organisms living in the dredged material will all die. (Tr. 222). He said it would take about ten years for the community to reestablish after the major disturbance. (Tr. 193). But even after a community reestablishes, it will not be the same type of community that exists there now because the chance that the same species will colonize the pond is "quite small." (Tr. 194-94).

Dr. Reice also said that the upstream wetlands will be impacted. The area is in equilibrium now, but once the pond level is dropped, the wetland area will decrease. (Tr. 192). The wetland size will decrease because once the water level is lowered, upstream water will flow more rapidly downstream, drying out and removing a large amount of the upstream wetland. (Tr. 192-93).

In addition to the physical and chemical qualities of the water that he measured, Dr. Reice said that in order to assess the impacts of altering the pond, there are other factors that need to be evaluated. He said one would want to know the history of the pond, how it was formed, how long it has been there, the rate of sediment accumulation, how the excavation will be conducted and the extent of the excavation, as well as the nutrient loads coming into the pond. (Tr. 228-31). DHEC did not assess impacts using any of these factors.

Roper Pond, LLC, identified Cary Lake as the nearest receiving water body. (Tr. 41). But Ms. Stewart admitted that the lily pad pond is actually the first receiving water body. (Tr. 43). The stormwater from the proposed residential development site will go first into the lily pad pond before it gets to Cary Lake.

Elaine Starr, one of the Petitioners, has lived on Cary Lake, which is downstream of Roper Pond, for 38 years. (Tr. 263). She is a retired biology teacher and has conducted ongoing studies in Gills Creek watershed, which includes Cary Lake and Roper Pond. She also tests the water quality in Cary Lake as part of a team looking at water quality in the lake. (Tr. 267). She said that the water in Cary Lake is not as clear as it used to be and that there is a lot of sediment in the lake coming from stormwater runoff. (Tr. 264). Ms. Starr said that based on her experience living on Cary Lake, a residential development at the Roper Pond site will have an impact on the lake because of the increased density will produce increased stormwater runoff which pollutes the Cary Lake. (Tr. 269-270, 276-77).

Use of the Lily Pad Pond as a Stormwater Detention Pond

The excavation of the lily pad pond would lower the water levels so that the pond could hold a greater volume of water and be used for stormwater detention. Ms. Stewart said that a stormwater detention pond would be considered a water control structure. (Tr. 40). Water control structures are required to be placed on upland to the maximum degree practicable. (Ex. 3, p. 15). If the water control structure is to be placed in waters of the State, the Corps must issue a 404 permit. (Ex. 3, p. 15). As discussed above, in order for the Corps 404 permit to be effective, DHEC must issue a 401 water quality certification of the 404 permit. And as discussed above, no 401 water quality certification has been issued for this project.

Regulations Regarding Excavation of Ponds

The Petitioners acknowledge that there is no specific DHEC regulation prohibiting the dredging or excavation of ponds. The Respondents argue that the lack of a specific regulation means that no DHEC review or permission is required. The issue, however, is not so simple.

DHEC's stormwater regulations, specifically Section 72-307.C.(7), require that where "existing wetlands are intended as a component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained." S. C. Code Ann. Regs. § R.72-301.C.(7). The DHEC general NPDES Permit for Storm Water Discharges from Large and Small Construction Activities (P/N SCR100000), specifically requires compliance with the state stormwater regulations, including S. C. Code Ann. Regs. § R.72-301.C.(7). (Pet. Ex. 3, NPDES General Permit, p. 4).

The filling of wetlands that are Waters of the United States requires a Section 404 permit from the Corps of Engineers. 33 U.S.C. § 1344. Before a Section 404 permit may be issued by the Corps, DHEC must issue a 401 Water Quality Certification for the project. This requirement is imposed both for individual and general nationwide permits.

The filling of 0.075 acres of wetlands is authorized by Corps Nationwide Permit # 29. This permit, however is limited to the filling of wetlands and does not constitute approval of other impacts. This Nationwide Permit also requires an applicant to submit a Pre-Construction Notification, which allows advance review by the Corps, and, in turn, by DHEC.

The DHEC Water Quality Certification Regulations, SC Code Regs. § R.61-101, expressly require that DHEC, prior to issuance of a certification, must consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation

patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others." S.C. Code Regs. § R.61-101.F.(3).

In reviewing and certifying Nationwide Permit # 29 in 2007, DHEC could only assess the impacts of the small amount of wetland fill allowed under that NWP. The broader impacts of the full Roper Pond project necessarily could not have been assessed in 2007, since DHEC was only informed of this project in 2008. The certification of NWP # 29 in 2007 was based on the premise that a Pre-construction Notification would be provided by each applicant for coverage under this permit. The special conditions of DHEC's 2007 certification demonstrate that a broader review would be necessary. For instance, DHEC's General Conditions require the applicant to "demonstrate that impacts to wetlands have been avoided; unavoidable impacts to wetland areas have been minimized, and provide suitable compensation for any unavoidable wetland impacts." (Pet. Ex. 12, p. 2 #6). These conditions also require the delineation of all wetlands on the site, and require DHEC to evaluate the complete project – "the overall project proposed or accomplished by a single owner/developer" – and "it is not interpreted to mean only the land area directly impacted by each NWP request." (Pet. Ex. 12, p. 2 #1).

Both DHEC's 401 Water Quality Certification manager and its Storm Water section manager admitted that no one at DHEC either examined the full scope of the impact of this project on waters and wetlands at the site, examined the impacts on the pond and the remaining wetlands above the pond, assessed the water quality impacts of the proposed excavation and alteration of the pond, assessed whether their were any feasible alternatives to the proposed impacts on the pond, or assessed whether the full project was in compliance with the Water

Quality Certification regulations, R.61-101, or the Water Quality Standards, R.61-68. They also admitted that neither the storm water permit nor the certification of NWP # 39 covered the impacts to the pond, and that no certification was ever issued for NWP #29.

DHEC's failure to perform the proper review, and failure to issue any approval of the impacts of the excavation, means that DHEC has not issued a certification of Roper Pond's NWP # 29. Without a proper certification, Roper Pond lacks the required state approval that is an express prerequisite to the storm water permit and coverage under the NPDES General Permit.

Moreover, the testimony of Petitioners' expert about impacts on the aquatic life in the pond and negative impacts on the wetlands above the pond, is uncontroverted. Given this testimony, this Court cannot conclude that the full scope of the work proposed by Roper Pond, LLC, is in compliance with the 401 Water Quality Certification and Water Quality Standards regulations.

FINDINGS OF FACT

Based on the evidence and testimony presented to the Court, the Court makes the following findings of fact:

1. Roper Pond, LLC, is the owner of a 12.75 acre tract of land adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The tract consists of 1.8 acres of waters of the United States, subject to federal Clean Water Act jurisdiction. (Pet. Ex. 4 & 5).

2. There is a lily pad pond, known as Roper Pond, on the proposed residential development site. There are also other wetlands on the proposed site. Both the wetlands and the lily pad pond have been delineated as federal jurisdictional wetlands by the U.S. Army Corps

of Engineers. (Petitioners' Exhibit 4, Corps delineation). These are also waters of the State under South Carolina Law. S.C. Code Ann. § 48-1-10(2).

3. Roper Pond, LLC, applied to DHEC for a stormwater permit and coverage under the NPDES General Permit for Small and Large Construction activities in connection with a proposed high-density, multi-family residential development.

4. Roper Pond, LLC, submitted an application to DHEC identifying 0.075 acres of wetlands which it proposed to fill in order to create highground for a building and for a sidewalk near the pond. (Pet. Ex. 9, Tr. 306-07). Roper Pond, LLC, did not identify any other wetlands impacts in its application, even though the application specifically requests the acreage of wetlands impacted through excavation or dredging. (Pet. Ex. 9, p. 2).

5. Roper Pond, LLC, submitted a Pre-construction Notice to the U.S. Army Corps of Engineers seeking approval to fill in 0.075 acres of wetlands under a Section 404 Clean Water Act Nationwide Permit ("NWP").

6. The Corps has issued Nationwide Permits (NWPs) for certain narrowly defined activities deemed to have insubstantial impacts. Those NWPs must also have a 401 Water Qualify Certification from DHEC.

7. DHEC issued certifications for some of the NWPs, which include NWP #29 being sought by Roper Pond, and required certain General and Special Conditions to apply to those NWPs. (Tr. 114). DHEC's General Conditions require DHEC to evaluate the complete project – "the overall project proposed or accomplished by a single owner/developer" – and "it is not interpreted to mean only the land area directly impacted by each NWP request." The General Conditions require an evaluation of all land within the project area

that is directly impacted by the project. DHEC is thus required to evaluate both impacts caused by the filling of wetlands and other direct impacts to wetlands and waters. The excavation or dredging of the lily pad pond is a direct impact of the project.

8. DHEC's certification of the NWPs only applies to activities in wetlands and waters specifically covered under that NWP. When there are other direct impacts to wetlands or waters of the state that are not authorized under the NWP, DHEC must issue an individual 401 water quality certification. (Tr. 114-115). DHEC did not issue an individual 401 water quality certification for the proposed project.

9. The Corps requires that "prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e., 401 water quality certification, . . .)." (Pet. Ex. 11 & 12).

10. The Corps approved the project for coverage under NWP #39 for "Commercial and Institutional Developments," even though the project was for a residential development (Pet. Ex.10).

11. DHEC issued a water quality certification for Nationwide Permit #39.

12. Nationwide Permit #39 applies to commercial and institutional projects. Upon realizing that the Corps had approved the wrong NWP, Roper Pond obtained a new Corps approval under NWP #29 for "Residential Development."

13. DHEC never issued a water quality certification for Nationwide Permit #29, and thus never provided the Corps with a copy of such certification, as required. (Pet. Ex. 12).

14. In addition to the filling of 0.075 acres of wetlands covered by NWP #29, Roper Pond is proposing additional impacts to wetlands and waters, mainly the excavation of the pond,

but those impacts are not covered by NWP # 29. The additional impacts are outside the scope of NWP #29; therefore these impacts require an individual 401 water quality certification that the project complies with Regulations 61-101 and 61-68.

15. DHEC conducted no evaluation of the aquatic community in the lily pad pond and no evaluation of the impacts to that community from excavation of the pond, as required by Regulation 61-68. The uncontested evidence is that the balanced indigenous community existing in the pond would be lost if the pond were excavated.

Standing

16. The Petitioners Linda and Robert Jackson live on Kaminer Road, which is adjacent to the lily pad pond and Roper Pond LLC's property. Ms. Jackson has walked or ran past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. She said the pond is very special to the community and it is "absolutely beautiful." (Tr. 243). She also walks around Cary Lake, which is downstream from the lily pad pond. (Tr. 244). She has seen sedimentation and garbage coming from upstream, as well as witnessed flooding associated with stormwater problems in that area. (Tr. 244). She said that if the pond were excavated, she would be sad not to see and enjoy the pond any more. (Tr. 245). She is also concerned about more sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired. (Tr. 245). Ms. Jackson knows the other Petitioners, has participated in community meetings regarding the proposed project, and said that the other Petitioners share her concerns. (Tr. 248).

17. Elaine and Gene Starr have lived on Sandy Shore Road, which is on Cary Lake, for 38

years. (Tr. 263). The Starrs swim, water ski, boat and fish with first their four children and now their grandchildren on Cary Lake. (Tr. 264). Ms. Starr said that the water in Cary Lake is not as clear as it used to be and that there is a lot of sediment in the lake. (Tr. 264). Ms. Starr said that based on her experience living on Cary Lake, a residential development will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit. (Tr. 276-77). She said that "if you change the whole landscape, then you'll have a problem" with stormwater, which is her primary concern. (Tr. 281). In her experience, it is better to correct potential problems before they arise, rather than after the project is finished, which was not done in this case. (Tr. 286).

18. Ms. Starr has also enjoyed viewing the lily pad pond and said it is "absolutely gorgeous." (Tr. 269). She said there are "white blooms, pink blooms, and you can see lots of life around it, like dragonflies" and that it is an aesthetic party of the community. (Tr. 269, 282). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged. (Tr. 270).

19. The parties stipulated that the testimony of Linda Jackson would be representative of the individual Petitioners who reside in the Kaminer Station area, and that Elaine Starr's testimony would be representative of those the individual Petitioners who are property owners on Cary Lake.

20. The Town of Arcadia Lakes has responsibility for maintenance of a stormwater management system to protect the water quality of Cary Lake, and represents the citizens of the Town in this proceeding.

CONCLUSIONS OF LAW

21. The South Carolina Administrative Law Court ("ALC") has subject matter jurisdiction in this action pursuant to S.C. Code Ann.§§ 1-23-310 *et seq.*, §§ 1-23-500 *et seq.* and § 48-39-150.

22. This Court is not limited to the record before the agency or the agency's decision documents. The hearing before the ALC is a contested case hearing pursuant to the APA and is heard de novo. *Marlboro Park Hosp. v. DHEC*, 358 S.C. 573, 595 S.E.2d 851 (2004). A trial de novo is one in which 'the whole case is tried as if no trial whatsoever had been had in the first instance." *Marlboro*, 358 S.C. at 579, 595 S.E.2d at 854 (quoting *Blizzard v. Miller*, 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991)).

23. Expert testimony on issues of law is generally inadmissible. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). Expert testimony offered to establish a conclusion of law is inadmissible because the determination of legal conclusions are within the exclusive province of the court. *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978). The issue of interpretation of a statute is a question of law for the court. *Catawba Indian Tribe of SC v. The State of SC*, 372 S.C. 519, 642 S.E.2d 751 (2007). The testimony of Mr. Hightower and Mr. Whatley, as it relates to whether DHEC has regulatory authority over the excavation of the lily pad pond, is therefore of no probative value because it was offered to establish a conclusion of law.

24. Placing fill material in wetlands that are jurisdictional waters of the U.S. requires a Clean Water Act §404 permit from the U.S. Army Corps of Engineers.

25. Regulation 72-307.C.(7) requires that where "existing wetlands are intended as a

component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained." To incorporate the lily pad pond, delineated as wetlands, into the Stormwater Pollution Prevention Plan ("SWPPP"), Roper Pond must have a valid §404 wetlands permit from the U.S. Army Corps of Engineers.

26. The Corps §404 permit triggers the requirement for a §401 Water Qualify Certification from DHEC. DHEC Regulations 61-101 govern the process and standards DHEC must follow and apply in its 401 certification review.

27. Regulation 61-101.A.(2) states that "no Federal license or permit is to be granted until such [401 water quality] certification is obtained." *See also* 33 U.S.C. § 1341.

28. Approval of the stormwater permit and coverage under the NPDES General Permit is expressly conditioned on obtaining DHEC 401 water quality certification approval of this specific project. Because DHEC did not issue a 401 water quality certification for the proposed project, Roper Pond does not have valid approvals for all of the impacts to wetlands and waters on site.

29. DHEC's certification of the NWPs only applies to activities in wetlands and waters specifically covered under that NWP, and any impacts to wetlands and waters not authorized under the NWP must receive an individual 401 water quality certification. (Tr. 114-115).

30. Roper Pond is proposing impacts to wetlands and waters, mainly the excavation of the lily pad pond, which are not covered by NWP # 29. These additional impacts are outside the scope of NWP #29; therefore these impacts require an individual 401 water quality certification that the project complies with Regulations 61-101 and 61-68. Because no individual 401 water quality certification was issued, Roper Pond, LLC, does not have

the required approvals.

31. The proposed project only qualifies for Nationwide Permit #29 if DHEC issues a proper certification based on the analysis required by Regulation 61-101. Chuck Hightower said that DHEC should have issued a 401 water quality certification letter for NWP #29, but did not. He also admitted that DHEC never evaluated the full wetlands and water quality impacts of the full project. Thus, there is no DHEC 401 water quality certification of Roper Pond LLC's Nationwide Permit #29.

32. DHEC's General Conditions require DHEC to evaluate the complete project – "the overall project proposed or accomplished by a single owner/developer" – and "it is not interpreted to mean only the land area directly impacted by each NWP request." DHEC must evaluate all land within the project area that is directly impacted by the project – impacts caused by filling wetlands and other direct impacts. In this case, DHEC failed to evaluate the direct impacts of excavation of the lily pad pond in violation of the NPDES General Permit Conditions.

33. DHEC's General Conditions require the applicant to "demonstrate that impacts to wetlands have been avoided; unavoidable impacts to wetland areas have been minimized, and provide suitable compensation for any unavoidable wetland impacts." This provision does not limit review to only wetlands being filled, but to wetlands that will be impacted. The lily pad pond is a wetland that Roper Pond is proposing to impact through excavation. Roper Pond made no demonstration and DHEC has done no review to establish that impacts to the lily pad pond have been avoided, minimized and/or compensated for, in violation of the NPDES Permit General Conditions.

34. Regulation 61-101.C. requires Roper Pond, LLC, to give a "description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, . . . that relate to water quality considerations." R. 61-101.C.(1)(c). Roper Pond, LLC, did not give a description of the pond excavation, which relates to water quality considerations, in violation of this regulatory provision.

35. Regulation 61-101.C. requires Roper Pond LLC, to give a "description of . . . any material to be dredged . . ." R. 61-101.C.(1)(d). Roper Pond, LLC, did not provide this description in violation of this regulatory provision.

36. Regulation 61-101.C. requires Roper Pond LLC, to describe "the method of dredging or filling and specific plans for disposal and control of dredge spoils." R. 61-101.C.(1)(e). Roper Pond LLC, did not describe how the lily pad pond would be dredged or where the spoils would go in its application in violation of this regulatory provision.

37. Under R. 61-101.F.(3), DHEC must consider whether there are feasible alternatives; all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including cumulative impacts; and the cumulative impacts of the proposed activity. DHEC failed to consider whether there were feasible alternatives; the water quality impacts; and the cumulative impacts caused by excavation of the lily pad pond, all in violation of R. 61-101.F.(3).

38. DHEC failed to assess the water quality impacts of the project by failing to look at the impacts to wetlands and waters beyond the impacts authorized under NWP #29, in violation of R. 61-68 and R. 61-101.

39. The NPDES permit "does not authorize discharges that DHEC, prior to authorization

under this permit, determines will cause, have the reasonable potential to cause or contribute to a violation of any applicable water quality standard." DHEC must make a determination of whether the applicable water quality standards of Regulation 61-68 have been met, which include to"maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." R. 61-68.A.(4). DHEC failed to evaluate whether pond excavation would violate R. 61-68.A.(4). Because excavation would eliminate the aquatic community in the lily pad pond, the project violates the water quality standards of R. 61-68.A.(4).

40. The water quality standards also require that "existing water uses and the level of water quality necessary to protect these uses shall be maintained." R. 61-68.D.(1). As discussed above, the existing uses would be lost if the lily pad pond were excavated, in violation of this regulatory provision.

41. All of the Petitioners have standing to pursue this contested case proceeding. *Smiley v. South Carolina Dept. of Health and Environmental Control*, 374 S.C. 326, 649 S.E.2d 31 (2007).

ORDER

Based on the foregoing, **IT IS THEREFORE ORDERED** that the DHEC decision to issue the stormwater permit and coverage under the NPDES General Permit to Roper Pond, LLC, is hereby reversed, and the permits are DENIED.

John D. McLeod
Administrative Law Judge

December ___, 2009
Columbia, South Carolina

Exhibit B

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No.: 09-ALC-07-0069-CC **AFFIDAVIT OF JOAN W. HARTLEY**

PERSONALLY APPEARED BEFORE ME, Joan W. Hartley., who, being duly sworn, swears and deposes that if she were called as a witness in the above-entitled action she would truthfully and accurately testify as follows:

1. I am an attorney licensed to practice law in the State of South Carolina as Special Counsel in the law firm of Nexsen Pruet, LLC (hereafter "the Firm"), 1230 Main Street, Suite 700, Columbia, South Carolina 29201.

2. The Firm represents Respondent Roper Pond, LLC ("Roper Pond"), in the above-captioned action. I am familiar with this file and the number of hours spent and expenses incurred in the representation of Roper Pond in this matter.

3. I have reviewed the timekeeping records maintained by Nexsen Pruet in the regular course of business in this file. Those records and reports reflect the individual entries by specific

attorneys that describe each attorney's activity and the amount of time spent on each activity for the representation of Roper Pond.

4. In accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through March 19, 2010:

W. Thomas Lavender, Jr.	91.9 hours at $370/hour	=	$34,003.00
Henry W. Brown	13.8 hours at $330/hour	=	$4,554.00
Joan Hartley	291.7 hours at $220/hour	=	$64,174.00
			$102,731.00

5. Since March 19, 2010, in accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through oral arguments before the South Carolina Supreme Court on March 18, 2015:

W. Thomas Lavender, Jr.	21.3 hours at $370/hour	=	$ 7,881.00
W. Thomas Lavender, Jr.	9.6 hours at $390/hour	=	$ 3,744.00
W. Thomas Lavender, Jr.	16.3 hours at $400/hour	=	$ 6,520.00
W. Thomas Lavender, Jr.	3.5 hours at $410/hour	=	$ 1,435.00
W. Thomas Lavender, Jr.	2.9 hours at $425/hour	=	$ 1,232.50
W. Thomas Lavender, Jr.	30.4 hours at $440/hour	=	$ 13,376.00
Joan Hartley	77.5 hours at $220/hour	=	$ 17,050.00
Joan Hartley	12 hours at $240/hour	=	$2,880.00
Joan Hartley	14.3 hours at $275/hour	=	$3,932.50
Joan Hartley	53.1 hours at $280/hour	=	$14,868.00

Joan Hartley	24 hours at $295/hour	=	$7,080.00
Joan Hartley	39.8 hours at $310/hour	=	$12,338.00
			$92,337.00

6. The total fees incurred by Respondent through March 18, 2015, in this matter are $195,068.00. Additionally, costs incurred in connection with the Firm's representation of the Respondent total $10,215.84.

FURTHER AFFIANT SAYETH NOT.

Joan W. Hartley

SWORN and subscribed to before me

this 28 day of May, 2015

Sheree M Rabon (L.S.)

Notary Public

My commission expires 1/16/25

Exhibit C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC AFFIDAVIT OF CHARLES C. MICKEL

PERSONALLY APPEARED BEFORE ME Charles C. Mickel, who, after being duly sworn, deposes and says that:

1. He is the managing member of Roper Pond, LLC ("Roper Pond"). He has personal knowledge of the financing for and costs associated with the development of the Roper Pond property on Trenholm Road ("Property"). He also has knowledge of the costs associated with the litigation of this matter.

2. The total charge for B.P. Barber & Associates' services related to the appeal was $56,734.

3. Roper Pond has incurred other costs solely as a result of the delay in the planned development of the Property. The following is a summary of the costs of delay from the date of the Petitioners' request for Board review of the Department's decision at issue in this matter on December 30, 2009, through the commencement of construction and which would not have

otherwise been incurred ("Delay"). These costs associated with the Delay of the planned development of the Property total $605,250 and are summarized below:

(a) $194,158 - Interest paid during the Delay on loans and notes for financing of the purchase of the property and the development costs for the project, including building design, engineering, geotechnical and due diligence;

(b) $32,558 – Property taxes paid on the real property during the Delay;

(c) $4,000 - Permitting costs for renewing or reissuing Richland County permits which expired during the Delay;

(d) $234,000 - Costs to comply with new electrical code adopted during the Delay which was previously approved under the prior electrical code;

(e) $102,534 – Increase in water/sewer impact and tap fees to East Richland County Public Service District and the City of Columbia, respectively, during the Delay;

(f) $38,000 - Overhead for management of project during the Delay.

FURTHER AFFIANT SAYETH NOT.

Charles C. Mickel

SWORN and subscribed to before me
this 28 day of May, 2015.

Chloé Cincotta (L.S.)
Notary Public for South Carolina
My Commission Expires: March 17, 2025

Exhibit D

NOTE: Exhibit D, Affidavit of Matthew Mundy, was withdrawn by Roper Pond, see Order dated March 24, 2017, and is therefore excluded.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT ROPER POND, LLC'S SECOND AMENDED PETITION FOR ATTORNEYS' FEES AND COSTS AND FOR SANCTIONS PURSUANT TO RULE 72, SCRPALC**

Respondent Roper Pond, LLC ("Roper Pond") respectfully submits this memorandum of law in support of its Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC ("Petition for Attorneys' Fees"), filed simultaneously herewith.

I. PROCEDURAL HISTORY

By letter dated December 15, 2008, the Respondent South Carolina Department of Health and Environmental Control ("Department") granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit"), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project") pursuant to the Construction General Permit. On December 30, 2008, Petitioners Town of Arcadia Lakes ("Town"), Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis

E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown (collectively, the "Petitioners") requested South Carolina Board of Health and Environmental Control ("Board") review of the issuance of the authorization to discharge under the Construction General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioners filed a Request for Contested Case Hearing, asserting the numerous grounds for its appeal of the Department's decision in this matter. (*See* Request for Contested Case Hearing, pp. 3-8). However, at the hearing on the merits, Petitioners' case in chief focused almost exclusively on the excavation and lowering of the Pond on the property and allegations that Roper Pond did not secure a required federal permit to conduct such activities.

On January 21, 2010, the Court issued its Final Order and Decision upholding the Department's decision to authorize coverage under the Construction General Permit and rejecting Petitioners' arguments that a Corps permit and individual 401 water quality certification was required for the excavation of the Pond. On February 1, 2010, Petitioners filed a Motion to Reconsider and for Stay. On March 23, 2010, the Court held a hearing to consider Petitioners' Motion to Reconsider and for Stay, and on April 1, 2010, the Court issued an order denying Petitioners' Motion to Reconsider and for Stay. On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, in abeyance pending the resolution of Petitioners' appeal. The Order further provided that within thirty days of the resolution of the appeal, Roper Pond could

file a revised Petition for Attorneys' Fees and supporting affidavit to include fees and costs incurred during the appeal before the Court of Appeals.

The parties filed final briefs to the Court of Appeals on February 28, 2011. On May 8, 2012, the Court of Appeals heard oral arguments. On March 6, 2013, the Court of Appeals issued Opinion No. 5095, affirming this Court's Final Order and Decision. On March 21, 2013, Petitioners filed a Petition for Rehearing of Opinion No. 5095. Roper Pond filed its Return to the Petition for Rehearing on April 1, 2013. On April 4, 2013, the Department sent a letter to the Court of Appeals joining in Roper Pond's Return, except for the arguments on standing on which the Department took no position. On June 12, 2013, the Court of Appeals substituted and refiled Opinion No. 5095, again affirming this Court's Final Order and Decision. On July 12, 2013, Roper Pond filed an Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC in this Court, along with supporting memorandum of law and affidavits.

On July 12, 2013, Petitioners filed a petition for Writ of Certiorari to the Supreme Court. On August 22, 2014, the Supreme Court issued an Order, granting Petitioners' Petition for a Writ of Certiorari. On October 2, 2014, Petitioners filed their Brief on Writ of Certiorari. Roper Pond and the Department filed their briefs to the Supreme Court on November 3, 2014, and November 12, 2014, respectively. Petitioners filed their reply brief on November 18, 2014. On January 29, 2015, the South Carolina Wildlife Federation ("Wildlife Federation") file a Motion for Leave to File Brief of Amicus Curiae in support of Petitioners' standing. The Supreme Court granted that motion on February 20, 2015, and Roper Pond and the Department each filed a reply brief on March 2, 2015. The Supreme Court heard oral arguments on March 18, 2015. On April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. On April 28, 2015, the Clerk of the

Supreme Court remitted the case to this Court along with a copy of a the Supreme Court's dismissal and the decision of the Court of Appeals.

II. ARGUMENT AND CITATION OF AUTHORITY

Since December 30, 2008, the Town has aggressively pursued its unjustified challenge to the Department's authorization under the Construction General Permit for the Proposed Project and has done so without regard for the resulting harm to Roper Pond. During more than six years of litigation at this Court, the Court of Appeals, and the Supreme Court, every ruling on every issue—including standing—has been in favor of Roper Pond and the Department. During this prolonged appeal, Roper Pond has incurred $205,283 in legal fees and costs. (See Affidavit of Joan W. Hartley, Exhibit B to Petition for Attorneys' Fees). Additionally, the delay in construction of the Proposed Development resulted in increased costs in the amount of $661,984 which would not have been incurred if Roper had been allowed to proceed with the project upon issuance of the Department's authorization under the Construction General Permit. (See Affidavit of Charles C. Mickel, Exhibit C to Petition for Attorneys' Fees). As discussed more fully below, Roper Pond is entitled to an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 15-77-300 *et seq.* ("State Action Statute") because Roper Pond is a prevailing party in this matter, the Town pursued its challenge to the Department's decision without substantial justification, and there are no special circumstances precluding an award of attorneys' fees in this matter. Additionally, or in the alternative, Roper Pond should be awarded attorneys' fees and costs and the costs of delay of the Proposed Project pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

A. Roper Pond is entitled to an award of attorneys' fees and costs from the Town under the State Action Statute.

Roper Pond is entitled to attorneys' fees and costs in this matter pursuant to Section 15-77-300 of the State Action Statute. Section 15-77-300 of the State Action Statue provides in relevant part as follows:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.
>
> * * *
>
> (C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300. It is indisputable that the Town is a political subdivision of the State. Additionally, attorneys' fees and costs incurred in an action originating in the Administrative Law Court are subject to an award under S.C. CODE ANN. § 15-77-300. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004) (reviewing an award of attorneys' fees pursuant to S.C. CODE ANN. § 15-77-300 for fees associated with appeal originating in the Administrative Law Court upon a finding the Department of Revenue acted with substantial justification). Indeed, Section 15-77-300(C) of the State Action Statute expressly excludes other actions which are within the jurisdiction of the Administrative Law Court. *See* S.C. CODE ANN. § 40-1-160 (2001) (providing that an appeal from the decision of a state licensing board is filed in the Administrative Law

Court); *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) (holding that an inmate may seek post-conviction relief under the provisions for contested cases contained in the Administrative Procedures Act); S.C. CODE ANN. § 1-23-310(3) (Supp. 2009) (defining contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing"). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Stewart v. Richland Memorial Hosp.*, 350 S.C. 589, 594, 567 S.E.2d 510, 513 (Ct. App. 2002) (citation omitted). As such, there is no question that an action brought by the Town before the Administration Law Court is subject to the State Action Statute.

In order to recover under the State Action Statute, a party must establish that: "first, the contesting party must be the 'prevailing party;' second, the court must find 'that the agency acted without substantial justification in pressing its claim against the party;' and third, the court must find 'that there are no special circumstances that would make an award of attorney's fees unjust.'" *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (quoting *Heath v. Aiken County*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988)). As discussed more fully below, Roper Pond is unquestionably entitled to an award of attorneys' fees and costs pursuant to the State Action Statute because Roper Pond is the prevailing party in this matter, the Town pursued its challenge to the Department's decision in this matter without substantial justification, and there are no special circumstances precluding an award of attorneys' fees and costs in this matter.

B. Roper Pond is a "prevailing party" in this matter.

On January 21, 2010, this Court issued its Final Order and Decision affirming the Department's grant of coverage the Roper Pond under the Construction General Permit. "The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees." *Douan v. Charleston County Council*, 631 S.E.2d 544, 546 (Ct. App. 2006). The South Carolina Supreme Court has held that "a party need not be successful as to all issues in order to be found to be a prevailing party" under the State Action Statute. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). In *Heath*, the Court defined "prevailing party" as "'[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.'" *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). There is no dispute that Roper Pond is a prevailing party in this action. Not only did the Respondents prevail on the main issue in the matter, they prevailed on all issues before this Court—including standing. This Court's Final Order and Decision found that Petitioners, including the Town, lacked standing to bring this action; however, the Court also considered the merits of the issues raised by Petitioners and affirmed the Department's decision to grant Roper Pond coverage under the Construction General Permit. The Court of Appeals thereafter affirmed this Court's decision on standing and the substantive ruling on the Department's decision to grant Roper Pond coverage under the Construction General Permit. Following oral arguments, the Supreme Court dismissed the appeal as moot because Roper Pond had proceeded with construction of the Proposed Development during the appeal of this Court's Final Order and Decision. However, in doing so, the Supreme Court allowed the Court of Appeals decision, including the ruling on standing, to stand. Despite the mootness, the Supreme

Court could have reversed or vacated all or part of the Court of Appeals decision. "Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27-28, 630 S.E.2d 474, 478 (2006). Indeed, both the Petitioners and the Wildlife Federation argued the Court of Appeals decision on standing would have far-reaching implications for other parties seeking review the decisions of the Department. Petitioners argued in their brief to the Supreme Court:

> The new, unjustifiably burdensome requirements for standing that a Plaintiff have a property interest in the area over which the challenged activity will occur, as well as prove either the merits or a future permit violation, are a significant divergence from well-established standing law. Neither of these standards has been applied by this State's appellate court or any federal court, and, indeed, both federal and South Carolina courts hold the contrary. Instead these new requirements muddy the waters of this state's carefully crafted standing law and will like have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their communities.

(Brief of Petitioners on Writ of Certiorari, attached as Exhibit 17 to Affidavit of Joan W. Hartley, Exhibit A to Roper Pond's Petition for Attorneys' Fees ("Hartley Aff."), p. 4). Petitioners also included a footnote advising the Supreme Court that this Court had already cited to the Court of Appeals opinion in granting a motion for summary judgment for lack of standing in the case of *Preservation Society of Charleston, et al. v. S.C. State Ports Authority*, Docket No. 13-ALJ-07-0056-CC, filed April 11, 2014. *Id.* at Footnote 1. The Wildlife Federation filed it amicus curiae brief solely on the issue of standing and argued that it "is actively engaged in proceedings involving the review of permitting decision made by the South Carolina Department of Health and Environmental Control (DHEC), and has long-standing interested in its right to review DHEC decisions under S.C. Code Ann. § 44-1-60." (Brief of Amicus Curiae South Carolina Wildlife Federation in Support of Petitioners' Standing, attached to Hartley Aff. as Exhibit 18, p.

1). Had the Supreme Court found the ruling on standing in this case to be as far removed from well-established standing law as the Petitioners and the Wildlife Federation contend, the Court could have applied one of the exceptions to the mootness rule and corrected the alleged errors in the standing holding of this Court and the Court of Appeals. However, the Supreme Court did not take such action. Roper Pond has prevailed on every issue at every stage of this appeal and is entitled to an award of attorneys' fees and costs pursuant to Section 15-77-300 of the State Action Statue.

C. The Town acted without substantial justification in challenging the Department's grant of coverage to Roper Pond under the Construction General Permit.

The Town's challenge to the Department's decision in this matter was without substantial justification as the Town failed to identify any reasonable statutory or regulatory basis for its claims that the Department improperly granted coverage to Roper Pond under the Construction General Permit. Additionally, and significantly, this Court and the Court of Appeals both found that all Petitioners, including the Town, lacked standing to bring this action. "[S]tanding is a fundamental prerequisite for instituting a legal action." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). There can be no justification for an action where the Town lacked the basic right to bring such action.

Additionally, the record is devoid of any reasonable basis in law or fact for the Town's challenge to the Department decision in this matter. "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." *McDowell v. South Carolina Dep't of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991) (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)). In *Heath v. County of Aiken*, the South Carolina Supreme Court held that "substantial justification," for the purposes of S.C. CODE ANN. § 15-77-300, means "justified to a

degree that could satisfy a reasonable person." 302 S.C. at 183, 394 S.E.2d at 712. However, "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *Id.* (citing *Pierce v. Underwood*, 108 S. Ct. at 2251). In *Heath*, the Court held that the county council acted without substantial justification because "[t]he statute construed in [the case] was unambiguous, and coupled with the relevant precedent clearly established that the Council's claims were without merit." *Id.* at 184, 394 S.E.2d at 712. The holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), further clarifies "substantial justification" for the purposes of S.C. CODE ANN. § 15-77-300:

> Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), **the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim**. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (emphasis added). As discussed below, there is no question that the Town acted without substantial justification in challenging the Department's grant of coverage to Roper Pond under the Construction General Permit. Not only did the Town fail to identify any reasonable basis in state or federal law for its claims, but the record clearly shows that the Town pursued its claims in this Court for the sole purpose of delaying the planned development of the Property.

1. The Town identified no reasonable basis in law or in fact for its challenge to the Department's grant of coverage to Roper Pond under the Construction General Permit.

In the Request for Contested Case Hearing and Petitioners' Pre-Hearing Statement, Petitioners cited a number of state and federal statutes and regulations which the Department's decision in this matter allegedly violated. However, at the hearing on the merits, Petitioners failed to offer evidence in support of any legitimate claim with a reasonable basis in law and in fact. As a preliminary matter, the Department's decision which was challenged in this matter was the grant of coverage to Roper Pond under the Construction General Permit. The Department's decision was based on its review and approval of the Storm Water Pollution Prevention Plan ("SWPPP") prepared for the Proposed Project. Yet, at the hearing on the merits, Petitioners offered absolutely no evidence that the SWPPP approved by the Department was technically deficient. (Final Order and Decision, pp. 21-22). The Court of Appeals affirmed this Court's finding on that issue: "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013).

Moreover, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Yet, no expert testimony was offered for this purpose. Indeed, Petitioners' only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Administrative Hearing dated September 3 and 4, 2009, hereinafter "Tr.," p. 201, l. 12 – p. 202, l. 7). Moreover, Petitioners' expert testified that he has no prior experience in assessing the potential impacts of excavation of

a water body. (Tr. p. 190, l. 24 – 191, l. 6). Petitioners' case in chief was focused almost exclusively on the dredging of the Pond; yet, Petitioners' expert at trial admitted at trial that he was not qualified to opine on this matter. In fact, while Petitioners' expert initially opined that the proposed excavation of the pond "will simply destroy the ecosystem that is now present," he later withdrew that opinion because, as he stated, "I was trying to restrict myself to what I actually knew as opposed to my conjectures." (Roper Pond Ex. 12; Tr. p. 200, ll. 3-19). With respect to the testimony of Petitioners' expert, Dr. Seth Reice, the Court of the Appeals stated as follows:

> Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

Town of Arcadia Lakes, 404 S.C. at 526, 745 S.E.2d at 391.

Additionally, and significantly, at the heart of Petitioners' claims was the contention that Roper Pond did not have the required federal permit to excavate the pond on the property. However, the federal law is clear and well-settled that a federal permit is required for excavation of a water body only when such activity is to be conducted in a "navigable water of the United States" under Section 10 of the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.* ("Rivers and Harbors Act"). 33 U.S.C. § 403. This Court correctly held that "Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act." (Final Order and Decision, p. 27). Moreover, Petitioners failed to identify any other federal or state law which required a permit for excavation

of the Pond. Instead, Petitioners merely claimed that a federal permit for excavation of the Pond, which was unquestionably not required under federal law, was nonetheless required as a condition of the 401 water quality certification for the Nationwide Permits or by a general reference to federal permits in the Construction General Permit. While these claims might be characterized as novel, such characterization does not preclude a finding that the Town acted without substantial justification. The fact that a political subdivision of the State has raised novel issues in an action does not mean that the political subdivision was substantially justified in bringing such action. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (finding that citizen who initiated declaratory judgment action against a county was entitled to attorneys' fees because the fact that novel issues were raised does not mean the county was substantially justified in opposing the citizen in the declaratory judgment action). Accordingly, while Petitioners have repeatedly attempted to demonstrate that a federal permit was required for the excavation of the Pond through some inventive, yet untenable, theories of law, such theories are insufficient to demonstrate that the Town acted with substantial justification in pressing these claims.

Despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, the Town continued to press its claim that a federal permit was required for the excavation of the Pond. In fact, in its Proposed Order, Petitioners included a conclusion of law that the 401 Certification for the Nationwide Permit required the Department to consider the impacts of the excavation of the Pond. (Petitioners' Proposed Order, Conclusion of Law No. 5, Exhibit 19 to Hartley Aff.). As this Court fully addressed in its Final Order and Decision, a 404 permit is required to filling of wetlands, not dredging. The only evidence on the record shows that during excavation of the

Pond, the dredged material will be placed in an area upland of the Pond. The Court thus found that a 404 Permit was not required for that activity. (Final Order and Decision, pp. 23-25). The Court of Appeals affirmed that ruling and further rejected all of Petitioners' arguments regarding the sufficient of the 401 certification and the alleged error in the Department's failure to consider the impacts of the dredging of the Pond:

> Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

Town of Arcadia Lakes, 404 S.C. at 534, 745 S.E.2d at 395. The Court of Appeal also affirmed this Court's ruling that a 404 permit was required for coverage under the Construction General Permit:

> Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.
>
> First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.
>
> Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to

> reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444–45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

Id. At 536, 745 S.E.2d at 396. Petitioners' efforts to contort the law and facts to create a 404 permitting requirement where none existing in the well-settled and substantial body of law was rejected by the Court and the Court of Appeals. There is simply no reasonable basis in law or in fact for the issues raised by the Town in this matter.

Finally, and significantly, the Town could not have substantial justification in bringing this action because the Town lacked standing to bring the action. "[S]tanding is a fundamental prerequisite for instituting a legal action." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). Affirming this Court's Final Order and Decision, the Court of Appeals found that the Town lacked standing because the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "were 'fairly traceable to the challenged action in this case." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 530, 745 S.E.2d 385, 393 (Ct. App. 2013). Indeed, as discussed more fully below, in the 30(b)(6) deposition of the Town and communications obtained through a subpeona, the Town resolved to take such action as necessary to stop or delay the Proposed Project, and the appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit was but another avenue for accomplishing that objective. Moreover, as evidenced by those communications, the Town intended to appeal that decision even if there were no grounds for such appeal.

2. The evidence on the record demonstrates that the Town brought this action for the sole purpose of delaying the Proposed Project.

As the record clearly shows, Town's primary objective in appealing the Department's decision in this matter was not to challenge the Department's decision to grant Roper Pond coverage under the Construction General Permit, but to stop or delay the construction of an apartment complex on the Roper Pond property. On July 29, 2009, Roper Pond noticed the deposition of the Town pursuant to Rule 30(b)(6), SCRCP. The notice of deposition included the following matters on which the Town was to designate an individual to testify:

> 2. Actual or threatened harm from the activities authorized under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit") for land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project").
>
> * * *
>
> 4. The specific manner in which the land-disturbing activities authorized under the General Permit will violate the terms and conditions of the General Permit and/or DHEC Regulations.

(Pet. Tr. Ex. 1; Transcript of the Deposition of Richard W. Thomas, Jr., hereinafter "Thomas Dep.," Notice of Rule 30(b)(6) Deposition of the Town of Arcadia Lakes, attached thereto as Ex. 1). The Town designated the Mayor of the Town, Mr. Richard Thomas, as its sole witness for the Rule 30(b)(6) deposition of the Town. Mr. Thomas holds a masters degree in engineering with a focus on structures of mechanics and environmental engineering. (Thomas Dep., p. 14, ll. 4-10). As an engineer licensed by the State, Mr. Thomas has affixed his seal to drawings which include the design of water retention structures. (Thomas Dep., p. 16, l. 15 - p. 19, l. 10). Mr. Thomas is aware of the requirements for the management of stormwater at an improved site. (Thomas Dep., p. 24, ll. 16-22). Mr. Thomas testified that he has seen the design drawings for the Proposed

Project. (Thomas Dep., p. 22, l. 19 – 23, l. 11; p. 25, ll. 17-23). Indeed, Mr. Thomas testified that he would be competent to prepare and seal such drawings:

> Q: Would you hold yourself out as competent to prepare, and present, and seal drawings similar to what BP Barber has presented to DHEC in this case?
>
> A: If I had the time to study and develop said drawings, I would be capable of doing that.

(Thomas Dep., p. 32, ll. 11-16). However, Mr. Thomas was unable to testify regarding the topics identified by Roper Pond in its notice of deposition to the Town.

When counsel for Roper Pond asked Mr. Thomas to identify any alleged deficiencies in the SWPPP approved by the Department for the Proposed Project, Mr. Thomas responded that any deficiencies were identified by its attorney in the pleadings in this matter:

> Q: All right. Let's talk about that. Tell me—well, let me back up. The current plan.
>
> Tell me what in the current plan you think presents a possibility or probability of harm to Cary Lake.
>
> A: I outlined those before. It will possibly do harm to the water flowing through the project and under North Trenholm Road into Cary Lake.
>
> Q: What is the deficiency in the BP Barber drawings that may lead to the possibility?
>
> A: They're outlined in our petition.
>
> Q: Point them out to me.
>
> A: You want me to read you the document?
>
> Q: No, sir. I want to know what the town's –
>
> A: I'll defer that to Mr. Chandler because he's the legal expert.
>
> Q: He is not my witness, Mr. Thomas. You are my witness and you are the town.

Tell me what facts the town has as we sit here today that allows you to opine that there's a possibility of harm if the BP Barber plan is implemented.

A: Based on what we have been told and led to believe by Mr. Chandler, who is the expert in the legal side of this, there are violations in this plan with regard to the project. The plans and its permitting with DHEC and the U.S. Corp of Engineers.

Q: I want you to step aside and put aside anything Mr. Chandler may have told you. In the absence of Mr. Chandler's comments, is the town aware of any fact upon which it could base an opinion that there is a deficiency in the BP Barber drawings permitted by DHEC?

A: We have hired Mr. Chandler as our spokesman on the legal issues in this case. We believe the case has merit.

Q: Step aside what Mr. Chandler tells you—if Mr. Chandler becomes a witness, we'll deal with this case differently.

What information does the Town of Arcadia Lakes have that, outside of Mr. Chandler's comments to you, leads you to the conclusion that there are deficiencies in the BP Barber design approved by DHEC?

A: We lean on Mr. Chandler's filings and his documentation as the basis for our—

Q: Is Mr. Chandler's complaint the sole source of facts, for the Town of Arcadia Lakes, for it to present a position that the BP Barber drawings are in some way insufficient?

A: I can repeat. Mr. Chandler's pleadings and his filings speak to the case that the town and the petitioners—not speaking for them, but as far as the town is concerned—where we are in our position on this project.

(Thomas Dep., p. 51, l. 14 – p. 53, l. 22). Mr. Thomas further testified regarding an allegation of a technical deficiency in the SWPPP:

Q: I assume that you are asserting that that's something wrong with the plans?

A: If Mr. Chandler says that's something wrong, then I agree with Mr. Chandler.

Q: What information did Mr. Chandler rely upon to come to that conclusion?

A: You'd have to talk to Mr. Chandler, because I do not know.

Q: Do you know of any witness on behalf of the Town of Arcadia Lakes, outside of Mr. Chandler, who can tell me how that conclusion was arrived at?

A: Not to my knowledge.

(Thomas Dep., p. 60, ll. 2-14). Despite Mr. Thomas's education in environmental engineering, his experience in the design of stormwater retention structures, and his familiarity with the SWPPP, he was unable to identify a single factual allegation related to the defects in the SWPPP independent of the filings in this matter. However, while Mr. Thomas could not testify regarding the specific facts supporting the allegation that the SWPPP was deficient, Mr. Thomas did testify at great length about the Town's numerous concerns and complaints about the planned development of the Roper Pond property as an apartment complex.

Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. Specifically, Mr. Thomas testified regarding a request from Roper Pond to annex the property into the Town and the support for the development of the property as condominiums and patio homes:

Q: All right. Arcadia Lakes has its own zoning ordinance administered by its own zoning board?

A: That's correct.

Q: Why did you not suggest that he make an appeal to your zoning board?

A: It was easier—we thought it was easier for them to do it the other way. I don't remember what the context was then.

Q: Were you concerned that the citizens would oppose that kind of zoning?

A: No. As a matter of fact from the condo standpoint, out of the 15 or 20 small zero lot line patio homes, we had as many as 10 that were spoken for by town's people that wanted to retire and no longer do yard work and still be in the town.

Our town is a very close town. We have almost 900 residents and we are a very, very close [k]nit town. People don't want to move out of the town once they move in.

There are a lot of amenities in the town that are very, very good. For instance, there's no taxes. We don't have any town taxes. We deal off of County taxes, revenue sharing, franchise fees, business licenses. Those type of things. We run the town off of a very lean budget.

Q: So you, for whatever reason, suggested that rather than annexing him in and changing your zoning—

A: We couldn't do that. It was my understanding at that time that that was not an option.

Q: For what reason?

A: If we annexed him in, then he would be annexed in as the existing zoning. And he didn't want the existing zoning, which was residential, light commercial. He wanted multifamily.

Q: So to solve that you suggested he get the County to change it, and then you can bring him in, grandfather him in, or bring him in subject to that zoning?

A: Correct.

Q: And you thought that would work?

A: With the plans that he had then, everyone was very much in favor of those. The plans were very high-end condos, low density, a lot of amenities, and fit in with the -- --

Q: Understanding that we're talking hindsight, but the feeling at the time was that if he had gone forward with that project of patio homes to condominiums, it would have been supported by the town and you could have brought it in, annexed it in, subject to the County zoning?

A: --with the plans that were presented to us at that time, we did not have any major problems with those plans at that time that I can recall.

Q: You would have recommended bringing it into the city by annexation?

A: Correct.

Q: And you had citizens in the town who were in favor of it and who actually wanted to live in the patio homes?

A: That's correct.

(Thomas Dep., p. 83, l. 21 – p. 86, l. 10). The opposition to the development began upon learning that the property would be developed as an apartment project. Mr. Thomas testified:

Q: As of October 2nd, was one of your reasons for opposing this project as mayor of the Town of Arcadia lakes, the potential for individual unit owners to have their property values depressed?

A: Yes. That was one of the reasons we wanted an economic study done to determine that.

Q: Is that one of the reasons you wanted to stop this project?

A: That was one of the reasons for our opposition to the project as it was presented.

Q: And do I understand you to say that as it was presented, the primary concern was the additional density over and above what was presented to you in 2004?

A: No. It was also the economic impact. It was also the character of the neighborhood.

Q: Well, you did not oppose the townhouses, patio homes, condominiums, correct? You personally wanted to buy one.

A: True.

Q: What factor, other than the density of the apartments, led you to believe there would be a depression in economic value for certain homeowners in Arcadia Lakes?

A: Safety to you, to the transient nature of the folks renting the property, light intrusion into the actual property adjoined, potential overflow of the sewer system due to the fact—did it actually—was it sized properly to handle an additional 204 units. I mean, the town only has 890 people living in the town. You're adding another 4-500 residents to the system, traffic. All those had—all those come together—all of that has to do with the density.

Q: All of those factors arise out of the increase density, right?

A: That's the way I see it.

(Thomas Dep., p. 112, l. 5 -113, l. 17). There is no doubt that the Town felt that the developers of the Proposed Project had misled the Town to obtain support for the rezoning of the property. For example, in a August 23, 2008 email, Mr. Thomas wrote:

> I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain. Per conversation with Mr. Carter Ellis, the same was told to the property owners on the north side of the Roper Property to get their blessing for the rezoning. The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

(Ex. 2 to Hartley Aff.). It is clear that the Town opposed the planned development of the property for reasons which had nothing to do with the Department's approval of the SWPPP and authorization under the Construction General Permit. Moreover, as discussed above, the Town had no independent knowledge of facts supporting its appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit. In fact, the record demonstrates that the appeal of the Department's decision was merely a means to stop or delay the planned development of the property.

The Department issued its decision to grant coverage to Roper Pond on December 15, 2008. On December 17, 2008, Mr. Thomas sent an email to Brian Bates regarding the appeal of the Department's decision. Mr. Thomas wrote as follows:

> We have until December 30 (15 days) to file an appeal to the DEHEC Board. We need to review the approval and the revised plans to determine if we have a reason or cause to appeal to the Board, **and if not, can we still send in a blanket appeal to the DEHEC Board and delay the actual decision for 60 days.** We need to get our hands on the plans.

(Thomas Dep., Ex. 5, attached to Hartley Aff. as Ex. 15) (emphasis added). Again, Mr. Thomas could not identify any technical defect in the SWPPP at the time or later at his deposition, but determined to pursue an appeal of the Department's decision even if grounds for the appeal did not exist. Moreover, the purpose of such appeal was plainly stated as an effort to delay the planned development of the property by Roper Pond. Indeed, at the close of the December 17, 2008 email, Mr. Thomas wrote: "**Let me know where you think we can go to delay and/or stop this project**." (Thomas Dep., Ex. 5, attached to Hartley Aff. as Ex. 15) (emphasis added). The intent of this statement is borne out by the Town's efforts to oppose governmental authorization for the planned development at every turn. For example, Mr. Thomas contacted politicians and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. (Exs. 3 and 4 of Hartley Aff.). Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project. (Thomas Dep., Ex. 6, attached to Hartley Aff. as Ex. 16). The Resolution advised the Commission of the Town's belief that the proposed development as multifamily high density apartments was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." *Id.* The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ." *Id.*

The Town also participated in meetings with politicians in an effort to stop Roper Pond from receiving the government permitting for the Proposed Project. However, the record shows that such meetings were not intended to facilitate the correction of deficiencies in the SWPPP

prepared by B.P. Barber on behalf of Roper Pond. In fact, the Town supported the exclusion of B.P. Barber from a meeting with Senator Joel Lourie as a strategy for further delaying the approval of the SWPPP. Brian Bates and Daniel Hill, both professional engineers and residents of the Town had been assisting the Town in its opposition to the Department's approval of the SWPPP. (*See, e.g.*, Exs. 5, 6, 7, and 8 to Hartley Aff.). In a November 6, 2008 email, Mr. Thomas requested that Mr. Bates and Mr. Hill attend a meeting with the Department and Senator Lourie to "review the revised set of BP Barber plans for the Roper Property." (Ex. 8 to Hartley Aff.). Mr. Bates advised Mr. Thomas as follows:

> Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

(Ex. 9 to Hartley Aff.). Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (Ex. 10 to Hartley Aff.) (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie with his endorsement of the proposed strategy. (Exs. 11 and 12 to Hartley Aff.). There can be no doubt that the Town's "concerns" about the SWPPP were merely another avenue in response to Mr. Thomas's inquiry regarding "where you think we can go to delay and/or stop this project." The Town intended to use all means available to delay or stop Roper Pond's development of the property as an apartment complex. Any concerns about the SWPPP were merely a pretext for stopping such development.

With respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's

decision to grant Roper Pond coverage under the Construction General Permit. Prior to the November 14, 2008 meeting with the Department staff at Senator Lourie's office, the Town and its technical advisors had reviewed the SWPPP and provided comments to the Department staff, which the staff unquestionably addressed. In an October 2, 2008 email, Mr. Thomas advised Mr. Bates as follows:

> Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

(Ex. 14 to Hartley Aff.). It is apparent that the Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." (Ex. 5 of Hartley Aff.). Mr. Bates advised Mr. Thomas as follows:

> Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.
>
> **I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff.** To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required.

Id. (emphasis added). Mr. Thomas responded: "Thanks again for your continued expertise in this matter." *Id.* This email exchange unquestionably shows that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues.

More importantly, it shows that the ultimate objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. Otherwise, there would be no suggestion that "we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Indeed, the Petitioners offered no evidence at the hearing that the concerns raised by the Town and other Petitioners were not fully considered by the Department staff and addressed by B.P. Barber prior to the Department's final decision.

In its effort to stop or delay the planned development of the property, the Town looked for any opportunity to delay the Proposed Project once it learned that the property would be developed as an apartment complex. While the Town typically included remarks related to the stormwater permitting in its laundry list of concerns regarding the Proposed Project, such remarks were clearly secondary and included merely as a means to identify yet another matter for which a governmental authority had oversight related to the development. For example, in the Town's resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project, the Town included a statement asserting that Richland County should give special consideration to the Proposed Project in order to protect the wetlands of the Gills Creek Flood Plan. (Thomas Dep., Ex. 6, attached to Hartley Aff. as Ex. 16). However, the primary concern raised was the impact on the "character" of the community and the loss of property value to neighboring homes as a result of the planned development as an apartment complex. *Id.*

To demonstrate that the Town acted without substantial justification in bringing this appeal, it is not necessary to show that the Town's claims were frivolous. *Heath*, 302 S.C. at

183, 394 S.E.2d at 712 (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification"). However, the Town's claims in this action were, in fact, frivolous. The law on the federal permitting requirements for the Proposed Project is well-settled. Yet, the Town continued to press its claims that the excavation of the Pond required a 401 Certification which is only required for a federal 404 permit. Moreover, as the record clearly shows, the Town resolved to take such action as necessary to stop or delay the Proposed Project, and the appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit was but another avenue for accomplishing that objective. Moreover, as evidenced by Mr. Thomas's email of December 17, 2008, the Town intended to appeal that decision even if there were no grounds for such appeal. Indeed, the Town failed to offer any evidence of a technical deficiency in the SWPPP. Under the circumstances, it is indisputable that the Town acted without substantial justification in bring this action.

D. <u>There are no special circumstances that would make an award of attorney's fees unjust.</u>

Roper Pond has expended substantial time and money in defending the Town's challenge to the Department's grant of coverage under the Construction General Permit. The attorneys' fees and costs incurred by Roper Pond to defend this contested case and subsequent appeal total $205,283. (*See* Affidavit of Joan W. Hartley, attached to the Petition for Attorneys' Fees as Ex. B). As discussed *supra*, the Town completely failed to advance any reasonable basis for its challenge to this Department's decision. Moreover, it is indisputable that the Town availed itself of this Court and the state appellate courts for the purpose of stopping or delaying the planned development of the Roper Pond property as an apartment complex, not to ensure that the Department properly granted coverage to Roper Pond under the Construction General Permit. As such, there are no special circumstances which would make an award of attorneys' fees and costs

unjust. Indeed, the principles of justice and equity require the award of attorneys' fees and costs to Roper Pond.

The Town has endeavored to stop Roper Pond's development as an apartment complex by any means necessary. The Town attempted a challenge to the rezoning of the Property, but such challenge was not timely. (Tr. p. 249, ll. 18-19; p. 250, ll. 1-11). The record clearly shows that the Town brought this contested case without any independent belief that the Department's decision was improper. The Town's challenge to the Department's grant of coverage to Roper Pond under the Construction General Permit was merely another attempt to stop Roper Pond's development of the property because the Town opposed the development of the property as an apartment complex. There can be no justification for such action since the Roper Pond Property is outside of the corporate limits of the Town. Richland County—not the Town—has jurisdiction over zoning and land use issues affecting the Property. Simply stated, the Town abused the appeal process authorized under S.C. CODE ANN. § 44-1-60 and the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA") in order to redress claims which would have been properly addressed by and through Richland County zoning and land use authorities. S.C. CODE ANN. § 44-1-60 (Supp. 2009); S.C. CODE ANN. § 1-23-610(B) (Supp. 2009).

Additionally, the negative impact of the Town's improper challenge to the Department's decision in this case is significant and far-reaching. In opposing the lawful development of the Property, the Town is working at cross purposes with Richland County, the local government with authority over the development of the Property and whose citizens will directly benefit from such development. Indeed, the Town's challenge to the Department's decision not only delayed Roper Pond's development of the Property, but it has also deprived the citizens of Richland County and the State of much-needed stimulus to the economy and taxes and revenues for the

County. Specifically, in the short term, the construction of the apartment complex would have produced immediate economic benefits for construction workers and local businesses which were negatively impacted by the economic recession in 2009. Based on a model developed by the National Association of Home Builders, the short-term estimated local impact for the construction of the 204-unit apartment complex may be conservatively estimated as follows: $11.85 million in local income to construction-related businesses; $1.24 million in taxes and other revenue for local governments; and 183 local jobs. (*See* Affidavit of Matthew H. Mundy attached to the Petition for Attorneys' Fees as Exhibit D). The Town took deliberate action to impede a project which would have provided direct and immediate economic benefits to the citizens of Richland County and the State at a time when it is desperately needed. As such, there can be no special circumstances which would make an award of attorneys' fees unjust. Accordingly, the circumstances of this case clearly support the award of attorneys' fees to Roper Pond pursuant to Section 15-77-300 of the State Action Statute.

E. Additionally, or in the alternative, Roper Pond is entitled to sanctions pursuant to Rule 72, SCRALC, in the form of attorneys' fees and costs and the cost of delay of the Proposed Project.

In addition, or in the alternative, Roper Pond is entitled to an award of attorneys' fees and costs and the costs of the delay of the Proposed Project pursuant to Rule 72, SCRALC. Administrative Law Court Rule 72 provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALCR. Furthermore, the 2009 Revised Notes to Rule 72, provide that "in determining whether a case is frivolous, the administrative law judge may refer to S.C. CODE ANN. § 15-36-10, the Frivolous Civil

Proceedings Sanctions Act." Rule 72, SCALCR, 2009 Revised Notes. Section 16-36-10(C)(1) provides in relevant part that "[a]n attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

> (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or
>
> (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. CODE ANN. § 15-36-10(C)(1). In determining if a violation occurred under the Sanctions Act, the court applies a "reasonable attorney" standard for evaluating sanctionable conduct. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). More specifically, the Sanctions Act provides that the court must take into account:

> (1) the number of parties;
>
> (2) the complexity of the claims and defenses;
>
> (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
>
> (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
>
> (5) previous violations of the provisions of this section;
>
> (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
>
> (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. CODE ANN. § 15-36-10(E). There is no question that Petitioners' challenge to the Department's grant of coverage under the Construction General Permit was frivolous and/or taken solely for the purpose of delay. Moreover, as discussed at length *supra*, Petitioners failed to advance any legitimate legal basis for their contention that the Department did not adequately review the SWPPP or improperly granted Roper Pond coverage under the Construction General Permit. Contrary to well-settled case law regarding permitting for the dredging of navigable waters of the United States and Petitioners' complete failure to offer any evidence that the Pond was a navigable water, which required a federal permit authorizing dredging activities, Petitioners continued to press their claim that a 401 Certification, which is only required for a federal 404 permit, was required in connection with the dredging activities. Indeed, despite the lack of federal or state law supporting their claims, Petitioners continued to avail themselves of this Court and the state appellate courts with full knowledge that Roper Pond was incurring great expense in legal fees and costs and was incurring significant costs associated with the delay of the Proposed Project. The record clearly shows that Petitioners continued to pursue the appeal with the knowledge that there was no legal basis for such claims, and did so in order to delay and/or stop the planned development of the property as an apartment complex.

Petitioners' own testimony indisputably demonstrates that they availed themselves of this Court and the state appellate courts solely for the purpose of delaying a project for which they believed the zoning was improperly obtained, but could no longer be challenged. For example, Petitioner Linda Jackson testified as follows:

> Q: And will this affect your use and enjoyment of the area?
>
> A: Absolutely. I mean, it will be sad not to see the pond any more, to not be able to enjoy, but then I look at what's going to happen to the Cary Folks. I mean, they've been hit with it so many times. Dent Middle School, Richland County did all they were supposed to do, and DHEC did all they

were supposed to do, but Cary Lake still ended up being compromised to a great extent by that construction, and you know it's just—the Gills Creek Watershed is very much impaired. There have been huge fines assessed against Richland County. There was even an article in the paper today about it, and it's only going to get worse. And what we would like to see is something that would be an amenity to the community and something that would—people would be proud of and want to participate, and **I suspect if they had put up something like they wanted to put up and had told the community they were going to put up five years ago, we wouldn't be in this courtroom today, because what they proposed five years ago was something that the community supported enough not to object to the rezoning of the multi-family high density, and they would never have not objected had that been proposed almost five years ago that they were going to put up a 204 apartment complex.** The whole community would have been there objecting there at Richland County, and you know what, not one sole appeared. The only person there was Mr. Joe Walker, and they laughed. I have the minutes from the meeting. They laughed because no one was there to object.

(Tr. p. 245, l. 6 – p. 246, l. 15) (emphasis added). Ms. Jackson further testified that the zoning "was obtained improperly," but could no longer be appealed. (Tr. p. 249, ll. 18-19; p. 250, ll. 1-11). Similarly, Petitioner Elaine Starr testified:

Q: Well, if it were C-2, if I told you that it was C-2, and it would have allowed a shopping center there, what would your position have been?

A: Oh, I would have fought that, too.

Q: So, in other words, it's what they want to do with the property?

A: Right. It's the density. If they would change the density and put in some best management practice, I would say "Great, be a good neighbor."

(Tr. p. 281, l. 23 – p. 282, l. 7). As discussed *supra*, in a December 17, 2008 email regarding the appeal of the Department's decision on the State Construction General Permit coverage for Roper Pond, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." (Thomas Dep., Ex. 5, attached to Hartley Aff. as Ex. 15). Indeed, a draft of the request for Board review of the Department's decision unquestionably demonstrates that the Petitioners'

claims related to the planned development of the property had nothing to do with the Department's grant of coverage under the Construction General Permit. On December 30, 2008, the deadline for filing for Board review, Ms. Jackson forwarded a draft letter to Mr. Thomas. (Ex. 13 to Hartley Aff.). The draft letter raised any number of issues regarding the planned development of the property, but did not identify a single defect in the Department's grant of coverage under the Construction General Permit. The draft letter included the following claims:

> Mr. Mundy, who signed the Notice of Intent for this project, has claimed for months that he is not the current owner of the land upon which the project is to be built. The current owner of record is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital Development, LLC in January of 2008, however, there is no deed of record to reflect a transfer of interest in the referenced real property. From what we know, the only member of Capital Development, LLC is Charles Mikel who lives in Greenville. This information may or may not have any impact on the decision to issue the stormwater permit, but we believe that the Board need to be informed about who is truly responsible in this situation.
>
> What is significant in this matter is that Mr. Mundy came to the Arcadia Lakes community in May of 2004 with a plan for the subject property to be developed with high end, single-family patio homes with a transition-type design which moved from patio homes to multi-family condominium units, along with a clubhouse and other recreational areas. The original plan for the property was based on a density of approximately four (4) units per acre. The new plan for development of the property presented in early August of this year by Mr. Mundy has no provision for a transition, and in fact has total of eight (8) multi-family apartment buildings with an overall density of approximately sixteen (16) units per acre. We feel that this drastic change in the plans for the property was misleading to adjacent property owners and the local neighborhood in general. Had we not been presented a plan four years ago that was basically satisfactory to the neighborhood, we never would have allowed the County rezoning process to move forward unchallenged. Essentially, the community was duped.

(Ex. 13 of Hartley Aff.). Although the Petitioners filed a different letter requesting Board review, this earlier draft by Mr. Jackson appears to express the real reasons behind the Petitioners' decision to appeal the Department's grant of coverage to Roper Pond. As noted above, the Petitioners unquestionably abused the appeal process authorized under S.C. CODE

ANN. § 44-1-60 and the APA in order to redress claims which are properly addressed by local zoning and land use authorities. The evidence clearly demonstrates that Petitioners opposed the Proposed Project because of the proposed development as an apartment complex and simply used the appeal of the coverage under the Construction General Permit as a means to stop or delay the Project.

It is clear that Petitioners knew or should have known that there was no reasonable legal basis for its challenge to the Department's decision. Yet, Petitioners aggressively pursued their appeal. Indeed, as this Court found and the Court of Appeals affirmed, Petitioners did not even establish standing to bring this contested case. At the hearing on the merits, Petitioners failed to identify any alleged harm that would result from the design of the stormwater management system approved by the Department. Instead, Petitioners testified about the damage resulting from the land-disturbing activities of other parties and those parties' failure to implement the measures required by the Department to control stormwater runoff and sedimentation during construction. The record is devoid of any evidence which would support a claim that the SWPPP as approved was not sufficient to manage the stormwater runoff and control sedimentation during the construction of the Proposed Project. Petitioners expert offered no opinion on the impact of the land-disturbing activities authorized under the Construction General Permit on the Pond or Cary Lake. (Tr. p. 203, ll. 18-23; p. 211, ll. 2-11). Ms. Jackson testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the Construction General Permit and the SWPPP during the construction of the Proposed Project. (Tr. p. 250, l, 16 – p. 251, l. 7). Ms. Starr testified that she believed that the Proposed Project would increase the rate of stormwater runoff. (Tr. p. 277, l. 24 - p. 281, l. 14). However, as this Court found, any such increase would be a violation of the Stormwater Regulation, and therefore Ms. Starr's

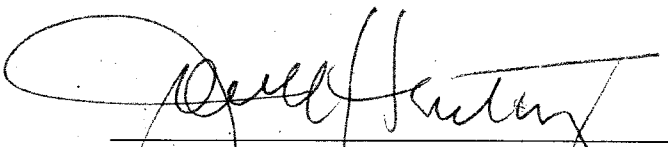
concerns regarding an increase in the rate of stormwater runoff would be the result of a violation of the Construction General Permit, not of the Department's issuance of coverage to Roper Pond under the Construction General Permit. (Final Order and Decision, p. 20). Petitioner did not offer any evidence that the SWPPP approved for the Proposed Project was inadequate to control stormwater runoff and sedimentation during the planned development of the property.

There is no doubt that Petitioners' appeal of the Department's decision in this matter is "frivolous or taken solely for the purposes of delay." The evidence on the record unquestionably demonstrates that Petitioners initiated this contested case for the sole purpose of delaying the Proposed Project. Petitioners either knew or should have known that its claims were without merit. Indeed, Mr. Thomas testified that he has the education and experience to evaluate the sufficiency of the design of Roper Pond's SWPPP. Moreover, during the course of the Department's review of the SWPPP, the Town and other Petitioners also received the advise of other engineers who reviewed the SWPPP to assess its technical sufficiency. (Exs. 6, 7, 8, 9, and 14 to Hartley Aff.). Yet, despite his own education and experience and the advice received from other engineers, Mr. Thomas could not independently identify any deficiency in the SWPPP. Moreover, in a draft letter requesting Board review of the Department's decision, Ms. Jackson argued that Roper Pond had allegedly misled the community to secure rezoning, but failed to identify a legitimate basis for appealing the Department's grant of coverage to under the Construction General Permit. Indeed, in the hearing on the merits, Ms. Jackson testified that if Roper Pond had proceeded with their original planned development of the property, "we wouldn't be in this courtroom today." (Tr. p. 245, l. 6 – p. 246, l. 15). Petitioners have unquestionably abused the appeal process established under S.C. CODE ANN. § 44-1-60 and the APA.

Rule 72, SCRPALC, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCRPALC. The objective of discouraging like conduct in the future can only be achieved by shifting the cost of defending this action and the delay of the Proposed Project from Roper Pond to the Petitioners. Otherwise, Petitioners have achieved their stated and improper objective of delaying the Proposed Project. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. In addition to the attorneys' fees and costs associated with the defense of Petitioners' challenge, Roper Pond has incurred costs in the amount of $661,984 as a direct result of the delay of the Proposed Project during the pendency of this case. (*See* Affidavit of Charles C. Mickel, attached to the Petition for Attorneys' Fees as Exhibit C). Roper Pond therefore requests the Court issue an order imposing sanctions in the form of an award of attorneys' fees and costs in the amount of $205,283 and the cost of delay of the Proposed Project in the amount of $661,984.

III. CONCLUSION

For the foregoing reasons, Roper Pond asks the Court to issue an Order directing the Town to pay Roper Pond's reasonable attorneys' fees and costs in the amount of $205,283 pursuant to S.C. CODE ANN. § 15-77-300. Additionally, or in the alternative, Roper Pond asks the Court to impose sanctions on Petitioners in the form of an award of attorneys' fees and costs in the amount of $205,283 and the cost of delay of the Proposed Project in the amount of $661,984 pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.



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Attorneys for Respondent
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May 28, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

This is to certify that Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC and Memorandum of Law in Support of Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC have been served on counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 28th day of May, 2015:

Stephen P. Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **PETITIONERS' MOTION TO STRIKE OR, ALTERNATIVELY, TO ALLOW DISCOVERY**

TO: ADMINISTRATIVE LAW JUDGE JOHN D. MCLEOD AND ALL PARTIES AND THEIR ATTORNEYS

The Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown respectfully move this Court for an Order striking certain exhibits or, alternatively, allowing discovery in order for Petitioners to test the veracity and validity of those exhibits.

Roper Pond's Petition for Fees and Costs and Sanctions was filed on May 25, 2015, and included more than 100 pages of new documentary evidence, including affidavits from its own counsel and from its representatives.

Exhibit A is the Affidavit of Joan Hartley, which contains its own set of exhibits.

Exhibits 2 -14 attached to Ms. Hartley's affidavit were allegedly received pursuant to a subpoena served on SCANA, who is not a party to this litigation. The subpoena was served and the documents procured by Roper Pond prior to the hearing of this matter, yet Exhibits 2 -14 were not admitted into evidence during the hearing.[1]

Exhibit B, another Affidavit of Joan Hartley, references records and reports that are not attached to the affidavit, thus the Petitioner has no way to test the validity of the statements contained therein.

Of even greater concern are Exhibits C and D. Exhibit C is the Affidavit of Charles C. Mickel. Mr. Mickel discusses costs as a result of the "delay in the planned development." Mr. Mickel does not explain how the Petitioners' caused any delay; what he believes the length of that delay to be; nor any single document supporting his assertions or providing a basis for his determination of costs for any purported delay. The affidavit is filled with vague assertions about delay costs with absolutely no supporting documentation that would allow the Petitioners to test the validity and veracity of the statements and to prepare an appropriate response. At a minimum, Petitioners would need to see documentation of how Mr. Mickel arrived at these figures and depose him on such matters. However, as this exhibit stands it should be stricken.

Exhibit D is the Affidavit of Matthew H. Mundy, which contains an exhibit that was not presented to this Court and bears no apparent relevance to this matter. Mr. Mundy similarly makes a number of broad and vague statements about income and revenue generated from residential developments, essentially regurgitating information contained in the "National

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[1]Petitioners do not object to the inclusion of exhibits15 and 16, which were introduced at trial, nor to exhibits 17, 18 and 19, which include appellate briefs and the proposed order submitted to this Court.

Association of Home Builders," a document which he did not author. Exhibit D amounts to hearsay within hearsay and should be excluded because Petitioners are unable to test the validity of that information nor to understand how it is applicable in the instant action.

Roper Pond is coming in at this late date and offering exhibits in existence at the time of the hearing, affidavits with no documents supporting the claims therein, and testimony that Petitioners are unable to independently assess. For these reasons, the Petitioners request that this Court issue an Order striking certain extra-record exhibits or, alternatively to permit Petitioners to conduct discovery if the exhibits are not stricken.

Because Petitioners' approach to its response to Roper Pond's Petition for Fees, Costs and Sanctions is dependent on the Court's treatment of Petitioners' motion to strike or alternatively, to allow discovery, the Petitioners' position is that this motion stays the response deadline; however, in an abundance of caution, the Petitioners are simultaneously filing a motion for an extension.

Respectfully submitted,

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Attorneys for the Petitioners

Georgetown, South Carolina

June 24, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **PETITIONERS' MOTION FOR EXTENSION FOR FILING RESPONSE**

TO: ADMINISTRATIVE LAW JUDGE JOHN D. MCLEOD AND ALL PARTIES AND THEIR ATTORNEYS

The Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown respectfully move this Court for an Order extending the time for filing a response to Roper Pond LLC's Petition for Fees and Costs and Sanctions.

The Petition for Fees and Costs and Sanctions was filed on May 25, 2015. Under this Court's Order dated May 11, 2010, Petitioners' response is due June 24, 2015. The Petition presents several novel and difficult issues involving questions of both fact and law. Roper Pond, LLC has presented more than 100 pages of documents containing new documentary evidence,

including affidavits from its own counsel and from its representatives. The basis for the extension request is as follows:

The legal issues presented by this motion are thorny. The Petition invokes ALC Rule 72, which gives this Court no standard for determining whether an action is "frivolous" and does not indicate whether sanctions can be imposed against the party, the attorney, or both. SCRPALC Rule 72. The Notes following Rule 72 indicate that this Court may refer to the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, *et seq.* (the "Act"); and Roper Pond's Petition cites to various provisions of that Act.

The Act authorizes the court to order a party to pay reasonable costs and attorneys fees; order an attorney to pay a fine to the court; or issue a nonmonetary directive. S.C. Code Ann. § 15-36-10(G). Section 15-36-10 places the focus of the inquiry on the attorney who pursued the case, signed the pleadings, and presented the evidence and arguments. Section 15-36-10 requires that if sanctions are awarded, the Court "shall report its findings to the South Carolina Commission of Lawyer Conduct," and that all violations of the provisions of that act "must be reported to the South Carolina Supreme Court and a public record must be maintained and reported annually to the Governor, Senate, and House of Representatives." S.C. Code Ann. § 15-36-10(G).

Roper Pond's Petition under the Act has grave implications for me as the attorney who presented this case for the Town of Arcadia Lakes and the individuals. I am required to put my malpractice liability insurance on notice of such claims and I have provided that notification to my carrier. I am awaiting a formal response from my carrier and at this point have not been able to determine whether I need to retain outside counsel to represent me in defending against this

Petition. Counsel is taking the allegations made in Roper Pond's Petition very seriously and must ensure that, if the carrier believes there is liability, counsel has defense counsel to represent her. In any event, I will have to put a substantial amount of effort and resources into the defense of my legal career and reputation which has not been possible given counsel's time constraints.

Specifically, counsel for the Petitioners was traveling for work from May 28 - June 5 and then was on a long-standing family vacation the week of June 14-June 18. Due to this travel schedule, counsel has been unable to spend the time needed to thoroughly assess the implications of the Petition, secure affidavits, and respond to the assertions made by Roper Pond. Counsel has secured one affidavit from a practitioner with experience in administrative and environmental law, is in the process of securing another affidavit from an expert in ethics, and may need additional affidavits as well. Counsel also anticipates that live testimony may be necessary.

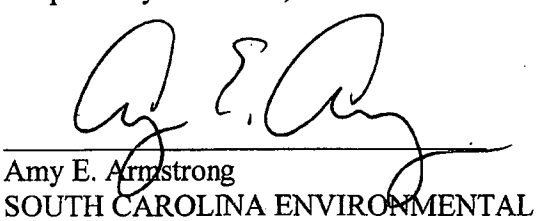
An additional consideration is how the Court will treat the Petitioners' motion to strike or alternatively, to allow discovery. The Petitioners' approach to its response is dependent on the Court's treatment of that motion.

Finally, the Petitioners recently received an Order from the Supreme Court, dated June 17, 2015, denying Roper Pond, LLC's motion for costs in this matter. Counsel is assessing the implications of this Order denying costs on the Petition pending before this Court, as well as whether Roper Pond is, in fact, a "prevailing party" as required under both the State Action Statute and the Frivolous Civil Proceedings Sanctions Act given the Supreme Court's disposition of this matter.

For these reasons, the Petitioners request that this Court issue an Order granting an extension until August 24, 2015, to allow counsel to determine whether outside defense counsel

is needed, to conduct discovery if the exhibits are not stricken, and to prepare a thorough response to the allegations made in the Petition.

Respectfully submitted,



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June 24, 2015

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served copies of the Petitioners' Motion for Extension and Motion to Strike upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

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Joan W. Hartley, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29202

Stephen P. Hightower, Esquire
DHEC Office of Counsel
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong
Attorney for the Petitioners

Georgetown, South Carolina

June 24, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO STRIKE OR, ALTERNATIVELY, TO ALLOW DISCOVERY**

Respondent Roper Pond, LLC ("Roper Pond"), by and through its undersigned counsel, respectfully submits this response in opposition to Petitioners' Motion to Strike or, Alternatively, to Allow Discovery.

I. Affidavit of Joan Hartley – Exhibit A to Petition ("First Hartley Affidavit")

Petitioners object to the First Hartley Affidavit on the basis that the documents attached thereto were not admitted into evidence during the hearing on the merits in this case. (Motion, p. 2). Pursuant to S.C. CODE ANN. § 15-77-310, a petition for attorney's fees under Section 15-77-300 is filed "within thirty days following final disposition of the case." S.C. CODE ANN. § 15-77-310. A petition for fees under S.C. CODE ANN. § 15-77-300 is a post-trial motion and may be filed following an appeal of the trial court's decision. *Brackenbrook North Charleston, LP v. County of Charleston*, 366 S.C. 503, 623 S.E.2d 91 (2005) (holding that the 30 days for filing under 15-77-300 runs from the filing of the remittitur by the trial court); *McDowell v. South*

Carolina Dept. of Social Services, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) (same). "[P]ost trial motions may be heard on affidavits." *Saro Investments v. Ocean Holiday Partnership,* 314 S.C. 116, 122, 441 S.E.2d 835, 838 (Ct. App. 1994) (citing *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979); *Gaskins v. California Insurance Co.*, 195 S.C. 376, 11 S.E.2d 436 (1940); Rule 43(e), SCRCP). As such, the affidavits filed in support of Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72 SCRPALC ("Roper Pond's Petition for Fees") are an appropriate filing to present facts to the Court in support of that Petition.

Additionally, Roper Pond was not required to offer the documents attached to the First Hartley Affidavit into evidence during the hearing on the merits. Indeed, had Roper Pond attempted to admit these records into evidence, Petitioners would have been expected to object to such documents on the grounds of relevance. However, Roper Pond's Petition for Fees requires specific findings by this Court on issues which were not before the Court in the hearing on the merits. For example, the ruling of Roper Pond's Petition for Fees requires a determination of whether the Town of Arcadia Lakes "acted without substantial justification in pressing its claim" in this matter. S.C. CODE ANN. § 15-77-300. This issue was not required for the Court's determination of the claims raised by Petitioners at the hearing on the merit.

Moreover, Petitioners make no claims that the First Hartley Affidavit does not comply with the rules governing the form of affidavits under the South Carolina Rules of Civil Procedure. The First Hartley Affidavit is based on personal knowledge on matters to which she is competent to testify. The documents attached to the First Hartley Affidavit are documents produced pursuant a subpoena issued as an officer of this Court in this matter, exhibits to a

deposition in this matter, and filings in this matter. As parties to this case, Petitioners have sufficient knowledge and information related to these documents to raise objections to the admissibility of these documents. Accordingly, Petitioners' motion to strike the First Hartley Affidavit should be denied.

II. Affidavit of Joan Hartley – Exhibit B to Petition ("Second Hartley Affidavit")

Petitioners object to the Second Hartley Affidavit on the basis that the Affidavit references records and reports that are not attached thereto. (Motion, p. 2). Roper Pond contends that no such documentation is required in support of the Second Hartley Affidavit. The affiant is an officer of court and has provided sufficient details of the attorneys' fees and costs in this matter as required in support of a motion for fees. *See, e.g.*, Rule 55(b)(3) (requiring only an affidavit of the attorney for fees for a default judgment). Moreover, Roper Pond objects to providing Petitioners with detailed time entries which contain information related to attorney-client communications. Therefore, the motion to strike this affidavit should be denied. However, in the interest of addressing Petitioners' objections and further asserting that these objections are not valid grounds for Petitioners' motion to strike the Affidavit, attached hereto as Exhibit A is the Amended Affidavit of Joan W. Hartley, which includes a list of daily time entries for Roper Pond's attorneys from the date of the filing of the Request for Contested Case on February 9, 2009, through oral arguments before the Supreme Court on March 18, 2015. This list of time entries by specific date provides Petitioners with sufficient details in support of the summaries provided in the Second Hartley Affidavit to address their concerns regarding the "validity of the statements contained therein." (Motion, p. 2).

III. Affidavit of Charles C. Mickel – Exhibit C to Petition ("Mickel Affidavit")

Petitioners object to the Mickel Affidavit on the basis that the Affidavit lacks information regarding the delay in the planned development at issue in this matter and contains vague

assertions. Contrary to these assertions, the Mickel Affidavit is Mr. Mickel's sworn statement of facts in his personal knowledge on matter on which he is competent to testify and would satisfy the requirements for an affidavit under Rule 56, SCRCP. Accordingly, Petitioners' motion to strike the Mickel Affidavit should be denied. However, in the interest of addressing Petitioners' objections and further asserting that these objections are not valid grounds for Petitioners' motion to strike the Affidavit, attached hereto as Exhibit B is the Amended Affidavit of Charles C. Mickel which includes further facts regarding the length of the delay in the planned development and provides documentation related to the costs of such delay.

IV. Affidavit of Matthew H. Mundy – Exhibit D to Petition ("Mundy Affidavit")

Petitioners object to the Mundy Affidavit on the basis that the Affidavit "contains an exhibit that was not presented to this Court and bears no apparent relevance to this matter." (Motion, p. 2). For the reasons stated in Section I above, the exhibit was not required to be offered into evidence during the hearing on the merits to be offered in support of Roper Pond's Petition for Fees. The Mundy Affidavit is Mr. Mundy's sworn statement of facts in his personal knowledge on matter on which he is competent to testify, including the calculations based on the NAHB model which he uses in the course of his duties as the Development Financial Manager for estate Management Company. Accordingly, Petitioners' motion to strike the Mickel Affidavit should be denied.

V. Conclusion

Contrary to Petitioners' assertions, Roper Pond is not "coming in at this late date" to offer the affidavits in support of its Petition for Fees. (Motion, p. 3). Except for documents related to fees and court filings during the appeal of this Court's Final Order and Decision, the affidavits filed in support of Roper Pond's Petition for Fees are substantially the same as those filed on March 23, 2010, in support of Respondent Roper Pond, LLC's Motion for Attorneys' Fees and

Costs and for Sanctions Pursuant to Rule 72, SCRPALC, and on July 12, 2013, in support of Respondent Roper Pond, LLC's Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. As such, affidavits in substantial the same form have been before the Court for more than five years and there is no basis for Petitioners' contention that Roper Pond is only now presenting these affidavits to the Court. Furthermore, Petitioners have failed to cite a legal basis for allowing discovery related to Roper Pond's Petition for Fees. There is a substantial body of case law interpreting S.C. CODE ANN. § 15-77-300 *et seq.* Yet, neither the case law nor the statute itself provide any basis for discovery on a petition for attorneys' fees. Similarly, there is no such basis for discovery in connection with the motion for sanctions under Rule 72, SCRPALC.

For the reasons stated herein above, Roper Pond respectfully requests that the Court deny Petitioners' Motion to Strike or, Alternatively, to Allow Discovery.

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John W. Hartley (SC Bar No. 72735)
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1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Respondent
Roper Pond, LLC

July 16, 2013
Columbia, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No.: 09-ALC-07-0069-CC **AMENDED AFFIDAVIT OF JOAN W. HARTLEY**

PERSONALLY APPEARED BEFORE ME, Joan W. Hartley., who, being duly sworn, swears and deposes that if she were called as a witness in the above-entitled action she would truthfully and accurately testify as follows:

1. I am an attorney licensed to practice law in the State of South Carolina as Special Counsel in the law firm of Nexsen Pruet, LLC (hereafter "the Firm"), 1230 Main Street, Suite 700, Columbia, South Carolina 29201.

2. The Firm represents Respondent Roper Pond, LLC ("Roper Pond"), in the above-captioned action. I am familiar with this file and the number of hours spent and expenses incurred in the representation of Roper Pond in this matter.

3. I have reviewed the timekeeping records maintained by Nexsen Pruet in the regular course of business in this file. Those records and reports reflect the individual entries by specific

attorneys that describe each attorney's activity and the amount of time spent on each activity for the representation of Roper Pond. Attached as Exhibit 1 is a list of the individual time entries totaling $217,048.50. This includes entries for time discounted by Nexsen Pruet.

4. In accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through March 19, 2010:

W. Thomas Lavender, Jr.	91.9 hours at $370/hour	=	$34,003.00
Henry W. Brown	13.8 hours at $330/hour	=	$4,554.00
Joan Hartley	291.7 hours at $220/hour	=	$64,174.00
			$102,731.00

5. Since March 19, 2010, in accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through oral arguments before the South Carolina Supreme Court on March 18, 2015:

W. Thomas Lavender, Jr.	21.3 hours at $370/hour	=	$ 7,881.00
W. Thomas Lavender, Jr.	9.6 hours at $390/hour	=	$ 3,744.00
W. Thomas Lavender, Jr.	16.3 hours at $400/hour	=	$ 6,520.00
W. Thomas Lavender, Jr.	3.5 hours at $410/hour	=	$ 1,435.00
W. Thomas Lavender, Jr.	2.9 hours at $425/hour	=	$ 1,232.50
W. Thomas Lavender, Jr.	30.4 hours at $440/hour	=	$ 13,376.00
Joan Hartley	77.5 hours at $220/hour	=	$ 17,050.00
Joan Hartley	12 hours at $240/hour	=	$2,880.00
Joan Hartley	14.3 hours at $275/hour	=	$3,932.50

Joan Hartley	53.1 hours at $280/hour	=	$14,868.00
Joan Hartley	24 hours at $295/hour	=	$7,080.00
Joan Hartley	39.8 hours at $310/hour	=	$12,338.00
			$92,337.00

6. The total fees incurred by Respondent through March 18, 2015, in this matter are $195,068.00. Additionally, costs incurred in connection with the Firm's representation of the Respondent total $10,215.84.

FURTHER AFFIANT SAYETH NOT.

Joan W. Hartley

SWORN and subscribed to before me

this 7 day of July, 2015

_____(L.S.)

Notary Public

My commission expires_____.

Exhibit 1

Date	Initials	Name / Invoice Number	Hours	Amount	Matter Number	Index
2/11/2009	135	THOMAS LAVENDER	0.1	$ 37.00	021146-00047	5615839
2/17/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5616225
2/17/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5616234
2/20/2009	135	THOMAS LAVENDER	3.5	$ 1,295.00	021146-00047	5621929
2/24/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5624611
2/27/2009	135	THOMAS LAVENDER	2	$ 740.00	021146-00047	5629488
2/27/2009	163	HENRY BROWN	0.2	$ 66.00	021146-00047	5627438
3/2/2009	163	HENRY BROWN	0.2	$ 66.00	021146-00047	5650712
3/3/2009	163	HENRY BROWN	0.3	$ 99.00	021146-00047	5650795
3/5/2009	135	THOMAS LAVENDER	2.6	$ 962.00	021146-00047	5634328
3/6/2009	563	JOAN HARTLEY	0.3	$ 66.00	021146-00047	5636165
3/10/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5638186
3/12/2009	135	THOMAS LAVENDER	0.5	$ 185.00	021146-00047	5641138
3/13/2009	563	JOAN HARTLEY	1.1	$ 242.00	021146-00047	5648040
3/19/2009	135	THOMAS LAVENDER	1.5	$ 555.00	021146-00047	5651515
3/23/2009	135	THOMAS LAVENDER	0.2	$ 74.00	021146-00047	5653559
3/30/2009	135	THOMAS LAVENDER	1	$ 370.00	021146-00047	5658798
3/30/2009	563	JOAN HARTLEY	0.8	$ 176.00	021146-00047	5661009
3/30/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5687201
4/2/2009	563	JOAN HARTLEY	0.8	$ 176.00	021146-00047	5681514
4/3/2009	563	JOAN HARTLEY	2.8	$ 616.00	021146-00047	5681439
4/6/2009	563	JOAN HARTLEY	6.8	$ 1,496.00	021146-00047	5681555
4/6/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5669514

4/7/2009	563	JOAN HARTLEY	1.2	$ 264.00	021146-00047	5681676
4/8/2009	563	JOAN HARTLEY	1.9	$ 418.00	021146-00047	5681713
4/13/2009	563	JOAN HARTLEY	1.1	$ 242.00	021146-00047	5680844
4/14/2009	563	JOAN HARTLEY	2.2	$ 484.00	021146-00047	5680877
4/14/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5676235
4/20/2009	563	JOAN HARTLEY	0.6	$ 132.00	021146-00047	5693933
4/22/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5686344
4/28/2009	135	THOMAS LAVENDER	1.5	$ 555.00	021146-00047	5691943
4/28/2009	563	JOAN HARTLEY	0.3	$ 66.00	021146-00047	5692494
4/29/2009	563	JOAN HARTLEY	0.4	$ 88.00	021146-00047	5692509
4/30/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5693741
4/30/2009	563	JOAN HARTLEY	1.4	$ 308.00	021146-00047	5693989
5/1/2009	563	JOAN HARTLEY	0.2	$ 44.00	021146-00047	5717944
5/4/2009	563	JOAN HARTLEY	1.2	$ 264.00	021146-00047	5717761
5/4/2009	135	THOMAS LAVENDER	2	$ 740.00	021146-00047	5697949
5/8/2009	563	JOAN HARTLEY	0.3	$ 66.00	021146-00047	5717340
5/11/2009	563	JOAN HARTLEY	0.4	$ 88.00	021146-00047	5717421
5/12/2009	563	JOAN HARTLEY	2.4	$ 528.00	021146-00047	5716822
5/13/2009	563	JOAN HARTLEY	2.5	$ 550.00	021146-00047	5716670
5/19/2009	563	JOAN HARTLEY	2.5	$ 550.00	021146-00047	5720045
5/20/2009	563	JOAN HARTLEY	2.8	$ 616.00	021146-00047	5721081
5/21/2009	563	JOAN HARTLEY	2.3	$ 506.00	021146-00047	5728781
5/22/2009	563	JOAN HARTLEY	3.3	$ 726.00	021146-00047	5728742

5/24/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5728744
5/24/2009	135 THOMAS LAVENDER	0.7	$	259.00	021146-00047	5723435
5/27/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5728736
6/2/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5733412
6/2/2009	563 JOAN HARTLEY	4.4	$	968.00	021146-00047	5738137
6/3/2009	563 JOAN HARTLEY	3.2	$	704.00	021146-00047	5738149
6/4/2009	563 JOAN HARTLEY	0.2	$	44.00	021146-00047	5738155
6/8/2009	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	5739634
6/8/2009	563 JOAN HARTLEY	5.2	$	1,144.00	021146-00047	5754848
6/9/2009	563 JOAN HARTLEY	4.2	$	924.00	021146-00047	5755538
6/10/2009	563 JOAN HARTLEY	3.9	$	858.00	021146-00047	5755387
6/11/2009	563 JOAN HARTLEY	2.7	$	594.00	021146-00047	5755362
6/11/2009	2104 JENNIFER SHARPE	0.1	$	13.00	021146-00047	5743089
6/12/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5755586
6/15/2009	563 JOAN HARTLEY	3.2	$	704.00	021146-00047	5754942
6/16/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5755054
6/17/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5755215
6/24/2009	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	5759945
6/29/2009	563 JOAN HARTLEY	4.7	$	1,034.00	021146-00047	5763531
7/1/2009	563 JOAN HARTLEY	0.8	$	176.00	021146-00047	5767935
7/2/2009	163 HENRY BROWN	0.5	$	165.00	021146-00047	5768751
7/2/2009	563 JOAN HARTLEY	1.3	$	286.00	021146-00047	5785101
7/3/2009	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	5785349

7/6/2009	163 HENRY BROWN	0.5	$ 165.00	021146-00047	5770124
7/6/2009	135 THOMAS LAVENDER	0.25	$ 92.50	021146-00047	5786393
7/7/2009	563 JOAN HARTLEY	0.9	$ 198.00	021146-00047	5786118
7/7/2009	163 HENRY BROWN	0.2	$ 60.00	021146-00047	5771688
7/9/2009	563 JOAN HARTLEY	1.2	$ 264.00	021146-00047	5785559
7/13/2009	563 JOAN HARTLEY	0.7	$ 154.00	021146-00047	5777155
7/20/2009	163 HENRY BROWN	0.4	$ 120.00	021146-00047	5787714
7/27/2009	563 JOAN HARTLEY	0.7	$ 154.00	021146-00047	5800202
7/28/2009	563 JOAN HARTLEY	1.5	$ 330.00	021146-00047	5800310
7/29/2009	563 JOAN HARTLEY	1.3	$ 286.00	021146-00047	5800287
8/10/2009	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	5810763
8/10/2009	135 THOMAS LAVENDER	5.2	$ 1,924.00	021146-00047	5813547
8/11/2009	135 THOMAS LAVENDER	0.2	$ 74.00	021146-00047	5813540
8/13/2009	135 THOMAS LAVENDER	0.5	$ 185.00	021146-00047	5820677
8/14/2009	135 THOMAS LAVENDER	2	$ 740.00	021146-00047	5820699
8/14/2009	563 JOAN HARTLEY	4.9	$ 1,078.00	021146-00047	5824429
8/16/2009	563 JOAN HARTLEY	3.1	$ 682.00	021146-00047	5824412
8/17/2009	563 JOAN HARTLEY	6.1	$ 1,342.00	021146-00047	5824316
8/17/2009	135 THOMAS LAVENDER	1.1	$ 407.00	021146-00047	5820703
8/17/2009	135 THOMAS LAVENDER	1.5	$ 555.00	021146-00047	5820734
8/17/2009	163 HENRY BROWN	0.8	$ 240.00	021146-00047	5819678
8/18/2009	163 HENRY BROWN	2.4	$ 720.00	021146-00047	5821334
8/18/2009	563 JOAN HARTLEY	1.5	$ 330.00	021146-00047	5824290
8/19/2009	163 HENRY BROWN	6.2	$ 1,860.00	021146-00047	5825349

8/19/2009	563 JOAN HARTLEY	6.2	$	1,364.00	021146-00047	5826022
8/19/2009	135 THOMAS LAVENDER	3	$	1,110.00	021146-00047	5826541
8/20/2009	163 HENRY BROWN	2.1	$	630.00	021146-00047	5826355
8/20/2009	135 THOMAS LAVENDER	5.7	$	2,109.00	021146-00047	5826549
8/20/2009	563 JOAN HARTLEY	7.8	$	1,716.00	021146-00047	5826762
8/21/2009	563 JOAN HARTLEY	5.3	$	1,166.00	021146-00047	5829689
8/25/2009	135 THOMAS LAVENDER	2	$	740.00	021146-00047	5829548
8/27/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5832472
8/30/2009	135 THOMAS LAVENDER	2	$	740.00	021146-00047	5834748
8/30/2009	563 JOAN HARTLEY	0.9	$	198.00	021146-00047	5836531
8/31/2009	563 JOAN HARTLEY	2.9	$	638.00	021146-00047	5836586
8/31/2009	135 THOMAS LAVENDER	4.8	$	1,776.00	021146-00047	5835993
9/1/2009	135 THOMAS LAVENDER	5	$	1,850.00	021146-00047	5838604
9/1/2009	563 JOAN HARTLEY	10.5	$	2,310.00	021146-00047	5838906
9/2/2009	135 THOMAS LAVENDER	7	$	2,590.00	021146-00047	5840556
9/2/2009	563 JOAN HARTLEY	11.5	$	2,530.00	021146-00047	5845627
9/3/2009	563 JOAN HARTLEY	12.9	$	2,838.00	021146-00047	5845641
9/3/2009	135 THOMAS LAVENDER	10.5	$	3,885.00	021146-00047	5842889
9/4/2009	135 THOMAS LAVENDER	3.5	$	1,295.00	021146-00047	5842902
9/4/2009	563 JOAN HARTLEY	3.5	$	770.00	021146-00047	5845651
9/8/2009	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	5844842
9/25/2009	563 JOAN HARTLEY	1.4	$	308.00	021146-00047	5869607
9/28/2009	563 JOAN HARTLEY	1.9	$	418.00	021146-00047	5869081

10/1/2009	563 JOAN HARTLEY	1.3	$	286.00	021146-00047	5886966
10/7/2009	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	5877978
10/11/2009	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	5886974
10/12/2009	563 JOAN HARTLEY	2.3	$	506.00	021146-00047	5886975
10/13/2009	563 JOAN HARTLEY	1.4	$	308.00	021146-00047	5887004
10/13/2009	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	5890831
10/23/2009	563 JOAN HARTLEY	3.7	$	814.00	021146-00047	5905562
11/15/2009	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	5925750
11/21/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5933871
11/22/2009	563 JOAN HARTLEY	4.9	$	1,078.00	021146-00047	5933864
11/23/2009	563 JOAN HARTLEY	3.9	$	858.00	021146-00047	5933935
11/24/2009	563 JOAN HARTLEY	0.8	$	176.00	021146-00047	5933913
11/25/2009	563 JOAN HARTLEY	3.8	$	836.00	021146-00047	5933931
11/26/2009	135 THOMAS LAVENDER	0.1	$	37.00	021146-00047	5943542
11/27/2009	563 JOAN HARTLEY	4.8	$	1,056.00	021146-00047	5933826
11/28/2009	563 JOAN HARTLEY	5.9	$	1,298.00	021146-00047	5933846
11/29/2009	563 JOAN HARTLEY	7.9	$	1,738.00	021146-00047	5933860
11/30/2009	563 JOAN HARTLEY	5.6	$	1,232.00	021146-00047	5933960
12/3/2009	563 JOAN HARTLEY	3.6	$	792.00	021146-00047	5938843
12/3/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5943552
12/18/2009	563 JOAN HARTLEY	0	$	-	021146-00047	5966286
12/18/2009	563 JOAN HARTLEY	0	$	-	021146-00047	5966287
12/18/2009	135 THOMAS LAVENDER	0	$	-	021146-00047	5966288
1/12/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	5974190

1/26/2010	563 JOAN HARTLEY	2.1	$ 462.00	021146-00047	5988837
2/2/2010	563 JOAN HARTLEY	0.3	$ 66.00	021146-00047	5998107
2/2/2010	135 THOMAS LAVENDER	0.7	$ 259.00	021146-00047	5998425
2/3/2010	563 JOAN HARTLEY	2.1	$ 462.00	021146-00047	5999888
2/4/2010	135 THOMAS LAVENDER	0.3	$ 111.00	021146-00047	5999969
2/4/2010	563 JOAN HARTLEY	1.5	$ 330.00	021146-00047	6001159
2/5/2010	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	6007127
2/5/2010	135 THOMAS LAVENDER	0.3	$ 111.00	021146-00047	6009191
2/8/2010	563 JOAN HARTLEY	0.5	$ 110.00	021146-00047	6007145
2/10/2010	563 JOAN HARTLEY	6.3	$ 1,386.00	021146-00047	6007186
2/11/2010	563 JOAN HARTLEY	6.5	$ 1,430.00	021146-00047	6007478
2/12/2010	563 JOAN HARTLEY	5.7	$ 1,254.00	021146-00047	6009172
2/12/2010	135 THOMAS LAVENDER	0.6	$ 222.00	021146-00047	6010224
2/15/2010	135 THOMAS LAVENDER	0.8	$ 296.00	021146-00047	6010234
2/15/2010	563 JOAN HARTLEY	1.3	$ 286.00	021146-00047	6010237
2/16/2010	563 JOAN HARTLEY	4.3	$ 946.00	021146-00047	6012227
2/17/2010	563 JOAN HARTLEY	0.3	$ 66.00	021146-00047	6014040
2/21/2010	563 JOAN HARTLEY	0.8	$ 176.00	021146-00047	6019691
2/22/2010	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	6020907
2/24/2010	135 THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6023567
2/25/2010	563 JOAN HARTLEY	4.9	$ 1,078.00	021146-00047	6025952
2/25/2010	135 THOMAS LAVENDER	1.5	$ 555.00	021146-00047	6025958
2/26/2010	563 JOAN HARTLEY	4.2	$ 924.00	021146-00047	6026538

2/26/2010	135 THOMAS LAVENDER	0.95	$	351.50	021146-00047	6026977
2/28/2010	563 JOAN HARTLEY	4.7	$	1,034.00	021146-00047	6026584
3/1/2010	135 THOMAS LAVENDER	1.1	$	407.00	021146-00047	6028664
3/1/2010	563 JOAN HARTLEY	3.8	$	836.00	021146-00047	6029314
3/2/2010	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	6032980
3/2/2010	563 JOAN HARTLEY	3.9	$	858.00	021146-00047	6031319
3/3/2010	135 THOMAS LAVENDER	0.1	$	37.00	021146-00047	6032993
3/3/2010	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	6034734
3/5/2010	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	6053638
3/9/2010	563 JOAN HARTLEY	2.4	$	528.00	021146-00047	6042670
3/10/2010	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	6042677
3/11/2010	563 JOAN HARTLEY	4.9	$	1,078.00	021146-00047	6042690
3/16/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6045793
3/17/2010	135 THOMAS LAVENDER	2	$	740.00	021146-00047	6047950
3/18/2010	563 JOAN HARTLEY	1.9	$	418.00	021146-00047	6049740
3/19/2010	135 THOMAS LAVENDER	3	$	1,110.00	021146-00047	6054963
3/22/2010	135 THOMAS LAVENDER	3	$	1,110.00	021146-00047	6054971
3/22/2010	563 JOAN HARTLEY	7.2	$	1,584.00	021146-00047	6061159
3/23/2010	563 JOAN HARTLEY	4.3	$	946.00	021146-00047	6061163
3/23/2010	135 THOMAS LAVENDER	4.5	$	1,665.00	021146-00047	6056426
3/31/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6064920
4/1/2010	135 THOMAS LAVENDER	0.3	$	111.00	021146-00047	6068676
4/2/2010	135 THOMAS LAVENDER	0.2	$	74.00	021146-00047	6068684
4/5/2010	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	6075002

4/5/2010	135 THOMAS LAVENDER	0.3	$	111.00	021146-00047	6068669
4/6/2010	563 JOAN HARTLEY	0.8	$	176.00	021146-00047	6075069
4/7/2010	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	6075315
4/8/2010	563 JOAN HARTLEY	1.6	$	352.00	021146-00047	6075087
4/14/2010	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	6079397
4/15/2010	135 THOMAS LAVENDER	0.3	$	111.00	021146-00047	6091664
4/18/2010	563 JOAN HARTLEY	6.3	$	1,386.00	021146-00047	6083565
4/19/2010	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	6088653
4/19/2010	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	6089564
4/21/2010	135 THOMAS LAVENDER	1.2	$	444.00	021146-00047	6089625
4/21/2010	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	6089638
4/22/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6090550
4/23/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6093270
4/26/2010	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	6100492
4/27/2010	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	6100443
4/30/2010	135 THOMAS LAVENDER	1	$	370.00	021146-00047	6098819
4/30/2010	563 JOAN HARTLEY	0.5	$	110.00	021146-00047	6100255
5/3/2010	563 JOAN HARTLEY	0.5	$	110.00	021146-00047	6105999
5/4/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6106019
5/4/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6103723
5/10/2010	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	6107900
5/11/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6112405

6/4/2010	563 JOAN HARTLEY	0.2	$ 44.00	021146-00047	6148426
6/7/2010	563 JOAN HARTLEY	0.2	$ 44.00	021146-00047	6148436
6/17/2010	135 THOMAS LAVENDER	0.8	$ 296.00	021146-00047	6164860
6/28/2010	135 THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6170255
7/7/2010	135 THOMAS LAVENDER	0.5	$ 185.00	021146-00047	6180283
7/15/2010	563 JOAN HARTLEY	0.5	$ 110.00	021146-00047	6193658
7/20/2010	135 THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6196875
7/20/2010	563 JOAN HARTLEY	0.3	$ 66.00	021146-00047	6199330
7/21/2010	563 JOAN HARTLEY	0.3	$ 66.00	021146-00047	6199336
7/21/2010	135 THOMAS LAVENDER	0.3	$ 111.00	021146-00047	6197858
7/27/2010	280 LEIGHTON LORD	0.5	$ 147.50	021146-00047	6202446
7/27/2010	563 JOAN HARTLEY	1.7	$ 374.00	021146-00047	6204036
8/23/2010	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	6235572
8/24/2010	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	6236185
8/24/2010	163 HENRY BROWN	0.5	$ 150.00	021146-00047	6239104
8/24/2010	279 JOHN DAVIDSON	2.6	$ 715.00	021146-00047	6242174
8/24/2010	135 THOMAS LAVENDER	0.2	$ 74.00	021146-00047	6234665
8/31/2010	279 JOHN DAVIDSON	0.5	$ 137.50	021146-00047	6242501
9/1/2010	279 JOHN DAVIDSON	1.2	$ 330.00	021146-00047	6245930
9/3/2010	135 THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6248556
10/1/2010	135 THOMAS LAVENDER	0.6	$ 222.00	021146-00047	6282258
10/7/2010	280 LEIGHTON LORD	1	$ 295.00	021146-00047	6289743
10/8/2010	280 LEIGHTON LORD	1	$ 295.00	021146-00047	6291266

11/1/2010	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	6322486
11/8/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6329262
11/15/2010	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	6338649
11/17/2010	563 JOAN HARTLEY	3.4	$	748.00	021146-00047	6338952
11/18/2010	563 JOAN HARTLEY	9.2	$	2,024.00	021146-00047	6343259
11/19/2010	563 JOAN HARTLEY	5.4	$	1,188.00	021146-00047	6350238
11/21/2010	563 JOAN HARTLEY	5.5	$	1,210.00	021146-00047	6350591
11/22/2010	563 JOAN HARTLEY	2.1	$	462.00	021146-00047	6350247
11/23/2010	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	6350244
11/24/2010	563 JOAN HARTLEY	3.7	$	814.00	021146-00047	6350255
11/24/2010	280 LEIGHTON LORD	0.5	$	147.50	021146-00047	6348972
11/29/2010	563 JOAN HARTLEY	2.1	$	462.00	021146-00047	6350272
12/1/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6365539
12/2/2010	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	6365496
12/6/2010	563 JOAN HARTLEY	3.5	$	770.00	021146-00047	6365765
12/7/2010	135 THOMAS LAVENDER	2.5	$	925.00	021146-00047	6366133
12/7/2010	563 JOAN HARTLEY	4.5	$	990.00	021146-00047	6365747
12/8/2010	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	6365653
12/17/2010	563 JOAN HARTLEY	2.5	$	550.00	021146-00047	6373990
12/17/2010	135 THOMAS LAVENDER	1	$	370.00	021146-00047	6376219
12/23/2010	135 THOMAS LAVENDER	0.4	$	156.00	021146-00047	6382459
12/23/2010	135 THOMAS LAVENDER	0.2	$	78.00	021146-00047	6388827
12/27/2010	135 THOMAS LAVENDER	0.8	$	312.00	021146-00047	6382515

12/28/2010	563	JOAN HARTLEY	2.2	$ 528.00	021146-00047	6383682
12/28/2010	135	THOMAS LAVENDER	0.5	$ 195.00	021146-00047	6388929
12/29/2010	135	THOMAS LAVENDER	1.2	$ 468.00	021146-00047	6385109
12/29/2010	563	JOAN HARTLEY	3.4	$ 816.00	021146-00047	6385293
12/29/2010	465	SHEREE RABON	0.5	$ 82.50	021146-00047	6385841
12/31/2010	135	THOMAS LAVENDER	0.2	$ 78.00	021146-00047	6388962
1/5/2011	135	THOMAS LAVENDER	0.4	$ 156.00	021146-00047	6392760
1/11/2011	135	THOMAS LAVENDER	0.2	$ 78.00	021146-00047	6404157
1/13/2011	563	JOAN HARTLEY	0.5	$ 120.00	021146-00047	6402206
1/17/2011	135	THOMAS LAVENDER	0.3	$ 117.00	021146-00047	6406431
1/18/2011	135	THOMAS LAVENDER	0.3	$ 117.00	021146-00047	6406304
1/21/2011	563	JOAN HARTLEY	1.2	$ 288.00	021146-00047	6421397
1/24/2011	135	THOMAS LAVENDER	0.8	$ 312.00	021146-00047	6412394
2/24/2011	163	HENRY BROWN	0.4	$ 120.00	021146-00047	6451351
2/24/2011	563	JOAN HARTLEY	2.1	$ 504.00	021146-00047	6455347
3/18/2011	163	HENRY BROWN	0.3	$ 90.00	021146-00047	6474538
3/29/2011	163	HENRY BROWN	1.2	$ 360.00	021146-00047	6488507
3/29/2011	465	SHEREE RABON	1.3	$ 214.50	021146-00047	6490554
3/30/2011	280	LEIGHTON LORD	1	$ 295.00	021146-00047	6489871
4/1/2011	163	HENRY BROWN	1.3	$ 390.00	021146-00047	6497367
4/1/2011	465	SHEREE RABON	1.5	$ 247.50	021146-00047	6498974
4/4/2011	465	SHEREE RABON	0.5	$ 82.50	021146-00047	6499083

4/5/2011	465 SHEREE RABON	0.2	$	33.00	021146-00047	6501171
4/6/2011	465 SHEREE RABON	0.3	$	49.50	021146-00047	6515209
4/6/2011	163 HENRY BROWN	0.4	$	120.00	021146-00047	6499737
4/7/2011	563 JOAN HARTLEY	0.9	$	216.00	021146-00047	6504785
4/8/2011	563 JOAN HARTLEY	0.5	$	120.00	021146-00047	6504799
4/11/2011	563 JOAN HARTLEY	0.8	$	192.00	021146-00047	6504821
4/11/2011	135 THOMAS LAVENDER	0.6	$	234.00	021146-00047	6515151
4/12/2011	135 THOMAS LAVENDER	0.2	$	78.00	021146-00047	6515172
4/12/2011	135 THOMAS LAVENDER	0.2	$	78.00	021146-00047	6515179
4/12/2011	465 SHEREE RABON	1.2	$	198.00	021146-00047	6507455
4/12/2011	163 HENRY BROWN	0.6	$	180.00	021146-00047	6507705
4/13/2011	135 THOMAS LAVENDER	0.4	$	156.00	021146-00047	6515223
4/14/2011	163 HENRY BROWN	1.3	$	390.00	021146-00047	6507669
4/14/2011	465 SHEREE RABON	1	$	165.00	021146-00047	6508390
4/25/2011	135 THOMAS LAVENDER	0.3	$	117.00	021146-00047	6520980
4/26/2011	135 THOMAS LAVENDER	0.6	$	234.00	021146-00047	6521017
5/9/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6534924
7/5/2011	163 HENRY BROWN	0.3	$	90.00	021146-00047	6601053
7/19/2011	563 JOAN HARTLEY	0.4	$	96.00	021146-00047	6620543
8/12/2011	135 THOMAS LAVENDER	0.3	$	117.00	021146-00047	6654029
8/15/2011	163 HENRY BROWN	2.3	$	690.00	021146-00047	6649609
8/15/2011	135 THOMAS LAVENDER	1	$	390.00	021146-00047	6650125
8/16/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6649610
8/19/2011	465 SHEREE RABON	0.3	$	49.50	021146-00047	6658233

8/26/2011	135 THOMAS LAVENDER	0.3	$	117.00	021146-00047	6665750
9/19/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6692159
9/21/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6694191
9/22/2011	163 HENRY BROWN	0.6	$	180.00	021146-00047	6696952
10/26/2011	163 HENRY BROWN	1.2	$	360.00	021146-00047	6735718
10/27/2011	163 HENRY BROWN	0.3	$	90.00	021146-00047	6737315
10/28/2011	163 HENRY BROWN	0.4	$	120.00	021146-00047	6738434
11/3/2011	135 THOMAS LAVENDER	0.4	$	156.00	021146-00047	6748207
11/23/2011	163 HENRY BROWN	0.8	$	240.00	021146-00047	6770390
2/28/2012	135 THOMAS LAVENDER	0.2	$	80.00	021146-00047	6880691
3/8/2012	563 JOAN HARTLEY	0.4	$	110.00	021146-00047	6901739
3/15/2012	135 THOMAS LAVENDER	0.8	$	320.00	021146-00047	6897585
3/27/2012	163 HENRY BROWN	0.4	$	120.00	021146-00047	6915953
4/30/2012	163 HENRY BROWN	0.5	$	150.00	021146-00047	6953128
5/1/2012	163 HENRY BROWN	0.8	$	240.00	021146-00047	6953347
5/1/2012	135 THOMAS LAVENDER	0.5	$	200.00	021146-00047	6955534
5/2/2012	163 HENRY BROWN	0.3	$	90.00	021146-00047	6955424
5/3/2012	163 HENRY BROWN	1.6	$	480.00	021146-00047	6955398
5/3/2012	135 THOMAS LAVENDER	0.7	$	280.00	021146-00047	6955541
5/4/2012	163 HENRY BROWN	0.4	$	120.00	021146-00047	6959990
5/6/2012	135 THOMAS LAVENDER	6	$	2,400.00	021146-00047	6958133
5/6/2012	563 JOAN HARTLEY	3.7	$	1,017.50	021146-00047	6959523
5/7/2012	135 THOMAS LAVENDER	4.5	$	1,800.00	021146-00047	6958139

5/7/2012	563 JOAN HARTLEY	6.1	$	1,677.50	021146-00047	6959358
5/8/2012	563 JOAN HARTLEY	4.1	$	1,127.50	021146-00047	6959383
5/8/2012	135 THOMAS LAVENDER	4	$	1,600.00	021146-00047	6966191
5/16/2012	163 HENRY BROWN	0.8	$	240.00	021146-00047	6966813
5/17/2012	163 HENRY BROWN	0.3	$	90.00	021146-00047	6968483
5/17/2012	465 SHEREE RABON	2.2	$	385.00	021146-00047	6969042
5/18/2012	465 SHEREE RABON	0.3	$	52.50	021146-00047	6975662
5/18/2012	163 HENRY BROWN	0.3	$	90.00	021146-00047	6976642
5/21/2012	465 SHEREE RABON	1.2	$	210.00	021146-00047	6977079
5/21/2012	163 HENRY BROWN	0.4	$	120.00	021146-00047	6976621
5/25/2012	465 SHEREE RABON	0.2	$	35.00	021146-00047	6984371
6/5/2012	163 HENRY BROWN	0.3	$	90.00	021146-00047	6992534
7/30/2012	163 HENRY BROWN	0.3	$	90.00	021146-00047	7052223
7/30/2012	465 SHEREE RABON	1.2	$	210.00	021146-00047	7053480
7/31/2012	465 SHEREE RABON	0.5	$	87.50	021146-00047	7054986
8/1/2012	163 HENRY BROWN	0.2	$	60.00	021146-00047	7058040
8/1/2012	465 SHEREE RABON	1.5	$	262.50	021146-00047	7059432
8/2/2012	465 SHEREE RABON	1	$	175.00	021146-00047	7060519
8/23/2012	465 SHEREE RABON	0.7	$	122.50	021146-00047	7084999
8/23/2012	465 SHEREE RABON	0.4	$	70.00	021146-00047	7088842
8/24/2012	135 THOMAS LAVENDER	0.4	$	160.00	021146-00047	7088521
8/24/2012	465 SHEREE RABON	1.2	$	210.00	021146-00047	7088857
8/28/2012	465 SHEREE RABON	1.3	$	227.50	021146-00047	7091300

9/14/2012	465 SHEREE RABON	0.8	$	140.00	021146-00047	7110678
10/3/2012	465 SHEREE RABON	0.7	$	122.50	021146-00047	7133863
2/12/2013	163 HENRY BROWN	0.5	$	150.00	021146-00047	7276736
2/13/2013	163 HENRY BROWN	0.9	$	270.00	021146-00047	7278998
2/14/2013	465 SHEREE RABON	0.8	$	144.00	021146-00047	7280053
2/15/2013	465 SHEREE RABON	0.6	$	108.00	021146-00047	7281673
2/20/2013	163 HENRY BROWN	0.3	$	90.00	021146-00047	7288197
2/20/2013	465 SHEREE RABON	0.8	$	144.00	021146-00047	7289798
2/21/2013	465 SHEREE RABON	0.4	$	72.00	021146-00047	7289812
2/26/2013	163 HENRY BROWN	0.4	$	120.00	021146-00047	7294126
2/28/2013	163 HENRY BROWN	1	$	300.00	021146-00047	7296226
3/1/2013	163 HENRY BROWN	0.3	$	90.00	021146-00047	7299454
3/1/2013	465 SHEREE RABON	0.8	$	144.00	021146-00047	7302821
3/4/2013	465 SHEREE RABON	2.5	$	450.00	021146-00047	7302826
3/4/2013	163 HENRY BROWN	4.2	$	1,260.00	021146-00047	7301031
3/6/2013	135 THOMAS LAVENDER	0.5	$	205.00	021146-00047	7308407
3/6/2013	563 JOAN HARTLEY	0.5	$	140.00	021146-00047	7309324
3/8/2013	465 SHEREE RABON	0.9	$	162.00	021146-00047	7309058
3/8/2013	163 HENRY BROWN	0.2	$	60.00	021146-00047	7306709
3/20/2013	465 SHEREE RABON	0.2	$	36.00	021146-00047	7323389
3/27/2013	465 SHEREE RABON	1	$	180.00	021146-00047	7330095
3/28/2013	465 SHEREE RABON	0.5	$	90.00	021146-00047	7329525
3/28/2013	465 SHEREE RABON	0.5	$	90.00	021146-00047	7330259

3/29/2013	563 JOAN HARTLEY	6.2	$	1,736.00	021146-00047	7331844
3/30/2013	563 JOAN HARTLEY	7.2	$	2,016.00	021146-00047	7331860
3/31/2013	563 JOAN HARTLEY	7.7	$	2,156.00	021146-00047	7331866
4/1/2013	563 JOAN HARTLEY	12.2	$	3,416.00	021146-00047	7335709
4/1/2013	135 THOMAS LAVENDER	0.6	$	246.00	021146-00047	7335806
4/1/2013	135 THOMAS LAVENDER	1	$	410.00	021146-00047	7335838
4/18/2013	465 SHEREE RABON	0.2	$	36.00	021146-00047	7356825
5/14/2013	465 SHEREE RABON	0.5	$	90.00	021146-00047	7384391
5/20/2013	465 SHEREE RABON	0.2	$	36.00	021146-00047	7393480
5/22/2013	563 JOAN HARTLEY	0.2	$	56.00	021146-00047	7397440
6/11/2013	465 SHEREE RABON	1	$	180.00	021146-00047	7418744
6/12/2013	563 JOAN HARTLEY	0.7	$	196.00	021146-00047	7419407
6/12/2013	135 THOMAS LAVENDER	0.2	$	82.00	021146-00047	7419448
6/13/2013	135 THOMAS LAVENDER	0.8	$	328.00	021146-00047	7419507
6/13/2013	563 JOAN HARTLEY	0.8	$	224.00	021146-00047	7419422
7/10/2013	563 JOAN HARTLEY	0.4	$	112.00	021146-00047	7449962
7/12/2013	563 JOAN HARTLEY	3.4	$	952.00	021146-00047	7451840
7/26/2013	563 JOAN HARTLEY	0.3	$	84.00	021146-00047	7467414
7/29/2013	563 JOAN HARTLEY	1.4	$	392.00	021146-00047	7469690
8/2/2013	563 JOAN HARTLEY	1.3	$	364.00	021146-00047	7479146
8/8/2013	563 JOAN HARTLEY	1.1	$	308.00	021146-00047	7484928
8/12/2013	563 JOAN HARTLEY	1.6	$	448.00	021146-00047	7486039
9/4/2013	563 JOAN HARTLEY	0.2	$	56.00	021146-00047	7512326

9/5/2013	563 JOAN HARTLEY	1.4	$	392.00	021146-00047	7516403
9/9/2013	563 JOAN HARTLEY	3.6	$	1,008.00	021146-00047	7516464
9/10/2013	563 JOAN HARTLEY	3.4	$	952.00	021146-00047	7517623
9/11/2013	563 JOAN HARTLEY	10.3	$	2,884.00	021146-00047	7518528
10/16/2013	563 JOAN HARTLEY	0.5	$	140.00	021146-00047	7561953
8/28/2014	135 THOMAS LAVENDER	0.3	$	127.50	021146-00113	7948574
10/23/2014	563 JOAN HARTLEY	0.4	$	118.00	021146-00113	8018326
10/27/2014	563 JOAN HARTLEY	0.5	$	147.50	021146-00113	8018475
10/30/2014	563 JOAN HARTLEY	1.8	$	531.00	021146-00113	8018812
10/31/2014	563 JOAN HARTLEY	6.2	$	1,829.00	021146-00113	8018894
11/2/2014	563 JOAN HARTLEY	5.3	$	1,563.50	021146-00113	8028751
11/3/2014	563 JOAN HARTLEY	9.5	$	2,802.50	021146-00113	8028753
11/3/2014	135 THOMAS LAVENDER	1.8	$	765.00	021146-00113	8029209
11/4/2014	135 THOMAS LAVENDER	0.8	$	340.00	021146-00113	8029294
11/4/2014	563 JOAN HARTLEY	0.3	$	88.50	021146-00113	8028768
12/1/2014	563 JOAN HARTLEY	0.4	$	118.00	021146-00113	8061389
2/3/2015	135 THOMAS LAVENDER	0.4	$	176.00	021146-00113	8134328
2/9/2015	563 JOAN HARTLEY	4.3	$	1,333.00	021146-00113	8126184
2/27/2015	563 JOAN HARTLEY	0.5	$	155.00	021146-00113	8143613
2/28/2015	563 JOAN HARTLEY	2.3	$	713.00	021146-00113	8143616
3/2/2015	563 JOAN HARTLEY	7.9	$	2,449.00	021146-00113	8148206
3/2/2015	135 THOMAS LAVENDER	0.3	$	132.00	021146-00113	8168999
3/12/2015	135 THOMAS LAVENDER	2	$	880.00	021146-00113	8168437
3/12/2015	563 JOAN HARTLEY	2.8	$	868.00	021146-00113	8163913

3/13/2015	563 JOAN HARTLEY	0.8	$	248.00	021146-00113	8163967
3/13/2015	135 THOMAS LAVENDER	1	$	440.00	021146-00113	8168447
3/14/2015	135 THOMAS LAVENDER	9	$	3,960.00	021146-00113	8168457
3/16/2015	135 THOMAS LAVENDER	7.5	$	3,300.00	021146-00113	8168879
3/16/2015	563 JOAN HARTLEY	7.1	$	2,201.00	021146-00113	8164044
3/17/2015	563 JOAN HARTLEY	10.8	$	3,348.00	021146-00113	8165147
3/17/2015	135 THOMAS LAVENDER	7.2	$	3,168.00	021146-00113	8168904
3/18/2015	135 THOMAS LAVENDER	3	$	1,320.00	021146-00113	8168914
3/18/2015	563 JOAN HARTLEY	3.3	$	1,023.00	021146-00113	8165710
Total			$	217,048.50		

Exhibit B

NOTE: The executed Exhibit B, Affidavit of Charles Mickel, is located on R. pp. 1307-1420, and not reproduced here.

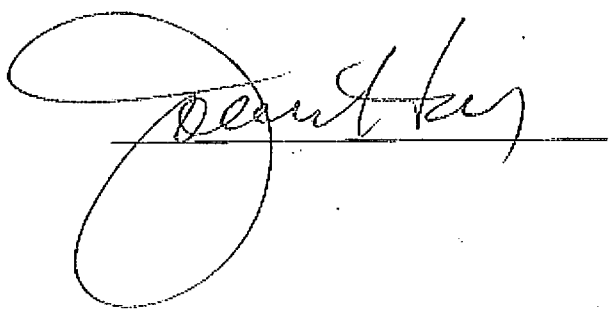
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

This is to certify that Respondent Roper Pond, LLC's Response in Opposition to Petitioners' Motion to Strike or, Alternatively, to Allow Discovery has been served on counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 16th day of July, 2015:

Stephen P. Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S MOTION TO STRIKE**

FILED
SEP 10 2015
SC ADMIN. LAW COURT

Pursuant to Rule 19 of the South Carolina Rules of Procedure for the Administrative Law Court, Respondent Roper Pond, LLC ("Roper Pond"), by and through its undersigned counsel, hereby moves the Court for an Order striking the Affidavit of Eugene C. McCall, Jr. ("McCall Affidavit"), the Affidavit of D. Cravens Ravenel ("Ravenel Affidavit"), and the Affidavit of John P. Freeman ("Freeman Affidavit") (collectively referred to as the "Affidavits") and to exclude the opinions therein. Roper Pond further moves to strike statements from the oral arguments before the Supreme Court as irrelevant and inadmissible hearsay. If the Court denies the motion to strike these statements, Roper Pond moves the Court for an order pursuant to Rule 106, SCRE, permitting Roper Pond to engage a court reporter to produce a full transcript of the oral arguments to be admitted into evidence. The grounds for this motion are stated herein below.

Petitioners offer the Freeman Affidavit in which Mr. Freeman responds at length the arguments raised by Roper Pond in support of its Petition for Fees and Costs and opines on the

legal merits of those arguments. Mr. Freeman reviewed the filings in the record before this Court and the appellate courts. Mr. Freeman further opines on the reasonableness of counsel for Petitioners and on whether there is a basis for a determination that Petitioners' challenge to the DHEC decision at issue in this case was frivolous. As discussed below, Mr. Freeman merely steps into the shoes of this Court in determining whether Roper Pond is entitled to an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 15-77-300 or sanctions under Rule 72, SCRPALC.

Petitioners offer the Ravenel Affdiavit in which Mr. Ravenel opines on the Town's claims in this matter. Mr. Ravenel reviewed the filings in the record before this Court and the appellate courts and opined as follows: "Based on my review of the relevant documents, in my professional opinion, the Town presented a colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC's authorization to Roper Pond, LLC." (Ravenel Affidavit, ¶ 8). Mr Ravenel further opines:

> 11. In my professional opinion as an attorney, the Town of Arcadia Lakes' claims were well founded and not frivolous. In addition, I have seen no indication that the Town's actions were simply to delay the Roper Pond project, but rather that the Town has throughout this litigation, expressed a real and serious concern about the impact that the Roper Pond project would have on the aesthetic and environmental qualities of the Town that made it a desirable place to live. The Supreme Court's dismissal of this case as moot further supports my conclusion. Had the Supreme Court concluded that the Town failed to present a compelling case on the merits, it could have affirmed the Court of Appeals Opinion. Instead, the Supreme Court's opinion indicates that it believed the Town presented a meritorious case; however, it was unable to grant the requested relief because the project had been completed.

(Ravenel Affidavit, ¶ 8). As discussed more fully below, this statement is nothing more than the affiant's opinion on how this Court should rule based on his review of the record. Additionally, Mr. Ravenel re-states Petitioners' arguments for interpreting the Supreme Court's order as support for Petitioners' positions.

Petitioners offer the McCall Affidavit in which Mr. McCall opines that the Petitioners' petition "contained a reasonable basis in law for pursuant their request for a contested case." (McCall Affidavit, ¶ 12). Mr. McCall further opines that "[b]ased upon the history, facts and law in this case, I have concluded, as an attorney and an engineer, that there was a reasonable basis for pursuing this litigation. The Supreme Court's dismissal of this case as moot further supports my conclusion." (McCall Affidavit, ¶ 13). Mr. McCall further opines that "Petitioners' claims were well founded and not frivolous." (McCall Affidavit, ¶ 14).

The Affidavits are merely the affiants' opinions on the ultimate legal questions before this Court and are therefore inadmissible under Rule 702, SCRE. Rule 702, which governs the admissibility of expert testimony, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

S.C.R. Evid. 702. (Emphasis added). As a preliminary matter, the Affidavits do not address a subject matter which is beyond the ordinary knowledge of the Court as the trier of fact on Roper Pond's Petition for Attorneys' Fees. According to the Affidavits, the affiants merely reviewed the filings before this Court and the appellate courts. Essentially, the affiants undertook the examination of the record in this case and researched the relevant law to opine on the ultimate legal issue before this Court. In other words, the affiants have stepped into the shoes of this Court and offered the Court their opinions on the legal determinations to be made by this Court.

The affiant's opinions are inadmissible legal opinions and the Affidavits should be stricken. The Supreme Court ruling in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), is directly on point with this case, and in fact, involves the proffered opinion of Mr. Freeman which the trial court in that case declined to consider. The holding in *Dawkins* provides as follows:

Rule 702, SCRE, provides that "[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." While it is true that "an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," Rule 704, SCRE, Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. *See O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106-07, 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

In general, expert testimony **on issues of law** is inadmissible. *See generally* Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797, 797 (1984); *see also Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); *United States v. Sinclair*, 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

Recently, this Court decided the issue of whether expert testimony from a criminal defense attorney on whether trial counsel was deficient could be admitted at a post-conviction relief (PCR) hearing. *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002). Green argued that Rule 702 required the PCR judge to admit the expert opinion testimony. We disagreed, and stated the following:

> The expert offered no factual evidence. He proffered his opinion, assuming certain facts, [that] trial counsel's actions fell below acceptable legal standards of competence. **The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.** Such "testimony" falls outside of Rule 702, SCRE.

Id. (emphasis added).

Green is instructive to the instant case. Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information,[FN4] the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise. *See Green, supra; O'Quinn, supra.*

> FN4. For instance, Professor Freeman offered his opinion that based on the value of the south side tract, Seaside's stock value per share was approximately $800, and therefore, selling the stock for $100 per share was improper.

Dawkins v. Fields, 354 S.C. 58, 65-67, 580 S.E.2d 433, 437 (2003) (emphasis in original). In this case, the affiants do not even offer any "helpful, factual information." The Affidavits offer no "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue" related to Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC ("Petition for Attorneys' Fees"). The affiants offer no admissible testimony to assist the Court in any factual determination at issue in Roper Pond's Petition. The Affiants merely make Petitioners argument that Roper Pond's Petition should be denied. In particular, Mr. Freeman simply provides his opinion on whether the case warrants sanctions as a frivolous proceeding under the "reasonable attorney" standard in S.C. CODE ANN. § 15-36-10. The Affidavits are nothing more than an attempt to "usurp the trial court's role in determining whether" Roper Pond's Petition for Attorneys' Fees should be granted.

As noted, Mr. Freeman in substantial part opines on the "reasonable attorney" standard under S.C. CODE ANN. § 15-36-10 (Frivolous Civil Proceedings Sanctions Act). As discussed more fully in Roper Pond's Reply to Petitioner's Response, filed simultaneously herewith, Rule 72 does not require a showing that the case is frivolous. Under the Rule 72, SCRPALC, as amended in 2013, this Court may impose sanctions upon a determination that the contested case "is frivolous **or** taken solely for purposes of delay." Rule 72, SCRPALC (emphasis added). Contrary to the Petitioners' assertions, a showing that the contested case is frivolous is not required for the imposition of sanctions under Rule 72. While the 2009 Revised Notes to Rule 72 provides that this Court "may refer to S.C. CODE ANN. § 15-36-10, the Frivolous Civil

Proceedings Sanctions Act" in determining whether a case is frivolous, referral to the Act is clearly within the Court's discretion and does not require the Court to use the standards set forth under the Act in making such determination. Roper Pond has presented substantial evidence that Petitioners brought the case "solely for the purpose of delay." Accordingly, a showing that the contested case was frivolous is not necessary for the award of sanctions to Roper Pond and Petitioners' arguments that Roper Pond has not met the frivolous standard under Rule 72 or the Frivolous Civil Proceedings Sanctions Act does not preclude this Court's imposition of sanctions under Rule 72.

With respect to Mr. McCall's opinions as a professional engineer, he attests that prior to the filing of this contested case he provided counsel for Petitioners with his professional engineering opinion regarding "appropriate controls" necessary to prevent sedimentation and water quality degradation. (McCall Affidavit, ¶ 8). Such opinions are irrelevant in the context of the issue currently before the Court. In the Final Order and Decision, this Court found that Petitioners failed to offer any evidence that the storm water pollution prevention plan ("SWPPP") approved by the Department was technically deficient. (Final Order and Decision, pp. 21-22). The Court of Appeals affirmed this Court's finding on that issue: "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013). Moreover, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Indeed, Mr. McCall

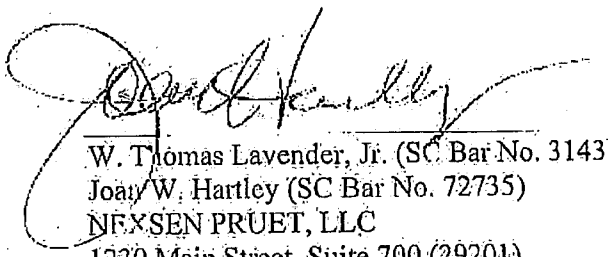
attests that he offered this opinion to counsel for Petitioners, but was unable to provide the testimony at the hearing on the merits in this case because of a potential conflict. (McCall Affidavit, ¶ 8). Yet, Petitioners engaged no other professional engineer to provide expert testimony regarding the sufficiency of the SWPPP. Indeed, Petitioners' only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Administrative Hearing dated September 3 and 4, 2009, hereinafter "Tr.," p. 201, l. 12 – p. 202, l. 7). Having failed to present any such evidence at the hearing on the merits, Petitioners may not now offer such testimony. Petitioners cannot retroactively correct the deficiencies in the case presented to the Court to avoid a determination that the Town acted without substantial justification.

Additionally, the photograph attached to the McCall Affidavit and Mr. McCall's testimony regarding observations during entry onto the Roper Pond on June 14, 2015 should be stricken. Any entry on Roper Pond's property to obtain evidence to be admitted in this litigation should have been undertaken in the course of discovery pursuant to Rule 21, SCRPALC, and Rule 34, SCRCP. Petitioners' served no such discovery on Roper Pond. Moreover, this Court has not authorized discovery even though a request for discovery was raised by Petitioners in its Motion to Strike or, Alternatively, to Allow Discovery filed on June 24, 2015. Accordingly, the photographs attached to the McCall Affidavit and Mr. McCall's statements regarding his observation upon entry onto the Roper Pond property should be stricken.

Finally, Petitioners' statements and quotes from the audio recording of the oral arguments before the Supreme Court on March 18, 2015, should be stricken as irrelevant and inadmissible hearsay. Roper Pond also offered quotes from the audio recording, but only to provide further clarification of those presented by Petitioners. Petitioners offer such statements in support of its

arguments that its claim have merit. Such statements cannot be offered for this purpose as the Supreme Court made no rulings from the bench. As at any oral argument to an appellate court or a motion hearing before this Court, the questions addressed to the attorneys might at times appear to forecast a judge's ultimate decision on an issue, but in reality offer no reliable indication of how the Court will rule on an issue. Accordingly, Roper Pond requests that the Court strike all statements and quotes from the audio recording of the oral arguments before the Supreme Court on March 18, 2015, in both the Petitioners' Response and Roper Pond's Reply. If the Court denies the request to so strike, Roper Pond moves the Court for an order pursuant to Rule 106, SCRE, permitting Roper Pond to engage a court reporter to produce a full transcript of the oral arguments to be admitted into evidence.

For the foregoing reasons, Roper Pond respectfully moves the Court for an order striking the Affidavit of Eugene C. McCall, Jr., the Affidavit of D. Cravens Ravenel, and the Affidavit of John P. Freeman and to exclude the opinions therein. Roper Pond further moves to strike statements from the oral arguments before the Supreme Court as irrelevant and inadmissible hearsay. If the Court denies the motion to strike these statements, Roper Pond moves the Court for an order pursuant to Rule 106, SCRE, permitting Roper Pond to engage a court reporter to produce a full transcript of the oral arguments to be admitted into evidence.



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Attorneys for Respondent
Roper Pond, LLC

September 10, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **PETITIONERS' RESPONSE TO RESPONDENT ROPER POND LLC'S MOTION TO STRIKE**

INTRODUCTION

Respondent Roper Pond, LLC ("Roper Pond") moves this Court to strike the Affidavit of Eugene C. McCall, Jr. ("McCall Affidavit"), the Affidavit of D. Cravens Ravenel ("Ravenel Affidavit"), and the Affidavit of John P. Freeman ("Freeman Affidavit") (collectively referred to as the "Affidavits"), offered as expert opinions on the questions surrounding whether the Petitioners' had a reasonable basis to pursue its claims against Respondent in the underlying case and whether such claims were brought solely for delay. Petitioners oppose this motion and respectfully request this Court deny Respondent Roper Pond's motion.

FACTUAL AND LEGAL SUMMARY

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC. The Petitioners successfully petitioned the South Carolina Supreme Court for

a Writ of Certiorari, which was granted on August 22, 2014. After the Supreme Court heard oral arguments on March 18, 2015, the Court dismissed Petitioners' appeal as moot in an April 9, 2015 Order. Roper Pond then filed a Motion for Costs pursuant to SCARCR Rule 222, which was denied by the Supreme Court in a June 17, 2015 Order. Order of Supreme Court, dated July 17, 2015. Roper Pond then filed its Second Amended Petition for Attorneys Fees and Costs and for Sanctions before this Court on May 25, 2015.

To help inform this court of the issues present in the fee dispute, Petitioners offered the Affidavits of three experts: (1) an expert in environmental health engineering in his professional capacity as a registered professional engineer familiar with the case, as well as in environmental and administrative practice (McCall); (2) an expert in law and ethics, with experience in attorney ethics matters as the Chairman of the South Carolina Supreme Court Committee on Character and fitness for 15 years (Ravenel); and (3) an expert in legal malpractice and professional responsibility whose expert opinions have been frequently used by courts across this state (Freeman). Collectively these experts investigated and assessed the factual and legal bases supporting this case at multiple stages: prior to filing the request for contested case; while the case was pending in the court of appeals; and after the supreme court issued its ruling.

Roper Pond seeks to strike these Affidavits pursuant to Rule 19 of the South Carolina Rules of Procedure for the Administrative Law Court, arguing that the Affidavits "are merely the affiants' opinion on the ultimate legal questions before this Court and are therefore inadmissible under Rule 702, SCRE." Respondent Roper Pond, LLC's Motion to Strike, p. 3. Since this characterization of the Affidavits is incorrect and contrary to well-established South Carolina law on the admissibility of expert testimony, Petitioners ask that this court deny Roper Pond's

Motion to Strike.

ARGUMENT

While an expert can not "usurp the trial court's role in determining whether" Roper Pond is entitled to attorneys fees and sanctions in this case, experts are able to offer an opinion that "embraces an ultimate issue to be decided by the trier of fact." See Dawkins v. Fields, 354 S.C. 58, 65 (2003) (internal citation omitted). To determine whether an expert is offering an admissible legal opinion on an ultimate issue or wrongfully extending into the exclusive province of the trial court, courts are to examine whether the testimony offered is on questions of fact or mixed questions of law and fact or exclusively on issues of law. See Expert Legal Testimony, 97 Harv.L.Rev. 797, 798 (1984).

Respondent's Reliance on *Dawkins v. Fields* is Inapposite

Roper Pond focuses on Dawkins v. Fields, a sole case where Freeman's testimony was held to stray too far from mixed questions of law and fact to questions of law to be exclusively decided by the court. Aside from the fact that both cases involve affidavits submitted by Professor Freeman, the situation at hand has very little in common with that in Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). In Dawkins, "Professor Freeman's affidavit primarily contained legal arguments and conclusions" that were not based on his expert review of the relevant facts. Id. at 65. As the Supreme Court later stated: "In Dawkins v. Fields . . . this Court held that the trial court properly refused to consider an expert affidavit filed in response to a summary judgment motion where the **affidavit largely contained only legal opinions, conclusions, and no factual support**." State v. Morris, 376 S.C. 189, 205 fn.7 (2008) (emphasis added). The Supreme Court in Dawkins equated Freeman's affidavit to other rejected expert

testimony that "offered no factual evidence" and "was not designed to assist the [ ]court to understand certain facts, but, rather, was legal argument." Dawkins, 354 S.C. at 66.

The holding in Dawkins is explained more fully by reference to the Harvard Law Review article on which it relies. See Id. at 66. That article notes that "expert testimony on questions of fact and on mixed questions of law and fact is generally permissible but testimony on issues of law is not." Expert Legal Testimony, 97 Harv.L.Rev. 797, 798 (1984). The article explains further that in between pure questions of fact and pure questions of law "exists a vast range of issues that are termed mixed questions of law and fact," on which expert testimony is admissible. Id. Indeed, most expert testimony, including Professor Freeman, Mr. Ravenel and Mr. McCall's testimony in this case, falls within that range of mixed questions of fact and law, where an expert offers a factual explanation to support a legal conclusion. See Id. at 799.

In contrast, the reason why Professor Freeman's affidavit was rejected in Dawkins is because it strayed too far to the extreme end of that range, offering legal conclusions without reference to the facts. However, to hold that the Affidavits offered in the present case veer too far toward testifying exclusively to questions of law is to erroneously restrict the admissibility of expert legal testimony generally. Each affidavit addresses the mixed questions of law and fact raised by Roper Pond's motion. Indeed, there is no way to determine how a "reasonable attorney" would act without having a reasonable attorney (or three in this case) discuss how they personally evaluated and assessed the factual and legal grounds for the case.

The Vast Body of Case Law Supports Admission of the Affidavits

The case at hand is more akin to Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197 (2008). In that case, the defendants similarly argued that Professor Freeman's expert

testimony should not be admitted because it offered legal conclusions. Id. at 206. In response, the Supreme Court differentiated Dawkins, drawing a clear line between pure legal questions and mixed questions of fact and law. Id. at 207. Specifically, the question of whether a fiduciary duty existed at all in the Vortex case was a pure question of law reserved for the court and could not be the subject of expert testimony. Id. On the other hand, the question of whether that fiduciary duty was breached under the specific facts of the case was a mixed question appropriate for Professor Freeman's expert testimony. Id. Professor Freeman indeed testified that a breach had occurred (which was an ultimate issue before the court), and the Supreme Court ruled that this testimony was properly admitted. Id. at 207.

Analogizing to this case, the Affiants have not offered testimony on what legal standard the Court should apply or on what that legal standard means. Likewise, they have not offered bald legal conclusions without reference to the specific facts of this case. In this respect, the Affidavits are typical of most expert testimony and are consistent with the purposes of Rule of Evidence 702. In this case, Professor Freeman, Mr. Ravenel and Mr. McCall offer testimony that comes down squarely and strongly against Roper Pond's efforts to recover fees, costs and sanctions. Under such circumstances, the Respondent's effort to block that testimony is not surprising and is based entirely on its dissatisfaction with the Affidavits' impact. However, under the authority discussed below, the Affidavits clearly fall within the vast allowable range of expert testimony that addresses a mixed question of fact and law.

As Professor John Freeman's affidavit and curriculum vitae lay out, his education, teaching experience, publications, and decades of legal practice have firmly established him as a nationally renowned scholar on legal ethics and conduct and a sought-after expert in matters of

legal fees and sanctions. He has also served as legal counsel in such matters. Contrary to the Respondent's motion, Professor Freeman regularly utilizes his expertise in legal ethics to offer expert opinions and conclusions, just like those contained in his challenged affidavit. Such opinions and conclusions from Professor Freeman have been admitted into, and relied upon by, an array of South Carolina courts. This Court need not take counsel's word for that fact, as Judge Michelle Childs recently stated the same, describing: "Professor John Freeman, who often serves as an expert on attorney's fees issues" and "Professor John Freeman, whose expert testimony has been accepted by District Courts in the region on the matter of reasonableness of attorney's fees awards." Savani v. URS Professional Solutions LLC, 2014 WL 172503, *7-*8 (D.S.C. 2014); See also Kennedy v. Aneco Elec. Constr., Inc., 2011 WL 7154432 (S.C. Work. Comp. Comm. Jan. 5, 2011), *19 ("Professor Freeman has also testified in numerous large cases concerning the reasonableness of attorney's fees.").

Indeed, a simple search reveals a host of cases where Professor Freeman has offered expert opinions and conclusions equivalent to those in his challenged affidavit. In Hatfield v. Van Epps 358 S.C. 185 (2004), Professor Freeman was called as an expert witness in a case considering whether legal malpractice had occurred through improper conflict of interest. The Supreme Court summarized as follows:

> Professor John Freeman, appearing without compensation, was qualified as an expert in lawyer's duties and legal malpractice, based largely on his academic and other professional involvement in matters of legal ethics. He stated, "**I believe there was an improper conflict of interest**, and I believe that Susan Van Epps suffered because that conflict of interest was not dealt with properly." Professor Freeman further testified that this conflict gave rise to Law Firm's failure to properly value Stewart's interest and that, in his opinion, if there was an unethical conflict of interest, **no attorney's fees should be awarded**.

Id. at 197-98 (emphasis added). Note that Professor Freeman offered a conclusion on the very question before the court, based on his expert consideration of the relevant facts; this conclusion was admitted and relied upon by the court. The situation is the same in Holmes v. Haynsworth, Sinkler & Boyd, P.A., 760 S.E.2d 399 (2014), where attorneys were sued by a former client for legal malpractice. Professor Freeman offered his expert opinion on whether the alleged conduct constituted legal malpractice. Specifically: "In his testimony, **Professor Freeman repeatedly and unequivocally stated that he believed Respondents did not commit malpractice** and nothing Respondents did in representing Appellant would have altered the result given applicable federal antitrust law." Id. at 408 (emphasis added). Again, Professor Freeman offered a conclusion on the ultimate question before the court, based on his expert consideration of the relevant facts; this conclusion was admitted and relied upon by the court. Likewise, in Brandt v. Gooding, 368 S.C. 618, 622-23 (2006), Professor Freeman offered expert analysis of the facts and expressed his opinion that legal malpractice had occurred: "The letter was introduced in Professor Freeman's deposition and used by him to **opine that Gooding had committed malpractice**." Yet again, Professor Freeman offered a conclusion on the very question before the court, based on his expert consideration of the relevant facts; this conclusion was admitted and relied upon by the court. Finally, in Dehlinger v. U.S., 2012 WL 1719294 (D.S.C. 2012), Professor Freeman submitted an affidavit in which he relied upon his expertise in legal ethics to reach a conclusion on attorney conduct. Professor Freeman opines:

> **I am convinced as an expert in the legal ethics field that Mr. Engelhard, Dr. Dehlinger's lead counsel, labored under an actual conflict of interest**, and that the attorney's misconduct in dealing with that conflict of interest adversely affected Mr. Engelhard's representation. . . . In my judgment, **Mr. Engelhard's conduct was in flagrant violation of a host of ethical rules applicable to lawyers** in South Carolina and in Washington State (Mr. Engelhard's home state),

Id. at (emphasis added). Note that Professor Freeman's affidavit very plainly expresses an opinion on the ultimate question before the court, based on his expert consideration of the relevant facts. The affidavit was admitted and relied upon by the court.

Most recently, Professor Freeman was qualified and cited as an expert witness in numerous subjects including professional responsibility and "professional duties handling litigation for clients." Tuten v. Joel, 410 S.C.104, 763 S.E.2d 54 (Ct. App. 2014). Based on his review of the facts of that case, Professor Freeman testified on an ultimate issue: the existence of an attorney-client relationship and the duties arising thereunder. Id.

The Respondent's Motion to Strike is inconsistent with all of these cases because the Respondent fails to account for the difference between an expert offering a legally significant opinion based on the facts of the case (which is perfectly acceptable) and an expert offering an opinion on a purely legal issue or question. Expert testimony inherently involves an assessment of relevant facts in order to offer a conclusion on an issue before the court. In this way, the conclusions and opinions offered by an expert witness are often of great legal significance and can indeed "embrace[ ]an ultimate issue to be decided by the trier of fact." S.C.R. Evid. 704. This situation is entirely distinct, though, from an expert offering testimony on the type of purely legal question that is strictly reserved for the court and was rejected in Dawkins.

The Affidavits of McCall and Ravenel similarly fall within the ambit of testimony allowed under the above-cited precedent. Gene McCall testified that he inspected Roper Pond in his capacity as a professional engineer with significant experience in construction and post-construction stormwater runoff issues. He further testified that his investigation revealed that the

water quality in Roper Pond would be significantly degraded without implementing proper controls, and that, "**in [his] professional opinion**," the petition for a contested case offered a "colorable, adequate, reasonable, and proper factual basis." See Affidavit of Eugene McCall, 11 (emphasis added). He continues to reiterate throughout the Affidavit that his statements are his professional opinion, informed by his professional experience as both an engineer and a licensed attorney. He never makes any assertion that this court "should rule, as a matter of law," that Petitioners' contested case was not frivolous nor taken solely for purposes of delay. Nor does he opine that sanctions should not be awarded. See Dawkins, 354 S.C. at 66 (citing Green v. State, 351 S.C. 184, 198 (2002)) (emphasis added). In Green, the expert witness was a criminal defense attorney who offered testimony on an adequacy of counsel issue at a post-conviction relief hearing. See Green, 351 S.C. at 198. The attorney in that case offered "**no factual evidence**," but instead only offered an opinion on the ultimate issue and how the judge should rule on the case. Id. (emphasis added). This is simply not analogous to the McCall Affidavit, where McCall offers facts as to his findings in his investigation as a professional engineer, his visual observations of Roper Pond and how it has entered a more eutrophic state since 2008. See McCall Affidavit, 8, 13. While he offers a position that is conclusive on the ultimate legal issue, he never argues the law or asserts how the judge should rule on this motion. In contrast, the court in Dawkins held that the stricken affidavit "reads as if it could have been respondents' oral argument to the trial court at the . . . hearing." Dawkins, 354 S.C. at 66.

The Ravenel Affidavit is similar in nature to the McCall affidavit. They "embrace[] an ultimate legal issue," which is allowed under Rule 704, SCRE. See S.C.R. Evid. 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable

because it embraces an ultimate issue to be decided by the trier of fact."). Mr. Ravenel is an attorney with extensive experience working in legal ethics in a professional capacity. As an expert in legal ethics, he testified in his affidavit that he reviewed the relevant documents contemporaneous with the appeal and that in his professional opinion the contested case was meritorious and was not filed with the purpose to delay. While this opinion speaks to an ultimate legal issue to be decided by this court, he did not step in to try to make that decision for the court. He also asserted facts which informed his professional opinion which could help this court decide whether attorneys fees and sanctions are appropriate. See, e.g., Ravenel Affidavit, 10 ("The Town of Arcadia Lakes briefs contain questions of law that have not been answered by an appellate court[.]"); id. at 11 ("[T]he Town has . . . expressed a real and serious concern about the impact that the Roper Pond project would have on the aesthetic and environmental qualities of the Town that make it a desirable place to live.").

Finally, Professor John Freeman's education, teaching experience, publications, decades of legal practice, and wealth of admitted expert opinions before South Carolina courts all demonstrate his ability to successfully offer "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue," as he has done many times before. See S.C.R. Evid. 702. Professor Freeman engages in a thorough analysis of the relevant facts, reviewing voluminous documents from the record and applying his expert knowledge and experience, to arrive at a legally significant conclusion on the issues before this court. Freeman has offered very similar expert testimony which has been admitted and used by courts throughout this state on many more occasions. See, e.g., Savani v. URS Professional Solutions LLC, 2014 WL 172503, *7-*8 (D.S.C. 2014); Kennedy v. Aneco Elec.

Constr., Inc., 2011 WL 7154432 (S.C. Work. Comp. Comm. Jan. 5, 2011), *19; Hatfield v. Van Epps, 358 S.C. 185, 197-98 (2004) (addressing an ultimate issue of whether there was an improper conflict of interest and, as such, no attorney's fees should be awarded); Holmes v. Haynsworth, Sinkler, & Boyd, P.A., 760 S.E.2d 399, 408 (2014) (speaking to ultimate issue of whether Respondents committed legal malpractice); Brandt v. Gooding, 368 S.C. 618, 622-23 (2006) (opining that Gooding committed malpractice); Dehlinger v. U.S., 2012 WL 1719294 (D.S.C. 2012) (offering opinion on an ultimate issue as to whether an attorney committed violations of ethical rules due to a conflict of interest); Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197 (2008).

The Affidavits are extremely similar to the affidavits accepted into evidence in the above cited cases. The Affiants do not try to substitute their judgment for the judgment of the trial court, which is solely tasked with adjudication of the case. Instead, they offer professional opinions which speak to an ultimate issue and are supported by the facts of the case. In particular, the evidentiary issues present are virtually the same as those in Vortex, and Roper Pond fails to address with particularity how this case is different.

CONCLUSION

The prospect of being forced to cover an opponent's extravagant legal fees represents a serious obstacle to the courtroom for those seeking to protect their own health, welfare, quality of life and rights. This type of motion becomes substantially more burdensome, and even more of an unfair obstacle, without the availability of expert affidavits like the one offered in this case. The assessment of an expert is indeed the most efficient, reliable way to address this sort of claim and is the only means by which the Petitioners can defend these false allegations. If the

type of opinions offered by Eugene McCall, D. Cravens Ravenel, and Professor John Freeman here is inadmissible, expert affidavits are essentially rendered useless in this fee/sanction context. This would represent a dangerous precedent contrary to the Rules of Evidence and the case law. As a result, Petitioners ask that this court deny Roper Pond's motion to strike.

Respectfully submitted,

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Attorney for the Petitioners

Georgetown, South Carolina

October 19, 2015

NEXSEN|PRUET

Joan W. Hartley
Special Counsel
Admitted in SC, NC

October 26, 2015

The Honorable John D. McLeod
Administrative Law Court
Edgar Brown Building, Suite 224
1205 Pendleton Street
Columbia, South Carolina 29201

Re: *Town of Arcadia Lakes, et al. v. South Carolina Department of Health and Environmental Control and Roper Pond, LLC*
Docket No. 09-ALC-07-0069-CC

Dear Judge McLeod:

Enclosed for filing please find the original and one copy of Respondent Roper Pond, LLC's Reply to Petitioners' Response to Respondent Roper Pond LLC's Motion to Strike in the above-reference matter. Please return a clocked-in copy to us in the enclosed envelope.

By copy of this letter, we are serving the same of counsel for Petitioners and Respondent South Carolina Department of Health and Environmental Control. As always, we appreciate your consideration in this matter.

Best regards,

Joan W. Hartley
JWH/cb

cc: Amy E. Armstrong, Esquire
Stephen P. Hightower, Esquire

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S REPLY TO PETITIONERS' RESPONSE TO RESPONDENT ROPER POND LLC'S MOTION TO STRIKE**

Respondent Roper Pond, LLC ("Roper Pond"), respectfully submits this Reply to Petitioners' Response to Respondent Roper Pond LLC's Motion to Strike ("Petitioners' Response"), filed on October 19, 2015. Roper Pond moves to strike the Affidavit of Eugene C. McCall, Jr. ("McCall Affidavit"), the Affidavit of D. Cravens Ravenel ("Ravenel Affidavit"), and the Affidavit of John P. Freeman ("Freeman Affidavit") (collectively referred to as the "Affidavits") and to exclude the opinions therein. Petitioners' Response addresses only the opinions in the Affidavits. Petitioners did not respond to Roper Pond's request that the Court strike a photograph attached to the McCall Affidavit and Petitioners' statements from the oral arguments before the South Carolina Supreme Court.

In Petitioners' Response, the Petitioners note that various courts have qualified Mr. Freeman as an expert in legal ethics and on the reasonableness of attorneys' fees. As discussed more fully below, the matters on which Mr. Freeman has opined in this case do not relate to

either legal ethics or the reasonableness of attorneys' fees. This Court's determination on whether the Town of Arcadia Lakes ("Town") acted "without substantial justification" is not a question of legal ethics. Such determination does not require a showing that the Town's attorneys violated any rule of ethics or a duty to their client. In fact, S.C. CODE ANN. § 15-77-300 establishes the factors to be considered in determining the reasonableness of fees upon the finding that the Town acted without substantial justification. The reasonableness of attorneys' fees under S.C. CODE ANN. § 15-77-300 is a separate and distinct determination from the Court's ruling on whether the Town acted without substantial justification as recognized by the Court's bifurcation of those determinations in this case. Moreover, Mr. Freeman does not even opine on the reasonableness of attorneys' fees in his Affidavit, nor should he as that is a question to be explored only in the event of an award of attorneys' fees. He merely opines that the Town acted with substantial justification, the Petitioners' attorneys met the "reasonable attorney" standard under the under S.C. CODE ANN. § 15-36-10 (Frivolous Civil Proceedings Sanctions Act), and therefore Roper Pond is not entitled to an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 15-77-300 or sanctions under Rule 72.

The cases cited in the Petitioners' Response have no application to the matters before this Court on Roper Pond's Petition. Petitioners cite to a recent ruling by Judge Michelle Childs on an award of attorneys' fees in a class action case under the Employee Retirement Income Security Act of 1974 ("ERISA"). Judge Childs' ruling in *Savani v. URS Professional Solutions, LLC*, 2014 WL 172503, (D.S.C. Jan. 15, 2014), involved the determination of reasonableness of attorneys' fees for an award under Section 1132 of ERISA, which provides for attorneys' fees in an action on behalf of an employee benefits plan. Judge Childs did not consider Mr. Freeman's opinion in determining whether plaintiffs' counsel was entitled to the award of fees. Indeed,

there is no indication in that ruling that Mr. Freeman offered such opinion. In her ruling, Judge Childs considered Mr. Freeman's opinion of individual factors used for determining the reasonableness of the fees incurred by plaintiffs' counsel. Specifically, Judge Childs cited to the Fourth Circuit holding in to *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978):

> Thus, **in determining reasonableness**, this court is to analyze the twelve (12) factors set forth in *Barber*: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases." *Id.* at 226 n. 28.

Savani, 2014 WL 172503, *3. Judge Childs considered Mr. Freeman's opinions "in determining the reasonableness" of the attorneys' fees--not in determining whether plaintiffs' counsel was entitled to such award. Specifically, Judge Childs referred to Mr. Freeman's opinion on the following three *Barber* factors: (1) the time and labor expended; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose. *Id.* at *3, *6, and *7. Judge Childs also cited to Mr. Freeman's opinion on the lodestar cross-check of the fee award amount under the percentage-fee method used by the Court. *Id.* at *8. Judge Childs did not refer to Mr. Freeman's testimony in determining whether plaintiffs' counsel was entitled to an award under Section 1132 of ERISA. She considered Mr. Freeman's testimony only in assessing the reasonableness of the fees awarded.

In contrast, in this case the affiants have opined on whether the Town was without substantial justification--not on the reasonableness of an award following that determination by the Court. As noted above, S.C. CODE ANN. § 15-77-300 establishes the factors to be considered in determining the reasonableness of fees upon the finding that the Town acted without

substantial justification. The reasonableness of attorneys' fees under S.C. CODE ANN. § 15-77-300 is a separate and distinct determination from the Court's ruling on whether the Town acted without substantial justification. Accordingly, the admissibility of Mr. Freeman's expert opinion by Judge Childs in the *Savani* case does not support the Town's claim that his expert opinion is admissible in this case to show that the Town acted with substantial justification in pressing its claims.

Similarly, Petitioners cite to a number of legal malpractice cases in which the court considered the expert testimony of Mr. Freeman. (*See* Petitioners' Response, pp. 6-8 (citing *Tuten v. Joel*, 2014 WL 4212684 (S.C. Ct. App. Aug. 27, 2014); *Holmes v. Haynsworth, Sinkler & Boyd, PA*, 408 S.C. 620, 760 S.E.2d 399 (2014); *Hatfield v. Van Epps*, 358 S.C. 185, 594 S.E.2d 526 (Ct. App. 2008); *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006).[1] As a preliminary matter, the admissibility of Mr. Freeman's testimony in a legal malpractice case has no bearing on the admissibility in this case because a legal malpractice claim requires an expert. As the South Carolina Supreme Court explained in the *Holmes* decision,:

> With respect to a legal malpractice claim, a claimant **must rely** on expert testimony to "establish both the standard of care and the deviation by the defendant from such standard." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990) (citation omitted); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct.App.2002). In this regard, a claimant must establish, through expert testimony, the following:
>
> (1) the existence of an attorney-client relationship;
>
> (2) a breach of duty by the attorney;
>
> (3) damage to the client; and
>
> (4) proximate cause of the plaintiff's damages by the breach.

[1] Petitioners also cite to the admissibility of Mr. Freeman's expert testimony in *Dehlinger v. U.S.*, 2012 WL 1719294 (D.S.C. May 16, 2012). The testimony supported the claim of ineffective assistance of counsel under the Sixth Amendment. Like the testimony in legal malpractice cases, the admissibility of Mr. Freeman's testimony in *Dehlinger* does not support Petitioners' claim that his testimony is admissible in this case. Roper Pond's claim under S.C. CODE ANN. § 15-77-300 is based on the conduct of the Town--not its attorneys.

Hall, 349 S.C. at 174, 561 S.E.2d at 656.

Holmes, 760 S.E.2d at 407 (emphasis added). Accordingly, in a legal malpractice case, a courts' consideration of the expert testimony from Mr. Freeman is not a matter of whether such testimony is admissible under Rule 702 as a subject matter requiring "scientific, technical, or other specialized knowledge." The South Carolina Supreme Court has held that expert testimony is required in a legal malpractice case on both the standard of care and the deviation by the defendant from such standard. There is no such requirement for an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300. Indeed, the South Carolina appellate courts have reviewed the award or denial of attorneys' fees under S.C. CODE ANN. § 15-77-300 in numerous cases, and none even mention expert testimony in support of or in opposition to the determination of whether a state agency or political subdivision of the state acted "without substantial justification."[2]

Additionally, and significantly, an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 is based on the actions of the state agency or political subdivision--not the attorneys representing the state agency or political subdivision. Such award does not require a showing that the attorneys committed malpractice or even represented a party in pressing a frivolous claim. "[A] court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *McDowell v. South Carolina Dep't of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991) (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)). Moreover, even if the attorney for a state agency or political subdivision of the state

[2] *See Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Video Gaming Consultants, Inc. v. South Carolina Dept. of Rev.*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004); *Tennis v. South Carolina Dep't of Soc. Servs.*, 355 S.C. 551, 585 S.E.2d 312 (Ct. App. 2003); *McDowell v. South Carolina Dep't of Soc. Servs.*, 304 S.C. 539, 405 S.E.2d 830, (1991); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990).

identifies a novel question of law in the action, the state agency or political subdivision of the state may still be found to have acted without substantial justification under S.C. CODE ANN. § 15-77-300. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (rejecting a county's argument that it acted "with 'substantial justification' within the meaning of the statute" because novel issues were raised by the county in that case). Simply stated, the conduct of the attorney in the underlying case has no bearing on the Court's determination of whether a state agency or political subdivision of the state acted without substantial justification. Therefore, the admissibility of Mr. Freeman's expert testimony in legal malpractice cases does not support the Town's claim that such testimony is admissible in this case on the legal question of whether the Town acted without substantial justification is pressing its challenge to the DHEC decision in this case.

Similarly, Mr. Freeman's testimony in legal malpractice cases does not support admissibility of his testimony with respect to Roper Pond's claim against the Petitioners for sanctions under Rule 72, SCRPALC. Petitioners claim that Roper Pond is not entitled to sanctions under Rule 72, SCRPALC, because Mr. Freeman, relying largely on the opinions of the other affiants, opined that Petitioners' attorneys did not violate the "reasonable attorney" standard under S.C. CODE ANN. § 15-36-10 (Frivolous Civil Proceedings Sanctions Act). Mr. Freeman merely recites the opinions of Mr. McCall and Mr. Ravenel to opine that "the case was brought for legitimate reasons, and in good faith." (Freeman Affidavit, ¶ 14). As discussed more fully in Roper Pond's Reply to Petitioners' Response to Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions ("Roper Pond Reply"), Rule 72 does not require a showing that the case is frivolous. Under the Rule 72, SCRPALC, as amended in 2013, this Court may impose sanctions upon a determination that the contested case "is frivolous **or taken**

solely for purposes of delay." Rule 72, SCRPALC (emphasis added). Roper Pond argues for sanctions under Rule 72 because the Petitioners brought this case "solely for the purpose of delay." The "reasonable attorney" standard is therefore inapplicable to that claim for sanctions.

Contrary to Petitioners' assertions, the Supreme Court holding in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), is directly on point with this case. In that case, the Supreme Court found that "Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." *Id.* at 65, 580 S.E.2d at 437 (citation omitted). Such is the case here. This Court's determination on whether the Town acted without substantial justification under S.C. CODE ANN. § 15-77-300 involves the application of the facts in this case to the significant body of case law interpreting "without substantial justification" under S.C. CODE ANN. § 15-77-300. Mr. Freeman has no "scientific, technical, or other specialized knowledge" to assist the Court in understanding those facts or determining a fact in issue. As in *Dawkins*, "Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court." *Id.* at 66, 580 S.E.2d at 437. Mr. Freeman merely seeks to stand in the shoes of the Court in applying the facts to the applicable law.

Additionally, the Supreme Court holding in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008), can be easily distinguished from the present case. In *Vortex*, the Supreme Court found that the trial properly admitted Mr. Freeman's expert testimony because Mr. Freeman's experience in the substantive body of law--corporate law--qualified him to opine on self-dealing by a corporation's former officer. *Id.* at 208, 662 S.E.2d at 450. The trial court qualified Mr. Freeman as an expert "in the field of duties owed by corporate lawyers, officers, or shareholders in connection with transactions involving business in a South

Carolina closed corporation." *Id.* at 206, 662 S.E.2d at 449. In that case, Mr. Freeman has found to have specialized knowledge regarding the underlying factual determinations in the case:

> We find Professor Freeman's testimony consisted of specialized knowledge that assisted the trier of fact to understand the evidence or to determine a fact in issue. He was qualified as an expert, and thus, was allowed to testify as to his opinion relating to those facts. **He did not make improper legal conclusions or instructions but simply opined regarding acts Ware committed that breached his fiduciary duty**.

Id. at 208, 662 S.E.2d at 450 (emphasis added). In this case, Mr. Freeman has no experience--much less expertise--in the substantive body of law. Mr. Freeman has no specialized knowledge on the underlying factual determinations or the law applicable to the underlying case. Mr. Freeman merely cites to the opinions of Mr. McCall and Mr. Ravenel to conclude that Petitioner acted with substantial justification and the case was not frivolous under the "reasonable attorney" standard of the Frivolous Civil Proceedings Sanctions Act.

As to the opinions of the other two affiants, Mr. McCall opines that the Petitioners' request for a contested case included "colorable, adequate, reasonable and proper factual basis." (McCall Affidavit, ¶ 11). Similarly, Mr. Ravenel opines that the Petitioners' request for a contested case included "colorable, adequate, reasonable and proper factual and legal basis." (Ravenel Affidavit, ¶ 8). However, only Mr. McCall has any experience in environmental litigation. Yet, as discussed at length in Roper Pond's Motion to strike, the deficiencies purportedly identified by Mr. McCall prior to the filing of the request for contested case were not advanced by Petitioners in their case in chief. In the Final Order and Decision, this Court found that Petitioners failed to offer any evidence that the storm water pollution prevention plan ("SWPPP") approved by the Department was technically deficient. (Final Order and Decision, pp. 21-22). The Court of Appeals affirmed this Court's finding on that issue: "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under

the SWPPP were inadequate to prevent sediment from leaving the construction site." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013). Moreover, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Indeed, Mr. McCall attests that he offered this opinion to counsel for Petitioners, but was unable to provide the testimony at the hearing on the merits in this case because of a potential conflict. (McCall Affidavit, ¶ 8). Yet, Petitioners engaged no other professional engineer to provide expert testimony regarding the sufficiency of the SWPPP. Indeed, Petitioners' only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Final Order and Decision, p. 15). Having failed to present any such evidence at the hearing on the merits, Petitioners may not now offer such testimony to claim that the Town had a "colorable, adequate, reasonable and proper factual and legal basis" for bring this contested case. Such opinions are therefore irrelevant to this Court's consideration of whether the Town acted without substantial justification.

Significantly, while the affiants opine as to the purported legal bases for Petitioners' claims in this matter, none addresses the fact that the Petitioners failed to make the showing necessary to establish standing in this case. Even if the Town could show that there was a reasonable basis in law and fact for challenging DHEC's decision, which they cannot, there can be no "substantial justification" for an action for which the Town lacked standing. It is telling that none of the affiants address this fundamental deficiency in the Petitioners' case.

Additionally, throughout their Response, Petitioners appear to mischaracterize Roper Pond's claim for attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 and Rule 72 as a claim of misconduct by Petitioners' attorneys. Neither S.C. CODE ANN. § 15-77-300 nor Rule 72 requires a showing of attorney misconduct, and Roper Pond has made no such allegations. Indeed, the conduct of the Petitioners' attorney is not an issue before this Court on Roper Pond's Petition. This is a petition for fees from the Town under S.C. CODE ANN. § 15-77-300. This petition is based on the Town's conduct in attempting to stop or delay the Roper Pond development by any means available—and in this case, through means for which there was no factual or legal basis.

For the foregoing reasons, Roper Pond respectfully requests that the Court issue an order striking the Affidavit of Eugene C. McCall, Jr., the Affidavit of D. Cravens Ravenel, and the Affidavit of John P. Freeman and to exclude the opinions therein. Roper Pond further moves to strike statements from the oral arguments before the Supreme Court as irrelevant and inadmissible hearsay. If the Court denies the motion to strike these statements, Roper Pond moves the Court for an order pursuant to Rule 106, SCRE, permitting Roper Pond to engage a court reporter to produce a full transcript of the oral arguments to be admitted into evidence.

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October 26, 2015
Columbia, South Carolina

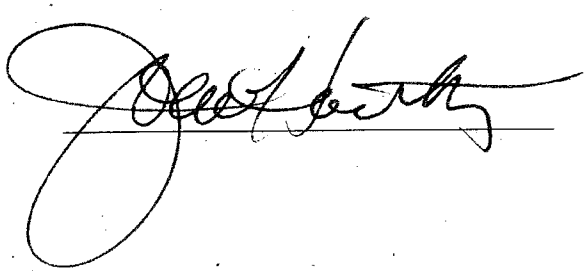
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

This is to certify that Respondent Roper Pond, LLC's Reply to Petitioners' Response to Respondent Roper Pond LLC's Motion to Strike has been served on counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 26th day of October, 2015:

Stephen P. Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585



STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **TOWN OF ARCADIA LAKES' AMENDED MOTION TO STRIKE OR, ALTERNATIVELY, TO ALLOW DISCOVERY**

TO: ADMINISTRATIVE LAW JUDGE JOHN D. MCLEOD AND ALL PARTIES AND THEIR ATTORNEYS

The Town of Arcadia Lakes respectfully moves this Court for an Order striking certain exhibits or, alternatively, allowing discovery in order for the Town to test the veracity and validity of statements and exhibits contained within Roper Pond's Petition for Fees and Costs and Sanctions.

Roper Pond filed the Petition for Fees and Costs and Sanctions on May 25, 2015, which included more than 100 pages of new documentary evidence, including affidavits from its own counsel and from its representatives. Petitioners filed this motion to strike or, in the alternative, to permit discovery on June 24, 2015. Roper Pond filed a response to Petitioners' motion on July 16, 2015. On August 3, 2015, the Court issued an Order bifurcating the issues raised in Roper Pond's petition as to liability and damages and concluding that Petitioners' motion was

withdrawn without prejudice and with the express right to re-file that motion should the Court determine that any liability exists. The Court held a hearing on liability on May 9, 2016 and on September 1, 2016 issued an Order finding that Roper Pond was entitled to attorneys' fees, costs and sanctions. Accordingly, the Town now renews its motion to strike or alternatively to allow it to conduct discovery. The basis for this motion is as follows:

As stated above, Roper Pond's Petition contains over 100 pages of new documentary evidence, including affidavits from its own counsel and from its representatives. Roper Pond's July 16, 2016 response to Petitioners' motion likewise included new documentary evidence.[1] Many of those documents were not produced in discovery and are not part of the record before this Court. Many of those documents further contain inadmissible hearsay. See Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006) ("Written affidavits generally constitute inadmissible hearsay . . ."); see also Spivey v. U.S., 912 F.2d 80 (4th Cir. 1990) (finding affidavit of plaintiff's counsel offered as substantive evidence so as to allow recovery of excess damages was inadmissible hearsay where counsel did not testify at trial and was not subject to cross-examination). Thus, this new documentary evidence should be stricken as it is outside the record because the Court has notified counsel that the damages issue will be considered based on the record.

Alternatively, in order to adequately respond to Roper Pond's damages claims, the Town must be permitted an opportunity to conduct discovery and investigate the bases for the statements made in the affidavits and documents attached thereto, as well as present its own

[1] The additional new evidence included with Roper Pond's July 16 response does nothing to address the issues raised in this motion.

evidence. Discovery is necessary in order to allow the Town to respond fully and fairly and make a complete presentation against the petition for fees, costs and sanctions.

Exhibit A to Roper Pond's petition is the Affidavit of Joan Hartley, which contains its own set of exhibits. Exhibits 2 -14 attached to Ms. Hartley's affidavit were allegedly received pursuant to a subpoena served on SCANA, who is not a party to this litigation. The subpoena was served and the documents procured by Roper Pond prior to the hearing of this matter, yet Exhibits 2 -14 were not admitted into evidence during the hearing.[2] Indeed, such documents contain inadmissable hearsay that was not testified to or admitted at trial and not subjected to cross-examination. Therefore, these materials should be stricken or, alternatively, the Town should be allowed the opportunity to conduct discovery in relation thereto.

Exhibit B, another Affidavit of Joan Hartley, references records and reports that are either not included in their entirety or are insufficiently detailed in order to allow to allow the Town the ability to test the validity of the statements contained therein.

Of even greater concern are Exhibits C and D.[3] Exhibit C is the Affidavit of Charles C. Mickel. Mr. Mickel discusses costs as a result of the "delay in the planned development." Mr. Mickel does not explain how the Petitioners' caused any delay; what he believes the length of that delay to be; nor any single document supporting his assertions or providing a basis for his determination of costs for any purported delay. The affidavit is filled with vague assertions about

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[2]Petitioners do not object to the inclusion of exhibits15 and 16, which were introduced at trial, nor to exhibits 17, 18 and 19, which include appellate briefs and the proposed order submitted to this Court.

[3] In an e-mail to the Court dated February 20, 2017, counsel for Roper Pond indicated a willingness to withdraw Exhibit D.

delay costs with absolutely no supporting documentation that would allow the Town to test the validity and veracity of the statements and to prepare an appropriate response. Simply because Roper Pond was charged and paid expenses relating to its construction project, as is reflected in the supporting documentation, that is insufficient on its face to support the allegations that such costs were the result of any delay or that such delay was caused by the Town. At a minimum, the Town would need to see documentation of how Mr. Mickel arrived at these figures and depose him on such matters. However, as this exhibit stands it should be stricken.

Exhibit D is the Affidavit of Matthew H. Mundy, which contains an exhibit that was not presented to this Court and bears no apparent relevance to this matter. Mr. Mundy similarly makes a number of broad and vague statements about income and revenue generated from residential developments, essentially regurgitating information contained in the "National Association of Home Builders," a document which he did not author. Exhibit D amounts to hearsay within hearsay and should be excluded because the Town is unable to test the validity of that information nor to understand how it is applicable in the instant action.

Roper Pond is coming in well after the contested case hearing and offering exhibits in existence at the time of the hearing, affidavits with no documents supporting the claims therein, and testimony that the Town is unable to independently assess. If the Court wishes to determine Roper Pond's petition for fees based on the existing record, then the exhibits to Roper Pond's petition must be stricken for they are not part of that record and have not been subjected to cross-examination. Alternatively, should the Court take into consideration this new documentary evidence, then it must re-open the record and allow for the taking of additional new evidence. See Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 233–34, 647 S.E.2d 488,

497 (Ct. App. 2007) ("A judge may not, after all testimony has been taken, receive additional contested evidence without reopening the case." (citing Johnson v. Johnson, 288 S.C. 270, 274, 341 S.E.2d 811, 814 (Ct. App. 1986)). The Town must be given the opportunity to present a full and complete response to the petition, including the presentation of evidence which necessarily entails some limited discovery.

For these reasons, the Town requests that this Court issue an Order striking certain extra-record exhibits or, alternatively to permit the Town to conduct discovery if the exhibits are not stricken.

Respectfully submitted,

Amy E. Armstrong
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Petitioners

Georgetown, South Carolina

February 21, 2017

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served copies of the Town's Amended Motion to Strike, or Alternatively, to Permit Discovery upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

W. Thomas Lavender, Esquire
Joan W. Hartley, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29202

Stephen P. Hightower, Esquire
DHEC Office of Counsel
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong
Attorney for the Petitioners

Georgetown, South Carolina

February 21, 2017

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S RESPONSE IN OPPOSITION TO TOWN OF ARCADIA LAKES' AMENDED MOTION TO STRIKE OR, ALTERNATIVELY, TO ALLOW DISCOVERY**

Respondent Roper Pond, LLC ("Roper Pond"), by and through its undersigned counsel, respectfully submits this response in opposition to Town of Arcadia Lakes' Amended Motion to Strike or, Alternatively, to Allow Discovery ("Motion").

The Town moves to strike the affidavits offered in support of Roper Pond's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC ("Roper Pond's Petition"). The general grounds for the Motion are that Roper is offering evidence which was not produced in discovery and was not introduced at the hearing on the merits in this matter. The Town further asserts that the affidavits contain inadmissible hearsay and that affidavits of Roper Pond's attorney may not be offered in support of Roper Pond's Petition. Finally, the Town asserts that the affidavits cannot be offered without the opportunity to conduct additional discovery. For the reasons stated below, the Town's Motion should be denied.

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I. Affidavit of Joan Hartley – Exhibit A to Petition ("First Hartley Affidavit")

Petitioners object to the First Hartley Affidavit on the basis that the documents attached thereto were not admitted into evidence during the hearing on the merits in this case. (Motion, p. 3). Pursuant to S.C. CODE ANN. § 15-77-310, a petition for attorney's fees under Section 15-77-300 is filed "within thirty days following final disposition of the case." S.C. CODE ANN. § 15-77-310. A petition for fees under S.C. CODE ANN. § 15-77-300 is a post-trial motion and may be filed following an appeal of the trial court's decision. *Brackenbrook North Charleston, LP v. County of Charleston*, 366 S.C. 503, 623 S.E.2d 91 (2005) (holding that the 30 days for filing under 15-77-300 runs from the filing of the remittitur by the trial court); *McDowell v. South Carolina Dept. of Social Services*, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) (same). "[P]ost trial motions may be heard on affidavits." *Saro Investments v. Ocean Holiday Partnership,* 314 S.C. 116, 122, 441 S.E.2d 835, 838 (Ct. App. 1994) (citing *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979); *Gaskins v. California Insurance Co.*, 195 S.C. 376, 11 S.E.2d 436 (1940); Rule 43(e), SCRCP). As such, the affidavits filed in support of Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72 SCRPALC ("Roper Pond's Petition for Fees") are an appropriate filing to present facts to the Court in support of that Petition.

Additionally, Roper Pond was not required to offer the documents attached to the First Hartley Affidavit into evidence during the hearing on the merits. Indeed, had Roper Pond attempted to admit these records into evidence, Petitioners would have been expected to object to such documents on the grounds of relevance. However, Roper Pond's Petition for Fees requires specific findings by this Court on issues which were not before the Court in the hearing

on the merits. For example, the ruling of Roper Pond's Petition for Fees requires a determination of whether the Town of Arcadia Lakes "acted without substantial justification in pressing its claim" in this matter. S.C. CODE ANN. § 15-77-300. In fact, the Court cited to certain evidence offered in the First Hartley Affidavit in the Order on Respondents' Petition for Attorneys' Fees and Costs and for Sanctions issued on September 1, 2016.

The Town has failed to state a valid basis for striking the First Hartley Affidavit. The Town cites to the Fourth Circuit ruling in *Spivey v. U.S.*, 912 F.2d 80 (4th Cir. 1990), which found that an affidavit of counsel is inadmissible hearsay. However, in that case, the Fourth Circuit ruled that the affidavit was inadmissible hearsay because it offered substantive evidence on the plaintiff's physical condition, the timing of the discovery of her condition and her prognosis based on statements of third parties to plaintiff's counsel for which no exception applied. *Id.* at 85. Such is not the case here, the statements in the First Hartley Affidavit provide personal knowledge of the production of the attachments thereto. The documents attached to the First Hartley Affidavit are documents produced pursuant a subpoena issued as an officer of this Court in this matter, exhibits to a deposition in this matter, and filings in this matter. Moreover, the documents are not hearsay because the documents are admissions by a party-opponent. S. C. R. EVID. 801(d)(2). Therefore, the holding in *Spivey* is not applicable to the First Hartley Affidavit. Indeed, in *Spivey*, the Fourth Circuit acknowledged that affidavits of counsel can be admissible: "While affidavits submitted by counsel are permissible under some circumstances, this was not one of them." *Id.* at 84. Petitioners make no claims that the First Hartley Affidavit does not comply with the rules governing the form of affidavits under the South Carolina Rules of Civil Procedure. The First Hartley Affidavit is based on personal knowledge on matters to which she is competent to testify. The Town has failed to state valid basis for striking the First

Hartley Affidavit. Accordingly, Petitioners' motion to strike the First Hartley Affidavit should be denied.

II. Affidavit of Joan Hartley – Exhibit B to Petition ("Second Hartley Affidavit")

The Town objects to the Second Hartley Affidavit on the basis that the Affidavit "references records and reports that that are either not included in their entirely or are insufficiently detailed in order to allow the Town to test the validity of the statements contained therein." (Motion, p. 3). The affiant is an officer of the Court and has provided sufficient details of the attorneys' fees and costs in this matter as required in support of a motion for fees. An affidavit of counsel has been recognized as an appropriate means of offering evidence of attorneys' fees and costs. *See, e.g.*, *Layman v. State*, 658 S.E.2d 320, 336, 376 S.C. 434, 463, fn. 2 (2008) (noting that costs and fees incurred were set forth in affidavits); *Catchings v. South Carolina Dep't of Motor Veh.*, 2008 WL 9841742, at *5 (Ct. App. Jun. 9, 2008) (noting that counsel presented affidavit for fees under Section 15-7-300); Rule 55(b)(3) (requiring only an affidavit of the attorney for fees for a default judgment). Moreover, Roper Pond objects to providing Petitioners with detailed time entries which contain information related to attorney-client communications. Therefore, the motion to strike this affidavit should be denied.

III. Affidavit of Charles C. Mickel – Exhibit C to Petition ("Mickel Affidavit")

Petitioners object to the Mickel Affidavit on the basis that the Affidavit contains "vague assertions about delay costs with absolutely no supporting documentation that would allow the Town to test the validity and veracity of the statement and to prepare an appropriate response." (Motion, p. 4). Contrary to these assertions, the Mickel Affidavit is Mr. Mickel's sworn statement of facts in his personal knowledge on matter on which he is competent to testify and would satisfy the requirements for an affidavit under Rule 56, SCRCP. Mr. Mickel attests to the nature and basis of the costs caused by the delay in construction in Paragraph 3 of the Affidavit.

Moreover, Mr. Mickel attests to the time period for which the costs were calculated. Finally, the Mickel Affidavit includes and authenticates the business records used to make these calculations. Accordingly, the Town has sufficient documentation to test the validity and veracity of the statements in the Mickel Affidavit.

Additionally, the Mickel Affidavit is offered in support of Roper Pond's petition for sanctions under Rule 72, SCRPALC. As discussed above, the Mickel Affidavit is offered to demonstrate that Roper Pond incurred significant cost increases in the project as a result of the delay caused by this contested case. However, Rules 72 provides that "the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCRPALC. Accordingly, such costs are only one consideration in determining the award of sanctions. The Court has advised the parties that the determination of the amount the award of sanctions will be based on the "discouragement of like conduct in the future." Therefore, the motion to strike the affidavit should be denied.

IV. Affidavit of Matthew H. Mundy – Exhibit D to Petition ("Mundy Affidavit")

The Town objects to the Mundy Affidavit on the basis that the Affidavit "contains an exhibit that was not presented to this Court and bears no apparent relevance to this matter." (Motion, p. 4). As it pertains to the Court's determination of fees and costs and sanctions, Roper Pond hereby withdraws the Mundy Affidavit.

V. Additional Discovery

The Town has failed to cite a legal basis for allowing discovery related to Roper Pond's Petition. There is a substantial body of case law interpreting S.C. CODE ANN. § 15-77-300 *et seq.* Yet, neither the case law nor the statute itself provide any basis for discovery on a petition for attorneys' fees. Indeed, the courts routinely decide petitions under S.C. CODE ANN. § 15-77-300 and other fee-shifting statutes on affidavits. *See, e.g., Layman v. State*, 658 S.E.2d 320, 336, 376

S.C. 434, 463, fn. 2 (2008) (noting that costs and fees incurred were set forth in affidavits); *Catchings v. South Carolina Dep't of Motor Veh.*, 2008 WL 9841742, at *5 (Ct. App. Jun. 9, 2008) (noting that counsel presented affidavit for fees under Section 15-7-300); *South Carolina Dep't of Transp. v. Revels*, 766 S.E.2d 700, 707, 411 S.C. 1, 15 (2014) (noting that affidavit of counsel to be submitted in support of petition for attorneys' fees); *Hunkler v. Frey*, 2012 WL 10862808, at *3, fn. 2 (Ct. App. Oct. 3, 2012) (noting that award of attorneys' fees was based on counsel's affidavit). *Haley Nursery Co., Inc. v. Forrest*, 381 S.E.2d 906, 909, 298 S.C. 520, 524 (1989) (same). Similarly, there is no such basis for discovery in connection with the motion for sanctions under Rule 72, SCRPALC. Accordingly, the Town's request to conduct discovery should be denied.

For the reasons stated herein above, Roper Pond respectfully requests that the Court deny the Town's Motion to Strike or, Alternatively, to Allow Discovery.

W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
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Columbia, South Carolina 29202
803.771.8900

Attorneys for Respondent
Roper Pond, LLC

March 3, 2017
Columbia, South Carolina

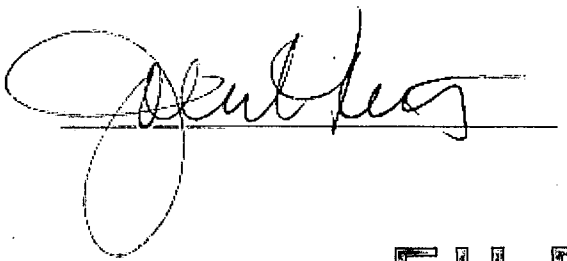
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

This is to certify that **Respondent Roper Pond, LLC's Response in Opposition to Town of Arcadia Lakes' Amended Motion to Strike or, Alternatively, to Allow Discovery** has been served on counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 3rd day of March, 2017:

Stephen P. Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong, Esquire
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585



FILED
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SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONDENT ROPER POND, LLC'S THIRD AMENDED PETITION FOR ATTORNEYS' FEES AND COSTS AND FOR SANCTIONS PURSUANT TO RULE 72, SCRPALC**

Pursuant to S.C. CODE ANN. § 15-77-300 and in accordance with the Court's Order dated May 11, 2010, Respondent Roper Pond, LLC's ("Roper Pond") hereby moves this Court for an order directing the Petitioner Town of Arcadia Lakes ("Town") to pay to Roper Pond its attorneys' fees and cost in the amount of $205,283 which were incurred in this matter, including fees and costs incurred during the appeal before the Court of Appeals and on the petition for writ of certiorari to the Supreme Court. In the alternative, Roper Pond moves the Court for an order awarding Roper Pond $205,283 for attorneys' fees and costs incurred in this matter and $661,984 for the costs associated with delay of the planned development of the Roper Pond property on Trenholm Road in Richland County ("Property") as sanctions against the Town pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

The grounds for this petition for fees and costs pursuant to S.C. CODE ANN. § 15-77-300 and sanctions pursuant to Rule 72, SCRPALC, are:

1. Roper Pond is a prevailing party in this matter as this Court's Final Order and Decision filed January 21, 2010, and the denial of Petitioners' Motion to Reconsider on March 23, 2010, upheld the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC") to grant Roper Pond coverage under Permit No. SCR100000, NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit");

2. The Town acted without substantial justification in bringing this action challenging DHEC's decision to grant coverage to Roper Pond under the Construction General Permit, and in fact, this Court and the Court of Appeals held that the Town lacked standing to bring such action, and;

3. There are no special circumstances that would make an attorneys' fee award unjust.

4. On April 19, 2010, Roper Pond filed its Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, on the above-stated grounds. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, in abeyance pending the resolution of Petitioners' appeal. The Order further provided that within thirty days of the resolution of the appeal, Roper Pond could file a revised Petition for Attorneys' Fees and supporting affidavit to include fees and costs incurred during the appeal before the Court of Appeals. On June 12, 2013, the Court of Appeals issued Opinion No. 5095, affirming this Court's Final Order and Decision on standing and the substantive ruling on the Department's decision to grant Roper Pond coverage under the Construction General Permit. On July 12, 2013, Petitioners filed a petition for Writ of Certiorari to the Supreme Court. On August 22, 2014, the Supreme Court issued an Order, granting

Petitioners' Petition for a Writ of Certiorari. The Supreme Court heard oral arguments on March 18, 2015. On April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. On April 28, 2015, the Clerk of the Supreme Court remitted the case to this Court along with a copy of a the Supreme Court's dismissal and the decision of the Court of Appeals. On May 25, 2015, Roper Pond filed its Second Amended Petitioner for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC ("Petition for Fees").

5. Roper Pond hereby amends its Petition for Fees to withdraw all claims for sanctions against the individual Petitioners and to limit its request for an award of sanctions against the Town under Rule 72, SCRPALC, to sanctions based on a determination that the contested case was "taken solely for purposes of delay." All claims for relief against the individual Petitioners is hereby withdrawn, and any arguments in support the request for such relief as stated in Memorandum of Law in Support of Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC filed on May 25, 2015 ("May 25, 2015 Memorandum of Law") as to these individual Petitioners are also withdrawn. Further, any argument that Roper Pond is entitled to sanctions pursuant to Rule 72, SCRPALC, because the contested case was frivolous is likewise withdrawn.

This amended petition is supported by the applicable law, the pleadings, motions, and the May 25, 2015 Memorandum of Law as amended herein, the discovery conducted in this case, the testimony and evidence presented at the hearing on the merits, the record before the Court of Appeals and the Supreme Court, and the affidavits attached hereto.

WHEREFORE, Roper Pond requests that the Court enter an order awarding attorneys' fees and costs pursuant to S.C. CODE ANN. § 15-77-300. Additionally, or in the alternative, Roper Pond asks the Court to award attorneys' fees and costs and the costs associated with delay

in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRALC, on the grounds that the Town's challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was taken solely for the purpose of delay.

W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan W. Hartley (SC Bar No. 72735)
NEXSEN PRUET, LLC
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Post Office Drawer 2426
Columbia, South Carolina 29202
803.771.8900

Attorneys for Respondent
Roper Pond, LLC

November 30, 2015
Columbia, South Carolina



Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com



The Amended Mickel Affidavit is located at R. pp. 1307-1420 and not reproduced here.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No.: 09-ALC-07-0069-CC **AFFIDAVIT OF JOAN W. HARTLEY**

PERSONALLY APPEARED BEFORE ME, Joan W. Hartley, who, being duly sworn, swears and deposes that if he were called as a witness in the above-entitled action he would truthfully and accurately testify as follows:

1. I am special counsel in the law firm of Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina 29201. I am an attorney of record in the above-captioned case, and I submit this affidavit in support of Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, in this matter.

2. On May 20, 2009, Respondent Roper Pond, LLC served a subpoena on SCANA Corporation, a copy of which is attached hereto as Exhibit 1. Attached hereto are true and correct copies of the following documents which were produced by SCANA Corporation in response to the May 20, 2009 subponea:

Exhibit 2: August 23, 2008 emails regarding "Affidavits (Who, What, When, Where, and Why from parties solicited)" and Bates labeled SCANA – 0070 – 0072;

Exhibit 3: December 17-19, 2008 emails regarding "Rick Thomas – Roper Pond Project Request" and Bates labeled SCANA – 0896 – 0897;

Exhibit 4: December 17, 2008 email regarding "Roper Pond Appeal-DOT" and Bates labeled SCANA – 0867;

Exhibit 5: October 28-29, 2008 emails regarding "Follow-up – Roper Pond Apartments" and Bates labeled SCANA – 0652 - 0653;

Exhibit 6: October 5, 2008 email with attachment regarding "letter kaminer sta" and Bates labeled SCANA – 0583 - 0585;

Exhibit 7: October 2, 2008 emails with attachment regarding "Roper Latest revised revision" and Bates labeled SCANA – 0500 – 0503;

Exhibit 8: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0697;

Exhibit 9: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0698;

Exhibit 10: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0699;

Exhibit 11: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0701;

Exhibit 12: November 7, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0704;

Exhibit 13: December 30, 2008 emails with attached regarding "(no subject)" and Bates labeled SCANA – 0906 - 0908;

Exhibit 14: October 2, 2008 email regarding "Roper Planning Comm Revision #2" and Bates labeled SCANA – 0496.

3. On August 19, 2009 Respondent Roper Pond, LLC deposed Richard W. Thomas, Jr., the Rule 30 (b)(6) designee for Petitioner Town of Arcadia Lakes. This deposition was admitted at trial as Petitioners' Exhibit 1. Attached hereto are true and correct copies of the following documents which were exhibits to this deposition:

Exhibit 15: December 17, 2008 email regarding "Roper Pond Apartments" - Exhibit 5 to the Deposition of Richard W. Thomas, Jr..

Exhibit 16: October 2, 2008 Resolution of the Town of Arcadia Lakes - Exhibit 6 to the Deposition of Richard W. Thomas, Jr..

4. The following are true and accurate copies of filings and submittal to this Court and the Supreme Court in this matter.

Exhibit 17: Brief of Petitioners on Writ of Certiorari filed on October 2, 2014;

Exhibit 18: Brief of Amicus Curiae South Carolina Wildlife Federation in Support of Petitioners' Standing;

Exhibit 19: Petitioners' Proposed Final Order emailed to this Court on December 3, 2009.

FURTHER AFFIANT SAYETH NOT.

Joan W. Hartley

SWORN and subscribed to before me

this 28th day of May, 2015

_____(L.S.)

Notary Public

My commission expires 4/12/23

Exhibit 1

NOTE: Exhibits 1-16 are contained in the Petition for Fees, R. pp. 285-334; Exhibits 17-19 are contained in the Second Amended Petition for Fees, R. pp. 531-591 & 625-678.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No.: 09-ALC-07-0069-CC **AMENDED AFFIDAVIT OF JOAN W. HARTLEY**

PERSONALLY APPEARED BEFORE ME, Joan W. Hartley., who, being duly sworn, swears and deposes that if she were called as a witness in the above-entitled action she would truthfully and accurately testify as follows:

1. I am an attorney licensed to practice law in the State of South Carolina as Special Counsel in the law firm of Nexsen Pruet, LLC (hereafter "the Firm"), 1230 Main Street, Suite 700, Columbia, South Carolina 29201.

2. The Firm represents Respondent Roper Pond, LLC ("Roper Pond"), in the above-captioned action. I am familiar with this file and the number of hours spent and expenses incurred in the representation of Roper Pond in this matter.

3. I have reviewed the timekeeping records maintained by Nexsen Pruet in the regular course of business in this file. Those records and reports reflect the individual entries by specific

attorneys that describe each attorney's activity and the amount of time spent on each activity for the representation of Roper Pond. Attached as Exhibit 1 is a list of the individual time entries totaling $217,048.50. This includes entries for time discounted by Nexsen Pruet.

4. In accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through March 19, 2010:

W. Thomas Lavender, Jr.	91.9 hours at $370/hour	=	$34,003.00
Henry W. Brown	13.8 hours at $330/hour	=	$4,554.00
Joan Hartley	291.7 hours at $220/hour	=	$64,174.00
			$102,731.00

5. Since March 19, 2010, in accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures were necessarily incurred in our representation of Roper Pond in this matter through oral arguments before the South Carolina Supreme Court on March 18, 2015:

W. Thomas Lavender, Jr.	21.3 hours at $370/hour	=	$ 7,881.00
W. Thomas Lavender, Jr.	9.6 hours at $390/hour	=	$ 3,744.00
W. Thomas Lavender, Jr.	16.3 hours at $400/hour	=	$ 6,520.00
W. Thomas Lavender, Jr.	3.5 hours at $410/hour	=	$ 1,435.00
W. Thomas Lavender, Jr.	2.9 hours at $425/hour	=	$ 1,232.50
W. Thomas Lavender, Jr.	30.4 hours at $440/hour	=	$ 13,376.00
Joan Hartley	77.5 hours at $220/hour	=	$ 17,050.00
Joan Hartley	12 hours at $240/hour	=	$2,880.00
Joan Hartley	14.3 hours at $275/hour	=	$3,932.50

Joan Hartley	53.1 hours at $280/hour	=	$14,868.00
Joan Hartley	24 hours at $295/hour	=	$7,080.00
Joan Hartley	39.8 hours at $310/hour	=	$12,338.00
			$92,337.00

6. The total fees incurred by Respondent through March 18, 2015, in this matter are $195,068.00. Additionally, costs incurred in connection with the Firm's representation of the Respondent total $10,215.84.

FURTHER AFFIANT SAYETH NOT.

Joan W. Hartley

SWORN and subscribed to before me

this 7 day of July, 2015

_____(L.S.)

Notary Public

My commission expires _____.

Exhibit 1

Date	Initials	Name / Invoice Number	Hours	Amount	Matter Number	Index
2/11/2009	135	THOMAS LAVENDER	0.1	$ 37.00	021146-00047	5615839
2/17/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5616225
2/17/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5616234
2/20/2009	135	THOMAS LAVENDER	3.5	$ 1,295.00	021146-00047	5621929
2/24/2009	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	5624611
2/27/2009	135	THOMAS LAVENDER	2	$ 740.00	021146-00047	5629488
2/27/2009	163	HENRY BROWN	0.2	$ 66.00	021146-00047	5627438
3/2/2009	163	HENRY BROWN	0.2	$ 66.00	021146-00047	5650712
3/3/2009	163	HENRY BROWN	0.3	$ 99.00	021146-00047	5650795
3/5/2009	135	THOMAS LAVENDER	2.6	$ 962.00	021146-00047	5634328
3/6/2009	563	JOAN HARTLEY	0.3	$ 66.00	021146-00047	5636165
3/10/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5638186
3/12/2009	135	THOMAS LAVENDER	0.5	$ 185.00	021146-00047	5641138
3/13/2009	563	JOAN HARTLEY	1.1	$ 242.00	021146-00047	5648040
3/19/2009	135	THOMAS LAVENDER	1.5	$ 555.00	021146-00047	5651515
3/23/2009	135	THOMAS LAVENDER	0.2	$ 74.00	021146-00047	5653559
3/30/2009	135	THOMAS LAVENDER	1	$ 370.00	021146-00047	5658798
3/30/2009	563	JOAN HARTLEY	0.8	$ 176.00	021146-00047	5661009
3/30/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5687201
4/2/2009	563	JOAN HARTLEY	0.8	$ 176.00	021146-00047	5681514
4/3/2009	563	JOAN HARTLEY	2.8	$ 616.00	021146-00047	5681439
4/6/2009	563	JOAN HARTLEY	6.8	$ 1,496.00	021146-00047	5681555
4/6/2009	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	5669514

4/7/2009	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	5681676
4/8/2009	563 JOAN HARTLEY	1.9	$	418.00	021146-00047	5681713
4/13/2009	563 JOAN HARTLEY	1.1	$	242.00	021146-00047	5680844
4/14/2009	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	5680877
4/14/2009	135 THOMAS LAVENDER	0.6	$	222.00	021146-00047	5676235
4/20/2009	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	5693933
4/22/2009	135 THOMAS LAVENDER	0.6	$	222.00	021146-00047	5686344
4/28/2009	135 THOMAS LAVENDER	1.5	$	555.00	021146-00047	5691943
4/28/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5692494
4/29/2009	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	5692509
4/30/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5693741
4/30/2009	563 JOAN HARTLEY	1.4	$	308.00	021146-00047	5693989
5/1/2009	563 JOAN HARTLEY	0.2	$	44.00	021146-00047	5717944
5/4/2009	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	5717761
5/4/2009	135 THOMAS LAVENDER	2	$	740.00	021146-00047	5697949
5/8/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5717340
5/11/2009	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	5717421
5/12/2009	563 JOAN HARTLEY	2.4	$	528.00	021146-00047	5716822
5/13/2009	563 JOAN HARTLEY	2.5	$	550.00	021146-00047	5716670
5/19/2009	563 JOAN HARTLEY	2.5	$	550.00	021146-00047	5720045
5/20/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5721081
5/21/2009	563 JOAN HARTLEY	2.3	$	506.00	021146-00047	5728781
5/22/2009	563 JOAN HARTLEY	3.3	$	726.00	021146-00047	5728742

5/24/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5728744
5/24/2009	135 THOMAS LAVENDER	0.7	$	259.00	021146-00047	5723435
5/27/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5728736
6/2/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5733412
6/2/2009	563 JOAN HARTLEY	4.4	$	968.00	021146-00047	5738137
6/3/2009	563 JOAN HARTLEY	3.2	$	704.00	021146-00047	5738149
6/4/2009	563 JOAN HARTLEY	0.2	$	44.00	021146-00047	5738155
6/8/2009	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	5739634
6/8/2009	563 JOAN HARTLEY	5.2	$	1,144.00	021146-00047	5754848
6/9/2009	563 JOAN HARTLEY	4.2	$	924.00	021146-00047	5755538
6/10/2009	563 JOAN HARTLEY	3.9	$	858.00	021146-00047	5755387
6/11/2009	563 JOAN HARTLEY	2.7	$	594.00	021146-00047	5755362
6/11/2009	2104 JENNIFER SHARPE	0.1	$	13.00	021146-00047	5743089
6/12/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5755586
6/15/2009	563 JOAN HARTLEY	3.2	$	704.00	021146-00047	5754942
6/16/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5755054
6/17/2009	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	5755215
6/24/2009	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	5759945
6/29/2009	563 JOAN HARTLEY	4.7	$	1,034.00	021146-00047	5763531
7/1/2009	563 JOAN HARTLEY	0.8	$	176.00	021146-00047	5767935
7/2/2009	163 HENRY BROWN	0.5	$	165.00	021146-00047	5768751
7/2/2009	563 JOAN HARTLEY	1.3	$	286.00	021146-00047	5785101
7/3/2009	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	5785349

7/6/2009	163 HENRY BROWN	0.5	$	165.00	021146-00047	5770124
7/6/2009	135 THOMAS LAVENDER	0.25	$	92.50	021146-00047	5786393
7/7/2009	563 JOAN HARTLEY	0.9	$	198.00	021146-00047	5786118
7/7/2009	163 HENRY BROWN	0.2	$	60.00	021146-00047	5771688
7/9/2009	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	5785559
7/13/2009	563 JOAN HARTLEY	0.7	$	154.00	021146-00047	5777155
7/20/2009	163 HENRY BROWN	0.4	$	120.00	021146-00047	5787714
7/27/2009	563 JOAN HARTLEY	0.7	$	154.00	021146-00047	5800202
7/28/2009	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	5800310
7/29/2009	563 JOAN HARTLEY	1.3	$	286.00	021146-00047	5800287
8/10/2009	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	5810763
8/10/2009	135 THOMAS LAVENDER	5.2	$	1,924.00	021146-00047	5813547
8/11/2009	135 THOMAS LAVENDER	0.2	$	74.00	021146-00047	5813540
8/13/2009	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	5820677
8/14/2009	135 THOMAS LAVENDER	2	$	740.00	021146-00047	5820699
8/14/2009	563 JOAN HARTLEY	4.9	$	1,078.00	021146-00047	5824429
8/16/2009	563 JOAN HARTLEY	3.1	$	682.00	021146-00047	5824412
8/17/2009	563 JOAN HARTLEY	6.1	$	1,342.00	021146-00047	5824316
8/17/2009	135 THOMAS LAVENDER	1.1	$	407.00	021146-00047	5820703
8/17/2009	135 THOMAS LAVENDER	1.5	$	555.00	021146-00047	5820734
8/17/2009	163 HENRY BROWN	0.8	$	240.00	021146-00047	5819678
8/18/2009	163 HENRY BROWN	2.4	$	720.00	021146-00047	5821334
8/18/2009	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	5824290
8/19/2009	163 HENRY BROWN	6.2	$	1,860.00	021146-00047	5825349

8/19/2009	563 JOAN HARTLEY	6.2	$	1,364.00	021146-00047	5826022
8/19/2009	135 THOMAS LAVENDER	3	$	1,110.00	021146-00047	5826541
8/20/2009	163 HENRY BROWN	2.1	$	630.00	021146-00047	5826355
8/20/2009	135 THOMAS LAVENDER	5.7	$	2,109.00	021146-00047	5826549
8/20/2009	563 JOAN HARTLEY	7.8	$	1,716.00	021146-00047	5826762
8/21/2009	563 JOAN HARTLEY	5.3	$	1,166.00	021146-00047	5829689
8/25/2009	135 THOMAS LAVENDER	2	$	740.00	021146-00047	5829548
8/27/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5832472
8/30/2009	135 THOMAS LAVENDER	2	$	740.00	021146-00047	5834748
8/30/2009	563 JOAN HARTLEY	0.9	$	198.00	021146-00047	5836531
8/31/2009	563 JOAN HARTLEY	2.9	$	638.00	021146-00047	5836586
8/31/2009	135 THOMAS LAVENDER	4.8	$	1,776.00	021146-00047	5835993
9/1/2009	135 THOMAS LAVENDER	5	$	1,850.00	021146-00047	5838604
9/1/2009	563 JOAN HARTLEY	10.5	$	2,310.00	021146-00047	5838906
9/2/2009	135 THOMAS LAVENDER	7	$	2,590.00	021146-00047	5840556
9/2/2009	563 JOAN HARTLEY	11.5	$	2,530.00	021146-00047	5845627
9/3/2009	563 JOAN HARTLEY	12.9	$	2,838.00	021146-00047	5845641
9/3/2009	135 THOMAS LAVENDER	10.5	$	3,885.00	021146-00047	5842889
9/4/2009	135 THOMAS LAVENDER	3.5	$	1,295.00	021146-00047	5842902
9/4/2009	563 JOAN HARTLEY	3.5	$	770.00	021146-00047	5845651
9/8/2009	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	5844842
9/25/2009	563 JOAN HARTLEY	1.4	$	308.00	021146-00047	5869607
9/28/2009	563 JOAN HARTLEY	1.9	$	418.00	021146-00047	5869081

10/1/2009	563 JOAN HARTLEY	1.3	$	286.00	021146-00047	5886966
10/7/2009	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	5877978
10/11/2009	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	5886974
10/12/2009	563 JOAN HARTLEY	2.3	$	506.00	021146-00047	5886975
10/13/2009	563 JOAN HARTLEY	1.4	$	308.00	021146-00047	5887004
10/13/2009	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	5890831
10/23/2009	563 JOAN HARTLEY	3.7	$	814.00	021146-00047	5905562
11/15/2009	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	5925750
11/21/2009	563 JOAN HARTLEY	2.8	$	616.00	021146-00047	5933871
11/22/2009	563 JOAN HARTLEY	4.9	$	1,078.00	021146-00047	5933864
11/23/2009	563 JOAN HARTLEY	3.9	$	858.00	021146-00047	5933935
11/24/2009	563 JOAN HARTLEY	0.8	$	176.00	021146-00047	5933913
11/25/2009	563 JOAN HARTLEY	3.8	$	836.00	021146-00047	5933931
11/26/2009	135 THOMAS LAVENDER	0.1	$	37.00	021146-00047	5943542
11/27/2009	563 JOAN HARTLEY	4.8	$	1,056.00	021146-00047	5933826
11/28/2009	563 JOAN HARTLEY	5.9	$	1,298.00	021146-00047	5933846
11/29/2009	563 JOAN HARTLEY	7.9	$	1,738.00	021146-00047	5933860
11/30/2009	563 JOAN HARTLEY	5.6	$	1,232.00	021146-00047	5933960
12/3/2009	563 JOAN HARTLEY	3.6	$	792.00	021146-00047	5938843
12/3/2009	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	5943552
12/18/2009	563 JOAN HARTLEY	0	$	-	021146-00047	5966286
12/18/2009	563 JOAN HARTLEY	0	$	-	021146-00047	5966287
12/18/2009	135 THOMAS LAVENDER	0	$	-	021146-00047	5966288
1/12/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	5974190

1/26/2010	563 JOAN HARTLEY	2.1	$ 462.00	021146-00047	5988837
2/2/2010	563 JOAN HARTLEY	0.3	$ 66.00	021146-00047	5998107
2/2/2010	135 THOMAS LAVENDER	0.7	$ 259.00	021146-00047	5998425
2/3/2010	563 JOAN HARTLEY	2.1	$ 462.00	021146-00047	5999888
2/4/2010	135 THOMAS LAVENDER	0.3	$ 111.00	021146-00047	5999969
2/4/2010	563 JOAN HARTLEY	1.5	$ 330.00	021146-00047	6001159
2/5/2010	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	6007127
2/5/2010	135 THOMAS LAVENDER	0.3	$ 111.00	021146-00047	6009191
2/8/2010	563 JOAN HARTLEY	0.5	$ 110.00	021146-00047	6007145
2/10/2010	563 JOAN HARTLEY	6.3	$ 1,386.00	021146-00047	6007186
2/11/2010	563 JOAN HARTLEY	6.5	$ 1,430.00	021146-00047	6007478
2/12/2010	563 JOAN HARTLEY	5.7	$ 1,254.00	021146-00047	6009172
2/12/2010	135 THOMAS LAVENDER	0.6	$ 222.00	021146-00047	6010224
2/15/2010	135 THOMAS LAVENDER	0.8	$ 296.00	021146-00047	6010234
2/15/2010	563 JOAN HARTLEY	1.3	$ 286.00	021146-00047	6010237
2/16/2010	563 JOAN HARTLEY	4.3	$ 946.00	021146-00047	6012227
2/17/2010	563 JOAN HARTLEY	0.3	$ 66.00	021146-00047	6014040
2/21/2010	563 JOAN HARTLEY	0.8	$ 176.00	021146-00047	6019691
2/22/2010	563 JOAN HARTLEY	0.4	$ 88.00	021146-00047	6020907
2/24/2010	135 THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6023567
2/25/2010	563 JOAN HARTLEY	4.9	$ 1,078.00	021146-00047	6025952
2/25/2010	135 THOMAS LAVENDER	1.5	$ 555.00	021146-00047	6025958
2/26/2010	563 JOAN HARTLEY	4.2	$ 924.00	021146-00047	6026538

2/26/2010	135 THOMAS LAVENDER	0.95	$	351.50	021146-00047	6026977
2/28/2010	563 JOAN HARTLEY	4.7	$	1,034.00	021146-00047	6026584
3/1/2010	135 THOMAS LAVENDER	1.1	$	407.00	021146-00047	6028664
3/1/2010	563 JOAN HARTLEY	3.8	$	836.00	021146-00047	6029314
3/2/2010	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	6032980
3/2/2010	563 JOAN HARTLEY	3.9	$	858.00	021146-00047	6031319
3/3/2010	135 THOMAS LAVENDER	0.1	$	37.00	021146-00047	6032993
3/3/2010	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	6034734
3/5/2010	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	6053638
3/9/2010	563 JOAN HARTLEY	2.4	$	528.00	021146-00047	6042670
3/10/2010	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	6042677
3/11/2010	563 JOAN HARTLEY	4.9	$	1,078.00	021146-00047	6042690
3/16/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6045793
3/17/2010	135 THOMAS LAVENDER	2	$	740.00	021146-00047	6047950
3/18/2010	563 JOAN HARTLEY	1.9	$	418.00	021146-00047	6049740
3/19/2010	135 THOMAS LAVENDER	3	$	1,110.00	021146-00047	6054963
3/22/2010	135 THOMAS LAVENDER	3	$	1,110.00	021146-00047	6054971
3/22/2010	563 JOAN HARTLEY	7.2	$	1,584.00	021146-00047	6061159
3/23/2010	563 JOAN HARTLEY	4.3	$	946.00	021146-00047	6061163
3/23/2010	135 THOMAS LAVENDER	4.5	$	1,665.00	021146-00047	6056426
3/31/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6064920
4/1/2010	135 THOMAS LAVENDER	0.3	$	111.00	021146-00047	6068676
4/2/2010	135 THOMAS LAVENDER	0.2	$	74.00	021146-00047	6068684
4/5/2010	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	6075002

4/5/2010	135 THOMAS LAVENDER	0.3	$	111.00	021146-00047	6068669
4/6/2010	563 JOAN HARTLEY	0.8	$	176.00	021146-00047	6075069
4/7/2010	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	6075315
4/8/2010	563 JOAN HARTLEY	1.6	$	352.00	021146-00047	6075087
4/14/2010	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	6079397
4/15/2010	135 THOMAS LAVENDER	0.3	$	111.00	021146-00047	6091664
4/18/2010	563 JOAN HARTLEY	6.3	$	1,386.00	021146-00047	6083565
4/19/2010	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	6088653
4/19/2010	135 THOMAS LAVENDER	0.5	$	185.00	021146-00047	6089564
4/21/2010	135 THOMAS LAVENDER	1.2	$	444.00	021146-00047	6089625
4/21/2010	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	6089638
4/22/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6090550
4/23/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6093270
4/26/2010	563 JOAN HARTLEY	0.3	$	66.00	021146-00047	6100492
4/27/2010	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	6100443
4/30/2010	135 THOMAS LAVENDER	1	$	370.00	021146-00047	6098819
4/30/2010	563 JOAN HARTLEY	0.5	$	110.00	021146-00047	6100255
5/3/2010	563 JOAN HARTLEY	0.5	$	110.00	021146-00047	6105999
5/4/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6106019
5/4/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6103723
5/10/2010	135 THOMAS LAVENDER	0.8	$	296.00	021146-00047	6107900
5/11/2010	135 THOMAS LAVENDER	0.4	$	148.00	021146-00047	6112405

6/4/2010	563	JOAN HARTLEY	0.2	$ 44.00	021146-00047	6148426
6/7/2010	563	JOAN HARTLEY	0.2	$ 44.00	021146-00047	6148436
6/17/2010	135	THOMAS LAVENDER	0.8	$ 296.00	021146-00047	6164860
6/28/2010	135	THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6170255
7/7/2010	135	THOMAS LAVENDER	0.5	$ 185.00	021146-00047	6180283
7/15/2010	563	JOAN HARTLEY	0.5	$ 110.00	021146-00047	6193658
7/20/2010	135	THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6196875
7/20/2010	563	JOAN HARTLEY	0.3	$ 66.00	021146-00047	6199330
7/21/2010	563	JOAN HARTLEY	0.3	$ 66.00	021146-00047	6199336
7/21/2010	135	THOMAS LAVENDER	0.3	$ 111.00	021146-00047	6197858
7/27/2010	280	LEIGHTON LORD	0.5	$ 147.50	021146-00047	6202446
7/27/2010	563	JOAN HARTLEY	1.7	$ 374.00	021146-00047	6204036
8/23/2010	563	JOAN HARTLEY	0.4	$ 88.00	021146-00047	6235572
8/24/2010	563	JOAN HARTLEY	0.4	$ 88.00	021146-00047	6236185
8/24/2010	163	HENRY BROWN	0.5	$ 150.00	021146-00047	6239104
8/24/2010	279	JOHN DAVIDSON	2.6	$ 715.00	021146-00047	6242174
8/24/2010	135	THOMAS LAVENDER	0.2	$ 74.00	021146-00047	6234665
8/31/2010	279	JOHN DAVIDSON	0.5	$ 137.50	021146-00047	6242501
9/1/2010	279	JOHN DAVIDSON	1.2	$ 330.00	021146-00047	6245930
9/3/2010	135	THOMAS LAVENDER	0.4	$ 148.00	021146-00047	6248556
10/1/2010	135	THOMAS LAVENDER	0.6	$ 222.00	021146-00047	6282258
10/7/2010	280	LEIGHTON LORD	1	$ 295.00	021146-00047	6289743
10/8/2010	280	LEIGHTON LORD	1	$ 295.00	021146-00047	6291266

11/1/2010	563 JOAN HARTLEY	0.4	$	88.00	021146-00047	6322486
11/8/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6329262
11/15/2010	563 JOAN HARTLEY	0.6	$	132.00	021146-00047	6338649
11/17/2010	563 JOAN HARTLEY	3.4	$	748.00	021146-00047	6338952
11/18/2010	563 JOAN HARTLEY	9.2	$	2,024.00	021146-00047	6343259
11/19/2010	563 JOAN HARTLEY	5.4	$	1,188.00	021146-00047	6350238
11/21/2010	563 JOAN HARTLEY	5.5	$	1,210.00	021146-00047	6350591
11/22/2010	563 JOAN HARTLEY	2.1	$	462.00	021146-00047	6350247
11/23/2010	563 JOAN HARTLEY	1.5	$	330.00	021146-00047	6350244
11/24/2010	563 JOAN HARTLEY	3.7	$	814.00	021146-00047	6350255
11/24/2010	280 LEIGHTON LORD	0.5	$	147.50	021146-00047	6348972
11/29/2010	563 JOAN HARTLEY	2.1	$	462.00	021146-00047	6350272
12/1/2010	563 JOAN HARTLEY	1.8	$	396.00	021146-00047	6365539
12/2/2010	563 JOAN HARTLEY	1.2	$	264.00	021146-00047	6365496
12/6/2010	563 JOAN HARTLEY	3.5	$	770.00	021146-00047	6365765
12/7/2010	135 THOMAS LAVENDER	2.5	$	925.00	021146-00047	6366133
12/7/2010	563 JOAN HARTLEY	4.5	$	990.00	021146-00047	6365747
12/8/2010	563 JOAN HARTLEY	2.2	$	484.00	021146-00047	6365653
12/17/2010	563 JOAN HARTLEY	2.5	$	550.00	021146-00047	6373990
12/17/2010	135 THOMAS LAVENDER	1	$	370.00	021146-00047	6376219
12/23/2010	135 THOMAS LAVENDER	0.4	$	156.00	021146-00047	6382459
12/23/2010	135 THOMAS LAVENDER	0.2	$	78.00	021146-00047	6388827
12/27/2010	135 THOMAS LAVENDER	0.8	$	312.00	021146-00047	6382515

12/28/2010	563	JOAN HARTLEY	2.2	$	528.00	021146-00047	6383682
12/28/2010	135	THOMAS LAVENDER	0.5	$	195.00	021146-00047	6388929
12/29/2010	135	THOMAS LAVENDER	1.2	$	468.00	021146-00047	6385109
12/29/2010	563	JOAN HARTLEY	3.4	$	816.00	021146-00047	6385293
12/29/2010	465	SHEREE RABON	0.5	$	82.50	021146-00047	6385841
12/31/2010	135	THOMAS LAVENDER	0.2	$	78.00	021146-00047	6388962
1/5/2011	135	THOMAS LAVENDER	0.4	$	156.00	021146-00047	6392760
1/11/2011	135	THOMAS LAVENDER	0.2	$	78.00	021146-00047	6404157
1/13/2011	563	JOAN HARTLEY	0.5	$	120.00	021146-00047	6402206
1/17/2011	135	THOMAS LAVENDER	0.3	$	117.00	021146-00047	6406431
1/18/2011	135	THOMAS LAVENDER	0.3	$	117.00	021146-00047	6406304
1/21/2011	563	JOAN HARTLEY	1.2	$	288.00	021146-00047	6421397
1/24/2011	135	THOMAS LAVENDER	0.8	$	312.00	021146-00047	6412394
2/24/2011	163	HENRY BROWN	0.4	$	120.00	021146-00047	6451351
2/24/2011	563	JOAN HARTLEY	2.1	$	504.00	021146-00047	6455347
3/18/2011	163	HENRY BROWN	0.3	$	90.00	021146-00047	6474538
3/29/2011	163	HENRY BROWN	1.2	$	360.00	021146-00047	6488507
3/29/2011	465	SHEREE RABON	1.3	$	214.50	021146-00047	6490554
3/30/2011	280	LEIGHTON LORD	1	$	295.00	021146-00047	6489871
4/1/2011	163	HENRY BROWN	1.3	$	390.00	021146-00047	6497367
4/1/2011	465	SHEREE RABON	1.5	$	247.50	021146-00047	6498974
4/4/2011	465	SHEREE RABON	0.5	$	82.50	021146-00047	6499083

4/5/2011	465 SHEREE RABON	0.2	$	33.00	021146-00047	6501171
4/6/2011	465 SHEREE RABON	0.3	$	49.50	021146-00047	6515209
4/6/2011	163 HENRY BROWN	0.4	$	120.00	021146-00047	6499737
4/7/2011	563 JOAN HARTLEY	0.9	$	216.00	021146-00047	6504785
4/8/2011	563 JOAN HARTLEY	0.5	$	120.00	021146-00047	6504799
4/11/2011	563 JOAN HARTLEY	0.8	$	192.00	021146-00047	6504821
4/11/2011	135 THOMAS LAVENDER	0.6	$	234.00	021146-00047	6515151
4/12/2011	135 THOMAS LAVENDER	0.2	$	78.00	021146-00047	6515172
4/12/2011	135 THOMAS LAVENDER	0.2	$	78.00	021146-00047	6515179
4/12/2011	465 SHEREE RABON	1.2	$	198.00	021146-00047	6507455
4/12/2011	163 HENRY BROWN	0.6	$	180.00	021146-00047	6507705
4/13/2011	135 THOMAS LAVENDER	0.4	$	156.00	021146-00047	6515223
4/14/2011	163 HENRY BROWN	1.3	$	390.00	021146-00047	6507669
4/14/2011	465 SHEREE RABON	1	$	165.00	021146-00047	6508390
4/25/2011	135 THOMAS LAVENDER	0.3	$	117.00	021146-00047	6520980
4/26/2011	135 THOMAS LAVENDER	0.6	$	234.00	021146-00047	6521017
5/9/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6534924
7/5/2011	163 HENRY BROWN	0.3	$	90.00	021146-00047	6601053
7/19/2011	563 JOAN HARTLEY	0.4	$	96.00	021146-00047	6620543
8/12/2011	135 THOMAS LAVENDER	0.3	$	117.00	021146-00047	6654029
8/15/2011	163 HENRY BROWN	2.3	$	690.00	021146-00047	6649609
8/15/2011	135 THOMAS LAVENDER	1	$	390.00	021146-00047	6650125
8/16/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6649610
8/19/2011	465 SHEREE RABON	0.3	$	49.50	021146-00047	6658233

8/26/2011	135 THOMAS LAVENDER	0.3	$	117.00	021146-00047	6665750
9/19/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6692159
9/21/2011	163 HENRY BROWN	0.5	$	150.00	021146-00047	6694191
9/22/2011	163 HENRY BROWN	0.6	$	180.00	021146-00047	6696952
10/26/2011	163 HENRY BROWN	1.2	$	360.00	021146-00047	6735718
10/27/2011	163 HENRY BROWN	0.3	$	90.00	021146-00047	6737315
10/28/2011	163 HENRY BROWN	0.4	$	120.00	021146-00047	6738434
11/3/2011	135 THOMAS LAVENDER	0.4	$	156.00	021146-00047	6748207
11/23/2011	163 HENRY BROWN	0.8	$	240.00	021146-00047	6770390
2/28/2012	135 THOMAS LAVENDER	0.2	$	80.00	021146-00047	6880691
3/8/2012	563 JOAN HARTLEY	0.4	$	110.00	021146-00047	6901739
3/15/2012	135 THOMAS LAVENDER	0.8	$	320.00	021146-00047	6897585
3/27/2012	163 HENRY BROWN	0.4	$	120.00	021146-00047	6915953
4/30/2012	163 HENRY BROWN	0.5	$	150.00	021146-00047	6953128
5/1/2012	163 HENRY BROWN	0.8	$	240.00	021146-00047	6953347
5/1/2012	135 THOMAS LAVENDER	0.5	$	200.00	021146-00047	6955534
5/2/2012	163 HENRY BROWN	0.3	$	90.00	021146-00047	6955424
5/3/2012	163 HENRY BROWN	1.6	$	480.00	021146-00047	6955398
5/3/2012	135 THOMAS LAVENDER	0.7	$	280.00	021146-00047	6955541
5/4/2012	163 HENRY BROWN	0.4	$	120.00	021146-00047	6959990
5/6/2012	135 THOMAS LAVENDER	6	$	2,400.00	021146-00047	6958133
5/6/2012	563 JOAN HARTLEY	3.7	$	1,017.50	021146-00047	6959523
5/7/2012	135 THOMAS LAVENDER	4.5	$	1,800.00	021146-00047	6958139

5/7/2012	563 JOAN HARTLEY	6.1	$ 1,677.50	021146-00047	6959358
5/8/2012	563 JOAN HARTLEY	4.1	$ 1,127.50	021146-00047	6959383
5/8/2012	135 THOMAS LAVENDER	4	$ 1,600.00	021146-00047	6966191
5/16/2012	163 HENRY BROWN	0.8	$ 240.00	021146-00047	6966813
5/17/2012	163 HENRY BROWN	0.3	$ 90.00	021146-00047	6968483
5/17/2012	465 SHEREE RABON	2.2	$ 385.00	021146-00047	6969042
5/18/2012	465 SHEREE RABON	0.3	$ 52.50	021146-00047	6975662
5/18/2012	163 HENRY BROWN	0.3	$ 90.00	021146-00047	6976642
5/21/2012	465 SHEREE RABON	1.2	$ 210.00	021146-00047	6977079
5/21/2012	163 HENRY BROWN	0.4	$ 120.00	021146-00047	6976621
5/25/2012	465 SHEREE RABON	0.2	$ 35.00	021146-00047	6984371
6/5/2012	163 HENRY BROWN	0.3	$ 90.00	021146-00047	6992534
7/30/2012	163 HENRY BROWN	0.3	$ 90.00	021146-00047	7052223
7/30/2012	465 SHEREE RABON	1.2	$ 210.00	021146-00047	7053480
7/31/2012	465 SHEREE RABON	0.5	$ 87.50	021146-00047	7054986
8/1/2012	163 HENRY BROWN	0.2	$ 60.00	021146-00047	7058040
8/1/2012	465 SHEREE RABON	1.5	$ 262.50	021146-00047	7059432
8/2/2012	465 SHEREE RABON	1	$ 175.00	021146-00047	7060519
8/23/2012	465 SHEREE RABON	0.7	$ 122.50	021146-00047	7084999
8/23/2012	465 SHEREE RABON	0.4	$ 70.00	021146-00047	7088842
8/24/2012	135 THOMAS LAVENDER	0.4	$ 160.00	021146-00047	7088521
8/24/2012	465 SHEREE RABON	1.2	$ 210.00	021146-00047	7088857
8/28/2012	465 SHEREE RABON	1.3	$ 227.50	021146-00047	7091300

9/14/2012	465 SHEREE RABON	0.8	$	140.00	021146-00047	7110678
10/3/2012	465 SHEREE RABON	0.7	$	122.50	021146-00047	7133863
2/12/2013	163 HENRY BROWN	0.5	$	150.00	021146-00047	7276736
2/13/2013	163 HENRY BROWN	0.9	$	270.00	021146-00047	7278998
2/14/2013	465 SHEREE RABON	0.8	$	144.00	021146-00047	7280053
2/15/2013	465 SHEREE RABON	0.6	$	108.00	021146-00047	7281673
2/20/2013	163 HENRY BROWN	0.3	$	90.00	021146-00047	7288197
2/20/2013	465 SHEREE RABON	0.8	$	144.00	021146-00047	7289798
2/21/2013	465 SHEREE RABON	0.4	$	72.00	021146-00047	7289812
2/26/2013	163 HENRY BROWN	0.4	$	120.00	021146-00047	7294126
2/28/2013	163 HENRY BROWN	1	$	300.00	021146-00047	7296226
3/1/2013	163 HENRY BROWN	0.3	$	90.00	021146-00047	7299454
3/1/2013	465 SHEREE RABON	0.8	$	144.00	021146-00047	7302821
3/4/2013	465 SHEREE RABON	2.5	$	450.00	021146-00047	7302826
3/4/2013	163 HENRY BROWN	4.2	$	1,260.00	021146-00047	7301031
3/6/2013	135 THOMAS LAVENDER	0.5	$	205.00	021146-00047	7308407
3/6/2013	563 JOAN HARTLEY	0.5	$	140.00	021146-00047	7309324
3/8/2013	465 SHEREE RABON	0.9	$	162.00	021146-00047	7309058
3/8/2013	163 HENRY BROWN	0.2	$	60.00	021146-00047	7306709
3/20/2013	465 SHEREE RABON	0.2	$	36.00	021146-00047	7323389
3/27/2013	465 SHEREE RABON	1	$	180.00	021146-00047	7330095
3/28/2013	465 SHEREE RABON	0.5	$	90.00	021146-00047	7329525
3/28/2013	465 SHEREE RABON	0.5	$	90.00	021146-00047	7330259

3/29/2013	563 JOAN HARTLEY	6.2	$	1,736.00	021146-00047	7331844
3/30/2013	563 JOAN HARTLEY	7.2	$	2,016.00	021146-00047	7331860
3/31/2013	563 JOAN HARTLEY	7.7	$	2,156.00	021146-00047	7331866
4/1/2013	563 JOAN HARTLEY	12.2	$	3,416.00	021146-00047	7335709
4/1/2013	135 THOMAS LAVENDER	0.6	$	246.00	021146-00047	7335806
4/1/2013	135 THOMAS LAVENDER	1	$	410.00	021146-00047	7335838
4/18/2013	465 SHEREE RABON	0.2	$	36.00	021146-00047	7356825
5/14/2013	465 SHEREE RABON	0.5	$	90.00	021146-00047	7384391
5/20/2013	465 SHEREE RABON	0.2	$	36.00	021146-00047	7393480
5/22/2013	563 JOAN HARTLEY	0.2	$	56.00	021146-00047	7397440
6/11/2013	465 SHEREE RABON	1	$	180.00	021146-00047	7418744
6/12/2013	563 JOAN HARTLEY	0.7	$	196.00	021146-00047	7419407
6/12/2013	135 THOMAS LAVENDER	0.2	$	82.00	021146-00047	7419448
6/13/2013	135 THOMAS LAVENDER	0.8	$	328.00	021146-00047	7419507
6/13/2013	563 JOAN HARTLEY	0.8	$	224.00	021146-00047	7419422
7/10/2013	563 JOAN HARTLEY	0.4	$	112.00	021146-00047	7449962
7/12/2013	563 JOAN HARTLEY	3.4	$	952.00	021146-00047	7451840
7/26/2013	563 JOAN HARTLEY	0.3	$	84.00	021146-00047	7467414
7/29/2013	563 JOAN HARTLEY	1.4	$	392.00	021146-00047	7469690
8/2/2013	563 JOAN HARTLEY	1.3	$	364.00	021146-00047	7479146
8/8/2013	563 JOAN HARTLEY	1.1	$	308.00	021146-00047	7484928
8/12/2013	563 JOAN HARTLEY	1.6	$	448.00	021146-00047	7486039
9/4/2013	563 JOAN HARTLEY	0.2	$	56.00	021146-00047	7512326

9/5/2013	563 JOAN HARTLEY	1.4	$	392.00	021146-00047	7516403
9/9/2013	563 JOAN HARTLEY	3.6	$	1,008.00	021146-00047	7516464
9/10/2013	563 JOAN HARTLEY	3.4	$	952.00	021146-00047	7517623
9/11/2013	563 JOAN HARTLEY	10.3	$	2,884.00	021146-00047	7518528
10/16/2013	563 JOAN HARTLEY	0.5	$	140.00	021146-00047	7561953
8/28/2014	135 THOMAS LAVENDER	0.3	$	127.50	021146-00113	7948574
10/23/2014	563 JOAN HARTLEY	0.4	$	118.00	021146-00113	8018326
10/27/2014	563 JOAN HARTLEY	0.5	$	147.50	021146-00113	8018475
10/30/2014	563 JOAN HARTLEY	1.8	$	531.00	021146-00113	8018812
10/31/2014	563 JOAN HARTLEY	6.2	$	1,829.00	021146-00113	8018894
11/2/2014	563 JOAN HARTLEY	5.3	$	1,563.50	021146-00113	8028751
11/3/2014	563 JOAN HARTLEY	9.5	$	2,802.50	021146-00113	8028753
11/3/2014	135 THOMAS LAVENDER	1.8	$	765.00	021146-00113	8029209
11/4/2014	135 THOMAS LAVENDER	0.8	$	340.00	021146-00113	8029294
11/4/2014	563 JOAN HARTLEY	0.3	$	88.50	021146-00113	8028768
12/1/2014	563 JOAN HARTLEY	0.4	$	118.00	021146-00113	8061389
2/3/2015	135 THOMAS LAVENDER	0.4	$	176.00	021146-00113	8134328
2/9/2015	563 JOAN HARTLEY	4.3	$	1,333.00	021146-00113	8126184
2/27/2015	563 JOAN HARTLEY	0.5	$	155.00	021146-00113	8143613
2/28/2015	563 JOAN HARTLEY	2.3	$	713.00	021146-00113	8143616
3/2/2015	563 JOAN HARTLEY	7.9	$	2,449.00	021146-00113	8148206
3/2/2015	135 THOMAS LAVENDER	0.3	$	132.00	021146-00113	8168999
3/12/2015	135 THOMAS LAVENDER	2	$	880.00	021146-00113	8168437
3/12/2015	563 JOAN HARTLEY	2.8	$	868.00	021146-00113	8163913

3/13/2015	563	JOAN HARTLEY	0.8	$ 248.00	021146-00113	8163967
3/13/2015	135	THOMAS LAVENDER	1	$ 440.00	021146-00113	8168447
3/14/2015	135	THOMAS LAVENDER	9	$ 3,960.00	021146-00113	8168457
3/16/2015	135	THOMAS LAVENDER	7.5	$ 3,300.00	021146-00113	8168879
3/16/2015	563	JOAN HARTLEY	7.1	$ 2,201.00	021146-00113	8164044
3/17/2015	563	JOAN HARTLEY	10.8	$ 3,348.00	021146-00113	8165147
3/17/2015	135	THOMAS LAVENDER	7.2	$ 3,168.00	021146-00113	8168904
3/18/2015	135	THOMAS LAVENDER	3	$ 1,320.00	021146-00113	8168914
3/18/2015	563	JOAN HARTLEY	3.3	$ 1,023.00	021146-00113	8165710
Total				$ 217,048.50		

The South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

a 501c3
non-profit organization

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January 5, 2016

Honorable John D. McLeod
Judge, Administrative Law Court
1205 Pendleton Street, Suite 224
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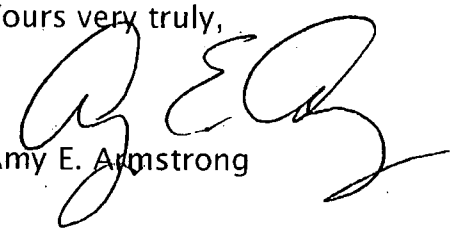
Re: Town of Arcadia Lakes, et al. vs. Roper Pond, LLC, and South Carolina Department of Health and Environmental Control
Case No. 09-ALC-07-0069-CC

Dear Judge McLeod:

I am enclosing for filing the Town of Arcadia Lakes, et al.'s Response to Roper Pond, LLC's Third Amended Petition for Fees and Costs, along with my certificate of service.

Kindly return a clocked-in copy in the enclosed self-addressed, postage-paid envelope.

Yours very truly,



Amy E. Armstrong

cc: W. Thomas Lavender, Esquire
Joan W. Hartley, Esquire
Stephen P. Hightower, Esquire

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **RESPONSE TO RESPONDENT ROPER POND, LLC'S THIRD AMENDED PETITION FOR FEES, COSTS, AND SANCTIONS**

INTRODUCTION

Respondent Roper Pond, LLC ("Roper Pond") has moved for fees and costs pursuant to S.C. Code Ann. 15-77-300, as well as sanctions pursuant to Rule 72, South Carolina Rules of Procedure for the Administrative Law Court ("SCALC"). Petitioners oppose this motion and respectfully request this court deny Respondent Roper Pond's motion. The Petitioner Town of Arcadia Lakes incorporates all of the applicable legal analysis and arguments contained in its Response to Roper Pond's Second Amended Petition for Fees, Costs and Sanctions.

FACTUAL AND LEGAL SUMMARY

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a stormwater permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC. This Court conducted a hearing and issued a final order and decision on

January 21, 2010, affirming the DHEC decision and ruling that the Petitioners lacked standing to maintain this action. The Petitioners filed a Notice of Appeal and the Court of Appeals issued an Opinion on March 6, 2013, affirming the ALC's Order. The Petitioners filed a Petition for Rehearing and on June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion.

Ultimately, the Petitioners successfully petitioned the South Carolina Supreme Court for a Writ of Certiorari, which was granted on August 22, 2014. After the Supreme Court heard oral arguments on March 18, 2015, the Court dismissed Petitioners' appeal as moot in an April 9, 2015 Order. See Exhibit A. Roper Pond then filed a Petition for Costs pursuant to SCRCP Rule 22, which was denied by the Supreme Court in a June 17, 2015 Order. See Exhibit B, Order of Supreme Court, dated July 17, 2015. Roper Pond then filed its Second Amended Petition for Attorneys Fees and Costs and for Sanctions before this Court on May 25, 2015. On November 30, 2015, Roper Pond amended its Petition for Fees to withdraw all claims and grounds for relief with the exception of its claim that the Town of Arcadia Lakes' filing of this contested case was "taken solely for purposes of delay" under Rule 72, SCALC and its claim against the Town of Arcadia Lakes under Section 15-77-300.

ARGUMENT

I. ROPER POND DOES NOT MEET THE STANDARD TO RECOVER FEES AND COSTS UNDER SECTION 15-77-300, THE STATE ACTION STATUTE

Roper Pond argues that it is entitled to an award of attorneys' fees and costs pursuant to S.C. Code Ann. § 15-77-300 et seq. ("State Action Statute"), which authorizes a prevailing party to recover attorney's fees in an action brought by the State or a political subdivision thereof if:

(1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust. S.C. Code Ann. § 15-77-300(A).

Accordingly, there are three prerequisites to recovery of attorney's fees and costs under the State Action Statute: (1) the contesting party must be the "prevailing party;" (2) the court must find that the agency acted without substantial justification in pressing its claim against the party; and (3) the court must find that there are no special circumstances that would make an award of attorney's fees unjust. Heath v. County of Aiken, 302 S.C. 178, 182-84, 394 S.E.2d 709, 711-12 (1990).

A. Roper Pond is not a "prevailing party"

At base, Roper Pond's petition consists of a declaration that it is entitled to attorney's fees and costs because it claims victory. Roper Pond asserts itself as the prevailing party "on all issues before this Court" and points to the Court of Appeals decision to affirm those rulings (See Mem. in Supp. of Pet. 7); however, Roper Pond fails to meet an essential element to recover under the State Action Statute. S.C. Code Ann. § 15-77-300(A). Roper Pond mischaracterizes the final disposition of this case. The Supreme Court did not affirm the lower court opinions, instead concluding that since Roper Pond had proceeded with and completed the challenged construction during the pendency of the appeal, the case was moot because it was "impossible for this Court to grant any redress in the context of the issues framed and litigated below." (Exhibit A). Accordingly, Roper Pond does not qualify as a "prevailing party" entitled to seek attorneys' fees under the State Action Statute.

"As a general rule, attorney fees are not recoverable unless authorized by contract or

statute." Judy v. Judy, 403 S.C. 203, 211, 742 S.E.2d 672, 676 (Ct. App. 2013), reh'g denied (May 21, 2013), cert. denied (June 25, 2014). Many of the provisions allowing for the recovery of fees and costs, as with Section 15-77-300, utilize the term "prevailing party;" however, depending on the context of the case and particular provision at issue, the meaning of the term can shift.[1] The South Carolina Supreme Court has found that a prevailing party is "one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." Sloan v. Friends of Hunley, 393 S.C. at 157, 711 S.E.2d at 897; see also Douan v. Charleston County. Council, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007) ("The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees."). A "prevailing party," for purposes of statute authorizing award of attorney fees to the prevailing party in state-initiated action, is a party who successfully prosecutes the action by prevailing on the main issue and in whose favor the decision or verdict is rendered and judgment entered. Douan v. Charleston County Council, 373 S.C. 384, 645 S.E.2d 241 (2007). In Douan, the Plaintiff whose challenge

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[1] See Sloan v. Friends of Hunley,393 S.C. 152, 157, 711 S.E.2d 895, 897 (2011) (affirming trial court's finding that plaintiff was "prevailing party" entitled to attorneys' fees under FOIA statute after affirming trial court's grant of summary judgment in favor of plaintiff based on defendant mooting the case and frustrating intent of FOIA); Cedar Creek Properties v. Cantelou Associates, Inc., 320 S.C. 483, 465 S.E.2d 774 (Ct. App. 1995) (concluding property owner was "prevailing party" entitled to award of attorneys' fees and costs where contractor canceled mechanics' lien only after property owner had initiated litigation to have lien dissolved); Uhlig, LLC v. Shirley, 895 F. Supp. 2d 707 (D.S.C. 2012), appeal dismissed (4th Cir. Nov. 26, 2013) (affirming plaintiff was "prevailing party" at trial for verdict directed in plaintiff's favor as to each cause of action submitted to jury); Cornelius v. Oconee Cnty., 369 S.C. 531, 633 S.E.2d 492 (2006) (confirming a party whose position prevails in declaratory judgment action with a state agency may be awarded fees under § 15-77-300).

to county's sales and use tax referendum was rendered moot by Supreme Court's decision voiding election results was not "prevailing party," under provision authorizing award of attorney fees to the prevailing party under the State Action Statute. Id.; see also, City of Charleston v. Masi, 362 S.C. 505, 510, 609 S.E.2d 301, 304 (2005) ("The District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot.")

Here, as with Douan and City of Charleston v. Masi, the posture of the case precludes any party from claiming "prevailing party" status.

The Supreme Court heard oral arguments on March 18, 2015 during which time counsel for Petitioners explained the legitimate concerns the Town and individuals had all along with regard to Roper Pond's construction project – that there would be stormwater management and erosion runoff and control problems. Counsel for Petitioners provided the Court with photographs evidencing that those concerns had become a reality on the site since Roper Pond moved forward with its construction project. The Supreme Court acknowledged the existence of a problem and that the Department should take enforcement action if sediment control issues are occurring on the site.[2] The Supreme Court further expressed a desire to find redress for the Town and individuals, but also a concern that their hands were tied now that the development project was completed. Specifically, Justice Kittredge stated that "DHEC did not give an individualized permit acceptance to the act of excavating Roper Pond and they should have because of the

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[2]Oral Arguments, available at http://media.sccourts.org/videos/2013-001521.mp4. The Town does not intend to limit this Court's consideration of the oral arguments to be limited to the quoted language, but rather incorporates the entire oral argument by citation to the archives of that proceeding.

sedimentation issues that would flow down to the folks at Cary Lake. Which is a very legitimate concern, but do they have a legal duty? And . . . I am just wondering what relief we can grant in the context of this case" (Oral Arguments, 28:26). The Supreme Court was presented with and considered the predicament of the parties in light of the Petitioners' basis for challenging the construction project, the fact that construction had occurred, and that many of Petitioners' concerns came to fruition.

Roper Pond erroneously claims that at " . . . the Supreme Court, every ruling on every issue – including standing – has been in favor of Roper Pond and the Department." (Roper Pond's Memo, p. 4). Roper Pond then rests heavily on this Court's ruling as its basis. While it is understandable that Roper Pond would rely on this Court's ruling, under which it was the prevailing party, much has happened since that time. The Court of Appeals issued two separate opinions. Then the Supreme Court granted certiorari, and accepted an amicus brief in support of Petitioners' arguments. Surely, if the Supreme Court believed that the case was without merit or solely for the purpose of delay, it would not have exercised its discretion and requested briefing and oral arguments. It is evident from these actions that this case raised issues that the appellate courts went to great lengths to address, which would be unnecessary and a waste of judicial resources had these appellate courts not believed that the case presented important and meritorious issues. Moreover, prevailing at one stage of the case is insufficient to meet the "prevailing party" requirement. Douan v. Charleston County Council, 373 S.C. 384, 645 S.E.2d 241 (2007). The final disposition must be entered in favor of the party seeking fees and costs. The Supreme Court's decision to dismiss the case as moot simply cannot be read to affirm the lower court's opinions.

Roper Pond's attempt to spin the Supreme Court's mootness dismissal into an implicit affirmance of the lower courts' rulings on the standing issue has no legal support. Never before has a mootness finding by a Court been manipulated and stretched to support a claim that the underlying proceeding was brought without a substantial basis or solely for the purpose of delay. By definition, the Supreme Court's mootness finding was not a ruling on the merits. The case was simply dismissed because Roper Pond's actions made "it . . . impossible for this Court to grant any redress in the context of the issues as framed and litigated below." (Exhibit A, Supreme Court Order dated April 9, 2015, at 2).

Contrary to the theory hypothesized by Roper Pond, (see Mem. in Supp. of Pet. 7-9), the Supreme Court's decision to dismiss the case as moot does not evidence an intent to allow the Court of Appeal's decision to stand. Rather, had the Supreme Court intended the decision below to govern, it would have affirmed that court's decision. It is improper for Roper Pond to speculate on or add to the intentions underlying the Supreme Court's decision in the absence of language to that effect. Moreover, Roper Pond fails to acknowledge a telling passage from the Supreme Court's Order: "As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate postconstruction complaints." (Exhibit A, Order at 2, note 2). On this passage, the Supreme Court was attentive to and solicitous of the Town's concerns. The Supreme Court's Order attests to legitimate judicial concern over the conduct of Roper Pond and DHEC. (See Exhibit A). The fact that the Supreme Court dismissed this case as moot after hearing arguments and indicating a concern that meaningful judicial relief was no

longer possible, and without affirming the Court of Appeals, takes "prevailing party" status off the table. See City of Charleston v. Masi, 362 S.C. 505, 510, 609 S.E.2d 301, 304 (2005); Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997) (declining to determine whether party was a "prevailing party" entitled to an award of costs where matter on appeal dismissed as moot).

Since Roper Pond is not able to establish that it was the "prevailing party" in this case, it is not entitled to an award of attorneys' fees and costs. Furthermore, Roper Pond fails to meet the other requirements to recover attorneys' fees and costs pursuant to the State Action Statute.

B. The Town Acted With Substantial Justification

If the government acts with "substantial justification" in pursuing its claim or position, the court should deny recovery of attorney fees. 2 S.C. Jur. Attorney Fees § 65. The government is **presumed to be substantially justified** in pressing its claim against the party if it follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction. S.C. Code Ann. § 15-77-300(A). For purposes of determining whether prevailing party in a state-initiated action is entitled to attorney fees, the government's loss on the merits does not create a presumption that its position was not substantially justified. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 358 S.C. 647, 595 S.E.2d 890 (2004); Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 326 (2008). "Conceivably, the Government could take a position that is not substantially justified, yet win; and even more likely, it could take a position that is substantially justified, yet lose." Pierce v. Underwood, 487 U.S. 552, 569, 108 S.Ct. 2541, 2552 (1988).

In deciding whether the Town acted with substantial justification in pressing its claim, as

would preclude award of attorney fees to prevailing party, the courts look to the government's position in litigating the case to determine whether it is one which has a reasonable basis in law and fact. Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 358 S.C. 647, 595 S.E.2d 890 (2004); McDowell v. S.C. Dept. of Soc. Serv., 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991) (citing Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541 (1988)); Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 326 (2008). The standard for evaluating whether state agency action was taken "without substantial justification" is based on whether the action can be "justified to a degree that could satisfy a reasonable person." McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1991); see also Heath v. County of Aiken, 302 S.C. 178, 183 (S.C. 1990). "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." Id. Simply because Roper Pond claims that the Town acted without substantial justification by purportedly pursuing this action without a reasonable basis in fact or law, does not make it so. Roper Pond offers scant evidence or explanation to verify its accusation. Rather, it recounts its version of the evidence and mischaracterizes the Petitioners' testimony. (See Mem. in Supp. of Pet. 11-15).

In this case, the Supreme Court could have simply denied the Petition for Writ of Certiorari if the Petitioners' case had no basis in law or fact. Instead, the Court exercised its discretion, a clear acknowledgment of the meritorious claims.

Roper Pond bears the burden of proving that the Town acted without "substantial justification" such that there is no reasonable basis in law and fact for pressing its claims. Pierce v. Underwood, 108 S.Ct. 2541, 2250 (1990). In Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990), the Court held that "substantial justification" is determined by a "reasonable

person" standard. Substantial justification in the context of attorney's fees means "'justified in substance or in the main'—that is justified to a degree that could satisfy a reasonable man." Pierce v. Underwood, 108 S.Ct. 2541, 2250 (1990). The Supreme Court in Pierce further explained that the phrase substantial justification "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept to support a conclusion . . . . To our knowledge, [substantial justification] has never been described as meaning 'justified to a high degree, but rather has been said to be satisfied if there is a 'genuine dispute.'" Pierce, 487 U.S. at 565, 108 S.Ct. at 2550 (internal citations omitted).

Roper Pond relies on Heath which found a lack of substantial justification when both the statute was unambiguous and the relevant precedent indicated that the claims were without merit. (Memo. in Support of Petition for Fees, p. 10). Neither of these circumstances exist here. Roper Pond has not asserted a lack of ambiguity nor identified any case law on the particular points of law raised by Petitioners, i.e., the Department's scope of review and authority under the Section 401 water quality certification program. (See Petitioners' Brief on Writ of Certiorari, pp. 4-5). Instead of elucidating to this Court on how this case is similar to Heath, or any other cases where a court has found a lack of substantial justification, Roper Pond simply and repeatedly asks this Court to assume that the Town did not have substantial justification without providing the evidence and analysis required to arrive at that conclusion. Id.

On the other hand, the Town provides testimony and evidence demonstrating that it did have substantial justification for pursuing its claims, proving that they were guided by a reasonable basis in law and fact. The Town sought the advice of experts in the fields of environmental and administrative law and environmental engineering. (See Exhibit F, Cook Aff.)

The Town relied entirely on this advice and counsel in deciding to file the request for contested case hearing. (Exhibit F, Cook Aff.). The Town retained James S. Chandler, Jr., who advised the Town that ample support in fact and law existed to warrant filing the request for contested case hearing. (Exhibit G, Armstrong Aff.). The Town also retained Eugene McCall, who has been practicing law for 27 years, primarily in the areas of environmental and water law. (See Exhibit D, McCall Aff.). Mr. McCall has taught the water quality section of Environmental Law at the University of South Carolina School of Law. (Id.) He also holds a PhD in Environmental Health Engineering. (Id.) In 2008 the Town and Individual Petitioners asked Mr. McCall to review DHEC's file for the Roper Pond project, as well as inspect the project site. (Id.) At that time Mr. McCall opined that the project would most likely have a "significant and deleterious impact on Roper Pond and also likely to the connecting, downstream Cary Lake and other portions of Gills Creek Watershed." (Id. ¶ 7). Mr. McCall reviewed the request for contested case hearing and noted that some of his opinions were contained therein and testified that the Petitioners presented a "colorable, adequate, reasonable and proper factual basis" for filing their request. (Id. ¶ 11). On the question of reasonable basis in law for the request, Mr. McCall testified that the "allegations that Roper Pond's alterations to waters of the state would violate Regulations 61-9 and 61-68; that Roper Pond did not qualify for a Nationwide Permit and Certification and should have been required to obtain an individual NWP Certification; that the Stormwater Pollution and Prevent Plan ("SWPPP") was deficient; and that water quality would be impaired in violation of Regulation 61-68 provide sufficient legal basis upon which I would, as an attorney licensed and practicing in South Carolina, file a request for contested case hearing."(Id. ¶ 12). Indeed, at the time that the contested case was filed Mr. McCall believed that the Town was doing "the right

thing." (Exhibit H).

Mr. McCall also reviewed the appellate briefing and testified that "it is evident that the appellate courts spent considerable time reviewing the issues in this case. The Town of Arcadia Lakes et al.'s briefs contain questions of law that have not been answered by an appellate court and that have a reasonable basis in law." (Id. ¶ 13). Mr. McCall conducted a visual inspection of Roper Pond on June 14, 2015. (Id.) He noted that most of the stormwater runoff entering Roper Pond is untreated and uncontrolled, which is "causing adverse affects to the Roper Pond water quality and its wetlands border." Id. He opines that the water quality degradation is due to construction and post-construction runoff from the Roper Pond multi-family development – degradation which he forecasted in advising the Town and Individuals prior to filing the request for contested case hearing. Attached to his affidavit are a number of photographs showing Mr. McCall's post construction site visit and which form the basis of his opinions. (Id., Figures 1-10).

In this case, the applicable standard of Video Games Consultants, Inc., et al. v. S.C. Dept. of Revenue, similarly warrants a finding and conclusion that the Town of Arcadia Lakes acted with substantial justification. There can be no doubt that there was a "genuine dispute" and justification that would "satisfy a reasonable man" regarding these issues. Pierce v. Underwood, 108 S.Ct. 2541, 2250 (1990).

Professor Freeman testifies that:

> the Town and Residents present via record facts and various lawyers' affidavits what I consider to be a comprehensive and compelling report on the good faith efforts undertaken by counsel in bringing forth the Town's claims. That those efforts were not rewarded with the relief sought is to me simply an unfortunate result, due largely to the fact that construction had been completed by the time the Supreme

> Court heard this case. I find no justification whatever for punishing the Residents or the Town with hundreds of thousands of dollars of sanctions.
>
> My review of the factual background convinces me that the Residents and Town's lawyers were fully mindful at all times that asserting claims such as those advanced in this lawsuit implicated ethical duties and obligations, and that those ethical requirements were met. Ms. Armstrong took the lead in that effort. Included in her detailed and extensive due diligence effort was a background that gave her an excellent base from which to evaluate this case and to proceed. Drawing on her long experience, Ms. Armstrong concluded that there were reasonable grounds to support the key allegations made in the Contested Case Proceeding and took on the litigation. This is not conduct deserving of punishment, particularly given that, at the time she took the case to court, the case had already been reviewed by Mr. McCall and had been judged to be meritorious.

(Freeman Affidavit, Exhibit C ¶ 16 & 17).

Rather than an analysis of the facts and law, Roper Pond narrowly focuses on the impetus behind the Town's challenge of DHEC's authorization for the construction project, ignoring the reasonable basis in fact and law upon which the Town pursued this action. Roper Pond's memorandum relies heavily on the favorable decision it received from this Court in attempting to meet its burden of proving that there was no reasonable basis in law or fact for the Petitioners' challenge. Then Roper Pond erroneously injects the "solely for the purpose of delay" standard of ALC Rule 72 into the substantial justification test. (Memo. in Support of Petition for Fees, p. 16). In essence, Roper Pond's regurgitation of its arguments made before this Court provide the sole basis for its claim that there is no reasonable basis in fact or law for the Petitioner's case. In response and direct contradiction, the Petitioners secured the affidavits of three attorneys with

broad collective experience in administrative and environmental law, appellate practice, ethics, and attorney misconduct.

For Roper Pond's Petition for Fees and Costs under Section 15-77-300 to be granted, Roper Pond must be the prevailing party and the Town of Arcadia Lakes must have been unreasonable in pursuing the contested case and appeals. The Town of Arcadia Lakes, as a political entity, pursued litigation in this case when it was convinced in good faith that DHEC was not abiding by its own regulations, in a way that adversely affected the Town's own material interests. There is not an indication of unreasonableness resulting from an unfavorable decision in this case, due to the fact that such presumption does not arise under the law. That the South Carolina Supreme Court dismissed the case as being moot and did not reach the merits also fails to prove unreasonableness. (Exhibit A, April 6, 2015 Order) (Id. at 445).

Moreover, the Town's decision to file the request for contested case hearing was made solely and completely on reliance of the advice of counsel. (See Exhibit F, Cook Aff.). While believing that the DHEC authorization was erroneous, the Town did not have the ability to determine whether facts and law supported its supposition on its own. For that reason, the Town sought the advice of two practitioners experienced in environmental engineering and environmental and administrative law to provide it advice and counsel as to whether a valid basis for challenging the DHEC authorizations existed. (Exhibit F, Cook Aff., pp. 2-3). The undersigned testifies that its firm provided advice and counsel to the Town. (Exhibit G, Armstrong Aff.) That advice included a determination that there was a reasonable and substantial basis in fact and law for filing the request for contested case hearing. (Exhibit G, Armstrong Aff.) That advice and counsel formed the basis of the Town's decision to pursue this

contested case proceeding. (Exhibit F, Cook Aff.; Exhibit G, Armstrong Aff.) Indeed, it was only after the Town sought and received such advice from counsel that it decided to proceed with the underlying challenge. (Exhibit F, Cook Aff.)

Finally, the fact that the Town maintained the suit even though the construction had already occurred is not evidence of unreasonableness of appeals. The Town believed in good faith that the appellate courts would choose to remedy the water quality violations that had already occurred, even if the remedy to prevent construction was foreclosed. The appeals process also did nothing to delay the project, as the project went forward to completion regardless. For all these reasons, the Town acted with substantial justification.

II. ROPER POND IS NOT ENTITLED TO SANCTIONS UNDER SCALC RULE 72

Rule 72 of this court's rules states that "[i]f the presiding administrative law judge determines that a contested case, appeal or motion is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALC. Roper Pond, LLC has abandoned all claims that the contested case is frivolous, instead arguing only that the Town brought this case solely for the purpose of delay, thus effectively conceding that the case has merit. Roper Pond's assertion that the Town's challenge to DHEC's decision to grant the permit was "taken solely for the purpose of delay" is entirely unsupported by fact or law. (Resp.'s 3d Pet. for Fees, p. 4).

A. Roper Pond's Claim for Sanctions Does not Meet the Required Evidentiary Standard

"Solely" is defined as "without another" or "to the exclusion of all else." See "Solely," Merriam-Webster, http://www.merriam-webster.com/dictionary/solely. For a challenge to be

taken "solely" for the purposes of delay, there can be no other purpose for which the challenge is commenced. A case brought "solely for the purposes of delay" requires a demonstration that there is no legitimate basis for initiating the action and a lack of intention or desire to achieve resolution of the issues raised. Although delaying a project may be a desirable outcome in a challenge to a contentious project, it is only if that delay is brought about solely for the sake of delay, i.e., harassment, that Rule 72 is implicated. As discussed thoroughly below, the Town had a legitimate and reasonable basis in law and fact for initiating this case.

The legitimate purposes for which the challenge was commenced include, inter alia, protecting interests recognized by law, such as the financial, recreational and aesthetic harms asserted by the Town of Arcadia Lakes. (Dec. 2009 Order 18, 19). The Town of Arcadia Lakes raised these legitimate concerns regarding Roper Pond's project; sought legal advice and counsel related to those concerns (See Exhibits C, D, E & F); retained legal and engineering experts (Exhibit F); and otherwise conducted due diligence to ensure a valid, proper and substantial basis in fact and law existed prior to filing this contested case proceeding (Exhibit F).

Richard Thomas, then-mayor of Arcadia Lakes, testified on behalf of the Town as to the Town's justification for filing this contested case. Water from Roper Pond goes straight under Trenholm Road into Cary Lake, which is in the town of Arcadia Lakes. (R. p. 825). The Town desires to protect the environmental quality of Cary Lake, which is a natural resource within its borders. When asked what detriment the Town will sustain if the project proceeds under the permit as issued, Mayor Thomas directly responded, "the detriment is potential harm to the water flowing through the project under North Trenholm Road, and into Cary Lake" which would work a "harm to the environmental interest of the town." (R. p. 822, lines 16-21).

Mayor Thomas further explained the Town's justification for filing this case on the basis that Roper Pond's project stands to damage the Town's interest in maintaining its character and desirable attributes. Mayor Thomas noted that "[o]ur town motto is seven lakes - one town." (R. p. 823, lines 3-4). The "seven lakes [within our borders] are a vital part of our identity" and environmental harm to Cary Lake stands to damage this identity. (R. p. 823, line 3). Mayor Thomas cited the risk of "[h]arm to the aesthetic interest of the Town of Arcadia Lakes being that the project is surrounded on three sides by the town" and that water flowing through the project flows directly into a lake within the Town's borders. (R. p. 822, lines 20-22). The diminishment of the aesthetics, character and environment of the Town which would result in decreased demand for residing in the Town provide the motivation and justification for the Town's election to file the contested case proceeding; the advice and counsel of its attorneys provide the factual and legal justification.

Further, the permit and project threatened the Town's ability to comply with federal law. Mayor Thomas noted that "we are responsible for the water that flows into Cary Lake as well as out through our NPDES rules and regs." (R. p. 828). Mayor Thomas elaborated on the Town's responsibilities under the NPDES provision of the Clean Water Act as follows: "The town is responsible for what comes into the town and what leaves the town as far as water quality. If the water quality coming into the town is not regulated by the town and we allow it to flow through the town [into downstream water bodies], then the way I understand the NPDES, we would then be responsible. Therefore, we could -- it could result in financial and/or litigation for the mitigation of that damage. Whatever that would be." (R. p. 844, lines 5-15). The Town's ability

to comply with federal law provided further substantial justification for its decision to file the contested case proceeding.

All of this testimony was uncontradicted. Roper Pond does not dispute the Town's interest in "protecting the environmental quality of Cary Lake" and interest in "maintaining its character and desirable attributes, including aesthetic appeal," all of which formed the basis of its decision to seek review of the DHEC authorization. Nor does Roper Pond dispute the Town's testimony that there would be a "diminution of property values within the Town" as a result of Roper Pond's project.

Instead, Roper Pond relies heavily on the documents containing statements and emails of Richard Thomas, then-Mayor of the Town of Arcadia Lakes. (Hartley Aff. May 28, 2014, Exhibits 1-16). Contrary to the way these statements are cast in Roper Pond's memorandum, the documents bolster and reflect the long list of legitimate reasons why the Town of Arcadia Lakes brought this case, as well as evidence the Town's standing. For example, Exhibit 2 to the Hartley Affidavit is an email in which Mr. Thomas states "I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain." (Hartley Aff., Ex. 2.) Mayor Thomas goes on to list other reasons for the Town's concerns, and thus its rationale for initiating this action, including environmental impact, faulty traffic impact studies, and flood control. (Id.) Roper Pond lists a number of concerns raised by the Town – each of which reinforces their legitimate reasons for concern about this high density project. (Memo in Support of Pet., p. 26). Indeed, the concerns that the Town expressed have borne out in reality, according to environmental engineering expert, Gene

McCall. (Exhibit D, McCall Affidavit). Similarly, Exhibit 7 to the Hartley Affidavit draft list of questions and concerns for the Richland County Planning Commission meeting concerning Roper Pond raises twenty-one different issues all of which are reasons why this case was eventually brought by Arcadia Lakes. (Hartley Aff. Ex. 7.) After the Town felt it had been deceived, and after Roper Pond refused to develop the property in the responsible, low-density way as previously agreed, then the Town finally resorted to discussing the use of delay as a negotiation tactic and to obtain more information about the newly-proposed development. (See Hartley Aff. Ex. 9-11 (containing email discussions about not expediting the process between Mr. Thomas, Brian Bates of Arcadia Lakes's town council and Senator Joel Lourie.) While the Town wanted to slow the process, in large part to allow it to fully assess Roper Pond's new plans, its communications do not show that Arcadia Lakes brought the case "solely for the purpose of delay."

As discussed above, the Town articulated legally recognized interests that would be affected by Roper Pond's project. Because the Town thoroughly described its bases and rationale for pursing the contested case proceeding, by definition, Roper Pond's assertion that the contested case and appeals were brought "solely" for purposes of delay must fail.

B. Roper Pond Erroneously Bifurcates the SCALC Standard for Sanctions

Roper Pond is attempting to create a false dichotomy between "solely for the purposes of delay" and frivolousness under SCALC Rule 72, when in fact the two criteria are intrinsically related.[3] As explained in In re Marriage of Flaherty, "[t]he two standards are often used together,

[3]Presumably this is because of the "reasonable attorney" standard of the revised South Carolina Frivolous Civil Proceeding Sanctions Act, to which SCALC Rule 72 refers. The 2009 Revised Notes for Rule 72 explain that, "[i]n determining whether a case is frivolous, the

with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellate must have intended it only for delay." In re Marriage of Flaherty, 31 Cal.3d 637, 639 (Cal. 1982).

The Town has found no support for the contention that a case could be reasonable or meritorious, i.e., not frivolous, and also brought **solely** for the purpose of delay. It could be argued that a reasonable attorney or party could file a legally and factually sound case for purposes of delay; however, upon information and belief, there has never been any instance where a reasonable attorney or party did so **solely** for the purpose of delay.

Furthermore, the unlikely scenario of a reasonable filing **solely** for the purpose of delay is not one that can be proven by use of a threadbare assumption. Yet that is what Roper Pond attempts with its petition. There is no evidence establishing that the Town pursued this action solely for the purpose of delay. Instead, the Town sought the advice and counsel of highly respected legal experts in the community (Exhibit F, Cook Affidavit); which experts analyzed the relevant facts and law and ascertained that the claims brought by the Town had merit toward protecting legitimate aesthetic and recreational interests. (Exhibits C, D, E & F, affidavits). In such instances, evidence of bad faith is required to show that the case was brought solely to delay and there is no such evidence here. (See SCRCP, Rule 11(a)) (See also Exhibit C, Freeman Affidavit, 14 (explaining that there was good cause to bring claims that Regulation 61-9 and 61-68 were violated and that the Stormwater Pollution and Prevention Plan was inadequate); Exhibit

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administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." See Oconee County Assessor v. Chirillo et al., Docket No. 09-ALJ-17-0079-CC, 2010 WL 6782538, at *11 (S.C.Admin.Law.Judge.Div., Nov. 23, 2010) (citing Rule 72, SCALC (2009 Revised Notes)).

D, McCall Affidavit, 12, 13 (explaining that he would, as an attorney of the state, also have filed the same claims based on the facts); Exhibit E, Ravanel Affidavit, 9, 11 (explaining that, in his expert opinion, Petitioners' counsel was not frivolous in bringing these claims); Exhibit F, Cook Affidavit (the Town sought advice of experienced practitioners prior to filing the contested case proceeding); Exhibit G, Armstrong Affidavit (counsel for the Town advised the Town that ample support in fact and law existed for filing the contested case proceeding).).

A variety of legitimate legal concerns were raised by the Town throughout the exhibits presented by Roper Pond,[4] as well as through testimony of then-Mayor Richard Thomas, discussed above. The property had changed hands from Mr. Mundy (who signed the Notice of Intent for the project) to Roper Pond, which was then acquired by Capital Development, LLC in January 2008 (Resp.'s Ex. 15). Afterwards, the project as proposed was changed from single-family patio homes to a property development for multifamily high density apartments directly adjacent to a tranquil residential area. Id. This was not what was intended when the Town previously chose to not challenge the County rezoning process. (Resp.'s Ex. 2, 15). The Mayor and Town Council expressed concerns regarding the project's adherence to the County's Land Development ordinances (Resp.'s Ex. 16), as well as its economic impact, inconsistency with the character of the area, and the impact on impaired waters in the area (Resp.'s Ex. 13, 16).

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[4] This Response will only address Roper Pond's exhibits proceeding the attached briefs (Resp.'s Ex. 1-16). The rest of the exhibits have either already been addressed by the parties (the briefs), or involve financial calculations the parties previously agreed to brief if this Court first holds that fees and sanctions are appropriate (ALC Order on Mot. to Strike). Hence, Petitioners will only address the question of whether liability exists at all. The Petitioners reserve the right to brief the fees and sanctions calculations, if this Court finds that an award is indeed appropriate in this case.

The Town's legal concerns also extended to: the project's applicability with the Storm Water Pollution Prevention Plan (SWPPP); South Carolina Stormwater Management and Sediment Control Act; NPDES Rules and Regulations regarding the use of jurisdictional waters to mitigate first flush requirements; inconsistent information given by the applicant (Roper Pond); and liability of the Town for further NPDES infractions. (Resp.'s Ex. 7, 14). Hill Engineering, LLC echoed these concerns of the Town when analyzing the BP Barber review of the Plans of Roper Pond Development. (Resp.'s Ex. 6).

In addition, the Town performed its own due diligence in investigating the facts of the case and the legal basis for a challenge by seeking legal advice and counsel from experienced practitioners in the fields of environmental engineering and environmental and administrative law. (Exhibit F, Cook Affidavit) The Town retained two of the State's most experienced attorneys and engineers in the environmental field to advise it on whether a factually and legally viable case could be filed. (Exhibit F, Cook Aff). The Town retained James S. Chandler (now deceased) and Eugene McCall, an engineer and attorney who filed an affidavit with this court. (See Exhibit D, McCall Affidavit). As an independent engineering consultant, McCall determined that the Roper Pond Development would more likely than not "have a significant and deleterious impact on Roper Pond and also likely to the connecting, downstream Cary Lake and other portions of Gills Creek Watershed." (Exhibit D, McCall Aff. 7). In addition, McCall determined that significant sediment deposition and degradation of water quality would occur without appropriate controls, care during construction, and post-construction maintenance (Exhibit D, McCall Aff. 8). McCall recalled that he inspected the area after the S.C. Supreme Court's order and could visually detect the damage that had already been done to the water quality and wetlands border of Roper Pond as

a result of the project (Exhibit D, McCall Aff. 14). In sum, the evidence disproves that this case was filed solely for the purposes of delay.

The Town's long-standing counsel of over ten (10) years was present and participated in the discussions surrounding the factual and legal bases for filing the underlying contested case proceeding and testifies that he has seen no evidence to indicate that the Town filed the contested case hearing solely for the purposes of delay. (Exhibit E, Cook Aff., pp. 3-4). In fact, on February 17, 2009, during the time which the Town sought legal advice, Mr. McCall told the Town's attorney that "I believe the Town of Arcadia Lakes and citizens did the right thing in filing the appeal. I was glad I was able to help you get over this critical hurdle." (Exhibit H, 2/17/09 McCall email).

Roper Pond attempts to scaffold the claim that the contested case was filed **solely** for purposes of delay by attaching exhibits mentioning delays or potential delays. (See Resp. Ex. 3, 4 (displaying the Mayor of the Town requesting that SCDOT delay its approval until parties of the Town could meet with SCDOT to discuss concerns); Resp. Ex. 5, 8, 9, 10, 11, 12 (expressing the position that not inviting BP Barper to conference would delay, but also avail the Town of the fairness benefits of litigation); Resp. Ex. 15 (displaying the Mayor wishing to delay DHEC's final decision so the Town could have time to access the approval and revised plans)). All of the "delays" mentioned by the Town and its agents are normal aspects of the public decision-making process with reasonable bases; none are intended **solely** to delay, but rather to gain more information and fully understand and assess the project at issue.

No evidence exists showing that the Town or its agents were under the impression that there were no legitimate legal arguments to be made. Instead, the Town had consistently and

reasonably expressed its belief that there had been potential violations of DHEC regulations and zoning laws, as well as an unanticipated change in the proposed project. (See, e.g., Resp. Ex. 15 (potential violations of DHEC regulations, and concerns over SCDOT enforcement); Resp. Ex. 16 (potential violations of zoning code); Exhibit E, Cook Aff). The Town merely sought more time to perform a diligent investigation, beyond the 15 day filing requirement for a contested case. In sum, the Town in no way filed the contested case solely for the purposes of delay as contemplated under SCALC Rule 72.

III. THE SUPREME COURT'S DENIAL OF FEES UNDER SCACR RULE 222 FURTHER SUPPORTS DENIAL OF ROPER POND'S PENDING PETITION FOR FEES AND COSTS

As further evidence that Roper Pond is not the prevailing party and the case was not frivolous or brought solely for the purposes of delay, the Supreme Court denied Roper Pond's motion for costs on appeal. (Exhibit B). After the Supreme Court dismissed the appeal as moot, Roper Pond filed a motion for costs on appeal pursuant to SCACR Rule 222. Rule 222 states that "costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal affirmed." Unlike Section 15-77-300, et seq., which creates a "substantial justification" standard or SCALC Rule 72, which creates a "frivolous or taken solely for the purposes of delay" standard, Rule 222 contains no standard for determining whether an award of costs is warranted. In other words, if the Supreme Court affirms a lower court ruling or dismisses an appeal favourably, then an award of costs is presumed under SCACR Rule 222 and the respondent need only file a motion along with a sworn, itemized statement of costs incurred. SCACR Rule 222(d).

In this case, the Supreme Court denied Roper Pond's motion for costs on June 17, 2015. (Exhibit B). In denying the motion for costs, the Supreme Court implicitly concluded that dismissal on mootness grounds is not a favourable disposition and, after a thorough review of the record, found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted. This conclusion is further bolstered by case law holding that dismissal on mootness grounds does not satisfy the "prevailing party" requirement as previously discussed. Douan v. Charleston County Council, 373 S.C. 384, 645 S.E.2d 241 (2007) (no prevailing party status where case dismissed as moot); City of Charleston v. Masi, 362 S.C. 505, 510, 609 S.E.2d 301, 304 (2005) (same).

WHEREFORE, the Petitioners ask that Roper Pond's Third Amended Petition for Fees, Costs, and Sanctions be denied.

Respectfully submitted,

Amy E. Armstrong
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Attorney for Arcadia Lakes

Georgetown, South Carolina

January 5, 2016

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control, and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

I hereby certify that on this date I served copies of the Petitioners' Response to Roper Pond's Third Petition for Fees, Costs and Sanctions upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

W. Thomas Lavender, Esquire
Joan W. Hartley, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29202

Stephen P. Hightower, Esquire
DHEC Office of Counsel
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Columbia, SC 29201

Amy E. Armstrong
Attorney for the Petitioners

Georgetown, South Carolina

January 5, 2016

The Supreme Court of South Carolina

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

v.

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

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

ORDER

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

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

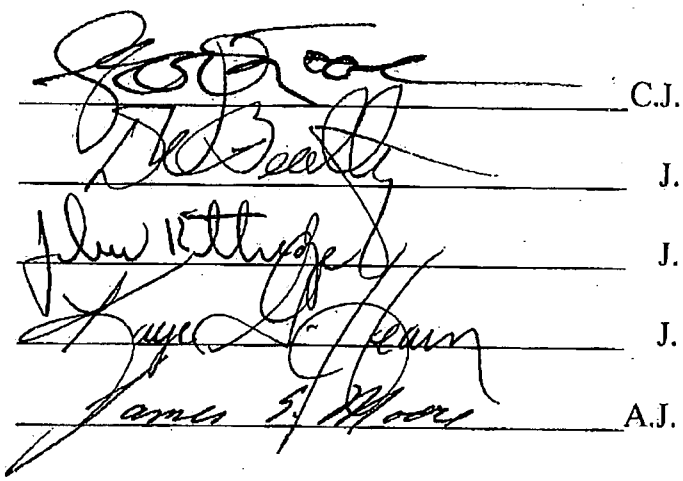
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[1] "[T]he serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision." S.C. Code Ann. § 1-23-610 (A)(2) (Supp. 2014); *see also* S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2014) ("A final decision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

Exhibit A
0871

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

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



C.J.

J.

J.

J.

A.J.

Columbia, South Carolina

April 9, 2015

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

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

cc:
W. Thomas Lavender, Jr., Esquire
Joan Wash Hartley, Esquire
Amy Elizabeth Armstrong, Esquire
Stephen Philip Hightower, Esquire
Jacquelyn Sue Dickman, Esquire
James Blanding Holman, IV, Esquire
The Honorable Jana Shealy

The Supreme Court of South Carolina

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

v.

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

Appellate Case No. 2013-001521

ORDER

The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied.

C.J.
FOR THE COURT

Pleicones, J., not participating

Columbia, South Carolina

June 17, 2015

Exhibit B

cc:
W. Thomas Lavender, Jr., Esquire
Joan Wash Hartley, Esquire
Amy Elizabeth Armstrong, Esquire
Stephen Philip Hightower, Esquire
Jacquelyn Sue Dickman, Esquire
James Blanding Holman, IV, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC AFFIDAVIT OF JOHN FREEMAN

PERSONALLY APPEARED BEFORE ME John P. Freeman who first being duly sworn, deposes and states as follows:

1. I respectfully submit this Affidavit in opposition to Respondent's request for sanctions made in Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to S.C. Code Ann. §§ 15-36-10 and 15-77-300 or Rule 72, SCRPALC. The information contained herein is true and correct to the best of my knowledge, information, and belief.

EXPERT'S CREDENTIALS AND BACKGROUND

2. Following my graduation from the University of Notre Dame Law School in 1970, I worked at the Jones Day law firm (then known as Jones, Day, Cockley and Reavis). I left Jones Day in 1972 to take a Fellowship at the University of Pennsylvania Law School's Center for Study of Financial Institutions. I subsequently received my LL.M. from Penn Law School. I joined the

Exhibit C

faculty of the University of South Carolina Law School in 1973. Though much of my professional life was devoted to teaching, I have substantial experience in practicing law. I have been admitted to practice as a lawyer for nearly 45 years. I have been admitted to practice in the States of South Carolina and Ohio, and in various federal courts, including the United States District Courts for the Northern District of Ohio, the South Carolina District, and the District of Colorado, the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, and the United States Supreme Court. I have practiced before each of the foregoing courts and I am at present a member in good standing of each of those courts. I have also been admitted to practice pro hac vice in various federal and state courts over the years, including courts in Georgia, North Carolina, New Jersey and the Virgin Islands. I retired from USC Law School in 2008 and am a Professor of Law Emeritus. Besides teaching at USC, I have taught at the University of Texas Law School and Loyola Law School in Chicago. I have also worked for the Securities and Exchange Commission as a special counsel. I have assisted South Carolina's Attorney General as a consultant and expert in various investigations and prosecutions. As a law school professor I specialized in business courses, legal ethics, and malpractice. I am familiar with standards governing lawyer disciplinary proceedings, having participated in the litigation of discipline cases as a defense lawyer, as consultant to disciplinary counsel, and as an expert witness on various occasions. I have served as a member of the South Carolina Bar's Ethics Advisory Committee and have written various ethics opinions involving lawyer conduct published by the Bar. Before my retirement in 2008, I taught legal ethics for 35 years at USC Law School. I have also taught professional responsibility subjects at numerous CLE programs, and at several JCLE programs. I have served as a litigation consultant in numerous legal malpractice cases and business-related cases. I have lectured on the ethical standards applicable to lawyers bringing and prosecuting lawsuits many times, and have written about the topic. I have done the same concerning the field of legal malpractice. I have participated

in disputes as to the behavior of lawyers and law firms in handling litigation matters and in their dealings for clients many times, and have testified as an expert in such cases many times. I am familiar with sanctions proceedings against lawyers and parties, having taught about such matters, and having participated in such proceedings as a lawyer and as an expert. I have participated in matters involving claims for assessment of legal fees many times, including claims such as those before this Court. I have expressed my expert opinion multiple times in connection with sanctions motions filed in legal proceedings, including in state and federal court. My current curriculum vitae is attached as Exhibit 1, which further establishes my qualifications.

EXPERT'S ASSIGNMENT AND FACTUAL BACKGROUND

3. I have been asked by legal counsel defending the instant request for sanctions to express my professional opinion on the propriety of their conduct in bringing and maintaining the underlying case on behalf of the Town of Arcadia Lakes and sixteen (16) individuals residing in the Town (collectively "the Residents"). I have familiarized myself with the factual allegations which have been advanced in this matter. Besides repeatedly consulting with counsel for the Town and the Residents, I have been furnished and have reviewed the fee petition and more than 700 pages of record material starting with the Request for Contested Case Hearing filed February 16, 2009. A roster of the record material is attached as Exhibit 2 hereto. I have also reviewed additional factual background material furnished to me by Ms. Armstrong as well as relevant materials related to sanctions, including the statute and Court Rule relied on, S.C. CODE ANN. § 15-77-300 and Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court. Since this matter involves South Carolina Counsel on both sides, I have also considered SCACR 407, Rule 3.1, a mandatory ethics rule applicable to South Carolina lawyers, which makes it unethical to bring a frivolous proceeding. I have also considered South Carolina's Frivolous Proceeding Sanctions Act, S.C. Code § 15-36-10, which is also binding on South Carolina lawyers like counsel for the parties

in this case. For an award of sanctions, that statute requires proof that a reasonable attorney faced with the same circumstances would consider that the claim advance was frivolous or brought merely to harass or injure the opposing party.

EXPERT'S FINDINGS

4. The record I have reviewed reflects a hotly contested matter with each side represented by talented and dedicated lawyers. Obviously, Respondent has claimed victory and has completed the contested construction project. However, the Town and Residents have reason to argue Roper Pond did not fully and finally prevail on the main issues in the case. After certiorari was granted and the case was fully briefed and argued, the Supreme Court did not render a favorable opinion on the main issues, instead disposing of the case as moot because it could not provide any relief.

5. Even if the Supreme Court had rendered a favorable opinion on the main issues, I do not agree that the Town acted without substantial justification. Nor do I agree with Roper Pond's claim that the Town or Residents litigated in bad faith. Specifically, I disagree with Roper Pond that "[t]here is no doubt that Petitioners' appeal of the Department's decision in this matter 'frivolous or taken solely for the purposes of delay.'" Roper Pond's Memorandum in Support at 35. Roper Pond provides no evidence for its bald claim that the case is frivolous and brought solely for delay, and after a thorough review of the relevant filings I have found no support for this claim of unprofessional conduct.

6. In the same vein, I do not agree with Roper Pond "that Petitioners knew or should have known that there was no reasonable legal basis for its challenge to the Department's decision, and Roper Pond again provides no evidence to support this statement Id. at 34. In summary, I do not agree that Roper Pond has been subjected to lawyer misconduct in the form of a frivolous or bad faith proceeding filed and maintained against it by it lawyers. Although the Town and Residents did

not ultimately obtain the relief sought in this case, in my professional opinion it was brought with substantial justification and was not frivolous, brought in bad faith or brought solely for the purposes of delay. My opinion is that the litigation was brought and maintained in good faith, but the reviewing court simply could not provide the relief requested because construction had been completed.. My opinion is that sanctions are not called for and would be inappropriate. Reasons supporting my opinions follow.

7. A telling portion of the record reflects the concerns expressed by the Town and Residents, and joined by the Wildlife Federation as amicus, to the effect that the ALC's ruling on standing, affirmed by the Court of Appeals, was incorrect and "would have far-reaching implications for other parties seeking review the decisions of the Department." Id. at 8. The ALC's ruling was decried by the Town for establishing "new, unjustifiably burdensome requirements for standing that a Plaintiff have a property interest in the area over which the challenged activity will occur, as well as prove either the merits or a future permit violation." These requirements, according to the Town and Residents, with support from the Wildlife Federation, were viewed as "a significant divergence from well-established standing law." Id.

8. Because the matter was moot, the Supreme Court never addressed the merits of the case. Roper Pond now attempts to spin the Supreme Court's mootness dismissal into an implicit affirmance of the lower courts' rulings on the standing issue: "Had the Supreme Court found the ruling on standing in this case to be as far removed from well-established standing law as the Petitioners and the Wildlife Federation contend, the Court could have applied one of the exceptions to the mootness rule and corrected the alleged errors in the standing holding of this Court and the Court of Appeals." Id. at 9.

9. In nearly 45 years of law practice I have never before encountered a claim by a litigant that a mootness finding by a Court can somehow be manipulated and stretched to support a

claim that the underlying proceeding was frivolous or brought in bad faith. By definition, the Supreme Court's mootness finding was not a ruling on the merits. The case was simply dismissed because Roper Pond's actions made " it . . . impossible for this Court to grant any redress in the context of the issues as framed and litigated below." Supreme Court Order dated April 9, 2015, at 2.

10. I notice that missing from Roper Pond's arguments is any reference to this passage from the Supreme Court's Order: "As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate postconstruction complaints." Id. at 2, note 2. I find that the Supreme Court was attentive to and solicitous of "Petitioner's concerns." There is no trace of a suggestion that the Supreme Court viewed Petitioners as illegitimate or their concerns as voiced in bad faith or purely for delay.

11. Whereas Roper Pond seeks to portray the verbiage not found the Supreme Court's order as supporting its sanctions attack, the language actually used by the Court in its signed order really attests to legitimate judicial concern over the conduct of Roper Pond and DHEC. This is evidence showing me that lawsuit brought by the Town and Residents had substance. Though the Town and Residents and their counsel did not obtain the relief they sought, their case was not frivolous, was not brought without substantial justification or in bad faith, and was not brought purely for delay.

12. Supporting my view that the merits of the case were such that a reasonable lawyer would consider the case worth bringing is the fact that two reasonable lawyers actually agreed with the Town's counsel and concluded the case had merit. I speak here of testimony being submitted via affidavits from Cravens Ravenel and Eugene McCall. Mr. McCall is an environmental law

expert. I find that his long and deep experience in the field gives great weight to his opinions. I find it significant that from Day 1 he viewed the subject case as legitimate and worth bringing. As for Mr. Ravenel, I have known and respected him for decades. He is universally viewed by knowledgeable South Carolina attorneys as a "lawyer's lawyer." He is well known throughout the Bar for his wisdom and his acute sensitivity to professionalism matters. These traits were implicitly acknowledged by our Supreme Court when it had him Chair the Court's Committee on Character and Fitness for 15 years.

13. Mr. Ravenel was consulted in advance by the Town as independent counsel and asked to evaluate its prospects for success on appeal. His opinion was that legitimate grounds for appeal existed. That he may have been wrong, does not undercut the salience and legitimacy of his view. The same goes for Mr. McCall's opinion given at the outset of the case.

14. These two independent opinions addressing the merits of the Town's case were advanced by extremely qualified, respected attorneys. Those lawyers' judgments go far toward establishing that this case was brought for legitimate reasons, and in good faith. Both highly experienced and qualified lawyers found, after study, that the Town had good cause to put forward allegations that Roper Pond's alterations to waters of the state would violate Regulations 61-9 and 61-68; that Roper Pond should have been required to obtain an individual NWP Certification; that the Stormwater Pollution and Prevent Plan was inadequate; and that water quality would be impaired in violation of Regulation 61-68. In my opinion, each of these allegations provides an independent, sufficient and reasonable legal basis warranting the filing of a request for contested case hearing.

15. Moreover, Mr. McCall's affidavit goes further and factually avers that his pre-litigation concerns have proved prescient. He opined in his affidavit, that Roper Pond's condition had been degraded and that the "cause of this degradation in Roper Pond was from the construction

and post construction runoff from the Roper Pond, LLC multifamily Development." McCall Aff. At 4. The fact that, at least in Mr. McCall's eyes, the harm that was forecast and which supported the filing of the lawsuit has actually occurred goes to show that the litigation was brought for good cause and not for any ulterior motive.

16. Sanctions require different proof and different facts from what is required to prevail on the main issues or merits of a case. In my opinion, such proof and facts are lacking here. In my estimation, though it is undisputed that the Residents and Town's positions were rejected by this Court and the Court of Appeals, Roper Pond has mustered no compelling proof suggesting entitlement to sanctions. On the other hand, the Town and Residents present via record facts and various lawyers' affidavits what I consider to be a comprehensive and compelling report on the good faith efforts undertaken by counsel in bringing forth the Town's claims. That those efforts were not rewarded with the relief sought is to me simply an unfortunate result, due largely to the fact that construction had been completed by the time the Supreme Court heard this case. I find no justification whatever for punishing the Residents or the Town with hundreds of thousands of dollars of sanctions.

17. My review of the factual background convinces me that the Residents and Town's lawyers were fully mindful at all times that asserting claims such as those advanced in this lawsuit implicated ethical duties and obligations, and that those ethical requirements were met. Ms. Armstrong took the lead in that effort. Included in her detailed and extensive due diligence effort was a background that gave her an excellent base from which to evaluate this case and to proceed. Drawing on her long experience, Ms. Armstrong concluded that there were reasonable grounds to support the key allegations made in the Contested Case Proceeding and took on the litigation. This is not conduct deserving of punishment, particularly given that, at the time she took the case to court, the case had already been reviewed by Mr. McCall and had been judged to be meritorious.

18. It is hard for me to imagine a worse case than this one in which to categorize the Claimant's contentions as frivolous, brought in bad faith (i.e., not in good faith), or sanctionable. Ms. Armstrong's detailed filings vouch convincingly in favor of her care, skill, diligence, and professionalism. Her work, though ultimately unsuccessful, had depth and substance, even if her arguments ultimately failed to achieve the desired result.

19. Accepting that the test for sanctions is "frivolity" and/or bad faith, I testify that the test has not been met here, in that, in light of all relevant facts: (1) reasonable attorneys after reasonable investigation would (and did) believe that the Residents and Town's position was meritorious and that there was good cause for bringing it; (2) a reasonable attorney would (and did) believe that the claims had not been raised in bad faith or merely to harass or injure Roper Pond; and (3) a reasonable attorney would (and did) believe that the claim was not frivolous and has not been raised for an ulterior motive. I state affirmatively that, in my opinion held to a reasonable degree of professional certainty, based on my investigation, including my review of the materials listed above, Roper Pond has no hope of proving frivolity or bad faith or lack of substantial justification by a preponderance of the evidence.

SUMMARY

20. There are few if any experienced lawyers who have gone to court with a case and have not met with failure. As the saying goes, "I you haven't lost 'em, you haven't tried 'em." In my opinion, expressed to a reasonable degree of certainty as an experienced lawyer who won and lost cases and has litigated sanctions issues over the years, the Town's lawyers' positions were credible, were substantially justified based on reasonable due diligence, were non-frivolous, and were advanced for professional purposes in the best of good faith. You cannot ask more from lawyers than that. In my opinion the pending motion seeking fees and expenses should, therefore,

be denied.

21. For the record, I state affirmatively that I have not received, nor will I receive, directly or indirectly, in any form or fashion, any consideration or compensation for preparing this affidavit or otherwise participating in this matter.

22. Further affiant sayeth not.

JOHN P. FREEMAN

SWORN TO BEFORE ME this 21st
day of August, 2015

Notary Public for South Carolina
My Commission Expires July 7, 2018

RESUME
John P. Freeman
Professor of Law Emeritus

Address and phone numbers:	2329 Wilmot Avenue Columbia, South Carolina 29205 803-254-4667 (phone) 753-9870 (fax)
Education history:	LL.M., 1976, University of Pennsylvania Law School; J.D., 1970, University of Notre Dame Law School; B.B.A., 1967, University of Notre Dame (Accounting)
Employment history:	1970 72, Attorney, Jones, Day Law Firm, Cleveland, Ohio
	1972 73, Fellow, University of Pennsylvania Law School Center for the Study of Financial Institutions
	1973 75, Assistant Professor of Law, University of South Carolina
	1974 and 1975 (Summers), Special Counsel, Division of Investment Management, SEC, Washington, D.C.
	1975 78, Associate Professor of Law, University of South Carolina; Visiting Associate Professor of Law at Loyola Law School (Chicago) Spring 1977
	1978 2008, Professor of Law, University of South Carolina; Visiting Professor of Law at University of Texas Law School, Summer 1978
Present:	Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus
Honors and Awards:	Undergraduate: Member Beta Alpha Psi (Honorary Accounting Fraternity)
	Law School: Executive Editor, Notre Dame Lawyer; Distinguished Military Graduate

EXHIBIT 1

	Professional: At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977,1984; Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving)
Admitted to Practice:	Ohio; South Carolina
Teaching History Courses Taught:	Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1999-2008, Regular Legal Ethics Column for South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).
Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations' South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

Article, Treble Damage Statutes Can Increase Trust Recoveries, 4 Probate Practice Reporter, June 1992, at 1.

Article (with Nathan Crystal), Scienter in Professional Liability Cases, 42 S.C.L. Rev. 783 (1991).

Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

Article, When Are Lawyers' Gifts to Judges Improper' Carolina Lawyer (November-December 1990).

Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

Article, Understanding the Joint Client Exception to the Attorney-Client Privilege, Carolina Lawyer (July-August 1989).

Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1 124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371 439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732 983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122 40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2008-04: John Belton O'Neall Inn of Court, Ethics of Advertising Firms, Jan.

20. 2009; S.C. Bar, Ethics Presentation "Business Lawyer Horror Stories, Nov. 21, 2008; Participant, Mutual Fund Industry Regulation Roundtable, Chicago-Kent Law School, Nov. 7, 2008; SC Legislature, Ethical Duties of Legislative Employees, Oct. 2, 2008; SC Bar, Dealing with Ethical Duties When Dealing with Pro Se Parties, Oct. 10, 2008; Richardson Patrick Local Counsel CLE, Litigation Ethics, May 2, 2008 (Charleston, SC); Inst. of Public Utilities, 39th Ann. Reg. Policy Conf., Panel on Equity and Responsibility in the Public Utilities Sector (Charleston, SC), Dec. 3, 2007; S.C. Attorney General's Office; Litigation Ethics, Nov. 9, 2007; Richland County Bar, Ethics Update, Nov. 2, 2007; SC Bar, Litigation Ethics, Oct. 26, 2007; S.C. Children's Law Center, Ethical Problems in the Child Abuse Area, Oct. 19, 2007; National Ass'n of Medicaid Fraud Control Units, Ethics and the Government Lawyer (Savannah, Ga.), Oct. 1, 2007; SCACPA Litigation Conf., Litigation Ethics (Kiawah Island, SC), Sept. 21, 2007; S.C. Circuit Court Judges, May 17, 2007, Practice Tips in Civil Litigation; Energy & Mineral Law Foundation, May 15, 2007, Panel Member, Legal Ethics, 2 hr.; S.C. Government Investigators, Ethical Duties of Investigators, Feb. 23, 2007; S.C. Bar, Employment Law Section, Ethics Update, Jan. 26, 2007; S.C. Association of Counties, Ethics Update, Dec. 8, 2006; Lexington County Bar Ass'n, Ethics Update, Dec. 6, 2006; Richland County Bar, Ethics Update, Nov. 3, 2006; S.C. State Government Lawyers, Ethics Update, Nov. 3, 2006; S.C. Judicial Merit Selection Commission, Overview of Judicial Ethics, Sept. 14, 2006 (½ hr.); Federal Bar Ass'n, SC Bar, Ethics and Professionalism, Sept. 8, 2006; Commercial Law League of America, Avoiding Grievances and Malpractice Worries in Your Practice, July 6, 2006, Asheville, N.C. (2 hours); National Structured Settlement Trade Ass'n, Ethics in Litigation, Westin Rio Mar, Puerto Rico, May 9, 2006; S.C. Chamber of Commerce, Legal Ethics for the Employment Lawyer, Hilton Head, S.C., May 6, 2006; American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTLA, Making Money Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004; S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter). American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTLA, Making Money

Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004; S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service
Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976).
Faculty Senate (1996-98)

University Committees
Promotion and Tenure
Faculty Welfare

Annuities and Insurance
Budget Committee

Law School Committees
Faculty Selection
Academic Standing (currently serving)
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee

Chairman, Supreme Court Commission on Continuing Lawyer Competence (1980 83)

President, Leaphart Elementary School PTO (1983)
Chairman, Irmo Middle School School Improvement Council (1985)
Member, Irmo Middle School School Improvement Council (1985-89),
President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member Executive Board (1988-93)
Member, Irmo High School-School Improvement Council (1988-93)
Founder and Past-president, University of Notre Dame Club of South Carolina
Lexington District Five and South Carolina State School Volunteer of the Year 1993

Town of Arcadia Lakes v. Roper Pond, LLC & DHEC

Record Materials Reviewed in Connection with Roper Pond's Petition for Fees, Costs and Sanctions

1. Request for Final Review Conference (pp. 1-10)
2. Final Order & Decision of ALC (pp. 11-39)
3. Motion to Reconsider and For Stay (pp. 40-43)
4. Order for Temporary Stay (p. 44)
5. Order Denying Motion to Reconsider and For Stay (pp. 45-46)
6. Final Brief of Appellants (pp. 47-99)
7. Brief of Respondents (pp. 100-154)
8. Reply Brief of Appellants (pp. 155-181)
9. Court of Appeals Opinion (pp. 182-199)
10. Petition for Rehearing (pp. 200-228)
11. Court of Appeals Opinion on Rehearing (pp. 229-246)
12. Petition for Certiorari (pp. 247-278)
13. Roper Pond's Response to Petition for Cert (pp. 279-307)
14. DHEC's Response to Petition for Cert (pp. 308-326)
15. Reply on Petition for Cert (pp. 327-343)
16. Order Granting Writ of Certiorari (p. 344)
17. Petitioners' Brief on Certiorari (pp. 345-400)
18. Roper Pond's Brief on Cert (pp. 401-447)
19. DHEC's Brief on Cert (pp. 448-469)
20. Reply Brief on Cert (pp. 470-492)
21. Supreme Court's Order (pp. 493-495)
22. Roper Pond's Petition for Fees, Costs and Sanctions, with exhibits (pp. 496-766)

EXHIBIT 2

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
DOCKET NO. 09-ALJ-07-0069-CC

Town of Arcadia Lake, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC Respondents.	**AFFIDAVIT OF EUGENE C. MCCALL, JR.**

1. I am an attorney licensed in the state of South Carolina and President of McCall Environmental, PA.

2. I have been in private practice for twenty-seven years and most all of my legal work has been in the areas of environmental and water law.

3. I have been an Adjunct Professor of Law at the University of South Carolina for three semesters, where I taught the water quality section of the team-taught law school course, South Carolina Environmental Law.

4. I also hold a PhD in Environmental Health Engineering, am a registered professional engineer in the State of South Carolina, and have taught environmental engineering courses at the University of South Carolina College of Engineering.

Exhibit D

5. In late 2008, at Jimmy Chandler's request, I inspected Roper Pond and met with some of the petitioners in this action, including representatives of the Town of Acadia Lakes, regarding their concerns about the anticipated development. I reviewed the Roper Pond documents from the South Carolina Department of Health and Environmental Control (DHEC) file.

6. Mr. Chandler requested my opinion of the development as a professional engineer because I have significant experience in construction and post construction stormwater runoff and proper controls needed for developments when sited close to receiving waters.

7. From my investigation, I found that the Roper Pond Development (the "Development") would more probably than not, have a significant and deleterious impact on Roper Pond and also likely to the connecting, downstream Cary Lake and other portions of Gills Creek Watershed.

8. I provided Mr. Chandler with my professional engineering opinion. Specifically, in part, I opined that:

   a. significant sediment deposition would most probably occur in Roper Pond during and after construction unless appropriate controls were implemented, proper care was taken during construction, and proper maintenance was conducted after construction; and

   b. significant degradation of water quality would most probably occur in Roper Pond because of construction and post construction runoff unless appropriate controls were implemented, proper care was taken during construction, and proper maintenance was conducted after construction.

9. I was not able to continue working with Mr. Chandler on this matter due to other litigation on which Mr. Chandler and I were attorneys on opposing sides and the potential conflicts that could occur if I worked on this matter as a consultant and expert witness.

10. I have reviewed materials provided by counsel for the Petitioners, attached as Exhibit A.

11. The Town of Arcadia Lakes et al.'s petition included some of the points of my opinion and provided, in my professional opinion, a colorable, adequate, reasonable and proper factual basis for their request for a contested case.

12. The Town of Arcadia Lakes et al.'s petition contained a reasonable basis in law for pursuing their request for a contested case. Specifically, the allegations that Roper Pond's alterations to waters of the state would violate Regulations 61-9 and 61-68; that Roper Pond did not qualify for a Nationwide Permit and Certification and should have been required to obtain an individual NWP Certification; that the Stormwater Pollution and Prevent Plan ("SWPPP") was deficient; and that water quality would be impaired in violation of Regulation 61-68 provide sufficient legal basis upon which I would, as an attorney licensed and practicing in South Carolina, file a request for contested case hearing.

13. Upon review of the appellate briefing in this case, it is evident that the appellate courts spent considerable time reviewing the issues in this case. The Town of Arcadia Lakes et al.'s briefs contain questions of law that have not been answered by an appellate court and that have a reasonable basis in law. Specifically the Town et al. argued that 1) the NWPs only cover certain clearly defined activities; 2) DHEC's 401

certifications of the NWPs provide additional limitations, including general conditions; 3) in order to receive coverage under DHEC's certifications the activity must be limited to the impacts authorized by that certification and must meet the general conditions; 4) the general conditions require DHEC to review the "overall project," not "only the land area directly impacted by the NWP;" and 5) when a project's impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly do in this case, they are not covered by DHEC's NWP certification. Based upon the history, facts and law in this case, I have concluded, as an attorney and an engineer, that there was a reasonable basis for pursuing this litigation. The Supreme Court's dismissal of this case as moot further supports my conclusion. On June 14, 2015 I was in Columbia, walked around the walking trail of the Roper Pond Development, and visually inspected Roper Pond and the Development. Although there are several post construction water quality devices installed, much of the stormwater runoff from the Development enters the pond uncontrolled and untreated. This clearly, upon my visual observation, is causing adverse affects to the Roper Pond water quality and its wetlands border. Roper Pond is in a more eutrophic state in 2015 than I observed in 2008; the only cause of this degradation in Roper Pond was from the construction and post construction runoff from the Roper Pond, LLC multifamily Development. Thus several of the major concerns of the Petitioners have in fact occurred; see my photos taken on June 14, 2015 attached as Figures 1 – 10.

14. Although the Courts did not agree with the Petitioners' claims, those claims were properly asserted, and in my professional engineering opinion and as an attorney, Petitioners' claims were well founded and not frivolous.

Eugene C. McCall, Jr., PhD, PE, JD
SC Bar # 3721
SC PE # 10005

SWORN to before me this
7th day of July, 2015.

(SEAL)
Notary Public for South Carolina

My commission expires: February 21st, 2024

Exhibit A

Town of Arcadia Lakes v. Roper Pond, LLC & DHEC

Materials for Review in Connection with Roper Pond's Petition for Fees, Costs and Sanctions

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Eugene C. McCall, Jr. Affidavit
Figures

Roper Pond
Columbia, SC
June 14, 2015



Figure 1. Sediment from Development filling pond and wetlands.



Figure 2a. Development's poor drainage causing algal growth, which flows directly into Roper Pond.

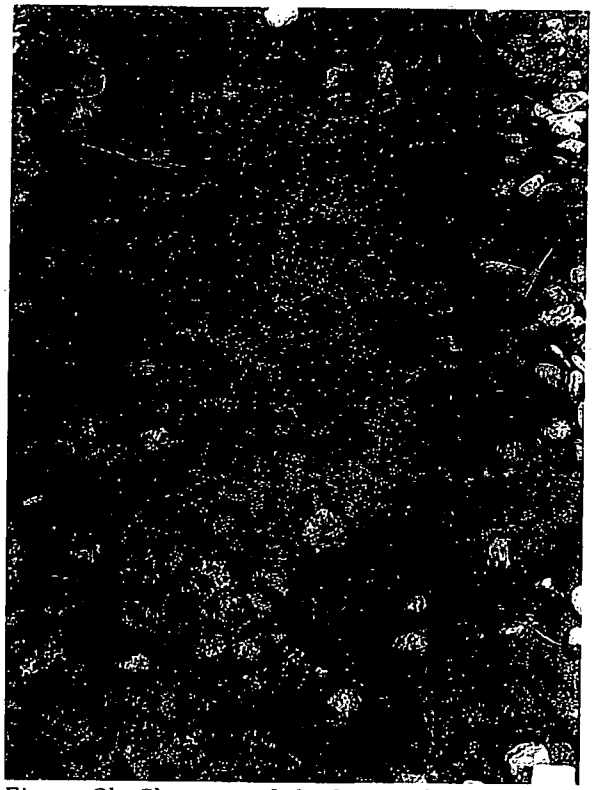


Figure 2b. Close up of algal growth



Figure 3. Eroding drainage ditch providing sediment directly to Roper Pond.

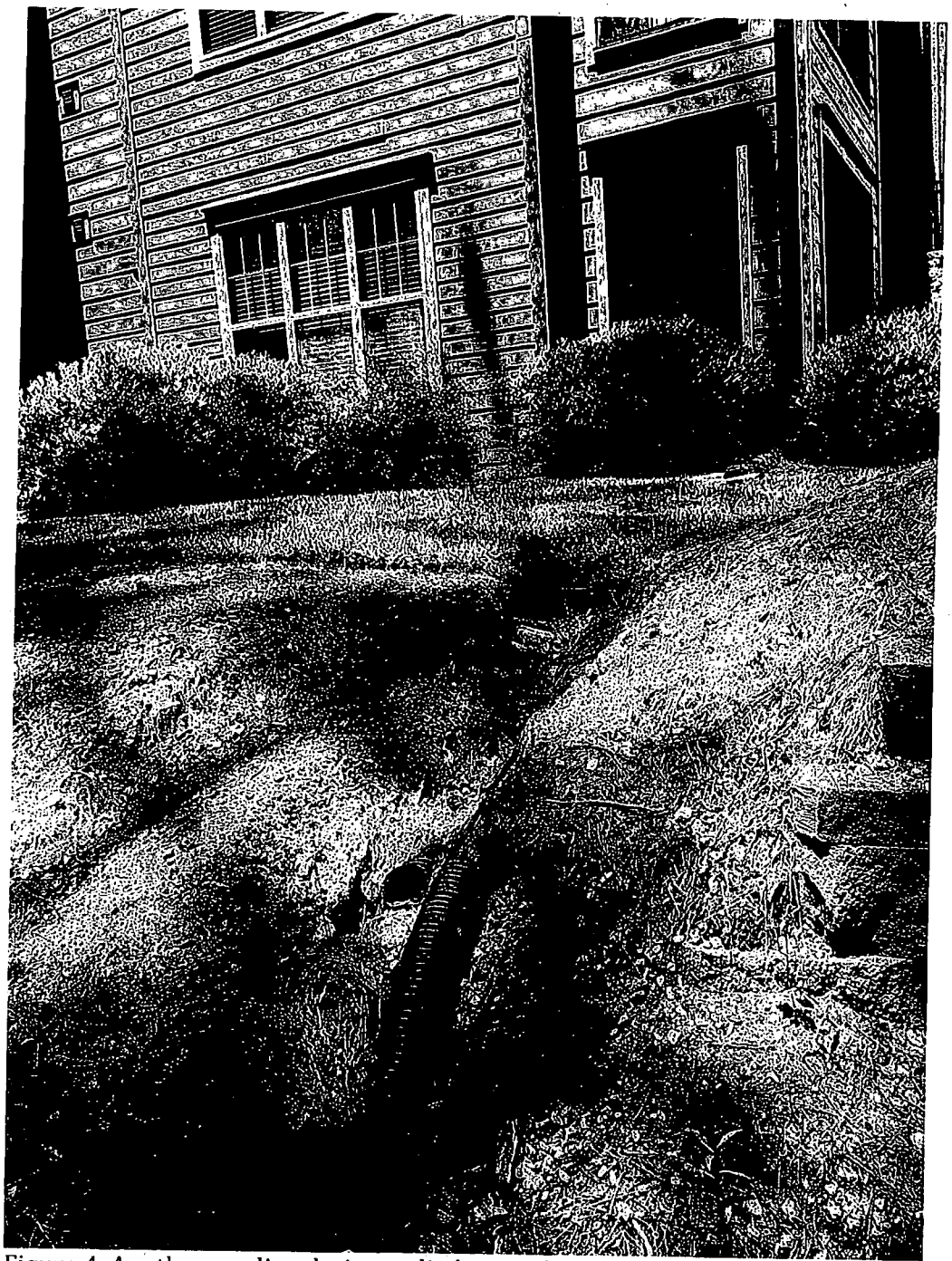


Figure 4. Another eroding drainage ditch providing sediment directly to Roper Pond.

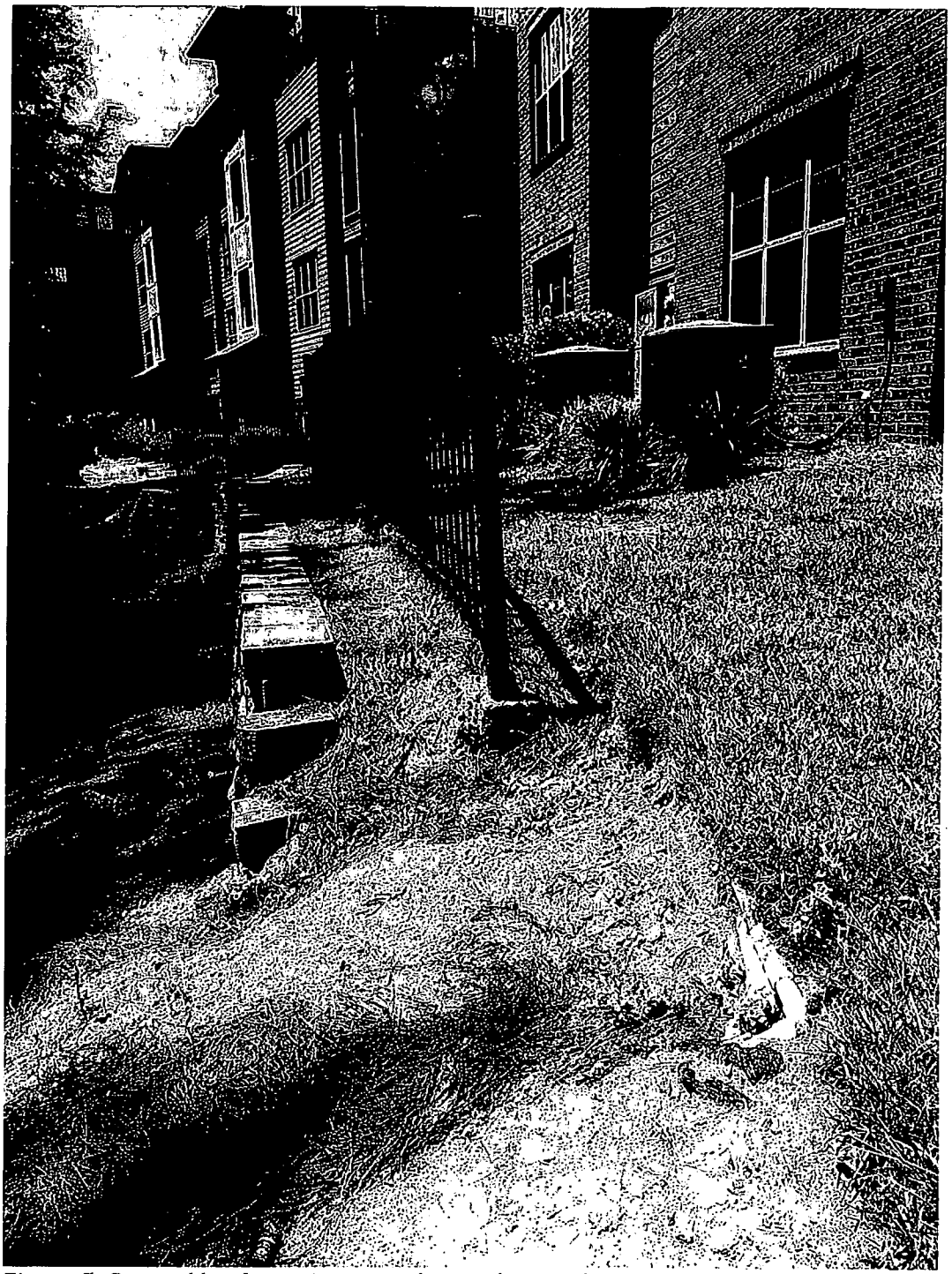


Figure 5. General bank erosion providing sediment directly into Roper Pond.



Figure 6. Foundation erosion provides sediment directly into Roper Pond.



Figure 7. Uncontained trash (foreground) and Carwash runoff (structure in background) flow directly into Roper Pond via uncontrolled curb inlet shown in Figure 8.



Figure 8. Curb inlet which receives runoff directly trash dumpster and carwash areas.

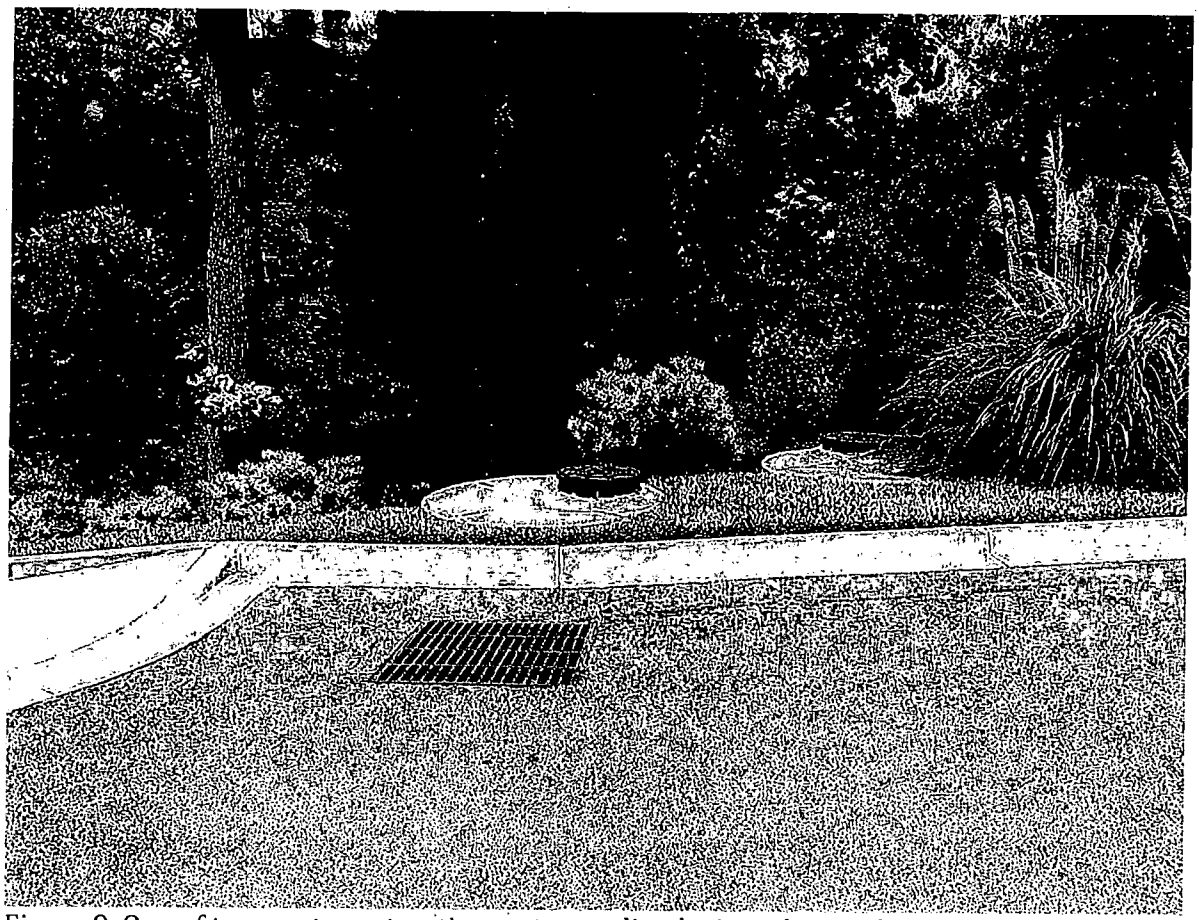


Figure 9. One of two post construction water quality devices observed, which receives some, but not all of the Development runoff.



Figure 10. Roper Pond in June of 2015 demonstrates a much more eutrophic and degraded state than was observed in 2008, prior to the Development.

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lake, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC Respondents.	DOCKET NO. 09-ALJ-07-0069-CC **AFFIDAVIT OF D. CRAVENS RAVENEL**

1. I am an attorney licensed in the state of South Carolina and have been a member of the South Carolina bar since 1970. I was admitted to the U.S. Fourth Circuit Court of Appeals in 1982 and the U.S. Supreme Court in 1985.

2. I have been in private practice for forty-five years and my work has included providing certified mediation services, to litigation, to appellate advocacy on a wide range of issues and cases. Currently I am a partner at Baker Ravenel & Bender, LLP, where I have practiced since 1999.

3. I was the Chairman of the South Carolina Supreme Court Committee on Character and Fitness from 1989 through 2004.

4. I served as a Corporal in the U.S. Marine Corps from 1958 through 1960.

Exhibit E

0909

5. In April of 2013 I was retained by the Town of Arcadia Lakes in connection with the appeal of the Department of Health and Environmental Control's ("DHEC") authorization to Roper Pond, LLC, for the construction of a multi-family residential development adjacent to the Town. At that time, the case, which had originated in the Administrative Law Court, was pending before the South Carolina Court of Appeals on a Petition for Rehearing.

6. The Town requested my services because I am a certified mediator and I have significant experience in dispute resolution and appellate practice. The Town sought my advice and opinion regarding the merits of its appeal as well as Roper Pond's petition for fees, costs and sanctions.

7. In connection with rendering my advice and opinions, I reviewed the following documents: the Request for Contested Case Hearing; the Prehearing Statements; the Final Order and Decision of the Administrative Law Court; the Motion to Reconsider and For Stay; the Order for Temporary Stay; the Order Denying Motion to Reconsider and For Stay; the Final Brief of Appellants; the Final Brief of Respondents; the Reply Brief of Appellants; the Court of Appeals Opinion; the Petition for Rehearing; the Court of Appeals Opinion on Rehearing; and the Petition for Fees, Costs and for Sanctions.

8. Based on my review of the relevant documents, in my professional opinion, the Town presented a colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC's authorizations to Roper Pond, LLC.

9. The Town's reasonable basis for seeking a contested case hearing, and continuing in its appeal, include the allegations that Roper Pond's alterations to waters of the state would violate Regulations 61-9 and 61-68; that Roper Pond did not qualify for a Nationwide Permit and Certification and should have been required to obtain an individual NWP Certification; that the Stormwater Pollution and Prevent Plan was deficient; and that water quality would be impaired in violation of Regulation 61-68. In my opinion, each of these allegations provide an independent, sufficient and reasonable legal basis warranting the filing of a request for contested case hearing.

10. Upon review of the appellate briefing in this case, it is evident that the appellate courts spent considerable time reviewing the issues in this case. The Town of Arcadia Lakes briefs contain questions of law that have not been answered by an appellate court and that have a reasonable basis in law. Specifically the Town et al. argued that 1) the NWPs only cover certain clearly defined activities; 2) DHEC's 401 certifications of the NWPs provide additional limitations, including general conditions; 3) in order to receive coverage under DHEC's certifications the activity must be limited to the impacts authorized by that certification and must meet the general conditions; 4) the general conditions require DHEC to review the "overall project," not "only the land area directly impacted by the NWP;" and 5) when a project's impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly do in this case, they are not covered by DHEC's NWP certification. Based upon the history, facts and law in this case, I have concluded that the Town had substantial justification for pursuing this litigation.

11. In my professional opinion as an attorney, the Town of Arcadia Lakes' claims were well founded and not frivolous. In addition, I have seen no indication that the Town's actions were simply to delay the Roper Pond project, but rather that the Town has, throughout this litigation, expressed a real and serious concern about the impact that the Roper Pond project would have on the aesthetic and environmental qualities of the Town that make it a desirable place to live. The Supreme Court's dismissal of this case as moot further supports my conclusion. Had the Supreme Court concluded that the Town failed to present a compelling case on the merits, it could have affirmed the Court of Appeals Opinion. Instead, the Supreme Court's opinion indicates that it believed that the Town presented a meritorious case; however, it was unable to grant the requested relief because the project had been completed.

D. Cravens Ravenel

SWORN to before me this
20th day of August, 2015.

(SEAL)
Notary Public for South Carolina

My commission expires: 7-8-2024

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lake, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC Respondents.	)	DOCKET NO. 09-ALJ-07-0069-CC **AFFIDAVIT OF CHARLES H. COOK**

1. I am an attorney licensed in the state of South Carolina and have been a member of the South Carolina bar since the Eleventh (11th) day of October, 1965. Aditionally I have been admitted to practice in the State of South Carolina Federal Fifth District, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. I have served over fifty years both privately and as corporate counsel in the practice of law, excluding two years as an Infantry Officer in the U. S. Army, and including five years in the Judge Advocate General Reserve. For more than fifteen years while practicing, I served concurrently as the Reporter for the Supreme Court of South Carolina. While continuing to practice private law, I have served over 10 years as Town Attorney of the Town of Arcadia Lakes, South Carolina.

Exhibit F

2. Without waiving privilege and any confidentiality as Town Attorney, I have personal knowledge and information surrounding the Town Council's pursuit of the contested case proceeding, through my service as the Town's Attorney. Based upon the nature of the complexities of environmental permitting and mixed use development plans for the development referenced by the above docket, I encouraged the Town Council to seek special counsel for legal advice and counsel and litigation, including necessity for expert witness, in order to have experienced, qualified and trained counsel.

3. As the Town's attorney, prior to the inception of the contested case proceeding at issue in Roper Pond, LLC's petition for fees and costs, I was apprised of the Town Council's consideration of an appeal of the DHEC permitting decision. In my role as Town attorney, I was privy to the Town Council's decision to continue pursuit of its legal challenges to Roper Pond, LLC's mixed use development. The mixed use development is directly adjacent to and abuts the borders contiguously of the Town of Arcadia Lakes.

4. I was personally aware that the Town Council sought the advice of Mr. James S. Chandler of the South Carolina Environment Law Project ("SCELP") who with association of Mr. Eugene McCall, Esq., an environmental engineering attorney (also noted expert witness), both independently and in concert assessed the facts and the law surrounding the S.C. Department of Health and Environmental Control's ("DHEC") stormwater permit decision, which authorized Roper Pond's mixed use development.

5. The Town sought the advice of Mr. Chandler and Mr. McCall because of their respective reputations as practitioners with vast experience in administrative and

environmental law, as well as Mr. McCall's environmental engineering credentials. Mr. McCall and Mr. Chandler were provided with substantial documentation related to the DHEC decision to authorize Roper Pond, LLC's storm water permit.

6. The Town Council requested that I meet with both Mr. Chandler and Mr. McCall to discuss with these attorneys their due diligence and determination which would be presented to the Town Council and certain expected individual petitioners prior to any decision to retain their selection as special Town counsel for the above docket.

7. I was requested by the Town Council to attend discussions that the Town Council, together with other prospective petitioners entered into with both Mr. Chandler and Mr. McCall. It is my firm recollection that these two gentlemen advised the Town Council and attending petitioners now of record, that in their opinion, ample support in fact and in law was clearly evident to support filing a challenge to the DHEC permit decision.

8. Prior to determining to proceed with a challenge, both Mr. Chandler and Mr. McCall presented their advice and counsel to the Town and the other affected petitioners, as to the viability of this case in point. Both Mr. Chandler and Mr. McCall advised the Town that there was a substantial and good faith basis in law and in fact to support filing the request for contested case hearing. At that point I was instructed to negotiate with Mr. Chandler a retainer agreement for services to be rendered which was timely executed.

9. This affidavit is provided based upon my personal knowledge of the events and record as the same involved the Town's pursuit of counsel prior to initiating this challenge action and thereafter. The undersigned has not observed any evidence to

indicate that the Town Council has pursued this contested case proceeding solely for the purposes of delay. The advice of counsel by Mr. Chandler, (unfortunately deceased during the existence of the ongoing case) and that of his able assistant Ms. Amy Armstrong, Esq., respectively addressed the nature of the case legally, the rights of the Town, those cases and statutes supporting the Town and applicable cases and statutes at law. In deciding whether to file the contested case hearing at issue, the Town of Arcadia Lakes, acting through its Council, relied solely and completely on the advice and counsel of Mr. Chandler and Ms. Armstrong, including initial review and advice advanced by Mr. McCall who withdrew due to a conflicting existing case with Mr. Chandler.

10. Subsequently, the Town Council for due diligence, and upon my recommendation, retained D. Cravens Ravenel, Esq. as a special counsel for advice regarding the merits of the Town's legal position in the case, given the existing status, facts, law and questions relating to appeal issues. Mr. Ravenel advised the Town Council that he found ample support in fact and in law for maintaining the appeal of the DHEC permit decision based upon his review of existing record, documents and discussions with the Town's attorney of record, Ms. Armstrong.

11. The Town Council relying upon that advice of Mr. Ravenel and the ongoing advice of Ms. Armstrong pursued its appeal all the way to the S.C. Supreme Court, which accepted the case on a writ of certiorari.

FURTHER THE AFFIANT SAYETH NOT.

Charles H. Cook

Charles H. Cook

SWORN to before me this
12 day of January, 2016.

Christine W. Murphy (SEAL)
Notary Public for South Carolina

My commission expires: April 21, 2021

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lake, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC Respondents.	)	DOCKET NO. 09-ALJ-07-0069-CC **AFFIDAVIT OF AMY E. ARMSTRONG**

1. I am an attorney licensed in the state of South Carolina and have been a member of the South Carolina bar since 2002. I was admitted to practice before the District Court of South Carolina in 2004 and before the Fourth Circuit Court of Appeals in 2011.

2. I have been practicing environmental and administrative law with the South Carolina Environmental Law Project for thirteen (13) years. During the first eight (8) years I worked with James S. ("Jimmy") Chandler, Jr., on all of the firm's cases, including the challenge to the DHEC authorizations challenged by the Town of Arcadia Lakes and a number of individuals residing within the Town of Arcadia Lakes at issue in this proceeding.

3. In early 2009 the Town of Arcadia Lakes and the individuals sought legal advice and counsel from the South Carolina Environmental Law Project and Jimmy Chandler

Exhibit G

regarding Roper Pond, LLC's proposal to construct a mixed use development adjacent to the Town's borders. The Town formally retained Mr. Chandler and this firm, including me, in February of 2009.

4. The Town Council sought Mr. Chandler's advice in assessing the facts and the law surrounding the S.C. Department of Health and Environmental Control's ("DHEC") stormwater permit decision, which authorized Roper Pond's mixed use development.

5. As co-counsel for the Town, I was aware of and involved in the analysis and assessment of the facts and law that my firm and Mr. Chandler undertook in formulating the legal advice and counsel that we provided to the Town. We were provided numerous documents related to the DHEC decision to authorize Roper Pond, LLC's stormwater permit. We also reviewed both state and federal statutes and regulations applicable to the project at issue.

6. Ultimately, Mr. Chandler and this firm, in consultation with Eugene McCall, Esquire, advised the Town that there was ample factual and legal support to maintain a challenge to DHEC's permit to Roper Pond. Mr. Chandler and Mr. McCall further advised the Town and individuals that there was a reasonable basis in fact and in law for filing a request for contested case hearing.

7. The Town relied upon the advice and counsel of Mr. Chandler and this firm, which was supported by a thorough analysis of the facts and law, in deciding to pursue the request for contested case hearing.

8. Upon information and belief, the Town of Arcadia Lakes relied solely and completely on the advice of counsel, Mr. McCall and Mr. Chandler and this firm, in filing the request for contested case hearing.

9. Through all of this firm's communications with the Town of Arcadia Lakes, by and through its Council, I have never observed any indication that the Town was pursuing this contested case solely for the purpose of delay. Rather, I have observed that the Town has sought experienced legal advice and counsel prior to initiating the contested case proceeding and during the successive stages of this litigation to ensure that it had a substantial basis in fact and law for maintaining its challenge to Roper Pond's project.

FURTHER THE AFFIANT SAYETH NOT.

Amy E. Armstrong

SWORN to before me this
5th day of January, 2015.

(SEAL)
Notary Public for South Carolina

My commission expires: Jan. 15, 2023

Fwd: Resolution Roper Pond, et al

From: Unda8@aol.com
To: amy@scelp.org
Cc: ccook@elliottlaw.us
Subject: Fwd: Resolution Roper Pond, et al
Date: Tuesday, March 12, 2013 1:39 PM
Size: 16 KB

Confidential and Privileged Attorney Client Communication
Charles Cook; Town Attorney Arcadia Lakes
March 12, 2012

From: Unda8@aol.com
To: ccook@elliottlaw.us
CC: Unda8@aol.com
Sent: 3/17/2009 9:48:31 P.M. Eastern Daylight Time
Subj: Fwd: Resolution Roper Pond, et al

From: ccook@elliottlaw.us
To: jchandler@scelp.org
CC: unda8@aol.com
Sent: 2/23/2009 10:53:15 P.M. Eastern Daylight Time
Subj: Re: Resolution Roper Pond, et al

Jimmy,

I would really hope that Gene could resolve the concern as his ability, knowledge of the issues and otherwise experience is definitely important!

Thanks,
Charlie
Charles H Cook
Town Attorney
Town of Arcadia Lakes

Attorney communication, confidential and privileged!

Original Message:

From: jchandler@scelp.org
Date: Tue, 17 Feb 2009 20:55:06 -0500
To: Unda8@aol.com, ccook005@sc.rr.com, ccook@elliottlaw.us, Unda8@aol.com
Subject: Re: Resolution Roper Pond, et al

Exhibit H

[redacted]

[redacted]

[redacted]

On Tue, 17 Feb 2009 18:06:21 EST, Unda8@aol.com said:
>[redacted]
>
> I will talk to Linda tomorrow!
>
> Charlie
> Confidential and Privileged
>
>
> In a message dated 2/17/2009 4:51:59 P.M. Eastern Standard Time,
> jchandler@scelp.org writes:
>
> Charlie & Linda:
>
>[redacted]
>
> Jimmy
>
>
> On Tue, 17 Feb 2009 15:57:52 -0500, "Gene McCall" <gene@McCallEnv.com>
> said:
> >
> > Bad news. I now have a conflict that requires me to withdraw from this

> > matter.
> >
> >[redacted]

> >
> > I believe the Town of Arcadia Lakes and citizens did the right thing
> > in filing the appeal. I was glad I was able to help you get over this
> > critical hurdle; I apologize for having to bow out now. I realize this

> > adds an extra burden to you and will not bill for my work to date;
> > consider it my several thousand dollar donation to the cause. I will
> > get with Brian Bates and we will come up with several names of
> > potential engineering expert witnesses. Jimmy already had mentioned
> > that he has a wetlands expert in mind.
> >
> > Best wishes as you proceed,

> >
> > Gene
> >
> > Eugene C. McCall, Jr.
> > McCall Environmental, PA
> > 200 Augusta Arbor Way, Suite B
> > Greenville, SC 29605
> > gene@mccallenv.com
> > www.mccallenv.com
> > 864-370-1550 p
> > 864-370-1551 f
> > 864-567-1477 m
> >
> > > Gene:
> > >
>
> > > For your perusal and relection.
> > >
> > > [redacted]
> > >
> > > Thanks,
> > >
> > > Charlie
> > > Charles H Cook
> > > Attorney Communication
> > >
> > > Nothing says I love you like flowers! Find a florist near you now.
> > > <Resolution10208TownArcadiaLakesOpposeRoperPond.docx>
> >
> >
> >
> >
> >
> >
>
>
> **********A Good Credit Score is 700 or Above. See yours in just 2
> easy
> steps!
>
(http://pr.atwola.com/promoclk/100126575x1218822736x1201267884/aol?redir=htt
p://www.freecreditreport.com/pm/default.aspx?sc=668072%26hmpgID=62%26bcd=fe
> bemailfooterNO62)

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mail2web.com – What can On Demand Business Solutions do for you?
http://link.mail2web.com/Business/SharePoint

A Good Credit Score is 700 or Above. See yours in just 2 easy steps!

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **REPLY TO AMENDED RESPONSE TO RESPONDENT ROPER POND, LLC'S THIRD AMENDED PETITION FOR FEES, COSTS AND SANCTIONS**

Respondent Roper Pond, LLC ("Roper Pond") respectfully submits this reply to Petitioner Town of Arcadia Lakes' ("Town") Response to Roper Pond, LLC's Third Amended Petition for Fees, Costs and Sanctions ("Town's Response"). Roper Pond hereby incorporates the arguments set forth in its May 25, 2015 Memorandum of Law.

I. ROPER POND IS A PREVAILING PARTY UNDER S.C. CODE ANN. § 15-77-300 DESPITE THE SUPREME COURT ORDER DISMISSING THE APPEAL.

Despite this Court's Final Order and Decision ruling in favor of Respondents on both standing and the merits of the contested case and the Court of Appeals decision affirming that Order, the Town continues to argue that Roper Pond is not a prevailing party in this matter. This argument disregards that wealth of case law interpreting the "prevailing party" requirement under S.C. CODE ANN. § 15-77-300 *et seq.* ("State Action Statute"). The South Carolina Supreme Court has held that "a party need not be successful as to all issues in order to be found to be a prevailing party" under the State Action Statute. *Heath v. County of Aiken*, 302 S.C. 178, 182,

394 S.E.2d 709, 711 (1990). In *Heath*, the Court defined "prevailing party" as "'[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.'" *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). In this case, there can be no doubt that Respondents have successfully defended against the Town's challenge. In fact, there is no substantive ruling under which Roper Pond has not prevailed on all issues raised in the contested case. Therefore, it is clear that Roper Pond satisfies the "prevailing party" requirement under Section 15-77-300 of the State Action Statute.

Despite the rulings in favor of Respondents in this Court and the Court of Appeals, the Town contends that Roper Pond is not a prevailing party because "[t]he Supreme Court did not affirm the lower court opinions. . . ." (Town's Response, p. 3). The Town appears to argue that this Court may award fees and costs under Section 15-77-300 only if its ruling is affirmed on appeal. The State Action Statute imposes no such requirement. The award of fees and costs under the State Action Statute is made at the trial court level, and according to the case law, such determination can be made following a ruling/judgment by the trial court. *See, e.g., Brown v. City of N. Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994) (affirming the trial court order granting summary judgment to plaintiffs and reversing the trial court's denial of attorney fees under Section 15-77-300); *Cornelius v. Oconee County*, 369 S.C. 531; 633 S.E.2d 492 (2006) (affirming trial court's order granting summary judgment to plaintiff and awarding attorney fees under Section 15-77-300). There is simply no basis for the Town's argument that Roper Pond is not a prevailing party because the Supreme Court did not affirm the Court of Appeals decision upholding this Court's ruling.

Similarly, the Town asserts that "[t]he Supreme Court's decision to dismiss the case as moot cannot be read to affirm the lower court's opinions." (Town's Response, p. 6). Contrary to the Town's assertions that Roper Pond is improperly interpreting the Supreme Court's Order as an "implicit affirmance of the lower courts' rulings," Roper Pond clearly recognizes that the Supreme Court did not affirm the Court of Appeals decision as the Court made no ruling whatsoever on the merits of the case. (Town's Response, p. 6). However, the Town is attempting to interpret the Supreme Court's Order as an "implicit reversal" of the Court of Appeals decision. The Supreme Court took no action that could possibly be interpreted as a reversal of that decision. Moreover, if the Supreme Court intended to vacate the lower courts' rulings, the Court could have taken such action in the Order dismissing the appeal as moot. *See, e.g., Friends of McLeod, Inc. v. City of Charleston*, 384 S.C. 438, 682 S.E.2d 488 (2009) (dismissing appeal as moot and vacating the Court of Appeals opinion in the matter); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2005) (finding that decision in separate tort action rendered insurance coverage litigation moot and vacating the trial court's order). Similarly, the Supreme Court has issued published opinions dismissing the grant of certiorari as improvidently granted, but requiring the Court of Appeals to depublish its opinion in the case. *See., e.g., Rivera v. Newton*, 413 S.C. 26, 773 S.E.2d 913 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Horton v. City of Columbia*, 413 S.C. 25, 773 S.E.2d 912 (2015) (same); *Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014) (same). In this matter, the Supreme Court's dismissal of the appeal as moot does not affect the validity of this Court's Final Order and Decision or the Court of Appeals decision affirming that Order. Contrary to the Town's argument, the effect of that order is

limited to dismissal of the action before the Supreme Court. The Supreme Court's order does not reverse or vacate the Court of Appeals decision affirming this Court's Final Order and Decision. The decision of the Court of Appeals stands as a published opinion affirming this Court's Final Order and Decision. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013).

The Town further contends that the Supreme Court's finding of mootness precludes an award of fees and costs under Section 15-77-300. Specifically, the Town contends that "[t]he fact that the Supreme Court dismissed this case as moot after hearing arguments and indicated a concern that meaningful judicial relief was no longer possible, and without affirming the Court of Appeals, takes 'prevailing party' status off the table." (Town's Response, p. 7). However, the cases cited by the Petitioners are easily distinguished as the mootness determination was made prior to the trial court's decision on the merits of the case. In *City of Charleston v. Masi*, 362 S.C. 505, 609 S.E.2d 301 (2005), the Supreme Court held that the trial court properly declined to award attorney's fees under the State Action Statute where the trial court held the action to be moot by the Supreme Court's decision in another matter. The Court thus upheld the trial court's denial of attorney's fees, finding that "[t]he District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot." 373 S.C. at 387, 645 S.E.2d at 243. As such, since there was no decision by the trial court, there could be no prevailing party for purposes of the State Action Statute. That is simply not the case here. This Court issued a Final Order and Decision which was affirmed by the Court of Appeal. Roper Pond is a prevailing party in that decision and is therefore entitled to an award of attorney's fees under the State Action Statute.

Petitioners further cite to *Session v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997), in support of its argument that there can be no "prevailing party" when a matter is dismissed as moot on appeal. That case is also easily distinguished. In that case, the trial court awarded costs to the plaintiff as the prevailing party pursuant to Rule 54, SCRCP, upon a jury verdict in the amount of $600. The plaintiff thereafter entered into a settlement with the liability insurer under which she agreed to mark the judgment obtained satisfied. *Id.* at 417, 488 S.E.2d at 892. Since Rule 54, SCRCP, required that any costs taxed be included in the judgment, the plaintiff could not make claim to such costs since she was contractually obligation not to execute the judgment. The Court thus held that the appeal related to the attorney's fees was rendered moot. *Id.* It was the inability to execute the judgment which included the costs that rendered the issue moot. Similarly, in *Douan v. Charleston County Council*, 373 S.C. 384, 645 S.E.2d 241 (2007), the plaintiff challenged the County's action alleging that a proposed ordinance and referendum violated state law. Prior to the trial court's decision in that case, the Supreme Court issued a decision in a related case against the county election commission which rendered the action before the trial court moot. Since the trial court did not rule of the merits of the case, the Supreme Court held that the trial court properly held that the plaintiff was not a prevailing party in that action and therefore not entitled to attorneys' fees under the State Action Statute. 373 S.C. at 387, 645 S.E.2d at 243.[1] Such is not the case here. This Court's Final Order and Decision stands, and there is no contractual impediment to Roper Pond's executing a judgment on this Court's award of attorney's fees under the State Action Statute.

[1] *See, also, Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 51-52, 398 S.E.2d 498, 499-500 (1990) (holding that party was not a "prevailing party" entitled to recover attorney's fees under § 15–77–300 where case was dismissed for lack of jurisdiction and thus there was never a resolution on the merits); *Richland County v. Kaiser*, , 351 S.C. 89, 97, 567 S.E.2d 260, 264 (Ct. App. 2002) (holding that party was not prevailing party upon reversal of decision in party's favor at the Court of Appeals).

The Town argues that the Supreme Court's "hands were tied now that the development project was completed." (Town's Response, p. 5) However, despite the completion of the project, the Supreme Court could have reversed or vacated all or part of the Court of Appeals decision under one of the exceptions to mootness. "Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 27-28, 630 S.E.2d 474, 478 (2006). Indeed, both the Petitioners and the Wildlife Federation argued the Court of Appeals decision on standing would have far-reaching implications for other parties seeking review the decisions of the Department. Petitioners argued in their brief to the Supreme Court:

> The new, unjustifiably burdensome requirements for standing that a Plaintiff have a property interest in the area over which the challenged activity will occur, as well as prove either the merits or a future permit violation, are a significant divergence from well-established standing law. Neither of these standards has been applied by this State's appellate court or any federal court, and, indeed, both federal and South Carolina courts hold the contrary. Instead these new requirements muddy the waters of this state's carefully crafted standing law and will like have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their communities.

(Brief of Petitioners on Writ of Certiorari, attached as Exhibit 17 to Affidavit of Joan W. Hartley, Exhibit A to Roper Pond's Petition for Attorneys' Fees ("Hartley Aff."), p. 4). Petitioners also included a footnote advising the Supreme Court that this Court had already cited to the Court of Appeals opinion in granting a motion for summary judgment for lack of standing in the case of *Preservation Society of Charleston, et al. v. S.C. State Ports Authority*, Docket No. 13-ALJ-07-0056-CC, filed April 11, 2014. *Id.* at Footnote 1. The Wildlife Federation filed an amicus curiae brief solely on the issue of standing and argued that it "is actively engaged in proceedings involving the review of permitting decision made by the South Carolina Department of Health

and Environmental Control (DHEC), and has long-standing interested in its right to review DHEC decisions under S.C. Code Ann. § 44-1-60." (Brief of Amicus Curiae South Carolina Wildlife Federation in Support of Petitioners' Standing, attached to Hartley Aff. as Exhibit 18, p. 1). Had the Supreme Court found the ruling on standing in this case to be as far removed from well-established standing law as the Petitioners and the Wildlife Federation contend, the Court could have applied one of the exceptions to the mootness rule and corrected the alleged errors in the standing holding of this Court and the Court of Appeals. However, the Supreme Court did not take such action. Roper Pond has prevailed on every issue in every substantive ruling in this case and is entitled to an award of attorneys' fees and costs pursuant to Section 15-77-300 of the State Action Statue.

Additionally, the Town improperly attempts to construe an order denying costs under SCACR Rule 222 as a pronouncement by the Supreme Court on Roper Pond's status as a prevailing party in this action. As the Town correctly notes, "Rule 222 contains no standard for determining whether an award of costs is warranted." (Town's Response, p. 22). Accordingly, the Court's denial of Roper Pond's petition for costs cannot be read to have any effect on Roper Pond's status as a prevailing party in this action. Moreover, the Supreme Court recently held that its ruling on a motion for costs under SCACR Rule 222 has no bearing on a trial court's authority to grant attorney fees under a statute. In *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013), the Supreme Court held that an appellate court's authority to award discretionary appellate attorneys' fees and a circuit court's authority to award appellate and post-appellate attorneys' fees pursuant to South Carolina Regulation of Manufacturers, Distributors, and Dealers Act were not mutually exclusive:

> Notably, it is within this Court's discretion whether to award fees and costs under Rule 222. *See* Rule 222(a), (e), SCACR (identifying circumstances for which an

> appellate court may tax costs on appeal). In contrast, section 56–15–110(a) states that a party who prevails under the Dealer's Act "**shall recover** double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.) This is a fundamental distinction as a denial of fees under a discretionary rule cannot eliminate a statutory mandate. Thus, we hold that this Court's summary denial of Austin's request for attorney's fees under Rule 222 was not dispositive of his right to seek statutory fees in the circuit court. Moreover, this conclusion is consistent with our jurisprudence interpreting Rule 222 wherein our appellate courts have found that a decision under this rule does not preempt an award of attorney's fees to which one is otherwise entitled, *i.e.*, statutorily authorized. *See Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (awarding Respondents a $1,000 attorneys' fee and $81.66 for costs as allowed by Rule 222 and holding that Respondents could seek additional attorneys' fees in the circuit court under the UTPA, which provides for reasonable attorneys' fees and costs); *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (finding Appellant waived right to recover appellate costs and fees under Rule 222 as he failed to file an itemized statement of costs prior to the Court's issuance of the remittitur, but holding that Appellant could seek appellate costs in the circuit court based on his statutory right under section 29–5–10 (authorizing costs incurred for the enforcement of a mechanic's lien) as "Rule 222 does not preempt an award of attorney's fees to which one is otherwise entitled" (citation omitted)); ***McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (holding that an award of attorney's fees under Supreme Court Rule 38 (precursor to Rule 222) did not "preempt an award of attorney's fees to which one is otherwise entitled" and, thus, Appellant could seek an award of attorney's fees pursuant to section 15–77–300, which permits an award of fees for a party prevailing in an action against a state agency)**; *see also Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004) (recognizing, in a partition action, that whether Respondents were entitled to appellate attorney's fees pursuant to section 15-61-110 was a determination for the circuit court). Accordingly, we find the Court's denial of Austin's Rule 222 motion had no preclusive effect on his attempt to seek statutory attorney fees in the circuit court, including appellate fees and the post-appellate fees incurred in enforcing the judgment against Stokes–Craven.

406 S.C. at 199-200, 750 S.E.2d at 84-85 (second emphasis added). This ruling cites to *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991), which expressly references Section 15-77-300 of the State Action Statute. Accordingly, the Supreme Court's denial of costs under Rule 222 has no effect on this Court's ruling on Roper Pond's Petition for Fees and Costs under Section 15-77-300. Roper Pond is clearly a prevailing party entitled to fees and costs under the State Action Statute.

II. THE TOWN MISCONSTRUES THE STANDARD FOR DETERMINING "WITHOUT SUBSTANTIAL JUSTIFICATION" UNDER THE APPLICABLE CASE LAW.

As a preliminary matter, the Town repeatedly argues that there was substantial justification to bring this action because "the Town's decision to file the request for contested case hearing was made solely and completely on reliance of the advice of counsel." (Town's Response, p. 12). This argument erroneously suggests a showing of "substantial justification" would merely require a party to overcome the frivolous filing standard under Rule 11, SCRCP, or the Frivolous Civil Proceedings Sanctions Act, S.C. CODE ANN. § 15-36-10 et seq. ("FCPSA"). *Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (finding the standard for sanctions under Rule 11 to be essentially the same as that under the FCPSA). The South Carolina Supreme Court has unequivocally held that a finding of "without substantial justification" does not require a showing that the claims asserted were frivolous. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712 (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification"). As such, a party's reliance on legal advice that it has claims which can be expected to survive a motion for sanctions under Rule 11, SCRCP, or the FCPSA does not shield a party from a finding of "without substantial justification" under Section 15-77-300.

Additionally, if reliance on the advice of counsel were a shield against a finding of "without substantial justification," Section 15-77-300 would be rendered utterly meaningless. Indeed, the South Carolina appellate courts have upheld a number of lower court findings that a state agency or political subdivision acted "without substantial justification" under Section 15-77-300, and in every reported case, the state agency or political subdivision was represented by counsel. See *Layman v. State*, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (upholding award of attorney fees in class action by state retirees against the State and the South Carolina

Retirement System); *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (upholding award of attorney fees to citizen who brought declaratory judgment action against the county); *Tennis v. S.C. Dep't of Soc. Servs.*, 355 S.C. 551, 559, 585 S.E.2d 312, 317 (Ct. App. 2003) (reversing the denial of attorney fees in daycare operator action against DSS); *Brown v. City of North Charleston*, 314 S.C. 298, 301, 442 S.E.2d 633, 635 (Ct. App. 1994) (reversing trial court's denial of attorney fees for citizen seeking displacement and relocation costs from the city); *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (upholding award of attorney fees in declaratory judgment action brought by sheriff against the county).

In the recent decision in *McNaughton v. Charleston Charter School for Math and Science, Inc.*, 411 S.C. 249, 768 S.E.2d 389 (2015), the Supreme Court addressed the defendant school's reliance on the advice of legal counsel in the context of an award of attorney fees under Section 15-77-300. The Supreme Court affirmed the trial court's verdict in favor of McNaughton on her breach of contract claim against the school and award of attorney fees under Section 15-77-300. On appeal, the school argued that the award of attorney fees was unjust because "the principal solicited legal advice before terminating McNaughton's employment to ensure that the existence of the contingency clause in her employment agreement did not have legal significance." 411 S.C. at 267-68, 768 S.E.2d at 399. The Supreme Court held that the trial court carefully considered and applied the factors in Section 15-77-300 and properly rejected this argument regarding the advice of legal counsel. *Id.* at 268, 768 S.E.2d at 399. As such, it is clear that the Town's reliance on legal counsel is not a factor to be considered in determining whether the Town acted without substantial justification in bringing this contested case.

The Town also incorrectly interprets the case law in asserting that there is a presumption that the Town acted with substantial justification. The cases cited in support of this assertion do not state that there is any presumption regarding the determination of substantial justification under Section 15-77-300. (Town's Response, p. 8 (citing *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue,* 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004) and *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008)). Instead, the relevant language in *Video Gaming Consultants* states that "[a]n agency's loss on the merits does not create a presumption that its position was not substantially justified." *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue,* 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004) (emphasis added). The full quote from *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), states as follows:

> Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Id. at 445, 658 S.E.2d at 326 (emphasis added). Contrary to the Town's assertions, the Supreme Court has not held that there is a presumption of substantial justification. The Supreme Court has merely stated while there is not a presumption of "not substantially justification," the outcome of the litigation is relevant to the determination of "without substantial justification." Accordingly, there is no presumption that the Town is substantially justified in pressing its claims in this action, and the fact that the Town has lost on all issues on the merits and on standing in every substantive ruling in this case is relevant to the Court's determination on whether the Town acted without substantial justification.

The Town also incorrectly states the standard for determining whether the Town acted substantial justification. Quoting the United States Supreme Court holding in *Pierce v.*

Underwood, the Town asserts that a finding of substantial justification is "said to be satisfied if there is a 'genuine dispute.'" (Town's Response, p. 9 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550 (1988)). The South Carolina Supreme Court first looked to *Pierce* for guidance in the *Heath* holding in 1990. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) ("This Court has not previously determined the appropriate standard of review in an attorney's fee case under Section 15-77-300. We are guided, however, by the United States Supreme Court decision in *Pierce v. Underwood,* 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)"). However, the Supreme Court has never adopted *in toto* the holding in *Pierce* as the appropriate standard under Section 15-77-300, and none of the South Carolina appellate cases have included the "genuine dispute" language which the Town quoted in its Response. *Video Gaming Consultants, Inc. v. South Carolina Dep't of Rev.*, 358 S.C. 647, 650, 595 S.E.2d 890, 891 (Ct. App. 2004); *McDowell v. South Carolina Dep't of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991); *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990). The Supreme Court's most recent citation to *Pierce* in examining the "without substantial justification" standard under Section 15-77-300 is found in the 2008 decision in *Layman v. State*, which states as follows:

> Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Layman, 376 S.C. at 445, 658 S.E.2d at 325-26. As such, contrary to the Town's assertions, the appropriate standard is whether there is "a reasonable basis in law and in fact" for the Town's actions, and the fact that the Town lost of all issues on the merits and on standing are a relevant to the determination of whether there was substantial justification in bringing this contested case.

Moreover, substantial justification under Section 15-77-300 requires more than a plausible legal theory on which to bring the contested case. In *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006), the Supreme Court upheld the award of attorney fees in a declaratory judgment action brought by a county citizen against the county for a wastewater treatment facility funding scheme which violated a county referendum. The county argued that the award of attorney fees under Section 15-77-300 was improper because, *inter alia*, the county "acted with 'substantial justification' because there are no preexisting judicial precedents on these issues, merely attorney general opinions." *Id.* at 538-39, 633 S.E.2d at 496. In upholding the award of attorney fees, the Supreme Court held:

> The trial court can award attorneys' fees under the statute only if it finds the State "agency acted without substantial justification in pressing its claim. . . ." § 15–77–300(1). An agency acts with "substantial justification" within the meaning of the statute when its position has a "reasonable basis in law and fact." *McDowell v. SCDSS*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Contrary to County's contention, the fact that novel issues were raised does not mean County was substantially justified in opposing Cornelius. Declaratory judgment actions by their very nature often present novel questions. *See, e.g. Eargle, supra* (authority of county administrator to suspend elected official's employees); *United Oil Marketers, supra* (constitutionality of license tax incentive statute for gas/ethanol blend); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff's office and county council). Moreover, County cited no viable authority supporting its position that it was no longer bound by the Referendum's terms. We agree with the circuit court that County acted without substantial justification, and no special circumstances render the attorneys' fee award unjust.

Id. at 539-40, 633 S.E.2d at 496-97 (emphasis added). As such, the fact that there were no prior rulings directly on point as to the claims raised by the county did not preclude a finding that the

county acted without substantial justification. Such is the case here. As discussed more fully in Roper Pond's May 28, 2015 Memorandum of Law, Petitioners advanced a contorted legal theory for which there was no basis in federal or state law. Despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, the Town continued to press its claim that a 401 Certification issued for a Nationwide Permit in 2007, two years prior to the DHEC decision at issue in this case, required the Department to consider the impacts of the excavation of Roper Pond. (Petitioners' Proposed Order, Conclusion of Law No. 5, Exhibit 19 to Hartley Aff.). As this Court fully addressed in its Final Order and Decision, a 404 permit is required for filling of wetlands, not dredging. The only evidence on the record shows that during excavation of the Pond, the dredged material will be placed in an area upland of the Pond. The Court thus found that a 404 Permit was not required for that activity. (Final Order and Decision, pp. 23-25). The Court of Appeals affirmed that ruling and further rejected all of Petitioners' arguments regarding the sufficient of the 401 certification and the alleged error in the Department's failure to consider the impacts of the dredging of the Pond:

> Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

Town of Arcadia Lakes, 404 S.C. at 534, 745 S.E.2d at 395. The Court of Appeal also affirmed this Court's ruling that a 404 permit was not required for coverage under the Construction General Permit:

> Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.
>
> First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.
>
> Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444–45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

Id. at 536, 745 S.E.2d at 396. Petitioners' efforts to contort the law and facts to create a 404 permitting requirement where none existing in the well-settled and substantial body of law was rejected by this Court and the Court of Appeals. There is simply no reasonable basis in law or in fact for the issues raised by the Town in this matter.

The Town contends that its claims were justified because "if the Supreme Court believed that the case was frivolous or without merit it would not have exercised its discretion and requested briefing and oral arguments." (Town's Responses, p. 6). There is simply no basis for

this contention. The Supreme Court regularly grants certiorari to review a decision of the Court of Appeals and then subsequently dismisses the petition for writ of certiorari as improvidently granted following oral arguments. *See, e.g., York County v. South Carolina Dept. of Health and Environmental Control,* 408 S.C. 180 (2014) (dismissing writ of certiorari as improvidently granted following May 6, 2014 oral argument); *(State v. Gilliard,* No. 2012-213344, 2015 WL 4348912, at *1 (S.C. July 15, 2015) (dismissing writ of certiorari as improvidently granted following June 16, 2015 oral argument); *State v. Scott,* 413 S.C. 24, 773 S.E.2d 912 (2015) (missing writ of certiorari as improvidently granted following April 22, 2015 oral argument); *Washington v. Rhett,* No. 2015-MO-039, 2015 WL 3886259, at *1 (S.C. June 24, 2015) (dismissing writ of certiorari as improvidently granted following June 16, 2015 oral argument); *State v. McMillan,* No. 015-MO-035, 2015 WL 3819068, at *1 (S.C. June 17, 2015) (dismissing writ of certiorari as improvidently granted following May 20, 2015 oral argument); *Estate of Atn Burns Livingston v. Livingston,* 412 S.C. 610, 773 S.E.2d 579, 580 (2015) (dismissing writ of certiorari as improvidently granted following May 5, 2015 oral argument). As such, the fact that the Supreme Court granted the petition for writ of certiorari in this matter cannot be construed as the Supreme Court's "clear acknowledgment of the meritorious claims" as the Town contends. (Town's Response, p. 9). The Town improperly interprets the Supreme Court's decision to grant its writ of certiorari as a definitive statement on the merits of the claims at issue.

Finally, and significantly, the Town could not have substantial justification in bringing this action because the Town lacked standing to bring the action. "[S]tanding is a fundamental prerequisite for instituting a legal action." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). Affirming this Court's Final Order and Decision, the Court of Appeals found that the Town lacked standing because the Town

failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "were 'fairly traceable to the challenged action in this case." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 530, 745 S.E.2d 385, 393 (Ct. App. 2013). Indeed, as discussed more fully below, in the 30(b)(6) deposition of the Town and communications obtained through a subpeona, the Town resolved to take such action as necessary to stop or delay the Proposed Project, and the appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit was but another avenue for accomplishing that objective. Moreover, as evidenced by those communications, the Town intended to appeal that decision even if there were no grounds for such appeal.

This Court's ruling of the Town's lack of standing as affirmed by the Court of Appeal should be dispositive of this Court's determination that the Town acted without substantial justification. There can be no justification for an action where the Town failed to present evidence to establish standing to challenge the DHEC decision at issue. As discussed above, there is no merit to Town's arguments that this Court's Final Order and Decision and the Court of Appeals decision affirming that Order were somehow invalidated because the Supreme Court did not affirm the Court of Appeals decision. Moreover, Roper Pond has presented substantial evidence demonstrating that the Town's real motive in challenging the DHEC decision was to stop or delay the construction of the Roper Pond project. Accordingly, the rulings and record before this Court support a finding that the Town acted without substantial justification.

III. THE TOWN CANNOT RELY ON THE ALLEGED CONCERNS REGARDING THE ROPER POND PROJECT TO CLAIM THAT THE CONTESTED CASE WAS NOT BROUGHT SOLELY FOR THE PURPOSE OF DELAY.

The Town argues that Roper Pond is not entitled to sanctions under Rule 72 because the Town did not bring this contested case "solely" for the purpose of delay. Again, the Town seeks

to interpret the one sentence order denying Roper Pond motion for costs under Rule 222, SCACR, as a pronouncement on the merits of the case and the Town's motivation for bringing the case. The Supreme Court's Order denying the motion reads as follows: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied." However, the Town contends that "[i]n denying the motion for costs, the Supreme Court implicitly concluded that dismissal on mootness grounds is not a favourable disposition and, after a thorough review of the record, found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted." (Town's Response, p. 22). As a preliminary matter, the Town's communications prior to bringing the contested case and the statement from the Town's 30(b)(6) deposition were not in the record before the Supreme Court. As such, a review of the record would not provide the Supreme Court with the evidence supporting Roper Pond's claim that the Town brought the contested case solely for the purpose of delay. However, even if such communications were before the Supreme Court, there is simply no way to read the Supreme Court's one-sentence order denying the motion for costs as a ruling that the Supreme Court "found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted."

Additionally, as fully discussed in Roper Pond's May 28, 2015 Memorandum of Law, Roper Pond has presented this Court with numerous communications in which the Town's mayor and those acted on the Town's behalf admit that Petitioners were challenging the DHEC decision to issue coverage under the General Permit as a means to stop or delay the proposed development. The only real issue before the Court was the technical sufficiency of the stormwater pollution prevention plan ("SWPPP") submitted to DHEC in support of Roper Pond's request for coverage under the General Permit. However, as this Court and the Court of Appeals

held, Petitioners failed to present any evidence regarding any alleged deficiencies in the SWPPP, and neither Petitioner's expert nor any of the Petitioners even reviewed the SWPPP. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 527-33, 745 S.E.2d 385, 391-94 (Ct. App. 2013). Moreover, with respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's decision to grant Roper Pond coverage under the Construction General Permit. Prior to a November 14, 2008 meeting with the Department staff at Senator Lourie's office, the Town and its technical advisors had reviewed the SWPPP and provided comments to the Department staff, which the staff unquestionably addressed. In an October 2, 2008 email, Mr. Thomas advised Mr. Bates as follows:

> Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

(Ex. 14 to Hartley Aff.). It is apparent that the Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Brian Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." (Ex. 5 of Hartley Aff.). Mr. Bates advised Mr. Thomas as follows:

> Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

> **I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff.** To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required.

Id. (emphasis added). Mr. Thomas responded: "Thanks again for your continued expertise in this matter." *Id.* This email exchange unquestionably shows that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. More importantly, it shows that the ultimate objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. Otherwise, there would be no suggestion that "we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Indeed, the Petitioners offered no evidence at the hearing that the concerns raised by the Town and other Petitioners were not fully considered by the Department staff and addressed by Roper Pond's consultant prior to the Department's final decision.

The Town acknowledges that "the Town wanted to slow the process," but disputes that its actions were "solely for the purpose of delay." (Town's Response, p. 17). The Town attempts to show that the request for contested case hearing was not filed solely for the purpose of delay because the Town had other concerns about the proposed development. For example, the Town claims that the contested case was not brought "solely for the purpose of delay" because there were numerous concerns about zoning, compliance with the county land development ordinance, maintaining the character of the Town, diminution in property values in the Town, and faulty traffic impact studies. (Town's Response, pp. 14-16). However, none of these alleged concerns in any matter related to the DHEC decision at issue in this contested case. Indeed, this Court and the Court of Appeals held that such concerns—and others—were not sufficient to confer standing

on the Town. As such, despite the Town's characterization of these concerns as "legitimate purposes" for filing the request for contested case hearing, these alleged concerns do not negate the fact that the Town admittedly filed the request for contested case hearing to purportedly address concerns which had nothing to do with the DHEC decision at issue in the contested case and failed to present any evidence that the SWPPP approved by DHEC had any alleged deficiencies. The evidence clearly supports a finding that the Town filed the request for contested case hearing solely for purpose of delay and the Town is therefore entitled an award of sanctions under Rule 72, SCRALC.

Finally, the Town asserts that the "appeals process also did nothing to delay the project, as the project went forward to completion regardless." (Town's Response, p. 13). Contrary to this assertion, the project was unquestionably delayed by the Town. The DHEC decision which was challenged in this contested case was issued to Roper Pond by letter dated December 15, 2008. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for more than two years. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Accordingly, the Town cannot claim that there was no delay in the proposed development, and Roper Pond is entitled to sanctions for the intention and unwarranted delays resulting from the Town's actions.

IV. ROPER POND OBJECTS TO ARGUMENTS BASED ON AFFIDAVITS WHICH HAVE BEEN STRICKEN AND PHOTOGRAPHS WHICH ARE NOT IN THE RECORD.

Despite the Order Granting Motion to Strike issued by the Court on January 25, 2016, the Town continues to make reference to the three affidavits stricken in that Order in support of the

claim that the Town acted with substantial justification. (Town's Response, p. 11 ("While those affidavits have been stricken by Order of this Court, the fact that three separate, and well-respected, attorneys provided sworn testimony supporting the underlying contested case lends support that the Town acted with substantial justification."). Even though the Court's Order unquestionably has stricken these three affidavits in their entirety, Roper Pond renews its objections to the admissibility or reliance upon these affidavits in support of the Town's arguments.

Similarly, the Town continues to make reference to the substance of the oral arguments before the Supreme Court. Additionally, the Town notes that "[c]ounsel for Petitioners provided the Court with photographs evidencing that those concerns had become a reality on the site since Roper Pond moved forward with its construction project." (Town's Response, p. 5). Respondents objected to these photographs, and the Supreme Court neither considered nor admitted such evidence into the record in this case. As such, Roper Pond objects to the Town's reference to such photographs and the characterization of the photographs as "evidence."

Finally, the Town continues to improperly interpret the Court's Order dismissing the appeal as moot as a substantive ruling on the merits of the Town's case. For example, the footnote regarding "Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues" does not in any manner constitute a substantive ruling on the merits of the matter before this Court or the appellate courts. As this Court correctly held, "[t]he matter before this Court involves the Department's decision to grant coverage for the Proposed Project under the General Permit, not the enforcement of the conditions of the General Permit during the construction of the Property." (Final Order and Decision, p. 19). The Supreme Court clearly agreed that any alleged violation was not properly before the Court; otherwise, the Supreme

Court could have addressed such matter and the appeal would not have been deemed moot. Roper Pond thus objects to the Town's improper interpretation of the Supreme Court's order dismissed the appeal as moot.

V. CONCLUSION

For the foregoing reasons, Roper Pond asks the Court to issue an Order finding that Roper Pond is entitled to attorneys' fees and costs pursuant to S.C. CODE ANN. § 15-77-300. Additionally, or in the alternative, Roper Pond asks the Court to impose sanctions on the Town in the form of an award of attorneys' fees and the cost of delay of the Proposed Project pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

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February 16, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **CERTIFICATE OF SERVICE**

This is to certify that **Reply to Amended Response to Respondent Roper Pond, LLC's Third Amended Petition for Fees, Costs and Sanctions** has been served on counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 16th day of February, 2016:

Stephen P. Hightower, Esquire
South Carolina Department of
Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Amy E. Armstrong, Esquire
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P.O. Box 1380
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