

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
South Carolina Coastal Conservation League and Charleston Waterkeeper,	)	
	)	
	)	Case No. 2022-CP-10-_____
Plaintiffs,	)	
	)	
vs.	)	<b>SUMMONS</b>
	)	
South Carolina Department of Health and Environmental Control,	)	
	)	
	)	
Defendant.	)	
_____	)	

TO: THE ABOVE-NAMED DEFENDANT

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you (and which has been filed with the Office of the Clerk of Court), and to serve a copy of your Answer upon the above-named parties within thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to answer the said Complaint within such time, the relief demanded in the Complaint will be rendered against you by default.

**S.C. ENVIRONMENTAL LAW PROJECT**

s/ Emily M. Nellerhoe  
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*Counsel for Plaintiffs*

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South Carolina Coastal Conservation League and Charleston Waterkeeper,	)	
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Plaintiffs,	)	
	)	<b>COMPLAINT FOR DECLARATORY</b>
vs.	)	<b>JUDGMENT</b>
	)	(Non-Jury)
South Carolina Department of Health and Environmental Control,	)	
	)	
Defendant.	)	
_____	)	

Plaintiffs South Carolina Coastal Conservation League and Charleston Waterkeeper, by and through undersigned counsel, respectfully move this Court pursuant to S.C. Code Section 15-53-10, *et seq.* for a declaratory judgment in this matter. In support of this Complaint, Plaintiffs submit the following:

**NATURE OF THE CASE**

1. This is a civil suit brought against Defendant Department of Health and Environmental Control (“DHEC” or “the Department”) pursuant to the Uniform Declaratory Judgments Act, S.C. Code Section 15-53-10, *et seq.* Plaintiffs seek declaratory and injunctive relief and other relief the Court deems appropriate to remedy Defendant’s failure to properly review individual on-site wastewater systems (also known as septic tanks or septic systems) for consistency with the state’s Coastal Management Program, and Defendant’s additional failure to publicly notice septic applications and permits.

2. Defendant’s failures place the public’s health at risk and expose our state’s waterways, marshes, beaches, and fisheries to significant, documented harms that can be traced to untreated sewage from malfunctioning, ill-maintained, and/or ill-placed septic systems.

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over this action and may issue declaratory and/or injunctive relief pursuant to the Uniform Declaratory Judgments Act, S.C. Code Section 15-53-10, *et seq.*

4. This Court has personal jurisdiction over the parties because Plaintiffs are organizations based in Charleston, South Carolina. Defendant is a state agency with regulatory authority over activities occurring in the eight coastal counties, including Charleston County.

5. Venue is proper in this Court because Defendant has regulatory authority over the coastal zone, including Charleston County, and its Office of Ocean and Coastal Management (“OCRM”), which conducts reviews for Coastal Zone Consistency Certification in accordance with the State’s Coastal Management Program, is located in Charleston County.

### **PARTIES**

6. Plaintiff South Carolina Coastal Conservation League (“the League”) is a non-profit 501(c)(3) membership corporation organized and existing under the laws of the State of South Carolina, and headquartered in Charleston, South Carolina. The League has over 4,000 members residing in South Carolina, and works to protect coastal landscapes, abundant wildlife, clean water, and quality of life for South Carolina’s citizens and its members through various forms of advocacy and education. The League and its members have a strong interest in advocating for protection of the environment and preserving the state’s coastal resources for their use and enjoyment.

7. Plaintiff Charleston Waterkeeper (“Waterkeeper”) is a non-profit 501(c)(3) organization headquartered in Charleston, South Carolina, founded to protect and restore Charleston’s waterways. Waterkeeper has a strong interest in advocating for environmental protections that promote clean rivers, creeks, and beaches within the County. Waterkeeper

encourages community members, its volunteers, and its donors to participate in public advocacy on issues that affect water quality, wildlife, and the health of public trust waterways. Waterkeeper also regularly conducts water quality testing of the County's waterways and reports its findings to the public.

8. Plaintiff organizations and their members have significant, particularized, and concrete interests in the application of the South Carolina Coastal Tidelands and Wetlands Act, which is designed to protect sensitive coastal resources. The League routinely seeks to prevent or reduce endangerment to human health and the natural environment resulting from activities within the eight coastal counties. *See, e.g., S.C. Coastal Conserv. League v. S.C. Dep't Health & Env'tl. Control*, 434 S.C. 1 (2021); *Kiawah Dev. Partners v. S.C. Dep't Health & Env'tl. Control*, 411 S.C. 16 (2014); *Spectre v. S.C. Dep't Health & Env'tl. Control*, 386 S.C. 357 (2010). Waterkeeper similarly seeks to prevent and reduce such harms, specifically in Charleston County. *See, e.g., Charleston Waterkeeper v. Frontier Logistics*, 488 F.Supp.3d 240 (D.S.C. 2020).

9. Plaintiffs' members live near, recreate on, fish from, and regularly use the coastal waters in South Carolina, and specifically the waters and wetlands in and around Bulls Bay in Awendaw, Cape Romain National Wildlife Refuge, James Island Creek, Shem Creek and numerous other waterbodies that have been or will be impacted by the use of septic systems. These members intend to live on, recreate on, fish from, and use these water resources in the future. These individuals use and enjoy our state's coastal waters for purposes of commerce, recreation, conservation, education, and aesthetic enjoyment, including but not limited to shellfish harvesting, fishing, boating, birdwatching, and sightseeing. Further, these individuals have been and will continue to be harmed by pollution into waterways caused by septic systems, adversely impacting their ability to make such uses.

10. Malfunctioning septic systems harm Plaintiffs' members in part because septic discharges contain untreated human waste, pathogens, and other pollutants that are known to present public health risks and endanger both human and environmental health. If Defendant continues to permit septic systems without regard to the water table, soil characteristics, geography, or water quality classifications and designations, especially in high densities, Plaintiffs' members are persons for whom aesthetic and recreational values of the area have been and will continue to be lessened.

11. Defendant is failing to carry out its legally-mandated duties in failing to apply the plain language requirements of the Coastal Tidelands and Wetlands Act, S.C. Code Section 48-39-10, *et seq.*, by failing to assess whether installations of septic tanks in the coastal zone comply with the state's Coastal Management Program. Therefore, Plaintiff organizations and their members seek to remedy these agency omissions with this action.

12. Defendant is a state agency created by statute and administered under the supervision and control of the South Carolina Board of Health and Environmental Control. *See* S.C. Code Ann. § 44-1-20. DHEC's Office of Ocean and Coastal Resource Management administers the state's Coastal Management Program and has broad management authority over activities within the eight-county coastal zone.<sup>1</sup> DHEC also administers the state's septic tank permitting program. S.C. Reg. 61-56.

### **LEGAL BACKGROUND**

#### **Coastal Tidelands and Wetlands Act & the Coastal Management Program**

13. In 1972, finding an "urgent need to protect and to give high priority to natural systems in the coastal zone," the United States Congress promulgated the Coastal Zone

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<sup>1</sup> The "coastal zone" is comprised of Charleston, Beaufort, Berkeley, Colleton, Dorchester, Georgetown, Horry, and Jasper counties.

Management Act, 16 U.S.C. Section 1451, *et seq.*, declaring a national policy “to preserve, protect, develop, and where possible, to restore and enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” Thereafter, South Carolina promulgated the Coastal Tidelands and Wetlands Act (“the Act”), in 1977. S.C. Code Ann. § 48-39-10, *et seq.*

14. In promulgating the Act, the General Assembly found that “increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, [and] permanent and adverse changes to ecological systems[.]” S.C. Code Ann. § 48-39-20. The General Assembly also found that the coastal zone is “ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations” and that “[i]mportant 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.” *Id.* Therefore, the General Assembly declared that “the basic state policy in the implementation of [the Act] 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.” S.C. Code Ann. § 48-39-30(A).

15. Defendant, by and through OCRM, is charged with the Act’s administration, including the implementation and enforcement of a comprehensive coastal management program. *See* S.C. Code Ann. § 48-39-80. To that end, the Department promulgated the Coastal Management Program (“CMP”), which was approved by the General Assembly in 1979 and amended once in 1993. The CMP contains binding norms applicable to activities in the coastal zone and has been upheld by the South Carolina Supreme Court as valid and enforceable. *See, e.g., Spectre v. S.C. Dep’t Health & Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010). In developing the CMP, DHEC was directed to take into account “all lands and waters in the coastal zone,” which

encompasses the eight coastal counties, including Charleston County. S.C. Code Ann. § 48-39-10.

16. The Act directed DHEC to create two distinct regulatory programs: (1) a permitting program applicable to all uses and alterations of the coastal zone’s “critical areas”<sup>2</sup> where OCRM has direct permitting authority (S.C. Code Ann. § 48-39-130); and (2) a review and certification program, applicable throughout all of the coastal zone, through which the Department is directed to “[d]evelop a system whereby [OCRM] 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.” S.C. Code Ann. § 48-39-80(B)(11).

17. The CMP provides the following guidelines for evaluation of *all* projects in the coastal zone:

- (1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for [OCRM] in implementation of its management program, these being: (a) “to promote the economic and social improvement of the citizens of this State . . . **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** . . . ; (b) to protect and, where possible, to restore or enhance the resources of the State’s coastal zone for this and succeeding generations.”
- (2) The extent to which the project will have adverse impacts on the “critical areas” (beaches, primary ocean-front sand dunes, **coastal waters, tidelands**).
- (3) The extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds.
- . . .
- (7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.
- (8) The extent and significance of negative impacts on Geographic

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<sup>2</sup> “Critical area” includes coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J).

Areas of Particular Concern (GAPCs).

- (9) The extent and significance of impact on the following aspects of quality and quantity of these valuable coastal resources: (i) unique natural areas – **destruction of endangered wildlife or vegetation or of significant marine species . . . , degradation of existing water quality standards . . . .** [and] (ii) public recreational lands – . . . degradation of environmental quality in these areas[.]

CMP III-14 (internal citations omitted, emphases added).

18. The CMP contemplates added layers of protection and review for projects located in proximity to Geographic Areas of Particular Concern<sup>3</sup> (“GAPCs”) for two reasons: (1) barrier islands are designated Areas of Special Resource Significance<sup>4</sup> (CMP III-7); and (2) wildlife preserves, as “irreplaceable resources,” are considered to be GAPCs. *See* CMP IV-5.

19. Further, when “a project overlaps with, is adjacent to, or significantly affects a GAPC, [OCRM] will carefully evaluate the project based on the criteria listed as the priority of uses which specifically address each type of GAPC. A project would be prohibited if it would permanently disrupt the uses of priority for the designated area. A project would be strongly discouraged or the permit conditioned if the project would interrupt, disturb, or otherwise significantly impact the priority uses of the designated area.” CMP IV-2. Further still, the CMP provides that the “goals of the South Carolina coastal zone management program for preservation and development of GAPCs are: To give the highest priority to the identified primary value of a GAPC when considering the preservation or development to that area.” CMP IV-3.

20. The CMP document makes specific findings regarding septic systems: “[i]ndividual systems such as wells and septic tanks are adequate where development is limited,

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<sup>3</sup> GAPCs are lands that provide unique importance as natural, aesthetic, recreational, scientific, or economic resources in the coastal zone. *See* CMP IV-3.

<sup>4</sup> Areas of Special Resource Significance are those areas that have been identified through resource and inventory efforts as being unique and either environmentally fragile or economically significant to the coastal area and the State. *See* CMP III-69.



but can have major environmental impacts in densely populated areas. For example, a proliferation of wells in some areas can seriously draw-down or drain the aquifer, reducing the groundwater resources, and possibly resulting in saltwater intrusion.” CMP III-60. The document further finds: “the major negative impact associated with sewage treatment systems is potential water quality degradation from effluent discharge . . . . Septic tanks are only effective in treating sewage in areas where soils are suitable for proper drainage, where they are spaced adequately and where groundwater and surface water are sufficient distance away.” *Id.*

21. DHEC is charged with regulating septic tank permits throughout the state, and thus septic tank permits are state permits.

22. Despite the findings discussed in the preceding paragraphs, and despite the General Assembly’s clear mandate that DHEC “review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the [CMP]” (S.C. Code Ann. § 48-39-80(B)(11) (emphasis added)), DHEC has entirely failed to undertake this review for typical residential septic permits in low-lying and dynamic coastal areas. Consistency review is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the unique natural forces at play on the coast. *See* S.C. Code Ann. § 48-39-80. This failure violates the plain language of the statute.

23. The CMP contains a provision that “DHEC retains regulatory authority over septic tanks with flow rate of 1500 gallons per day or greater (Section 44-1-40, S.C. Code of Laws).” CMP III-62; *see also* CMP V-5. However, nothing in the statute authorizes such a limitation on DHEC’s certification review. Nor can the CMP override the plain language of the statute. *See, e.g., Milliken v. S.C. Dep’t of Labor*, 275 S.C. 264, 269 S.E.2d 765 (1980). “Although a regulation has the force of law, it must fall when it alters or adds to a statute.” *S.C. Coastal Conserv. League v. S.C. Dep’t Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010).

## **FACTUAL BACKGROUND**

### **Septic System Risks and Harms**

24. It is well-documented that septic systems can and do impact local drinking water wells, groundwater, surface water bodies, and coastal waters, especially when installed in sensitive environmental areas, at sites with inappropriate soils or high groundwater tables, when sited in high densities, and when sited on small lots with small drainfields.

25. Septic systems can be a significant source of environmental pollution, particularly in rural areas. According to Defendant's own Nonpoint Source Management Plan, nonpoint sources of pollution, such as septic systems, are "continuously recognized as the nation's largest cause of surface water quality impairments."<sup>5</sup>

26. The risks inherent to malfunctioning septic systems abound. According to the Environmental Protection Agency ("EPA"), the "most serious documented problems [with septic systems] involve contamination of surface waters and ground water with disease-causing pathogens [bacteria and viruses] and nitrates."<sup>6</sup> Even if a septic system is functioning properly, soil filtration alone cannot remove all contaminants (e.g., medicines, cleaning products, and other harmful chemicals) and can discharge wastewater with pollutant concentrations exceeding established water quality standards. In coastal regions, contamination of shellfish beds and beaches by pathogens is a concern, as coastal waters are more sensitive to nitrogen contamination from failing septic systems. "Other problems [with septic systems] include excessive nitrogen discharges to sensitive coastal waters and phosphorous pollution of inland surface waters, which

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<sup>5</sup> S.C. Dep't Health & Env'tl. Control, SOUTH CAROLINA NONPOINT SOURCE MANAGEMENT PLAN 2020-2024, (2019), *available at* [https://dc.statelibrary.sc.gov/bitstream/handle/10827/32190/DHEC\\_Nonpoint\\_Source\\_Management\\_Plan\\_2020-2024\\_2019.pdf](https://dc.statelibrary.sc.gov/bitstream/handle/10827/32190/DHEC_Nonpoint_Source_Management_Plan_2020-2024_2019.pdf) (last visited Oct. 28, 2022).

<sup>6</sup> U.S. Env'tl. Protection Agency, Septic System Impacts on Water Sources, *available at* <https://www.epa.gov/septic/septic-system-impacts-water-sources> (last visited Oct. 28, 2022).

increases algal growth and lowers dissolved oxygen levels” causing large-scale kills of fish and other aquatic organisms and creating regional “dead zones.”<sup>7</sup>

27. These risks are compounded for ill-placed septic installations within the coastal zone. Sandy soils commonly found in coastal areas drain rapidly, meaning that pollutants are able to reach groundwater before they are absorbed,<sup>8</sup> likewise, waterlogged soils allow untreated waste to flow laterally to ground and surface waters.<sup>9</sup> Because effective wastewater treatment from septic is dependent upon adequate depths of unsaturated soil beneath the drainfield, groundwater tables characteristic of low-lying coastal areas are often too shallow to support proper waste treatment.<sup>10</sup> Precipitation from seasonal variances, annual rainfall, storm events, and sea level rise raise water tables even higher, increasing the risk that poorly treated sewage will pollute nearby waterbodies.

28. Plaintiff Waterkeeper’s testing data shows that high levels of bacteria often make Charleston County waterways like Shem Creek, James Island Creek, and Filbin Creek unsafe for recreational activity and/or shellfish harvesting for human consumption due to high levels of fecal bacteria that indicate the presence of pathogens like tuberculosis, staph, cholera, and e. coli.

29. Septic systems placed in proximity to coastal waters have been identified as a source of the above-referenced bacteria and pathogens in coastal waterways in numerous scientific

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<sup>7</sup> *Id.*

<sup>8</sup> For example, within the James Island Creek Watershed, approximately 72.2% of the soil is considered to have moderate to severe limitations for septic system drainfields due to high water tables and percolation rates. Terracon, *et al.*, WATERSHED MGMT. PLAN – JAMES ISLAND CREEK (May 25, 2021), available at <https://www.jamesislandsc.us/Data/Sites/1/media/pdf-files/james-island-creek---watershed-management-plan-final.pdf> (last visited Nov. 1, 2022) (citing USDA, Soil Survey- Charleston County, South Carolina (1971)).

<sup>9</sup> See, e.g., Michael A. Mallin, *Septic Systems in the Coastal Environment: Multiple Water Quality Problems in Many Areas*, MONITORING WATER QUALITY (2013), available at <https://uncw.edu/cms/aelab/reports%20and%20publications/2013/mallin%20chapter%204%20septic%20system%20problems.pdf> (last visited Oct. 28, 2022).

<sup>10</sup> *Id.* see also Miami-Dade Cnty. Dep’t of Regulatory & Econ. Res., *et al.*, *Septic Systems Vulnerable to Sea Level Rise* (2018), available at <https://www.miamidade.gov/green/library/vulnerability-septic-systems-sea-level-rise.pdf> (last visited Oct. 28, 2022).

studies. For example, a study of Cape Hatteras National Seashore, a large public nature park in North Carolina, found fecal concentrations in water samples were “significantly correlated” to nearby community water usage, “indicating that increased septic tank usage led to increased pollutant concentrations in area waterways.”<sup>11</sup> In Charleston, a recent study of the routinely-impaired waters of the James Island Creek Watershed examined the correlation between two clusters of septic systems—an estimated 181 densely-placed septic tanks near the Simpson Creek tributary, and another cluster of approximately 27 septic tanks adjacent to James Island Creek—and water quality data from two sampling locations, collected by Plaintiff Waterkeeper over the course of eight years (2013-2020).<sup>12</sup> That study and associated Watershed Management Plan concluded that septic systems had a high likelihood of being a major source of *Enterococci*<sup>13</sup> in the waters of James Island Creek.

30. The exact number of failing septic systems in South Carolina is unknown because, after installation, South Carolina law does not require property owners to have existing systems inspected or maintained. However, the EPA estimates that as many as twenty percent of septic tanks are likely malfunctioning to some degree;<sup>14</sup> according to DHEC, ten to thirty percent of septic systems fail to work properly in an average year.<sup>15</sup>

31. Currently, OCRM’s coastal expertise and knowledge is completely excluded from

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<sup>11</sup> Michael A. Mallin & Matthew R. McIver, *Pollutant impacts to Cape Hatteras National Seashore from urban runoff and septic leachate*, *Marine Pollution Bulletin* 64, 1356-1366 (2012).

<sup>12</sup> Terracon, *et al.*, WATERSHED MGMT. PLAN – JAMES ISLAND CREEK at 25-26 (May 25, 2021), available at <https://www.jamesislandsc.us/Data/Sites/1/media/pdf-files/james-island-creek---watershed-management-plan-final.pdf> (last visited Nov. 1, 2022).

<sup>13</sup> *Enterococci* are bacteria that indicate the presence of fecal matter in water.

<sup>14</sup> U.S. Env’tl. Protection Agency, *Stormwater Best Management Practice: Preventing Stormwater Contamination from Septic Failure* (2021), available at <https://www.epa.gov/system/files/documents/2021-11/bmp-preventing-stormwater-contamination-from-septic-system-failure.pdf> (last visited Oct. 28, 2022).

<sup>15</sup> S.C. Dep’t Health & Env’tl. Control, SOUTH CAROLINA NONPOINT SOURCE MANAGEMENT PLAN 2020-2024, (2019), available at [https://dc.statelibrary.sc.gov/bitstream/handle/10827/32190/DHEC\\_Nonpoint\\_Source\\_Management\\_Plan\\_2020-2024\\_2019.pdf](https://dc.statelibrary.sc.gov/bitstream/handle/10827/32190/DHEC_Nonpoint_Source_Management_Plan_2020-2024_2019.pdf) (last visited Oct. 28, 2022).

septic tank application review and permit issuance, as permitting is delegated to a completely separate agency division (On-Site Waste Water, or “OSWW,” a program under the umbrella of the Bureau of Environmental Health Services, or “BEHM”). This, compounded by the Department’s failure to undertake Coastal Zone Consistency review and its related failure to consider the appropriateness and the impacts of coastal forces and geologic conditions on individual septic systems in the coastal zone, is arbitrary, capricious, and in error.

### **Bulls Bay Watershed & Cape Romain National Wildlife Refuge**

32. Cape Romain National Wildlife Refuge (“Cape Romain” or “the Refuge”) is a large wildlife preserve located in Charleston County and managed by the U.S. Fish and Wildlife Service (“FWS”). The Refuge extends for twenty-two miles along the coast and encompasses 66,306 acres of barrier islands and salt marsh, with elevations ranging from zero to four feet above sea level. Of the Refuge’s 63,300 acres, 29,000 acres have been designated as a Class 1 Wilderness Area<sup>16</sup> since 1975.

33. The Refuge is designated critical habitat for the federally listed Piping plover and its beaches are the site of the largest nesting population of the threatened Loggerhead sea turtle outside the state of Florida.<sup>17</sup>

34. Cape Romain is almost entirely surrounded by water: its borders are formed by the Intracoastal Waterway (“ICW”) to the west/north, Price Inlet and tributary to the south, Cape Romain Harbor and its tributaries to the north, and the Atlantic Ocean to the east. According to FWS, the Refuge is “seventy-five percent estuary with the seemingly endless emergent salt marshes that are dominated by smooth cordgrass and interwoven with winding tidal creeks,

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<sup>16</sup> Class 1 Wilderness Areas are designated pursuant to the Clean Air Act, 42 U.S.C. 7401, *et seq.*, and impose heightened air quality and visibility protections for national wilderness areas larger than 5,000 acres.

<sup>17</sup> U.S. Fish & Wildlife Serv., *Cape Romain National Wildlife Refuge*, <https://www.fws.gov/refuge/cape-romain> (last visited Oct. 28, 2022).

shallow bays, shell rake islands and salt flats. These estuarine wetlands are significant nursery habitats. The incoming tide carries juvenile fish, crabs, shrimp and other invertebrates. Combining the ocean's nourishment with the nutrient-laden fresh waters of small rivers makes the estuary one of the most productive environments on earth.”

35. Cape Romain lies within the Bulls Bay Watershed of the Santee River Basin. This watershed, specifically Bulls Bay, has a documented history of fecal coliform bacteria impairment due in part to malfunctioning septic systems. In 2002, DHEC added Shellfish Harvesting Area 7 to the Clean Water Act - Section 303(d) list of impaired waters for fecal coliform bacteria. To restore the water quality of this area, local and state governments began to implement best management practices and septic repairs. As part of the seven-year, nearly one-million-dollar project, sixty-two septic systems were completely replaced. By 2014, Shellfish Harvesting Area 7 was delisted and reopened for shellfish harvesting.

36. Today, the waters in and around the Refuge have been designated as Outstanding Resource Waters (“ORW”)—the highest water quality designation in the state—defined as waters which constitute an outstanding recreational or ecological resource. S.C. Reg. 61-68. Specifically, Bulls Bay, Cape Romain Harbor, Price Inlet, and their tributaries are all designated ORW. S.C. Reg. 61-69. The entirety of Sewee Bay is designated Shellfish Harvesting Waters (“SFH”), defined as tidal waters protected for shellfish harvesting and suitable for recreation, crabbing, fishing, and for the survival and propagation of a balanced indigenous aquatic community of marine fauna and flora. S.C. Reg. 61-68 and 69.

37. Additionally, the Refuge qualifies as both a GAPC and an Area of Special Resource Significance; therefore, under the CMP, permit applications for projects adjacent to or that will significantly affect the Refuge are subject to the additional requirements discussed *infra* (¶¶ 17-19).

### **Proposed Developments in Awendaw**

38. South Carolina's coastal areas are experiencing increased development pressures, particularly outside of areas with established utility services. In these areas, conventional septic tank systems are often chosen for household wastewater treatment because of the lack of sewer service, in addition to the low initial development costs and the ease of obtaining septic installation permits.

39. Plaintiffs are informed and aware of at least two pending projects in Charleston County that would utilize a significant number of individual septic tanks as part of high-density residential development proposals within and adjacent to sensitive coastal areas. Both projects are residential subdivisions within the Town of Awendaw, and both are situated in close proximity to the Congressionally-authorized boundaries of the Cape Romain National Wildlife Refuge. Further, both project sites and Cape Romain lie within the Bulls Bay Watershed of the Santee River Basin, indicating that waters, rainfall, snowmelt, sediments, and pollutants from inland locations are eventually channeled to geographically grouped outflow points such as reservoirs, bays, and the ocean, namely the waters in and around the Refuge.

40. Upon information and belief, White Family Partnership, LP, ("WFP") is a limited partnership organization doing business in Charleston County. WFP is the owner of four parcels of land located in Awendaw, corresponding with TMS Numbers 644-00-00-023, 644-00-00-025, 644-00-00-026, and 644-00-00-030. Together, these parcels comprise 233.45 acres, and are referred to collectively as "White Tract."

41. The White Tract property is situated east of Highway 17 near the intersection of Seewee Road and Bulls Island Road in Awendaw, South Carolina. *See* Exhibit A. Upon information and belief, this property primarily consists of forested uplands and freshwater wetlands, and is surrounded by public roadways and forested land, including forested land owned

by the federal government (Francis Marion National Forest). The easternmost boundary of the property consists almost entirely of wetlands, and a portion of the easternmost tract extends to the waters of the ICW and Sewee Bay, which are currently classified as SFH. The property lies within one mile of Cape Romain National Wildlife Refuge and is part of the Bulls Bay Watershed.

42. Upon information and belief, on April 18, 2022, following a public hearing, the Town's Planning Commission voted to approve the White Tract subdivision preliminary plat, green-lighting the development of 204 single-family homes at an overall gross density of one unit per acre. The individual proposed lots range in size from 14,167 square feet (approximately 0.325 acres) to 40,705 square feet (approximately 0.934 acres). *See* Exhibits B and C.

43. Upon information and belief, all of the proposed lots within White Tract are to be served by individual septic systems. *See* Exhibits B and C.

44. The Plaintiffs submitted a Freedom of Information Act ("FOIA") request to DHEC to determine whether any septic tank permit applications had been submitted for the White Tract development. On October 11, 2022, DHEC notified Plaintiffs that no such applications have been submitted to or received by the Department.

45. Upon information and belief, DHEC does not intend to issue public notices for any septic tank permit applications for the White Tract.

46. Upon information and belief, DHEC does not intend to conduct a review of any septic tank permits on the White Tract, or anywhere else in the coastal zone, for consistency with the CMP.

47. Upon information and belief, Wapataw, LLC ("Wapataw") is a limited liability company and the owner of one parcel of land located on Doar Road in Awendaw, corresponding with TMS Number 681-00-00-028. This parcel comprises 184 acres, and is commonly referred to as the "Doar Tract."



48. The Doar Tract is situated east of Highway 17 near the intersection of Seewee Road and Doar Road in Awendaw, South Carolina. *See* Exhibit D. Upon information and belief, Doar Tract is 46% wetland (approximately eighty-five acres of wetlands and ninety-nine acres of highland). *See* Exhibit D at 2. Upon information and belief, this property lies within 1.5 miles of the ICW and Cape Romain, and is part of the Bulls Bay Watershed.

49. On December 17, 2018, the Town's Planning Commission approved a major residential subdivision, also known as "Romain Bay Preserve," on the Doar Tract. Wapataw's Planned Development ("PD") document proposed two different design possibilities: (1) "Scenario One" which called for 249 residential units (gross density of approximately 1.5 units per acre); and (2) "Scenario Two" which called for 188 residential units (gross density of approximately 2.0 units per acre). Under either scenario, Wapataw's PD contemplated "individual or central septic systems for sanitary sewer, subject to DHEC approval for septic systems." Exhibit D.

50. Upon information and belief, Wapataw submitted a subdivision application to the Town, specifically regarding the first of several phases of the Romain Bay Preserve project ("Phase One"). Phase One encompassed eighty-five new parcels, three roads, and associated water infrastructure and service. *Id.*

51. On May 16, 2022, following a public hearing, the Town's Planning Commission approved the Romain Bay Preserve preliminary plat as to Phase One only. In its Memorandum on Conditions for Approval, the Town provided that "all proposed lots will be served with onsite septic systems." *See* Exhibit E at 2, n.7.

52. Upon information and belief, Defendant issued eighty-five individual permits for on-site wastewater systems to Romain Bay Preserve on or about August 4, 2022. DHEC did not issue public notices for any of these septic tank applications, nor did they publicly notice the permit decisions themselves. The Plaintiffs learned of these permits through a FOIA request, which was

submitted on September 12, 2022, and fulfilled on October 11, 2022, well past the fifteen-day window for challenging such decisions.<sup>18</sup>

53. Upon information and belief, DHEC failed to review the septic tank permit applications for consistency with the CMP.

### **PUBLIC NOTICE AND DUE PROCESS**

54. Currently, the Department does not place applications for individual septic tanks on public notice, nor does it publicly notice issued permits for the same.

55. The failure to provide public notice for applications or permits creates a system whereby affected persons and the public at large are unable to engage in decision-making processes that implicate their rights. In particular, those rights include recreational uses in and on public trust resources, such as boating, swimming, fishing, and harvesting shellfish, in addition to impacts on their health and well-being and their property values. In short, affected persons are kept completely in the dark about the state's permitting of septic systems in ecologically sensitive coastal areas that have the potential to harm the quality of their communities and surrounding environment.

56. Administrative agencies such as DHEC are required to meet minimum standards of due process. *Stono River Env't Prot. Ass'n v. S.C. Dep't Health & Env'tl. Control*, 305 S.C. 90, 93-94 (1991) (citing S.C. Const. Art. 1, § 3; *Smith & Smith, Inc. v. S.C. Public Service Comm'n*, 271 S.C. 405 (1978)). The South Carolina Constitution provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on **due notice** and an opportunity be heard . . . and he shall have in all such instances the right to judicial review.” S.C. Const., Art. 1, § 22 (emphasis added); *see also Kurschner v. City of*

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<sup>18</sup> *See* S.C. Code Ann. § 44-1-60(E)(2) (“The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review . . . is filed with the department by the applicant, permittee, licensee, or affected person.”).

*Camden Plan. Comm'n*, 376 S.C. 165, 171 (2008) (“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.”). “Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands.” *Kurschner*, 376 S.C. at 171-72 (internal citations omitted); *see also Stono River, supra* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

57. The General Assembly codified the same when it enacted S.C. Code Section 44-1-60(B), which provides: “To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.” The purpose of this act “is intended to provide a uniform procedure for contested cases and appeals from administrative agencies.” *S.C. Coastal Conserv. League v. S.C. Dep’t Health & Envtl. Control*, 390 S.C. 418, 429 (2010) (quoting Act No. 387 § 53).

58. To prevail on a claim of denial of due process in an administrative proceeding, there must be a showing of substantial prejudice. *See, e.g., Palmetto Alliance, Inc. v. S.C. Public Serv. Comm’n*, 282 S.C. 430, 435 (1984). Here, lack of public notice substantially prejudices Plaintiffs in that they receive no notice of an agency decision, and thereby lack the means to timely challenge that decision.

59. With a fifteen-day clock to challenge the issuance of the permit, affected persons must be aware that an application has been submitted and that DHEC has made a permitting decision. Currently, the only option the public has to obtain such information and challenge it is to request septic information under FOIA, placing an impossible burden on affected persons to time a FOIA request concurrently with a septic permit application and/or permit issuance. If a

FOIA request is made too soon, no information will be available for the Department to disclose. If a FOIA request is made too late, the fifteen-day clock will likely have run by the time the request is fulfilled, precluding an affected person from challenging DHEC staff's decision to issue said permits. Even assuming a FOIA request is perfectly timed, the Department has forty days to respond to a FOIA request, again presenting a substantial likelihood that a permit will have been issued and the fifteen-day clock expired.

60. Because DHEC does not provide any public notice of septic tank permit applications or its decisions to grant such permits, the public and any affected persons are foreclosed from a meaningful opportunity to be heard and subsequent judicial review.

61. Plaintiffs are aware of a recent instance in which the failure to publicly notice permit applications and agency decisions has caused prejudicial effects. In particular, the Gullah/Geechee Fishing Association ("the Association") has been objecting to a luxury resort proposed for Bay Point Island in Port Royal Sound in Beaufort County. In 2020, Governor Henry McMaster, Senator George E. "Chip" Campsen, and Representative Shannon Erickson joined in support of the Association and submitted letters to the Beaufort County Zoning Board of Appeals advocating for the protection of this cultural and natural resource and against the proposed development. Yet, despite monitoring DHEC activities and submitting a FOIA request regarding any septic tank permit applications, the Association did not learn of DHEC's decision to issue a septic tank until after the fifteen-day appeal window had passed. Even though the Association appealed within fifteen days of learning of the permit issuance, which occurred without a coastal zone consistency certification, the Administrative Law Court dismissed their appeal as untimely. *Gullah/Geechee Fishing Assoc. v. S.C. Dep't Health & Envtl. Control*, 22-ALJ-07-0008-CC, Order Granting Resp't Bay Point's Mot. to Dismiss (July 15, 2022). See Exhibit F.

62. The South Carolina Constitution, as well as multiple statutes promulgated by the General Assembly, envision a system of government whereby administrative agencies provide public notice of decisions and allow public input to promote transparency and public participation in the decision-making process. When legislative intent is subverted by an agency's failure to follow plainly stated processes and procedures, citizens are denied the rights conferred on them by the legislature and the Constitution. Such a result should not be permitted to stand, and the affected members of the public (i.e., Plaintiffs) should not be further prejudiced as a result.

**FOR A FIRST CAUSE OF ACTION**

(Declaratory Judgment – Coastal Zone Consistency Review)

63. Plaintiffs re-allege and incorporate the allegations of the preceding paragraphs as if fully contained herein.

64. Section 48-39-80(B)(11) of the S.C. Code requires the Defendant to “review **all** state and federal permit applications in the coastal zone, and to certify that these do not contravene the [CMP]” (emphasis added).

65. DHEC is the state agency charged with reviewing septic tank permit applications, and septic tank permits are state permits.

66. DHEC does not and has never reviewed septic tank permit applications for consistency with the Coastal Management Program.

67. DHEC has violated S.C. Code Section 48-39-80(B)(11) by failing to review septic tank permit applications for consistency with the Coastal Management Program.

68. DHEC's failure to comply with the Coastal Tidelands and Wetlands Act also indicates a failure to comply with the federal Coastal Zone Management Act.

69. Plaintiffs seek a declaration from this Court that DHEC-OCRM is required to review all septic system applications in the coastal zone for consistency with the Coastal Management Program pursuant to S.C. Code Section 48-39-80(B)(11).

70. A concrete issue exists in this case, Plaintiffs have asserted legal rights, and DHEC is denying an affirmative legal duty; as such, a justiciable controversy exists in this matter, and Plaintiffs are entitled to a declaratory judgment as a matter of law.

**FOR A SECOND CAUSE OF ACTION**  
(Declaratory Judgment – Public Notice)

71. Plaintiffs re-allege and incorporate the allegations of the preceding paragraphs as if fully contained herein.

72. The Due Process Clause of the S.C. Constitution provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity be heard.”

73. DHEC does not provide notice of any kind regarding septic tank permit applications, and as a result DHEC deprives the public of an opportunity to be heard and for judicial review.

74. The Plaintiffs are substantially prejudiced because they receive no notice, have no opportunity to be heard and have no ability to obtain judicial review.

75. Plaintiffs seek a declaration from this Court that DHEC must provide for public notice of all onsite wastewater system applications, regardless of volume, so that members of the public and affected parties have notice and an opportunity to be heard.

76. Plaintiffs re-assert that a concrete issue exists in this case, Plaintiffs have asserted legal rights, and DHEC is denying an affirmative legal duty; as such, a justiciable controversy exists in this matter, and Plaintiffs are entitled to a declaratory judgment as a matter of law.

**FOR A THIRD CAUSE OF ACTION**  
(Temporary and Permanent Injunction)

77. Plaintiffs re-allege and incorporate the allegations of the preceding paragraphs as if fully contained herein.

78. Plaintiffs ask the Court to enjoin the Defendant from issuing any septic tank permits in the coastal zone unless and until the agency has certified that such permit is consistent with the Coastal Management Program.

79. A temporary injunction is an appropriate remedy at law if the plaintiff shows the following: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *See, e.g., Scratch Golf Co. v. Dunes West Residential Golf Props. Inc.*, 361 S.C. 117, 122 (2004).

80. Similarly, a permanent injunction is an appropriate remedy at law if the plaintiff will suffer irreparable harm without such relief, the plaintiff lacks an adequate remedy at law for the defendant's wrongdoing, and equity favors the granting of such relief.

81. Here, Plaintiffs will suffer irreparable harm if an injunction is not granted. Continued permitting of septic systems in the coastal zone without regard for the special considerations outlined in the CMP and without review by the special expertise of OCRM staff will likely allow hundreds, if not thousands, of septic units to be installed in sensitive or inappropriate coastal areas, exposing Plaintiffs, the public at large, and the natural environment to unnecessary and heightened risks of water quality degradation and hazards to human health.

82. Plaintiffs are likely to succeed on the merits of this action based on the plain language of the Coastal Tidelands and Wetlands Act, which requires that **all** state and federal permits to be reviewed for consistency with the CMP.

83. In the absence of an injunction, there is no adequate remedy at law available to Plaintiffs. Challenging onsite wastewater permits individually is effectively impossible given that Defendant refuses to provide notice to the public of septic system applications or permits.

84. Until such time as the Court permanently decides the issues set forth herein, no material harm will result to Defendant if it is temporarily enjoined from approving septic tank

permits without conducting coastal zone consistency certification review.

85. Enjoining the Defendant from approving septic tank permits in sensitive coastal areas without regard to the special requirements mandated by the General Assembly would best serve the public interest.

86. As a result of the foregoing, Plaintiffs are entitled to the award of a temporary and permanent injunction for the relief sought herein.

**WHEREFORE**, having fully set forth the allegations against Defendant, Plaintiffs seek an Order of this Court granting the following relief:

- (1) Declaring that the Department of Health and Environmental Control must review all onsite wastewater system applications in the coastal zone for consistency with the Coastal Management Program;
- (2) Declaring that the Department of Health and Environmental Control must provide for public notice of septic tank permit applications and agency decisions on those permit applications;
- (3) Enjoining the Department of Health and Environmental Control from issuing any septic tank permits within the eight coastal counties without undertaking the requisite review for consistency with the Coastal Management Program; and
- (4) Granting Plaintiffs such other and further relief as this Court deems just and proper.

*Signature page to follow.*



Respectfully submitted,

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November 10, 2022  
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