

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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Case No. 09-ALJ-07-0226-CC

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**RECEIVED**  
FEB 22 2013  
S.C. Supreme Court

Upstate Forever, South Carolina Native Plant Society, and  
South Carolina Wildlife Federation,.....Petitioners,

v.

South Carolina Department of Health and Environmental Control and  
Greenville Water System,..... Respondents.

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**MOTION TO DISMISS OR STRIKE AMICUS CURIAE BRIEF OF  
TROUT UNLIMITED, THROUGH ITS MOUNTAIN BRIDGE CHAPTER**

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Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules (“SCACR” or “Appellate Court Rules”), Respondents South Carolina Department of Health and Environmental Control (“DHEC”) and Greenville Water, (collectively hereinafter referred to as “Respondents”) hereby move this Court for an order dismissing or striking the amicus curiae brief filed by Trout Unlimited, through its Mountain Bridge Chapter (“Brief”). This motion should be granted for two reasons. First, the Brief fails to comply with Rule 213 of the Appellate Court Rules and presents as attachments to the Brief matters and documents that are not a part of the record on appeal. Second, the Brief improperly interjects issues and arguments that are outside the scope of the limited issues before the Court in this appeal, *i.e.*, whether the Court of Appeals erred in dismissing the

appeal as moot. Therefore, the Court should dismiss or strike the Brief and require Trout Unlimited to limit any amicus brief to the issues presented in the Appeal. In the alternative, and at a minimum, this Court should strike the attachments to the Brief and disregard the arguments made by Trout Unlimited which do not inform the single issue presented by the Petition for Writ of Certiorari.

Respondents believe a brief procedural recitation of the case can better frame what is pending before the Court and explain why the arguments made by Trout Unlimited in the Brief are inappropriate at this stage of the appeal. The merits of this appeal, to the extent they still exist, relate to the certification and permit issued Greenville Water by DHEC and the United States Army Corps of Engineers, respectively, to replace one of two aging raw water transmission main intake pipes attached to the reservoir created by the Table Rock Dam in Greenville County (“Reservoir”). The Reservoir and watershed provide water to Greenville, Pickens, Laurens, and Anderson County residents through two intake pipes constructed in the 1930’s. In order to ensure the continued provision of safe, clean drinking water to the serviced communities, Greenville Water proposed replacing one of the pipes with a new, larger (in diameter) pipe that would replace the current use of both pipes, while leaving one of the older pipes in place for redundancy in case of incident or failure.

The pipe replacement project temporarily impacted, during construction, 0.332 acres of federally jurisdictional wetland and 0.2451 acres of open water, which required a Section 404 “Dredge and Fill” Permit from the Corps of Engineers. *See* 33 U.S.C.A. § 1344. Thus, under South Carolina Regulation 61-101.A.2, the project was also required to receive a Water Quality Certification from DHEC assuring that the pipe replacement

project complied with Section 401 of the federal Clean Water Act, 33 U.S.C.A. § 1341. *See* 25A S.C. Code Ann. Regs. 61-101.A.2 (“Any applicant for a federal license or permit to conduct any activity which during construction or operation may result in any discharge to navigable waters is required by federal law to first obtain a certification from the Department.”) (“401 Certification”). Greenville Water applied for and was issued by DHEC and the Corps the requisite 401 Certification and 404 “dredge and fill” permit.

Thereafter, the Petitioners in this appeal, Upstate Forever, South Carolina Native Plant Society, and South Carolina Wildlife Federation, filed a request for a contested case hearing at the Administrative Law Court (“ALC”). Greenville Water moved to lift the automatic stay, which was granted by the ALC for good cause, allowing construction of the pipe replacement project to continue. While initially raising multiple legal and factual issues in its appeal to the ALC, Petitioners voluntarily limited their contested case challenge to the single legal issue of whether DHEC has the authority to impose minimum instream flows to the South Saluda River from the Reservoir as a condition of issuing its 401 Certification for the intake pipe replacement, and dismissed the remainder of their legal claims. (**App.p.419**), Armstrong Ltr. to Judge McLeod. Subsequently, Respondents filed a joint motion for summary judgment with the ALC. Petitioners responded, agreeing that there were no factual issues in dispute and filing their own cross-motion for summary judgment. Following a hearing, the ALC granted Respondents’ motion. No motion for reconsideration was filed by Petitioners.

Petitioners filed a notice of appeal with the Court of Appeals, and the appeal was fully briefed. During the pendency of the contested case before the ALC, and the appeal before the Court of Appeals, the construction of the replacement intake pipe was

completed by Greenville Water. On February 1, 2012, DHEC issued its Final Approval to Place Into Operation (“Final Approval”), signifying that the construction project was complete and the water system permitted under the permit was operational. At this point the construction discharged ended. Petitioners did not request a final review conference of the DHEC Board for the Final Approval; therefore, it is considered final and unchallenged. Respondents filed a joint motion to dismiss the pending appeal at the Court of Appeals on the grounds of mootness. The Court agreed and dismissed the appeal without reaching the single, hypothetical issue raised by Petitioners. Consequently, the only issue currently pending before this Court in Petitioners’ petition for writ of certiorari (“Petition”) is whether the Court of Appeals erred in dismissing the appeal as moot. *See* Petition at 6 n.2 (Petitioners concede that the merits of the appeal were not addressed by the Court of Appeals and the issue of whether DHEC has the authority and is required to impose a flow regime on the pipe replacement project “is not an issue squarely before the Court.”). Because Trout Unlimited have chosen to file the Brief in support of the Petition, they, too, are limited to the single question of error assigned to the Court of Appeals.

### **ARGUMENT**

The posture of the appeal before this Court makes the consideration of the vast majority of the Brief inappropriate under the Appellate Court Rules.<sup>1</sup> Ordinarily the issues on appeal would be framed by this Court once it has made a determination of

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<sup>1</sup> Additionally, this Court has held that exhibits to briefs filed with the Court are not permitted under the Appellate Court Rules where they attempt to put matters before the Court that were not considered by the lower court or tribunal in making its decision. *See, e.g.,* Exhibit A, *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’tl. Control*, Case Tracking No. 2009-113526, Order dated April 19, 2010 (striking exhibits to a brief which were not before the lower court) (*citing Sanders v. Allis Chalmers Mfg. Co.*, 235 S.C. 259, 111 S.E.2d 201 (1959)).

whether it will grant the petition for writ of certiorari. Under Rule 213, SCACR, an amicus brief could then be appropriately filed,<sup>2</sup> but would be limited to the issues on appeal as decided by the Court's order granting the petition. *See* Rule 213, SCACR ("The brief shall be limited to argument of the issues on appeal as presented by the parties..."); *see also* Exhibit B (*Savannah Riverkeeper v. S.C. Dep't of Health and Entvl. Control*, Case Tracking No. 2012-209027, Order dated May 30, 2012 (dismissing amicus brief); Motion to Dismiss/Strike Amicus Brief dated May 25, 2012; Return to Motion to Dismiss/Strike Amicus Brief dated May 30, 2012; Reply in Support of Motion to Dismiss/Strike Amicus Brief dated May 30, 2012). The Brief fails to adhere to the standard set forth in Rule 213, SCACR. The Brief is even more inappropriate in its current posture because the Court of Appeals did not even reach the merits of Petitioners' appeal below, instead dismissing the appeal on justiciability grounds. Thus "the merits", such as they are,<sup>3</sup> are not even before the Court.

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<sup>2</sup> It is questionable whether an amicus brief on the issue of whether a petition for writ of certiorari should be granted is ever appropriate given that an amicus brief under Rule 213, SCACR, must be limited to the issues on which this Court grants a petition and is, by definition, premature. *See* 6 S.C. Juris. Brief of Amicus Curiae § 5 (1992) ("Rule 21[3] sets forth no guidelines as to the appropriate point in the appeal at which a party may seek permission to appear as an amicus curiae. However, the amicus is limited to arguing those issues that have been presented by the parties on appeal. It seems likely, therefore, that **an amicus could not petition the appellate court until after the parties had filed their initial briefs outlining the issues to be argued on appeal.**") (emphasis added). The U.S. Supreme Court has provided a mechanism under its rules with express requirements for parties to submit an amicus curiae brief prior to the Court issuing a writ of certiorari. *See* U.S. Sup. Ct. R. 37 (specifically providing that an amicus curiae brief may be submitted on the question of a petition for a writ of certiorari).

<sup>3</sup> As indicated above, Petitioners voluntarily dismissed the merits of the contested case before the ALC, as found by the ALC in its Order. *See* (App.p.4), ALC Order at 4 ("Because Petitioners limited their appeal to one legal question regarding DHEC's authority to impose minimum flow requirements as a condition of the Certification, all factual claims that the parties may have previously been in disagreement over are no longer in question. All that remains is quite literally, a questions of law; does DHEC

Notwithstanding, Trout Unlimited improperly interject issues which were abandoned by Petitioners below, present a doomsday scenario to the Court that is not representative of the facts of this case (which were not disputed below), and spends close to half of the Brief relaying a public service announcement on behalf of trout fishing and surrounding Upstate watershed which do not address or inform the Court in the least about the legal of whether the Court of Appeals erred in finding no justiciable controversy exists for this action. The Brief also attaches documents which are not a part of the record and which were not before the ALC below. *See* Attachments B and C. Trout Unlimited attach an unpublished case upon which they rely, *see* Attachment A; however, the Brief also attaches a document entitled “Watershed Insights Report No. 2” and a 1984 Resolution of the South Carolina Wildlife and Marine Resources Commission, both of which were matters that were not considered by the ALC, do not inform this Court’s judgment as to whether the appeal is moot and therefore should be stricken. This Court should not permit a non-party to interject new issues into litigation prior even to this Court granting certiorari and setting forth the issues to be considered. *See, e.g.,* Jean Hoefer Toal, et al., Appellate Practice in South Carolina 218 (2d ed. 2002) (holding that an amicus curiae may not raise arguments in its brief that were not made to the lower court) (citing *McQueen v. S.C. Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), *vacated on other grounds*, 533 U.S. 943 (2001)); *see also* 4 Am. Jur. 2d Amicus Curiae § 7 (stating that amicus curiae must accept the case before the reviewing court as it stands on appeal and as the issues have been framed by the parties, and amici generally have the authority to impose minimum instream flow requirements as a condition of the Certification at issue?”). Trout Unlimited are simply trying to aid Petitioners’ efforts in recreating its case on appeal by resurrecting arguments that Petitioners willfully abandoned below.

cannot raise issues that have not been preserved by the parties); 3B C.J.S. Amicus Curiae § 17 (“Because an amicus brief cannot be used as a vehicle to present additional or new evidence to the appellate court, reviewable issues must be presented in the parties’ briefs, not an amicus brief.”). Accordingly, the Court should dismiss or strike the amicus brief and require Trout Unlimited to limit any amicus brief to the issues presented in the appeal.

### CONCLUSION

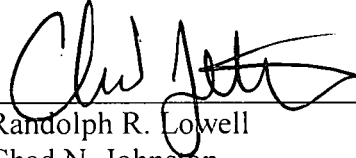
Based on the foregoing, Respondents respectfully request the Court to strike, *in toto*, Amicus Curiae Brief for failure to adhere to Rule 213, SCACR, and for attempting to interject issues which are not before the Court.<sup>4</sup> In the alternative, and at a minimum, Respondents respectfully request the Court strike the Attachments B and C to the Brief, which are not a part of the Appendix, and to disregard the portions of the Brief which do not relate to the single issue pending before the Court, *i.e.*, whether the Court of Appeals erred in dismissing the appeal as moot.

[SIGNATURE PAGE FOLLOWS]

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<sup>4</sup> Should the Court grant the petition for the writ of certiorari, Trout Unlimited could still file a motion for leave to file an amicus brief on the issue accepted by the Court for consideration.

Respectfully submitted,



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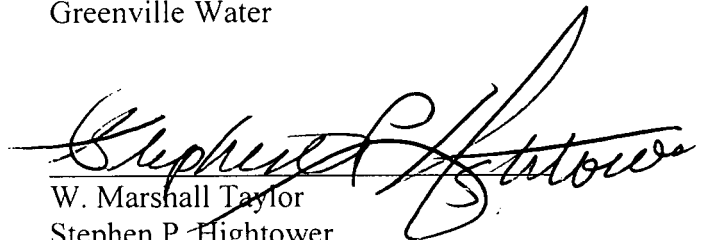
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February 22, 2013

# **EXHIBIT A**

# The Supreme Court of South Carolina

South Carolina Coastal  
Conservation League,

Respondent/Petitioner,

v.

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

Respondents,

of whom South Carolina  
Department of Health and  
Environmental Control is

Petitioner/Respondent.

and

South Carolina Coastal  
Conservation League,

Respondent/Petitioner,

v.

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

Respondents,

of whom South Carolina  
Department of Health and  
Environmental Control, is

Petitioner/Respondent.

The Honorable John D. Geathers  
Trial Court Case No. 2007-AL-07-00107  
2007-AL-07-00108

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ORDER

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In response to the amici curiae brief of South Carolina Wildlife Federation, Upstate Forever, Deerfield Plantation Phase II-B Property Owners Association, Engaging and Guarding Laurens County's Environment, Save Our Saluda, and National Wildlife Federation, Respondent South Carolina Ports Authority has filed a brief which contains various exhibits. All of these exhibits are dated after the Administrative Law Court (ALC) issued its orders in this matter.

Since nothing in the South Carolina Appellate Court Rules allows for the inclusion of exhibits in a brief and this Court cannot consider evidence that was not considered by the lower court or tribunal in making its decision,<sup>1</sup> the brief is hereby stricken. Respondent South Carolina Ports Authority may

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<sup>1</sup> Sanders v. Allis Chalmers Mfg. Co., 235 S.C. 259, 111 S.E.2d 201 (1959) (affidavit included in brief could not be considered because it was not before the trial judge).

serve and file an amended brief which does not contain any exhibits within ten (10) days of the date of this order.

IT IS SO ORDERED.



A.C.J

FOR THE COURT

Toal, C.J., and Hearn, J., not participating.

Columbia, South Carolina

April 19, 2010

cc: Carlisle Roberts, Jr, Esquire  
Davis Arjuna Whitfield-Cargile, Esquire  
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# **EXHIBIT B**

Rec'd 5/31/12  
39005/01501

# The Supreme Court of South Carolina

Savannah Riverkeeper, South Carolina Coastal  
Conservation League, South Carolina Wildlife  
Federation, Conservation Voters of South Carolina, and  
the Savannah River Maritime Commission, Petitioners,

v.

The South Carolina Department of Health and  
Environmental Control, Respondent.

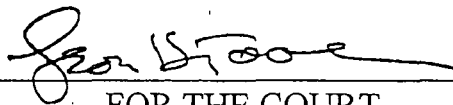
Appellate Case No. 2012-209027

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## ORDER

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The Motion to Dismiss/Strike the Amicus Curiae Brief of the South Carolina  
Public Interest Foundation and Edward D. Sloan, Jr., is granted.



C.J.

FOR THE COURT

Columbia, South Carolina

May 30, 2012

cc: Frank S. Holleman, III  
Christopher Kaltman DeScherer  
Sally Corbette Newman  
James Blanding Holman, IV  
Allen Mattison Bogan  
John Harleston  
Jacquelyn Sue Dickman  
Charles Mitchell Brown

Alan McCrory Wilson  
John W. McIntosh  
Robert D. Cook  
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James G. Carpenter  
Jennifer J. Miller  
Lewis Warren Clayton, III

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MAY 25 2012

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

In the Original Jurisdiction of the Supreme Court **S.C. Supreme Court**

Savannah Riverkeeper, South Carolina Coastal  
Conservation League, South Carolina Wildlife  
Federation, Conservation Voters of South Carolina, and  
the Savannah River Maritime Commission, ..... Petitioners,

v.

The South Carolina Department of Health and  
Environmental Control, ..... Respondent.

**Motion to Dismiss/Strike the Amicus Brief of the South Carolina Public Interest  
Foundation and Edward D. Sloan, Jr.**

Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules,  
Petitioner Savannah River Maritime Commission ("the Commission") hereby moves  
this Court for an order dismissing or striking the amicus brief filed by the South  
Carolina Public Interest Foundation and Edward D. Sloan, Jr. ("Amici"). This motion  
should be granted for two primary reasons. First, the amicus brief improperly  
interjects arguments that are outside of the scope of the issues upon which this Court  
agreed to accept this matter in its original jurisdiction. Second, the amicus brief fails to  
comply with Rule 213 of the South Carolina Appellate Court Rules. Therefore, this  
Court should dismiss or strike the amicus brief and require Amici to limit any amicus  
brief to the issues presented by the parties.

This Court granted original jurisdiction to analyze the issues raised in the  
Complaint. The issues presented to the Court were limited to whether DHEC exceeded

its authority and usurped the authority of the Commission by (1) negotiating and agreeing with Georgia state officials regarding the Savannah Harbor Expansion Project ("SHEP"), (2) issuing a Section 401 water quality certification under the Clean Water Act, a construction in navigable waters permit, and a coastal zone consistency determination on behalf of South Carolina for SHEP, and (3) encroaching on the Commission's authority by authorizing the Army Corps of Engineers to conduct construction activities in navigable waters in South Carolina for SHEP. *See* Complaint dated March 6, 2012. This Court granted original jurisdiction to address these issues raised in the Complaint. The parties limited briefing to these issues as well. However, Amici use their brief to interject new issues not within this Court's agreed exercise of its original jurisdiction. This Court should not permit a non-party to interject new issues into litigation after the exercise of original jurisdiction and briefing by the parties. This Court should dismiss or strike the amicus brief and require Amici to limit any amicus brief to the issues presented by the parties.

Further, the issues raised by the Amici mirror those that this Court recently declined to hear in its original jurisdiction. In *South Carolina Public Interest Foundation, et al. v. Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, et al.*, filed in this Court on October 31, 2011, petitioners sought to bring a constitutional dual office holding and separation of powers challenge in this Court's original jurisdiction. Respondents argued, *inter alia*, that this Court should decline to address such issues because our trial courts were well-suited to hear such constitutional challenges. This Court agreed and declined to entertain issues those issues in its original jurisdiction. *See* Order dated February 8,

2012. Amici raise these same constitutional challenges in this action. This Court should again decline to entertain such issues in its original jurisdiction, especially considering that these issues were not raised by any party or considered by this Court in determining to entertain this action in its original jurisdiction.

Additionally, the amicus brief fails to comply with Rule 213, SCACR. That rule provides that an amicus brief “shall be limited to arguments of the issues on appeal as presented by the parties.” Rule 213, SCACR. This amicus brief fails to adhere to the mandate of Rule 213, SCACR. DHEC and the Petitioners limited the issues, as noted above, to the statutory authority of the Commission and such impact on the Section 401 permit process. Amici did not limit the brief to the issues presented by the parties. In fact, Amici fail to address the issues presented by the parties at all. Instead, the brief interjects new issues into this litigation. This violates the mandatory limitations imposed on amicus parties. Moreover, the issues raised in the amicus brief were previously presented to this Court in their motion to intervene. This Court declined to allow intervention on these grounds now re-alleged verbatim in the amicus brief.<sup>1</sup> While the Court did allow an amicus brief to be filed, such a brief “shall be limited to the arguments . . . presented by the parties.” The brief fails to do so. Thus, this Court should dismiss or strike the amicus brief and require Amici to limit any amicus brief to the issues presented by the parties.

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<sup>1</sup> Had the Court desired these substantive issues to be considered in the case, then Amici would have been allowed to intervene and raise these issues as a party. The Court in its order of May 18 denied intervention and also ordered that an amicus brief be submitted on or before May 21. By implication it rejected the brief submitted in tandem with the motion to intervene on May 15. Amici has not filed a proper amicus brief in response to this Court's order.

Conclusion

Based on the foregoing, this Court should dismiss or strike the amicus brief and require Amici to limit any amicus brief to the issues presented by the parties. Additionally, the Commission respectfully requests that the deadline for its response to the amicus brief be held in abeyance pending the Court's resolution of this motion because the Commission cannot formulate a response to the amicus brief until it knows what version of the brief it will have to respond. Lastly, should this Court deny this motion, the Commission requests that the deadline for its response be extended until Thursday, May 31, 2012, in order to give the Commission adequate time to formulate a response.

Respectfully submitted,

{Signature Page Follows}

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May 25, 2012

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
IN THE ORIGINAL JURISDICTION**

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Savannah Riverkeeper, South Carolina  
Coastal Conservation League, South  
Carolina Wildlife Federation, and  
Conservation Voters of South Carolina.....Plaintiffs-Petitioners,

and

The Savannah River Maritime Commission.....Intervenor-Petitioner,

v.

The South Carolina Department of Health  
and Environmental Control.....Defendant-Respondent.

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**RETURN TO MOTION TO DISMISS/STRIKE**

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The *Amici*, the South Carolina Public Interest Foundation (“SCPIF”) and Edward D. Sloan Jr. (“Sloan”) submit this Return to the Motion to Dismiss/Strike the Amicus Brief (“Motion to Dismiss”) filed by the Savannah River Maritime Commission (“SRMC”).

**I. The Court Has Already Decided the Issue Raised by the Maritime Commission.**

Among other legitimate reasons, because they are currently prosecuting a case before this Court in its original jurisdiction that raises nearly identical issues,<sup>1</sup> on May 15, 2012, SCPIF and Sloan moved to intervene in this action and proffered a brief. In the

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<sup>1</sup> *South Carolina Public Interest Foundation et al. v. State of South Carolina et al (South Carolina Transportation Infrastructure Bank)*, Case No. 2012-207128 (scheduled for oral argument on June 19, 2012 at 9:30 AM).

alternative, they moved to file the proffered brief as *Amici Curiae*. The Court granted the alternative Motion and allowed SCPIF and Sloan to file the brief as *Amici*. Order entered May 18, 2012. The Court obviously was familiar with Rule 213, SCACR, when it granted *Amici's* motion and allowed them to file their brief for consideration by the Court.<sup>2</sup> Therefore, the Court has already ruled on the issue raised by the SRMC's Motion to Dismiss.

## **II. The *Amici* Brief Addresses an Issue Raised by the Parties: the Constitutional Authority of Two Governmental Bodies.**

SRMC specifically argues that a discussion of the South Carolina Constitution is outside the parameters of the issues raised by the parties. Motion to Dismiss, pp. 2-3. *Amici's* brief, however, meets the standard of Rule 213. This matter has always centered on the relative legal authority of the SRMC and the Department of Health and Environmental Control ("DHEC").

In granting the Petition for Original Jurisdiction, this Court stated,

Petitioners have filed a petition for original jurisdiction and complaint asking this Court to declare that respondent [DHEC] *exceeded its authority and usurped the powers* of the Savannah River Maritime Commission when it issued a Section 401 Water Quality Certification based on an agreement it negotiated with Georgia State Officials and the U.S. Army Corps of Engineers."

Order entered April 5, 2012 (emphasis added). Accordingly, the Court recognized that the issue of the authority of SRMC and DHEC was central to the case.

Similarly, the original Petitioners, Savannah Riverkeeper, South Carolina Coastal Conservation League, South Carolina Wildlife Federation, and Conservation Voters of

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<sup>2</sup> Even assuming that any issue raised in the *Amici's* brief is beyond the scope of issues presented by the Petitioners and Respondent, this is an original jurisdiction proceeding, and the Court should construe Rule 213 more broadly. Unlike cases the Court considers in its appellate jurisdiction, there is no reason for the Court to be concerned about issues being presented for the first time, particularly constitutional issues.

South Carolina (“Riverkeeper”) raised the issue of the authority of DHEC and SRMC. They asked the Court to address three questions:

- “1. Did . . . DHEC act *unlawfully* . . . when it negotiated . . . ?”
- “2. Is the . . . Decision of the DHEC Board . . . *unlawful* . . . ?”
- “3. Did DHEC act *unlawfully* . . . when it . . . granted a permit . . . ?”

Riverkeeper Brief, p. 1 (emphasis added). All three of the Riverkeeper questions relate to the lawful authority of DHEC. They contend that the authority exercised by DHEC properly belonged to SRMC.

Similarly, the SRMC raised the issue of the authority of SRMC and the authority of DHEC and squarely placed that issue before the Court for analysis. In support of its own Motion to Intervene, SRMC asserted, “This original jurisdiction matter involves whether the Commission’s *powers have been usurped.*” Motion to Intervene filed April 13, 2012 (emphasis added). Likewise, SRMC’s brief addresses the “authority” of the SRMC (SRMC Brief, p. 15), the alleged lack of authority by DHEC (SRMC Brief, p. 22), and DHEC’s alleged exceeding of its proper authority (SRMC Brief, p. 25). The SRMC brief asked this Court to address whether DHEC acted outside of its authority and invaded the “*exclusive jurisdiction and authority* of the [SRMC]” (SRMC Brief, Statement of Issues on Appeal, par. 1) (emphasis added). In its Conclusion, SRMC argues that certain powers were “*vested exclusively* in the [SRMC]”; that “DHEC’s actions . . . was an act [sic] outside the scope of its legislative *authority*,” and “[a]t issue here is whether DHEC acted outside the scope of its legislative *authority* . . . .” (SRMC Brief, p. 26) (emphasis added). Accordingly, SRMC has also raised the issue of the authority of SRMC and DHEC.

Finally, DHEC addressed the issue of its lawful authority. DHEC's brief addressed DHEC's "statutory *authority* to make decisions on water quality certification" (p. 14), "permitting and certification *authority*" (p. 15), "DHEC's *authority* for water quality certifications, coastal program consistency determinations [and] navigable waters construction permits" (p. 19), and DHEC's "*express and implied powers* to negotiate with the State of Georgia" (p. 24) (emphasis added). All arguments from all parties address the issues of the limits and proper application of the authority of the SRMC and DHEC.

Although SRMC seeks to exclude discussion of it, the State Constitution must necessarily form the framework and govern any discussion of "authority" of two competing government bodies. This Court would not and should not recognize authority in one of the competing bodies, if its authority, or the exercise of that authority, would violate the Constitution. Therefore, *Amici's* brief addresses the heart of the issue before the Court: whether SRMC possesses, or can constitutionally exercise, any authority at all. *Amici's* brief demonstrates that SRMC has no authority whatsoever because it is constitutionally unsound.

## CONCLUSION

A determination of the limits of authority of SRMC and DHEC is not ripe until the Court first addresses the threshold issue of the constitutionality of the SRMC's creation and composition. If the composition of SRMC is unconstitutional, this Court's decision on the scope and limits of SRMC's authority vis-à-vis DHEC's authority, as requested by the parties, would be only an advisory and theoretical opinion. *Amici* therefore respectfully suggest that the Court must decide the Constitutional issue before

addressing the one raised by the parties.

If, however, the Court determines that *Amici* must be parties to address these issues, they respectfully request that the Court reconsider its denial of their motion to intervene, and allow them to intervene as Respondents.

Respectfully submitted,

**THE CARPENTER LAW FIRM, PC**

A handwritten signature in black ink, appearing to read "J. Carpenter", written over a horizontal line.

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James G. Carpenter, S.C. Bar No. 1136  
Jennifer J. Miller, S.C. Bar No. 13611  
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Attorneys for *Amici* SCPIF and Sloan

May 30, 2012

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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In the Original Jurisdiction of the Supreme Court

Savannah Riverkeeper, South Carolina Coastal  
Conservation League, South Carolina Wildlife  
Federation, Conservation Voters of South Carolina, and  
the Savannah River Maritime Commission, ..... Petitioners,

v.

The South Carolina Department of Health and  
Environmental Control, ..... Respondent.

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**Reply to the Return of Amici to the Motion to Dismiss/Strike the Amicus Brief**

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Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules, Petitioner Savannah River Maritime Commission (“the Commission”) hereby files this brief Reply to the Return of Amici to the Motion to Dismiss/Strike the Amicus Brief. The Court should reject the arguments in the Return and dismiss the amicus brief for the following reasons.

First, when this Court granted leave to the file the amicus brief, the order set a future due date for the amicus brief. This future due date would have been unnecessary had the Court intended to accept the brief submitted with the motion to intervene. Moreover, the order allowing an amicus brief did not reference the brief submitted with the motion to intervene. This indicates the Court was not accepting the brief submitted with the motion to intervene.

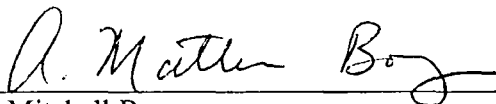
Second, amici argue the brief fits within the framework of the issues presented by the parties. Amici point to out of context portions of the parties’ submissions

referencing to the “authority” of the Commission or “whether the Commission’s powers have been usurped” to claim new arguments can be injected to this action via an amicus brief. This argument lacks merit. No party raised constitutional issues. Any challenges to authority or ability to act by the Commission or DHEC were limited to the statutory enabling language, regulations, and joint resolutions at issue. Further, no party referenced any constitutional arguments in the original jurisdiction petition or complaint. An amicus party cannot be permitted to interject new issues into an action.

Based on the foregoing, and the arguments set forth fully in the Motion to Dismiss/Strike, this Court should dismiss or strike the amicus brief and require Amici to limit any amicus brief to the issues presented by the parties.

Respectfully submitted,

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May 30, 2012

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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Case No. 09-ALJ-07-0226-CC

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Upstate Forever, South Carolina Native Plant Society, and  
South Carolina Wildlife Federation,.....Petitioners,

v.

South Carolina Department of Health and Environmental Control and  
Greenville Water System,..... Respondents.

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**PROOF OF SERVICE**

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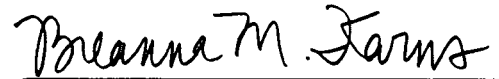
This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Motion to Dismiss or Strike the Amicus Brief of Trout Unlimited** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Breanna M. Karns

This 22nd day of February, 2013.