SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT

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March 17, 2022

VIA EMAIL AND U.S. MAIL
M. Denise Crawford, Clerk of the Board
South Carolina Board of Health and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
boardclerk@dhec.sc.gov

RE: Request for Board Review (RFR) on Critical Area Permit for Dredging and Excavating on Wadmalaw Island, Charleston County
P/N#: OCRM-03332; HP9-AGJB-XK14Y

Dear Denise,

Enclosed for filing please find the Request for Final Review Conference in the above-referenced matter submitted on behalf of Wadmalaw Island Land Planning Committee, South Carolina Coastal Conservation League, and John and Marilynn Hill along with our certificate of service. Our office manager, Debbie Weiner, paid the $100 filing fee with credit card by phone this morning (Confirmation #: 04195G). Please return a clocked-in copy by email.

Thank you very much for your kind cooperation and please don't hesitate to reach out if you need anything else. With deep respect and kind regards, I remain;

Sincerely,

Lauren Megill Milton

STATE OF SOUTH CAROLINA

BEFORE THE BOARD OF THE DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

Wadmalaw Island Land Planning Committee, South Carolina Coastal Conservation League, and John and Marilynn Hill,

Requestor,

vs.

Point Farm MB, LLC, and South Carolina Department of Health and Environmental Control,

Respondents.

RE: Critical Area Permit for Dredging and Excavating on Wadmalaw Island, Charleston County

P/N#: OCRM-03332; HP9-AGJB-XK14Y

REQUEST FOR FINAL REVIEW CONFERENCE

The Wadmalaw Island Land Planning Committee, South Carolina Coastal Conservation League, and John and Marilynn Hill (collectively "the Requestors"), pursuant to S.C. Code Ann. § 44-1-60, hereby respectfully request that the Board of the South Carolina Department of Health and Environmental Control ("Board") conduct a Final Review Conference in connection with the DHEC staff's decision to issue a critical area permit, coastal zone consistency certification and 401 water quality certification (hereinafter "the Permit"), Permit Number OCRM-03332, to Point Farm MB, LLC ("Point Farm"), and reverse those decisions. Point Farm proposes to dredge and excavate 0.37 acres of tidelands critical area adjacent to Leadenwah Creek on Wadmalaw Island, Charleston County. Point Farm is proposing to excavate and destroy this critical area tidelands,

not to serve any overriding public benefit, but instead to create a "mitigation bank" whereby it can sell credits to offset critical area impacts elsewhere along our coast. However, to create this mitigation bank, Point Farm is seeking to completely eliminate a functioning freshwater wetland and pond system by converting it into a saltwater system solely for its own private gain. DHEC's Office of Ocean and Coastal Resource Management issued the Permit on March 2, 2022, and Requestors received a copy the same day via email.

I. REQUESTORS AND THEIR INTERESTS

The Requestors are affected persons with interests that are protected under the Administrative Procedures Act, S.C. Code Ann. § 1-23-10, et seq., Coastal Zone Management Act ("CZMA"), S.C. Code Ann. § 48-39-10 et seq., the Coastal Zone Management Program document ("CMP"), the Critical Area Regulations, S.C. Code Regs. 30-1, et seq. and the 401 Water Quality Certification Regulations, S.C. Code Regs. 61-101, et seq.

A. South Carolina Coastal Conservation League

The Requestor, South Carolina Coastal Conservation League, is a non-profit membership corporation organized and existing under the laws of the State of South Carolina. The League works to protect coastal landscapes, abundant wildlife, clean water, and quality of life for South Carolina's citizens and its members in particular. The League has over 4,000 members residing in South Carolina and beyond who rely on the League to represent their interests in protecting and preserving the state's coastal resources for their use and enjoyment.

B. Wadmalaw Island Land Planning Commission

Requestor Wadmalaw Island Land Planning Committee ("WILPC") is a South Carolina community organization formed by the behest of Wadmalaw Island residents and Charleston County Council in February 1987. The Committee works to maintain and promote desirable living

conditions and the quality of life for all inhabitants, plants, and animals with the goal of preserving Wadmalaw Island and its adjacent waters. WILPC's mission is "[t]o preserve and maintain the unique and cherished character of Wadmalaw Island by encouraging only the most appropriate and sustainable land use and development and opposing unplanned and inappropriate use and development. To endeavor to represent the varied interests on the Island while protecting its diverse cultures and natural beauty for future generations." WILPC works to promote the health, culture, and general welfare of the island. WILPC members and the Wadmalaw Island residents they represent use and enjoy natural resources in the vicinity of the proposed project; they breathe the air, drink the water, walk, fish, crab, boat and enjoy the wildlife and beautiful landscapes in their community.

C. John Hill and Marilynn Hill

Requestors John Hill and Marilynn Hill are South Carolina residents who live near, use, enjoy, appreciate and seek to preserve the coastal resources on Wadmalaw Island. In particular, they are concerned that this project will harm their interests in the natural resources they value, such as watching dolphins, birds, and other wildlife, fishing, shrimping, crabbing, paddling, kayaking, and recreating with their family in and around the marshes of Leadenwah Creek and the North Edisto River, as well as the freshwater wetland and pond system, which would be permanently destroyed by the proposed project.

II. DHEC'S ISSUANCE OF THE CRITICAL AREA PERMIT VIOLATES SOUTH CAROLINA LAW

Point Farm's mitigation proposal is undermined by the very activity for which it is being offered; it characterizes its proposal as tidal wetland "restoration," while ignoring that the project would instead be a conversion of valuable freshwater wetlands into saltwater wetlands. Both South Carolina and Federal law require any enhancement and restoration projects to "clearly be an

improvement ecologically over the existing system" and result in net gains in aquatic resources. S.C. Code Regs 30-4(G) (2); see also 33 C.F.R. § 332.2.[1] S.C. Code Regs 30-4(G)(2) provides that "Mitigation shall take the form of wetland creation and/or wetland enhancement and restoration." Id. As discussed below, this project does not constitute creation, restoration or enhancement and is not in the public interest.

A. This Permit Eliminates a Valuable and Rare Freshwater Wetland

First, the activities proposed by this project do not constitute wetland creation because "[t]he creation of wetland systems involves the conversion of uplands (or non-jurisdictional wetlands) into wetlands." Because this area is already comprised of valuable jurisdictional freshwater wetlands the project fails to meet even this most basic requirement for wetlands mitigation. CMP XIV.B.2 at III-67. Here, the freshwater impoundment provides significant ecological value in its current state and all of the functions and values it is currently providing would be completely eliminated if this proposed conversion proceeds.

Second, under the CMP, this project does not constitute "restoration" because this area contains rare, valuable freshwater wetlands that are not degraded. See CMP XIV.B.3 at III-67 ("Restoration of degraded systems. This includes the restoration of wetland conditions on lands previously altered by man-made changes in vegetation, hydrology, or soils. Areas suitable for restoration include agricultural lands, mining sites, silvicultural lands, industrial sites, and other degraded wetland systems."). Aside from being an unsuitable area, the existing freshwater impoundment is not degraded and instead provides significant functions and values to the

[1] Under the Corps guidelines, re-establishment and rehabilitation are defined as resulting in net gains in aquatic resources. 33 C.F.R. § 332.2 ("Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions...Rehabilitation results in a gain in aquatic resource function, but does not result in a gain iii aquatic resource area.")

surrounding ecosystem, such as the threatened wood stork.[2] The South Carolina Department of Natural Resources ("DNR") correctly stated that "in order for mitigation in the form of preservation to be appropriate and provide compensatory mitigation value, the resources to be protected must be under threat of destruction or adverse modification." See DNR letter dated November 8, 2018. No threat of destruction or adverse modification exists for the resources at issue; indeed, they already are protected under state and federal law. Thus, this project cannot be considered as "restoration," because the proposed excavation proposed would destroy functions and values, rather than being an ecological improvement to the existing system. S.C. Code Regs 30-4(G)(2)("Enhancement and restoration projects…must clearly be an improvement ecologically over the existing system.").

Third, this project is also not an "enhancement" because local buffer requirements already exist for the wetlands at issue and the project would provide minimal, if any, additional protection. See CMP XIV. B.1 at III-67 ("Protection and enhancement of wetland systems (buffering). The buffering of a wetland system is to provide additional protection to the values and functions of the natural system.").

B. No Public Benefit Exists for This Project

DHEC's critical area regulations impose stringent requirements for any proposed project affecting South Carolina's critical areas. The critical area permit allows for the dredging and excavation of 0.37 acres of critical area "tidelands." The critical area regulations define "tidelands" as "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems

[2] Even the Corps' regulations define restoration as furthering "the goal of returning natural/historic functions to a former or degraded aquatic resource." 33 C.F.R. § 332.2.

involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C. Code Regs 30-1 (D)(51). Leadenwah Creek and the area proposed to be dredged is a critical area that consists of coastal wetlands as defined by the regulation. The critical area permit also violates statutory policies designed to protect critical areas. S.C. Code § 48-39-30(D) provides as follows:

> Critical areas shall be used to provide the combination of uses which will insure [sic] the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

Here, the applicant is blatantly attempting to extract private economic benefits from its proposed excavation of public trust tidelands. Under the Public Trust Doctrine ("PTD") the State holds presumptive title to land below the high-water mark in trust for the benefit of all the citizens of this State. McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003). "The State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)). The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 128, 456 S.E.2d 397, 402 (1995).

If, as part of its mitigation bank proposal, the applicant intends to offer 122.82 aces of critical area salt marsh as mitigation, such monetization of the critical area amounts to a taking of public trust property in violation of the Public Trust Doctrine. Our state's highest court has held that "While all citizens may use and enjoy these [public trust] lands subject to the State's control, no citizen has an inherent right to take possession of or alter these lands." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 29, 766 S.E.2d 707, 715 (2014). The "core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state." National Audubon, 33 Cal.3d 419, 425, 658 P.2d 709, 712 (1983).

Moreover, the public would not benefit in any way from the proposed excavation of critical area. The sole purpose of dredging and excavating the 0.23 acres of critical area is to remove an existing berm that maintains a fully-functioning 10.14-acre freshwater impoundment. This freshwater impoundment is a rarity on the sea islands and thus provides an ecologically rich system in the midst of vast amounts of salt marsh. Loss through excavation of the 0.23 acres of critical area would mean a loss of this valuable habitat, which supports threatened species including Wood storks. Our Supreme Court has ruled that allowing "the benefits to a private [interest] to override the interests of the people of South Carolina . . . defeats the very purpose of the public trust doctrine." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 30–31, 766 S.E.2d 707, 716 (2014). In fact, this project would be solely to provide an economic benefit to the applicant while overriding the public's interest.

Requestors have seen no demonstration that destroying this critical area will ensure "the maximum benefit to the people" much less that it will generate any "maximum dollar benefits" for anyone besides Point Farm. See S.C. Coastal Conservation League v. S.C. Dept. of Health and

Envtl. Control, 434 S.C. 1, 862, S.E.2d 72 (2021). Indeed, to comply with the dictates of this section, the critical area in question should be put to some "use" and destroying it completely is not a "use" as that word is employed or intended.

C. This Permit Should Have Been Denied Because The Project Purpose Is Flawed

The critical area regulations and the 401 water quality certification regulations require consideration of feasible alternatives, yet the purpose of the project is too geographically narrow to be utilized to evaluate alternatives. The project purpose, "to preserve, enhance, and restore tidal salt marsh wetlands adjacent to Leadenwah Creek and the North Edisto River as part of a saltwater mitigation bank[,]" is too narrow in that it seeks to limit possible alternatives to a single geographic area that is, essentially, the proposed site. Such narrow construction of the project purpose is contrary to ample caselaw. See, e.g., Sylvester v. United States Army Corps of Eng'rs, 882 F.2d 407, 409 (9th Cir. 1989) ("Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable"); Nat'l Wildlife Fed 'n v. Whistler, 27 F.3d 1341, 1346 (8th Cir. 1994). ("The cumulative destruction of our nation's wetlands that would result if developers were permitted to artificially constrain the alternatives analysis by defining the project's purpose in an overly narrow manner would frustrate the statute and its accompanying regulatory scheme."). Moreover, the project purpose is so broad, even with this improper geographical limitation, that Point Farm cannot demonstrate that onsite alternatives that involve fewer or no impacts could not fulfill the project purpose.

D. **This Project is Not Water-Dependent and Feasible Alternatives Exist**

South Carolina law and the CMP policies reflect the national interest in wetlands and strongly encourage protection against unwarranted dredging, filling or other permanent alteration of salt, brackish and freshwater wetlands. S.C. Code Regs. 61-101(F), CMP III-7, S.C. Code Regs

30-12. Under these regulations, DHEC staff erred in its determination that this project complies with applicable water quality requirements. 33 U.S.C. § 1341(a)(1). DHEC's 401 Water Quality Certification program requires that the agency consider all potential water quality impacts of the project, both direct and indirect, over the life of the project including:

> (a) Whether the activity is water dependent and the intended purpose of the activity;
>
> (b) Whether there are feasible alternatives to the activity;
>
> (c) All potential water quality impacts of the project, both direct and indirect, over the life of the project including:
>
> > (1) Impact on existing and classified water uses;
> > (2) Physical, chemical, and biological impacts, including cumulative impacts;
> > (3) The effect on circulation patterns and water movement;
> > (4) The cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.

S.C. Code Regs. 61-101(F)(3)(c).

Further, the regulations explicitly state that certification **will** be denied if: (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired; or (b) there is a feasible alternative to the activity, which reduces adverse consequences on water quality; or (c) the proposed activity adversely impacts waters containing State or Federally recognized rare, threatened, or endangered species. S.C. Code Regs. 61-101.F.5.

Point Farm is seeking to completely eliminate a functioning freshwater wetland and pond system by converting it into a saltwater system solely for the sole objective of selling mitigation credits. Not only would converting this wetland permanently alter the aquatic ecosystem and the species that rely on it such that its functions and values are eliminated, our laws provide that "the avoidance of tidelands is preferable to mitigation," and converting a fully functioning and

geographically rare freshwater system into a saltwater system in this location provides no demonstrable ecosystem benefit. S.C. Code Regs 30-4(G) (1); see also S.C. Code Regs. 61-101.F.

The regulations specific to dredging in critical areas recognize that "[d]evelopment of wetland areas often has been considered synonymous with dredging and filling activities," and thus, those regulations require denial of this permit. S.C. Code Regs 30-12 (G)(1). In particular, S.C. Code Regs 30-12(G)(1) mandates that "[d]redging and filling in wetlands can always be expected to have adverse environmental consequences; therefore, the Department discourages dredging and filling." Id. The regulation expressly forbids "[d]redging and filling in [critical area] wetland[s]" unless the proposed "**activity is water-dependent and there are no feasible alternatives**[.]" S.C. Code Regs. 30-12(G)(2)(b) (emphasis added); see also CMP Policy III.C.3.IV.(l)(b), [.]" S.C. Code Regs. 61-101. The regulation goes on to state that a facility is water-dependent if it "can demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity." S.C. Code Regs. 30-1(D)(53). Point Farm's project – to convert freshwater systems to salt marsh – is not dependent on use of or access to coastal waters and, therefore, the proposed activity is not water-dependent. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1367 (11th Cir.2008) (Kravitch, J., dissenting) ("A project is not water-dependent simply because an applicant asks to do it on wetlands, but only where it literally cannot be done elsewhere.").

Moreover, the applicant failed to demonstrate that no feasible alternatives exist, including the no action alternative. Feasibility includes the concept of reasonableness and is not determined by what may be the most convenient or profitable option to the developer. CMP glossary at v. Indeed, since the only purpose of this project is to monetize state public trust resources, the no action alternative is fully viable. In addition, R. 30-12.G(g) requires that "Applications for

dredging in submerged and wetland areas for purposes other than access, navigation, mining, or drainage shall be denied, unless an overriding public interest can be demonstrated." This regulation unequivocally prohibits the proposed activity because the dredging would not serve any of these purposes, and serves no public interest, much less any public interest.

E. **This Project Only Serves the Developer's Interests**

The critical area regulations also include various provisions that warrant denial of this permit application. The general guidelines require the agency to consider the "extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state, R. 30-11.B(7), and the "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area," R. 30-11.C(1); see also S.C. Code Regs. R. 61-101(F)(3)(c).

As discussed above, the 10.14 acres provide significant ecological value in its current state, and all of the functions and values it is currently providing would be completely eliminated if the proposed project proceeds. Again, the ***only*** benefit is economic benefit to the applicant by allowing it to "sell" mitigation credits. The American Timberland Company admits as much on their website, "[t]he property has multiple freshwater wetlands which were once tidal saltmarsh wetlands that could be converted back to tidal saltmarsh to generate tidal mitigation credits which can be sold. The opportunity to restore tidal wetlands is rare and thus tidal wetland restoration credits command a high price especially in a market such as Charleston where credit demand is high."[3] They go on to say, "[a]fter determining the opportunity or group of opportunities that will maximize the property's value, the property will be monetized through land, and potentially

[3]American Timberlands Point Farm Case Study [available at: https://www.americantimberlands.com/case-study/point-farm/]

mitigation credit, sales in whole or in part." Id. Converting a fully functioning and geographically rare freshwater system into a saltwater system in this location provides no demonstrable ecosystem benefit and DHEC has not sufficiently considered the loss of valuable freshwater wetlands that would occur should this project go forward.

F. **This Project Will Harm T&E Species**

First and foremost, the federally threatened American wood stork is protected under § 4 of the Endangered Species Act. 16 U.S.C. § 1533. The American wood stork is also listed as a species of highest priority on the State Wildlife Action Plan (SWAP) for habitat conservation. https://www.dnr.sc.gov/swap/main/chapter2-priorityspecies.pdf. The American wood stork is frequently observed at the proposed site. See, U.S. Fish and Wildlife Service Comment Letter. According to the National Audubon Society, American wood stork habitat includes: "Cypress swamps (nesting colonies); marshes, ponds, lagoons. Forages mainly in fresh water, including shallow marshes, flooded farm fields, ponds, ditches. Favors falling water levels (when fish and other prey likely to be more concentrated in remaining pools). Nests mainly in stands of tall cypress, also sometimes in mangroves, dead trees in flooded impoundments."[4] Historically, scientists have attributed the drastic decline in population to the reduction in prey because feeding areas have been reduced due to draining of wetlands, flood control practices, land development, and lumbering.[5] The primary diet of the wood stork are small fish, especially topminnows and sunfish, both of which are freshwater fish species.[6]

In this case, the proposed enhancement areas include: a saltwater pond, a freshwater pond, agricultural fields, and two freshwater impoundments. Point Farms intends to eliminate this

[4] https://www.audubon.org/field-guide/bird/wood-stork
[5] https://www.dnr.sc.gov/marine/mrri/acechar/speciesgallery/Birds/WoodStork/index.html.
[6] https://ecos.fws.gov/ecp/species/B06O.

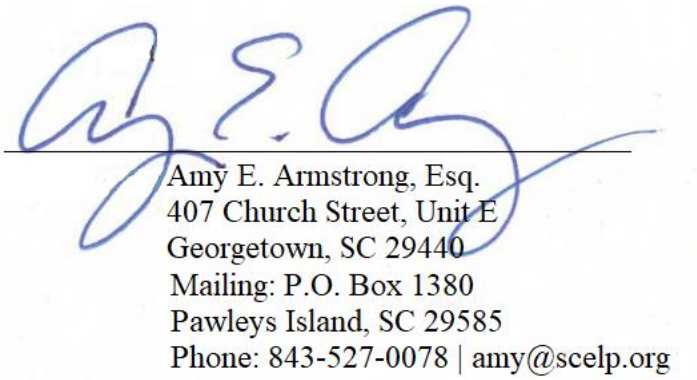
freshwater wetland habitat and replace it with salt water. The conversion of this habitat will negatively affect the current freshwater fish population that inhabit the pond and wetlands. cf. S.C. Code Regs. 61-101.F.5. Even if the fish survived the initial drainage of the freshwater pond, they would surely die from the stress of the inundation of salt water, for which they are not physiologically fit. Therefore, with the decimation of their food population due to the destruction of the unique freshwater habitat, the federally threatened wood storks would be in danger of further habitat loss in violation of S.C. Code Regs. 61-101.F.5.

III. CONCLUSION

Requestors hereby request that the Board conduct a Final Review Conference in connection with the DHEC staff's decision to issue a critical area permit, coastal zone consistency certification and 401 water quality certification (hereinafter "the Permit"), Permit Number OCRM-03332, to Point Farm MB, LLC ("Point Farm"), and reverse those decisions because they are inconsistent with the South Carolina Coastal Zone Management Act, the Coastal Zone Management Program document and DHEC's numerous regulations including the Critical Area Regulations and 401 Water Quality Certification Regulations.

Respectfully submitted,

SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT



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Georgetown, South Carolina
March 17, 2022

STATE OF SOUTH CAROLINA
BEFORE THE BOARD OF THE DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL

Wadmalaw Island Land Planning Committee, South Carolina Coastal Conservation League, and John and Marilynn Hill,

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RE: Critical Area Permit for Dredging and Excavating on Wadmalaw Island, Charleston County

P/N#: OCRM-03332; HP9-AGJB-XK14Y

CERTIFICATE OF SERVICE

I hereby certify that on this date I served Respondent SCDHEC by emailing and placing copies of the foregoing Request for Final Review Conference in the U.S. Mail addressed to:

South Carolina Board of DHEC
Attention: Clerk of the Board
2600 Bull Street
Columbia, South Carolina 29201
boardclerk@dhec.sc.gov

Point Farm MB, LLC
c/o Paracorp Incorporated
2 Office Park Court, Suite 103
Columbia, South Carolina 29223

Lauren Megill Milton

Charleston, South Carolina
March 17, 2022