

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

ORIGINAL

Appeal from the Administrative Law Court
Hon. Carolyn C. Matthews, Administrative Law Judge
ALC Docket No.: 10-ALJ-07-0217-CC

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SC Court of Appeals

DTG Holdings, LLC and
Jasper Station Associates, LLC,

Respondents,

v.

South Carolina Department of Health
and Environmental Control,

Appellant.

RESPONDENTS' FINAL BRIEF

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I. STATEMENT OF ISSUES ON APPEAL

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7. Whether There Are Any Independent Grounds To Support A Termination Of The Permit Coverage?

II. STATEMENT OF THE CASE

This appeal arises from a contested case which originated when the Appellant, the South Carolina Department of Health and Environmental Control (“SCDHEC” or “DHEC”), terminated permit coverage (R.p.14; R.p.51, para. 45; R.pp.809-811) obtained by the Respondents, Jasper Station Associates, LLC (“Jasper Station) and DTG Holdings, LLC (“DTG”). (R.p.14; R.pp.803-807).

Jasper Station owns certain real property located in Hardeeville, Jasper County, South Carolina, described as 18.4 undeveloped acres and bearing TMS 080-00-03-065 (the “18.4 Acre Parcel”). (R.p.14; R.p.15; R.pp.590-602; R.pp.603-702). On 8 April 2008, Jasper Station entered into a Purchase Agreement with DTG for the purchase of the 18.4 Acre Parcel.¹ (R.pp.14-15; R.pp.590-602; R.pp.1144-1147). Pursuant to the Purchase Agreement (R.pp.590-602; R.pp.1144-1147), DTG submitted an application to SCDHEC on 10 February 2009, seeking permit coverage for the anticipated stormwater discharges arising from construction, under SCDHEC’s General Permit identified as SCR100000. (R.pp.590-602; R.pp.603-702). DTG sought permit coverage for the project it described as Red Oaks Plaza Phase 3. (R.pp.590-602; R.pp.603-702).

SCDHEC granted the permit on 27 March 2009 (R.p.14; R.pp.803-807), but on 21 August 2009, SCDHEC notified DTG it intended to terminate permit coverage and did so as of 22 December 2009. (R.p.14; R.p.51, para. 45; R.pp.809-811). The underlying contested case challenging termination was filed on 21 January 2010. (R.pp.72-77). The South Carolina Administrative Law Court (“ALC”) conducted

¹ The Purchase Agreement was terminated prior to the ALC hearing. (R.p.1135). However, under the terms and conditions of the Purchase Agreement (R.pp.1144-1147), upon termination Jasper Station retains all entitlements obtained for the property, which includes the entitlements arising from the ALC’s reinstatement of permit coverage. (R.p.1144, para. 3).

hearings on 1 September 2010, and 20 October 2010. (R.pp.249-565). By order issued 11 February 2011 (R.pp.14-38), the ALC reversed SCDHEC's termination and reinstated the permit coverage for DTG. (R.pp.14-38).

SCDHEC filed its Motion to Reconsider and Alter or Amend on 28 February 2011. (R.pp.154-173).² The ALC issued an order denying SCDHEC's Motion to Reconsider and Alter or Amend on 5 May 2011. (R.p.42). This appeal followed.

III. STATEMENT OF THE FACTS

This appeal addresses procedures related to SCDHEC's stormwater permitting program, administered by SCDHEC's Bureau of Water ("BOW") and the Office of Ocean and Coastal Resource Management ("OCRM"). (R.p.14). In accordance the Clean Water Act,³ National Pollutant Discharge Elimination System ("NPDES") permits are required for stormwater discharges. (R.pp.35-36, paras. 7-8). SCDHEC administers the NPDES permit program in South Carolina. (R.p.19).⁴ SCDHEC has promulgated regulations governing stormwater discharges arising from construction activities. (R.pp.19-20).⁵ To implement its authority to regulate stormwater discharges arising from construction activities, SCDHEC adopted the "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" (R.p.36, para. 8;

² The parties consented to waive the deadlines provided for in the Rules of Procedure for the Administrative Law Court. Rule 29(D), RPALC, affords a party 10 days from the date of notice of an Order to seek reconsideration, and requires that the ALC act within 30 days on the motion.

³ See 33 U.S.C. § 1342 (Thomson Reuters West 2010).

⁴ See 33 U.S.C. § 1342(b) (Thomson Reuters West 2010).

⁵ See S. C. Code Reg. § 61-9.122.26 (Thomson Reuters West 2009).

R.pp.835-887), identified as Permit No.: SCR100000 (the "General Permit").⁶ A party must obtain permit coverage under the General Permit prior to commencing any construction and/or any land-disturbing activities.

In accordance with S.C. Code Reg. § 72-305(M): "*Upon receipt of a completed application for sediment and stormwater management, the appropriate plan approval agency shall accomplish its review and have either the approval or review comments transmitted to the applicant within 20 working days. If notice is not given to the applicant or if action is not taken by the end of the 20 working day period, the applicants plan will be considered approved.*" This regulation is also included in the General Permit as a term and condition. (R.p.841).

This regulation is significant for understanding of the underlying dispute between the parties. The 18.4 Acre Parcel is part of a parent tract consisting of approximately 88 acres owned by Jasper Station (the Jasper Station Tract" or the "Parent Tract"). (R.p.15). In a dispute presently pending in Colleton County Circuit Court between Jasper Station and SCDHEC (R.pp.44-60),⁷ Jasper Station alleges SCDHEC failed and refused to act on a stormwater permit application for the Parent Tract pending before SCDHEC for more than two years and, therefore, Jasper Station had permit coverage by default. (R.pp.48-50, paras. 25-39; R.p.51, para. 47).⁸ Consequently, Jasper

⁶ The General Permit combines the requirements of S.C. Code Reg. § 61-9 governing NPDES permits and S.C. Code Reg. §72-300 governing stormwater discharges and the obligation to design a Storm Water Pollution Prevention Plans (the "SWPPP"). (R.pp.835-887).

⁷ See Jasper Station Associates, LLC v. SCDHEC (Colleton County Court of Common Pleas, Civil Action No. 2010-CP-15-0093) (R.pp.44-64).

⁸ See S.C. Code Reg. § 72-305(M) and the General Permit's terms and conditions. (R.pp.835-887).

Station was authorized to conduct land disturbing activities on the 18.4 Acre Parcel,⁹ to prepare the site for sale to DTG. (R.p.50, para. 41). These land disturbing activities consisted of clearing, mucking, and filling portions of the 18.4 Acre Parcel, including six acres of isolated, non-federally jurisdictional freshwater wetlands located within the 18.4 Acre Parcel. (R.p.47, para. 22).¹⁰

As is alleged in the Colleton County pleadings (R.pp.44-60), which the ALC noted, in mid-2006, Jasper Station submitted a request for permit coverage to undertake land disturbing activities on the Parent Tract under the General Permit (R.p.47, para. 21 – R.p.48, para. 24)¹¹ and repeatedly requested SCDHEC take action and/or update Jasper Station on the status of the request. (R.pp.48-50, paras. 25-37). Jasper Station sought to clear, muck, fill, and restore to original grade the 31 acre isolated, non-jurisdictional wetland located within the Parent Tract. (R.p.47, para. 22). SCDHEC refused to act on the permit coverage request for almost a year, at which point, by May 2007, Jasper Station claimed it had obtained permit coverage by default. (R.p.50, para. 39; R.p.51, para. 47). In the third quarter of 2008, Jasper Station took measures to eliminate approximately six acres of wetlands located within the 18.4 Acre Parcel which is the subject of this appeal. (R.p.51, para. 48).

⁹ The 18.4 Acre Parcel was part of the larger Parent Tract and, in turn, covered by the default authorization permit authorization for stormwater discharge.

¹⁰ The United States Army Corps of Engineers reviewed the 88 acre parent tract and concluded, by letter dated 9 February 2006 (known as a "Jurisdictional Determination" or "JD"), the Parent Tract contained 31.17 acres of federally -defined freshwater wetlands which were not subject to the Corps of Engineers' jurisdiction under the Clean Water Act. (R.pp.827-833). The 18.4 Acre Parcel included six acres of non-jurisdictional wetlands, part of the 31.17 acres referenced in the Corps of Engineers' 9 February 2006 JD.

¹¹ This is known as a "Notice of Intent" or "NOI".

On 16 January 2009, the Corps of Engineers issued a JD, limited to the 18.4 Acre Parcel, and concluded that property did not contain any defined wetlands areas. (R.pp.776-784). DTG, after receiving this JD, submitted its NOI and supporting documentation to SCDHEC in order to obtain General Permit coverage for Red Oaks Plaza Phase 3. (R.pp.787-788). SCDHEC issued General Permit coverage to DTG. (R.pp.803-805).¹² When SCDHEC later discovered the 18.4 Acre Parcel was part of the Parent Tract, SCDHEC initiated the permit termination process. (R.pp.809-811). SCDHEC's failure to note the connection between the 18.4 Acre Parcel and the Jasper Station Parent Tract, however, did not result from any misrepresentations and/or lack of any disclosure by either Jasper Station or DTG (R.pp.19-21; R.p.37) and, therefore, SCDHEC's permit termination was improper.

A. Contents of NOI and Supporting Documentation

DTG hired a consulting firm to design its SWPPP and to submit its request for permit coverage under the General Permit to SCDHEC. (R.pp.603-702). Ryan Smith, a professional engineer employed by Thomas and Hutton Engineering Company's Savannah, Georgia office prepared DTG's submittal. R.p.268, line 8 – R.p.281, line 21; R.pp.603-702). On 9 February 2009, Darrel K. Callaway, who worked under Ryan Smith's supervision, submitted a NOI to SCDHEC. (R.pp.603-702). The NOI contained (a) a set of site development plans, (b) a Plan Review Checklist, (c) the applicable filing fee, (d) a copy of the "*Permanent Stormwater System Maintenance and Responsibility Agreement and Plan*," (e) a Stormwater Management model and report, (f) the United

¹² SCDHEC apparently did not realize the 18.4 Acre Parcel was part of Jasper Station's Parent Tract. (R.p.37).

States Army Corps of Engineers' 16 January 2009 Jurisdictional Determination, (g) a digital project boundary for the 18.4 Acre Parcel, and (h) the applicable maps. (R.p.330, lines 1-15; R.pp.603-702).

DTG made this submission for Red Oaks Plaza Phase 3. (R.pp.603-702). The 18.4 Acre Parcel was contiguous to a commercial development owned by entities related to DTG and known as Red Oaks Plaza. (R.pp.603-702). The 18.4 Acre Parcel was incorporated into the Red Oaks Plaza development master plan. (R.pp.342-343). Consequently, Ryan Smith concluded the 18.4 Acre Parcel was part of a "larger common plan," ("LCP") a term defined by SCDHEC in the Instructions it publishes with the NOI.¹³ (R.pp.626-627; R.pp.377-381).

Upon determining that the property was part of an LCP currently owned by DTG or related entities, Ryan Smith filled out the NOI to reflect that DTG owned the property even though, at the time the NOI and supporting documentation was submitted, Jasper Station owned the 18.4 Acre Parcel, but it was under contract for sale to DTG. (R.pp.603-702). Ryan Smith testified his decision to show DTG as the property owner, instead of Jasper Station, was his belief that if any property proposed for development is *subject to a purchase contract and a particular project is only going to be undertaken upon sale* of the property, then it is appropriate to list the entity intending to pursue the project who would own the property at the time the land disturbing activities and storm water discharges occur. (R.pp.350-351).¹⁴

¹³ SCDHEC states in its NOI Instructions that "If the site is part of a subdivision, industrial park, commercial park, *etc.*, then it is considered to be part of an LCP." (R.pp.603-702).

¹⁴ In addition to Ryan Smith's testimony, a review of OCRM permitting files demonstrated multiple other instances where NOIs were submitted showing project owner and

However, it is undisputed that other information submitted in support of the NOI clearly showed the 18.4 Acre Parcel was part of Jasper Station's Parent Tract. (R.pp.603-702). The NOI identified the 18.4 Acre Parcel with the TMS Number assigned the Parent Tract. (R.pp.603-702). The NOI provided coordinates and property location which are part of the Parent Tract. (R.pp.603-702). The NOI included the Corps of Engineers' 16 January 2009 JD which expressly referenced the 18.4 Acre Parcel as being part of the Parent Tract. (R.pp.603-702). The NOI included a digital boundary which showed the 18.4 Acre Parcel was part of the Parent Tract. (R.pp.603-702). The NOI included detailed engineering drawings and plans which showed the relationship of the 18.4 Acre Parcel with Jasper Station's Parent Tract. (R.p.264, line 20 – R.p.266, line 17; R.p.344, line 4 – R.p.355, line 16; R.p.358, line 17 – R.p.361, line 3; R.p.366, line 18 – R.p.375, line 14; R.pp.603-702).

Furthermore, DTG, Jasper Station, and Thomas and Hutton had directly communicated with SCDHEC regarding the 18.4 Acre Parcel and its relationship to DTG.¹⁵ On 6 January 2010, just prior to the NOI's submission, Shannon Hicks, a SCDHEC employee, contacted Gabe Smith, a professional engineer and Thomas and Hutton employee working for DTG and Jasper Station. Ms. Hicks was inspecting the work done to fill the six acres of wetlands within the 18.4 Acre Parcel, and Gabe Smith sent Ms. Hicks a map showing the 18.4 Acre Parcel was part of Jasper Station's Parent Tract, and advising Ms. Hicks "the parcel in red is the 18-acre piece Malphrus cleared." (R.pp.751-752).

property owner as the same entity, when at the time of the NOI submission, the property owner was actually another entity, not reflected on the NOI.

15 DTG is an entity formed by the Malphrus Family.

In addition to ownership information, the NOI seeks information regarding any past permitting history on the site. (R.pp.603-702). Consistent with his determination the 18.4 Acre Parcel was part of the Red Oaks Plaza LCP, Ryan Smith listed a state permit associated with development of Red Oaks Plaza when asked to disclose “*Previous state permit/file number.*” (R.pp.603-702). Mr. Smith left blank the request to “*list all state and federal environmental permits or approvals applied for or obtained for this site.*” (R.pp.603-702). Ryan Smith testified the omission of this information was an oversight, but that OCRM staff had advised him, upon review of the completed NOI, that the NOI application was administratively complete and did not express concern over the empty line on the form. (R.pp.382-384; R.pp.603-702).

It isn't clear, however, what information would be appropriately included in the line Ryan Smith inadvertently left blank on the NOI which, as noted, sought a list of “*all state and federal environmental permits or approvals applied for or obtained for this site.*” (R.pp.603-702). While Jasper Station has claimed default permit coverage (R.p.50, para. 39; R.p.51, para. 47),¹⁶ SCDHEC has yet to acknowledge or recognize the permit coverage and continues to dispute that fact in the Circuit Court. As is evident from the e-mail exchange between Ms. Hicks and Gabe Smith (R.pp.751-752), SCDHEC had conducted a series of investigations of the Jasper Station tract to determine if any land disturbing activities had been undertaken. (R.pp.703-726; R.pp.751-752). These investigations are embodied in multiple SCDHEC “*Stormwater Management and Sediment Reduction Site Inspection Reports.*” (R.pp.703-726).¹⁷

¹⁶ See S.C. Code Reg. § 72-305(M).

¹⁷ These Reports were created to reflect SCDHEC inspections which occurred on 26 July 2007, 14 February 2008, 15 October 2008, 23 October 2008, and 6 January 2009. (R.pp.703-

Importantly, the SCDHEC inspector is required to indicate on the "*Stormwater Management and Sediment Reduction Site Inspection Reports*" whether the matters observed on the site warranted enforcement. The DHEC Inspector concluded on 26 July 2007, and on 14 February 2008, that no violations were observed and no corrective action was necessary. (R.p.703; R.p.705). Upon observing land disturbance on 15 October 2008, 23 October 2008, and 6 January 2009, the Inspector noted in response to the inquiry as to whether "Any Enforcement Action to be taken" that enforcement was "to be determined." (R.pp.705-719). It is clear from these reports, copies of which were provided to Jasper Station by the Inspector upon completion of the report, that SCDHEC had not initiated any enforcement action against Jasper Station for the land clearing activity on the 18.4 Acre Parcel on 9 February 2009 (R.pp.705-719), when the DTG NOI and supporting application information was submitted. (R.pp.603-702). Consequently, in completing the NOI's section which asks whether "*DHEC has issued a Notice to Comply or Notice of Violation*" Mr. Smith indicated "No" in response. (R.p.621, para. III.G). Although Ms. Hicks sent Dan Lynch, a representative of Jasper Station, a "Warning Notice" dated 5 November 2008, (R.p.888) that "Warning Notice" indicates the matter was being "referred to enforcement." (R.p.888, para. 3). That status didn't change, as the later reports still indicated enforcement was "to be determined." (R.pp.703-726). SCDHEC did not notify DTG or Jasper Station it was commencing an

726). These reports all include a line upon which the SCDHEC inspector is to list the "Permit #." (R.p.703; R.p.705). That line is blank on the 26 July 2007, form following Jasper Station's declaration that it obtained permit coverage by operation of S.C. Code Reg. § 72-305(M). (R.p.703). The form dated 14 February 2008 lists a permit number - 27-06-08-01 (R.p.705)- as do the forms dated 15 October 2008 (R.p.707), and 23 October 2008. (R.p.710). Nevertheless, the most recent form dated 6 January 2009 (R.p.718), indicated "none" in the response to provide "NPDES Permit No." and refers to 27-06-08-01 as the "State Tracking No." (R.p.718). The forms are, at best, confusing.

enforcement action based on the matters observed and reported in the various Inspection Reports until 9 June 2009, several months after DTG submitted the NOI and SCDHEC approved General Permit coverage. (R.pp.72-79).

B. Basis for Termination

South Carolina law provides, in pertinent part, as follows:

- (a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:
 - (1) Noncompliance by the permittee with any conditions of the permit;
 - (2) The 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.**18**

SCDHEC terminated DTG's NPDES permit coverage based on DTG's alleged misrepresentations in "Section II.B, Section III.G and Section III.I." (R.pp.823-826).

SCDHEC identified the following alleged misrepresentations:

- 1. DTG was not the property's owner-of-record;
- 2. TMS # 080-00-03-065 was currently part of an enforcement investigation with SCDHEC; and
- 3. The NOI for Red Oaks Plaza Phase 3 indicated no environmental permits or approvals had been applied for or obtained for this site, yet SCDHEC had denied a previous application for permit coverage under the 2006 CGP prior to filing the NOI.

SCDHEC concluded that "[t]hose facts [were] not accurately represented on the NOI for Red Oaks Plaza Phase 3." (R.pp.823-826).

18 See S.C. Code Reg. § 61-9.122.64.

Assuming *arguendo* that the NOI was inaccurate,¹⁹ SCDHEC unjustifiably narrowed the permit application to just the two page NOI form, and not the hundreds of additional pages which admittedly accompanied the NOI. (R.pp.603-702). In fact SCDHEC's NPDES Regulations place little emphasis on the alleged deficiencies which SCDHEC has noted above. There are specific permit application requirements for NPDES permits.²⁰ Of SCDHEC's identified three "deficiencies" – property owner, enforcement, and prior permit applications – only one is contained in S.C. Code Reg. § 61-9.122.21(f) as "information requirements."²¹

The General Permit, admittedly drafted by SCDHEC, also addresses application requirements in Section 2.2 – "*Notice of Intent Contents and Other Required Information.*" (R.pp.835-887). Section 2.2(B) requires the applicant to provide the following information on the NOI form:

1. Operator Name;
2. Project/Site name;
3. Whether your Site is located in Indian Country;
4. Whether the SWPPP has been prepared in accordance with the CGP;
5. Name(s) of the Water(s) of the State into which your site discharges;
6. Information regarding discharge;

¹⁹ Both Jasper Station and DTG reiterate that the responses contained in the NOI were correct and justified under the circumstances.

²⁰ See S.C. Code Reg. § 61-9.122.21.

²¹ S.C. Code Reg. § 61-9.122.21(f) requires (a) a description of the activity necessitating NPDES permit coverage, (b) the name, location, and mailing address of the facility seeking coverage; (c) identification of services and products provided through the use of Standard Industrial Codes ("SIC"); (d) the operator's name; (e) whether the site is in Indian Country; and (f) a list of all permits or construction approvals previously sought or obtained. Neither enforcement history nor property ownership is noted as required information.

7. Project start and completion date;
8. Total acreage; and
9. Designation of Authorized Representative.

In addition, Section 2.2 states that the NOI is not considered complete without additional information, such as the information submitted by DTG, which includes a SWPPP, design documents, and supporting calculations. (R.pp.621-630). SCDHEC, therefore, has absolutely no justification for confining its decision to terminate DTG's permit coverage based solely on the information in the two-page NOI form.

The NPDES permit coverage, which allowed DTG to proceed with development of the 18.4 Acre Parcel, was a contractual contingency which, if satisfied, allowed for a closing of a Purchase Agreement for \$2,209,200.00. (R.pp.590-602). When SCDHEC revoked DTG's NPDES permit coverage, the Purchase Agreement terminated. (R.pp.590-602). The ALC accurately characterized SCDHEC's termination as a "drastic administrative action with the potential for significant negative impact on the permittee." (R.p.37). Moreover, the NPDES permit coverage survived termination of the Purchase Agreement and can be transferred/assigned by DTG to Jasper Station.**22**

22 S.C. Code Reg. § 61-9.122.61 allows for transfer of permits with SCDHEC's consent.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Substantial Evidence Supported The ALC's Conclusion SCDHEC Failed To Show Cause Under S. C. Code Ann. Reg. § 61-9.122.64 Justifying Termination Of The General Permit Coverage.

SCDHEC attempts to avoid the substantial evidence standard and persuade this Court of Appeals the ALC committed an error of law. In fact, this case is resolved upon review of the facts in the record to determine whether certain facts are relevant and, if relevant, whether these facts were fully disclosed and/or misrepresented. Issues of what information was provided to SCDHEC and whether the information was fully disclosed and relevant are factual issues, not questions of law. In an appeal from the decision of an administrative agency the *Administrative Procedures Act* provides the appropriate standard of review.²³ As this Court of Appeals is aware, “[s]ubstantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence.”²⁴ Furthermore, “where conflicting evidence exists as to an issue, [this Court of Appeals] substantial

²³ See *S. C. Code Ann.* §. 1-23-610(B) (“The review of the administrative law judge’s order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The Court of Appeals may . . . reverse or modify the decision if the substantive rights of the petitioner has been prejudiced because of the finding, conclusion, or decision is: . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . .”).

²⁴ *Original Blue Ribbon Tax v. South Carolina Dept. of Motor Vehicles*, 380 S.C. 600, 605-606, 670 S.E.2d 674, 676-677 (Ct.App. 2008) (Internal citations omitted).

evidence standard of review defers to the findings of the fact-finder.”²⁵ Moreover, pursuant to Rule 29B, RPALC, addressing the burden of proof, “[i]n matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.”

In this case, SCDHEC is enforcing its Order providing Notice of Termination and has the burden of proving the validity of its findings set forth in the Termination of Permit Coverage. (R.pp.823-826). SCDHEC must prove that relevant information was either not fully disclosed or was misrepresented. It is not enough for SCDHEC to prove, as it did below, that its two page NOI application form was not “filled-out completely”. Instead, the inquiry is whether relevant information was either misrepresented²⁶ or simply not provided during the permit issuance process.

1. NOI Section II.B – Property Owner

Ryan Smith, acting for DTG, listed DTG as the “Project Owner” in response to information sought in Section I of the NOI. (R.pp.603-702). When asked to provide the identity of the Property Owner in Section II.B, Ryan Smith inserted “Same as above.” (R.pp.603-702).²⁷ Nevertheless, it is further undisputed that the submittal package which accompanied the NOI contained multiple materials which clearly indicated the 18.4 Acre Parcel was part of the 88 acre Parent Tract owned by Jasper Station and the

²⁵ Risher v. South Carolina Dept. of Health and Env'tl. Control, 393 S.C. 198, 210, 712 S. E. 2d 428, 434-435 (2011).

²⁶ Importantly, “misrepresentation” is defined in Black’s Law Dictionary as “the act of making a false or misleading assertion about something, usually with the intent to deceive.” Black’s Law Dictionary (9th Ed. 2001).

²⁷ It is undisputed that on 10 February 2009, when the NOI and the accompanying documentation was submitted to OCRM, Jasper Station was the record owner of the 18.4 Acre Parcel.

subject of SCDHEC's inquiry extending from October 2008, into January 2009, relating to land disturbing activities resulting in the filling, grubbing, and grading of six acres of wetlands within the 18.4 Acre Tract. In Findings of Fact Nos. 20, 21, and 22 the ALC listed documents contained in the NOI submission which clearly revealed the relationship between Jasper Station's Parent Tract and the 18.4 Acre Parcel. (R.pp.26-27).²⁸ The ALC noted the importance of the digital boundary provided by Mr. Smith which clearly showed the 18.4 Acre Parcel was contained within the Parent Tract's 88 acres. (R.pp.26-27). Moreover, as noted in Finding of Fact No. 22, SCDHEC had notice one month prior to receipt of the permit submittal when Gabe Smith e-mailed Shannon Hicks, attached a plat of the 18.4 acre parcel within the Jasper Station tract, and explained that the clearing was done by "Malphrus." (R.pp.26-27). Importantly, Greg Malphrus signed the NOI on 5 February 2009, as "Project Owner/Operator." (R.pp.603-702).

The identity of the Property Owner was clearly disclosed in the volumes of required materials which accompanied the NOI (R.pp.603-702) and which were, certainly presumably, reviewed by the SCDHEC staff. Moreover, there was no basis upon which either SCDHEC or the ALC could reasonably conclude that the two-page NOI form was filled out reflecting DTG as the property owner with the intent to deceive. In fact, Ryan Smith testified he filled out the form in that manner in an effort to assist SCDHEC, since the land disturbing activities would only be undertaken if the Purchase

²⁸ The ALC noted there was "a) a site map ...; b) TMS number ...; c) January 16, 2009 letter from the U. S. Army Corps of Engineers ...; d) site development plans that ... depict the 18.4 acre parcel within the Jasper Station tract and identify Jasper Station Associates, LLC, as the property owner of the surrounding tract." (R.pp.26-27).

Agreement were to close, and if DTG owned the property. (R.p.349, line 2 – R.p.351, line 16). The President, CEO, and Chairman of the Board of Thomas and Hutton explained his firm's actions as follows:

Our intent was not to mislead or misrepresent, but instead to reflect the situation at the time permit coverage is triggered – when construction commences. That is what we understood to be the correct representation as in most NOI applications we prepare; the actual land owner is under contract with a third party.

(R.pp.889-894).**29**

Finally, South Carolina law³⁰ does not allow for permit coverage termination if any fact is omitted or misrepresented, but only if “relevant facts” are determined to be missing. The ALC properly assigned meaning to the word “relevant” and found that the terms and conditions of the General Permit addressing submittal requirements did not require disclosure of the identity of the property owner. (R.pp.19-20; R.pp.835-887). Moreover, the regulation³¹ governing NPDES permit applications does not require the identity of the property owner to be disclosed.

Consequently there is substantial evidence in the record to affirm the ALC's findings the identity of the property owner for the 18.4 Acre Parcel was disclosed and, moreover, was not misrepresented.

29 Jasper Station and DTG presented additional information, considered by the ALC, which supported Thomas and Hutton's practices with regard to completing the NOI. (R.pp.895-991; R.pp.992-1035). Jasper Station and DTG presented the testimony of two witness – one a title abstractor and the other a real property attorney – who examined NOI's and property records from Charleston, Berkeley, and Beaufort Counties and found several recent instances where the property owner was shown on the NOI as the party contracting to purchase the property, and not as the record owner on the date the NOI was submitted. (R.p.349, line 2 – R.p.351, line 16).

30 See S. C. Code Ann. Reg. §. 61-9.122.64.

31 See S. C. Code Ann. Reg. §. 61-9.122.21(f).

2. **NOI Section III.G – Notice to Comply/Notice of Violation**

The information sought in Section III.G is “*whether SCDHEC issued a Notice to Comply or Notice of Violation for the site.*” (R.p.621). Ryan Smith checked the box labeled “No.” (R.p.621). SCDHEC presented no evidence to show it had issued a Notice to Comply or Notice of Violation. Notably, the NOI **does not seek** information regarding whether SCDHEC has **ever** investigated the site. (R.p.621). The NOI seeks specific information related to specific enforcement procedures. (R.p.621). A Notice of Violation is a specific notification referenced in SCDHEC’s Uniform Enforcement Process and OCRM’s published Enforcement Policy. (R.pp.753-765). There is no reference in these policy documents to a Notice to Comply. Furthermore, there is no evidence any document entitled “Notice to Comply” was ever delivered to Jasper Station and/or DTG relative to the 18.4 Acre Parcel.

While Jasper Station/DTG received a “Warning Notice” on 5 November 2008 (R.p.888), and was asked to stop land disturbing activities (R.p.888), SCDHEC clearly hadn’t yet then determined whether the matter rose to the level of enforcement, since Jasper Station/DTG was advised that “this matter is being referred to Enforcement staff for further consideration.” (R.p.888). In a follow-up inspection, conducted on 6 January 2009, SCDHEC staff did not indicate any further enforcement action would be taken, as they could have by checking the “Yes” box on the Compliance Inspection Report. (R.pp.718-726). Instead, SCDHEC commented that “Enforcement action to be determined.” (R.pp.718-726).

The NOI seeks specific information regarding whether the applicant is aware of a Notice of Violation or Notice to Comply. (R.p.621). On the other hand, the NOI does not ask whether any inspection reports have been generated, or “Warning Notices” issued. (R.p.621). Ryan Smith correctly filled-out this section of the NOI and provided an accurate response to the information that was sought. Moreover, following SCDHEC’s 6 January 2009 site visit, Thomas and Hutton provided SCDHEC with a plat of the 18.4 Acre Parcel (located within Jasper Station’s Parent Tract, and had notified Ms. Hicks that “Malphrus” had performed the work that she had inspected that day. (R.pp.751-752). Consequently, there is no basis to conclude DTG withheld information regarding the status of the site. In fact, the facts presented to the ALC could support a finding SCDHEC knew, or should have known, based on the totality of information presented, the 18.4 Acre Parcel was the subject of numerous inspections and a “Warning Notice”.

3. NOI Section III.I – All State and Federal Environmental Permits or Approvals

As already noted, this section was left blank. As Ryan Smith explained, his failure to fill in the blank under Section III.I was simply an “oversight.” (R.p.324, lines 10-19; R.pp.276-277). In any case, identification of other permits is, arguably, relevant as it is the only criterion of three bases for termination that is found in the regulation addressing NPDES permit application.**32**

Here, however, the only reason this information was important to OCRM staff reviewing the submittal was, according to the Amanda Nodolf, because she could have entered the permit number into the SCDHEC data base known as EFIS and presumably

32 See S. C. Code Ann. Reg. §. 61-9.122.21(f).

would have brought-up a screen on her desktop that showed that the 18.4 acre site was part of the Jasper Station tract. (R.p.1229). Ms. Nodolf acknowledged, however, the same information would have been revealed had she followed her normal practice in her "Arcview" review.³³ Ms. Nodolf had multiple Arcview layers at her disposal, but admittedly didn't utilize them. (R.pp.554-558; R.p.750).

While DTG's consultant did not provide the information requested in Section III.I of the NOI, SCDHEC readily admits the information was only relevant because it would have alerted SCDHEC staff to the connection between Jasper Station's Parent Tract and the 18.4 Acre Parcel. Contrary to SCDHEC's implications, neither DTG nor Jasper Station ever concealed the connection between the two properties. In fact, the connection was disclosed in the multiple documents attached to the NOI as part of the permit application submission.

In addition, the ALC gave weight to Ryan Smith's conclusions Red Oaks Plaza Phase 3 was part of a larger common plan (LCP), and the relevant past permitting history was associated with development of the LCP Red Oaks Plaza, rather than Jasper Station's Parent Tract. The ALC also noted SCDHEC staff wasn't consistent in its identification of the Jasper Station NOI seeking permit coverage under the General Permit, which it submitted in July 2006. As is apparent from the Inspection Reports, (R.pp.703-726) there is little uniformity among SCDHEC staff in identifying the Jasper Station permit/permit application and, consequently, no basis to conclude that in February 2009, when DTG submitted the NOI, that the Jasper Station permit/permit

³³ OCRM staff testified they can conduct two desktop reviews. The EFIS review and the Arcview review. The Arcview review is not dependent on the information supplied by the applicant but, instead, utilizes the digital boundaries and allows OCRM to keep track of stormwater permit applications in a geographic area.

application number would have been material to SCDHEC's review.³⁴ In fact, SCDHEC staff determined, after the termination process was commenced, that its data base was insufficient to provide enough warning to SCDHEC staff and Ms. Hicks directed OCRM staff in a 21 July 2009, e-mail to add information to the data base expressly warning staff "do not permit within this tract – see EFIS." (R.p.834).

While the Jasper Station permit/permit application number from its 2006 NOI can be considered "relevant," it is only relevant because it may have led OCRM staff to see the relationship between DTG and Jasper Station when it reviewed the NOI permit application. The information wasn't misrepresented, as the only evidence as to why the information wasn't included was Ryan Smith's testimony that it was merely an oversight. Furthermore, the relationship between DTG and Jasper Station was fully disclosed, albeit not through information provided in Section III.I of the NOI, but through the many attached documents supporting the NOI. Furthermore, S.C. Code Ann. Reg. § 61-9.122.64 refers to the "permit issuance process" and ***not just*** to the two page NOI form which initiates the process.

This Court of Appeals should affirm the ALC's decision in all respects.

³⁴ Ms. Nodolf's EFIS review was conducted after-the-fact, in preparation for a trial conducted 18 months after SCDHEC issued General Permit coverage to DTG.

B. The ALC's Conclusion That SCDHEC Failed To Show Cause Under S. C. Code Ann. Reg. § 61-9.122.64 Justifying Termination Of The General Permit Coverage Constituted Factual Conclusions Implicating Appellate Review Pursuant To S. C. Code Ann. § 1-23-610(B).

SCDHEC characterizes the ALC's findings as misapplication of the agency's regulations and errors of law. Obviously, SCDHEC is aware of the weaknesses in the appellate record which SCDHEC created and, in turn, the overwhelming weight of the evidence demonstrating DGT's disclosure of all relevant facts. In addition, SCDHEC failed to prove, under any standard of review, that DTG and/or Jasper Station misrepresented the relevant facts during the NOI permit process. Therefore, SCDHEC's only opportunity to persuade this Court of Appeals to reverse the ALC depends on SCDHEC's ability to shift this Court of Appeals' focus in this appeal from the "substantial evidence" standard to an inquiry dithering whether the ALC's decision was "affected by other error of law".³⁵

South Carolina law³⁶ is clear and unambiguous. A NPDES permit may be terminated for cause, and the permittee's failure to disclose all relevant facts during the permit issuance process or misrepresentation of relevant facts at any time is cause for termination. SCDHEC demonstrated the NOI's first page was not completed to SCDHEC's "satisfaction". Nevertheless, SCDHEC failed to prove any relevant facts were withheld, since those facts were apparent in the accompanying materials which supported the NOI. As to whether DTG or Jasper Station misrepresented the relevant

35 See S. C. Code Ann. § 1-23-610(B).

36 S. C. Code Ann. Reg. § 61-9.122.64.

facts, the only “evidence” SCDHEC provided was the fact the property owner’s identity was not correctly identified on the NOI. As previously noted, the designation of DTG as the “property owner” was completely justified under the circumstances. SCDHEC failed to demonstrate either DGT or Jasper Station provided information on the NOI with an intent to deceive and/or was consciously misrepresented. In fact, the substantial evidence showed the practice of naming the purchaser as the property owner was certainly not limited to this permit application. Moreover, the identity of the property owner wasn’t hidden. It was disclosed in the NOI’s supporting materials.

SCDHEC had the burden to prove “cause for termination” and failed to sustain its burden. Cause is a factual analysis under the applicable regulation, not a legal analysis. SCDHEC frames its appeal based on a claim that the ALC interpreted S. C. Code Reg. § 61-9.122.64.³⁷ Notwithstanding SCDHEC’s arguments to the contrary, the ALC did not interpret the regulation. What the ALC did, however, was to conclude our Legislature intended the words “relevant” and “misrepresent” to have meaning.³⁸ The ALC then applied those words to the evidence presented within in the context of the regulation.

³⁷ “Statutory interpretation is a question of law.’ Hopper v. Terry Hunt Constr., 373 S. C. 475, 479, 646 S. E. 2d 162, 165 (Ct. App. 2007). This Court of Appeals is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S. C. 283, 287-88, 648 S. E. 2d 301, 303 (Ct. App. 2007). “But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard.’ Hopper v. Terry Hunt Constr., 373 S. C. 475, 479-480, 646 S. E. 2d 162, 165. See also Murphy v. Owens Corning, 393 S. C. 77, 710 S.E. 2d 454 (Ct. App. 2011).

³⁸ See CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 75, 716 S.E.2d 877, 881 (2011) (quoting State v. Sweat, 379 S.E. 367, 665 S.E.2d 645 (Ct.App. 2008), affirmed, 386 S.C. 339, 688 S.E.2d 569 (2010)) (Second and third alterations in original) (“We must read the statute so ‘that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, [since] [t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.’”).

The application of a regulation to a specific set of facts, and the assignment of ordinary meaning to words and phrases within that statute, is subject to review under the substantial evidence, and is improperly characterized by SCDHEC as legal action.

C. Both Jasper Station And DGT Have Standing To Challenge SCDHEC's Termination Action Even Though The Purchase Agreement Between Jasper Station And DGT Has Been Ended.

SCDHEC argues the ALC's should have dismissed the contested case on the grounds of mootness since the DGT/Jasper Station Purchase Agreement had been terminated. SCDHEC argues that the termination deprived DGT/Jasper Station of standing to challenge the NPDES permit termination notice. SCDHEC misinterprets the law.

The 18.4 Acre Parcel was subject to the Purchase Agreement with a sales price of \$2,209,200.00. (R.p.590, para. 2). The sale was, however, contingent upon the acceptance, approvals and permits by all governmental agencies as required for DGT's full development of the entire 18.4 Acre Parcel. (R.p.590, para. 3). Consequently, the fair market value of the property as reflected in the Purchase Agreement reflected the value of developed land - not undeveloped land. The ability to develop the land and attain the value stated in the Purchase Agreement was clearly dependent upon obtaining the applicable permits and entitlements.

The permit SCDHEC issued to DTG was for disturbance of all 18.4 acres in order to construct a "commercial business park." (R.pp.603-702). This permit has significant value both to DGT (purchaser) and to Jasper Station (seller). (R.pp.590-593). This permit aids Jasper Station (seller) in realizing the contract value of the property and

facilitates sale of the 18.4 Acre Parcel to DGT (purchaser). (R.p.590, para. 3). In accordance with the terms of the Purchase Agreement, Jasper Station retained the permit, and other entitlements, upon termination. (R.pp.590-593). SCDHEC's regulations allow for transfer of permits between original permittee and new permittee.³⁹ So, the fact that a contract didn't close, because of delay occasioned by SCDHEC procedures, doesn't render the issue moot.⁴⁰ The ALC reinstated the permit. (R.pp.14-38). After DTG and Jasper Station prevail in this meritless appeal, the procedures in S. C. Code Reg. § 61-9.122.61 can be implemented and Jasper Station will be able to accept transfer and assignment of the permit as DTG's contractual successor-in-interest.⁴¹

Regardless of the status of their contractual relationship, DTG and Jasper Station have an interest in the ALC's reinstated permit, as it establishes the right to develop the 18.4 Acre Parcel into a commercial business park – a logical use given the adjoining land uses. This interest is not conjectural, the property can be sold with entitlements which allow for development of a commercial business park. Both DTG and Jasper

³⁹ See S. C. Code Ann. Reg. § 61-9.122.61.

⁴⁰ The Purchase Agreement was entered into on 8 April 2008, with closing scheduled 60 days from the receipt of the SCDHEC permit. General Permit coverage was obtained in March 2009, but termination proceedings commenced five months later. The Purchase Agreement allowed for two years to obtain finality on all entitlements. At the expiration of two years, or in April 2010, DTG and Jasper Station were embroiled in the termination proceedings before the ALC and DTG exercised its contractual right to terminate the agreement.

⁴¹ "Generally, a successor is '[a] person who succeeds to the office, rights, responsibilities, or place of another.' Black's Law Dictionary (9th ed. 2009). The word successor can mean one who has in fact succeeded. Battery Homeowners Ass'n. v. Lincoln Fin. Res., Inc., 309 S. C. 247, 250, 422 S. E. 2d 93, 95 (1992). Holly Woods Ass'n of Owners v. Hiller, 392 S.C. 172, 188, 708 S. E. 2d 787, 796 (Ct.App. 2011) (In this matter 'Holly Woods Association of Residence Owners was the successor to Holly Woods Association of Residence Owners, Inc., and therefore, had standing.'").

Station were injured by the permit termination, regardless of whether the Purchase Agreement contract survived the protracted proceedings which have followed. Most importantly, DTG's and Jasper Station's injuries are clearly redressed when this Court of Appeals affirms the ALC's decision in all respects.⁴² Reinstatement of General Permit coverage affords the parties the opportunity to renegotiate the Purchase Agreement, or allows Jasper Station to offer the property for sale again, without contingencies.

D. SCDHEC Was Not Prejudiced By The ALC's Denial Of SCDHEC'S Motion To Compel.

The ALC denied SCDHEC's Motion to Compel production of two emails exchanged between an attorney for DGT/Jasper Station and Ryan Smith and Mitchell Bohannon of Thomas and Hutton. The e-mails were presumably sealed and traveled with the ALC's record, but the e-mails were made available to SCDHEC's counsel when the court reporter produced the trial transcript and exhibits⁴³ and are, in essence, no longer sealed. The ALC reviewed the e-mails before excluding them and concluded they were subject to the work product doctrine. (R.pp.249-251). The ALC concluded the communications at issue were between Jasper Station's legal counsel and Jasper Station's consultant and permitting agent.

⁴² See Bailey v. South Carolina Dept. of Health and Envrtl. Control, 388 S.C. 1, 6, 693 S. E. 2d 426, 429 (Ct.App. 2010) (Discussion of three-part test establishing standing from Lujan v. Defenders of Wildlife, 504 U. S. 555 (1992)).

⁴³ This production was done in advance of the time the parties submitted their respective proposed order to the ALC for consideration.

The e-mails reveal a dispute between the professionals at Thomas and Hutton and one of the principals of Jasper Station, Bob Glover. This dispute was no secret to DGT's and Jasper Station's counsel. Thomas and Hutton had put their errors and omissions carrier on notice of the dispute and potential claim, and M. Elizabeth Jowers, Esquire,⁴⁴ had participated in Ryan Smith's deposition as Mr. Smith's counsel. Attorney Jowers also attended the contested case hearing and SCDHEC's counsel was required to coordinate with Attorney Jowers for access to Mr. Smith and to compel his appearance at the ALC hearing. SCDHEC was well aware Thomas and Hutton was concerned about Jasper Station bringing claims against their firm and Thomas and Hutton had sought unsuccessfully to obtain a waiver from Jasper Station before its representatives testified in this matter. (R.pp.326-327; R.pp.399-400).

As this Court of Appeals knows, the "attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party."⁴⁵ Generally, in determining whether a document has been prepared 'in anticipation of litigation', most courts look to whether or not the document was prepared because of the prospect of litigation.⁴⁶

⁴⁴ Attorney Jowers is a member of Carlock, Copeland and Stair, a civil litigation firm specializing in defense of claims.

⁴⁵ See Rule 26(b)(3), *SCRCP*; *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁴⁶ See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992) (document 'must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim,' as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes."); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir.2004) (document "should be deemed 'in anticipation of litigation' ... if ... [it] can be fairly said to have been prepared or obtained because of the prospect of litigation." (citation omitted)); *In re Kaiser Aluminum & Chemical Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (primary motivation

In this case, DTG's and Jasper Station's counsel was, on 20 July 2010, reacting to a breakdown in relationship between her client and its consultant, and her client's threat to bring legal action against the consultant. This occurred approximately a month before the consultant's deposition was scheduled and six weeks before the scheduled contested case hearing. Since the e-mail was sent in anticipation of litigation, DGT and Jasper Station believed it was properly protected under the work-product doctrine. Regardless of whether the ALC's ruling was correct or in error, SCDHEC suffered no prejudice due to the non-production, since SCDHEC was already aware of the controversy which had arisen between Jasper Station and its consultant.

Should this Court of Appeals disagree with the ALC's assessment of the privilege attached to these two e-mail communications, the lateness of SCDHEC's motion hearing (*i.e.*; on the day of trial) prevents the parties from simply starting over. "Where, as here, a party abuses discovery^[47], the proper remedy is to vacate the requests and require the party to start over. As a result, we vacate the five discovery orders before us."⁴⁸

Consequently, this Court of Appeals must weigh whether remand is appropriate to allow the ALC to consider the e-mails and to allow counsel to cross examine witnesses regarding these e-mails. SCDHEC was aware of the conflict between Jasper Station and its consultant and the threat of litigation and, indeed, pursued those issues

behind creating the document must be to aid in possible future litigation)." *See also* Tobaccoville USA, Inc. v. McMaster, 387 S. C. 287, 692 S. E. 2d 526 (2010).

⁴⁷ Given the circumstances of the situation, SCDHEC cannot reasonably claim that in withholding these two e-mails DGT and Jasper Station "abused" the discovery process.

⁴⁸ *See* Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Envrtl. Control, 387 S. C. 380, 389, 692 S. E. 2d 920, 925 (2010).

at trial. Should this Court of Appeals disagree with the ALC regarding the work product doctrine designation, there is little benefit to be gained in remanding the case in light of the e-mails since SCDHEC was fully aware of the dispute at the commencement of the trial and questioned the witnesses regarding that very dispute.

E. The ALC Placed The Appropriate Weight On Matters Which Were Judicially Noted

The ALC took “judicial notice of the allegations in the pleadings that have been filed by Jasper Station and DHEC in the civil action pending in Colleton County” including an Order filed in the case denying SCDHEC’s Motion for Summary Judgment” (R.p.16). Nevertheless, the ALC noted, “any recitation of the allegations of the matters raised in Colleton County herein is only for purposes of providing relevant background of this contested case.” (R.p.16). SCDHEC argues, albeit incorrectly, the ALC accepted as “fact” the allegations of Jasper Station.

The ALC took judicial notice of the underlying dispute in the Colleton County Circuit Court, but did not accept as fact the allegations of the pleadings, rather, the ALC simply noted the existence of the underlying dispute and, stated it was relevant for purposes of understanding SCDHEC’s permit termination action. (R.p.15). The ALC qualified its recitation of matters alleged in the underlying suit simply as “background.” Quite simply, the ALC took notice of an undisputed fact, that Jasper Station and SCDHEC were parties to an action in the Court of Common Pleas related to whether Jasper Station had a permit by operation of law.

To the extent the ALC made any findings of fact regarding matters between Jasper Station and SCDHEC and to the extent SCDHEC is concerned those findings might be based on the ALC “accepting as fact” Jasper Station’s allegations, there was

substantial evidence in the record before the ALC to support the ALC's findings beyond the Circuit Court proceedings. SCDHEC relied on Bob Glover's deposition (with attached exhibits) as part of its case before the ALC. Mr. Glover's testimony, and the attached exhibits (reflecting communication between Jasper Station's attorney and SCDHEC) supported any finding made by the ALC regarding the underlying dispute. The ALC did not rely, and did not have to rely, on the allegations in the Circuit Court pleadings. Any of the ALC's findings regarding the underlying dispute were supported by SCDHEC's own evidence. (R.pp.1089-1114).

SCDHEC's arguments are meritless and must be dismissed.

F. The Parties' Stipulation That OCRM Employee Jeff Thompson Inspected The 18.4 Acre Parcel On 28 July 2009, And Found Evidence Of Hydrophytic Vegetation, Hydric Soils, And Hydrology (The Three Parameters For Delineating Wetlands) Did Not Constitute An Independent Ground Justifying Permit Termination.

SCDHEC asks this Court of Appeals to affirm the permit coverage termination on an independent ground – the parties' stipulations regarding OCRM's inspection of the 18.4 acre parcel and findings. (R.pp.568-570). Although this inspection and findings occurred before the 21 August 2009, Notice of Intent to Terminate (R.pp.809-816) and the 22 December 2009, final Notice of Termination, (R.pp.823-826), SCDHEC never made any mention of these findings as part of the cause for termination.

These 28 July 2009, findings can't serve as cause for termination because it is undisputed SCDHEC relies on the Corps of Engineers to identify and delineate wetlands for purposes of obtaining permit coverage under the NPDES General Permit.

(R.pp.568-570). As previously mentions, Corps of Engineers had inspected the 18.4 Acre Parcel and issued a JD advising there were no wetlands or waters of the United States on the property. (R.pp.603-702; R.pp.776-777).

The NOI requests, in Section IV, the applicant to disclose whether there are jurisdictional or non-jurisdictional delineated wetlands on the site. (R.p.621). The applicant is instructed that “delineation” means “identification by the U. S. Army Corps of Engineers or a wetland consultant. (R.p.627). The applicant is further instructed that in the coastal zone⁴⁹ “WOS [waters of the State] must be verified by the USACOE [U. S. Army Corps of Engineers].” (R.p.627). In this case, the Corps of Engineers issued a JD letter on 16 January 2009, valid for five years or until 16 January 2014, finding there were no wetlands located on the 18.4 acre tract. (R.pp.776-777).

In addition to its Instructions, SCDHEC provides a “*Checklist for Design Professionals*” which is completed by the applicant’s consultant and submitted along with the NOI. (R.pp.613-620). The 24th item on the Checklist is entitled “OCRM Requirement” (R.p.618) and includes the requirement to produce “a Corps wetland verification letter.” (R.p.618). The only reference to a delineation performed by OCRM is in relation to proposals to impact tidal wetlands areas⁵⁰, not freshwater wetland areas. (R.p.618; R.pp.789-797).

49 Jasper County is in the coastal zone as established by S. C. Code Ann. §§ 48-39-10 et seq., as it is one of the eight coastal counties.

50 SCDHEC-OCRM has permitting jurisdiction over the State’s critical areas which are tidal wetland areas.

DTG complied with the requirements when it provided a valid JD reflecting the Corps' of Engineers' conclusions there were no wetlands on the 18.4 Acre Parcel. OCRM may disagree with those conclusions, but that disagreement was not cause for termination. That fact is plainly evident from a review of SCDHEC's Notice of Termination in which **no mention is made** of OCRM's findings. There was no basis in the record before the ALC to support termination on this "alleged" independent ground. DTG and Jasper Station complied fully with the instructions provided by SCDHEC regarding identification of wetlands.

SCDHEC's arguments are meritless and must be dismissed.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, respectfully request this Court of Appeals to affirm the findings and conclusion of the ALC in all respects.

Respectfully submitted,

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16 January 2013

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**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Administrative Law Court
Hon. Carolyn C. Matthews, Administrative Law Judge
ALC Docket No.: 10-ALJ-07-0217-CC

DTG Holdings, LLC and
Jasper Station Associates, LLC,

Respondents,

v.

South Carolina Department of Health
and Environmental Control,

Appellant.

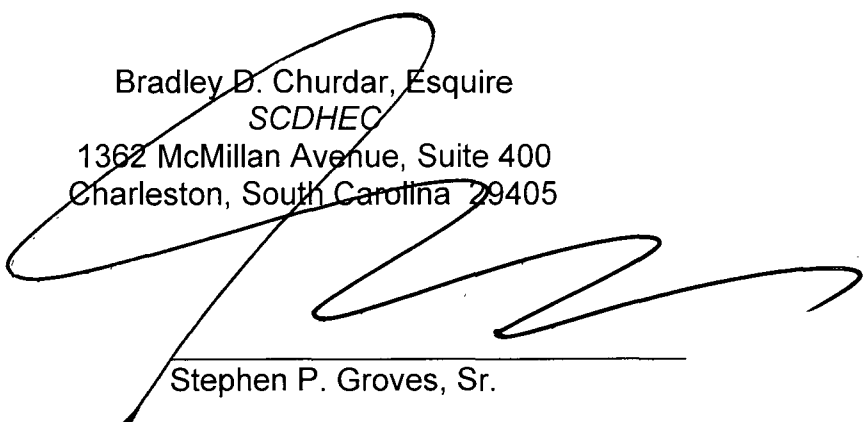
**Proof of Service
for the
RESPONDENTS' FINAL BRIEF**

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I, Stephen P. Groves, Sr., Esquire, hereby certify that on 16 January 2013, I served two copies of the **Final Brief** submitted on behalf of the Respondents, DTG Holdings, LLC and Jasper Station Associates, LLC, on all counsel appearing in this appeal, via the United States Mail, postage pre-paid, and addressed as follows:

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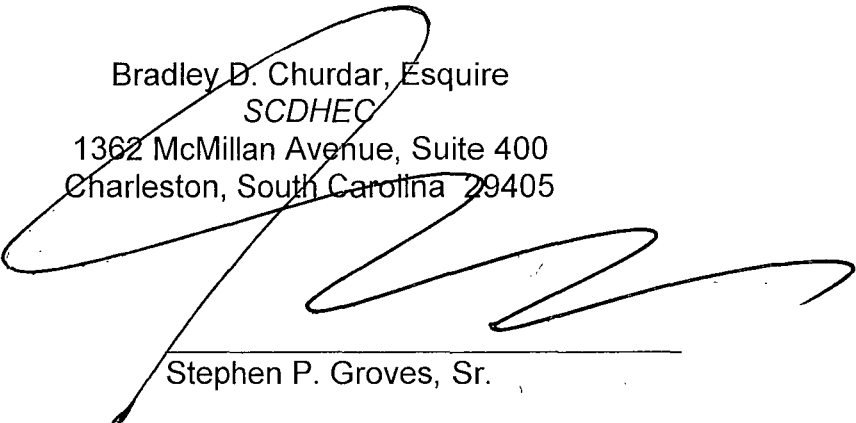
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