STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control, KDP II, LLC, and KRA Development, LP, Respondents. In Re: Cape Charles, Phase I	Docket No. 15-ALJ-07-0369-CC **ORDER DENYING PETITIONER'S MOTION TO COMPEL OR, IN THE ALTERNATIVE, TO STRIKE OR EXCLUDE EVIDENCE**

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Motion to Compel or, in the Alternative, to Strike or Exclude Evidence (Motion) filed October 12, 2017 by the South Carolina Coastal Conservation League (Coastal). Coastal seeks to compel the production of documents that it argues were in the possession of KDP II, LLC, and KRA Development, LP (collectively, KDP) prior to the hearing, that are responsive to Coastal's discovery requests, and for which no privilege assertion was made. Alternatively, Coastal seeks to strike or exclude testimony from KDP expert, Dr. Travis Folk. Coastal maintains that KDP's failure to produce such discoverable evidence in accordance with the rules resulted in extreme prejudice to Coastal. For the reasons set forth below, Coastal's Motion is denied.[1]

BACKGROUND

In a decision letter dated May 29, 2015, the South Carolina Department of Health and Environmental Control (Department or DHEC) notified KDP that it had approved issuance of four

[1] In response to Coastal's Motion and the issuance of a subpoena to Dr. Folk on October 17, 2017, KDP filed a Motion to Quash Subpoena and for Protective Order with the Court on October 30, 2017. However, as discussed *infra*, in light of the Court's disposition of Coastal's Motion, KDP's Motion has been rendered moot and thus will not be considered by the Court. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot 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 Court. Where there is no actual controversy, this Court will not decide moot or academic questions.").

permits to KDP granting it the right to construct site improvements necessary for the development of a 26-lot residential subdivision known as "Cape Charles, Phase I" on Captain Sam's Spit (Spit), at Kiawah Island in Charleston County, South Carolina. These permits included a Coastal Zone Consistency Certification (CZCC), National Pollutant Discharge Elimination System (NDPES) Stormwater Discharges Construction Permit, Water Supply Construction Permit, and Wastewater Construction Permit. These permits allowed the construction of an access road to the site (called "Cape Point Road"), drainage facilities, underground utilities, and other infrastructure needed for the subdivision. On June 12, 2015, Coastal filed a Request for Final Review. In a Staff Position Letter dated June 26, 2015, the Department staff concluded that each of these four permits complied with all applicable laws, regulations, and the South Carolina Coastal Zone Management Plan (CZMP). The DHEC Board declined to hold a final review conference, making the staff decision the final agency decision pursuant to S.C. Code Ann. § 44-1-60(F) (2018). On August 5, 2015, Coastal filed a contested case with this Court. The Court held a seven-day hearing concerning this matter beginning August 21, 2017 at the ALC in Columbia, South Carolina.

However, on August 18, 2017, **prior** to commencement of the hearing, Coastal filed a Motion in Limine or, in the Alternative, for a Continuance in response to the production of certain documents by KDP on the same day. In that motion, Coastal asserted that KPD waited until the last business day before the hearing to produce over thirty (30) documents. Coastal contended that this voluminous production of documents shortly before the onset of the scheduled hearing resulted in prejudice to Coastal and warranted the exclusion of the evidence – and any expert opinions which rely thereon – or, at a minimum, a continuance to allow Coastal time to prepare accordingly.

KDP opposed Coastal's Motion in Limine, arguing that KDP never expressed any intention to rely on any of the documents, that KDP had not proposed any new arguments based on the documents, and that most of the documents had long been in possession of Coastal – many of which were originally written or cited in the first instance by Coastal's own expert. In fact, only approximately 70 pages were arguably "new" to Coastal and those pages were not relevant to the hearing. Though Dr. Folk would not be relying upon them or testify about them, they were produced simply because they had been sent to Dr. Folk.

When the Court addressed the Motion in Limine at the beginning of the hearing, Coastal's objections focused on the wording of KDP's expert disclosure: that Dr. Folk would be testifying

about "the relationship between the permitted activity and any threatened or endangered plant and animal species." Coastal stated that it reviewed KDP's expert disclosure of Dr. Folk during pretrial discovery and made a "calculated decision" at the time not to depose Dr. Folk. Based on KDP's discovery responses as well as the documents they had produced at the time, Coastal believed that Dr. Folk would only be testifying as to species listed as threatened under the Endangered Species Act. However, the disclosure included documents relating to diamondback terrapins, a species of turtle that is not listed as threated under the Act. Coastal thus contended that had the documents in question been timely produced, they would have demonstrated a need to depose Dr. Folk during the pretrial discovery period.

This Court found that KDP's expert disclosure was sufficiently broad to include notice that Dr. Folk could potentially testify not just about species listed as threatened under the Act, but also about those which are generally threatened by the proposed project. In fact, the potential of that threat from the proposed permitted activity as it relates to diamondback terrapins is a disputed issue in this case. Therefore, the Court found that Coastal was placed on sufficient notice that warranted a reasonable attorney to inquire as to the interpretation of KDP's expert disclosure through pretrial discovery by deposition, or at least through an interrogatory or similar discovery. Nevertheless, to ameliorate Coastal's concerns, the Court offered Coastal an opportunity to depose Dr. Folk during a break in the hearing for that purpose. Additionally, at the request of Coastal, the Court sequestered Dr. Folk, out of an abundance of caution, during related testimony from Dr. Whit Gibbons, an expert for Coastal. However, despite these efforts, Coastal chose not to take the deposition of Dr. Folk. With the Court having resolved these issues at the time, the hearing concluded the evening of August 29, 2017.

Approximately six weeks later, on October 12, 2017, Coastal filed the instant Motion alleging similar discovery issues to those raised in its Motion in Limine. Specifically, Coastal argues that it was prejudiced by KDP's failure to timely provide it with responsive documentation and communications related to Dr. Folk, the vast majority of which Coastal asserts was provided to it on August 18, 2017. Coastal further alleges that Dr. Folk's testimony **during** the hearing regarding communications he had with counsel for KDP, revealed reason to believe that KDP failed to disclose all of its communications to Dr. Folk. As such, Coastal now requests that the Court either enter an order compelling the improperly withheld discovery and entertain a motion

to re-open the record, or exclude or strike the testimony of Dr. Folk due to KDP's willful failure to produce related discovery.

DISCUSSION

Rule 21(A) of the Rules of Procedure for the Administrative Law Court (SCALC Rules) provides in pertinent part that in contested cases, "[d]iscovery shall be conducted according to the procedures in Rules 26-37 [of the South Carolina Rules of Civil Procedure (SCRCP)] . . . ."[2] However, "all" discovery in contested cases before the ALC must be completed within 90 days of the date of the Notice of Assignment. *Id.* It may be "expanded or curtailed by the administrative law judge" only upon motion for good cause. *Id.* Furthermore, Rule 37(a)(2), SCRCP provides that a party may apply for an order compelling discovery if, among other things, a party fails to answer an interrogatory pursuant to Rule 33, or respond to a request for production under Rule 34. Rule 37(a)(2), SCRCP.

Rule 37(d), SCRCP allows the court to issue orders regarding discovery failures that "are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule." Rule 37(d), SCRCP. "In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009). Furthermore, when determining whether to impose the sanction of exclusion of a witness, a trial judge is required to consider and evaluate the following factors:

1. the type of witness involved;
2. the content of the evidence emanating from the proffered witness;
3. the nature of the failure or neglect or refusal to furnish the witness' name;
4. the degree of surprise to the other party, including the prior knowledge of the name of the witness; and
5. the prejudice to the opposing party.

Jumper v. Hawkins, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001).

The imposition of sanctions for discovery failures – including the exclusion or sequestration of a witness, or the granting of a motion to compel – is generally entrusted to the

[2] SCALC Rule 21 also provides certain exceptions to the general rule that the discovery procedures set forth in the SCRCP control. However, none of those exceptions are relevant in this matter.

sound discretion of the trial judge. *See Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987) (citation omitted); *State v. Jackson*, 265 S.C. 278, 281, 217 S.E.2d 794, 795 (1975) (citation omitted). However, "the sanction of exclusion of a witness should never be lightly invoked." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 592, 586 S.E.2d 572, 574 (2003) (quoting *Jackson v. H&S Oil Co.*, 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975) (citation omitted)).

When the rights of discovery provided by the rules are not accorded, prejudice must be presumed. *Samples v. Mitchell*, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997) (citing *Downey*, 294 S.C. at 46, 362 S.E.2d at 319). This presumption may be rebutted by the party who has failed to submit to discovery, however, upon a showing of lack of prejudice. *See Samples*, 329 S.C. at 114, 495 S.E.2d at 217.

Motion to Strike or Exclude Evidence

Here, Coastal argues that KDP's failure to timely produce discoverable articles related to Dr. Folk, as well as KDP's failure to produce communications between counsel for KDP and Dr. Folk, resulted in prejudice to Coastal and warrants the exclusion or striking of Dr. Folk's testimony.

Dr. Folk was initially disclosed as an expert witness to Coastal on May 2, 2017, with KDP stating that "Dr. Folk will testify based upon his training and experience in wildlife sciences and his research history in the relationship of wildlife species to habitats." It further disclosed that Dr. Folk "will offer expert opinions analyzing the relationship between the permitted activity and any threatened or endangered plant and animal species." Based upon this disclosure, counsel for Coastal made a "calculated decision" not to depose Dr. Folk during the discovery period. Coastal contends that decision was made because "threatened and endangered" is a legal term of art in the environmental community that applies only to animals listed under the under the Endangered Species Act (ESA). Therefore, Coastal's argument implies it assumed that because diamondback terrapins are not listed as a threatened species within the meaning of the ESA, it further assumed Dr. Folk would not provide testimony about diamondback terrapins and chose not to depose him for this reason.

Importantly, the Court is not interpreting the technical meaning of "threatened" as used in the ESA but rather the use of that term in the context of the factual testimony in this case. Indeed,

if "threatened," when applied to species is so well-known in the technical sense that it is limited in is application within the environmental professions as Coastal argues, then the Court should have ruled in favor of Coastal. However, while Coastal contends that diamondback terrapins are not threatened within the ESA, Coastal nevertheless contends that they are threatened in a general sense, and made that treat an issue in this proceeding. Specifically, Coastal's own expert, Dr. Gibbons, testified that diamondback terrapins are "threatened and from many places endangered species in the **generic** sense. . . . In a **generic** sense, they are certainly a threatened species." Tr. 263: 16-17; 264:1-2 (emphasis added). Therefore, Coastal's expert did not confine his testimony to the narrow definition of threatened under the ESA. Dr. Gibbons further testified about the general threats that diamondback terrapins face and the specific threats they face related to the proposed project. Therefore, in the context of this case, Coastal has taken inconsistent positions. On the one hand, to support their own case they rely on the general definition of "threatened." On the other hand, they argue that KDP should be held to the narrow definition of "threatened" under the ESA.

In light of Coastal's own application of the word "threat" in the general sense, the disclosure of Dr. Folk's testimony does not appear to be misleading. Dr. Folk was offered, among other things, to the Court as an expert in "the relationship between species and habitats," and was qualified as an expert in "wildlife science habitats, wildlife management, and population dynamics."[3] KDP's expert disclosure could reasonably be interpreted to express that Dr. Folk would be responding about species that are generally considered threatened by the project. At a minimum, KDP's disclosure provided notice to Coastal sufficient to raise a question as to the interpretation of the word "threatened," warranting further inquiry. Coastal thus had sufficient notice of Dr. Folk's testimony as an expert witness for KDP.

However, even assuming, *arguendo*, that the term "threatened" is a term of art and Coastal did not have sufficient notice of the scope of Dr. Folk's intended testimony until KDP's disputed disclosure, there was no prejudice to Coastal to support exclusion of Dr. Folk's testimony in light

[3] Though Coastal objected at the time to Dr. Folk offering expert opinions on diamondback terrapins, dolphins, and piping plovers, as well as testimony derived from the disputed articles provided to Dr. Folk by KDP and produced by KDP to Coastal just prior to the hearing, KDP had previously expressed its intent not to rely on any of those documents, and the Court tailored his qualifications to ensure that his testimony would fall within the purview of his expertise. In other words, the Court narrowed Dr. Folk's qualifications in light of the specific quantitative analysis methodology that Dr. Folk stated he has training and experience using.

of the Court's numerous offers throughout the hearing to remedy any discovery shortcomings by KDP and any resulting prejudice to Coastal. For instance, in *Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 95, 754 S.E.2d 267, 273 (Ct. App. 2014), the Court of Appeals held that a witness who was not properly disclosed should not have been excluded, in part, because the proponent made the witness "available for depositions overnight prior to taking the stand." *See also*, *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003) ("As a general rule, a party must establish prejudice as the result of another's failure to follow mandatory statutory procedure."); *id.* ("Where a party receives inadequate notice, he must demonstrate prejudice resulting from the insufficient notice."). Thus, the opportunity to depose the witness during the trial cured the prejudice.

Here, not only did the Court sequester Dr. Folk during relevant testimony from Dr. Gibbons, but the Court offered Coastal numerous opportunities to delay the hearing testimony to allow Coastal to depose Dr. Folk. In fact, the Court informed Coastal that "you decide when you think [the deposition] would be convenient and we'll proceed down that path." The Court's proposed remedy allowed Coastal an opportunity to resolve any question as to the scope of Dr. Folk's expertise under KDP's expert disclosure and gave Coastal a chance to explore Dr. Folk's intended testimony at the hearing. Had Coastal taken the opportunity offered by the Court at the hearing to depose Dr. Folk, it likely would have revealed the undisclosed communications between KDP and Dr. Folk that were also at issue in Coastal's Motion. Indeed, Coastal even initially accepted the Court's offer for Dr. Folk to be deposed over the weekend break, yet Coastal ultimately declined to avail itself of the Court's remedy before he was called as a witness on the seventh day of the trial. Accordingly, Dr. Folk was never deposed.

Consequently, even assuming initial prejudice to Coastal, the Court finds that the cure offered by the Court at the hearing amply remedied any prejudice to Coastal resulting from KDP's actions giving rise to Coastal's Motion in Limine, as well as Coastal's Motion at issue here. Moreover, in light of the foregoing analysis, the Court fails to see how the disputed portions of Dr. Folk's testimony should be excluded under the *Jumper* factors. Furthermore, though Petitioner made two motions in limine, it does not appear that Coastal objected to Dr. Folk's testimony regarding diamondback terrapins on the ground of prejudice from KDP's alleged discovery violations when it was offered. *See State v. Griffin*, 339 S.C. 74, 528 S.E.2d 668 (2000) ("[A]n in

limine ruling is not final and does not preserve the issue for appeal."); *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996) (explaining a motion in limine is not a final ruling on the admissibility of evidence; thus, "[u]nless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review."). Therefore, Coastal's Motion to Strike or Exclude Dr. Folk's testimony must be denied.

Motion to Compel

Coastal also argues, in the alternative, that it was prejudiced by KDP's failure to provide it with additional documents and communications related to Dr. Folk that it has believes exist, that are responsive to Coastal's discovery requests, and that are not privileged. As such, Coastal maintains that these discovery failures warrant the Court entering an order compelling the improperly withheld discovery. In response, KDP maintains that Coastal is attempting to conduct improper post-trial discovery after the record has been closed in violation of the applicable rules of discovery.

As previously discussed, the Court finds that Coastal was not prejudiced by any discovery shortcomings by KDP. Moreover, the Court would note that the hearing in this case concluded on August 29, 2017, and the record is closed.[4] As it stands, Coastal has not presented the Court with a motion to open the record, and has not provided any facts or authority for the Court to take that action. The Court offered a remedy to Coastal's allegations at the hearing and Coastal decided at that point not to avail itself of that remedy. Furthermore, even if the Court had not offered Coastal the opportunity to take a deposition, the information supporting this request occurred during Dr. Folks' testimony and is thus not "newly discovered." Following that disclosure, Coastal did not examine Dr. Folk regarding the information or even bring it to the Court's attention. Rather, Coastal waited until after the record was closed to present its concerns. Therefore, it would be inappropriate for the Court to allow Coastal to now re-litigate the arguments from its Motion in Limine and to continue discovery after the hearing has concluded and the record has been closed. Consequently, the Court finds that Coastal's Motion to Compel is untimely and improper, and is

[4] Paradoxically, at the conclusion of the hearing, Coastal argued to prevent KDP from admitting Dr. Folk's CV into evidence after KDP had already rested its case, yet now opposes KDP's similar argument that Coastal should not be allowed to admit new evidence after the record is closed.

hereby also denied.[5]

ORDER

IT IS HEREBY ORDERED that Coastal's Motion to Compel or, in the Alternative, to Strike or Exclude Evidence is **DENIED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

January 22, 2018
Columbia, South Carolina

[5] It is also noteworthy that KDP submitted with its response additional communications between counsel for KDP and Dr. Folk that had not been previously provided to Coastal. The communications submitted do not reflect any withholding that would be prejudicial.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

January 22, 2018
Columbia, South Carolina