THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Administrative Law Court Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC.....Respondents,

vs.

South Carolina Department of Health and Environmental Control.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case involves Appellant South Carolina Department of Health and Environmental Control's ("DHEC" or the "Department") termination of Respondent DTG Holdings, LLC's ("DTG") NPDES[1] permit coverage. DTG obtained NPDES permit coverage from DHEC on March 27, 2009. (R. pp. 803-805). On December 22, 2009, DHEC terminated DTG's NPDES permit coverage on the basis that DTG's permit coverage was obtained after DTG misrepresented information on its Notice of Intent for Stormwater Discharges from Large and Small Construction Activities ("NOI"), the application form submitted by DTG for NPDES permit coverage. (R. pp. 823-24 and 787-88).

On December 22, 2009, the Department staff issued a Final Decision terminating permit coverage. (R. pp. 823-24). DTG and Jasper Station, LLC ("Jasper Station") (collectively, "Respondents") filed requests for review before the Board of Health and Environmental Control (the "Board") on December 29, 2009. (R. pp. 64-67). At its meeting on January 14, 2010, the Board declined to conduct the review conference requested by Respondents. (R. p. 70). Notice of this decision was mailed to Respondents on January 19, 2010. (R. pp. 70-71). Pursuant to S.C. Code Ann. § 44-1-60(F), the staff decision to terminate DTG's permit coverage became the final agency decision when the Board notified Respondents of its decision not to conduct the review conference.

On January 21, 2010, Respondents requested a contested case at the Administrative Law Court (ALC) to challenge DHEC's final agency decision. (R. pp. 72-77). The ALC held a hearing on September 1, 2010, and October 20, 2010. The parties submitted competing proposed orders in lieu of closing arguments. On February 11,

[1] National Pollutant Discharge Elimination System.

2011, the Honorable Carolyn C. Matthews reversed the Department's termination of NPDES permit coverage and reinstated DTG's permit. (R. pp. 14-39). On Motion from DHEC with consent of Respondents, the ALC granted DHEC until February 28, 2011 to file post trial motions. (R. pp. 150-151 and 152-153). DHEC filed a Motion to Reconsider and Alter or Amend on February 28, 2011. (R. pp. 154-173). No order was issued on DHEC's motion within 30 days of its filing. (R. p. 42). Therefore, the motion was deemed denied by Rule on March 30, 2011. DHEC filed a Notice of Appeal on April 29, 2011, divesting the ALC of jurisdiction over the matter.[2]

[2] On May 5, 2011, after the ALC was divested of jurisdiction, the ALC issued an order purporting to deny the motion for reconsideration. (R. p. 42).

SUMMARY OF THE FACTS

On December 22, 2009, DHEC terminated DTG's NPDES permit coverage. (R. pp. 823-24). DHEC's termination was based on its determination that DTG misrepresented relevant facts in its NOI. (Id.). The NOI is the application form provided by DHEC that must be submitted in order for an entity to obtain NPDES permit coverage under the 2006 Construction General Permit for Large and Small Construction Activities (CGP). The NOI is readily available on the Department's website. (R. p. 269). Clear, easily understandable instructions are contemporaneously downloaded in the same document as the NOI. (R. p. 766-776). These instructions explain in detail how to answer each question on the NOI. Ryan Smith, DTG's consultant who prepared the NOI, downloaded these instructions and had them handy when he completed DTG's NOI. (R. pp. 269 and 271-272).

DTG submitted its NOI to the Department on February 9, 2009. (R. pp. 787-788). The NOI sought NPDES permit coverage for land disturbing activities for an 18.41 parcel of land at Red Oaks Lane Access from S.C. Highway 70 in Hardeeville, Jasper County, South Carolina (the "Site"). (R. pp. 787-788). The NOI was signed by Ryan Smith as the SWPPP[3] preparer, and Gregg Malphrus, on behalf of the Project Owner/Operator.[4] (R. p. 788). In signing the NOI, Gregg Malphrus made the following certification:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons

[3] The SWPPP is the Storm Water Pollution Prevention Plan.

[4] Gregg Malphrus is one of three brothers who own DTG Holdings. These same three brothers own Malphrus Construction, the entity that cleared, mucked, and filled a wetland on the Site in November, 2008 after DHEC had issued a decision denying an application for NPDES permit coverage for the site.

> who manage the system, or those persons directly responsible for gathering the information, the information is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

(R. pp. 787-788).

Section II(B) of the NOI asks the applicant to list the "Property Owner" for the site. (R. p. 787). The instructions for Section II(B) of the NOI specify that the applicant is required to list the "complete, legal name of the current property owner." (R. p. 771). DTG listed itself as the Property Owner. (R. p. 787). This was an inaccurate statement of fact. DTG never owned the property.[5] (R. pp. 1060, 1065, 1069). The ALC found that Jasper Station was the owner of the site. Indeed, DTG's 30(b)(6) designee testified that DTG knew Jasper Station was the owner of the site and that Jasper Station should have been listed. (R. pp. 1065, 1069). Ryan Smith also testified that he knew Jasper Station was the property owner and that Jasper Station should have been listed as the property owner. (R. pp. 273-274).

Section III(I) of the NOI asks the applicant to "list all state and federal environmental permits or approvals applied for or obtained for [the Site]." (R. p. 787). The instructions for Section III(I) of the NOI instruct the applicant to "see § 122.21(f) of S.C. Regulation 61-9 for a list of permits, approvals, and programs that should be considered. If the provided information is inaccurate, NPDES coverage may be invalid." (R. p. 772). The instructions for Section III(I) even provides a link to the relevant regulation. (R. p. 772). The regulation requires the applicant to list, among others, "any environmental permit or construction approval received or applied for under" the

[5] (DHEC ex 1, 30(b)(6) depo of DTG pg 11, lines 19-24, p. 17, lines 7-20, pg 23, lines 2-22).

"NPDES program under CWA." 24 S.C. Code Ann. Reg. 61-9 § 122.21(f)(6). (R. p. 581). DTG's NOI left this line blank. (R. p. 787). This was a representation that no environmental permits had been applied for or obtained for the site. This was an inaccurate statement of fact. The ALC found that Jasper Station had applied for NPDES permit coverage for this site. Indeed, DTG's 30(b)(6) designee testified that DTG knew Jasper Station had previously applied for NPDES permit coverage for the site. (R. p. 1076). Ryan Smith also testified that he knew Jasper Station had previously applied for NPDES permit coverage for the site. (R. p. 282). In fact, Mary Shahid, counsel for Respondents, instructed him to list the Jasper Station permit application on the NOI.[6]

Finally, Section III(G) of the NOI asks if DHEC "has issued a Notice to Comply or Notice of Violation for this site or LCP?" (R. p. 766). DTG answered "No." (R. p. 787). This was a misstatement of fact. On November 5, 2008, DHEC issued a letter to Jasper Station stating that land disturbance activities[7] were being conducted on the site without a permit. Pets. Ex. 32 (Nov. 5 letter). (R. p. 888). The letter gave Jasper Station notice that "such actions are considered unlawful and place [Jasper Station] in violation of the Pollution Control Act." (Pets. Ex. 32 (Nov. 5 letter). (R. p. 888). The letter also instructed Jasper Station to comply with the law by discontinuing any activity on the site except stabilization measures. (R. pp. 1084-88). DTG acknowledged that it was aware of this letter prior to submitting the NOI. The existence of this letter was not disclosed to DHEC in DTG's NOI. (R. p. 787).

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[6] Albeit she instructed him to list the Jasper Station permit under Section III(B).

[7] Incidentally, the work consisted of filling, mucking and clearing a 6 acre wetland. This work was performed by Malphrus Construction, which is owned by the same three brothers that own DTG.

The facts certified to by DTG became a condition of permit coverage. The Department terminated DTG's permit coverage based on DTG's misrepresentations of these facts and DTG's failure to disclose all relevant facts throughout the permitting process. (R. p. 809). Ms. Nodolf, DHEC's employee who reviewed DTG's NOI, testified that if these facts had been accurately represented on the NOI, then DHEC's review of the application may have been different. (R. pp. 526-527).

Rewinding to look at the background that preceded DTG's application brings to light the relevance of the misrepresented information. As mentioned above, the true owner of the site was Jasper Station. (R. p. 590). Jasper Station and DTG entered into a purchase agreement for the site on April 10, 2008. (R. pp. 590-593). The Respondents knew at the time of signing the purchase agreement that the wetlands were an issue and that DHEC may not authorize the fill of the 6.07 acre wetland on the site.[8] (R. p. 590). So Respondents included a clause that made the contract contingent upon obtaining Departmental approval to fill the wetland. DHEC Ex. 14 (Purchase Agreement). (R. p. 1144, paragraph 3).

When Respondents signed the purchase agreement, Jasper Station had a permit application pending with the Department. DTG and Jasper Station's 30(b)(6) designees both testified that there was no decision on the permit when the purchase agreement was signed in April 2008. (R. p. 1094). The Department subsequently issued a letter denying permit coverage on September 30, 2008. (R. p. 1097). Two months later, despite having received DHEC's letter denying Jasper Station's permit application, Jasper Station hired

[8] This wetland portion is located in the center of the tract. It is a non-jurisdictional wetland (NJW), and was delineated by the U.S. Army Corps of Engineers (the Corps) on February 9, 2006 as a NJW. This means that the wetland tract was not subject to regulation by the Corps.

Malphrus Construction—owned by the same three brothers that own DTG—to clear, muck, and fill the wetland. (R. p. 1119). The Department initiated an enforcement action after Malphrus Construction began land disturbance on the site. On November 5, 2008, the Department notified Jasper Station by letter that it was in violation of the Pollution Control Act.[9] (R. p. 888). In the same letter, DHEC also requested Jasper Station to comply with the law by stopping all activities except as necessary to stabilize the site.

In the meantime, while the Department was investigating land disturbance activities on the site, Respondents were working to receive a new letter from the Corps stating that there were no longer wetlands on the site based on the work performed by Malphrus Construction. (R. p. 302). The purpose was to enable DTG to apply for new NPDES permit coverage for the Site. (R. p. 332). In fact, Ryan Smith had already begun preparation of a new NOI for DTG when Malphrus began work on the wetland. Ryan Smith knew that the wetland issue was a problem, so he left section IV(B) blank on his initial draft. DHEC Ex. 17 (Initial Draft of DTG NOI).[10] (R. p. 1161). Ryan Smith also sent Andy Smith a letter in October 2008 asking for guidance on how to deal with the situation. (DHEC Ex. 9, Oct. 16, 2008 Letter from Ryan Smith to Andy Smith)). (R. p.1133). He proposed as a solution that they "indicate wetlands exist on the site, submit the current plat and JD, and accompany the package with a letter stating what events have

[9] "Please note that such actions are considered unlawful and place you in violation of the Pollution Control Act, S.C. Code Ann § 48-1-90(a) (2008)." Pets. Ex. 32 (Nov. 5 letter)

[10] In fact, before the purchase agreement had even been entered, Bob Glover (Jasper Station) emailed Andy Smith (DTG's 30(b)(6) designee) that Malphrus was to clear, grub, grade, and seed an 800' area and fill "only the low area of the wetlands, which is necessary in order to draw attention to the fact that all of this work is being done so that OCRM will not be able to say that we performed this work in the middle of a wooded area at night in an attempt to sneak in." (DHEC Ex. 6, March 25, 2008 email from Bob Glover to Andy Smith).

previously occurred." (DHEC Ex. 9 (Oct. 16, 2008 letter from Ryan Smith to Andy Smith, p. 2). (R. p.1134). Ryan Smith also at some point prepared a plat that showed the location of the work in relation to the wetlands, Jasper Station's prior permit application, and the 18 acre DTG site. (Pets. Ex. 9).

Respondents subsequently received a letter from the U.S. Army Corps of Engineers (the "Corps") to this effect on January 16, 2009. (R. p. 776). DTG then submitted its NOI to apply for NPDES permit coverage for the site. (R. p. 787). Rather than do as Ryan Smith suggested in his October 16 letter and explain what happened, or include Pets. Ex. 9, or follow Ms. Shahid's advice and list the Jasper Station permit number on the NOI, DTG misrepresented the property owner, misrepresented that no previous environmental permits had been applied for or obtained, and misrepresented that no notice to comply or notice of violation had been sent. (R. p. 787). DTG was aware that the application it submitted, with misrepresentations and lacking full disclosure, would "go through without too much scrutiny" since the NOI represented that there would be no wetland impacts involved. (DHEC Ex. 11, October 21 email chain Andy Smith, Mary Shahid, et al). (R. p. 1136).

DHEC was made aware of the misrepresentations in July 2009 when Jasper Station initiated a declaratory judgment action in circuit court. (R. p. 44). On August 21, 2009, DHEC issued a notice of intent to terminate permit coverage, and provided DTG and all other interested parties 30 days to comment. (R. p. 809). On December 22, 2009, DHEC staff issued a final decision terminating coverage. (R. p. 823). The staff decision became the final agency decision when the Board sent Respondents notice of its decision not to conduct a final review conference.

STANDARD OF REVIEW

The Administrative Procedures Act establishes this Court's standard of review for cases decided by the ALC and is set forth in Section 1–23–610(B) of the South Carolina Code (Supp.2009), which provides that the review of the ALC's order must be confined to the record. This Court may not substitute its own judgment for that of the administrative law judge as to the weight of the facts. Id. This Court may affirm the ALC's decision or remand the case for further proceedings. Id. Further, the ALC's decision may be reversed or modified if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: (a) *in violation* of constitutional or *statutory provisions*; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) *affected by other error of law*; (e) *clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record*; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id. (emphasis added).

DHEC's appeal primarily focuses on the ALC's legal error in applying the wrong legal standard from the regulation governing termination of NPDES permits. Questions of law are reviewed *de novo* on appeal. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo."); Brownlee, et al. v. South Carolina Dept. of Health & Envtl. Control, 382 S.C. 129, 137, 676 S.E.2d 116, 120 (2009). Rules of statutory construction are employed to discern the meaning of regulations. See S.C. Ambulatory Surgery Center Assn. v. S.C. Workers' Compensation Comm., 389 S.C. 380, 699 S.E.2d 146 (2010). "The cardinal rule of

statutory construction is to ascertain and effectuate the intent of the legislature." Media Gen. Communications, Inc. v. S.C. Dept. of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (quoting Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6,8 (1993). The legislative language used in a statute or regulation is considered the best evidence of legislative intent, and courts are bound to implement the legislature's express intent. Lexington County Health Services Dist. v. S.C. Dept. of Revenue, 384 S.C. 647, 651, 382 S.E.2d 508, 509 (Ct. App. 2009). Further, DHEC is given "the most respectful deference" in interpreting the terms of its regulations. Converse Power v. DHEC, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002); Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). See also, Brownlee, 382 S.C. at 136, 676 S.E.2d at 120 (quoting South Carolina Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ.") and Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.")). Appellate courts look to the ordinary meaning of words when interpreting a regulation, taking care not to "resort to subtle or forced construction" that "limit[s]...the regulation's operation." Converse, 350 S.C. at 47, 546 S.E.2d at 346 (citing Beverly v. Connor, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992)).

Argument

I. THE ALC's DECISION IS A RESULT OF THE APPLICATION OF THE WRONG LEGAL STANDARD FROM THE REGULATION

The regulation governing termination of NPDES permits presents five grounds for permit termination. S.C. Code Ann. Reg 61-9 § 122.64. The primary grounds in the regulation for purposes of this appeal are "[t]he permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time." S.C. Code of Regs. 61-9.122.64(a)(2) (emphasis added). The ALC applied the wrong standard in three main respects: (A) the ALC mistakenly ruled that a misrepresentation of fact is not a ground for termination if the correct information is disclosed elsewhere in the application; (B) the ALC mistakenly ruled that a misrepresentation of fact is not a ground for termination unless it is accompanied by an intent to deceive DHEC; and (C) the ALC mistakenly imposed a higher standard for "relevant" than that found in the regulation. Given the ALC's findings that certain facts on the NOI were inaccurate, the ALC's utilization of the wrong legal standard was prejudicial. Had the proper standards from the regulation been utilized, DHEC's termination of DTG's permit coverage should have been affirmed.

A. The ALC mistakenly ruled that a misrepresentation of fact is not a ground for termination if the correct information is disclosed elsewhere in the application.

The use of the word "or" in § 122.64(a)(2) shows it provides two separate, alternative causes for termination of permit coverage. See Mr. T vs. Ms. T, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) ("[The rule's] use of the word 'or' indicates to this Court two potential independent action attacks on a judgment, order, or proceeding"). In other words, if the permittee misrepresented any relevant fact at any time, the regulation provides DHEC grounds to terminate permit coverage. Or, if the applicant failed to fully disclose all relevant facts throughout the permitting process, then the

regulation also provides DHEC grounds to terminate permit coverage. DHEC primarily relies on the former—DTG's misrepresentation of relevant facts in the NOI. Any misrepresentation of a relevant fact in the NOI provides an independent ground for termination of permit coverage.

This result is consistent with the plain language of this particular regulation and with a review of the regulation as a whole. Under the CGP, DHEC gives itself 20 days to act upon receipt of a complete NOI. In exchange for this limited timeframe for review once a complete application is received, the regulation imposes a burden on the applicant to review its application and provide accurate and complete responses.[11] To facilitate this process, the regulations require applicants to utilize a form provided by DHEC. In addition, the regulation gives DHEC the authority to rely on facts certified to by the applicant by making such facts a condition of permit coverage. Reg. 61-9, § 122.41(o).[12] When a fact is certified to, therefore, DHEC need not comb through the application materials to search for latent clues that the fact may be inaccurate. Rather, such facts become a condition of permit coverage, and DHEC has authority to terminate coverage based on the applicant's misrepresentation of any relevant fact at any time.

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[11] See 24 S.C. Code Ann. Reg. 61-9 § 122.28(d)(4) ("Any NOI form submitted to the Department shall be signed in accordance with this Section."); § 122.28(d)(7) (certification requirement for signatures); § 122.41(o) ("Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation of the Department "shall certify that all information contained in such document is true."). The applicant is not entitled just to certify facts upon information and belief; the applicant is required to certify that she has made inquiry of the person responsible for gathering information and filling out the NOI.

[12] 24 S.C. Code Reg. 61-9 § 122.41(o) ("Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation of the Department "shall certify that all information contained in such document is true. All application facts certified to by the applicant shall be a considered a valid condition of the permit issued pursuant to that application.") (emphasis added).

The ALC reversed termination in part based on the ALC's conclusion that the truth could be discerned from information provided elsewhere in the application materials,[13] despite inaccurate statements of fact on the NOI. This conclusion is contrary to the regulation. The regulation provides grounds for termination if any relevant fact is misrepresented by the applicant, regardless of whether the correct information may be discernable elsewhere in the application.

B. The ALC erred in holding that an inaccurate statement of fact must be made with intent to deceive in order for there to be grounds to terminate permit coverage.

To the extent the ALC reads a "mens rea" requirement into Section 122.64(a)(2) of Regulation 61-9 by requiring an intent to deceive, this is a higher standard or burden of proof for termination of permits than the regulation intends and is error of law.[14] A review of the regulation's plain language reveals that no such requirement exists. A misrepresentation is "an assertion that does not accord with the facts." Black's Law Dictionary (9th Ed. 2009) ("A misrepresentation, being a false assertion of fact, commonly takes the form of spoken or written words. [....] An assertion need not be fraudulent to be a misrepresentation."). Though one of the definitions in Black's states

[13] The ALC reasoned that enough information was provided elsewhere in the application materials to give DHEC notice that this was the Jasper Station site. The ALC concluded that DHEC could have figured this out based in part on a comparison of TMS numbers provided throughout the application, or comparison of the longitude and latitude, or by comparing different data layers on a GIS program utilized by the Department. It is worth noting though, in paragraph 22 on page 14, the ALC found that Respondents' Exhibit 9 "clearly showed the relationship between the 18.4 acre parcel and the Jasper Station Tract." DTG did not disclose this document during the application process. Ryan Smith testified it was not included with the application. (R. p. 305).

[14] The ALC held that no misrepresentation occurred because the information an applicant is required to disclose on the NOI "was not hidden from the Department." In other words, the Court reasoned that DTG's failure to truthfully answer the questions asked on the NOI was irrelevant because the correct answers to those questions could be found elsewhere in DTG's application.

"[t]he act of making a false or misleading assertion about something, usually with the intent to deceive,"[15] the regulation at issue here does not require intent to deceive in order for an inaccurate statement of fact in the application to constitute grounds for termination of permit coverage. Regulation 61-9 only requires an inaccurate statement of a relevant fact in order for there to be grounds for termination.

This lack of an intent to deceive requirement is consistent with the plain language of § 122.64(a)(2) of Regulation 61-9 as well as the scheme of Regulation 61-9 as a whole. Regulation 61-9 contains very strict signatory requirements.[16] These requirements obligate the applicant to certify that the information submitted is true, complete, and accurate. The applicant is required to certify that it made inquiry of the persons responsible for gathering information and completing the NOI to ensure that the information is complete and accurate. Ignorance or inadvertence is not a defense to termination of permit coverage based on a misrepresentation.

As discussed above, facts certified to in the application become a condition of permit coverage. § 122.41(o). If an applicant fails to comply with a term of the permit, then the first ground for termination is also triggered. § 122.64(a)(1). Elsewhere in Regulation 61-9 and in the Pollution Control Act, stiffer repercussions, such as criminal

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[15] At the hearing, the Judge Matthews commented that she remembered the intent to deceive requirement as one of the nine elements of fraud from law school. **However, unlike the common law elements of fraud, Regulation 61-9 does not require proof of intent to deceive in order to terminate permit coverage based on a misrepresentation.**

[16] 24 S.C. Code Reg. 61-9 § 122.28(d)(3) ("Material submitted shall be complete and accurate"); § 122.28(d)(4) ("Any NOI form submitted to the Department shall be signed in accordance with this Section"); § 122.28(d)(7) (certification requirement for signatures); § 122.41(o) ("Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation off the Department "shall certify that all information contained in such document is true.").

convictions and civil fines, are provided when a misrepresentation is made by an applicant or permittee with intent to deceive.[17] Where DHEC does not feel that criminal charges or civil penalties are warranted, DHEC still has grounds to terminate permit coverage under § 122.64(a)(2). After all, if the permit is utilized by the permittee, then grounds would exist under § 122.64(a)(1) because terms of the permit would not be complied with.

Thus, to the extent the ALC required evidence of proof of an intent to deceive, this was an error of law. Claims of ignorance or inadvertence are not defenses to termination based on a misrepresentation. The regulation requires only a misrepresentation of a relevant fact.

C. The ALC applied the wrong legal standard for "relevant."

The ALC did not consider the correct identification of the property owner, permitting history, or the Department's issuance of notices "relevant" in the "context of determining whether cause exists for permit termination." (Order 24). In doing so, the ALC incorrectly applied a higher standard of relevance than required by law. Information is "relevant" when it displays "*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004) (emphasis added). This Court also has cited with approval the dictionary definition of relevant as "having a significant and demonstrable bearing on

[17] See § 122.41(k)(2): "The PCA provides that any person who **knowingly** makes any false statement, representation, or certification in any record or in any other document submitted or required to be maintained under this permit…shall, upon conviction, be punished by a fine of not more than $25,000 per violation, or by imprisonment for not more than two years, or both." (emphasis added); See also § 122.41(o)(2).

the matter at hand." State v. Lawton, 382 S.C. 122, 127, 675 S.E.2d 454, 457 (Ct. App. 2009).[18] Therefore, in the context of a permit application, information is relevant when it has *any* bearing or influence on the Department's decision on the permit. In other words, to find that DTG's misrepresentations were irrelevant, this Court would have to find as a factual matter that the misrepresentations caused *no* tendency or likelihood that the Department could have made a different decision regarding DTG's permit application had DTG provided accurate information. These findings were not made. In finding that the misrepresented information was not relevant, the ALC imposed a higher standard than the regulation requires for termination of permit coverage.

The ALC concluded that in order to be relevant, the information must be required by regulation. First, this is not the standard for relevance. While DHEC agrees that information is *per se* relevant if the information is required by regulation to be provided to DHEC, the definition of relevant is not limited to information required by regulation to be provided. Moreover, even using the ALC's standard, all of the information misrepresented by the applicant is required by Regulation 61-9. Section 122.21(f)(4) requires the applicant to provide information on property ownership status and Section 122.21(f)(4) requires a listing of all permits or construction approvals received or applied for under, among other programs, the NPDES program under the CWA. Moreover, Regulation 61-9 requires applicants to use forms provided by DHEC.[19] Applicants are

[18] *See* Merriam-Webster's Online Dictionary, "relevant" (last visited June 28, 2011) http:// www.merriam- webster.com/ dictionary/ relevant.

[19] See 24 S.C. Code Ann.Reg. 61-9 § 122.64(f) ("All applicants for NPDES permits shall provide the following information to the Department, using the application form provided by the Department.") (emphasis added); § 122.21(a)(2) ("Applicants for State-issued must use State forms which must require at a minimum the information listed in the appropriate paragraphs of this section.") (emphasis added); § 122.1(d)(1) ("Permit

required to completely, accurately, and truthfully complete the forms provided by DHEC.[20]

Thus, even using the improper standard utilized by the ALC, the ALC committed an error of law in failing to recognize that the regulation requires the applicant to provide the information requested on the NOI. Moreover, the ALC erred in raising the standard for termination beyond the standard of "relevant" as utilized by the regulation; relevancy means having any tendency to affect the outcome of the permitting decision.[21] The ALC did not make a finding that DTG's false statements of fact would have no tendency to affect the outcome of DHEC's permitting decision.

II. THE LEGAL ERRORS IDENTIFIED ABOVE WERE PREJUDICIAL; IF THE ALC HAD APPLIED THE CORRECT STANDARD TO THE FACTS FOUND, THEN THE ALC WOULD HAVE AFFIRMED DHEC'S TERMINATION OF DTG'S PERMIT COVERAGE.

A. DTG's Representation Of Property Owner Was A Misrepresentation Of A Relevant Fact

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application forms. Applicants for permits must submit their application on permit application forms designated by the Department."); § 122.28(b)(2)(i) ("Except as provided in paragraphs (b)(2)(v) and (b)(2)(vi) of this section, dischargers seeking coverage under a general permit shall submit to the Department a written notice of intent to be covered by the general permit. ... A complete and timely notice of intent (NOI) to be covered in accordance with the general permit requirements, fulfills the requirements for permit applications for purposes of [§§] 122.6, 122.21, and 122.26"); § 122.28(d)(1) ("An NOI shall be on forms as may be prescribed and furnished from time to time by the Department. An NOI shall be accompanied by all pertinent information as the Department may require...").

[20] 24 S.C. Code Reg. 61-9 §§ 122.28(d)(3) ("Material submitted shall be complete and accurate"); § 122.28(d)(4) ("Any NOI form submitted to the Department shall be signed in accordance with this Section"); § 122.28(d)(7) (certification requirement for signatures); § 122.41(o) ("Any person making application for a NPDES discharge permit or filing any record, report, or other document pursuant to a regulation off the Department "shall certify that all information contained in such document is true.")

[21] The ALC made no findings that the misrepresented information would have had no tendency to affect the outcome of the permit decision.

Section II(B) of the NOI, titled "Property Information," asks the applicant to list the site's Property Owner. (R. p. 766). The instructions for Section II(B) instruct the applicant to "list the complete, legal name of the current property Owner(s)." (emphasis added). DTG wrote "same as above" to answer Section II(B) of the NOI. (R. p. 787). The above line listed DTG as the Project Owner/Operator. The ALC found this to be a representation that DTG owned the site. The ALC found that DTG did not own the site. (Order 10-11). Instead, the ALC found that Jasper Station was the property owner. (R. p. 26). The ALC did not make a finding that if Jasper Station had been accurately listed then there would be no tendency to affect the DHEC's permit decision.

Moreover, such a finding would not be supported by the evidence. The only evidence as to whether this information would have had a tendency to impact the Department's decision on the permit was Ms. Nodolf's testimony. Ms. Nodolf testified that if the correct property owner had been listed, she would have seen their prior permit application for the Site in EFIS and that the Department was in the process of investigating land disturbance, including wetland fill, without a permit on the site. (R. p. 501). She testified that this would have resulted in additional reviews and would have affected DHEC's outcome on the permit application.[22] Her testimony was not rebutted. This makes the information relevant using the standard discussed above. The ALC erred in finding that this false statement of fact was not a misrepresentation of a relevant fact.

Moreover, since this information is required by regulation, it is relevant as a matter of law. The ALC's assertion that nothing in Reg. 61-9.122.21 or in the general permit requires the disclosure of the property owner's name is error. Section

[22] See Footnotes 26 and 27.

122.21(f)(4) specifically requires the applicant to disclose the site's "ownership status." The ownership status of the site was that Jasper Station owned it and DTG had entered into a purchase agreement with Jasper Station for the site. This fact was misrepresented. (R. p. 787). Moreover, Regulation 61-9 requires applicants to use the form provided by DHEC. The General Permit also requires the applicant to submit a complete NOI. The NOI requires the applicant to list the current property owner. Thus, the ALC's order is wrong when it states that this information is not required by regulation. Both the regulation and the general permit require the applicant to list the property owner. The property owner is relevant as a matter of law.[23]

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[23] In Durant v. S.C. Dept. of Health and Environmental Control, the circuit court affirmed the decisions of the ALC and the Coastal Zone Management Panel to deny Durant's critical area permit application for a dock near Brookgreen Gardens and Huntington Beach State Park. Durant v. South Carolina Dept. of Health & Envtl. Control et al., 2001-CP-22-248, Order Filed Nov. 12, 2002 (Cottingham, J.). In affirming the permit denial, the Circuit Court, the Honorable Edward Cottingham, ruled that DHEC "may properly deny any applicant that misrepresents a significant fact." Id. at 15. The applicant had represented that he was the sole owner of the lot to be attached to the proposed dock. Id. at 15-16. In fact, the applicant had a partner that also had an ownership interest in the lot. Judge Cottingham held that:

> "these misrepresentations are very important to the proper operation of the permitting process. Without the Petitioner's property being a party to this proceeding, OCRM, PRT, Brookgreen, the Administrative Law Judge division and this court system are all subject to another application from the Petitioner's partner related to this same lot. The interests of consistency and of administrative and judicial economy require that the Petitioner's partner be a party to the Petitioner's application and be bound by all decisions made with respect to that application. By incorrectly representing the state of title to the lot to be attached to the proposed construction, the Petitioner frustrated those interests. Similarly by [sic] representing incorrectly that he had title to the land that extended to the high water mark, the Petitioner prevented OCRM from notices as required of it by [regulation]. Because the Petitioner's application incorrectly represented facts that are essential to the fair and efficient administration of the permit system, OCRM's procedures, along with basic principles of fairness, authorizes the denial of the Petitioner's application."

Id. at 16-17. Judge Cottingham's decision was subsequently affirmed by this Court on other grounds. Durant v. South Carolina Dept. of Health and Environmental

The ALC also attempted to justify DTG's misrepresentation as reasonable because DTG is the project owner/operator and would have eventually become the property owner if the sale had closed when the work was performed. The ALC was persuaded by some examples Respondents provided that they thought to be similar practices.[24] While the ALC's approach to ask for the eventual property owner may be a reasonable approach if the ALC was the agency creating the form, the ALC does not create the form. The regulations require the applicant to use the form created by DHEC. The NOI is the form created by DHEC that DTG was required to complete. The applicant is required by regulation and the general permit to fill out the NOI completely, accurately, and truthfully. DHEC's form is the one that the regulation required the applicant to fill out, with complete accurate and truthful answers. The NOI requires the applicant to provide the current owner. What the ALC would ask for if the ALC was creating the form is irrelevant.

In addition, the ALC reasoned that it makes sense to list the Project Owner/Operator as the Property Owner since the permit will be issued to the Project

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Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). DHEC submits that the misrepresentations by DTG are even more significant than the misrepresentations by Mr. Durant.

[24] Respondents' title examiner conceded that DHEC would have had no way of knowing whether the representations in the examples provided by Respondents were false representations as to ownership. Respondents only came to such conclusion after reviewing an extensive volume of permit files and forwarding a large number of the files reviewed to a title examiner. DHEC neither employs a title examiner nor is authorized to do so. Moreover, as Justice Holmes explained, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, **whether it usually is complied with or not.**" Texas & P. Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623 (1903) (emphasis added). Here, what ought to be done is fixed by Regulation 61-9 and the General Permit, which require the applicant to fill out the form created by DHEC. This form requires the current property owner.

Owner/Operator. The form recognizes that the permit will be issued to the Project Owner/Operator, but it still requires the applicant to list the current property owner. Under this rationale, the answer to questions II(A) and II(B) would always be the same, rendering the second question redundant. If DHEC had intended that the project owner/operator would always be the property owner, DHEC would not have asked both questions.[25] Regardless, the NOI requires the applicant to list the current property owner. DTG misrepresented this information. (R. p. 787).

DTG's misrepresentation of the property owner on the NOI provides an independent ground for termination of coverage warranting reversal of the ALC's decision.

B. DTG's Representation That No Environmental Permits Had Been Applied For Or Obtained Was A Misrepresentation Of A Relevant Fact.

Section III(I) of the NOI requires the applicant to "list all state and federal environmental permits or approvals applied for or obtained for this site." (R. p. 766). The instructions for Section III(I) are clear. They warn that "if the provided information is inaccurate, NPDES coverage may be invalid." (Pets. Ex. 11). (R. p. 772). Moreover, the instructions direct the applicant "to see § 122.21(f) of regulation 61-9" and offer a link to the regulation. (R. p. 772). § 122.21(f) reiterates the requirement that an applicant list "all permits or construction approvals received or applied for under," among other permitting programs, "the NPDES program under CWA." DTG's NOI left Section III(I) blank. This represented that there had been no environmental permits applied for or obtained under any of the programs listed in § 122.21(f) of Regulation 61-9. The ALC

[25] See Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (stating it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something.")

found that Jasper Station had previously submitted an application for NPDES permit coverage for the site. If the ALC had applied the correct legal standard, the ALC would have concluded that DTG's answer to Section III(I) was a misrepresentation of a relevant fact.

The ALC did not make a finding that if the Jasper Station permit had been listed under Section III(I), it would have had no tendency to alter the decision DHEC made on DTG's application for NPDES permit coverage. This finding of fact would be required to reach a conclusion that the misrepresentation that there had been no permits applied for is not grounds for termination. The ALC did not make this finding because such a finding would not be supported by the evidence.

Moreover, as discussed above, Ms. Nodolf testified that if the Jasper Station permit had been listed in the NOI, she would have been aware of the permit and that DHEC was investigating land disturbance (including the fill of wetlands) without a permit on the Site.[26] (R. p. 562). She testified that she would have done additional

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[26] In her testimony, Ms. Nodolf, the stormwater section project manager primarily responsible for the review of DTG's application, explained that the NOI information is inputted into the Department's "Environmental Facility Information System" (EFIS), a computer database the Department uses to process permit applications. (R. p. 478). DHEC exhibit 37a displays the main EFIS screen for the DTG permit that is the subject of this action. Ms. Nodolf explained that her routine is to click the main screen's "site info" button, which brings up the screen shown in DHEC exhibit 37b. Next to the listed landowner is a "D" button, which brings up details about the landowner. This button loads a Company Update screen when clicked, showing important information concerning the entity listed as landowner. This information includes all permitting history related to the entity, in addition to any violations or enforcement actions levied against it. (R. p. 489). Because the NOI listed DTG as the property owner, DTG was shown as such in screen 37b. Accordingly, the company update for DTG came up when Ms. Nodolf clicked the "D" button. (DHEC Ex. 37h). Ms. Nodolf explained that after looking at DTG's permit history (DHEC Ex. 37i) she was satisfied that none of DTG's existing permits implicated concerns for this site. (R. p. 492-93).

reviews and would have reached a different decision on DTG's permit application.[27] This was the only evidence addressing what tendency this information would have had on the Department's decision had the information not been misrepresented on the NOI.[28] Using the test provided by the ALC, since this information is required by regulation,

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DTG's misrepresentation of this relevant fact prejudiced the Department. If Jasper Station was accurately listed as the property owner on the NOI, then Jasper Station would have appeared as the landowner in EFIS. Had this been the case, then the Company Update for Jasper Station (rather than for DTG) would have loaded when Ms. Nodolf clicked the "D" button. (DHEC Ex. 37c). (R. p. 563). The company update shows the entity's permitting history and enforcement history, including Jasper Station's prior permit application (which had been denied by DHEC) and an ongoing investigation for land disturbance without a permit. (DHEC 37c, 37d, 37e). Further, Jasper Station's Company Update would have included a violation, which in turn would have informed Ms. Nodolf that the Department was investigating an unpermitted land disturbance at that site. (DHEC 37c, 37f). The violation entry was created and entered into EFIS on February 12, 2009, prior to Nodolf's review of DTG's NOI in late March of 2009. Ms. Nodolf would have been aware of both Jasper Station's violation and suspect permitting history if it was correctly listed as the Property Owner on the NOI. As Ms. Nodolf explained, this would have prompted additional reviews and a different decision on the permit. Because the Department likely would have wanted to know this fact in determining whether to issue its permit, the fact is relevant. Thus, DTG's misrepresentation of this relevant fact provided proper grounds for permit termination.

[27] DHEC reviews the application for NPDES permit coverage for consistency with the state Coastal Management Program (CMP). S.C. Code Ann. § 48-39-80(B)(11); *Spectre, LLC v. S.C. Dep't of Health and Envtl. Cntrl.*, 386 S.C. 357, 688 S.E.2d 844 (2010) (holding the CMP governs isolated wetlands and that coastal zone consistency certification is necessary in order to obtain NPDES permit coverage in the coastal zone). There are policies in the CMP governing commercial activities in wetlands. In order to obtain coastal zone consistency certification, the applicant must demonstrate that there are no feasible alternatives and that the activity is water dependent. *CMP, Ch. III(C)(3)(IV)(1)(b) ("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.* Since these wetlands are valuable habitat for wildlife and plant species and serve as hydrologic buffers providing for storm water runoff and aquifer recharge, commercial development is discouraged in these areas. The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered.") (CMP, p. III-40) (emphasis added).

[28] The Order finds in paragraph 33 that there may have been some lack of conformity among DHEC staff in how they referenced the Jasper Station permit on internal documents. This is irrelevant, as DTG made no effort to list the Jasper Station permit applications in Section III(I) as instructed.

Jasper Station's prior NPDES permit application is relevant as a matter of law and it was a misrepresentation for DTG to represent that there had been no prior application.

The ALC justified DTG's misrepresentation of the site's permitting history by finding that DTG may have correctly answered Section III(B) of the NOI. Section III(B) of the NOI asks whether a project is properly considered part of a Larger Common Plan (LCP). (R. p. 766). According to Department instructions regarding Section III(B), the applicant is specifically asked to list the previous state permit numbers of other phases of the LCP. (R. p. 772). DHEC has not challenged the accuracy of DTG's answer to Section III(B) of the NOI. Whether DTG correctly answered Section III(B) of the NOI has no bearing on whether DTG misrepresented its answer to Section III(I). The ALC's rationale renders one of the two questions on the NOI redundant.[29] This was an error of law.

Since the regulations and the form require DTG to list Jasper Station's prior application for NPDES coverage, DTG's false representation that there were no such applications is an independent ground for termination of permit coverage warranting reversal of the ALC's decision.

C. DTG's Representation That No Notice To Comply Or Notice Of Violation Had Been Issued Was A Misrepresentation Of A Relevant Fact

Section III(G) of the NOI requires DTG to inform DHEC if DHEC has issued any notice of violation or notice to comply for the site. (R. p. 766). The instructions state "select yes if DHEC has issued a notice to comply or notice of violation for the site or any site within the LCP. Provide additional information about the notice (e.g., order

[29] *See* Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (stating it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something."

number) and a copy of correspondence with DHEC regarding the notice." (R. p. 772). DTG checked "No." (R. p. 787). The ALC found that the November 5, 2008 warning notice from DHEC was issued for the site. (R. p. 27). However, the ALC found that "nowhere in the letter is it designated as a "Notice of Violation or Notice to Comply." (R. p. 27). DHEC acknowledges that the caption of the November 5 letter is a "Warning Notice," and not a "Notice of Violation" or "Notice to Comply." But the ALC's reasoning puts form over substance. The law puts substance over form. See South Carolina Ins. Co. v. Barlow, 301 S.C. 502, 508, 392 S.E.2d 795, 798 (Ct. App. 1990) ("To hold otherwise, would amount to a sacrifice of substance to form.").

The substance of the letter clearly puts Jasper Station on notice that Jasper Station was in violation of the Pollution Control Act and must comply with the law:

> Be advised that based on recent inspections conducted on October 15, 2008 and October 23, 2008, the Department has determined that land disturbing activities have been initiated on your site without NPDES coverage for storm water discharges. According to Water Pollution Control Permits, 24 S.C. Code Ann. Regs. 61-9.122.26(a) (Supp. 2007), you are required to apply for and obtain a [NPDES] permit prior to initiating land-disturbing activity. Please note that such actions are considered unlawful and place you in violation of the Pollution Control Act, S.C. Code Ann. Section 48-1-90(a)(2008).

Pets. Ex. 32 (Nov. 5 letter) (emphasis added). (R. p. 888). The above language clearly put Jasper Station on notice that it was in violation of the Pollution Control Act. The letter also noticed Jasper Station to comply with the Pollution Control Act:

> You are hereby requested to discontinue any work activity at this site other than installation and maintenance of storm water, sediment and erosion control measures as directed by your design engineer for stabilization...[a]s indicated in my letter dated October 28, 2008, this matter is being referred to Enforcement Staff for further consideration. Please respond within three (3) working days to this office...with a time frame to bring this project into compliance.

Pets. Ex. 32 (Nov. 5 letter). (emphasis added). (R. p. 888). It cannot reasonably be disputed that the existence of this letter is not relevant to a subsequent application to conduct land disturbance on the very same site while DHEC investigates land disturbance (including wetland fill). This representation is an independent ground for termination of permit coverage warranting reversal of the ALC's decision.

D. Alternatively, DTG's Failure To Disclose The November 5, 2008 Warning Notice Was A Failure To Disclose All Relevant Information.

Even if the Court puts form over substance and concludes that Section III(G) did not contain a misrepresentation because the title of the November 5 letter was not "Notice to Comply" or "Notice of Violation," it is a relevant fact that was not disclosed during the permitting process. DTG did not include the November 5, 2008 letter with any of its application materials. It cannot be argued that the November 5 letter was not a relevant fact. In addition, in January 2009, Thomas & Hutton (DTG's and Jasper Station's mutual permitting consultant) prepared an exhibit that showed the location of the wetland in relation to the entirety of the Jasper Tract and the Site. (Pets. Ex. 9). (R. pp. 751-752). The ALC found this to be particularly useful in showing the relationship between the DTG site, the Jasper Station permit application, and the investigation into land disturbance without a permit. Ryan Smith testified that he did not include Exhibit 9 in the permit application. (R. p. 305). Thus, the alternative ground under section 122.64(a)(2), "the permittee's failure in the application or during the permit issuance process to disclose full all relevant facts," exists as an independent basis to reverse the ALC's decision.

E. The Fact That There Are Now Wetlands On The Site Further Reveals The Relevance of The Misrepresentations In Sections II(B), III(I) and III(G), and Also Provides An Independent Ground For Termination.

The ALC concluded that "the issue of the sufficiency of the information provided by DTG in Section IV of the NOI related to wetlands is not before [the] Court." (Order pg. 21). (R. p. 34). The ALC did not consider the wetlands on the site in determining the relevance of the other misrepresented information. While DHEC agrees that it could bring another termination action against DTG based on the wetlands, DHEC submits that the ALC erred in not considering the wetlands. First, the wetland issues are probative in further showing the relevance of the information misrepresented in Sections II(B), III(G), and III(I) of the NOI. In addition, the fact that there are now wetlands on the site provides an independent basis for termination and the ALC was free to terminate on that basis. The ALC erred in holding otherwise.

DTG represented in Section IV of the NOI that there were no wetlands on the site. (R. p. 787). This representation was based on a January 16, 2009 letter from the Corps, a letter which was obtained only after Malphrus Construction reportedly cleared, mucked, and discharged some fill material into the wetland.[30] (R. p. 776). Malphrus Construction, owned by the same three brothers that own DTG, conducted the land disturbing activities pursuant to a contract Malphrus had with Jasper Station; the work was done some time after DHEC's September 30, 2008 denial of Jasper Station's NPDES permit application. DHEC was in the process of investigating Jasper Station's land disturbance activities on the site when the new letter was obtained from the Corps and when the DTG NOI was submitted. Though DHEC did not terminate based on the representations in Section IV, the wetland issues help show the relevance of the other information misrepresented. Regardless of the accuracy of DTG's NOI when it was submitted in February 2009,

[30] Malphrus was instructed by Jasper Station to only fill the low areas of the wetland.

Respondents stipulated that DHEC's Jeff Thompson observed wetlands during site visits on July 28, 2009 and December 17, 2009. (R. pp. 568-569).

Though DHEC requires applicants to provide a Corps' wetland delineation, DHEC is not restricted to wetlands delineated by the Corps of Engineers; DHEC's jurisdiction under the Pollution Control Act and Coastal Zone Management Act extends to waters of the state, which includes isolated wetlands not subject to the jurisdiction of the Corps under the Clean Water Act. See Georgetown County League of Women Voters v. Smith Land Co., Inc. -- S.C. --, -- S.E.2d --, 2011 WL 2682437, 1 (2011) (holding that the Pollution Control Act specifically defines the waters subject to regulation under the Act to include isolated wetlands, and that DHEC has jurisdiction over such wetlands under the Pollution Control Act regardless of Corps' regulation over such wetlands under the Clean Water Act.); Spectre, LLC v. S.C. Dep't of Health and Enviro. Cntrl., 386 S.C. 357, 688 S.E.2d 844 (2010).

DTG was informed that the NOI would be unlikely to get much scrutiny if they could represent that there were no wetlands on the site. Ms. Shahid wrote the following in an email to Ryan Smith on October21, 2008:

> Here are my suggestions on how to compete [sic] the NOI:
>
> Section II.B: Previous state permit/file number: 27-02-02-02/27-06-08-01
>
> (Ryan included the previous Red Oaks number and I added the previous Jasper Station number.)
>
> Section IV. Waterbody Information: "No" Jurisdictional Wetlands
> "No" Non-Jurisdictional Wetlands
> But-in order to indicate No" on the wetlands section we need a new "No Wetlands" letter from the Corps.
> [...]
> This would constitute full disclosure to OCRM: including the Jasper Station permit # and getting the Corps to revise their earlier wetland letter.

> It might trigger some reaction from OCRM, but *it is also possible that the application would go through without too much scrutiny since there will be no wetland impacts involved.*

(DHEC Ex. 11) (emphasis added). (R. p. 1136). DTG did not follow Ms. Shahid's advice and left the Jasper Station permit off the NOI. DTG also did not follow Ryan Smith's advice in his October 16 letter where he suggested that they "indicate wetlands exist on site, submit the current plat and JD, and accompany the package with a letter stating what events have previously occurred." (R. p. 1134 and p. 562). Instead, DTG procured a new letter from the Corps, indicated no wetlands, and misrepresented the property owner, misrepresented that no environmental permits had been applied for, and misrepresented that no notice to comply or warning notice had been issued. In addition to the "no wetland" representation resulting in a decreased level of scrutiny, DTG's other three misrepresentations (of owner, permitting history, and enforcement history) decreased the likelihood that DHEC would discover that the no wetland letter was obtained only after wetlands were illegally filled. If any of this information had been accurately represented in the NOI, Ms. Nodolf would have pulled the Jasper Station permit and known that the no wetland letter was a result of Jasper Station's unlawful fill of the wetland. This would have triggered additional review.[31] (R. p. 527).

Several cases hold that the ALC is not restricted to the agency's action in a contested case. See Brown v. S.C. Dept. of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002) ("Although this case reached the ALJ in the posture of an appeal, the ALJ was not sitting in an appellate capacity and was not restricted to a review

[31] See Footnotes 26 and 27.

of OCRM's permit decision.") (citing Reliance Ins. Co. v. Smith, 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997)).

When it came to light that there are still wetlands on the Site, based on DTG's stipulation that Jeff Thompson observed wetlands on the Site, an independent ground for termination arose. (R. p. 569). Since DTG certified that there are no wetlands on the site, it is a condition of DTG's permit coverage that there be no wetland on the site. See 24 S.C. Code Ann. Reg. 61-9, § 122.41(o). Based on Respondent's stipulation that there are wetlands on the site, this condition of permit coverage cannot be complied with. DTG's NPDES permit coverage does not authorize the discharge of stormwater or fill material into wetlands or waters of the state. Ryan Smith agreed that DTG's application did not seek to discharge stormwater or fill into wetlands. Rather than sending the applicant and DHEC back through the administrative process, the ALC was free to sustain DHEC's termination of DTG's permit coverage on that basis alone. Therefore § 122.64(a)(1) provides an independent ground for termination, warranting reversal of the ALC's decision.

III. THE ALC COMMITTED REVERSIBLE ERROR BY NOT GRANTING THE DEPARTMENT'S MOTION TO DISMISS SINCE THE PERMITTEE NO LONGER HAS AN INTEREST IN THE SITE.

Prior to the hearing, DHEC filed a motion to dismiss because this dispute was rendered moot by DTG's April 8, 2010 termination of the purchase agreement with Jasper Station. (DHEC Ex. 10). (R. p. 118). Jasper Station's 30(b)(6) designee testified that Jasper Station did not know whether DTG had an interest in negotiating a new purchase agreement if DHEC's termination was reinstated. (R. p. 1110). He testified that it would be speculative to guess and that those conversations had not been fruitful.

(R. p. 1114). DTG was the only party to the permit—a contract between DHEC and DTG. Thus this dispute has been rendered moot as to DTG. Jasper Station does not have standing to revive it. Jasper Station cannot force DHEC to enter into a contract with another party who has no interest in the property.

In order for a litigant to have standing to bring an action, it must "be a real party in interest, *i.e.*, a party who has a real, material, or substantial interest in the subject matter of the action..." Powell ex. Rel. Kelley v. Bank of America, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (Ct. App. 2008); Commander Health Care Facilities, Inc. v. SCDHEC, 370 S.C. 296, 301 634 S.E.2d 664, 666, (Ct. App. 2006). At the bare minimum, constitutional standing requires that the litigant sustain a direct injury or the immediate danger that a direct injury will be sustained. Id. The South Carolina Supreme Court has articulated a stringent test for standing. To prove standing, DTG carries the burden of establishing that (1) it suffered an injury in fact; (2) the injury and the conduct complained of are causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Id.

Neither DTG nor Jasper can meet the three elements of standing. Powell provides a helpful illustration of this Court's refusal to grant standing when a business has no ownership in an entity. In Powell, Bank of America (BOA) appealed an order apportioning interpleaded funds. The Court of Appeals held that BOA lacked standing to appeal the order, taking care to emphasize that BOA had no ownership interest in the interpleaded funds. Nonetheless, BOA argued that it had standing because a different apportionment to one of the parties would reduce its liability in the underlying tort action.

The Court of Appeals disagreed, holding that such a tangential connection fell "far short of the 'injury in fact' standing requirement." Id.

Like BOA, Jasper Station's interest in hoping to have a better basis to negotiate a new purchase agreement with DTG or some other entity is too tangential a connection to provide standing. The lack of DTG's NPDES permit does not preclude Jasper Station from entering a purchase agreement with DTG or some other individual and subsequently submitting a new NPDES permit application that does not contain misrepresentations of fact. Thus, there was no justiciable controversy and the ALC erred by failing to dismiss the Department's Motion to Dismiss based on DTG's lack of standing.

IV. THE ALC DEPRIVED DHEC OF FULL DISCOVERY BY DENYING DHEC'S MOTION TO COMPEL PRODUCTION OF TWO DOCUMENTS WHICH WERE IMPROPERLY WITHHELD UNDER AN INAPPLICABLE CLAIM OF PRIVILEGE.

DHEC filed a motion to compel production of two documents that were improperly withheld by Respondents during discovery. (R. p. 127). The ALC's ruling from the bench that these documents were subject to privilege is contrary to law. In doing so, the ALC deprived DHEC of discovery provided by the rules.

"Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 186, 708 S.E.2d 787, 795 (Ct. App. 2011) (citing Samples v. Mitchell, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997)). "Where these rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required." Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2005).

A discovery violation occurred in this case because DHEC was entitled to production of the two documents under the discovery rules, but Respondents improperly withheld these two documents. After serving requests for production and a subpoena for documents, Respondents produced a privilege log on August 26, 2010. (R. p. 127). Counsel for Respondents and Appellant consulted and came to agreement on most of the documents, but Respondents counsel continued to withhold two documents under a claim of work product privilege. (R. p. 127). The ALC denied DHEC's motion to compel but admitted the documents under seal as Court's Exhibit 1. (R. p. 566). DHEC asserts that whatever work product protection may have applied was waived when the documents were shared with Ryan Smith. *See Privilege Log attached to Motion to Compel.*

The work product doctrine "protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party." Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010); See Rule 26(b)(3), SCRCP; Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385(1947). It is a general rule that "disclosure of privileged information waives the applicable privilege." See Tobaccoville, 387 S.C. at 295, 692 S.E.2d at 531. Assuming that the two documents were created in anticipation of litigation, they were shared with Thomas & Hutton Engineering, an entity that Respondents and Respondents' counsel lacked control over.[32] This constituted waiver of the privilege.

[32] DHEC sought documents from Respondents that were in the possession of Thomas & Hutton. Respondents' trial counsel instructed DHEC that a subpoena to Thomas & Hutton was necessary to obtain their production. Thomas & Hutton had separate counsel aid in the production of documents.

Because the ALC denied DHEC discovery to which it was entitled, prejudice is presumed and the burden is on Respondents to show the lack of prejudice to avoid reversal.

V. THE ALC ERRED BY TAKING JUDICIAL NOTICE OF ALLEGATIONS BY JASPER STATION IN PLEADINGS IN A CIVIL ACTION PENDING IN COLLETON COUNTY AND TREATING THOSE ALLEGATIONS AS FACT.

The ALC's Order took judicial notice of allegations contained in the litigation between Jasper Station and the Department pending before the Colleton County Court of Common Pleas (circuit court). (R. p. 16). The ALC treated Jasper Station's allegations as facts. While the existence of the circuit court action is relevant to the case at hand in that it brings various DTG misrepresentations to light,[33] the ALC cannot make findings of fact based upon allegations found in pleadings. Judicial notice "takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge." Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) (citing State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935)). A court may not take judicial notice unless the fact in question is either (1) of such common or general knowledge that it is accepted by the public *without qualification or contention*, or (2) its accuracy is capable of verification by reference to readily available sources of *indisputable reliability*. Moss, 267 S.C. at 370, 228 S.E.2d at 108 (emphasis added). Until an allegation in a pleading is actually litigated and sufficiently proven, it remains just that: an allegation and not a fact.

[33] The pending litigation filed by Jasper Station is relevant because it proves that: (1) Jasper Station had applied for NPDES permit coverage for the same site that is in issue in this case, and that DTG misrepresented a relevant fact when it certified (in Section III(I) of the NOI) that no prior application for NPDES permit coverage existed; and (2) the Department had issued a notice of violation and to comply for the site.

Using the circuit court action's allegations, the ALC made findings that have no bearing on whether cause exists for permit termination. For example, the Order found that DHEC took no action on Jasper Station's permit application despite Jasper Station repeatedly notifying DHEC that it claimed a permit by operation of law. (Order pg 8, paragraph 2). (R. p. 21). This finding is representative of the Order's prejudicial recitations and findings of fact based on the pleadings in the pending Jasper Station action.[34] The ALC's taking judicial notice of allegations as a basis for a finding of fact is error.

The allegations contained in the circuit court complaint cannot meet the standard for applying judicial notice articulated in Moss. First, the allegations may not be judicially noticed unless they are of such common or general knowledge that the public accepts them "without qualification or contention." Moss, at 370. The public cannot accept the Jasper Station allegations as true. Jasper Station's circuit court complaint simply makes allegations, which are "formal statement[s] of factual matter[s] as being true or provable, *without [their] having yet been proved.*" Black's Law Dictionary (9th Ed. 2009) (emphasis added). Because the allegations are currently being contested in a judicial proceeding, they cannot be accepted without qualification or contention. Second, the allegations may not be judicially noticed unless their accuracy can be verified by sources of "indisputable reliability." Moss at 370. Allegations in a complaint do not have the requisite indisputable reliability. In fact, they possess no indicia of reliability—that is why their veracity is being disputed in the circuit court action. Moreover, the timeliness of DHEC's actions on Jasper Station's permit application has no bearing on

[34] See pgs 3-4 of the Order.

DHEC's termination of DTG's permit. DHEC asks that these findings be vacated and the matter reversed.

Conclusion

The General Assembly charged the Department with administering, among others, the Pollution Control Act, the Stormwater Management and Sediment Reduction Act, and the Coastal Zone Management Act. Each Act DHEC administers includes a charge to DHEC to protect the public health and environment by regulating certain activities. Many of the statutes DHEC administers requires persons desiring to conduct activity in environmentally sensitive areas to obtain a permit or other approval from DHEC. DHEC's permitting process is public and transparent. It attempts to strike a balance between protecting the health and facilitating progress. It requires public notice of the permit application and allows members of the public and other resource agencies to provide written comment and provides applicants and other interested parties rights of appeal.

An integral part of this process is the requirement that the applicant provide full, complete, and accurate information to the Department. § 122.64. This obligation presents both the Department and the interested public with the opportunity to review an application and make comments and decisions that comport with the substantive requirements of the law and the facts on the ground. As the South Carolina Supreme Court recently stated in S.C. Coastal Conservation League v. S.C. Dept. of Health and Envtl. Control, this process of full disclosure is the linchpin that allows the Department to effectuate its mandated mission:

> DHEC is responsible for managing the welfare of our public health systems and environment. *In discharging these duties, DHEC has*

> *implemented practices and procedures which foster transparency and full disclosure in all matters regarding its regulatory authority.* To this end, DHEC has enacted various notification regulations ...
>
> Regulation 61–101 serves to further DHEC's policy goals including providing notice to the public, fostering openness, and keeping the public informed about important environmental decisions. ...

390 S.C. 418, 429-30, 702 S.E.2d 246, 252-53 (2010) (emphasis added). Regulation 61-9 fosters the policies of the Pollution Control Act in part by requiring applicants seeking NPDES permit coverage to use the forms provided by DHEC and to answer the questions on the forms completely and accurately and with full disclosure. This facilitates DHEC's job of processing the permit as well the ability of the public to review public notices and comment on an application within the short time frame provided for reviews. Permit coverage may be terminated if the form contains a misrepresentation of a relevant fact or if information is not fully disclosed. DHEC's ability to effectively regulate is obfuscated when applicants submit application forms that contain misrepresentations of fact. Knowing the property owner, permitting history, and enforcement history of a site are relevant facts that enable DHEC to meet its statutory obligations when acting on permit applications. The ALC's rationale that it is acceptable to misrepresent this information on the NOI so long as there are latent clues elsewhere in the application materials is contrary to the clear language of Reg. 61-9 § 122.64(a) and the purpose and policies of the Pollution Control Act. Each of DTG's misrepresentation on the NOI provides an independent basis to reverse the ALC's decision. For the reasons stated herein, DHEC respectfully requests that the Court reverse the ALC's decision and reinstate DHEC's decision to terminate DTG's permit coverage.

Respectfully submitted,

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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Charleston, South Carolina
January 17, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Administrative Law Court Docket No. 10-ALJ-07-0217-CC

DTG Holdings, LLC and Jasper Station Associates, LLC.....Respondents,

vs.

South Carolina Department of Health and Environmental Control.....Appellant.

CERTIFICATE OF MAILING

I certify that I have placed the ***FINAL BRIEF OF APPELLANT*** in the U.S. Mail, First Class, With Proper Postage Affixed, for filing with the Court and service on Respondents, addressed as follows:

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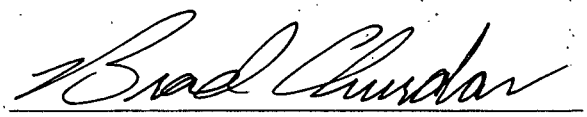

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