

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

Honorable Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No. 2011-192812

Court of Appeals' Opinion No. 27237, Filed March 27, 2013

Tommy W. Berry, Sr. and Jo S. Berry, *Appellants,*

v.

South Carolina Department of Health and Environmental
Control, Office of Ocean and Coastal Resource
Management, *Respondent.*

AFFIDAVIT OF
HOWELL V. BELLAMY, III

I, **Howell V. Bellamy, III**, personally appeared before the undersigned officer whom is duly authorized to administer oaths, and after being first duly sworn, depose and say:

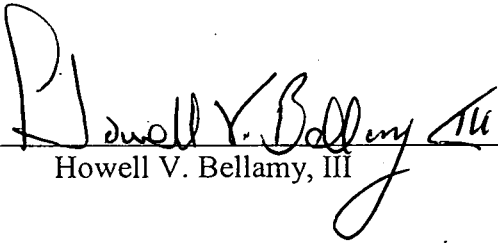
1. I am above the age of eighteen, competent to execute this affidavit, and give this affidavit based on personal knowledge.

2. On **May 11, 2010**, I instructed my secretary, Lynn Hearl to request a Final Review Conference with the DHEC Board regarding the revocation of Appellants' critical area permit. A copy of Appellants' Notice of Appeal consisting of Nine (9) pages was faxed/mailed to the Clerk for the DHEC Board showing that it was received on May 11, 2010 and is attached hereto as (Exhibit A). In the top right hand corner it states: "Received, S. C. Dept. of Health & Environmental Control, May 11, 2010, 2:10 PM, Office of the Commissioner, Chief of Staff, Clerk of SCDHEC Board."


3. On **May 12, 2010**, I instructed my legal secretary, Lynn Hearl, to fax/mail a copy of both the Administrative Order 07M-012S/Administrative Order of Revocation P/N OCRM-07-509 to Lisa Longshorn, Clerk of the Board for SC DHEC based on a conversation with her and upon review of Paragraph (3)(c) of the Notice of Appeal Procedure of the 2006 Act No. 387. A copy of both the Administrative Order and the Administrative Order of Revocation is attached hereto as (Exhibit B). The reason why Appellants' counsel faxed the Administrative Order 07M-012S/Administrative Order of Revocation P/N OCRM-07-509 is that we wanted to make it clear to the DHEC Board were challenging both Orders regarding the revocation of Appellants' critical area permit.

4. Since the Record on Appeal does not include stamped copies of these Orders stating "Received by DHEC", I have enclosed copies of the Administrative Order 07M-012S/Administrative Order of Revocation P/N OCRM-07-509 for your review attached hereto as (Exhibit B). The Orders are stamped in the top left hand corner indicating that Orders were received by S. C. Dept. of Health & Environmental Control dated **May 12, 2010 at 9:58 AM**, Office of the Commissioner, Chief of Staff, Clerk of SCDHEC Board.

5. I declare under penalty of perjury that the foregoing is true and correct.

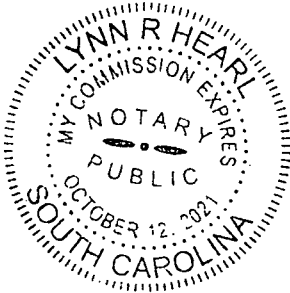

Howell V. Bellamy, III

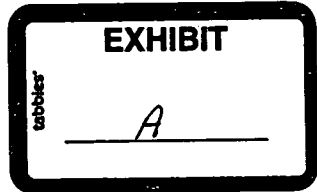
SWORN TO AND SUBSCRIBED
BEFORE ME, this 9th day of
April, 2013.


NOTARY PUBLIC

Print Notary's Name: Lynn R. Heard

My Commission Expires: 10-12-21





BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
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HOWELL V. BELLAMY, JR.
JOHN K. RUTENBERG
JOHN E. COPELAND
CLAUDE M. EPPS, JR.
DAVID R. GRAVELY**
EDWARD B. BOWERS, JR.
BRADLEY D. KING
M. EDWIN HINDS, JR.
JILL F. GRIFFITH
DAVID B. MILLER****

C. WINFIELD JOHNSON, III
DOUGLAS M. ZAYCEK
JEFFREY W. KING***
MARTIN C. DAWSEY
ROBERT S. SHELTON****
HOWELL V. BELLAMY, III
ASHLEY P. MORRISON
GEORGE W. REDMAN, III
W. JOSEPH CUNNINGHAM***
BENJAMINA. BAROODY
PHILLIP H. ALBERGOTTI

* CERTIFIED SPECIALIST IN TAXATION LAW
** FELLOW OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
*** ALSO MEMBER OF NORTH CAROLINA BAR
**** CERTIFIED MEDIATOR

May 11, 2010

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, S.C. 29201

ATTN: Lisa Longshorn

Re: Tommy W. Berry vs South Carolina Department of Health and Environmental
Control-Ocean Coastal Resource management
Civil Action No.: 2009-CP-26-5436
Our File No.: 22581-72957

Dear Lisa:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

1. A copy of the Administrative Order which is to be challenged on appeal; and
2. Certificate of Mailing;

With kindest regards, I remain

Sincerely,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Howell V. Bellamy, III
Howell V. Bellamy, III

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OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SC DHEC BOARD

HVBIII/lh
Enclosure

located on and adjacent to "K" Canal and Williams Creek at 317 49th Avenue North, North Myrtle Beach, Horry County, South Carolina (TMS # 145-02-24-019, Site).

2. In incorrectly finding and concluding in Paragraph two (2) of the Order's findings of fact, that the alleged impacted critical area vegetation was directly adjacent to the Appellants' home based on unclear and unauthenticated aerial photographs identified as Attachment A in the Order.
3. In incorrectly finding and concluding in Paragraph three (3) of the Order's findings of fact, that the previously existing bulkhead (to be replaced) facing North was located underneath the Appellants' house notwithstanding the Respondent's approval of the certified drawings showing the replacement of Appellants' 155 foot bulkhead with a new vinyl bulkhead extending long the northern property line, and, also, located approximately twenty (20) feet facing north from the back of their home.
4. In incorrectly finding and concluding in Paragraph four (4) of the Order's findings of fact, that Permit Number OCRM-07-509 (Permit) failed to authorize fill dirt at the site notwithstanding the Respondent's approval of the certified design and installation drawings, prepared by David R. Simms, P.E., for the construction of Appellants' new vinyl bulkhead.
5. In incorrectly finding and concluding in Paragraph five (5) of the Order's findings of fact, that the Appellants constructed their vinyl bulkhead twenty (20) feet channelward of the existing bulkhead notwithstanding the Respondent's approval of their critical area permit and attached certified drawings showing the replacement

of their 155 foot bulkhead extending along the northern property line, and, also, located approximately twenty (20) feet facing north from the back of their home.

6. In incorrectly finding and concluding in Paragraph six (6) of the Order's findings of fact, that the alleged critical area line existed between the alleged existing bulkhead and Appellants' newly vinyl constructed bulkhead.
7. In incorrectly finding and concluding in Paragraph seven (7) of the Order's findings of fact, that the backfill associated with the Appellants' bulkhead project destroyed vegetation resulting in a permanent loss of productivity from the estuary notwithstanding that the greater weight of the evidence to the contrary.
8. In incorrectly finding and concluding in Paragraph nine (9) of the Order's findings of fact, that backfill was placed in allegedly in tidelands critical area between the existing bulkhead and the newly constructed vinyl bulkhead.
9. In incorrectly finding and concluding in Paragraph ten (10) of the Order's findings of fact, that the newly constructed vinyl bulkhead allegedly impacted approximately two thousand six hundred and thirty-nine (2,639) square feet of unauthenticated critical area notwithstanding the Respondent's approval of the critical area permit and attached certified drawings showing the replacement of Appellants' 155 foot bulkhead extending along their northern property line, and, also, located approximately twenty (20) feet facing north from the back of their home.
10. In incorrectly finding and concluding that the new vinyl bulkhead built on the Appellants' property line was not constructed in compliance with Permit Number OCRM-07-509 (Permit) notwithstanding Respondent's approval of critical area

permit and attached certified drawing dated March 7, 2003.

11. In incorrectly finding and concluding in Paragraph seventeen (17) of the Order's findings of fact, that the Appellants' vinyl bulkhead and concrete driveway, white fence, and fill material including two (2) piles that support their deck were built in the alleged tidelands critical area without the approved of a critical area permit from the Respondent.
12. In incorrectly finding and concluding in Paragraph one (1) of the Order's conclusions of law, that the Appellants' violated Special Condition No.1, in that the existing bulkhead was not removed, concurrently with the new vinyl bulkhead construction.
13. In incorrectly finding and concluding in Paragraph two (2) of the Order's conclusions of law, that the Appellants' violated Special Condition No.2, in that their proposed new vinyl bulkhead was not placed in the same location as their existing bulkhead.
14. In incorrectly finding and concluding in Paragraph three (3) of the Order's conclusions of law, that the Appellants' construction of their new vinyl bulkhead violates DHEC-OCRM Regulations R.30-1 through 30-11 and, also, R.30-12(c).
15. In incorrectly finding and concluding in Paragraph three (3) of the Order's conclusions of law, that the Appellants' failed to construct their vinyl bulkhead in accordance with their approved drawings under General Condition No. 11 of their critical area Permit.
16. In incorrectly finding and concluding in Order that the Appellants are ordered to pay:
(1) within fifteen (15) days of the effective date of this Administrative Order (Order), pay a civil penalty of fifty-four thousand dollars (\$54,000.00) to DHEC OCRM; and

(2) within fifteen (15) days of the effective date of this Order, submit to DHEC OCRM for review and approval, a restoration plan, including corrective action to return the impacted critical area at the Site to pre-existing conditions including the removal of the bulkhead and associated fill, as well as a planting schedule to replace marsh vegetation.

II. SIGNIFICANT ISSUES OR FACTORS FOR THE BOARD TO CONSIDER IN DECIDING HOW TO HANDLE THIS MATTER:

- A. APPELLANTS ASSERT THE FINDINGS AND CONCLUSIONS IN THE ADMINISTRATIVE ORDER ARE IN ERR BY: 1) CONCLUDING THAT THE TIDAL MARSHLAND BETWEEN THE APPELLANTS' PROPERTY AND THE ADJOINING CANALS IS CRITICAL AREA; 2) FINDING THAT THE APPELLANTS' ERECTED THE NEW BULKHEAD TOO FAR CHANNELWARD OF THE ALLEGED EXISTING BULKHEAD; 3) ACCEPTING RESPONDENT'S UNAUTHENTICATED PHOTOGRAPHS AND MEASUREMENTS OF APPELLANTS' ALLEGED VIOLATION 4) FINDING THAT THE APPELLANTS' ACTIONS RESULTED IN A PERMANENT LOSS OF PRODUCTIVITY FROM THE ESTUARY; AND, 5) FINDING THAT THE APPELLANTS' IMPROPERLY FILLED APPROXIMATELY TWO THOUSAND SIX HUNDRED AND THIRTY-NINE (2,639) SQUARE FEET OF ALLEGED TIDELANDS CRITICAL AREA; WHEN PETITIONER FAILED TO PROVE THE EXISTENCE AND LOCATION OF A LAWFULLY ESTABLISHED CRITICAL AREA LINE AND PETITIONER'S WITNESSES FAILED TO UNDERSTAND THE PERMIT DRAWINGS.

Respondent's conclusions and findings in the Order are in error because, as a prerequisite to any of its findings or conclusions, the record must reflect that the Respondent proved the existence and location of a lawfully established Critical Area Line. The Respondent did not. Without first establishing a valid Critical Area Line, Respondent cannot demonstrate that it had any regulatory jurisdiction over Appellants' property. Section 48-39-210, Code of Laws of South Carolina, 1976, as amended, mandates the manner in which Critical Area Lines are established. In relevant part the statute provides:

A critical area delineation for coastal waters or tidelands established by the department is valid only if the line is depicted on a survey performed by a professional surveyor, the line is reviewed by department, department validates the location of the boundaries of the coastal waters or tidelands critical area on the survey by affixing a stamp and date to the survey, and the survey contains clearly on its face in bold type the following statement: "The area shown on this plat is a general representation of permit authority on the subject property. Critical areas by their nature are dynamic and subject to change over time. By generally delineating the permit authority of the department, the department in no way waives its right to assert permit jurisdiction at any time in any critical area on the subject property, whether shown hereon or not."

The statute further provides that "[a] critical area line established pursuant to subsection (B) that affects subdivided residential lots expire after three years from the department date on the survey described in subsection (B)..." The record is clear that in Respondent's prosecution of this case, it has failed to identify any certified documents lawfully establishing a Critical Area Line behind the Appellants' newly constructed vinyl bulkhead. For example, the Respondent in response to the Appellants' Freedom of Information Act ("FOIA") request received by certified mail on May 18, 2009, failed to produce any certified Critical Area Line documentation on or adjacent to the Site

Respondent's Enforcement Project Manager in Horry County, stated in the Order that vegetation is the primary factor in determining where a critical area line should be located, but he admitted that he had not visited Appellants' property until after Appellants' vinyl bulkhead was completed on July 19, 2007. When he visited the site, the area behind the vinyl bulkhead was backfilled. Further, the Respondent's Order contained no scientific or objective evidence to support its findings or conclusions, such as soil boring reports or excavation results, to establish where the critical area boundary existed. Finally, the Respondent's use of unauthenticated measurements and photographs is an inadequate evidentiary substitute to prove that allegedly two thousand six hundred and thirty-nine (2,639) square feet of critical area had been impacted since no lawful documentation

of a valid critical area line exists at the site.

South Carolina law provides that statutory construction requires tribunals “[t]o effectuate legislative intent.” Hitachi Data Systems Corporation v. Leatherman, 309 S.C. 174, 178 (1992). “The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.” Id. (internal citations omitted). Applying the rules of statutory construction in the subject case requires a finding that Respondent did not establish a valid critical area designation. While that failure in and of itself is not dispositive on the issue concerning whether or not Appellants’ vinyl bulkhead was constructed in compliance with the Permit, it is directly relevant to whether or not Respondent has jurisdiction over the Appellants’ property and specifically whether or not the vinyl bulkhead as constructed lies within a critical area designation. Assuming, in arguendo, that the Respondent has jurisdiction over the Appellants’ property, Respondent’s failure to establish in the Order a valid critical area designation is dispositive of whether or not Respondent met its burden of proof in establishing that the Appellants’ alleged violations. Respondent did not.

Further, to the extent that Appellants’ vinyl bulkhead is constructed in conformity with the approved certified drawings, the Respondent will not be able to meet its burden of proof in establishing that the Appellants’ violated their Critical Area Permit.

In Addition, the Appellants assert the following affirmative defenses, including, but not limited to, that no valid claim exists under 12(b)(6), SCRCF, lack of jurisdiction, and governmental estoppel based on the acts and omissions of Respondent in prosecuting this matter.

Further, the Appellants’ procedural due process rights under the United States and South Carolina Constitutions have been violated in this matter.

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AND CHIEF OF STAFF
CLERK OF SCHEC BOARD

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Procedural due process requirements are not technical, and no particular form of procedure is necessary. Sloan v. S.C. Bd. Of Physical Therapy Exam'rs, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). To prevail on a claim of denial of due process, there must be a showing of substantial prejudice. Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984).

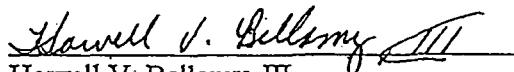
In the present case, the Appellants have been substantially prejudiced by the Respondent's failure to prove the existence and location of a lawfully established Critical Area Line at the site. But at the same time, the Respondents, also, found and concluded that the Appellants had unlawfully impacted approximately two thousand six hundred and thirty-nine (2,639) square feet of alleged critical area on their property. Accordingly, the Appellants have not been afforded adequate notice and the procedural protections as this particular situation demands to adequately defend themselves in this matter against Respondent's finding and concluding set forth in its Order dated April 26, 2010.

WHEREFORE, pursuant to the Standard of Review for Appellants' Appeal, the Board may affirm the decision of the Respondent's Administrative Order 07M-012S ("Order") dated April 26, 2010, remand the case for further proceedings; or may reverse or modify the decision. The Appellants assert that their substantive rights have been prejudiced because the Respondent's Order and 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 on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

For the foregoing reasons, Appellants respectfully request that the Board carefully review the record in this case, conduct a hearing, and issue a decision overturning and quashing the Department's Administrative Order 07M-012S dated April 26, 2010.

Respectfully Submitted,

BELLAMY, GUTENBERG, COPELAND, EPIS.,
GRAVBLY & BOWERS, P.A.
1000 29th Ave. N.
Myrtle Beach, South Carolina 29577
843-282-5393
Attorney for the Respondent


Howell V. Bellamy, III
Howell V. Bellamy, Jr.

May 10, 2009
Myrtle Beach, SC

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& ENVIRONMENTAL CONTROL

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OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SCDHEC BOARD

CERTIFIED MAIL

ARTICLE NUMBER 7009 2250 0003 6002 1247

April 27, 2010

Mr. Tommy W. Berry, Sr.
Mrs. Jo. S. Berry
c/o Mr. Howell V. Bellamy, Jr.
Bellamy, Rutenberg, Copeland, Epps,
Gravelly & Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578

Re: Administrative Order 07M-012S/Administrative Order of Revocation
Berry, Tommy W. & Jo S.
Horry County

Mr. and Mrs. Berry

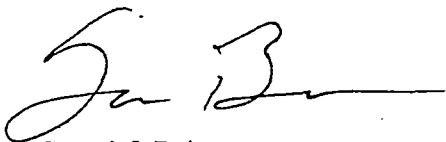
Enclosed, you will find a true copy of Administrative Order number 07M-012S (Order) regarding the unauthorized fill and bulkhead installed in the tidelands critical area. This Order was signed by the Deputy Commissioner of the South Carolina Department of Health and Environmental Control Office of Ocean Coastal Resource Management and executed on April 26, 2010.

Please comply with the requirements of the Order as outlined on page six and seven. Should you choose to appeal this Order, you must do so within 15 days of receipt by following the enclosed instructions. This Order shall become final as written if a proper request is not filed within fifteen (15) days of mailing of this Order.

Also enclosed you will find a true copy of an Administrative Order of Revocation for permit number OCRM-07-509.

Thank you for your prompt attention to this matter. If you have any questions you may contact me at (843) 238-4528 x 149.

Respectfully,



Sean M. Briggs
Enforcement Project Manager
Regulatory Division



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

COPY

orig: file
cc: HVE
GWR
- R. ent's

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due 5/11/10
BELLAMY, RUTENBERG, COPELAND
& EPPS, GRAVELLY & BOWERS, P.A.

Enclosures (2):

1. Administrative Order of Revocation, P/N OCRM-07-509
2. Administrative Order 07M-012S (with Attachments)

cc Mr. & Mrs. Berry
Davis Whitfield-Cargile, Legal Counsel DHEC OCRM
File # 07M - 012S



C. Earl Hunter, Commissioner

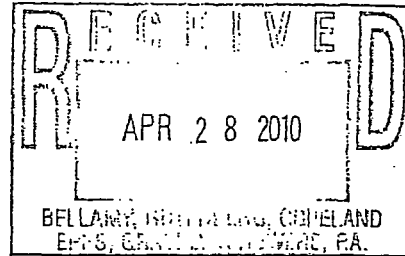
Promoting and protecting the health of the public and the environment

April 20, 2010

CERTIFIED MAIL

ARTICLE NO. 7009 2250 0003 6002 1247

Mr. Tommy W. Berry
c/o Mr. Howell V. Bellamy, Jr.
Bellamy, Rutenberg, Copeland, Epps,
Gravely & Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578



RE: **ADMINISTRATIVE ORDER OF REVOCATION**
P/N# OCRM-07-509 (Permit), Tommy W. Berry

Mr. Berry:

This is in reference to the bulkhead constructed in the tidelands critical area on and adjacent to "K" Canal and Williams Creek at 317 49th Avenue N, North Myrtle Beach, Horry County, South Carolina (TMS#145-02-24-019). This letter will serve as an order of revocation of the above-referenced permit by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (DHEC OCRM). As stated earlier, this permit, for the construction of a bulkhead, was issued in accordance with DHEC OCRM Regulation R.30-12(C), which governs bulkhead projects, and also in accordance with DHEC OCRM Regulations R.30-1 through 30-11, where applicable. This permit is being revoked on the grounds that you failed to construct the bulkhead according to the plans attached to the Permit and pursuant to General Condition # 11 of the Permit.

On August 2, 2007, a Notice of Intent to Revoke was sent to your home based on the above-mentioned facts and you received this notice on August 3, 2007. You were given a period of twenty (20) days from the date of receipt of the notice to respond. Since this time, you have failed to return your structure to compliance with the issued Permit. Pursuant to DHEC OCRM Regulation R.30-8(A) this permit is hereby revoked.

Sincerely,

Blair N. Williams
Wetland Section Manager
Regulatory Division

cc: Tantira S. Marshall, DHEC OCRM Wetland Project Manager
Sean M. Briggs, DHEC OCRM Enforcement Project Manager
Davis Whitfield-Cargile, DHEC OCRM Legal Counsel

CERTIFIED A TRUE COPY
OF DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL RECORDS
JMB

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

IN RE: TOMMY W. BERRY SR.
JO S. BERRY
OCRM-07-509
HORRY COUNTY

ADMINISTRATIVE ORDER
07M-012S

Tommy W. Berry, Sr. and Jo S. Berry (Mr. and Mrs. Berry) are responsible for unauthorized fill and a bulkhead placed in the tidelands critical area regulated by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (DHEC OCRM). The unauthorized activity in the tidelands critical area is a violation of the South Carolina Coastal Zone Management Act. After failing to resolve this matter through a Consent Order, and in accordance with DHEC OCRM regulations and enforcement policy, this Administrative Order is now being issued.

FINDINGS OF FACT

1. Mr. and Mrs. Berry are the owners of certain property abutting the tidelands critical area located on and adjacent to "K" Canal and Williams Creek at 317 49th Avenue N, North Myrtle Beach, Horry County, South Carolina (TMS#145-02-24-019, Site). Mr. and Mrs. Berry, as the property owners, are responsible for the unauthorized activity at the Site.
2. Aerial photographs taken in 2005 by Horry County show the existence of critical area vegetation adjacent to Mr. and Mrs. Berry's house in the now impacted critical area at the Site. (See Attachment A).
3. The previously existing North-facing portion of the bulkhead was located generally underneath the length of the house. The previously existing West-facing portion of the bulkhead extended approximately twenty-two (22) feet beyond the edge of the house. The previously existing bulkhead is clearly shown on Page 1 of Attachment B.

CERTIFIED A TRUE COPY
OF DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL RECORDS

4. On March 7, 2007, DHEC OCRM issued permit number OCRM-07-509 (Permit) to Mr. Berry. The Permit authorized the replacement of an existing bulkhead at the Site. The Permit required Mr. Berry to install the new bulkhead in the same location as the existing one, concurrently with the removal of the existing bulkhead. The Permit did not authorize fill at the Site.
5. On July 17, 2007, DHEC OCRM received a complaint that the bulkhead at the Site was being constructed twenty (20) feet channelward of the existing bulkhead and large amounts of fill were being placed in the tidelands critical area. Photographs of this activity were forwarded to DHEC OCRM and received July 19, 2007 (See Attachment B).
6. On July 19, 2007, Sean M. Briggs (Mr. Briggs), DHEC OCRM Enforcement Project Manager, conducted an inspection at the Site and observed that the bulkhead, consisting of vinyl sheets, was being built approximately twenty (20) feet channelward of the existing bulkhead in the tidelands critical area along the northern property line and approximately ten (10) feet channelward on the western property line. Mr. Briggs also observed large amounts of dirt, used as backfill, in the tidelands critical area between the previous bulkhead and the newly constructed bulkhead. Photographs were taken. (See Attachment C).
7. On July 23, 2007, DHEC OCRM issued a Cease and Desist Directive via certified mail to Mr. Berry for the unauthorized activity described above at the Site. Mr. Berry signed for the directive on July 24, 2007.
8. On July 25, 2007, a Notice of Violation and Admission Letter, including proposed Findings of Fact, were sent via certified mail to Mr. Berry. Delivery of these documents to Mrs. Berry was confirmed received with a certified mail receipt on July 26, 2007. The Admission Letter required a written response from Mr. Berry by August 14, 2009.
9. On July 31, 2007, Mr. Briggs conducted a follow up inspection at the Site following the receipt of both a Cease and Desist Directive and Notice of Violation by the Berrys and observed that the bulkhead was completely installed along both the northern and western

property lines including the whaler, but with the exception of the cap. Backfill had been placed in the tidelands critical area between the previous bulkhead and the newly constructed bulkhead to an elevation one foot below the top of the new bulkhead. Photographs were taken. (See Attachment D).

10. On August 2, 2007, Tanitra S. Marshall (Ms. Marshall), DHEC OCRM Wetland Project Manager, issued a Notice of Intent to Revoke the Permit to Mr. Berry. The notice provided a timeframe to respond. Delivery of this document to Mrs. Berry was confirmed received with a certified mail receipt on August 3, 2007. The Permit was suspended on August 2, 2007 and has been revoked in accordance with the attached order of revocation.
11. On August 13, 2007, Mr. Briggs received a letter from Mr. Howell V. Bellamy, Jr. (Mr. Bellamy), Mr. and Mrs. Berry's legal counsel. Mr. Bellamy indicated in the cover letter that this communication served as the Berrys' response to the various inquiries preponderated to them by DHEC OCRM. The letter contained a chronology of events from Mr. and Mrs. Berry as they perceived them to have happened. Mr. and Mrs. Berry stated that, "to the best of their knowledge and with the assistance of surveys in our possession we replaced the bulkhead." They further stated that, "We have never once thought that what we were doing was not in compliance with what DHEC would approve."
12. From August 2007 to February 2009, an attorney with DHEC OCRM attempted to negotiate a resolution through consent with the Berrys' legal counsel, Mr. Bellamy.
13. Aerial Site photographs taken in 2008 by Horry County show complete destruction of critical area vegetation and the filling of tidelands critical area at the Site. (See Attachment E). Through calculating area by using measurements obtained from satellite imagery, surveys, and field measurements, the disturbed area impacts approximately two thousand six hundred and thirty-nine (2,639) square feet of tidelands critical area.
14. On February 25, 2009, an enforcement conference was held at the Myrtle Beach office of DHEC OCRM. Mr. Briggs explained the critical area violations in detail to Mr. and Mrs. Berry as well as to Mr. Bellamy. Mr. and Mrs. Berry stated that they built the bulkhead according to the plans included in the Permit. They also stated that a bulkhead previously existed at the location where the bulkhead is currently placed. Mr. Bellamy stated that Mr. and Mrs. Berry have neighbors that could attest to the fact that the existing bulkhead was

previously in a location approximate to the current placement of the new bulkhead. No explanation was given for the fill that was placed in the tidelands critical area.

15. On April 7, 2009, Mr. Briggs received, from Mr. Bellamy, four (4) letters from Mr. and Mrs. Berry's neighbors stating that they, "[are] familiar with the [Site]. Prior to March 7, 2007, there was evidence of a bulkhead on the North West property line and on the property line facing Williams Creek." Mr. Bellamy stated in his letter that there were 30 more individuals that could make a similar statement and that he was in the process of gathering their statements. As of January 21, 2010, no further statements have been received by DHEC OCRM.
16. On April 28, 2009, Mr. Briggs responded to Mr. Bellamy confirming receipt of his letter and the four (4) statements from Mr. and Mrs. Berry's neighbors. Mr. Briggs explained that the statements did not mitigate or disprove the violations set forth in the Notice of Violation and Admission Letter and discussed at the February 25, 2009, enforcement conference. Mr. Briggs re-stated the fact that the bulkhead built at the Site was constructed out of compliance with the Permit and that the associated backfill, impacting approximately two thousand six hundred and thirty-nine (2,639) square feet of tidelands critical area, was placed without authorization from DHEC OCRM. Mr. Briggs also indicated that in the absence of an agreement in the form of a Consent Order, an Administrative Order would likely be issued.
17. On January 12, 2010, Mr. Briggs inspected the Site after reviewing 2009 aerial photographs from Horry County (See Attachment F) and seeing the addition of landscaping, fencing, and a concrete pad used as a driveway placed on top of the fill in the tidelands critical area. Consent was granted for the purpose of this inspection by Mrs. Berry through Mr. Bellamy. The concrete pad measured thirty-seven feet four inches by nineteen feet eight inches (37' 5" x 19' 8"). The fence measured twenty-four (24) feet on the eastern facing side of the property, eighty-four (84) feet on the northern facing side of the property, and forty-eight (48) feet on the western facing side of the property. The tidelands critical area that had been filled was landscaped with sod and ornamental trees. Additionally two (2) piles had been placed through the fill in the tidelands critical area to support a second story deck on the rear of the house. Photographs were taken. (See Attachment G)

18. DHEC OCRM finds that the Berrys filled in approximately two thousand six hundred and thirty-nine (2,639) square feet of tidelands critical area and constructed a bulkhead in the tidelands critical area without a permit from DHEC OCRM. The bulkhead is constructed out of compliance with the Permit. Additionally, the concrete driveway, sod, pilings and other alterations to the tidelands critical area were made by the Berrys without a permit from DHEC OCRM.

CONCLUSIONS OF LAW

The filling of the tidelands critical area and installation of a bulkhead in an unauthorized location in the tidelands critical area adjacent to Mr. and Mrs. Berry's property was performed without authorization from DHEC OCRM, in violation of the law. Based on the above findings, Mr. and Mrs. Berry have violated the following:

1. **The South Carolina Coastal Zone Management Act, S.C. Code Ann. §48-39-130 (A) and 23A S.C. Code Ann. Regs. 30-2(B), as amended**, which require that any utilization or alteration of the critical area must be permitted or otherwise legally authorized by DHEC OCRM. Specifically, Mr. & Mrs. Berry constructed a bulkhead and concrete driveway, installed a fence, and placed fill material and two (2) piles that support a deck in the tidelands critical area without a permit from DHEC OCRM.
2. **Critical Area Permit and Coastal Zone Consistency Certification OCRM-07-509:**
 - a) **Special Condition # 1**, in that the existing bulkhead was not removed concurrently with the new bulkhead construction, and
 - b) **Special Condition # 2**, in that the proposed bulkhead was not placed in the same location as the existing bulkhead.

Furthermore, **Critical Area Permitting Regulations, 23A S.C. Code Ann. Reg. 30, as amended: R.30-12(G)(2)(a)**, states that the creation of commercial and residential lots strictly for private gain is not a legitimate justification for the filling of wetlands. Additionally, **Critical Area Permit and Coastal Zone Consistency Certification OCRM-07-509, General Condition # 12** provides that when

the Permittee is notified that DHEC OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.

The South Carolina Coastal Zone Management Act, S.C. Code Ann. §48-39-170 provides that any person determined to be in violation shall be liable for, and may be assessed a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. It also provides that whenever DHEC OCRM finds that a person is in violation of any permit, regulation, standard, or requirement under this chapter, DHEC OCRM may issue an order requiring the person to comply with the permit; regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by DHEC OCRM. In addition, §48-39-170 provides that DHEC OCRM may bring a civil enforcement action under this section as well as seeking appropriate injunctive relief under §48-39-160.

NOW, IT IS THEREFORE ORDERED THAT Mr. and Mrs. Berry shall:

1. Within fifteen (15) days of the effective date of this Administrative Order (Order), pay a civil penalty of fifty-four thousand dollars (\$54,000.00) to DHEC OCRM. The penalty shall be in the form of a check made payable to SCDHEC and reference Order number 07M-012S.
2. Within fifteen (15) days of the effective date of this Order, submit to DHEC OCRM for review and approval, a restoration plan, including corrective action to return the impacted critical area at the Site to pre-existing conditions including the removal of the bulkhead and associated fill, as well as a planting schedule to replace marsh vegetation. This restoration plan shall also include but not be limited to the following:
 - a) A time period for completion with a schedule of remedial measures to be taken from implementation through completion,
 - b) A monitoring plan for 2 years from the date of completion, including identification of a reference site for use in determining success of the restoration plan,
 - c) A current survey including all existing structures at the Site,
 - d) Procedures for reporting the progress of the restoration and contact information,
 - e) Steps for reimplementation of the restoration plan should the original planting fail.

3. Within fifteen (15) days of receipt of any comment from DHEC OCRM, adequately revise and resubmit the restoration plan.
4. Upon receipt of written approval by DHEC OCRM of the restoration plan, begin the restoration plan within thirty (30) days and complete the restoration in accordance with the timeframe set forth therein. Once approved by DHEC OCRM, the restoration plan shall become a fully enforceable part of this Order.
5. Notify DHEC OCRM, in writing, of the completion of the corrective action within seven (7) days of completion. Following this notification, DHEC OCRM will perform an inspection of the Site to ensure compliance with the Act, terms of this Order, and the approved restoration plan.
6. All communication regarding this Order should be directed to:

Attn: Sean M. Briggs
Enforcement Project Manager
Office of Ocean and Coastal Resource Management
927 Shine Avenue
Myrtle Beach, SC 29577

IT IS FURTHER ORDERED THAT failure to comply with any provision of this Order within the time specified above shall be grounds for additional daily monetary sanctions and / or the institution of a court action.

AND IT IS SO ORDERED.

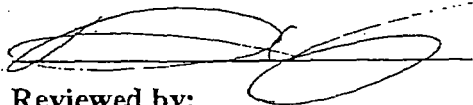
[Signatures on following page]

STATE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT



Carolyn Boltin-Kelly
Deputy Commissioner

Date: 4/26/10



Reviewed by:
DHEC OCRM Legal Counsel

Date: 4/26/10



Rheta Geddings DiNovo
DHEC OCRM Enforcement Program

Date: April 22, 2010

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.
2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393.

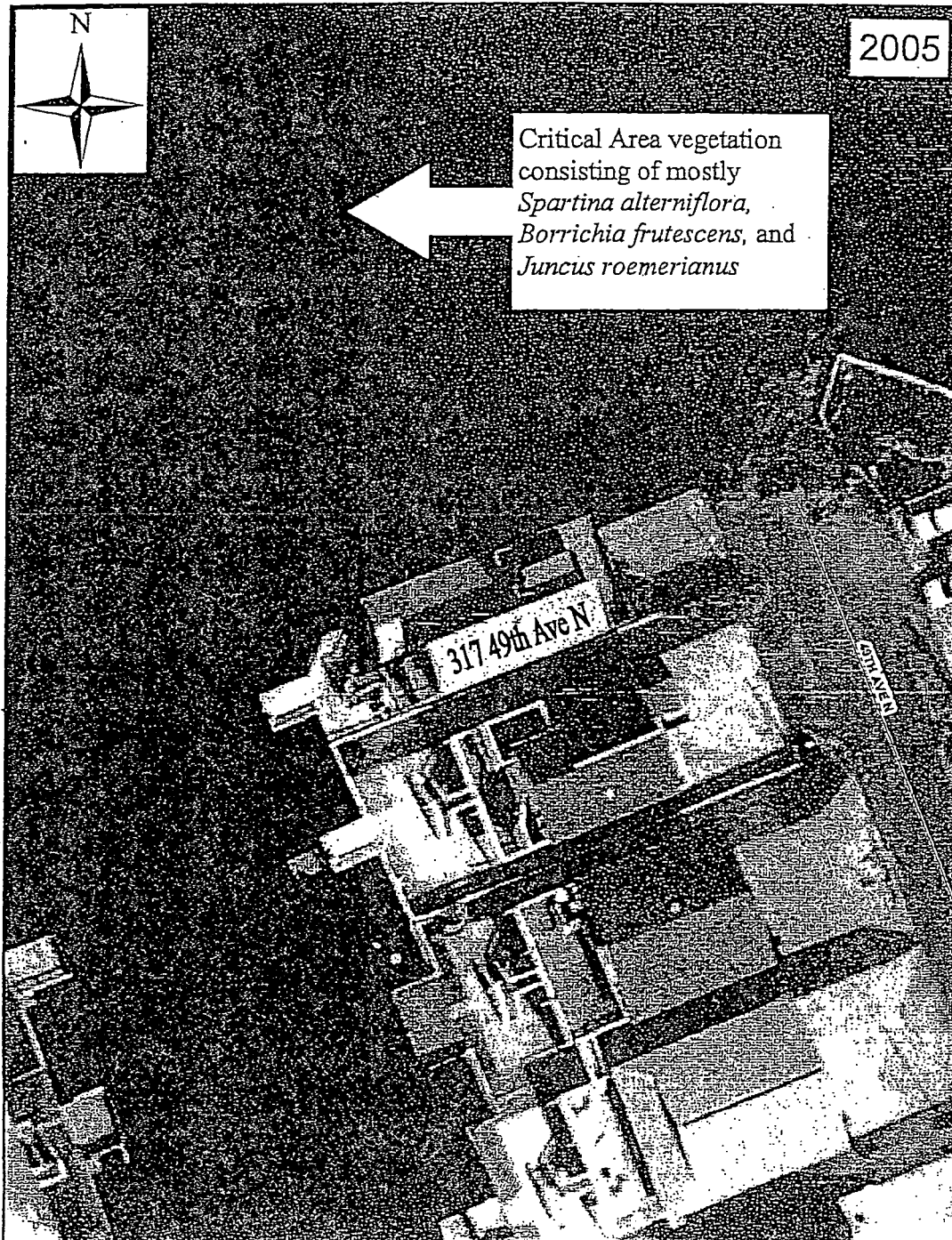
Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201
3. The request for final review should include the following:
 - a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
 - b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
 - c. a copy of the Department's decision or action under review
4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.
5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.
6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.
7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT A

Berry, Tommy W., Sr. and Jo S.
317 49th Ave North, North Myrtle Beach, Horry County, SC
2005 Digital Orthophoto by Horry County

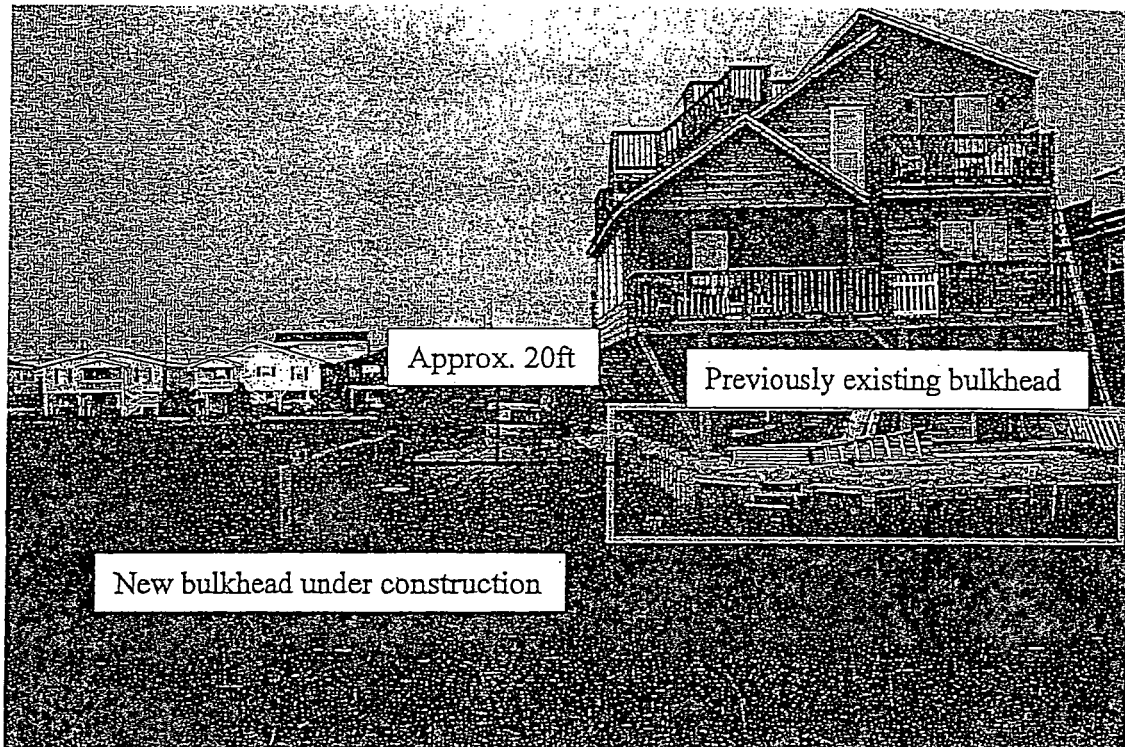


South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT B

Photos of 317 49th Ave North, North Myrtle Beach, Horry County, SC submitted by
the complainant and received by DHEC OCRM on 7/19/07

Berry, Tommy W., Sr. and Jo S.



This photograph shows the placement of the new wall on the northern side of the lot approximately 20 feet channelward. The existing wall can be seen, still intact, underneath the cantilevered portion of the house. Also visible is the fill material placed on top of saltwater wetland vegetation in the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT B

Photos of 317 49th Ave North, North Myrtle Beach, Horry County, SC submitted by
the complainant and received by DHEC OCRM on 7/19/07

Berry, Tommy W., Sr. and Jo S.



This photograph shows the placement of the new wall on the western side of the lot approximately 20 feet channelward. This photograph was taken after the previous photograph. Again, the fill material being placed in the tidelands critical area can be seen just behind the front facing wall.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT B

Photos of 317 49th Ave North, North Myrtle Beach, Horry County, SC submitted by
the complainant and received by DHEC OCRM on 7/19/07

Berry, Tommy W., Sr. and Jo S.



This picture is taken facing the southeast and shows the northern side of the property.
Note the large amounts of fill placed between the new bulkhead and existing bulkhead in
the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT C

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

DATE: 10/15/2009
FILE: Berry, Tommy W., Sr. and Jo S. 07M-012S
AUTHOR: Sean M. Briggs
RE: Inspection Photographs from 7/19/07
Camera: HP Photosmart M425
Media: Digital

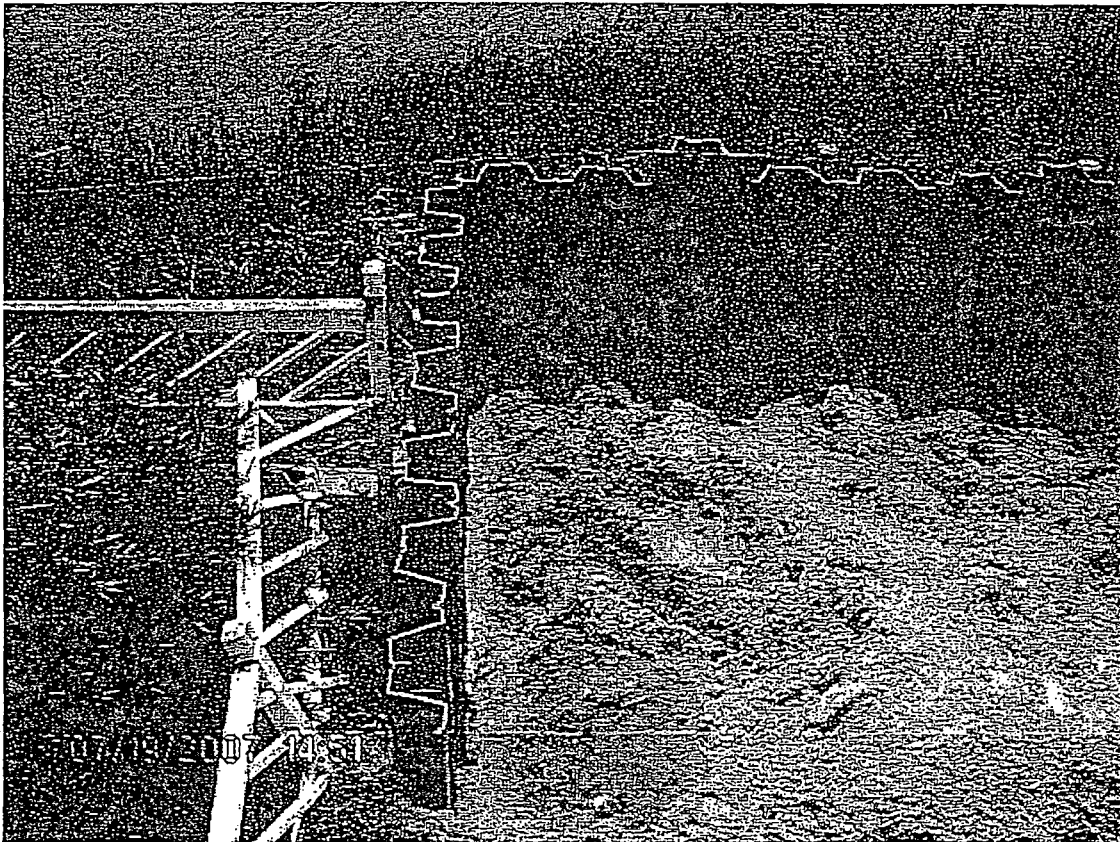
On 7/19/07, the author inspected the Site and documented the bulkhead under construction with the vinyl sheets installed as well as a large amount of dirt used as backfill in the tidelands critical area between the previous bulkhead and the new bulkhead. The purpose of this inspection was to document the reported bulkhead being constructed out of compliance with the permit and the unauthorized fill being placed in the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT C

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



This photograph shows the southwestern corner of the new bulkhead and fill in the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT C

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



This photograph shows the northwestern corner of the new bulkhead and fill in the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT C

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



This photograph shows the northern side of the lot with new bulkhead and fill in the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT D

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

DATE: 10/15/2009
FILE: Berry, Tommy W., Sr. and Jo S. 07M-012S
AUTHOR: Sean M. Briggs
RE: Inspection Photographs from 7/31/07
Camera: HP Photosmart M425
Media: Digital

On 7/31/07, the author inspected the Site and documented the bulkhead completely installed with the exception of the cap. This inspection occurred following the issuance of both a Cease and Desist Directive and a Notice of Violation to the Berrys.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT D

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

DATE: 10/15/2009

FILE: Berry, Tommy W., Sr. and Jo S. 07M-012S

AUTHOR: Sean M. Briggs

RE: Inspection Photographs from 7/31/07

Camera: HP Photosmart M425

Media: Digital

On 7/31/07, the author inspected the Site and documented the bulkhead completely installed with the exception of the cap. This inspection occurred following the issuance of both a Cease and Desist Directive and a Notice of Violation to the Berrys.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT D

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



This photograph shows the western facing portion of the bulkhead with the whaler installed. The whaler has been highlighted in this photo for illustrative purposes.

Enclosures (2):

1. Administrative Order of Revocation, P/N OCRM-07-509
2. Administrative Order 07M-012S (with Attachments)

cc Mr. & Mrs. Berry
Davis Whitfield-Cargile, Legal Counsel DHEC OCRM
File # 07M - 012S

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT E

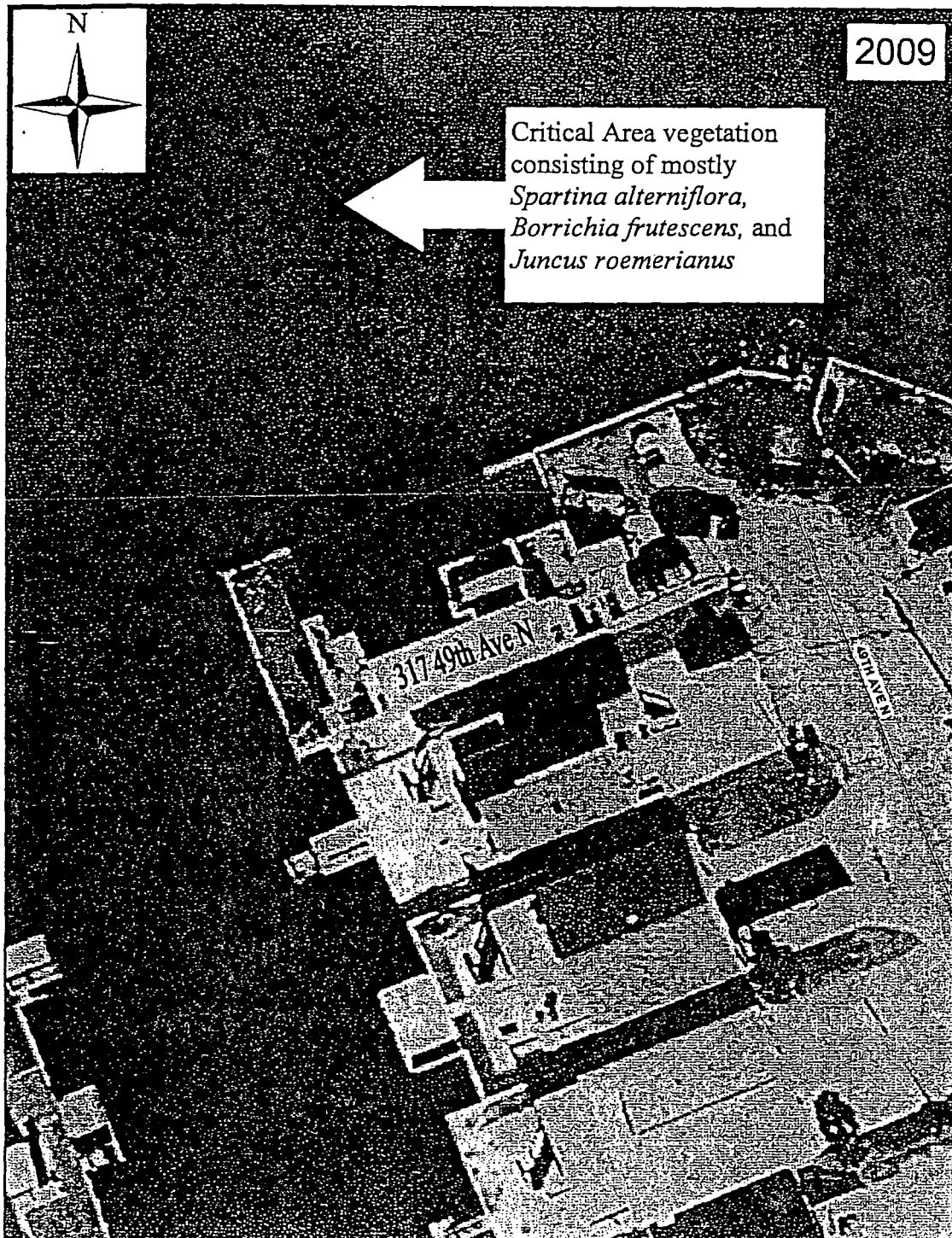
Berry, Tommy W., Sr. and Jo S.
317 49th Ave North, North Myrtle Beach, Horry County, SC
2008 Digital Orthophoto by Horry County



South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT F

Berry, Tommy W., Sr. and Jo S.
317 49th Ave North, North Myrtle Beach, Horry County, SC
2009 Digital Orthophoto by Horry County



South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT G

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

DATE: 1/14/2010
FILE: Berry, Tommy W., Sr. and Jo S. 07M-012S
AUTHOR: Sean M. Briggs
RE: Inspection Photographs from 1/12/10
Camera: HP Photosmart M425
Media: Digital

On 1/12/10, the author inspected the Site and documented additional improvements to the Site. The purpose of this inspection was to document these improvements which included a concrete pad, fencing, and landscaping.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT G

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



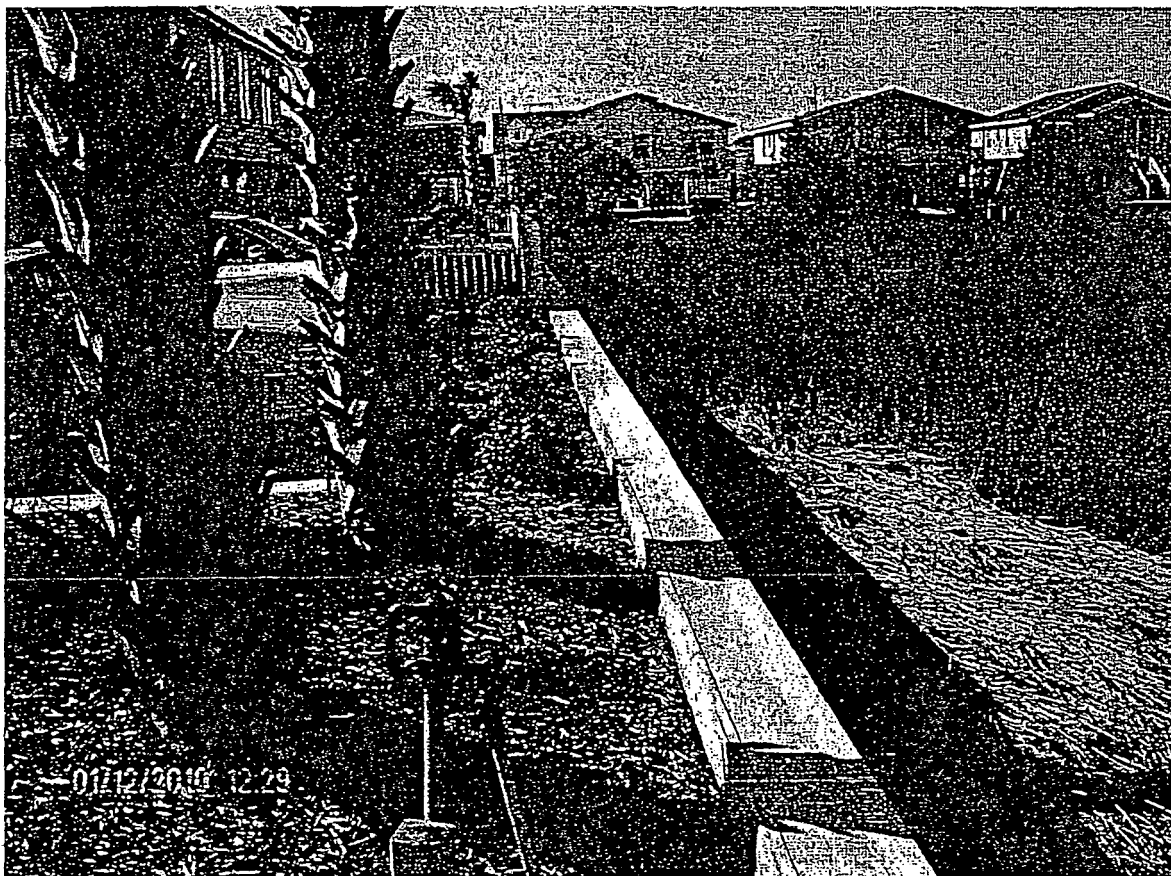
This photograph shows the concrete pad used as a part of the driveway that was installed on top of the fill placed in the tidelands critical area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT G

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



This photograph shows the length of the north facing portion of the bulkhead. A new fence is visible as well as landscaping and a portion of the concrete pad in the foreground.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT G

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



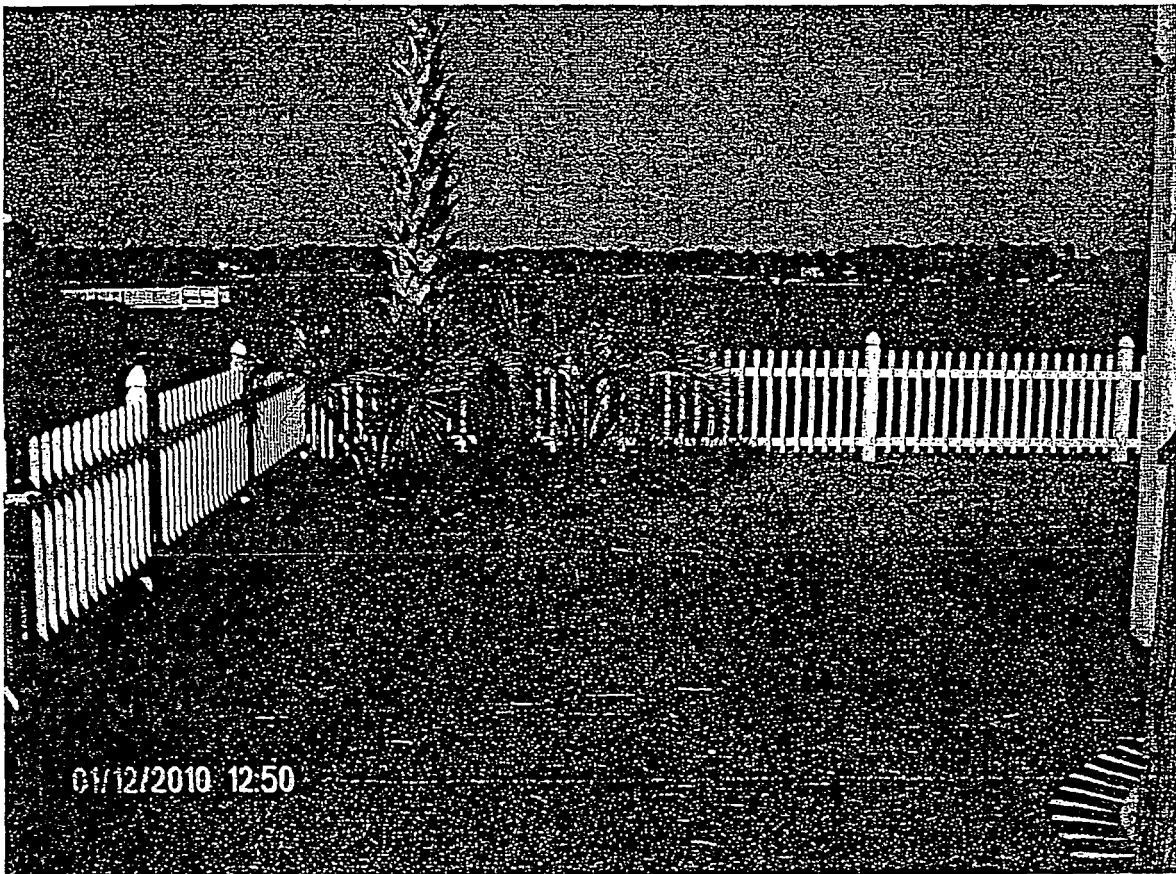
This photograph shows the northern side of the lot that has been landscaped including the placement of sod. Two piles for a new deck can be seen in the right had side of the picture.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT G

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



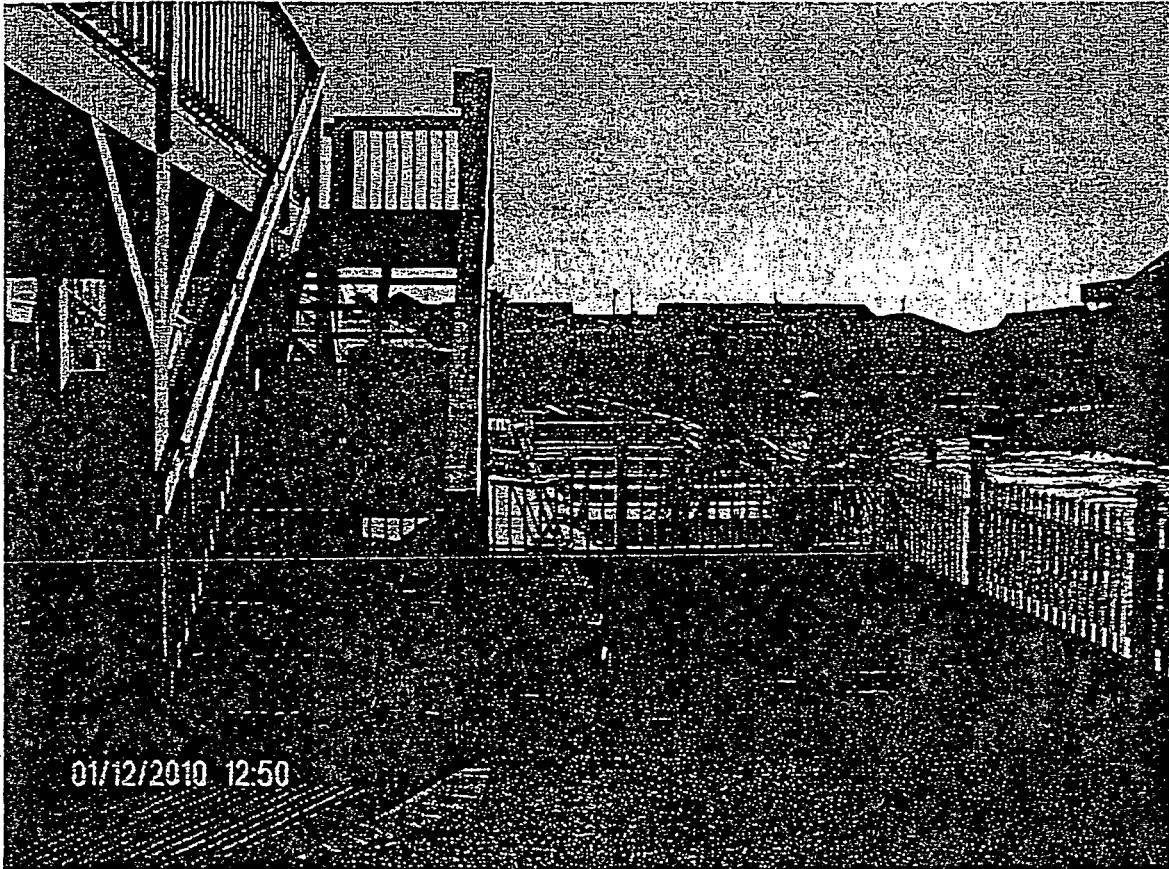
This photograph shows the northwestern corner of the lot with the landscaping and the fence in that area.

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

ATTACHMENT G

Photo Log for 317 49th Ave North, North Myrtle Beach, Horry County, SC

Berry, Tommy W., Sr. and Jo S.



This photograph shows the southwestern corner of the lot with landscaping and the fence in that area.

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S.C. DEPT OF HEALTH
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IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

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CHIEF OF STAFF
CLERK OF SCDHEC BOARD

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Tommy W. Berry, Sr., and Jo S. Berry)
)
Appellants)
)
)
)

South Carolina Department of Health)
and Environmental Control, Bureau of)
Ocean and Coastal Resource)
Management,)
Respondent)
)
)
)

CERTIFICATE OF MAILING

I, Lynn Hearl, an employee of the Law Firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., Counsel for the Appellants, in the above-captioned action, certify that I have this day sent a copy of the Notice of Appeal, a copy of the Administrative Order which is to be challenged on appeal and Certificate of Mailing, with sufficient postage attached, thereto as follows:

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, S. C. 29201
ATTN: Lisa Longshorn

Sean M. Briggs
DHEC
Ocean and Coastal Resource Management
927 Shine Avenue
Myrtle Beach, S. C. 29577

Howell V. Bellamy, III

Howell V. Bellamy, III

Howell V. Bellamy, Jr.

1000 29th Ave. N.

Myrtle Beach, S. C. 29577

843-282-5393

Attorneys for the Appellants

April 11, 2010

Myrtle Beach, S. C. 29577