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HENRY MCMASTER
ATTORNEY GENERAL

April 3, 2006

The Honorable Paul Agnew
Member, House of Representatives
436-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Agnew:

You have requested our opinion, seeking "clarification on the legality of the scope of a proposed regulation before the General Assembly which governs permits for bridges to marsh islands - R.3006." By way of background, you provide the following information:

> [t]he DHEC Board approved the draft regulation in January of this year, and its expiration date is May 20, 2006. The public trust tidelands are important to all the citizens of South Carolina, so I want to be sure that DHEC does in fact have the authority to impose the proposed regulations and that the legislature is correct in recommending approval of them.
>
> Attorneys on both sides of this issue have submitted opinions (attached) on DHEC's authority to impose the proposed regulations. Also Carl Roberts, chief attorney for DHEC provided a statement at the House Agriculture Environmental II Subcommittee hearing clarifying that DHEC OCRM has the legal authority for all of the provisions in the proposed regulations (attached).

You provide the following background with respect to the proposed Regulation:

> SC DHEC OCRM has proposed regulations for Access to Coastal Islands (see enclosed SC Regulations 30-12). These regulations allow in limited circumstances permits for private bridges to marsh islands in the public trust tidelands. These bridges would facilitate the private development and use of an island by an applicant, most often for residential purposes. Visual, chemical, and physical impacts to public trust tidelands and productive marsh estuaries are likely to result unless the additional safeguards are included in these regulations to protect the marshes and waters surrounding the islands.

For many years OCRM had regulations for "Access to Small Marsh Islands." These regulations required OCRM to consider public need before issuing a permit for a bridge to a small marsh island. They also required a consideration of the impacts to protected resources including important ecological, cultural, natural, geological, scenic, and historical characteristics.

The OCRM regulations governing access to small marsh islands were invalidated in 2005 by the SC Supreme Court due to vagueness. The Court ruled the OCRM did not know when to apply the regulations because "small" was not defined.

The proposed regulations, R.3006, ... [do] not consider public need because development interests on the stakeholders committee drafting the regulations consider this to be a vague term and a difficult, if not impossible, test for an individual to meet. Instead, the proposed regulations contain very specific language designed to protect the important public values in the tidelands including, water quality, wildlife habitat, and scenic views. These safeguards are in the development standards section.

During the debate on these regulations in the House Environmental Affairs II Agriculture Subcommittee, lawyers representing the development interests argued that SC DHEC OCRM does not have the authority to regulate activities on the islands above the mean high water mark, even though those activities would impact the public trust tidelands. Enclosed is a letter from the McNair Law Firm.

During this debate lawyers representing development interests also argued that, "OCRM was instructed by the SC Supreme Court to simply define "small" and instead they crafted 12 pages of regulations."

Your specific questions are as follows:

1 – Does SC DHEC OCRM have the legal authority to regulate the items in the proposed regulations under Section 3, Minimum Development Standards for Bridge Applications?

This section deals with docks; stormwater; wastewater, housing density to prevent too much impervious surface generating polluted runoff and to protect some wildlife habitat; landscaping and buffers to protect views and water quality; an environmental assessment for endangered species, species of concern, and wetlands; a tree survey; protection of navigation on waterways; pervious paving to reduce stormwater runoff; exterior lighting to reduce impacts to wildlife, marine life, and the public's use and enjoyment on the tidelands; the location of utilities when crossing the tidelands; impervious surface coverage ratios, open space requirements, and building footprints to protect water quality and wildlife habitat; conservation easements to ensure that all development standards agreed upon to get the bridge permit remain in place; and

a consideration of the reduction in economic benefits to the area. (Proposed regulation attached.)

2 – Does SC DHEC OCRM have the authority to promulgate these new regulations for Access to Coastal Islands, or are they limited by the SC Supreme Court to only define "small" and resubmit the recently invalidated regulation? (Park Island Supreme Court decision attached.)

It is our opinion that DHEC possesses the authority to promulgate these regulations and that the referenced Supreme Court decision does not limit such authority.

Law / Analysis

Your questions first require an examination of certain basic principles of statutory interpretation. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). Further, as our Supreme Court stated in *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942), "it is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words."

In addition, in construing statutory language, a statute must be read as a whole, not provisions thereof in isolation. All sections must be construed together with one another and each section given effect. *Higgins v. State*, 307 S.C. 446.415 S.E.2d 799 (1992). As our Supreme Court has recognized, "[i]n ascertaining the intent of this Legislature, a court should not focus on a single section or provision but should consider the language of the statute as a whole." *Croft v. Old Republic Ins. Co.*., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005).

Governing Standard of Agency Powers

Our analysis begins with an examination of the generally governing law with respect to the powers and duties of state agencies and officers. In *Op. S.C. Atty. Gen.*, Op. No. 79-79 (June 12, 1979) we stated the following in that regard:

> '[i]n general, the powers and duties of officers are prescribed by the constitution or by statute or both, and they are measured by the terms and necessary implication of the grant, and must be executed in the manner directed and by the officer specified. If broader powers are desirable, they must be conferred by the proper authority. They cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial functions. No consideration of public policy can properly induce a court to reject the statutory definition, of the powers of an officer ....

(Quoting 63 Am.Jur.2d *Public Officers and Employees*, § 263). And, in *Op. S.C. Atty. Gen.*, February 19, 1988, we said the following:

> [t]he administrative officer's power must be exercised within the framework of the provisions bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare ....

(Quoting 1 Am.Jur.2d *Administrative Law* § 132). In that same opinion, we also observed that

> [t]he powers of administrative agencies, bodies or officials are not to be derived from mere inference, and their jurisdiction cannot be conferred by implication. As a general rule, however, in addition to the powers expressly conferred on them by organic or legislative enactment, such officials and bodies, in the absence of restricting limitations of public policy or express provisions as to the manner of exercise of the powers given, have such implied powers, as are necessarily inferred or implied from, or incident to, the express powers granted to, or duties imposed on them, and to accomplish the purposes of the legislation which established them.

Finally, it is well recognized that statutes which are remedial in nature must be liberally construed in order to effectuate the Legislature's purpose. *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). Thus, with respect to the Coastal Zone Management Act, as amended, we have previously concluded that "DHEC has been granted broad authority and discretion by the General Assembly to regulate the usage and development of the beach/dune systems of this State." *Op S.C. Atty. Gen.*, September 2, 2003. With that background in mind, we turn now to an examination of the relevant statutes.

Coastal Zone Management Act

It has been stated by one scholar that "[t]he state's role in coastal land use planning derives primarily from the South Carolina Coastal Zone Management Act ...." Kendall, "Preserving South Carolina's Beaches: The Role of Local Planning In Managing Growth In Coastal South Carolina,"

1 *S.C. Envtl. L. J.*, 61, 63 (Summer 2000). This legislation was enacted in 1977. Kendall further comments that

> [t]he Coastal Zone Act gives the Office of Ocean and Coastal Resource Management (OCRM) of the Department of Health and Environmental Control (DHEC) permitting authority *over any proposed development that will alter any critical area in the coastal zone*.... Critical areas are defined to include coastal waters, tidelands (such as coastal wetlands, beaches and dunes .... The Beachfront Management Act, passed in 1988 as an amendment to the Coastal Zone Act, grants the state additional powers to protect the South Carolina beach/dune ecosystem ....

(emphasis added). Thus, DHEC is seen to be given authority "over any proposed development that will alter any critical area in the Coastal Zone." As we will be see below, this includes developments *outside the critical areas* which are deemed to adversely impact those critical areas.

As our Supreme Court recognized in *Brown v. South Carolina Dept. of Health and Environmental Control*, 348 S.C. 507, 560 S.E.2d 410 (2002),

> [i]n 1977, the General Assembly enacted the Coastal Tidelands and Wetlands Act (Coastal Zone Management Act). S.C. Code Ann. §§ 48-39-10 to -360 (Supp. 2001). Under the Coastal Zone Management Act, one of the South Carolina Coastal Council's (OCRM's predecessor) duties was to develop and administer a Coastal Management Program (CMP). § 48-39-80. ... According to the applicable statute,
>
> > The department shall develop a comprehensive [CMP] and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter.
> >
> > § 48-39-80.
>
> As part of the CMP, the Coastal Council was required to "[d]evelop a system whereby the department shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." § 48-39-80(B)(11). ... The parties agree the Coastal Council developed a CMP which was approved by the General Assembly and Governor. The CMP was published as a special edition of the *State Register, 2 State Register* (No. 26, Oct. 1978), and is reflected in the "CMP document." "Refinements" to the CMP document appear in the *State Register. See* 17 *State Register*, Issue 5, Part I, pp. 155-56 (May 1993); 17 *State Register*, Issue 6, pp. 55-56 (June 1993). These refinements were approved by the General Assembly and Governor.

348 S.C. at 516-517.

The Coastal Zone Management Act and Beachfront Management Act are codified at S.C. Code Ann. Section 48-39-10 *et seq*. Pursuant to § 48-39-20, the General Assembly expressed its purpose as follows:

> [t]he General Assembly finds that:
>
> (A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.
>
> (B) The increasing and competing demands upon *the lands and waters of our coastal zone* occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.
>
> (C) A variety of federal agencies presently operate land use controls and permit systems *in the coastal zone*. South Carolina can only regain control of the regulation of its critical areas by developing its own management program. *The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.*
>
> (D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.
>
> (E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.
>
> (F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

State policy is further expressed by § 48-39-30. Section 48-39-30 provides in pertinent part as follows:

> (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the

> economic and social improvement of *the coastal zone* and of all the people of the State.
>
> (B) Specific state policies to be followed in the implementation of this chapter are:
>
> (1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities *in the critical areas of the coastal zone*;
>
> (2) To protect and, where possible, to restore or enhance the resources of the State's *coastal zone* for this and succeeding generations ....

(emphasis added).

The term "coastal zone" is defined by § 48-39-10(B) as follows:

> ... (B) "Coastal zone" means all coastal waters and submerged lands seaward to the State's jurisdictional limits and *all lands and waters in the counties of the State which contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown.*

Subsection (J) of § 48-39-10 defines "critical area" to mean any of the following:

> (1) coastal waters;
>
> (2) tidelands;
>
> (3) beaches;
>
> (4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

DHEC's authority relating to the enforcement of § 48-39-10 *et seq.* is set forth in various sections throughout the Act. Section 48-39-50 (E), for example, authorizes DHEC "[t]o promulgate necessary rules and regulations to carry out the provisions of this chapter." Subsection (F) requires DHEC "[t]o administer the provisions of this chapter and all rules, regulations and orders promulgated under it." The Department is further authorized to

> (G) [t]o examine, modify, approve or deny applications for permits for activities covered by the provisions of this chapter.

> (H) To revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit.
>
> (I) To enforce the provisions of this chapter and all rules and regulations promulgated by the department and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter. ...
>
> (M) To implement the state policies declared by this chapter. ...
>
> (O) To exercise all incidental powers necessary to carry out the provisions of this chapter.

Pursuant to § 48-39-80, DHEC is required to "develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter." It should be noted that this management program encompasses the entire coastal zone, not just the "critical areas." Moreover, DHEC must provide for the "orderly and beneficial use of the critical areas." Obviously, such provision may well require regulation beyond the critical area boundaries in order to insure that the "beneficial use of the critical area" is protected and preserved. In developing such a coastal management program, DHEC is mandated to

> (A) Provide a regulatory system which the department shall use in providing for the *orderly and beneficial use of the critical areas.*
>
> (B) In devising the management program the department *shall consider all lands and waters in the coastal zone for planning purposes.* In addition, the department shall:
>
> (1) Identify present *land uses* and coastal resources.
>
> (2) Evaluate these resources in terms of their quality, quantity and capability for use both now and in the future.
>
> (3) Determine the present and potential uses and the present and potential conflicts in uses of each coastal resource.
>
> (4) Inventory and designate areas of critical state concern within the coastal zone, such as port areas, significant natural and environmental, industrial and recreational areas.
>
> (5) Establish broad guidelines on priority of uses in critical areas.
>
> (6) Provide for adequate consideration of the local, regional, state and national interest involved in the siting of facilities for the development, generation,

> transmission and distribution of energy, adequate transportation facilities and other public services necessary to meet requirements which are other than local in nature.
>
> (7) Provide for consideration of whether a proposed activity of an applicant for a federal license or permit complies with the State's coastal zone program and for the issuance of notice to any concerned federal agency as to whether the State concurs with or objects to the proposed activity.
>
> (8) Provide for a review process of the management plan and alterations thereof that involves local, regional, state and federal agencies.
>
> (9) Conduct other studies and surveys as may be required, including the beach erosion control policy as outlined in this chapter.
>
> (10) Devise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication.
>
> (11) Develop a system whereby the department shall have the authority to review all state and federal permit applications *in the coastal zone*, and to certify that these do not contravene the management plan.
>
> (C) Provide for a review process of the management program and alterations that involve interested citizens as well as local, regional, state and federal agencies.
>
> (D) Consider the planning and review of existing water quality standards and classifications *in the coastal zone*.
>
> (E) Provide consideration for nature-related uses of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame habitat protection projects and endangered flora and fauna.

(emphasis added). It is significant, in our view, that in developing the program, DHEC is to consider "all lands and waters in the coastal zone for planning purposes." Such consideration, by definition, extends well beyond the "critical areas" themselves.

Section 48-39-90 further provides for the process pursuant to which the coastal management plan was prepared. Subsection (D) of § 48-39-90 states that "[u]pon review and approval of the proposed management plan by the Governor and General Assembly, the proposed plan shall become the final management plan *for the State's coastal zone.*" (emphasis added). As seen, *Brown v. S.C. DHEC, supra* indicates that such process was followed. Again, the regulatory agency is not constrained to regulate only the "critical area," but the statute specifically references the entire "coastal zone."

Section 48-39-130 addresses the requirement of the issuance of a permit by DHEC with certain exceptions so as to utilize critical areas. Such provision in pertinent part states the following:

> (A) Ninety days after July 1, 1977, no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the department.
>
> (B) Within sixty days of July 1, 1977, the department shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating and granting or denying all permit applications until such time as the final rules and regulations are adopted in accordance with this section and Chapter 23 of Title 1. Within one hundred and twenty days of July 1, 1977 the department shall publish and make available to local and regional governments and interested citizens for review and comment a draft of the final rules and regulations it will follow in evaluating permit applications. Sixty days after making such guidelines available the department shall hold a public hearing affording all interested persons an opportunity to comment on such guidelines. Following the public hearing the department, pursuant to the Administrative Procedures Act, shall in ninety days publish final rules and regulations. Provided, however, the interim rules and regulations shall not be subject to the provisions of Chapter 23 of Title 1.
>
> (C) Ninety days after July 1, 1977 no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department. Provided, however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the Budget and Control Board, or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit. Any person may request the department to review any project or activity to determine if he is exempt under this section from the provisions of this chapter. The department shall make such determinations within forty-five days from the receipt of any such request.

Section 48-39-130(D)(3), one of the exceptions to a permit being required, further excepts

> ... (3) [t]he discharge of treated effluent as permitted by law; provided, however, that the department shall have the authority to review and comment on all proposed permits *that would affect critical areas.*

(emphasis added). Thus, while portions of § 48-39-130 do reference "critical areas," other parts refer to proposed permits which "affect critical areas." Thus, even § 48-39-130 itself is not limited to DHEC's authority only over the "critical area."

Section 48-39-150 sets forth the criteria pursuant to which DHEC may approve or deny a permit. Such provision states in pertinent part that

> (A) In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:
>
> (1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.
>
> (2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the department prior to issuing a permit.
>
> (3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.
>
> (4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.
>
> (5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.
>
> (6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.
>
> (7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.
>
> (8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.
>
> (9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

> (10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

Moreover, § 48-39-150 (B) provides in part that "a[t] the request of twenty citizens or residents of the county or counties affected, the department shall hold a public hearing on any application *which has an effect on a critical area*, prior to issuing a permit." (emphasis added). Further, such subsection declares that "[t]he permit may be conditioned upon the applicant's amending the proposal to *take whatever measures the department feels are necessary to protect the public interest.*" (emphasis added). These provisions further reinforce the conclusion that DHEC is not limited to regulation of the "critical areas" only.

DHEC also possesses broad regulatory authority pursuant to statutes other than the Coastal Zone Management Act, further buttressing this conclusion. Such regulatory authority extends far beyond the "critical areas" of the State, to include all lands of South Carolina. See e.g. § 48-1-10 *et seq.* (Pollution Control Act); § 48-14-10 *et seq.* (Stormwater Management and Sediment Reduction Act). Furthermore, as referenced above, and as recognized in *Brown v. S.C. DHEC, supra,* in compliance with the federal Coastal Zone Management Act (16 U.S.C.A. §§ 1451-1465), the General Assembly and Governor approved South Carolina's Coastal Management Program in order to define and manage activities which have a direct and significant impact on coastal waters. DHEC has defined such activities as follows:

> [a]n activity is considered to have direct and significant impact on coastal waters and is therefore subject to management in the coastal zone if it entails one or more of the following criteria:
>
> 1) located in a critical area;
>
> 2) *detrimental environmental impact upon a critical area* (for example, water pollution upstream from an inland source which would then reach and result in degradation of the estuarine system);
>
> 3) adverse effects on the quality of coastal resources – natural, economic, social or historical;
>
> 4) disruption of access to a public coastal resource.

S.C. Coastal Management Program, p. III - 12. (emphasis added). The Program's policies with respect to residential development are as follows:

> a) Adequate sewage disposal service (septic tanks or treatment systems) which meet the Environmental Protection Agency, South Carolina Department of Health and Environmental Control, and local health department standards must be provided in residential development plans. **Septic tanks should be permitted, where feasible, in low density residential developments when**

they are designed properly and soils are adequate to insure against pollutants leaching into surface or groundwater resources. Septic tanks must be situated in a safe distance from the shoreline to ensure proper drainage and filtering of tank effluents before they reach the water's edge with special attention given in identified erosion areas. Policies for sewage treatment and associated facilities appear in IX (A) of this section.

b) Residential development which would require **the filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited, unless no feasible alternatives exist or an overriding public interest can be demonstrated**, and any substantial environmental damage can be minimized. These marshes are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for absorption of storm water runoff and acquifer recharge, and, therefore, their destruction for residential development must be avoided whenever possible.

c) Location of new residential developments in flood-prone river or other hazard areas is discouraged. When development does occur in flood hazard areas, the inclusion of natural, vegetated buffers between developed areas and the shoreline must be incorporated whenever possible to help absorb flood water surges. ....

d) **Where appropriate, particularly adjacent to a critical area, drainage plans and construction measures for residential development shall be designed so as to control erosion and sedimentation, water quality degradation, and other negative impacts on adjacent water and wetlands. Example techniques include buffering and filtering runoff water; use of permeable surfacing materials for roads, parking and other paved areas within a subdivision**; and grass ditching, surface drainage contours, or catchment ponds rather than direct storm water discharge. Best management practices (any resultant regulations) designed to control nonpoint source runoff that are developed and implemented as part of the 208 Water Quality Planning process also apply to new housing projects. ....

(emphasis added). *S.C. Coastal Management Program*, IV - 16-17. Again, such *Management Program* frequently makes reference to areas outside the "critical area" itself. The Program, approved by the Governor and General Assembly, thus recognizes, consistent with numerous references in § 48-39-10 *et seq.*, that regulation of activities *which affect the "critical area"* is as important as the regulation of the "critical area" itself, if not often more so.

Cases decided by our Supreme Court are also particularly instructive with respect to the questions posed here. We note that in *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995), the Court rejected any argument that former § 48-39-200 limited the jurisdiction

of the Coastal Council (predecessor to OCRM) to "'critical areas,' and that because the Overwash Area was not a critical area, the Coastal Council lacked jurisdiction over Grant." 319 S.C. at 355. The Court noted, among other things, that § 48-39-200 had been repealed in 1993. Such provision had read as follows:

> [n]otwithstanding any other provisions of this chapter, the Council shall have no direct regulatory authority over any area outside the critical areas in the coastal zone.

While *Grant* did not rely exclusively upon such repeal in the case before it, the Court did consider the fact that such provision had been repealed to be significant in concluding that the Coastal Council possessed no jurisdiction to regulate *Grant's* property outside the "critical area." Such repeal is particularly instructive here in our conclusion that DHEC does not lack authority to promulgate regulations governing areas outside the "critical areas."

The repeal of § 48-39-200 was part of the 1993 government restructuring legislation. As we noted in our opinion, dated October 25, 1996, the functions of the Coastal Council were shifted to DHEC. OCRM, within DHEC, thus assumed the Coastal Council's regulatory functions. As we understand it, as part of this restructuring effort, § 48-39-50 was broadened to give OCRM the authority "[t]o enforce the provisions of this chapter and all rules and regulations promulgated by the department." See, § 48-39-50(I). It is our understanding that the concept of this restructuring was to promote the idea of "one stop shopping," with the various environmentally protective permitting programs consolidated into a single agency. Thus, the repeal of § 48-39-200 made it clear that this single agency – DHEC – possessed comprehensive regulatory authority, both in the "critical area" and beyond. Accordingly, we deem the repeal of § 48-39-200 as particularly instructive in concluding that DHEC possesses the requisite authority to promulgate the regulations at issue.

Consistent with the recognition of DHEC's broad regulatory authority in the area of the environment is *City of Rock Hill v. South Carolina Department of Health and Environmental Control*, 302 S.C. 161, 394 S.E.2d 327 (1990). There, the Court stated with respect to DHEC's sweeping authority pursuant to the Pollution Control Act that:

> [t]he Pollution Control Act provides DHEC with broad authority and power to regulate persons ... who may pollute the environment of the State of South Carolina and to abate, control, and prevent such pollution. For example, DHEC may make, revoke, or modify orders requiring the discontinuance of the discharge of sewage or other wastes and may also issue, deny, revoke, suspend, or modify permits for the discharge of such wastes. *See, S.C. Code Ann.*, § 48-1-50(3) and (5) (1987).
>
> The Pollution Control Act also provides for damages to be recovered from those who violate the provisions of that chapter. S.C. Code Ann. § 48-1-90(b) (1987) specifically provides that any person who discharges organic or inorganic waste into the environment thereby damaging or destroying fish, shellfish, aquatic animals, wildlife, or plant life indigenous to or dependent upon the receiving water or any property, shall be liable to the State for damages as may be proven. Section 48-1-

> 90(b) also states that such action for damages shall be brought in the name of either the State or DHEC. While the Pollution Control Act does not specifically set forth the forum in which such damages are to be pursued, our review of the various provisions of the Act, reveals that the Act implies that DHEC not only has the authority to administratively assess penalties, but damages as well.
>
> As creatures of statute, regulatory bodies such as DHEC possess only those powers which are specifically delineated. *City of Columbia v. Board of Health and Environmental Control,* 292 S.C. 199, 355 S.E.2d 536 (1987). By necessity however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged. *Id.* Also, where an administrative agency such as DHEC is acting for the protection of the health of the environment, the delegation of authority to that agency should be construed liberally. *Id.* Under the Pollution Control Act, DHEC is charged with the responsibility of insuring that the waters of the State are as free of pollutants as possible. To achieve this end, DHEC has been granted broad authority. Implicit in this authority is the power to administratively assess damages which may occur from violations of the Pollution Control Act.

302 S.C. at 164-165. See also, *City of Cola v. Bd. of Health and Environmental Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987) [DHEC, like other regulatory agencies "possesses not only the powers expressly conferred on it, but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged."].

We turn now to a discussion of the recent Supreme Court decision, *South Carolina Coastal Conservation League v. DHEC*, 363 S.C. 67, 610 S.E.2d 482 (2005). That case involved "a permit to build a concrete bridge for vehicular traffic over 'critical area' as defined in South Carolina Code section 48-39-10 (J)." The case developed and proceeded as follows:

> LandTech of Charleston, L.L.C. (LandTech) applied to OCRM for a permit to build a bridge across the marshes of the Wando River to Park Island in the Town of Mt. Pleasant. OCRM staff deemed Park Island a small island and therefore considered the permit application governed by the access-to-small-islands regulation, Regulation 30-12(N) (Small Islands Regulation). ... LandTech claimed that Park Island was not a small island and that the application was governed by the transportation-projects regulation, Regulation 30-12-(F) (Transportation Regulation). ... OCRM disagreed and processed the permit application under the Small Islands Regulation, the criteria of which are more stringent than those of the Transportation Regulation. OCRM granted the permit.
>
> Respondents objected and requested a contested hearing before the ALJD. At the hearing, LandTech raised its argument that Park Island was not a small island and that the Transportation Regulation, not the Small Islands Regulation, governed. Respondents countered that Park Island was a small island and that the criteria for the

> grant of a permit for bridge access had not been met. OCRM staff agreed with Respondents that Park Island was a small island but argued that the Small Islands Regulation was satisfied.
>
> The Administrative Law Judge (ALJ) observed that "small island" is not defined in the regulations and decided "there needs to be some standard to guide the OCRM in its application of its regulation dealing with bridges to islands." The ALJ compared Park Island only to other islands within the Wando River basin; islands in other coastal areas were not considered. Because Park Island was larger than eighty percent of the Wando River basin's islands, the ALJ found that Park Island was not a small island. He therefore adopted LandTech's position that the application was governed by the Transportation Regulation, not the Small Islands Regulation. He held that the Transportation Regulation was satisfied and upheld the permit.
>
> Nevertheless, because OCRM staff had granted the permit under the Small Islands Regulation, the ALJ addressed whether the permit complied with that regulation assuming Park Island were small. He found that each factor in the regulation that OCRM mut consider weighed in favor of granting the permit. He stated that even if the Small Islands Regulation were the governing regulation, its criteria had been satisfied.
>
> Respondent appealed to the Panel, which affirmed without analysis.
>
> Respondents then appealed to the circuit court, which reversed. With respect to the issue whether the Transportation Regulation or Small Islands Regulation governed, the court held that the ALJ erred by using a test not promulgated by regulation. The court deferred to OCRM staff and found that Park Island was in fact a small island and that the permit application was therefore governed by the Small Islands Regulation. The court held that the permit's issuance did not comply with that regulation's criteria.
>
> In addition, the circuit court held that there was not substantial evidence to support the finding that the permit's issuance complied with the regulation requiring OCRM to consider the direct and cumulative effects of a project. Regulation 30-11 (Effects Regulation). ... The court vacated the grant of the permit.

The Supreme Court held the "small island" regulation invalid and concluded that the "transportation regulation" governed. Describing the case's history, the Court stated:

> [t]he circuit court also held that Park Island was a small island, using no test but rather deferring to OCRM staff. OCRM and Respondents assert that "small" is a term of common understanding, so no particular test is necessary. We disagree.

> "Small" is a term of subjective relativity, and the regulations provide no benchmark for comparative size. Smallness arguably could be determined per watershed, with respect to all of South Carolina's islands, or on an absolute scale. The problem is that there is nothing to interpret or apply. ... Allowing OCRM to exercise unrestrained discretion is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation. ... *See, Captain's Quarters Motor Inn, Inc.*, 306 S.C. at 490-91, 413 S.E.2d at 14. (invalidating a test used by OCRM's predecessor in evaluating permit applications because it was not promulgated by regulation); *see also Edisto Aquaculture Corp. v. S.C. Wildlife and Marine Res. Dep't*, 311 S.C. 37, 40, 426 S.E.2d 753, 755 (199o3) (distinguishing mandatory agency enabling statutes from permissive ones).
>
> That there is no promulgated test means that the Small Islands Regulation fails for vagueness. ... Any test to determine whether an island is small is invalid as not promulgated by regulation.
>
> In light of the Small Islands Regulation's invalidity, the circuit court should have deferred to the Panel's decision that the permit was governed by the Transportation Regulation. Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ. *Brown*, 348 S.C. at 515, 560 S.E.2d at 414; *Byerly Hosp. v. Health and Human Serv. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995). The Panel, not OCRM staff, is entitled to deference from the courts. *See*, S.C. Code Ann. § 1-23-610(A) (Supp. 2003); S.C. Code Ann. § 48-39-40(A) (Supp. 2003); S.C. Code Ann. § 48-39-150(D) (Supp. 2003); *see also Dorman v. Dep't of Health and Envtl. Control*, 350 S.C. 159, 167, 565 S.E.2d 119, 123-24 (Ct. App. 2002).
>
> There is no compelling reason to overrule the Panel's decision that the Transportation Regulation governed. Despite its adoption of the invalid ALJ test to determine whether an island is small, ... the Panel's conclusion that the Transportation Regulation controlled was correct. As OCRM Director of Permitting and Certification Richard Chinnis testified, the Transportation Regulation is the default bridge regulation. OCRM staff would have applied it had the staff recognized that the Small Islands Regulation was invalid.
>
> Consequently, we reverse the circuit court's decision and hold that the Transportation Regulation was the governing project-specific regulation.

It is significant that the prior regulation, which the Supreme Court invalidated for lack of an adequate definition of a "small" island, also required assessment of the upland development. See, S.C. Code Ann. R.30-12N. Pursuant to those regulations, OCRM was to consider:

> ... (1) Distance of bridging required;

(2) Type of bridging and dimensions of bridging requested;

(3) Configuration of shoreline;

(4) Size of the island including highland and critical area;

(5) The existence of feasible alternative access;

(6) Public need;

(7) Impacts on protected resources;

(8) The ability of the owner to tie into existing sewer utilities or meet SCDHEC standards for septic tanks;

(9) Impact upon values set forth in Section 48-39-20(E);

(10) The island is subject to stormwater and management policies set forth in the Program Document;

(11) The owner must provide a dock master plan, and a development plan. Mitigation will be required for any fill placed in the critical area for widening causeways.

Thus, even though the Court concluded that the regulation in question was invalid, there is no suggestion in the Court's opinion which could be perceived as undermining DHEC's authority to promulgate the regulations. Indeed, Chief Justice Toal in concurring in a separate opinion stated that "[i]n my view, however, OCRM properly granted the permit under the Small Islands Regulation." Thus, we do not view this decision as restricting DHEC's ability or authority to promulgate the regulations in question.

Conclusion

Based upon all of the foregoing, including the specific language of various portions of the Coastal Zone Management Act, as well as the underlying legislative intent thereof, it is our opinion that DHEC possesses the requisite authority to promulgate the regulations in question. DHEC is the principal regulatory agency for the protection of the environment in South Carolina, including the preservation and protection of the "coastal zone" as defined by the Coastal Zone Management Act. The agency is bestowed broad regulatory powers, not only pursuant to the Coastal Zone Management Act, but by virtue of various other environmental laws as well. To conclude that DHEC's authority to promulgate regulations is limited by the Coastal Zone Management Act to the "critical areas" alone is not only inconsistent with the Act's language, viewed as a whole and in its entirety, but with the clearly expressed and controlling intent of the General Assembly in enacting such legislation. The power to regulate and protect the "critical areas" must necessarily include the authority to regulate activities outside these "critical areas" where such activities are deemed to adversely affect

these areas. We conclude that the General Assembly agreed with this principle and so stated throughout the Act.

As we have noted throughout, the language of the Coastal Zone Management Act speaks frequently to DHEC's authority with respect to the protection of the "coastal zone." Indeed, the Act expressly defines the "coastal zone" as "all lands and waters of the State which contain one or more of the critical areas" and specifically defines which counties are involved. *See*, § 48-39-10(B). Other provisions throughout the Act confirm DHEC's broad authority. *See*, e.g. § 48-39-20(D); § 48-39-20(E); § 48-39-30(B)(1); § 48-39-50(O); 48-39-150(10). Provisions contained in the Pollution Control Act and other provisions reinforce DHEC's authority. *See*, § 48-1-20; § 48-1-10(2) and (7); § 48-1-50 (septic tanks); § 48-39-130 (docks); § 48-15-50 (storwater runoff). Our Supreme Court has recognized, moreover, that DHEC not only possesses the powers expressly conferred upon it, but those powers inferred or necessarily implied. The Court has also recognized that such powers, being remedial, must be broadly construed. All of this leads us to the strong conclusion that DHEC possesses the authority to regulate activities and development outside the "critical areas" which impact these areas so that such critical areas may be protected and preserved.

It is, in addition, particularly noteworthy that any question regarding DHEC's being limited to regulation of the "critical areas" was removed by the 1993 Restructuring Act which repealed § 48-39-200. This provision expressly stated that the predecessor Coastal Council "shall have no direct regulatory authority over any area outside the critical areas in the coastal zone." Yet, when the duties of the Coastal Council were transferred to DHEC by the 1993 Restructuring Act, such limitation or constraint was expressly removed by repeal of § 48-39-200. Thus, any issue concerning DHEC's power to regulate only in the "critical areas" under the Coastal Zone Management Act was fully resolved

Accordingly, we deem the definition of "coastal zone," the legislative findings, and other specific provisions of the Coastal Zone Management Act, as well as other Acts, referenced and discussed herein, to be controlling. Thus, in our view, DHEC possesses authority to promulgate the proposed regulations and to impose conditions upon the construction of any bridge over public trust tidelands. Such authority would necessarily include the power to regulate development in areas outside the "critical area" which are deemed to adversely impact or affect the "critical area." Such would include septic tank regulations, stormwater, wetlands etc., and therefore, DHEC is not, in our opinion, exceeding its authority in promulgating the proposed regulations. In addition, we do not read the recent decision of our Supreme Court, *Coastal Conservation League v. DHEC, supra* as limiting DHEC's authority in any way to promulgate the regulations in question.

Yours very truly,

Henry McMaster

HM/an