

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 11-ALJ-07-0425-CC
Appellate Case No. 2012-213207

South Carolina Coastal Conservation League and
Save the Angel Oak Appellants,

vs.

South Carolina Department of Health and Environmental Control and
Angel Oak Village, LLC, Respondents.

INITIAL BRIEF OF APPELLANTS

Amy E. Armstrong
Michael Corley
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 Appellants

Georgetown, South Carolina

January 28, 2013

RECEIVED

JAN 30 2013

SC Court of Appeals

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases, Statutes and Other Authorities	iii
Statement of the Issues on Appeal	
Statement of the Case	1
Argument	
STATEMENT OF LAW	
STATEMENT OF FACTS	
SUMMARY OF ARGUMENT	
I. THE ALJ FAILED TO MAKE NECESSARY RULINGS ON WATER QUALITY	
A. The ALJ Failed to Address the Aquatic Ecosystem under R.61-101.F.(5)(a)	
B. The ALJ Stopped Short of the Conclusions Required Under R.61-68	
II. DHEC AND THE ALJ IMPROPERLY FAILED TO CONSIDER IMPORTANT IMPACTS TO THE ANGEL OAK TREE AND ANGEL OAK PARK	
A. The Applicable Regulations Broadly Encompass Consideration of the Angel Oak Tree and Angel Oak Park, Both of Which are “Special or Unique Habitats”	
B. The Breadth of the Regulations Is Further Bolstered by Case Law	
C. DHEC did not Consider Impacts to the Angel Oak Tree or Angel Oak Park	
D. The ALJ did not Properly Consider Impacts to the Angel Oak Tree or Angel Oak Park	
i. The ALJ Improperly Rejected Application of R.61-101(F)(5)(d)	
ii. The ALJ Made an Unsupported Finding of no Hydrological Impacts to the Angel Oak Tree	

iii. The ALJ Committed Reversible Error in Allowing Dr. Ham to State a Conclusion on Hydrology

iv. The Evidence Properly Before the Court Clearly Evidenced Hydrological Impacts to Angel Oak

III. THE ALJ AND DHEC APPLIED AN INCONSISTENT AND INSUFFICIENT ANALYSIS OF FEASIBLE ALTERNATIVE

IV. THE ALJ IMPROPERLY DISMISSED APPELLANT’S CLAIMS UNDER THE COASTAL ZONE MANAGEMENT ACT, PREJUDICING THE APPELLANTS

V. CONCLUSION

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Page(s)

CASES

Kiawah Development Partners, II, 2011 WL 5840326

Kiawah Development Partners, II v. SCDHEC et. al, 2011 WL 5840326

Rorrer v. P.J. Club, Inc., 347 S.C. 560, 556 S.E.2d 726 (Ct. App. 2001)

Sierra Club v. DHEC and Chem Nuclear Systems, LLC, 387 S.C. 424,
693 S.E.2d 13 (Ct. App. 2010)

Spectre v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010)

State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008)

TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)

STATUTES

S.C. Code Ann. § 48-39-10

S.C. Code Ann. § 48-39-80

33 U.S.C. § 1341

REGULATIONS

S.C. Code Ann. Reg. R.30-1

S.C. Code Ann. Reg.61-68

S.C. Code Ann. Reg. 61-68(A)(2)

S.C. Code Ann. Reg. R.61-68(E)(10)

S.C. Code Ann. Reg. 61-68.G(11)

S.C. Code Ann. Reg.61-101

S.C. Code Ann. Reg. 61-101(A)(7)

S.C. Code Ann. Reg. 61-101(F)

S.C. Code Ann. Reg. 61-101(F)(1)

S.C. Code Ann. Reg. 61-101(F)(2)

S.C. Code Ann. Reg. 61-101(F)(3)

S.C. Code Ann. Reg. 61-101(F)(5)

S.C. Code Ann. Reg. 61-101(F)(5)(a)

S.C. Code Ann. Reg. 61-101(F)(5)(d)

S.C. Code Ann. Reg. 61-101(F)(6)

CMP III-40, at (1)(b)

CMP III 27, at (1)(a)

CMP III-14 at (I)(9)

CMP III-14 at (I)(1)

OTHER AUTHORITIES

S.C. Rule of Evidence 703

S.C. Rule of Evidence 802

S. C. Rule of Evidence 803(18)

South Carolina Administrative Law Court Rule 29(D)(2)

STATEMENT OF ISSUES ON APPEAL

- I. **Can the Administrative Law Court Order Be Upheld When the ALJ Failed to Rule on the Whether the Proposed Project Complies With Regulation 61-101.F(5), Which Requires Denial of 401 Water Quality Certification When a Project Would Either:
 - A. **Permanently Alter the Aquatic Ecosystem in the Vicinity of the Project Such That its Functions and Values and Eliminated or Impaired, or**
 - B. **Adversely Impact the Ancient Landmark Angel Oak Tree, Which is Undisputedly a Unique and Special Resource?****

- II. **Can the Administrative Law Court Order Be Upheld When the ALJ Failed to Rule on Whether the Proposed Project Complies with Regulation 61-68.E.(10), Despite Uncontradicted Evidence That the Project Will Not Enhance Church Creek's Classified Use as Shellfish Harvesting Waters and That the Project Will Degrade the Aquatic Ecosystem?**

- III. **Did DHEC and the ALJ Err in Concluding that Impacts to the Angel Oak Tree and Angel Oak Park Were Beyond the Scope of Regulatory Review, Despite the Requirement to Consider "All Potential Water Quality Impacts of the Project, Both Direct and Indirect," Including "Physical, Chemical, and Biological Impacts," As Well as Impacts to "Special or Unique" Resources?**

- IV. **Did the ALJ Err in Admitting Hearsay Opinion Testimony Through an Unqualified Witness, Over Appellants' Objection, and Then Placing Complete Reliance on that Testimony as a Basis for Concluding That There Would be No Hydrological Impacts to the Angel Oak Tree?**

- V. **Did DHEC and the ALJ Err in Excluding Feasible Alternatives on the Basis of a Consideration That Was Entirely Inconsistent with the Remainder of Their Review, While Ignoring Other Uncontradicted Evidence of Feasible Alternatives?**

- VII. **Did the ALJ Err in Dismissing Appellants Challenge to the Coastal Zone Consistency Certification?**

STATEMENT OF THE CASE

On August 15, 2011, The Petitioners-Appellants (hereinafter, "Appellants") South Carolina Coastal Conservation League and Save the Angel Oak filed a contested case hearing seeking review of the South Carolina Department of Health and Environmental Control's ("DHEC") decision to grant 401 Water Quality Certification and Coastal Zone Consistency Certification to Angel Oak Village, LLC. The Certifications at issue authorize the filling of 2.23 acres of wetlands in connection with a proposed mixed-use development consisting of 274 residential units along with commercial retail space on Johns Island in Charleston County.

The Appellants allege that the project violates the Water Quality Regulations at S.C. Code Ann. Reg. 61-101, as well as the provisions of the Coastal Management Program ("CMP"). The Respondents Angel Oak Village, LLC, and DHEC assert that the project complies with the applicable standards.

A hearing was conducted before the Administrative Law Judge April 3 – April 6, 2012 at the Administrative Law Court in Columbia. The parties submitted proposed orders to the Court on July 9, 2012. On July 25, 2012, the ALJ issued a Final Order and Decision ("Final Order"), affirming DHEC's issuance of the 401 Water Quality Certification and dismissing the Appellants' challenge to the Coastal Zone Consistency Certification.

The Appellants filed a Motion to Alter or Amend and to Reconsider in the Administrative Law Court on August 6, 2012. The ALJ never took action on that motion, and, pursuant to South Carolina Administrative Law Court Rule 29(D)(2), the motion was deemed denied thirty days later on September 5, 2012. The Appellants filed their notice of appeal in this case on October 5, 2012.

ARGUMENT

STATEMENT OF LAW

There are two statutes (and two corresponding regulatory programs) that apply to a wetlands fill project such as this one in the Coastal Zone of South Carolina – the Clean Water Act and the South Carolina Coastal Zone Management Act.

Before filling wetlands that fall under jurisdiction of the Clean Water Act (“CWA”), Section 401 of the CWA requires that an applicant obtain “a certification from the State in which” the fill will occur (hereinafter, “Water Quality Certification” or “Section 401 Certification”). See 33. U.S.C.A § 1341. In particular, the State must certify that the proposed wetland fill is in compliance with State water quality standards. Id. In South Carolina, Regulation 61-101 “establishes procedures and policies for implementing State water quality certification requirements of Section 401 of the Clean Water Act.” R.61-101(A)(1). In other words, Section 401 Water Quality Certifications are issued pursuant to Regulation R.61-101.

R.61-101 provides its own set of standards for certification decisions, but it also incorporates the standards of R.61-68: “A certification shall be issued if the applicant has demonstrated that the project is consistent with the provisions of these regulations [and] the State Water Quality Standards, Reg. 61-68.” R.61-101(F)(2). In sum, R.61-101 and R.61-68 contain South Carolina’s standards for water quality, standards which must be satisfied before certification is issued for the filling of Clean Water Act jurisdictional wetlands (“jurisdictional wetlands”). DHEC is charged with administering this program.

If the filling of jurisdictional wetlands is proposed in one of South Carolina’s eight coastal counties, as it is in this case, a second certification is triggered. The S.C. Coastal Zone

Management Act requires DHEC, through its Office of Coastal Resource Management (“OCRM”), “to review all state and federal permit applications” submitted in the coastal zone, “and to certify that these do not contravene” South Carolina’s Coastal Management Program. S.C. Code Ann. § 48-39-80(B)(11).

The Coastal Management Program (“CMP”) was issued in 1979 and contains binding policies designed to protect our State’s unique coastal resources. See Spectre v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010). Certification under the Coastal Zone Management Plan is referred to as Coastal Zone Consistency Certification (“CZC Certification”). A Clean Water Act permit is one of the permits that must be reviewed by OCRM for consistency with the CMP. See R.61-101(A)(7).

Again, the Appellants are challenging DHEC’s issuance of both Section 401 Water Quality Certification and CZC Certification in this case.

STATEMENT OF FACTS

This case is a dispute over the development of a 42-acre tract adjacent to and surrounding the famed Angel Oak Tree (the “Angel Oak” or the “Tree”) on Johns Island in Charleston County. More specifically, the 42-acre tract, which is currently almost entirely forested, surrounds three sides of Angel Oak Park, a 2.2 acre City of Charleston park in which the Angel Oak grows. (Petitioners’ Exs. 2 & 3). Angel Oak Village, LLC (“AOV”) acquired the 42-acre tract in 2006 and immediately began seeking approvals for development of the property. (Day 4, Tr. 13). The AOV property contains 6.46 acres of wetlands, which the U.S. Army Corps of Engineers initially concluded were not subject to CWA jurisdiction. In March 2010, the Corps of

Engineers reversed itself after Petitioners' expert, Jean Everett, informed it of the connection between the wetlands and Church Creek and asserted Clean Water Act jurisdiction over all 6.46 acres of wetlands. The Corps' assertion of CWA jurisdiction triggered the requirement for the 401 Water Quality Certification and Coastal Zone Consistency Certification at issue in this case. (Petitioners' Exhibit 29). Through the two certifications challenged here, DHEC has authorized 2.23 acres of the wetlands to be filled for AOV's development plan. (Petitioners' Exhibit 30).

AOV's development plan has evolved over time, starting out as a proposed big box store, then going through several iterations involving varying amounts of proposed wetland fill. (Day 4, Tr. 14-15). The development plan for which AOV has obtained DHEC approval calls for a high-density, mixed residential and commercial project. (Day 2, Tr. 301). Development is to take place in two phases. Together, phases I and II will contain 570 residential units. (Day 1, Tr. 76). However, the DHEC 401 Water Quality Certification and CZC Certification at issue in this case only cover Phase I. (Day 1, Tr. 142-43). Phase I includes 274 residential units, with a density of 15 units per acre, which is roughly equivalent to the density of downtown Charleston. (Day 1, Tr. 76). The majority of Johns Island is zoned either one unit per eight acres, on large parcels, or one unit per acre in "settlement areas," which typically represents communities located in proximity to major crossroads on the Island. (Day 1, Tr. 89). The density of the proposed project is thus fifteen (15) times greater than what is otherwise allowed under the most dense areas of Johns Island.

When this project was proposed, it immediately "triggered controversy because of the proximity of the development to a notable ancient oak tree known as the 'Angel Oak' and because of general opposition from residents of Johns Island and Wadmalaw Island." (Order, p.

5). The details of what makes the Angel Oak Tree so special are discussed below, but sufficed to say for now that the Angel Oak is an important landmark for the Johns Island community, as well as the State of South Carolina, that draws thousands of visitors a year. (Petitioners' Ex. 1; Day 1, Tr. 59).

As the AOV property stands today, it is essentially 100% forested and undeveloped. (Petitioners' Ex. 2). This forest surrounds the Angel Oak, and no one who testified in this case had any memory or documentation of a time when the Angel Oak was not surrounded by woods. (See Day 2, Tr. 311). However, the large majority of this forest will be removed during development of AOV's property. The forest cover remaining after development would occupy about 20% of the property, and the remaining 80% would be buildings, parking lots, roads, and stormwater structures. (Day 3, Tr. 67). The proposed development would recognize a 300 foot buffer from the trunk of the Angel Oak, within which no development would occur. (Day 1, Tr. 222). The branches of the Angel Oak extend up to 180 feet.¹

When a property is developed, covering natural soil with impervious asphalt, rooftops and other hard surfaces, significant water quality concerns are implicated. Namely, the increase in impervious surfaces leads to a higher volume and rate of stormwater runoff from rain events. (Day 1, Tr. 216). Once a site is covered with impervious surfaces, rainwater will not infiltrate

¹Throughout this action, AOV has referred to 7.24 acres of its property "surrounding the Angel Oak," which will be preserved in its undeveloped state. This acreage by no means forms an even-width barrier around the Angel Oak. The 300 foot buffer – the so-called "tree protection zone" – accurately reflects the distance between the Tree and AOV's proposed development in many places. The testimony of the parties' competing tree experts focused on the effectiveness of the 300 foot tree protection zone, not this lopsided acreage, the preservation of which had as much to do with the shape and layout of the property as with Tree protection. (See, e.g., Day 3, Tr. 75, 94, 104-05; Day 1, 228).

into the soil covered by those impervious surfaces. Lack of infiltration will increase the capacity for runoff from the site. (Day 1, Tr. 216). Naturally, higher density development leads to more impervious surfaces and more stormwater runoff. The higher volume and rate of stormwater runoff picks up and transports more pathogens, microbes and chemicals from our parking lots and lawns. (Day 2, Tr. 109). Without intervention, this phenomenon “results in the transport of sediment and pollutants into [downstream] creeks and streams.” (Day 1, Tr. 44, lines 12-17). More than 50% of all water pollution in the United States is attributable to this phenomenon of stormwater runoff. (Day 1, Tr. 45-46).

Wetlands naturally serve to filter and store this stormwater runoff. (Day 2, Tr. 112). So when a development calls for the filling of wetlands, in addition to significant impervious ground cover, the potential for polluted stormwater runoff is exacerbated. (Day 2, Tr. 113).

Runoff leaving the AOV property flows into a tidal water known as Church Creek. (Day 1, Tr. 206; Day 2, Tr. 46). In the property’s undeveloped state, runoff flows into the wetlands on AOV’s property, which then drain into Church Creek. Church Creek is designated by DHEC as a shellfish harvesting water, but it is presently listed on DHEC’s list of impaired waters pursuant to Section 303(d) of the CWA and is therefore closed to shellfish harvesting. (Petitioners Ex. 14). Church Creek was designated as impaired due to high levels of fecal coliform bacteria and low levels of dissolved oxygen, both of which are symptoms of stormwater runoff from development. (Day 2, Tr. 51-52). Fecal coliform bacteria, in particular, is a common pollutant found in runoff from developed sites, and it harmful to the health of humans. (Day 2, Tr. 109).

The AOV property will obviously have significantly more impervious surfaces post-development. (Day 1, Tr. 69). To manage the resulting problem of stormwater runoff, AOV

proposes to install a stormwater retention and infiltration system. The engineering firm of HLA designed the stormwater system for AOV, which consists of 16 or 17 small drainage basins, going through 12 rain gardens, 5 bio-ponds, a swale, and two large and three small retention ponds. (Day 2, Tr. 48). These stormwater structures are known as Best Management Practices or BMPs, and are designed to retain and infiltrate polluted stormwater on the AOV property, rather than allowing it to flow downstream to Church Creek. (Day 3, Tr. 209-10). Stormwater which does manage to exit the property will flow to Church Creek. (Day 2, Tr. 49).

The Witnesses

Dana Beach testified as the Executive Director of the S.C. Coastal Conservation League (“the League”), representing approximately 4,000 members, some of whom live on Johns Island and near the Angel Oak Tree. (Day 1, Tr. 49-50). Mr. Beach has followed the water quality problems in Church Creek, which is the receiving waterbody for the proposed development’s stormwater runoff, since the 1980s. (Day 1, Tr. 41).

Beach testified that rapid, high density development leads to increased stormwater runoff (rainfall running across the landscape) from “impervious surfaces and the hardening of watersheds, and with that the transport of sediment and pollutants into creeks and streams, many of which were small like Church Creek and many of which in the lowcountry didn’t flush very well.” (Day 1, Tr. 44, lines 12-17). Specific to this case, Beach noted that there would be significantly more impervious surfaces post-development. (Day 1, Tr. 69).

The League’s concerns about adverse impacts to water quality in Church Creek are twofold. First, the League is concerned about the amount of wetlands that would be filled in relation to this development and the loss of the water quality functions that those wetlands

perform. Second, the League is concerned about the significant increase in impervious surface on the property, which will have adverse impacts on water quality. (Day 1, Tr. 146).

Jane Gowin testified as a member of Save the Angel Oak and the S.C. Coastal Conservation League. (Day 2, Tr. 303-304). In 1908, Ms. Gowin's grandfather purchased property that is on the opposite side of Angel Oak Road from the Angel Oak Tree. (Day 2, Tr. 305). Both Ms. Gowin and her father grew up on that property, and Ms. Gowin maintains a residence on the property today. (Day 2, Tr. 306). Gowin's property is bordered by a tributary to Church Creek. (Day 2, Tr. 307). Ms. Gowin learned to swim in that tributary, and grew up crabbing, shrimping and fishing in the tributary, which is now too polluted for those uses. (Day 2, Tr. 312).

Amy Fabri testified as a member of the Coastal Conservation League and Save the Angel Oak. (Day 2, Tr. 322). Ms. Fabri is currently serving as a Commissioner on the Charleston County Planning Commission, and is Chairperson for the County's Comprehensive Plan Review Committee. (Day 2, Tr. 323). Ms. Fabri recognizes that while it is not realistic to expect the project site to remain undeveloped forest, it is the type of development being proposed that is the problem. (Day 2, Tr. 326).

Samantha Siegel testified as a member and one of the founders of Save the Angel Oak. (Day 2, Tr. 352). The purpose of Save the Angel Oak is to "protect and enhance the Angel Oak through the protection of the surrounding forest and wetlands." (Day 2, Tr. 359, lines 1-3). Ms. Siegel would like to see a "responsible development that's not so dense and massive and out of character with Johns Island, . . . something that avoids the wetlands and stays further away from the tree and maintains the affordable housing component." (Day 2, Tr. 370, line 23 – 371, line 3).

Robert DeMoura testified as a representative of the Respondent, Angel Oak Village, LLC (“AOV”). Mr. DeMoura has been in the land development business since 2001. (Day 4, Tr. 5-6). He formed AOV in furtherance of the proposed development.

Tim Keane is the Director of Planning for the City of Charleston and testified on behalf of Angel Oak Villages, LLC. (Day 3, Tr. 286). He first worked for the City from 1999-2005 as the Director of Neighborhoods. (Day 3, Tr. 287). He left the City in 2005 to open a consulting practice working on planning and design projects, during which time he was hired by DeMoura and AOV. (Day 3, Tr. 287). In 2009, he returned to work at the City as the Director of Planning, Preservation and Sustainability. (Day 3, Tr. 287). Mr. Keane believes that the Angel Oak is a unique resource on Johns Island, and that it is a resource worth protecting. (Day 3, Tr. 335).

The parties presented competing “tree experts.” Donald Ham was qualified and testified as an expert in forestry with a focus in arboriculture, which is the study of an individual tree. (Day 3, Tr. 39). Dr. Ham received his PhD. in forestry from Duke University. His past employment includes providing expertise in dealing with insects, diseases and prescribed fire. (Day 3, Tr. 10). His primary focus has been on arboriculture. (Day 3, Tr. 25). At present, he is the only full-time member in a consulting firm, the Laurus Group. (Day 3, Tr. 4-5). Through this firm he provides information on proper tree care, conducting inventories and surveys, managing vegetation and trees in rights-of way issues, conducting hazard tree surveys, and consulting in tree failure cases resulting in personal injury or death. (Day 3, pp. 5-6).

Dr. Ham's original involvement in this matter arose not from a request to assess the Angel Oak, but to evaluate and develop a plan to protect the trees that the developer would be required to retain onsite under the City of Charleston ordinance. (Day 3, Tr. 40-43). He was hired by

Angel Oak Villages, LLC, to assist with securing the necessary approvals for the tree removal plan.

Petitioners presented Jean Everett, who received her PhD. in forest resource management from Virginia Polytechnic Institute. (Pet. Ex. 11). Dr. Everett was qualified and testified as an expert in forest ecology. Forest ecology is a comprehensive approach to looking at forest ecosystems. (Day 1, Tr. 182). Forest ecology encompasses geomorphology, the underlying geology and landscape, the soils, hydrological patterns and vegetation patterns. (Day 1, Tr. 182). Dr. Everett assessed impacts to the Angel Oak from an ecosystem perspective, including impacts to the watershed that supplies water to the Angel Oak. (Day 1, Tr. 223). Dr. Everett has taught courses in field botany, ecology, and environmental studies. (Day 1, Tr. 181; Pet. Ex. 11). She regularly consults on ecosystem-oriented questions and works on contract projects, including survey work for governmental agencies. (Day 1, Tr. 184-85).

The Petitioners also presented the testimony of Dr. Fred Holland, who testified as an expert in ecology with a special emphasis on land use impacts on water quality. (Day 2, Tr. 45). Dr. Holland has a PhD. in Marine Science from the University of South Carolina, and was the only expert to testify as to water quality/ the aquatic ecosystem with a PhD in a scientific field. (Day 2, Tr. 5; Pet. Ex. 13). Dr. Holland was the Director of the Marine Resources Research Institute at the S.C. Department of Natural Resources (“DNR”). (Day 2, Tr. 6-7). As director, Dr. Holland oversaw all of the approximately 100 research projects at the Institute and ran his own research program. (Day 2, Tr. 8). While at DNR, Dr. Holland started two programs. One program, the environmental monitoring and assessment program, looks at the environmental quality, status and trends of estuaries in the Southeastern U.S. as part of a National Oceanic and

Atmospheric Administration (“NOAA”) and U.S. Environmental Protection Agency (“EPA”) project. (Day 2, Tr. 9). DHEC currently utilizes that program to assess estuarine water quality. (Day 2, Tr. 9). Indeed, DHEC has funded various components of Dr. Holland’s work related to land use impacts on water quality. (Day 2, Tr. 26).

The other program looks at land use impacts on tidal creeks and S.C.’s estuarine systems. (Day 2, Tr. 9). Through this program Dr. Holland looked at the tidal creeks at their interface with land when the creek is at its maximum potential exposure to runoff from the land. (Day 2, Tr. 13). DNR “loaned” Dr. Holland to NOAA to create and direct the Hollings Marine Lab with the purpose of looking at how changes in ecosystems resulting from man’s activities have impacted man’s health and well-being. (Day 2, Tr. 15). At that point he added a component to the tidal creeks program looking at the relationships between land use and shellfish bed closures, potential for flooding, economic impacts on house values, and other functions of water quality and land use changes. (Day 2, Tr. 14).

The focus of Dr. Holland’s research since he started the Hollings Marine Lab has been how land use activities affect environmental quality and human health and well-being. (Day 2, Tr. 17). This research encompasses estuarine ecology, evaluating nonpoint source pollution², environmental assessments, benthic ecology, fisheries, water quality, understanding pathogens and shellfish. (Day 2, Tr. 18). For the past twenty years Dr. Holland has been conducting research on land use impacts on water quality, which includes approximately 50 peer-reviewed publications and over 100 technical reports. (Day 2, Tr. 23-25).

²Nonpoint source pollution comes from runoff from the land as stormwater, and cannot be attributed to a specific source. (Day 2, Tr. 18).

Dr. Holland explained that failure to propagate high levels of water quality has real and concrete consequences, particularly in the aquatic ecosystem involved in this case. With diminished water quality, male mud minnows do not produce as much sperm, (Day 2, Tr. 109); oysters don't have a functioning metabolic system, (Id.); and shrimp and crustaceans, which are pollution-sensitive species, decrease in abundance, (Id.). The net result is that you've altered the food web so significantly that it will not support the same kind of fisheries and nursery habitat. (Id.). At some point there are human health and societal responses: shellfish beds are closed; beaches are closed; water contact recreation is prohibited; and houses along degraded creeks lose economic value. (Day 2, Tr. 109-110).

The only DHEC employee to testify was Erin Owen, who was the project manager for the 401 water quality certification in this case. (Day 2, Tr. 208). Ms. Owen explained that Church Creek is classified as a Shellfish Harvesting ("SFH") water, which means that it is protected for shellfish harvesting, as well as primary and secondary contact recreation, crabbing and fishing. (Day 2, Tr. 239; S.C. Code Ann. Reg. 61-68.G(11)). The SFH designation also means that Church Creek is suitable for the survival and propagation of a balanced indigenous aquatic community of marine fauna and flora. (Day 2, Tr. 239). Ms. Owens testified that this is one of the highest water quality standards in the State. (Day 2, Tr. 239).

AOV presented the testimony of Rick Karkowski, who was qualified and testified as an expert in civil engineering with an emphasis on water management. Mr. Karkowski has a bachelor's degree in civil engineering and is a licensed professional engineer. (Day 3, Tr. 145-46). He is also certified as a hydrologist and in stormwater quality. (Day 3, Tr. 149). Mr. Karkowski was hired to analyze the stormwater system design to determine whether it met

DHEC requirements, and specifically whether the project would worsen water quality in the already-impaired Church Creek. (Day 3, Tr. 163). He uses a mathematical model, which is a computer program, to model the physical characteristics of stormwater systems and “to demonstrate that you’re capturing a certain amount of runoff, a volume of runoff in your stormwater treatment system and it gets a level of treatment before being discharged.” (Day 3, Tr. 152, line 22 - Tr. 153, line 1). The information he uses to run a model typically consists of both site specific data, as well as literature, or default, values. (Day 3, Tr. 157). He ran such a model for use in seeking stormwater approval from DHEC in this case. (Day 3, Tr. 155-56).

Mr. Karkowski offered testimony on the workings of AOV’s stormwater system, while Dr. Holland offered testimony related how the proposed land use changes would impact water quality and the aquatic ecosystem, regardless of the stormwater system. The ALJ ignored Dr. Holland’s testimony and instead focused on the operation, details and effectiveness of AOV’s stormwater system, which are not meant to be an issue in this appeal. Rather, the above discussion is intended only to explain the mechanism through which this proposed project, and projects like it, impact the water cycle.

SUMMARY OF ARGUMENT

The fundamental errors in the Administrative Law Court’s Order include failing to rule on compliance with the applicable regulations and ignoring uncontradicted evidence necessary and relevant to a determination of compliance with those regulations. At the heart of this case are three requirements that must be met in order for the project to proceed. Two of those requirements are found in Regulation 61-101.F(5)(a) and (d), which established outright

prohibitions against issuing a 401 Water Quality Certification if a project either 1) permanently alters the aquatic ecosystem, resulting in elimination or impairment of the system's functions and values or 2) adversely impacts a unique or special resource. The third requirement is found in Regulation 61-68.E.(10), which mandates that this project enhance the existing water use of Shellfish Harvesting in Church Creek. Compliance with these requirements was raised to the ALC in the pleadings and in a motion to reconsider, yet the ALJ utterly failed to address these key questions, despite uncontradicted evidence that the aquatic ecosystem would be impaired; the hydrology around the Angel Oak Tree, a special and unique resource, would be altered, thereby adversely impacting the Tree; and the Shellfish Harvesting waters of Church Creek would not be enhanced, but would likely be further impaired.

Rather than evaluating the uncontradicted evidence presented by the Appellants, the ALJ relied on hearsay opinion testimony of a witness that did not testify at trial and was not qualified as an expert, provided through another witness with no knowledge or experience, for the sole ruling on hydrologic impacts found in the Order. None of the other uncontradicted impacts described in detail by qualified experts were addressed in the Order. Had they been addressed, the only possible conclusion would be that the project fails to comply with Regulations 61-68.E.(10), 61-101.F.(5)(a) and 61-101.F.(5)(d). The case must be remanded to the ALC with instructions to make conclusions on compliance with these provisions.

Finally, the ALC erred in dismissing the Appellants' challenges related to compliance with the Coastal Management Plan ("CMP"). The ALC improperly rejected the CMP claims on the basis that DHEC had previously issued a Certification of Consistency with the CMP that went unchallenged, despite the fact that a new Clean Water Act Permit was required, thereby

triggering the requirement for certification of that new permit.

I. THE ALJ FAILED TO MAKE NECESSARY RULINGS ON WATER QUALITY

Water quality regulations R.61-101.F.(5)(a) and R.61-68(a)(2) provide important standards, compliance with which is mandatory for issuance of Section 401 Water Quality Certification. Despite the fact that the Appellants raised compliance with these regulations as a key issue by presenting expert testimony and other evidence, and submitted a proposed final order containing rulings on both, the ALJ's Final Order fails to rule on whether the project complies with these specific regulations. The Appellants raised the ALJ's failure in a Motion to Alter or Amend and to Reconsider, but the Court never ruled on that Motion. See Motion, p. 6-8. R.61-101.F.(5)(a) and R.61-68(a)(2) provide some of the strongest protections for water quality found in the regulations. This case should be remanded to the ALJ for the purpose of ruling on these important standards. See Sierra Club v. DHEC and Chem Nuclear Systems, LLC, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010) (remanding case to the ALC for failure to rule on specific regulatory provisions raised to the ALC, with directions to apply the ALC's factual findings to regulatory provisions).

A. The ALJ Failed to Address the Aquatic Ecosystem under R.61-101.F.(5)(a)

Regulation R.61-101.F(5)(a) flatly provides that “[c]ertification **will be denied** if: (a) the proposed activity **permanently alters the aquatic ecosystem in the vicinity of the project** such that its **functions and values** are eliminated or impaired.” While the ALJ noted that this provision is applicable and directly quoted its terms, (Order, FF 52, CL 8), he failed to reach any

conclusion on whether the project complies with the provision.³

The word “ecosystem” is not defined in the regulations, but inclusion of the terms “functions and values” within F(5)(a) is illuminating. An ecosystem is commonly understood to mean “the complex of a community of organisms and its environment **functioning** as an **ecological unit.**” Merriam-Webster (emphasis added). Regulation R.61-101.F(5)(a) is unique in its focus on this “ecological unit.” None of the other provisions of R.61-101 directly call for the agency to account for the aquatic functions and values that may be lost with filled wetlands. For this reason, the ALJ’s failure to address R.61-101.F(5)(a) is particularly significant.⁴

At least 2.23 acres of wetlands on the AOV property would be filled and eliminated from the aquatic ecosystem as a result of this project. While the ALJ concludes that the amount of wetlands filled has been minimized under the circumstances, (Order, p. 31), he offers no conclusions on what impact this “minimized” amount of wetland fill will have on the aquatic ecosystem on and around the AOV property.⁵ The only expert to testify regarding the aquatic

³The ALJ recognizes that 61-101(F) is “material to the disposition of this contested case,” yet inexplicably fails to rule on this important provision. (Order, p. 9).

⁴Reference to the aquatic ecosystem is not limited to section (F)(5)(a). R.61-101(F)(6) provides also that: “Certification will not be issued unless the Department is assured appropriate and practical steps . . . will be taken to minimize adverse impacts on water quality **and** the aquatic ecosystem.” (emphasis added). Note that “water quality” and the “aquatic ecosystem” are presented as separate inquiries in the certification analysis.

⁵The ALJ did determine that AOV’s stormwater plan will adequately keep pollutants from leaving the AOV property and entering Church Creek. One could stretch to argue that this is equivalent to a determination that the pollutant filtering function of the filled wetlands is adequately replaced in this regard. However, even under such an argument, the ALJ’s determination goes to a narrow function in relation to a single nearby waterway. The ALJ’s Order clearly says nothing about the host of other functions and values the wetlands perform, or about the other waters within the aquatic ecosystem.

ecosystem was Appellants' witness Dr. Fred Holland, and his testimony related to the aquatic ecosystem (as opposed to AOV's stormwater plan) was completely absent from the ALJ's Order. Erin Owen, the author of the DHEC's decision document, the project manager for this project, and the only DHEC employee to testify in this case, (Day 2, Tr. 211), was specifically questioned about her application of R.61-101.F(5)(a), and her testimony on the aquatic ecosystem was similarly excluded from the Final Order. (Day 2, Tr. 241)

Dr. Fred Holland explained that the wetlands on the AOV property are part of an aquatic ecosystem that includes onsite wetlands, Church Creek, Bohicket Creek and a number of smaller tributary creeks. (Day 2, Tr. 119). Ms. Owen agreed with that assessment. (Day 2, Tr. 241). Holland and Owen further agreed that the aquatic ecosystem would include groundwater under Regulation 61-101. (Day 2, Tr. 295). Dr. Holland defined this aquatic ecosystem "as a functioning type of creek network" and explained that the components of the aquatic ecosystem would include the "physical environment, the abiotic component," the "biotic component," and the "kinds and abundance of aquatic life" on the site and in the creek network. (Day 2, Tr. 119-20).

Dr. Holland testified that presently, the wetlands that would be filled and disrupted by this project provide a number of important functions and values within the ecosystem: they serve as habitat for "a wide range of organisms," they buffer storm flows, cleanse our water, and process our pollutants. (Day 2, Tr. 112, 119-121). Dr. Holland's opinion on these points, which was not contradicted by any other testimony, was that all of these functions and values will be

impaired or lessened by the proposed project. (Day 2, Tr. 121-22).⁶ Ms. Owen acknowledged that the project would result in impairment to the aquatic ecosystem, but she concluded that this impairment was justified because the wetland fill was compensated for by the purchase of offsite mitigation credits. (Day 2, Tr. 242-43).⁷

Despite Ms. Owen's conclusion, which is entirely inconsistent with the regulations, the fact remains that the Appellants challenged DHEC's application of R.61-101.F(5)(a), requiring denial of certification if the aquatic ecosystem is permanently altered and its functions and values eliminated or impaired, and the ALJ heard testimony on this point, but then did not even broach the subject in his Final Order, even after being asked to do so through Appellants' Motion to Alter or Amend and to Reconsider. See Motion, p. 6-7. This case should therefore be remanded for the ALJ to apply R.61-101.F(5)(a) to the undisputed testimony of Dr. Holland.⁸

B. The ALJ Stopped Short of the Conclusions Required Under R.61-68

As explained above, the Section 401 Water Quality Certification regulations (R.61-101) incorporate, and explicitly require compliance with, our State Water Quality Standards found in Regulation R.61-68. An important provision in that regulation is R.61-68(E)(10), which, like

⁶In a comment letter, the United States Environmental Protection Agency ("EPA") also expressed aquatic ecosystem-based concerns: "development will surround the preserved [wetland] areas with impervious surfaces which will greatly alter the current hydrologic and chemical functions performed by the wetlands." (Pet. Ex. 35).

⁷R.61-101(F)(5) does not contain any language authorizing impairment to the aquatic ecosystem to simply be offset through the purchase of mitigation.

⁸Overall, in the context of a Water Quality Certification, shockingly little attention was given to the fact that 2.23 acres of wetlands are being permanently eliminated. The 2.23 acres of impacts and how those impacts related to water quality was given cursory treatment in the context of regulations designed to protect the aquatic ecosystem.

R.61-101.F(5)(a), also provides a flat disallowance: “Discharge of fill into waters of the State is not allowed unless the activity is consistent with Department regulations and **will result in enhancement of classified uses with no significant degradation of the aquatic ecosystem** or water quality.” (emphasis added).

The relevant “classified use” in this case is that of Church Creek, the receiving water for the wetlands on AOV’s property. While the ALJ did conclude that the project would not cause further impairment of Church Creek, he made no conclusion on enhancement of classified uses and did not reference R.61-68(E)(10) in his Final Order, (See Tr. Day 2, p. 238), despite the fact that the Appellants went so far as to have DHEC’s Erin Owen read R.61-68(E)(10) aloud during her testimony, to submit a proposed final order containing a ruling on R.61-68(E)(10), and to point out the ALJ’s failure to make a ruling on R.61-68(E)(10) in their Motion to Alter or Amend and to Reconsider.⁹

The classified use for Church Creek is as a Shellfish Harvesting (“SFH”) water, which means that it is protected for shellfish harvesting, as well as recreation, crabbing and fishing. (Day 2, Tr. 239; S.C. Code Ann. Reg. 61-68.G(11)). The SFH designation also means that Church Creek is suitable for the survival and propagation of a balanced indigenous aquatic community of marine fauna and flora. (Day 2, Tr. 239; S.C. Code Ann. Reg. 61-68.G(11)). Ms. Owens testified that the SFH designation is one of the highest water quality designations in the State. (Day 2, Tr. 239). However, as mentioned above, Church Creek is presently listed by

⁹Note that R.61-68(a)(2) also incorporates protection of the “aquatic ecosystem.” Though the Appellants will not restate all of the arguments in the preceding section, they are equally applicable here. The ALJ’s failure to make any assessment of the aquatic ecosystem, despite the uncontradicted testimony of Dr. Fred Holland, provides further grounds for a remand under R.61-68(a)(2).

DHEC as an “impaired water,” meaning that it is not properly functioning for its classified use. Specifically, though shellfish live and grow in Church Creek, they are unsafe to eat because of runoff from surrounding development. (Day 1, Tr. 80-82; Pet. Ex. 6; Day 2, Tr. 50-51). The impaired nature of Church Creek makes R.61-68(E)(10) particularly relevant to a proper evaluation of this project.¹⁰

Erin Owen testified to DHEC’s conclusion that the project would not improve the impaired condition of Church Creek. (Day 2, Tr. 240). The Appellants expert Dr. Holland testified that the impairment to Church Creek would be worsened, (Day 2, Tr. 208), and AOV’s expert Mr. Karkowski offered no opinion on whether Church Creek would be enhanced by this project, (Day 3, Tr. 270). The undisputed evidence presented at trial in this case is that the project will not enhance the classified use of Shellfish Harvesting in Church Creek, and that it will actually further impair the classified use. The ALJ did not address any of this evidence in its Final Order.

The ALJ’s Order fails to address the applicability of either R.61-68(E)(10) or R.61-68(A)(2), and the ALJ further declined to address these provisions when asked to do so through Appellants’ Motion to Alter or Amend and to Reconsider. (Motion, p. 6-8). This case should be remanded to the ALJ with direction to apply these provisions, which on their face would require the certification to be denied for failure to enhance the presently impaired waters of Church

¹⁰Related to R.61-68(E)(10), and also of relevance here, is R.61-68(A)(2), which directs DHEC to not only maintain water quality, but to improve that quality when a water fails to meet standards: “waters which do not meet standards **shall be improved wherever attainable** to achieve those standards.” (emphasis added). Note that both (E)(10) and (A)(2) speak to improvement of water quality standards, an issue not addressed at all by the ALJ. R.61-68(A)(2) is in fact of particular relevance here, as it is specific to an impaired water like Church Creek.

Creek.

II. DHEC AND THE ALJ IMPROPERLY FAILED TO CONSIDER IMPORTANT IMPACTS TO THE ANGEL OAK TREE AND ANGEL OAK PARK

A. The Applicable Regulations Broadly Encompass Consideration of the Angel Oak Tree and Angel Oak Park as “Special or Unique Habitats”

DHEC concluded that “the affect of the development on the Angel Oak Tree . . . [is] not within the scope of review for 401 Water Quality Certification for this project.” Staff assessment, p. 7. The agency’s narrow reading of its authority, and indeed mandate, to broadly consider the impacts of this proposed project is in clear error.

DHEC’s water quality regulations are broad and authorize consideration of impacts to the adjacent property and the Angel Oak. The consideration of water quality impacts under R.61-101 goes beyond impacts to the wetlands actually being filled, beyond impacts to connected surface waters, and beyond the artificial property lines withing which the fill occurs. R.61-101(F)(1) broadly provides that the scope of analysis under the water quality certification covers not only water quality standards and protected uses but also “related water quality impacts.” In elaborating on this scope, subsection (F)(3) defines the analysis as including “**all** potential water quality impacts of the project, **both direct and indirect**,” including “physical, chemical, and **biological impacts**” and “**the effect on circulation patterns and water movement.**” (emphasis added). The regulation further defines the scope of DHEC’s consideration to include “the cumulative impacts of the proposed activity.” R.61-101(F)(3).

These broad regulations contain no language to indicate that DHEC’s consideration

would be artificially limited to the boundaries of the AOV property. If this project creates the potential for water quality impacts to the Angel Oak Tree and Angel Oak Park (no party has disputed that this potential does not exist), these regulations plainly and explicitly provide that those impacts must be considered. DHEC erred in artificially limiting the scope of the water quality impacts it considered.

Further, while R.61-101(F)(3) generally provides DHEC with an expansive command to consider the water quality impacts of a project, the regulations also get quite specific. R.61-101(F)(5)(d) specifically provides that “[c]ertification **will be denied** if . . . the proposed activity **adversely impacts special or unique habitats**, such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers.” (emphasis added). While a nationally-renowned, ancient tree of historic, cultural and ecological significance is not one of the specific resources listed in (F)(5)(d)’s non-exclusive list, the Appellants presented ample undisputed evidence that the Tree constitutes a “special or unique” resource under any plausible definition of those words.

The Angel Oak is an important landmark for the Johns Island community, as well as the State of South Carolina. (Day 1, Tr. 59). The Tree has been confirmed by the Eastern Native Tree Society to have the largest span of any live oak in the United States, (Day 2, Tr. 354-55; Pet. Ex. 9), and reliable sources, including one introduced by AOV through its tree expert, Dr. Ham, and available on the Clemson University website, list the tree as being 1,500 years old. (AOV Ex. 32; Day 3, Tr. 127-29).

The Angel Oak also has cultural and historical importance, as it has been a sacred place of visitation for centuries; there was a former slave site on the property; there was a Gullah

community; there was a Freedman's village; and it was a Native American meeting place. (Day 2, Tr. 368-69). AOV's exhibit notes that the Angel Oak's "massive, draping limbs and wide spreading canopy present the aura of an angel." (AOV Ex. 32, Pet. Ex. 1).

As a result of these special attributes, the Angel Oak was designated as the Millenium Tree in 2000 and was the inaugural South Carolina State Heritage Tree in 2004. (Day 2, Tr. 356). As implied by the name, Angel Oak Park was established by the City of Charleston to protect and facilitate visitation of the Tree. DHEC employee Erin Owen testified that she was not aware of any other park in the State that had been established on account of a single tree. (Day 2, Tr. 220). Mr. DeMoura himself enjoys visiting the Angel Oak because it is "a wonderful place to be. It's a wonderful tree." (Day 4, Tr. 41, lines 6-7). DeMoura acknowledged that the Angel Oak absolutely has unique features. (Day 4, Tr. 41). AOV's witness Tim Keane similarly believes that the Angel Oak is a unique resource on Johns Island, and that it is a resource worth protecting. (Day 3, Tr. 335).

The clear consensus among those who know and visit the Angel Oak is that the Tree is a unique resource and a special place. This conclusion is evident in the significant outcry this proposed project has caused. After learning of this proposed project, Ms. Samantha Siegel, founding member of Save the Angel Oak, started a petition aimed at protecting the Angel Oak and its environs. At the time of trial, she has collected 11,200 signatures of people that care about and want to protect the tree. (Day 2, Tr. 359). The fight to protect the Angel Oak has received significant media attention. (Day 2, Tr. 363-64). The Post & Courier, The State, CNN, ABC, NBC and CBS local news stations have covered the proposed development. (Day 2, Tr. 364). One day Ms. Siegel received a call from Diane Sawyer with ABC World News interested

in doing a story about the Angel Oak and the development threatening the tree. (Day 2, Tr. 364).

Seemingly, the only entity that does not acknowledge the Angel Oak's special status is DHEC, whose employee Erin Owen, who had visited the site, testified that it was a special place "to some people" but not in her mind. Day 2, Tr. 219. Ms. Owens did not have any personal opinions about whether the Angel Oak is unique, but indicated that "it's supposedly unique, is what I hear." Day 2, Tr.219-220.

Whether the Angel Oak is a "special or unique" habitat is a question of law. The Appellants/Petitioners presented this factual evidence that the Angel Oak is special and unique under the ordinary terms of those words, and that evidence was not disputed. (See Day 4, Tr. 41; Day 3, Tr. 335). The legal question presented to this Court then is whether a resource that is special and unique under the plain meaning of the words is "special or unique" under R.61-101(F)(5)(d). DHEC's Erin Owen says no, relying on non-exclusive list of examples in R.61-101(F)(5)(d) ("such as National Wild and Scenic Rivers, National Estuarine Research Reserves, or National Ecological Preserves, or designated State Scenic Rivers."). (Day 2, Tr. 251-52). The ALJ adopted Ms. Owen's interpretation of the regulation. (See Order, FF 24). The Appellants submit that DHEC and the ALJ improperly read additional requirements into R.61-101(F)(5)(d), the plain terms of which would clearly encompass consideration of the Angel Oak, given the facts presented in this section.

B. The Breadth of the Regulations Is Further Bolstered by Case Law

While the Appellants maintain that the plain meaning of the regulations discussed above clearly encompass consideration of the Angel Oak Tree, any ambiguity in the scope of DHEC's consideration is eliminated by reference to applicable case law. Of particular relevance is the

recent case of Kiawah Development Partners, II v. SCDHEC et. al, 2011 WL 5840326, *4 (November 11, 2011), with its command that DHEC’s “**permitting decisions are not to be made in a vacuum.**” That case involved DHEC’s consideration of a critical area permit request. By way of background, beaches, tidelands, and coastal waters are considered “critical area,” and the disturbance thereof requires a permit. See S.C. Code of Regulations, R.30-1. Kiawah Development Partners sought a critical area permit to construct a 2,783 foot wall/mat structure in the critical area. Kiawah Development Partners, II, 2011 WL 5840326 at *1.

In evaluating that permit request, the Administrative Law Judge, acting as an arm of DHEC, limited his consideration of the project’s impacts to those in the critical area itself. Id. at *3. The South Carolina Supreme Court strongly rebuked this limitation, citing the breadth of language in DHEC’s critical area regulations, including its command to account for the “long-range, cumulative effects” of a project, which is practically identical to the language of R.61-101(F)(3) discussed above. See, Id. at *3-*4. In an analysis that draws close parallels to the case a hand, the Court noted that: DHEC “is charged with managing the entire coastal zone, and thus permitting decisions are not to be made in a vacuum.” Id. at *4. Just the same, while DHEC’s permitting authority in this case may be limited to wetlands and waters on AOV’s property, DHEC is charged with managing overall water quality -- “all potential water quality impacts of the project, both direct and indirect” – and “the cumulative impacts of the proposed activity.” See, R.61-101(F)(3). Aligning these cases even further, the Supreme Court notes in Kiawah Development that the ALJ’s narrow reading of the scope of DHEC’s authority is in conflict with DHEC’s charge to consider a project’s impacts on any “pristine habitats.” Kiawah Development Partners, II, 2011 WL 5840326 at *1. This critical area provision has a direct

corollary in the water quality regulations' command that DHEC account for impacts to any "special or unique habitats." See, R.61-101(F)(5).

"In construing a statute, the court looks to the language as a whole in light of its **manifest purpose.**" State v. Sweat, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008) (emphasis added). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998); see also Rorrer v. P.J. Club, Inc., 347 S.C. 560, 568, 556 S.E.2d 726, 730 (Ct. App. 2001) ("[The Court] should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the **purpose of the whole statute and the policy of the law**" (emphasis added)). By failing to evaluate and weigh impacts to the Angel Oak Tree and Angel Oak Park, despite R.61-101's clearly stated purpose of assessing and accounting for all water quality impacts of a project, DHEC improperly placed its permitting decision in a vacuum.

C. DHEC did not Consider Impacts to the Angel Oak Tree or Angel Oak Park

As unequivocally evidenced in the Staff Assessment, DHEC made no evaluation and reached no determination regarding impacts to the Angel Oak Tree. The Staff Assessment is a document issued by DHEC for all 401 Certification decisions and represents the embodiment of DHEC's decision making process. (Day 2, Tr. 213). According to Erin Owen, the "staff assessment is to basically summarize what [DHEC] looked at, comments received, water body designation, description of the project, and it also adds conditions to the permit." (Day 2, Tr. 213). The Staff Assessment is a publicly-issued document, and for this proposed project it was

drafted by Ms. Owen. (Day 2, Tr. 214).¹¹ The Staff Assessment plainly states: “The primary concern show in the public comments is the affect of the development on the Angel Oak Tree (AOT). . . . **While the Department understands the public’s concern for the AOT, the concerns expressed are not within the scope of review for the 401 Water Quality Certification for this project.**” (Pet. Ex. 30, p. 7 (emphasis added)).¹²

Despite the fact that DHEC’s official decision document states this unequivocal conclusion, the Respondents have attempted throughout this case to cloud the issue of DHEC’s consideration of the Tree.¹³ Ms. Owen’s testimony regarding impacts to the Angel Oak Tree was inconsistent, at best. During her deposition she testified flatly that she did not consider impacts to the Angel Oak tree:

Question: Did you reach any conclusion about impacts to the Angel Oak Tree?
Ms. Owen: No.

¹¹Ms. Owen was in fact the author of the Staff Assessment, the project manager for this project, and the only DHEC employee to testify in this case. (Day 2, Tr. 211)

¹²Similarly, the Staff Assessment notes that the Department of Natural Resources’ “concern for grand trees is not within the scope of the 401 Water Quality Certification for this project.” Staff Assessment, p. 4. DHEC’s Erin Owen offered her interpretation of this statement as follows:

Question: Does that [statement] again say basically that the Angel Oak is not within the scope of your review?
Ms. Owen: Yes.
(Day 2, Tr. 215).

¹³DHEC does not equivocate, however, on whether it considered impacts to Angel Oak Park:

Question: Did you consider impacts to the Angel Oak Park in your water quality certification review?
Ms. Owen: No
(Day 2, Tr. 216).

(Day 2, Tr. 218) (reading from deposition). During the trial of this case, Ms. Owen's testimony was difficult to resolve. She continued to maintain that impacts to the Angel Oak were outside the scope of DHEC's review; however, she claimed to have considered information submitted by the applicant on those impacts: "it's not within my scope of review as far as my regulations go. However, I did look at it and consider it." (Day 2, Tr. 218). However, while she apparently "considered" information submitted on impacts to the Angel Oak Tree, she did not "analyze" that information. (Tr. Day 2, p. 218).

The confusion created by Ms. Owen inconsistent's and convoluted testimony was resolved to some degree by her admission that, whatever the nature of DHEC's consideration of the Angel Oak Tree, DHEC did not give the Angel Oak any more weight than it did any other offsite tree. (Day 2, Tr. 250). This admission, along with DHEC's consistent position that impacts to the Angel Oak Tree are outside the scope of its consideration, demonstrate that, though DHEC may not have literally closed its eyes to information submitted on the Angel Oak, the Agency clearly misinterpreted the scope of its review under the water quality regulations and did not give the Angel Oak Tree the consideration dictated by those regulations. The ALJ compounded this error by stating that, "[w]ithin the context of her review, [Ms. Owen] **did not consider the potential for hydrological impacts to the Angel Oak Tree nor require protection for the Tree**, but she was cognizant in her review of the information provided by the applicant that protection of the Tree was addressed." (Order, FF 54 (emphasis added)). The Appellants would go a step further, however, and submit that it was only after DHEC realized the potential legal implications of its decision that it attempted to distort the actuality clearly reflected in its publicly-issued decision document and its project manager's deposition testimony:

that the Angel Oak Tree was flatly not considered during this permitting process.

D. The ALJ did not Properly Consider Impacts to the Angel Oak and Angel Oak Park

i. The ALJ Improperly Rejected Application of R.61-101(F)(5)(d)

The ALJ failed to rule on whether impacts to the Angel Oak Tree and Angel Oak Park were within the scope of the 401 Water Quality Certification. The ALJ did however find that the Angel Oak Tree was not a “special or unique habitat,” invoking the protections of R.61-101(F)(5)(d). Specifically, the ALJ found that the “Petitioners presented no evidence upon which to conclude that the Tree has special status for regulatory purposes, aside from being subject to the City of Charleston’s Tree Ordinance.” (Order, p. 19). The ALJ did not cite or otherwise make reference to R.61-101(F)(5)(d) within his Conclusions of Law, while the other applicable provisions in R.61-101(F), including the other subsections of (F)(5), were quoted in-full and ruled upon. See Order, pp. 45-46.

For the reasons explained above, the ALJ’s failure to apply R.61-101(F)(5)(d) was in error. This error is particularly prejudicial in light of the enhanced protections of (F)(5). While R.61-101(F)(3) broadly encompasses consideration of water quality impacts to the Angel Oak Tree (see supra, II.A), that section requires only that the impacts be “addressed and considered” by DHEC. Only subsection (F)(5)(d) provides for the decisive protection that “[c]ertification **will be denied**” if “the proposed activity **adversely impacts** special or unique habitats.” Under (F)(5)(d), any single adverse impact to a special or unique habitat means the certification must be denied. Under (F)(3), adverse impacts can be dismissed based on avoidance, minimization or any number of other considerations. The regulations are clearly designed to give heightened protection to resources like the Angel Oak, but the ALJ ignored that mandate.

Because the ALJ did not find R.61-101(F)(5)(d) applicable, he did not go so far as to determine that the Angel Oak Tree would not suffer any “adverse impact.” In a section adopted word-for-word from the Respondents’ proposed order, the ALJ did find that the buffer around the Angel Oak is “sufficient to protect the Tree,” and that the stormwater design “is protective of the Angel Oak Tree.” (Order, FF 47). The Appellants submit, however, that neither of these factual findings goes so far as making the necessary conclusion under (F)(5)(d) that no adverse impact will occur. Rather, in line with R.61-101(F)(3), the use of “sufficient” and “is protective” indicates the ALJ’s determination that the protections provided the Tree are good enough, weighing any number of other factors. Had the ALJ applied R.61-101(F)(5)(d), it would have necessitated a stricter, more-detailed assessment of whether any adverse impact would result.

What is more, to the extent the ALJ’s order makes any factual findings as to the water quality / hydrological impacts on the Angel Oak Tree, those findings are speculation not supported by evidence in the record.

ii. The ALJ Made an Unsupported Finding of no Hydrological Impacts to the Angel Oak Tree

Because the Appellants have made an issue of the Agency’s failure to consider the Angel Oak Tree, the Respondents strained in their proposed Order, in a section adopted word-for-word by the ALJ, to reach a factual finding that the Angel Oak Tree would not be subject to any water quality/ hydrological impacts. None of the evidence presented at trial provides a basis on which to make such a finding, and it is therefore arbitrary and capricious.

It is certainly true that a great deal of evidence was presented at trial on the Angel Oak Tree. AOV offered the testimony of Dr. Donald Ham, who was qualified and testified as an

expert in forestry with a focus in arboriculture, which is the study of an individual tree. (Day 3, Tr. 39). The Appellants presented Dr. Jean Everett, who was qualified and testified as an expert in forest ecology, which is the study of forest ecosystems. (Day 1, Tr. 182). Dr. Ham and Dr. Everett offered mostly conflicting testimony on the spread of the Angel Oak's roots, the consequences of cutting or compacting those roots, and the impact of removing the forest presently surrounding the Angel Oak. As to these impacts, the ALJ's findings are reviewed under the substantial evidence standard.

However, when it comes to hydrology/water quality (the subject of the 401 Certification at issue in this case), Dr. Ham testified plainly and repeatedly that he had no knowledge of, and offered no opinion as to, the hydrological impacts on the Angel Oak Tree:

Ms. Armstrong: And you're not a hydrologist?
Dr. Ham: No, ma'am.
...
Ms. Armstrong: But you haven't done anything to insure that the hydrology post-development is going to be in a state that the tree will be protected, have you?
Dr. Ham: I've already said that that wasn't my area.
...
Ms. Armstrong: Now, the Angel Oak, you'd agree it's adapted to the existing water regimes that are on the site; is that accurate?
Dr. Ham: I would say that's accurate.
Ms. Armstrong: You personally didn't look at the water regimes?
Dr. Ham: No.
...
Ms. Armstrong: And so when [the other trees are cut down], most likely the water table is going to go up; isn't that right?
Dr. Ham: I'm not a hydrologist.

(Day 3, Tr. 33, 121-123). Dr. Ham in fact admitted that: **“What none of us know is how much the subsurface water would rise [from this project].”** (Day 3, Tr. 124).

Nevertheless, the ALJ's Order places great reliance on a supposed conclusion by Dr. Ham

as to hydrological impacts on the Angel Oak. Specifically, the Order states that “Dr. Ham concluded that if any stormwater created post-development was retained on site, or primarily retained on site, and allowed to infiltrate into groundwater, that it should not negatively influence the health of the Angel Oak.” Order, ¶39. As evidenced by his responses above, Dr. Ham was unequivocal that he had made no assessment of hydrology and had no expertise from which to draw any conclusions. The ALJ (and the Respondents) derived their “conclusion” from a statement made during an exchange wherein counsel for AOV attempted several times to elicit from Dr. Ham the opinion of an alleged expert hydrologist named Dr. Gregory, without that witness being admitted as an expert or subjected to cross-examination, and over Appellants’ repeated objections. That statement should have been excluded from evidence.

iii. The ALJ Committed Reversible Error in Allowing Dr. Ham to State a Conclusion on Hydrology

The exchange between counsel and Ham relating to Dr. Gregory began with the following telling exchange:

Question: And you were -- **since you're not a hydrologist**, were you **relying on Dr. Gregory's opinions** regarding the hydrology around the Angel Oak for the purposes of the tree?

Dr. Ham: I was. I, you know, expressed my concerns just about water relations and tree growth and **let him take it from there.**

(Day 3, Tr. 69 (emphasis added)). Note that right at the outset, Dr. Ham states that he turned over considerations of hydrology entirely to Dr. Gregory and that any conclusions on hydrology necessarily belong to Gregory, who was not a witness in this case.

The entire exchange runs pages 68-73 of the day 3 transcript. First Dr. Ham discusses how he met up with Dr. Gregory onsite and how Dr. Gregory explained his analysis of

hydrology. As Ham was attempting to recite the analysis Dr. Gregory conveyed, the Appellants objected on the basis of hearsay, and the objection was sustained. (Day 3, Tr. 68-69, lines 22-7). Later within the same exchange, counsel notes the potential of this project to have an impact on the water table and asks Dr. Ham his thoughts on those impacts. This question also drew an objection, this time on the grounds that it is outside of Dr. Ham's area of expertise. Counsel withdraws the question. (Day 3, Tr. 71, lines 2-15). Finally, counsel asks Dr. Ham whether he "think[s] that that water table is sufficient to withstand any sort of impacts that construction might have." (Day 3, Tr. 72, lines 13-15). Appellants again object on the grounds that Dr. Ham has not been qualified to testify on hydrology, and the ALJ sustains the objection, noting that: "I certainly sustain that objection. **That's not within his field of expertise unless he had direct knowledge.**" (Day 3, Tr. 73, lines 15-17).

However, between these failed attempts to elicit hydrology conclusions from Dr. Ham, the ALJ, over an objection, inexplicably allowed Dr. Ham to flatly state a conclusion on the hydrological impact to the Angel Oak, without any elaboration or explanation, and in direct contradiction of previous rulings and Ham's own admission that he did not look at hydrology. As noted above, this statement was then cited (practically verbatim) in the ALJ's Order as Dr. Ham's expert conclusion on the hydrology impact to the Angel Oak. The statement should have been excluded as both hearsay and as falling outside Dr. Ham's qualification as an expert.

The objectionable question that drew Dr. Ham's inadmissible statement is as follows: "Due to this involvement with Dr. Gregory, what conclusions did you arrive upon regarding the drainage for the development site in regards to the Angel Oak tree?" This question called for Dr. Ham to either reach his own conclusion on hydrology or to state Dr. Gregory's conclusion on

hydrology. As noted above, the ALJ had otherwise not allowed Dr. Ham to testify as to either of these things. However, after an overruled objection from the Appellants on hearsay and scope of expertise, the following exchange occurred:

Question: What conclusions did you arrive upon regarding the health and welfare of the tree?
Dr. Ham: That if we -- that if the stormwater that would be -- that was created post- development was retained on site, or primarily retained onsite, that it should not negatively influence the health of the Angel Oak.

(Day 3, Tr. 70-71). Dr. Ham did not elaborate on how he reached this conclusion. In actuality, he was not able to, as the Court rejected any of his other efforts to discuss hydrology.

If Ham's statement constituted his recitation of Dr. Gregory's conclusion, the statement is hearsay under S.C. Rule of Evidence 802. The so-called "learned treatise" hearsay exception applies to expert witnesses, but does not apply to a statement coming directly from Dr. Gregory. See Rule 803(18). If Ham's statement is supposed to constitute his own conclusion, Rule 703 is implicated. Under the terms of this Rule, expert opinion testimony can be based on information received from others, even though the information itself is not admissible, if such facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." See, Rule 703. Therefore, for example, with the proper foundation, it would be permissible for Dr. Ham to rely on hearsay statements from Dr. Gregory to form an opinion in his qualified area of expertise. However, Rule 703 certainly does not expand the subject over which an expert is qualified to speak. Rule 703 in no way allows Dr. Ham to use Dr. Gregory's alleged expert conclusion on hydrology to form his own expert conclusion on hydrology when he is not so qualified.

Rule 702 requires an expert to be qualified on the basis of "knowledge, skill, experience,

training, or education.” Nothing in Dr. Ham’s voir dire, qualification by the ALJ, or testimony gives any indication of his qualification to extrapolate the workings of a stormwater system into the hydrological impacts on the Angel Oak, as was done in the “conclusion” he offered to the ALJ. What the Respondents have done is to admit Dr. Gregory’s alleged opinion through Dr. Ham, without voir dire, admission as an expert or any opportunity for the Appellants to cross examine Dr. Gregory on the basis of his opinion. The ALJ’s decision to admit this “conclusion,” and to then rely heavily on the conclusion in his Final Order, is reversible error.

The 401 Certification at issue in this case concerns hydrology/water quality impacts, and the only real evidence that the Angel Oak will not suffer such impacts was a vague, ill-formed, inadmissible statement made by an expert who otherwise was not allowed to offer any analysis or conclusion of hydrology/water quality.

iv. The Evidence Properly Before the Court Clearly Evidenced Hydrological Impacts to Angel Oak

Without Dr. Ham’s inadmissible conclusion, the only evidence before the ALJ indicated a serious potential for detrimental hydrological impacts to the Angel Oak Tree. First of all, while Dr. Ham is not qualified to offer any conclusions on hydrology, he did provide some general opinions. Dr. Ham agreed that it is important to maintain the existing hydrology around the Angel Oak Tree “as much as possible.” (Day 3, Tr. 121). He also agreed that after the property is cleared of trees for development, “less water [will be] taken from the ground and released into the environment.” (Day 3, Tr. 122). This is problematic because, as Dr. Ham noted, if the Angel Oak’s roots are flooded, “the root system will die a little bit and if it lasts long enough, you know, and the entire root system could die, the whole tree could die.” (Day 3, Tr. 123). The

aforementioned Dr. Gregory also concluded that the project has the potential to alter the hydrology around the Angel Oak. (Day 2, Tr. 226).

The change in hydrology surrounding the Angel Oak Tree is Dr. Everett's biggest concern with this project. (Day 1, Tr. 209). She testified that under current conditions, the forest cover on the AOV property is relatively uniform, thus rainwater falling on the site hits the canopy and trickles through, being absorbed by the intact forest floor and then infiltrated into the soil. (Day 1, Tr. 210-11). The trees then suck up a significant amount of this water. (Day 1, Tr. 211). Dr. Everett testified that trees "are extremely efficient at transpiration," which means that they move a lot of water from the soil into the atmosphere by evaporating water through their large leaf surface area. (Day 1, Tr. 211). Transpiration generally takes in approximately 40% of rainfall. (Day 2, Tr. 105-106). In other words, 40% of the rainfall on the AOV site is currently is tied up in the trees themselves; 30-40% of the rainfall goes to recharge the groundwater; and 10-20% will run off the land. (Day 2, Tr. 105-106).

Dr. Everett testified that the abrupt change on the AOV property from completely forested to mostly impervious ground cover will have a dramatic impact. (Day 1, Tr. 210). Particularly, if you cut the majority of the trees on a forested site, you eliminate transpiration, and less than 10% of rain ends up evaporating. (Day 2, Tr. 106; Day 3, Tr. 122, Dr. Ham). Dr. Ham agreed that as a result of this phenomenon, the groundwater table would rise, and that if the groundwater table rises, the root system of the Angel Oak could become flooded and it would not be able to get sufficient oxygen (Day 3, Tr. 123).

Dr. Everett testified that the Angel Oak's root system is integrated across the currently forested AOV site, and this project will be a significant change to the system. (Day 1, Tr. 213).

Dr. Everett believes that the Angel Oak may not be able to survive such an abrupt change, and that the change could be negative in terms of the health of the Angel Oak. (Day 1, Tr. 213 & 219).

In sum, the Appellants introduced uncontradicted evidence that, as a result of the proposed development, the distribution and pattern of water on and under the Angel Oak Village property and the adjacent Angel Oak Park property will be changed dramatically, with unpredictable effects on the hydrological regime experienced by the Angel Oak, and that this change in hydrology will impact the Angel Oak. Such hydrological impacts are within the scope of R.61-101(F), and it was error for DHEC to declare these impacts beyond the scope of consideration. The ALJ compounded that error by citing an unfounded and inadmissible hydrology conclusion by Dr. Ham, by extrapolating from that “conclusion,” and by ignoring the uncontradicted opinions of Dr. Everett related to the hydrological changes. The mandate from R.61-101(F) that water quality impacts to the Angel Oak be addressed and considered and that the certification be denied if those impacts are in fact present has not been carried out. This case should be remanded for the ALC to make findings based on this properly admitted evidence of hydrological impacts, or to rehear the issue of hydrological impacts to the Angel Oak.

III. THE ALJ AND DHEC APPLIED AN INCONSISTENT AND INSUFFICIENT ANALYSIS OF FEASIBLE ALTERNATIVES

Several provisions in R.61-101 require the consideration of any “feasible alternatives.” See, R.61-101(F)(3) and (F)(5). Particularly, these provisions ask whether there are any feasible alternatives to the proposed project with fewer impacts to water quality. Id. Both DHEC and the

ALJ foreclosed the availability of feasible alternatives based on a consideration that was entirely inconsistent with the remainder of their analysis – namely, the location of the Angel Oak Tree.

As to feasible alternatives, the ALJ states that AOV's "development is located in the vicinity of the wetlands by necessity." (Order, p. 11). Elaborating, the ALJ provides that "protection of the Angel Oak . . . pushed development into northern portions of the AOV [] property where the wetland area was located." Id. The ALJ is adopting the position of DHEC, which notes that "by identifying and trying to minimize impacts to the park and to the Angel Oak tree, it does push their development more towards the wetlands on the site." (Order, p. 11). Inexplicably, at the same time that both the ALJ and DHEC are saying that protection of the Tree necessitates wetland fill, neither is willing to say that the Angel Oak Tree is a relevant consideration in the Water Quality Certification. The ALJ notes that "DHEC did not seek specific protection of the Tree," Order, p. 19; the ALJ is somehow able to resolve this finding with DHEC's position that protection of the Tree necessitates wetland fill.

By taking this convoluted position, both DHEC and the ALC attempt to have it both ways: consideration of the Angel Oak Tree is not within the scope of Water Quality Certification, so water quality and hydrologic impacts to the Tree need not be fully analyzed; but wetland impacts cannot be reduced based on consideration of the Angel Oak Tree. Within the context of the Water Quality Certification, if protection of the Angel Oak Tree justifies the elimination of feasible alternatives and the fill of wetlands, then impacts to the Angel Oak Tree are squarely within the scope of that Water Quality Certification. On the other hand, if water quality impacts to the Angel Oak Tree are not within the scope of the Water Quality Certification, protection of the Angel Oak Tree is not a valid basis for eliminating feasible alternatives. To summarize this

confusing contradiction, in a certification review focused on water quality, OCRM has authorized the elimination of 2.23 acres of wetlands in their feasibility analysis in order to protect the Tree, which they have said is not considered as part of their review.

The ALJ and DHEC blame wetland impacts on the Tree, while ignoring evidence of feasible alternatives from both sides. For instance, AOV's witness Tim Keane testified that "you could design the road through the site in a lot of different ways," thereby avoiding wetland impacts, while still meeting City of Charleston requirements for connectivity through the site. (Day 3, Tr. 315). Mr. Kean further testified that the project could have fewer exits and roads, particularly those that propose to cross wetlands, and still comply with City requirements. (Day 3, Tr. 317). Further, Phase II of the project has been presented as "conceptual" throughout these proceedings, yet neither DHEC nor the ALJ has addressed why it is infeasible to shift portions of Phase I out of the wetlands and into the empty space "conceptually" set aside for Phase II. (See Day 4, Tr. 45).

DHEC and the ALJ rest their feasibility analysis primarily on an entirely inconsistent and convoluted justification. This case should be remanded for the ALJ to remedy the inconsistency inherent in both its and DHEC's analysis, and to conduct a feasibility analysis consistent with the other findings in this case.

IV. THE ALJ IMPROPERLY DISMISSED APPELLANT'S CLAIMS UNDER THE COASTAL ZONE MANAGEMENT ACT, PREJUDICING THE APPELLANTS

The Appellants filed this contested case to challenge DHEC's June 6, 2011 issuance of: (1) water quality certification pursuant to Section 401 of the Clean Water Act and (2) coastal

zone consistency certification pursuant to South Carolina Coastal Zone Management Plan. While the ALJ acknowledged that “a permit application submitted to the Corps of Engineers triggers a requirement for a coastal zone consistency certification undertaken by DHEC-OCRM,” the ALJ concluded that OCRM need not (and did not) issue CZC Certification in this instance because the agency had previously issued Certification when reviewing the stormwater permit for this project.¹⁴ The ALJ therefore dismissed all of the Appellants’ claims under the Coastal Zone Management Act.

The ALJ is correct that AOV previously applied for a stormwater permit for this project, triggering OCRM’s CZC Certification review, and that CZC Certification was issued along with the stormwater permit on March 23, 2010. Order, p. 6. However, the S.C. Coastal Zone Management Act clearly provides that both of these permits should be certified as consistent with our State’s Coastal Management Program (“CMP”).

The Coastal Zone Management Act, which created CZC Certification review, provides that DHEC shall: “Develop a system whereby the department shall have the authority to **review all state and federal permit applications in the coastal zone, and to certify** that these do not contravene the management plan.” S.C. Code §48-39-80(B)(11). DHEC’s own website provides that “DHEC-OCRM **is required** by the South Carolina Coastal Zone Management Act to review **all state and federal permit applications** for activities within the eight county coastal zone **for**

¹⁴Before filling wetlands that fall under jurisdiction of the CWA, an applicant must obtain a Section 404 permit from the Corps of Engineers and the Section 401 Water Quality Certification from DHEC that has been discussed throughout this brief. The Section 404 permit application actually triggers the requirement for Section 401 Certification. For simplicity, the Section 404 component is not discussed in this brief, as the same action triggers both Section 401 and Section 404, and as Section 404 is not at issue in this appeal.

consistency with the State's Coastal Zone Management Plan.”¹⁵ <<http://www.scdhec.gov/environment/ocrm/czc.htm>> (emphasis added). Both these statements are unambiguous in that all permit applications must be certified. The South Carolina Supreme Court has upheld the validity and applicability of the Coastal Management Program to state and federal permits. Spectre v. DHEC, 386 S.C. 357, 688 S.E.2d 844 (2010). DHEC-OCRM’s command is unequivocally not to certify the **project** one time and to then forego all future review, but rather to certify each federal and state **permit application** in the coastal zone for compliance.¹⁶ The fact that OCRM had previously issued CZC Certification during consideration of a stormwater permit in no way forecloses or replaces CZC Certification review during consideration of this Section 401 Water Quality Certification.

The ALJ’s dismissal is even more indefensible in light of the fact that the project, and the circumstances surrounding the project, changed between issuance of the stormwater permit and issuance of the Section 401 Certification at issue in this case. Perhaps most notably, the documents on which CZC Certification of the stormwater permit were based showed the wetlands on the property as “isolated”/non-jurisdictional. AOV’s stormwater application indicated (accurately at the time) that all wetlands on the property were considered “isolated,”

¹⁵This fact is appropriate for the Court of Appeals to consider under judicial notice, as DHEC’s own website is a readily available source of indisputable reliability. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002).

¹⁶In further support of this conclusion, DHEC’s water quality regulations provide as follows: “For Federal permits that require both a water quality certification and a coastal zone consistency certification, **the coastal zone consistency certification determination shall be issued as a component of, and concurrently with, the water quality certification.**” R.61-101.A.7. Note that CZC Certification is consistently discussed in terms of the permit, not the project.

meaning that they are not connected to another water body and do not fall under the Clean Water Act. (Day 1, Tr. 208; Pet. Ex. 29). However, on March 15, 2010, the U.S. Army Corps of Engineers issued a reassessment of the wetlands on the site. (Pet. Ex. 29). The Corps determined not only that the wetlands are jurisdictional and not isolated, but also that the wetlands are directly connected to Church Creek, designated by the State as shellfish harvesting waters, but presently impaired and closed to shellfish harvesting because of fecal coliform bacteria and dissolved oxygen levels. (Day 1, Tr. 80-82, 92; Day 2, Tr. 50-51).

In other words, since CZC Certification of the stormwater permit, DHEC-OCRM has learned that any impacts to the wetlands on AOV's property have the potential to cause downstream impacts in an important coastal waterway that is already suffering impairment from development. Certainly, one would expect this to be an important consideration for OCRM in determining whether the Water Quality Certification is consistent with our State's CMP. Instead, the ALJ ruled that OCRM did not have to certify the Section 401 Water Quality Certification and that OCRM did not in fact do so.

The size and layout of the project also changed between issuance of the stormwater permit and issuance of the Section 401 Certification. While true that these changes resulted in a net reduction in wetland fill, the footprint of development and the area of wetland impact shifted relatively significantly. See Order, p. 8. Relatedly, OCRM's CZC Certification of the stormwater permit covered 3.42 acres of wetland impacts, which was the amount of fill proposed for the project at the time. In issuing its CZC Certification, OCRM concluded there were no feasible alternatives to filling 3.42 acres. (Order, FF 23). When the project came back before OCRM during Section 401 Certification, the wetland fill had been reduced to 2.23 acres, and

OCRM's finding of no feasible alternatives had been demonstrated to be incorrect. Nevertheless, the ALJ found that the net reduction in wetland fill, considered in isolation, meant that these changes did not need to be considered for consistency with the Coastal Zone Management Plan.

See Order, p. 41

On the contrary, the documents issued by DHEC-OCRM prior to the commencement of this litigation indicate on their face that the agency did in fact conduct a CZC Certification review for the Section 401 Certification. DHEC and the Army Corps issued a Joint Public Notice on June 29, 2010, which states that “[p]ursuant to Sections 401 and 404 of the Clean Water Act (33 U.S.C. 1344), **and the South Carolina Coastal Zone Management Act (48-39-10 et.seq.)** an application has been submitted.” (DHEC Ex. 4) (emphasis added). DHEC then issued a Notice of Proposed Decision (“NOPD”) on the application June 6, 2011. The NOPD states that “The Department, acting on an application for Water Quality Certification pursuant to Section 401 **and** for certification of consistency with the SC Coastal Zone Management Plan in accordance with R.48-39-10 has reached a proposed decision for the [AOV] project.” (emphasis added). The NOPD gives equal treatment to the Water Quality Certification and the Coastal Zone Consistency Certification:

After reviewing the project plans, staff of the Ocean and Coastal Resource Management **determined that the proposed work is consistent** with the Coastal Management Program. After reviewing the project plans, staff of the Division of Water Quality **determined that there is reasonable assurance** that the proposed project will be conducted in a manner consistent with the certification requirements of Section 401.”

NOPD, p. 1. Note that the phrasing for the Coastal Zone Consistency Certification and the Section 401 Certification are exactly the same. Both are being issued in the June 6 Notice.

Respondent AOV moved to dismiss Appellants' CZC Certification claims early on in this

case, on the grounds that DHEC did not issue a second CZC Certification on June 6.¹⁷ Following Respondent AOV's motion to dismiss, employees of DHEC testified that a second CZC Certification was not issued. The consistency and expediency of this testimony aside, the testimony nevertheless fails to reach the true heart of the issue here, which is whether DHEC was legally required to conduct CZC Certification of the Section 401 Certification. The same failure befalls the vague intra-agency letter relied on by the ALJ in granting dismissal. In that letter, dated August 9, 2010, OCRM employee David Thompson writes that OCRM "has previously reviewed the [project] and found it consistent with the S.C. Coastal Zone Management Program." Thompson instructs the Bureau of Water to "[p]lease incorporate this finding into the Notice of Proposed Decision [for the project]." (AOV's Motion to Dismiss, Ex. A). Even if this letter constitutes Thompson's conclusion that a second CZC Certification was not necessary (with its direction to "incorporate this finding," the Appellants submit that it should not be so read), the letter represents nothing more than an OCRM employee's misreading of the agency's statutory charge to "review all state and federal permit applications" for consistency. This letter, along with any other internal DHEC correspondence, has no legal significance and does not supersede the plain language of the statute discussed above.

Finally, the only law relied on by the ALJ in dismissing the CZC Certification claims is section V.C. of the CMP. That provision provides as follows: "In those instances where more than one permit is required for a project, as long as **no components of the project change**, [DHEC] will **only place the first permit received on public notice**. [DHEC] will take **identical**

¹⁷The ALJ deferred decision on that motion until his Final Order, where he granted dismissal.

action on all sequential permits.” (emphasis added). The ALJ underlined this entire provision in his final Order, as if it contained some great imperative for dismissal. See, Order, p. 41-42. In actuality, the ALJ’s reliance on this provision is clearly misguided. First of all, as indicated above, components of this project undisputedly changed after the first CZC Certification. The change in designation of the wetlands was particularly significant. Secondly, again indicated above, DHEC placed the CZC Certification on public notice with the Section 401 Certification, and therefore did not even follow this provision. Finally, the provision provides that “identical action,” will be taken, not that no action will be taken. The very words of the provision itself cut against the ALJ’s reliance.

DHEC publicly represented that it was conducting CZC Certification review of the Section 401 Certification, the law dictates that DHEC must conduct such review, and the only thing indicating that DHEC should not conduct such review is the subsequent testimony of DHEC employees during this litigation. The ALJ’s decision to dismiss all of the Appellants’ claims under the Coastal Zone Management Act is clearly in error.

Dismissal of the Coastal Zone Management Act Claims is Prejudicial

The propriety of the ALJ’s dismissal is more than an academic dispute, as the requirements for CZC Certification expand and strengthen the terms of R.61-101's environmental protections.

As mentioned above, CZC certifications are issued pursuant to the provisions of the Coastal Zone Management Program. Applicable to this project, the CMP requires that:

“**Commercial proposals** which require fill or other permanent alteration of salt, brackish or freshwater wetlands **will be denied unless** no feasible alternatives exist and the **facility is water-**

dependent.” CMP III-40, at (1)(b). Further, the CMP requires that: **“The filling** or other permanent alteration of productive salt, brackish, or freshwater wetlands **will be prohibited for purposes of parking** unless no feasible alternative exist, **the facility is directly associated with a water-dependent activity**, any substantial environmental impacts can be minimized, **and an overriding public interest can be demonstrated.”**¹⁸ CMP III 27, at (1)(a). Parking accounts for 1.01 acres of the proposed fill for this project. Order, p. 11.

While these CMP provisions share feasibility language with R.61-101, the provisions go well beyond the balancing of a feasibility analysis. Under the express terms of these CMP policies, the proposed wetland fill for this project, which would undisputedly be performed in part for commercial buildings and parking, should be flatly rejected, as none of the facilities in this development are water-dependent. The water quality regulations of R.61-101 do not provide any comparable protections.¹⁹

The CMP provisions also emphasize DHEC’s imperative to consider impacts to the Angel Oak and expand the scope of impacts that are proper for consideration. The CMP policies

¹⁸The Appellants submit that the purported “public benefit” of a donation of money to the nonprofit Sea Island Comprehensive Healthcare Corporation (FF 22), entirely unrelated to the purpose of this proposed project, does not rise to the level of the “overriding public interest” envisioned by the CMP.

Further, the ALJ erred in equating in equating a “public need” for this project with an “overriding public interest,” as required under the CMP. See Order, FF 95. These are two different standards, the latter being much more stringent. The ALJ’s finding that there is a public need for the minimal amount of affordable housing included in this project says nothing of an “overriding public interest.”

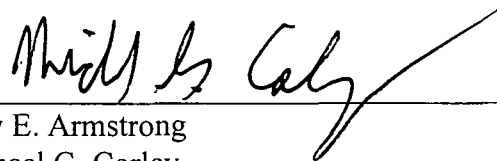
¹⁹R.61-101(F)(3)(a) does direct the agency to “address and consider” whether the project calling for wetland fill is “water dependent.” However, the Final Order failed to address this provision. The ALJ made no finding on whether this development is water dependent, and gave no weight to the fact that it is obviously not, much less the weight called for under the CZMP.

for evaluation of all projects call for DHEC to consider the “extent and significance” of a project’s impact on “unique natural areas” and “historic archeological resources.” CMP III-14 at (I)(9). The CMP further calls for consideration of a project’s impact on public recreational lands, Id., and mentions the protection of coastal zone natural resources for succeeding generations, CMP III-14 at (I)(1). Certainly the ancient Angel Oak Tree, which sits in a park drawing thousands of visitors a year, qualifies under these provisions. The considerations encompassed within these provisions go well beyond the mostly water quality concerns of R.61-101.

The ALJ’s dismissal improperly foreclosed consideration of any of these CMP policies and provisions.

CONCLUSION

WHEREFORE, the Appellants seek an Order 1) reversing the Final Order and Decision of the Administrative Law Court affirming DHEC’s Section 401 Water Quality Certification; 2) reversing the ALC’s dismissal of the Coastal Zone Consistency Certification challenge; and 3) remanding the case back to the ALC to make conclusions on compliance with the specific provisions of Regulation 61-101.F.(5) and 61-68.E.(10).



Amy E. Armstrong
Michael G. Corley
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 Appellants

Georgetown, South Carolina

January 28, 2013