THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from the Administrative Law Court

Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2019-001282

Richard J. Hook, Respondent,

Vs.

South Carolina Department of Health and Environmental Control and Phillip Patterson,

Of Which South Carolina Department of Health and Environmental Control is the Appellant and Phillip Patterson is the Respondent

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Respondent Phillip Patterson's

Final Brief of Respondent

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Summary Overview

In denying the pleas under the doctrines of Res Judicata and Collateral Estoppel and SCRCP Rule 60(b)(5), the ALC based its decision on misinterpreted facts concerning the issues litigated, faulted parties by requiring information already in the record, not joining parties who's interests were not protected, and allowing DHEC undue flexibility in application of its regulations.

The July 2, 2019 Order should be reversed for the following reasons:

1. The ALC erred in using erroneous definitions of the issues in the prior cases as they applied to the res judicata and collateral estoppel arguments.
2. The ALC erred in denying the Department's 60(B)(5) SCRCP motion.
3. The ALC erred when faulting DHEC for not providing evidence of the negative environmental impacts associated with relocating the dock on Lot 9.
4. The ALC erred in not joining the 3 parties who wrote letters of objection to the 2004 amendment request by Ford by not joining them to the proceedings via Rule 19(a), SCRCP.
5. The ALC erred in its allowance of undue flexibility in DHEC's application of its regulations and by allowing DHEC this flexibility under a false premise.

1 **The ALC erred in using erroneous definitions of the issues in the prior cases as they applied to the res judicata and collateral estoppel arguments.**

(Page 12 of the final Order) "Patterson argues that one or both of those doctrines essentially nullifies the Consent Order from the 2005 contested case because the issue of Lot 9's dock alignment was actually litigated and determined in the protracted 2003 contested case." (R. p. 73, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion,* page 12)

There was misleading information in the record as to the definition of the issues in the 2003 case and how they applied to the 2005 case. On page 6 of Petitioner's Reply to Returns filed by DHEC and Patterson to Petitioner's Motion to Enforce, Counsel for Hook asserts "The Final Order and Decision issued by Judge Anderson in the 2003 contested case includes a finding that OCRM modified the approved corridor for Lot 9 during the permitting process. This foreclosed litigation of the original longer dock length (595') as part of the 2003 contested case." (R. p. 316, November 17, 2017 *Petitioner's Reply to Returns to Motion to Enforce Consent Order* page 6) Counsel for Hook misunderstands and mischaracterizes the issues of the 2003 contested case before the court. The issue before the court was not simply the alignment and length of the dock on Lot 9. The issues of the 2003 Contested Case were whether Ford and OCRM had addressed the cumulative negative impacts from the construction of 27 docks on Parrot Creek ***and*** whether safeguards had been taken to avoid them. Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009). In reaching this conclusion, the court held "the identity of the subject matter of the two suits rests ***not in their forms of action*** or the relief sought, ***but rather, in the combination of the facts and law that give rise to a claim*** for relief." Id. at 10, 677 S.E.2d at 218.(emphasis added) When the combination of facts and law are applied to Ford's request, the issues that give rise to the claim of prior adjudication

are clearly the issues of cumulative impacts to the DMP, not merely the ***sole*** issue of the dock alignment.

1976 South Carolina Code of Laws Unannotated Updated through the end of the 2003 Session; **Section 48-39-150(A)(9)**

(A) In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

Page 10 of the 2003 Final Order;

"I, therefore, *find that the potential for adverse environmental consequences* arising from the construction of these twenty-seven (27) docks was given appropriate consideration by OCRM." (R. p. 10, November 13, 2003 *Final Order and Decision*, page 10).

Page 2 of 2003 Final Order;

ISSUES RAISED;

10) Whether OCRM considered the cumulative, long-range negative effects of this project; (R. p. 2, November 13, 2003 *Final Order and Decision*, page 2).

11) Whether the developer used safeguards to avoid these negative effects (R. p. 2, November 13, 2003 *Final Order and Decision*, page 2).

Page 6 of the 2003 Final Order;

"Moreover, though the approved DMP for Lots 1-5 and 7 sanctioned the permitting of six individual walkways for each lot, Ford agreed to the construction of and OCRM approved joint use docks on those Lots. These docks consist of shared walkways between Lots 1-2. 3-4, and 5-7. However, the docks depart from the typical joint use design in that at the terminus of the shared walkway each lot owner has access to their own pierhead an float. As a result, the docks permitted for Lots

1-5 and 7 consist of three walkways, six individual pierheads, and six individual floats. ***The combined walkways at these locations reduce the*** scenic and ***environmental impacts of these docks.*** Additionally, during the process, OCRM modified the approved corridor for Lot 9. The dock corridor identified in the approved DMP indicates a dock length of 595'. In deviating from the approved corridor, the permit extended the dock between property lines but reduced the length of the walkway. The dock permitted on Lot 9 now extends at an angle within the view corridor for Lot 10, but ***the walkway for this dock has been reduced from 595' to 200' thereby warranting the crossing of the extended property lines".***[1] (emphasis added) (R. p. 6, November 13, 2003 *Final Order and Decision*, page 6).

These environmentally friendly modifications to the DMP were considered during the 2003 contested case and *referenced as proof* OCRM and Ford had **"considered the cumulative, long range negative effects of this project"** and **"used safeguards to avoid these negative effects"** to the maximum extent feasible. When Ford applied to amend the alignment of Lot 9's dock, increasing the walkway from 200' to 595', Ford was asking to increase the cumulative impact of the DMP over the limit previously adjudicated. The maximum threshold of this impact had been set by the 2003 contested case. This request was clearly in violation of that ruling.

2 The ALC erred in denying the Department's 60(B)(5) SCRCP motion

(Page 15 Final Order) "In its motion, the Department presented no evidence or legal authority in support of the proposition that the Consent Order has prospective application"..."As such, the Department failed to demonstrate that, under the facts of this case, it is entitled to relief from enforcement of the Consent Order under Rule 60(b)(5)." (R. p. 76, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion*, page 15)

[1] When the Lot 9 walkway was reduced it lowered the impact of shading. Therefore, ***it was for this reason***, the reduction "warranted" crossing of the extended property lines.

When the issues are properly defined, the consent order has prospective application. "Prospective application is recognized when an order or judgment creates a liability or right where formerly none existed." (R. p. 317, November 17, 2017 *Petitioner's Reply to Returns to Motion to Enforce Consent Order*, page 7) (page 7 Petitioner's reply to Patterson and DHEC returns to motion to enforce) The Consent Order granted Ford the new exclusive right to add additional negative impact to the Belle Terre DMP. This new right ***is*** prospective in nature and therefore, it can be evaluated as to which issues are more important, now that the mistake has been made in DHEC authorizing the construction of the wrong dock. Counsel for Hook claims the principles of equity do not support that the Consent Order should be set aside because this case does not present an analogous public policy matter when compared to similar cases where the courts applied Rule 60(b)(5) to set aside judgements or consent orders." (R. p. 319, November 17, 2017 *Petitioner's Reply to Returns to Motion to Enforce Consent Order*, page 9) (page 9 Petitioner's reply to Patterson and DHEC returns to motion to enforce). Hook relies on cases involving divorce and false paternity representations to make this point. Neither of which align with the issues in this case. The central issues of this case are the impacts to the environment. DHEC, the authority in coastal waters, has a fiduciary responsibility to protect the environment. DHEC's focus in the administration of its powers in coastal management are predominantly to protect the environment. The action required to correct the mistake DHEC made when providing Patterson with the wrong permit would go directly against what DHEC represents as an institution. This would require destruction of the environment during removal of the existing

dock, due to heavy equipment operating in the marshland and excavation of the marshland, and would add substantial negative impact to the Belle Terre DMP by allowing Patterson to build a dock with an additional 410 feet of walkway when compared to the current dock. This additional walkway would substantially increase the negative impact of shading in the Belle Terre DMP. It would be an immense departure from DHEC's principles to allow such a thing. Hook asserts on page 10 of the same reply, the balance in equities should lie with the difference in what Hook paid for his lot and what Patterson paid for his. The environment should be ravaged because Hook paid more money for his lot. No other basis for Hooks equity was defined. Hook, throughout the case, has claimed his investment was damaged when DHEC provided Patterson with the wrong permit. Hook has never provided proof of this damage. It could be argued, it has not been damaged at all, as it is perfectly normal to find a dock in your view when you live on a creek. Therefore, when the balance of equity is whether DHEC is to violate their public creed, or Hook's investment is to be "damaged" by a variable without definition, the balance of equities clearly lies with DHEC upholding their commitment to the environment and the citizens of the State of South Carolina.

3 **The ALC erred when faulting DHEC for not providing evidence of the negative environmental impacts associated with relocating the dock on Lot 9.**

(Page 16 and 17 of the Final Order) "Additionally, while the environmental impact of removing and rebuilding Patterson's dock may have been worthy of consideration, the Department failed to submit any evidence to support its assertion that removing and rebuilding the dock would cause "substantial negative impact" to the environment." (R. p. 77, p. 78, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion,* page 16 and 17)

The negative environmental impacts associated with removing and rebuilding the Lot 9 dock, which would result in adding over 400 feet of walkway[2] and an additional 1640 square feet of shading to the Belle Terre DMP, had already been established as part of the record in the 2003 case as referenced here;

Page 9 of the 2003 Final Order;

"Recent scientific findings demonstrate that ***shading of the marsh grass*** is the **only negative environmental impact** resulting from dock construction." (emphasis added) (R. p. 9, November 13, 2003 *Final Order and Decision*, page 9).

Page 10 of the 2003 Final Order;

"Ford's subdivision plans also to a great extent deter potential ***negative impacts resulting from the shading of marsh grass.***" (emphasis added) (R. p. 10, November 13, 2003 *Final Order and Decision*, page 10).

There was no need for additional evidence to support the argument that removing this dock and building the longer dock would cause substantial negative impact to the environment.

4 The ALC erred in not joining the 3 parties who wrote letters of objection to the 2004 amendment request by Ford via Rule 19(a), SCRCP.

When Ford Development's 2004 permit amendment application (to realign and extend the Patterson dock from 200 feet to 556 feet) went out on Public Notice (see Exhibit A to *Department's Motion to Reconsider)* (R. p. 423, May 28, 2019 *DHEC's Motion to Reconsider with exhibits* Exhibit A), three of the eleven property owners (prior litigants) from the opposite side of Parrot Creek submitted comment letters objecting to changing the alignment and length of the Lot 9

[2] The as built survey indicates the current dock has a finished walkway of only 146 feet as opposed to the estimated 200 feet in the 2003 permit due to the *substantial* movement of Parrot Creek since 2003.

(Patterson) dock. (Exhibit B to *Department's Motion to Reconsider)* (R. p. 424, 425, 426, May 28, 2019 *DHEC's Motion to Reconsider with exhibits* Exhibit B). DHEC had a legal requirement to notify these three parties and include them in the Agency Transmittal Form when Ford requested the contested case. However, they did not. (R. p. 85, January 10, 2005 *Agency Transmittal Form* page 2) This was error of law. In the footnote on page 13 of the amended Final Order (R. p. 74, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion*, page 13), the ALC references this law; "an issue may not be raised for the first time in a motion to reconsider". However, the issue of the 2003 parties being robbed of their victory had been raised all along. The ***evidence*** of the robbery came in the Department's motion to reconsider. Had the three letter writers had been legally notified, and ***made the choice*** to not be joined, only then could the ALC reach the conclusion that DHEC was the ***only*** party that could have raised the defenses of res judicata and collateral estoppel in response to Ford's filing of the 2005 contested case (page 12 of the final Order) (R. p. 73, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion*, page 12). However, without such notification, the ALC court should have joined those parties via Rule 19(a), otherwise violating their due process rights under the 14th amendment to the US constitution[3]

[3] The Due Process Clause of the 14th Amendment to the US Constitution prohibits state and local governments from depriving persons of life, liberty, or property without a fair procedure.

Rule 12. Notification of Division by Agency of Contested Case. The agency requesting a contested case hearing or receiving a notice of a contested case from a party shall notify the Division within five (5) working days of the receipt of the request for a contested case hearing by completing and forwarding to the Division a transmittal form, and serving a copy ***on all parties***, containing the following information (emphasis added)

A. the name of the transmitting agency, along with the name and telephone number of the contact person in the agency responsible for the matter;

B. the name or title of the agency proceeding and the file number or any other identifying information of the agency action or inaction that is the subject of the hearing;

C. the names, addresses and telephone numbers, if known, of all known parties, and their attorneys or other representatives;

D. the names, addresses and telephone numbers, if known, of any persons who have exercised their legal right to object to the issuance of a permit or license.

Note to 1997 Amendments

Rule 12 has been amended to add paragraph D., which requires that the names, addresses, and telephone numbers ***of any individuals known to the agency who have objected to the issuance of a permit or license be provided in the transmittal form.*** The rule has been further amended to specify the procedure to be followed if the agency fails to forward the transmittal form to the Division within five working days as required by the first paragraph of Rule 12. (emphasis added)

Rule 14. Notification of Assignment and Request for Information. Upon receipt of the transmittal form, the Division shall notify all parties of the assignment of an administrative law judge, and the administrative law judge assigned to the case, by pre-hearing order, may request each party to prepare and return a Pre-Hearing Statement describing the contested case. (emphasis added)

2004 South Carolina Code of Regulations § 30-6(C)(1)(a,b,c)

C. Public Notice:

(1) At the same time as the Department transmits the request for a contested case to the Division, the ***Department shall notify in writing*** interested agencies, all adjoining landowners, local government units and ***other interested persons.*** This notice shall, to the extent that the information is available, indicate the following:

(a) The names of all parties including the agency, the petitioner(s) and the permittee(s), (b) The initial action of the agency, (c) The nature and extent of the contested case.

5 <u>The ALC erred in its allowance of undue flexibility in DHEC's application of its regulations and by allowing this undue flexibility under a false premise.</u>

(page 14 of the Final Order) "the Department is ***imbued with a degree of flexibility and discretion*** in making determinations regarding compliance with its regulations. ***While this court can only speculate***, it is possible that, at the time, the Department determined that the Permit amendment was proper in light of the ***benefits conferred to it by Ford in the agreement.***" (emphasis added) (R. p. 75, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion,* page 14)

This statement stems from the agreement made between DHEC and Ford in the 2005 consent order of dismissal. The statement "While this court can only speculate", is disturbing because had the court not speculated, the court would have found the "benefits conferred" were completely unnecessary and based in untruths. In Hook's AMENDED PETITIONER'S RETURN TO RESPONDENT PATTERSON'S MOTION TO ALTER OR AMEND JUDGMENT, in the conclusion, Hook states, "Respondent Patterson's Motion concludes with an argument that appeal of the 2003 Order was "the proper avenue of relief" to re-align the dock on Lot 9. This argument ignores that the

Department's regulations allow modifications of structures authorized by the DMP that are minor in nature and are in keeping with the spirit of the DMP. R. 30-12(A)(3)." (R. p. 617, June 3, 2019 *Amended Petitioner's Return to Respondent Patterson's Motion to Alter or Amend Judgment*, page 4) Hook refers to a then nonexistent regulation. The regulation quoted wasn't in effect until June 24th, 2005 and therefore, not before the court in the 2005 contested case. Two (2) of the then current regulations were cited in OCRM's denial letter dated December 13, 2004 that related directly to Ford's amendment request. Regulation 30-12(A)(2)(d): "Docks and piers should use the least environmentally damaging alignment" and Regulation 30-12(A)(3)(b): "Amendments to the general permit must be keeping with the spirit of the original dock master plan to the maximum extent feasible" (R. p. 564, December 13, 2004 *Denial Letter from Curtis Joyner*, page 2) How do these regulations apply to Ford's amendment request? Was this request keeping with the spirit of the DMP ***and*** did it result in the least environmentally damaging alignment? Obviously, this request went directly against both regulations, and therefore was clearly forbidden by the rules. In the 2005 Consent Order of Dismissal, Counsel for Ford and DHEC approached the ALC with the notion that the Belle Terre DMP and the prior court orders "made no mention of OCRM's intent to limit amendments" to the Belle Terre DMP (Page 2, 2005 Consent Order of Dismissal) (R. p. 22 February 9, 2005 *Consent Order of Dismissal*, page 2). This "failure" was the foundation for the "deal" made to "right the wrong" presented by this quandary, and the basis for the ALC

comment above, "that the Permit amendment was proper in light of the ***benefits conferred to it by Ford in the agreement.***" Further explained; we can allow this one instance of an increase in the impacts of the DMP, due to OCRM's "failure", but only if OCRM is bestowed with the ability to limit amendments to those keeping with the spirit of the DMP going forward, thereby correcting their "mistake". This would make sense if Ford's amendment request had been for something unusual and otherwise not prevented under existing rules. However, this was not the case. The implication of OCRM's need to limit amendments to the Belle Terre DMP was false. There were no findings of fact or conclusions of law explaining the reasoning or definition of this supposed necessity. There was no evidence any other contested DMP's required this protection. This idea was merely conjecture by counsel. This adverse inference, imposed without explanation, preemptively sanctioned the department from enforcing its own rules. If you reject this "failure", the 2005 Consent Order falls apart.

McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473, 475 (1933) ***("[S]tatements of fact appearing only in argument of counsel will not be considered.");*** S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (citations omitted) ***("Arguments made by counsel are not evidence.").***

The 2005 Consent Order directly violated Regulations 30-12(A)(2)(d) and 30-12(A)(3)(b) by allowing an amendment forbidden by the rules,

uselessly provided authority already available to OCRM (limiting amendments to those keeping with the spirit of the DMP), and is based on the false premise that OCRM had failed in its capacity. It is as if counsel for OCRM was unaware R30-12(A)(2)(d) and R30-12(A)(3)(b) existed *or willfully ignored them.* As stated previously, the ALC concedes "***the Department is imbued with a degree of flexibility and discretion in making determinations regarding compliance with its regulations***". (R. p. 75, July 2, 2019 *Amended Order Granting Petitioner's Motion to Enforce Consent Order and Denying DHEC's 60(b)(5) Motion,* page 14) However, this goes well beyond a "degree of flexibility and discretion". The approval of this request directly violated existing rules. The Department ignored its own regulations, to Ford's benefit, enabling Ford the sale of Lot 10 for 1 million dollars. This was done under the false assumption OCRM had failed to limit the ability of Ford, or others, to freely amend the DMP in this manner, in exchange for an ability that already existed. This shows a distinct bias towards Ford.

It is **ILLEGAL** for a DHEC employee to ignore the Department's regulations and the Rules of Procedure for The Administrative Law Division **to help a friend close a deal.**

References of law found in Converse *v.* DHEC, 564 S.E.2d 341 (S.C. Ct. App. 2002) identifying the Department's responsibilities:

When interpreting a regulation, ***we look for the plain and ordinary meaning*** of the words of the regulation, ***without resort to*** subtle or ***forced construction to limit*** or expand ***the regulation's operation.*** Byerly v. Connor, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992). See Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself.). The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons. Faile v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976). (emphasis added)

Generally, the delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public. City of Columbia v. Board of Health & Envtl. Control, 292 S.C. 199, 355 S.E.2d 536 (1987). However, this delegation does not go unchecked. ***DHEC must follow its own regulations*** and the provisions of the Administrative Procedures Act (13) in carrying out the legitimate purposes of the agency. Triska v. DHEC, *292 S.C.* 190, 355 S.E.2d 531 (1987). Thus, ***any action taken by DHEC outside of its statutory and regulatory authority is null and void.*** Id. (emphasis added)

"An administrative body must make findings which are sufficiently detailed to enable this Court to determine ***whether the findings are supported by the evidence*** and ***whether the law has been applied properly*** to those findings." (emphasis added) Kiawah Property Owners Group v. Public Serv. Comm'n of S.C., 338 S.C. 92, 95-96, 525 S.E.2d 863, 865 (1999) (quoting Porter v. S.C. Public Serv. Comm'n, *333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998)*). That is, "[t]his Court will not accept an administrative agency's decision at face value ***without requiring the agency to explain its reasoning.***" Id. at 96, 523 S.E.2d at 865 (citation omitted).

"A decision is arbitrary if it is ***without a rational basis***, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, ***without adequate determining principles***, or is ***governed by no fixed rules or standards.***" (emphasis added) Deese v. South Carolina State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing Hatcher v. South Carolina Dist. Council of Assemblies of God, Inc., *267 S.C.* 107, 226 S.E.2d 253 (1976) and Turbeville v. Morris, 203 S.C. 287, 26 S.E.2d 821 (1943)). (emphasis added)

CONCLUSION

"To establish resjudicata the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the prior suit." Sealy v. Dodge. 289 S.C. 543. 347 S.E.2d 504 (1986). DHEC and Ford were parties to the 2003 contested case. The subject matter of the 2003 contested case was whether Ford and OCRM had addressed the cumulative negative impacts from the construction of 27 docks on Parrot Creek *and* whether safeguards had been taken to avoid them. Realigning the Lot 9 dock raised again the issue of the negative environmental impact of "shading of the marsh grass" of which safeguards had been applied to reduce this impact previously on the ***very same dock***. Therefore, the doctrine of Res Judicata applies and nullifies the Order from the 2005 Contested Case. "Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties ***and their privies*** in any subsequent action ***based upon a different claim.***" Richbura v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986) (emphasis added). The issues "actually and necessarily litigated and determined" in the 2003 Contested case were whether Ford and OCRM had addressed the cumulative negative impacts from the construction of 27 docks on Parrot Creek *and* whether safeguards had been taken to avoid them to the maximum extent feasible. The different claim in the subsequent action was to re-align the dock on Lot 9. This realignment raised the issue of cumulative impact by increasing the negative impact of shading of the marsh grass. Therefore, the doctrine of collateral estoppel applies and nullifies the Order from the 2005 Contested Case. The 2003 litigants' interests were ignored during the 2005 case by lack of notification about

the case and the undue haste prompted by the false inference that OCRM had failed in their capacity to limit such amendments.

I respectfully request that the Court of Appeals reverse the ALC Order and nullify the 2005 consent order of dismissal. Ford had a friend at DHEC. Consequently, the 2005 Consent Order was illegal, and born of corruption.

Respectfully submitted,

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Charleston, South Carolina