SOUTH CAROLINA GENERAL ASSEMBLY

Legislative Audit Council

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S.C. DEPARTMENT OF COMMERCE

A REVIEW OF THE ECONOMIC DEVELOPMENT BOND FOR WETLANDS MITIGATION AT THE BOEING MANUFACTURING SITE

LEGISLATIVE AUDIT COUNCIL

1331 Elmwood Ave., Suite 315
Columbia, SC 29201
(803) 253-7612 VOICE
(803) 253-7639 FAX

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Senior Auditors
Kyle T. Craigo
Carmen J. McCutcheon, Esq.

Auditor
Courtney Phillips

Legislative Audit Council

A Review of the Economic Development Bond for Wetlands Mitigation at the Boeing Manufacturing Site

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Audit Planning

Audit Objectives

Members of the General Assembly requested an audit of the use of the proceeds from a S.C. Department of Commerce (DOC) general obligation economic development bond. Our audit objectives were to:

- Determine how the State of S.C. General Obligation State Economic Development Bond in the amount of $5,000,000 issued and administered by the Ashley-Cooper Rivers Environmental Trust (ACRET), a nonprofit set up to mitigate the wetlands destruction at the Vought plant site, was spent.

- Determine if there were restrictions on spending the bond proceeds, controls in place to monitor the spending by ACRET, and any provisions to return bond money to the state should the bond amount allocated exceed the cost necessary to mitigate the destroyed wetlands at the Vought site.

- Determine what the U.S. Army Corps of Engineers (Corps) Standard Operating Procedure was for mitigation of destroyed wetlands, why ACRET was formed to make purchases of lands to mitigate the wetlands at the Vought site, and determine if the proper types of acquisitions were made.

- Determine the similarities in both the wetlands permitting certification process and the related legal steps for appealing permits in other Southeastern states when compared to those same processes in South Carolina. Determine how permits can be delayed, who can delay permits, for how long, and what remedies there are, including bond requirements, for the delays.

Scope and Methodology

The period of this review is generally from 2004 through 2011, with consideration of certain events outside of this range when relevant. Evidence used as a basis of the report was obtained from a variety of sources including:

- Interviews with and documents from the DOC management staff.
- E-mails and documentation from the DOC.
- Interviews with parties involved in the wetlands permitting process.
- S.C. State Treasurer's Office (STO) – bonds and regulations.
- Documentation as a result of discovery from an unrelated legal action.
- Publications about wetlands mitigation.
- Federal and state laws and regulations.
- U.S. Army Corps of Engineers (Corps) documents and interviews.
- S.C. Department of Health and Environmental Control (DHEC).
- Other coastal Southeastern states' certification processes, interviews, and documentation.
- Formal agreements between various parties related to the wetlands permitting process.

Criteria used to determine how the economic development bond proceeds were spent and activities related to that spending required obtaining certain key documents and related explanations. The use of computerized data was not central to our audit objections, and we did not conduct any sampling of files; therefore, there was almost no reliance on the reliability of data related to any of the agencies' automated systems. Our findings are detailed in our report.

We conducted this performance audit in accordance with generally accepted government auditing standards with the exception of the general standard concerning internal controls as they relate to the validity and reliability of data. We deemed it unnecessary to conduct a review of internal controls because the types of documents we used, such as bonds, invoices, and real estate records, were only marginally dependent on the reliability of agencies' systems.

Those generally accepted government auditing standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides this reasonable basis for findings and conclusions based on our audit objectives.

Introduction to the Mitigation Bond, Purchases, Credits, and the Permitting Process

DOC Background

The S.C. Department of Commerce (DOC) is a cabinet agency whose mission is to promote job creation, economic growth, and improved living standards for South Carolinians. The agency is the economic development and recruiting arm of the state and has in place a number of programs aligned with the agency mission. Currently, those programs most notable as they pertain to recruiting a company like Vought, a major aircraft manufacturer, to locate in the state and is the subject of the bond review, are as follows:

GLOBAL BUSINESS DEVELOPMENT

Purpose is to recruit new locations and to increase the capital investment and the number of jobs in South Carolina.

MARKETING, COMMUNICATIONS AND RESEARCH

Purpose is to develop marketing strategies and provide data to facilitate attracting investments to the state.

GRANTS PROGRAM

Coordinating Council for Economic Development whose purpose is to assist with economic development activities and capital investment in the state. The Community Development Block Grant program purpose is to assist communities with grants for infrastructure, housing, economic development, and planning.

The agency reported that during 2004 and 2005, the national economy was in a slowdown, particularly manufacturing, with hundreds of thousands of manufacturing jobs lost nationwide. In spite of this state of the economy, the agency reported it assisted 105 firms with over $2.76 billion announced investment including 13,491 new jobs statewide in 2004. In 2013, the agency reported a total capital investment by businesses locating or expanding in the state of $5.4 billion with 127 economic development project closings, and 15,457 new jobs added.

Boeing Recruitment History

According to agency officials, in 2003 the DOC was recruiting the Boeing Company to locate in South Carolina and hosted Boeing officials at a site adjacent to the Charleston International Airport in the City of North Charleston. The weather was bad, the site was boggy, and the Boeing officials determined the site, as it existed at the time, to be unsuitable. Boeing ultimately located its first 787 assembly line in another state. The DOC continued its recruitment of a major aircraft manufacturer and developed "Project Emerald," a collaborative effort of Vought Aircraft Industries, Inc., the DOC, the S.C. Public Railways, Charleston County, and the Charleston County Airport District designed to incentivize Vought to locate at the site. Vought made commitments of new investment and jobs in the incentive agreement. In 2009, Boeing purchased Vought's North Charleston operations.

Bond Approval, Deposit, and Spending

On November 29, 2004, the Secretary of Commerce notified the Joint Bond Review Committee (JBRC) of its intent to cause the issuance of general obligation state economic development bonds in order to help fund the manufacturing site.

The bond requested was for a total of up to $160,000,000 in stages of construction and manufacturing investment by Vought. The initial request was for $116,000,000, with all but $5,000,000 being used for the following:

AMOUNT	PROJECT
$97,500,000	Manufacturing Facilities
$7,500,000	Site Preparation
$2,000,000	Airport Improvements
$2,000,000	Road Improvements
$2,000,000	Multipurpose Center

The State Budget and Control Board approved the bond on December 14, 2004. The remaining $5,000,000 was to be used for wetlands mitigation as listed in the bond request. The bond request called for a trust (later named the Ashley-Cooper Rivers Environmental Trust) fund to be created to purchase and protect thousands of acres of pristine wetlands to mitigate the filling of some wetlands at the construction site. The plan was also to attract additional contributions to enable a trust to protect more wetlands.

DOC arranged for $4.75 million of the approved bond to be deposited to an ACRET-owned interest bearing checking account for the sole purpose of obtaining the wetlands mitigation credits, which ultimately was done by purchasing conservation easements and mitigation bank credits (see *Chapter 5*).

The remaining $250,000 was used to pay legal and environmental expenses associated with obtaining the wetlands permit — which included professional services for environmental studies and legal fees for setting up and running ACRET and other activities related to wetlands permit requirements. Actual expenses exceeded $250,000 by approximately $1,000 (see Table 2.2).

ACRET Mitigation Purchases

ACRET spent $4,988,828 (see Table 3.3) on acquiring conservation easements and mitigation bank credits, which consisted of approximately 7,100 acres taking into consideration additional acres that were covered. ACRET was able to acquire additional acres because it leveraged grants it awarded to two nonprofit conservation groups — Ducks Unlimited and Audubon — which in turn contributed funds, or had funds contributed, to the purchase of the conservation easements. The total amount spent by ACRET exceeded $4.75 million because approximately $299,756 was interest accrued on the bond before all funds were spent. The last purchase was made in 2011.

Table 2.1: ACRET Purchases

DATE	VENDOR *	TYPE	AMOUNT
9/25/2007	Audubon - Mims tract	Conservation easement (CE)	$1,000,000
10/20/2007	Ducks Unlimited - Millbrook tract	Conservation easement	462,005
11/1/2007	Ducks Unlimited - Poplar Grove	Development easement	2,000,000
4/30/2008	Pigeon Pond	Mitigation bank	281,250
6/30/2008	The Bank of South Carolina	Bank charge	10
6/30/2008	Audubon - Grooms Hoover tract	Appreciated value (CE)	32,000
9/25/2008	Audubon - Grooms Hoover tract	Conservation easement	1,000,000
12/30/2009	Ducks Unlimited - Swamp tract	Conservation easement	80,000
2/10/2010	Audubon - Pine Haven tract	Conservation easement	70,000
6/30/2010	Haynsworth Sinkler Boyd	Legal	30,919
6/30/2010	The Bank of South Carolina	Bank charge	20
8/25/2011	Audubon - Beidler Forest	Mitigation bank	73,573
9/30/2011	Haynsworth Sinkler Boyd	Final legal expenses	**20,009**
TOTAL			**$5,049,756**

*For conservation easements, the managing nonprofit is listed as the vendor.

Source: Interested parties.

The other portion of the bond, $251,018, was used for legal and accounting fees and environmental studies in connection with wetlands mitigation to obtain the Section 404 permit and comply with its terms. According to the STO, this portion of wetlands mitigation related expenses was funded with interest earned while the approved bond proceeds were under control of the state in the State Investment Pool, a fund which is separate from the state's general fund.

Table 2.2: Wetlands Permit Expenses ($250K of Bond)

DATE	VENDOR	AMOUNT
08/06/04 – 06/27/05	Haynsworth Sinkler Boyd	$135,137
06/14/05 – 06/27/05	Hagood and Kerr	1,212
07/05/05 – 05/31/07	Haynsworth Sinkler Boyd	66,669
03/31/05 – 03/31/05	Wilbur Smith Environmental Consulting	48,000
TOTAL		**$251,018**

Source: Interested parties.

Wetlands Permit and Mitigation

Section 404 of the Clean Water Act requires a federal 404 wetlands permit prior to discharge of fill material into the waters of the United States and compensation for unavoidable impacts to wetlands. That compensation is expressed in the form of wetlands mitigation credits. The protection of other wetlands may be used to make up for those filled in for economic use. The U.S. Army Corps of Engineers (Corps) has a standard operating procedure (SOP) used to determine what the required number of credits are and also what is allowed is assigned a value towards the credits. It was determined that this project required 450 of these mitigation credits (see *Chapter 5*).

Vought, as the entity seeking the permit, developed a wetlands mitigation plan and submitted it to the Corps. Applicants must show that steps have been taken to avoid impacts to wetlands, streams and other acquatic resources and that potential impacts have been minimized; and that compensation will be provided for all remaining unavoidable impacts. The plan called for impact consisting of the fill of approximately 38.33 acres of wetlands at the project site. Phase one of the project called for the use of 8.33 acres of jurisdictional wetlands at the construction site. Vought's initial commitment was to invest $425 million and deliver 645 jobs.

The plan included the creation of a nonprofit entity, which became ACRET, comprised of a board of directors selected from Vought, various environmental groups, such as the South Carolina Coastal Conservation League (League), and the S.C. Conservation Bank, environmental regulatory agencies, such as the S.C. Department of Natural Resources, the U.S. Fish and Wildlife Service, and DHEC, among others, for a total of 13 members.

ACRET was formed to fulfill the objectives of a Memorandum of Agreement (MOA) between DOC and the League to purchase the preservation of a minimum of 1,000 acres of wetlands and to satisfy conditions required by the Corps. The Corps' decision document noted the mitigation plan submitted by Vought would "enable the permittee to preserve and buffer…more than three times the number of mitigation credits that would typically be required for the project impacts". According to the agency's contracted attorney, the DOC entered into the MOA with the League because they believed the League to be the most influential stakeholder in the area with the best ability to help the state get buy in from other interested stakeholders and land preservation groups.

The Corps issued the 404 permit, number 2004-1N-402, with special wetlands mitigation conditions, on April 8, 2005, approximately four months after the request for a permit was received. The conditions described the wetlands mitigation elements that had to meet the Corps' requirements. DHEC also issued two certifications that are a prerequisite for issuing the federal wetlands permit — the Clean Water Act Section 401 Water Quality Certification (401 certification) and the Coastal Zone Management (CZM) consistency certification.

Bond Spending

In this chapter, we discuss how the state-issued general obligation economic development bond, in the amount of $5 million, issued as a part of a larger bond, was spent. The bond was part of an incentive package to attract Vought Aircraft Industries, Inc. to North Charleston to establish and operate an aircraft manufacturing plant.

In our review, we found:

- ACRET spent approximately $4.6 million more than the Corps' minimum for meeting the wetlands permit requirement (approximately $743,000). The entire bond was spent, including approximately $300,000 in interest earned on the bond, for a total of approximately $5.3 million.

- There is an expenditure overdraw in the amount of $21,942 exceeding the $5 million amount approved allocation for the wetlands mitigation. DOC has been unable to provide the documentation showing the basis of the expense.

- The DOC did not include any oversight monitoring provisions for the nonprofit's spending in the formal agreement it had with the League. This agreement authorized the creation of a nonprofit tasked with meeting permit mitigation requirements.

- The DOC had no provision in the MOA for returning any of the bond proceeds to the state should the cost to mitigate the fill of the wetlands at the impact site was less than the bond issuance.

- According to a DOC official, the $5 million, allocated for the wetlands mitigation portion of the bond, was arbitrarily determined.

- The DOC issued the MOA without instruction on how the interest on the bond should be expended. The state issued the bond for "wetlands mitigation"; however, ACRET spent approximately $51,000 on operating expenses.

- The state's general fund is used to repay the bond debt service, which includes the bond principal and interest — structured to be repaid over a 15-year repayment schedule that will total approximately $6.9 million.

Bond Purpose

The proceeds of the larger bond, approved for up to $160 million, were to be used for site preparation, construction, road, and airport runway improvements. The $5 million designated for wetlands mitigation, the portion subject to our review, was divided into two components or "buckets" for future draws to pay expenses as they were incurred.

A DOC official determined the amount to cover wetlands mitigation to be $5,000,000, when the state first recruited Boeing in 2003. The official could not specify as to how the amount was determined. DOC officials have stated that Vought officials were aware of this and remembered the amount and expected it in its incentive agreement.

Memorandum of Agreement

According to the MOA between the DOC and the League, a conservation group based in Charleston, $4,750,000 was to be used "to satisfy compensatory mitigation required by the corps and to fulfill the terms of this Agreement". The MOA is silent on how the remaining $250,000 was to be used. (See *Chapter 2* for how the $250,000 was spent.) However, the bond document indicates the funds were being approved for "wetlands mitigation." Other MOA stipulations included:

- Deposit of the $4.75 million in a newly-established "mitigation trust" in a financial institution account with a commercially-reasonable rate of return of interest.
- Establish a nonprofit organization to act on behalf of the trust (ACRET).
- Administer the trust by using grants awarded to qualified nonprofits which will apply for such monies solely for the purposes of acquisition of wetlands in the Ashley and Cooper Rivers basins.
- Establish criteria for mitigation including acquisition of a minimum of approximately 1,000 acres of wetlands and adjacent upland tracts.
- Use of the trust fund in its entirety within two to three years.

The League agreed to publicly support the mitigation plan as a part of this signed agreement. It would have been a violation of this agreement for the League to oppose the permit.

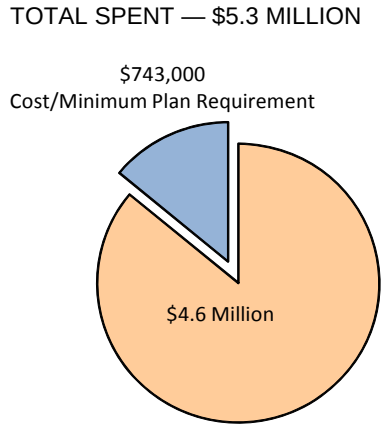
According to a former League official, the League might have considered appealing the permit if the state had taken the position that it would only pay to meet the minimum government mitigation requirements.

Wetlands Permit Minimum Requirement

Neither the MOA, nor any other agreement associated with the project, made provision for the return of any money to the state, should the cost of the acquisitions to mitigate the fill of the wetlands at the impact site be less than the $4.75 million allocated for that purpose. In fact, the MOA called for a mitigation trust fund in the amount of $4.75 million. It was a specific condition of the permit that the fund be used for the sole purpose of providing mitigation for environmental impacts associated with the aircraft manufacturing project. The agreement resulted in the state spending all of the $5 million established by the DOC and the MOA the agency had with the League.

It had been determined by March 2007 that the minimum requirements of the Section 404 wetlands permit would cost approximately $743,000. The minimum requirements may have cost slightly more if the Corps required more wetlands enhancement or restoration credits (see *Chapter 5*). The purchases equated to more than 450 mitigation credits, the number of credits the Corps required as indicated in its permit approval document.

Chart 3.1: Total Bond Spent Compared to Minimum Plan Cost Required for 404 Wetlands Permit



Sources: STO, ACRET, LAC

TOTAL AVAILABLE TO SPEND	
$5,000,000	Wetlands Mitigation Bond
299,756	Interest Earned on Bond
$5,299,756	TOTAL

DOC Oversight

The bond requires spending oversight by the DOC. The general obligation economic development bond procedures require: "The company shall submit to DOC a written request utilizing the Request to Withdraw Authorized Fund form. A listing of all obligations and copies of invoices should be attached."

DOC's responsibility is listed as:

> All invoices will be reviewed and compared to the contracts for compliance…. A review by DOC of the actual invoices will take place after the approved bond withdrawal. This review will compare all invoices to contracts and will ensure proper use of the State Economic Development Bonds.

We found one instance where DOC documented that it reviewed legal invoices related to the wetlands permitting process and ACRET operations. We found no indication of reviews of the rest of the expenses associated with the wetlands portion of the bond.

The MOA states it is the intent of the parties that the trust fund be used in its entirety for mitigation projects in a two-year to three-year period. ACRET did not meet this requirement. The first purchase was made on September 25, 2007, and the last purchase was made on August 25, 2011, a period of nearly 4 years; however, the last purchase was approximately 6½ years from the date of the agreement and approval of the bond.

Wetlands Permitting Issue

The DOC had no specific cost basis for determining $5 million should be allocated for wetlands mitigation, which was provided through grants to conservation groups for Project Emerald. In another economic development project, the state recently allocated $5 million to an environmental group, as a part of an economic development effort to deepen the port at Charleston. The S.C. State Ports Authority (SCSPA) entered into an agreement with the League and the Lowcountry Open Land Trust (LOLT) regarding the Charleston Harbor Deepening Project for which the state established the Harbor Deepening Reserve Fund and appropriated $300 million of non-recurring revenue for associated activities.

The project includes:

- SCSPA will provide $5,000,000 to fund property acquisition by the LOLT in the Cooper River corridor, which has been designated as a high priority for conservation.
- SCSPA will provide $125,000 to the South Carolina Aquarium for sea turtles and the SCSPA will help finalize shipping lanes "for the monitoring of right whales."
- The League and the LOLT "agree to release and covenant not to sue for any claim arising from the Post 45 Project against the Ports Authority and any authorizing State or Federal agency."

This agreement results in the LOLT obtaining $5,000,000 and the LOLT and the League agreeing not to sue for any claim arising from the project.

Bond Debt Service

The State Treasurer's Office (STO), as a part of the first bond issuance for the Vought Project, calculated a debt service schedule (of bond principal and interest) for repayment of the bond. This is the amount the taxpayers of the state will be responsible for, as general obligation bonds are issued on the "full faith, credit and taxing power of the State… and the General Assembly shall allocate on an annual basis sufficient tax revenues to provide for the punctual payment of Principal Installments of and interest on the Bonds." The cost of the repayment of the wetlands mitigation portion of the bond is just over $6.9 million as indicated in Table 3.2.

Table 3.2: Debt Service

	Series 2005A	Allocated to Wetlands Mitigation
Principal	$66,130,000	$4,750,000
Interest	30,310,220	2,177,129
TOTAL Debt Service	$96,440,220	$6,927,129

The bond had to be spent on wetlands mitigation, as is listed in the bond resolution stipulating the purpose of the bond:

> A description of the infrastructure for which the General Obligation State Economic Development Bonds are to be issued … is attached hereto as Exhibit A…Site Prep … Wetlands … Airport Improvements….

According to the STO, the U.S. Internal Revenue Service has certain requirements that apply to tax-exempt bonds with which states must comply; however, the portion of the bond that funded the wetlands mitigation was issued as a taxable bond and these regulations do not apply.

Summary of ACRET Bond Proceeds and Purchases

The agreement between the DOC and the League made no provision for what to do with interest earned on the bond. This caused uncertainty as to how ACRET was supposed to treat the interest. Correspondence we reviewed, primarily from and among the contracted attorneys, indicated that ACRET should seek clarification from the DOC. We could find no evidence clarity was sought, or if it was, it was provided. The MOA states:

> The Mitigation Trust Fund shall consist of a lump sum payment of …$4,750,000…. Such funds shall be used exclusively for acquisition of wetlands and adjacent upland tracts or conservation easements consistent with the terms of this agreement…and not for related transactional costs.

Table 3.3: ACRET Revenues and Expenditures

REVENUES FOR MITIGATION CREDITS	
Bond proceeds	$4,750,000
Interest earned	$299,756
TOTAL Revenue	**$5,049,756**
EXPENDITURES	
Conservation easements, covenants, fee simple	$4,644,005
Mitigation banks	354,823
Subtotal mitigation purchases	4,998,828
Operating expenses	30,919
Final legal expenses	20,009
TOTAL Expenditures	**$5,049,756**

Sources: STO, ACRET

Bond Interest Earned

The interest earned on the bond accrued to the ACRET checking account — the mitigation trust fund account. Therefore, the interest earned became a part of the mitigation trust fund and was required by the MOA to be spent on the acquisition of properties for wetlands permitting purposes, not for operating costs (if it was to be spent at all). As indicated in Table 3.3, the majority of the earned interest was spent on compensatory mitigation; $30,919 was spent on operating costs, plus another $20,009 was spent on legal fees and the dissolution of ACRET, according to the DOC. This brought the checking account balance to zero. We are unable to determine exactly what the expenses are for because we were not provided the detailed invoices.

The STO also earned interest on the initial bond issuance while some of those proceeds were invested in the State Investment Pool – before the proceeds were actually used for expenses. This interest was used to fund the $250,000 that was a part of the $5,000,000 bond approved for wetlands mitigation. This financing allowed the STO to not issue any additional bonds to fund the expenses for wetlands mitigation. STO records confirm DOC records showing an expense draw of $21,942 over the approved amount.

The purpose of the bond was stated as "wetlands mitigation" and the interest earned was commingled with the bond principal covered by the MOA. Since the MOA stated all of the trust fund should be used "to satisfy compensatory mitigation required by the corps and to fulfill the terms of this Agreement," we conclude spending the interest on operating costs was not consistent with the purpose of the mitigation trust account.

Recommendations

1. The S.C. Department of Commerce should determine and document the basis of the projected cost for wetlands permitting requirements associated with economic development projects and use that cost projection to determine the amount of the related bond.

2. The S.C. Department of Commerce, should it construct a nonprofit to carry out wetlands permit compensatory mitigation, should exercise oversight by reviewing mitigation plans and purchases and review invoices to ensure compliance with bond requirements.

3. The S.C. Department of Commerce should structure its separate agreements with its partners involved in wetlands mitigation to be consistent with the stated purpose of the bonds being issued.

4. The S.C. Department of Commerce should put procedures in place to prevent draws for expenses to exceed approved bond amounts.

5. The S.C. Department of Commerce should include in its agreements, provision for return of bond proceeds to the state when bond amounts allocated for wetlands mitigation exceed the cost required by the wetlands permit.

ACRET Operations: Grantee Acquisitions and Governance

ACRET Grantee Acquisitions

We reviewed the purchases made with ACRET distributions and found they may have been inconsistent with Corps standards for wetlands mitigation and the purpose for which the trust was created. We found some acquisitions were:

- Not wetlands.
- Out of the target watershed.
- A substantial distance from the Vought site.
- Protected with less stringent easements.

While all transactions may not have met Corps standards, the Corps approved the purchases, based on the presence of the few that met compensatory mitigation requirements (see *Chapter 5*).

We also found that it was unusual for ACRET to provide a grant of almost half of its funding to purchase a minimally-restrictive easement which contributed nothing to the mitigation credits requirement. In 2005, Ducks Unlimited acquired a $5 million line of credit and purchased a conservation easement over Poplar Grove. In 2007, the ACRET board approved a $2 million grant to partially repay that previous commitment.

DOC provided $4.75 million to ACRET to distribute, solely for the purposes of acquisition, perpetual preservation, enhancement, or restoration of wetlands in the Ashley and Cooper River Basins. There were three types of acquisitions:

FEE SIMPLE

An absolute or fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate. Here, the ownership interest rests with the organization to which ACRET distributed funds.

MITIGATION CREDIT

See *Chapter 5*.

CONSERVATION EASEMENT

A conservation easement is a voluntary restriction on land, preventing development on the property, in order to retain its natural condition. The restriction will remain on the property for all subsequent property owners unless it can be successfully removed by court order or by agreement of all affected parties.

In addition, S.C. Code §27-8-20(1) provides that:

> Conservation easement means a nonpossessory interest of a holder [government or nonprofit entity] in real property imposing limitations or affirmative obligations, the purposes of which include one or more of the following:
>
> (a) retaining or protecting natural, scenic, or open-space aspects of real property; (b) ensuring the availability of real property for agricultural, forest, recreational, educational, or open-space use; (c) protecting natural resources; (d) maintaining or enhancing air or water quality; (e) preserving the historical, architectural, archaeological, or cultural aspects of real property.

Here, the most relevant purposes are (a), (c), and (d). The holder of the conservation easement and third parties granted rights by the grantor have a right to enforce the easement.

ACRET distributions ranged from $70,000 to $2 million and the acreage of wetlands present on the tracts acquired ranged from 1.8 out of a 3,100 total to 395 out of a 582 total. Table 4.1 details the acquisitions made with ACRET's distributions. Of the approximately 1,821 acres protected, 945.6 acres were described as wetlands.

We attempted to obtain the time-of-purchase values of the acquisitions. Audubon provided the values but no documentation, and Ducks Unlimited declined to fulfill our request. We chose not to report the values because of the incomplete nature of the data.

Table 4.1: Property Protected with ACRET Funds

Tract Name	Amount Distributed	Distributed To	Transaction Type	Acreage	Land Type (In Acres*)	County	Miles to Project Site**	Basin
Grooms-Hoover	$1,000,000	Audubon	Restrictive Covenant (428.25 acres) Conservation Easement (154 acres)	582	395 Wetlands 33.5 Upland Buffer***	Berkeley	26.2	Edisto
Millbrook	$462,005	Ducks Unlimited	Conservation Easement	344	288.8 Wetlands 55 Upland Buffer	Charleston	7.72	Santee
Mims	$1,000,000	Audubon	Fee Simple Interest	165	158 Wetlands	Dorchester	26	Edisto
Pine Haven	$70,000	Audubon	Fee Simple Interest****	21	13 Wetlands 8 Uplands	Berkeley	31	Edisto
Poplar Grove	$2,000,000	Ducks Unlimited	Conservation Easement+	620++	Highland++ 1.8 Marsh	Dorchester	9.84	Santee
Swamp	$80,000	Ducks Unlimited	Conservation Easement	89	89 Wetlands	Colleton	49	Salkehatchie
Beidler Forest	$73,573.81	Audubon	Mitigation Credits					
Pigeon Pond	$281,250	Ducks Unlimited	Mitigation Credits					

* Based on the acreage documented in the recorded instruments at the county registrars of deeds.
** In a direct line.
*** No description with the conservation easement portion of the Glory Hole transactions.
**** ACRET funded purchase of property and then the purchaser placed a restrictive covenant on it.
\+ $2M went to repayment of $5M line of credit obtained for earlier purchase of the easement.
++ No documents provide the exact number of acres the $2M would have covered, but since it is 20% of the $10M total, we used 20% of the 3,100-acre total.

Source: Berkeley/Charleston/Colleton/Dorchester County Registrars of Deeds, interested parties.

Inconsistencies with Corps Preferred Standards and ACRET Purposes

Easement Type

We reviewed the restrictions contained in the easements and found that some of the conservation easements acquired are substantially less restrictive than the Corps model easement for wetlands mitigation and each other. In addition, for some of the easements, the state has no recourse should the property cease to be used in a manner consistent with the easement. The stated purpose of these acquisitions is to preserve, enhance, or restore wetlands. Table 4.2 compares the restrictions that attached to the land to the 1998 Corps model easement, which remained the model until 2010.

Table 4.2: Restrictions

Tract Name	Subdividing	Construct New Structures	Construct New Roads	Timber	Drain, Dredge, Dam	Use			
						Agricultural	Commercial	Industrial	Recreational
Corps Model Easement	No statement			Limited to what is defined in the forestry management practices					
Glory Hole (Grooms-Hoover)		Limited to 3 residential and the associated out buildings	Limited to what is needed to facilitate the permitted uses	Limited to what is defined in the forestry management practices					
Millbrook	No statement			Limited to what is required to protect the natural environment					
Poplar Grove	Limited to 50 lots of no less than 50 acres apiece	Limited to a certain number in each lot	Limited to permeable materials and what is required to serve new structures	Limited to timber harvest and forest management in compliance with the timber management plan	Limited to what is required to maintain existing water resources			No statement	
Swamp				Limited to what is required to protect the natural environment					

Restricted
Allowed with notice or approval
Allowed with limits not requiring notice or approval

Source: Army Corps of Engineers; Berkeley/Charleston/Colleton/Dorchester County Registrars of Deeds.

One of the conservation easements executed would have met Corps requirements for easements used as wetlands mitigation tools — the Millbrook tract. The Swamp tract is protected by an easement that is almost as restrictive generally, and more restrictive in the area of subdividing the property. The Grooms-Hoover easement is less restrictive but what is allowed requires notice to or approval by the holder of the easement. The least restrictive easement is the one over Poplar Grove.

In addition, both the Millbrook and Swamp tract easements give the Corps and DHEC a third-party right of enforcement. Neither the Grooms-Hoover nor Poplar Grove easements provide that. According to S.C. Code §27-8-20(4), a third-party right of enforcement is:

> …a right provided by the grantor of the conservation easement to enforce selected terms of the conservation easement which is granted to a governmental body, a charitable, not-for-profit, or educational corporation, association, or trust, which though not the holder of the easement, is eligible to be the holder of such easement.

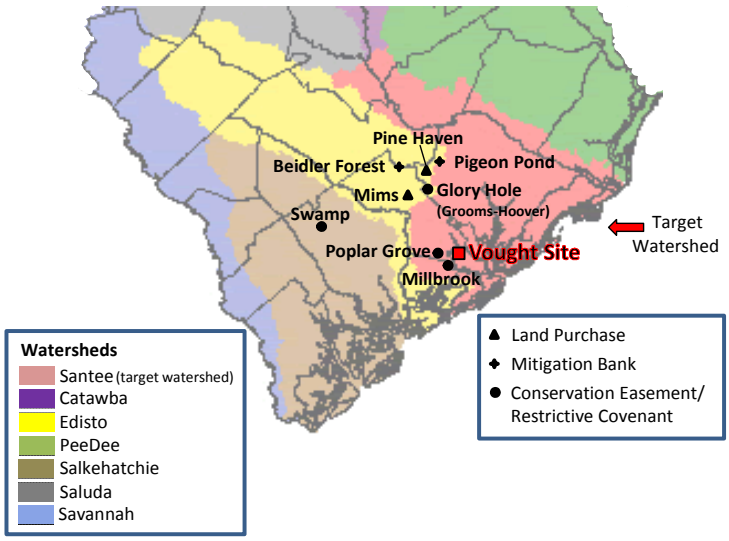
Should the properties cease to be used as required by the easements, the State of South Carolina has no right to enforce the easement.

Land Type

We reviewed the type of land protected with ACRET funds. We found that approximately half of the interests purchased with ACRET funds were non-wetland acreage. Table 4.1 shows the amount of wetlands contained on each property. Of the approximately 1,821 acres protected, where land type was described in the recorded documents, 945.6 acres were described as wetlands. However, since the purposes of the funds were to acquire, preserve, enhance, or restore wetlands, we did not conclude that this was in and of itself improper. According to a conservation expert, non-wetlands, even those not described as buffers, are also important to preservation or enhancement; they keep development from encroaching on wetlands. All purchases contain some, if minimal, wetlands.

Map 4.3 illustrates the county and watershed location of each ACRET acquisition.

Map 4.3: County and Watershed Location of Protected Properties



Source: Army Corps of Engineers; Berkeley/Charleston/Colleton/Dorchester County Registrars of Deeds.

Acquisition Locations

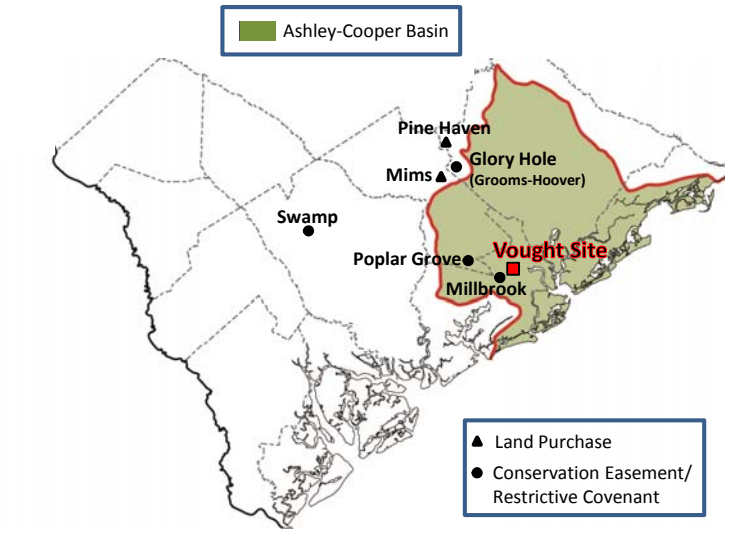
Watershed

We reviewed whether the protected properties were in the appropriate watershed and found that ACRET funds were used to purchase interests in properties outside of the target watershed. A watershed is an area of land where all surface and underground water drains to a common place, such as a lake, river, or the ocean.

According to a Corps official, the land purchased and restored/preserved generally has to be in the same watershed. The Corps standard operating procedures in place at the time of this project stated that, "where practicable and environmentally desirable, mitigation should be at or near to the project site and within the same watershed as the area of adverse impacts." The Corps defines South Carolina's watersheds using maps developed by DHEC. Here, the project site was in the Santee watershed (see Map 4.3). Two of the properties — Poplar Grove and Millbrook — are also in the Santee watershed. The Grooms-Hoover, Mims, and Pine Haven tracts are all in the Edisto watershed. The Swamp tract is in the Salkehatchie watershed.

We also found inconsistencies between the Corps, DOC, and ACRET's definitions of the target watershed. ACRET's formation documents include a purpose of protecting land in the Ashley and Cooper River Basins. While the Corps does not define this basin, the Department of Natural Resources defines an area called the "Ashley-Cooper River Basin." Map 4.4 displays that basin and the property locations. Poplar Grove and Millbrook are both in the Ashley-Cooper River Basin. The remaining properties are not.

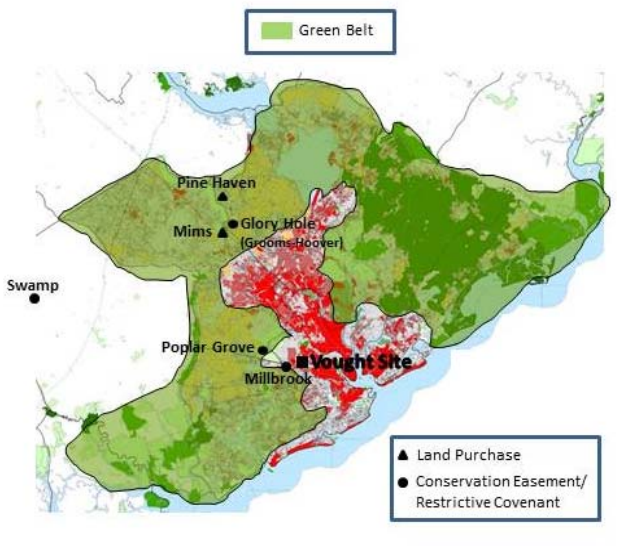
Map 4.4: Location of Protected Properties as it Relates to the Ashley-Cooper River Basin



Source: Department of Natural Resources.

In addition, a Lowcountry wetlands conservation expert and former ACRET trustee stated that ACRET was working to protect lands in a "green belt" around Charleston. The goal was not necessarily compatible with the Corps' watershed and distance mitigation preferences (see *Chapter 5*). A green belt is an extensive area of largely undeveloped or sparsely occupied land that is associated with a community and set aside to contain development, preserve the character of the countryside and community, and provide open space. This green belt primarily touches Berkeley, Dorchester, and Charleston counties, and includes small portions of neighboring counties. Map 4.5 displays the greenbelt and property locations. All properties but the Swamp Tract are in the greenbelt.

Map 4.5: Green Belt Location of Each Protected Property



Source: Interested party

Distance

Each property's distance from the project site ranged from approximately 8 to 49 miles, with 4 of the 6 properties being more than 25 miles away. To contrast, the City of North Charleston submitted a proposal to restore wetlands along Filbin (215.8 acres) and Noisette Creeks (58.6 acres). The beginning of Filbin Creek is less than one mile from the Vought site parking lot and the headwaters area for Noisette Creek is approximately two miles away. Both creeks flow into the Cooper River. The following reasons were given for not funding this proposal:

- The investment was too small to significantly impact the state of the target waterways.
- The project was underdeveloped.
- The project would take too long to complete.

In 2010, ACRET notified the City of North Charleston that the proposal was not funded because of the greater weight placed on "protecting parcels adjacent to larger protected units with high ecological value and which consolidate wildlife corridors as well as leverage other conservation funds."

Poplar Grove Acquisition

As stated above, we reviewed each acquisition for its consistency with ACRET purposes and Corps requirements and preferences. We found that the Poplar Grove acquisition was an exception. The purpose was to acquire properties that would mitigate the wetlands destroyed at the Vought site in a way that was consistent with Corps standards. Poplar Grove was protected with a minimally-restrictive easement and not primarily wetlands. In addition, this acquisition contributed nothing towards meeting the mitigation credit requirements of the Corps.

This choice of acquisitions was also unusual because the purchase was completed two full years before ACRET voted to fund it. In 2005, Ducks Unlimited acquired a $5 million line of credit to partially fund purchase of a conservation easement over Poplar Grove. In 2007, the ACRET board approved a $2 million grant to partially repay that previous commitment. At least two ACRET board members were involved in negotiating the initial Poplar Grove acquisition by Ducks Unlimited and identifying potential funding sources. However, neither ACRET board member recused himself from discussing or voting on funding the proposal that included repaying one of those initial funding sources. Because Ducks Unlimited was already committed, the protection of this property would have happened with or without ACRET's involvement.

Recommendations

6. The S.C. Department of Commerce, should it create a nonprofit to carry out wetlands permit compensatory mitigation, should require that acquired easements are appropriately restrictive and that a state agency always has a third-party right of enforcement.

7. The S.C. Department of Commerce, should it create a nonprofit to carry out wetlands permit compensatory mitigation, should require that the mitigation target a watershed that would be consistent with the U.S. Army Corps of Engineers' preferred requirements.

ACRET Governance

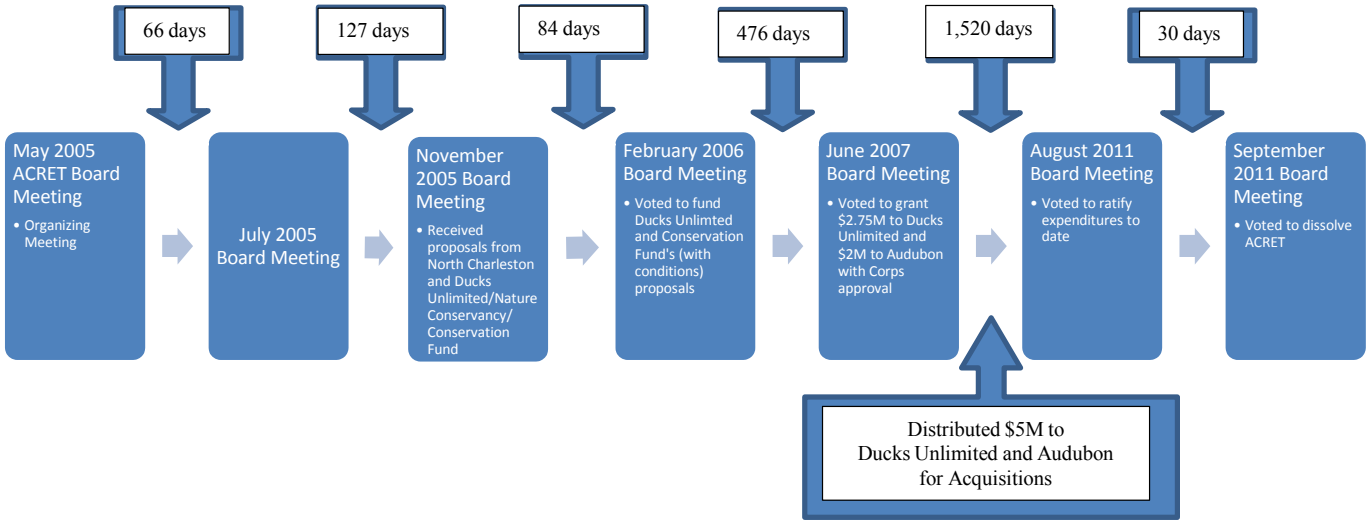
We reviewed ACRET's governance. We found that the board did not consistently operate within the bounds of its articles of incorporation, by-laws, and state public meeting laws. As a result, decisions made in some meetings could be viewed as invalid.

S.C. Code of Laws §30-4-20 defines a public body as "any department of the State…or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds..." ACRET was a nonprofit organization that was formed as a supporting organization to DOC. Its purpose was to distribute funds received from DOC. It was a public body that was governed by its own articles of incorporation and by-laws, and South Carolina's public meetings laws.

Meeting Timing

We reviewed the time between ACRET's meetings and found that the timing was inconsistent with requirements in the trust's by-laws. ACRET's by-laws required one meeting every fiscal quarter. The board met regularly and once every fiscal quarter, only between May 2005 and February 2006. Chart 4.6 is a timeline of the meetings and significant actions.

Chart 4.6: Board Meeting Timeline



All of ACRET's distributions occurred between the June 2007 and August 2011 meetings. We were unable to document if any other significant business took place in between the meetings. However, in the February 2006 meeting, the board voted to approve the proposal of the Conservation Fund, with conditions. The minutes from the June 2007 meeting contain approval to fund Audubon, instead of the Conservation Fund. It appears that significant decisions about whether to fund the original organization were made between the meetings, and without the benefit of full board review.

Open Meetings

We reviewed the openness of ACRET's meetings and found no evidence that announced meetings were closed. S.C. Code §30-4-60 states that, outside of some exceptions, every meeting of a public body shall be open to the public. Though ACRET's meetings took place in private offices, there is no evidence that the public was not welcomed at the meetings. However, the decision to fund Audubon, after previously deciding to fund the Conservation Fund can lead to a conclusion that a meeting happened for which we have no evidence, and it would not have been open.

Proper Notice of Meetings

We reviewed ACRET's compliance with notice requirements and found that it generally provided adequate notice. S.C. Code §30-4-80 requires that public bodies give notice of regular meetings at the beginning of the year and special meetings at least 24 hours before the meeting. Proper notice includes posting a copy at the meeting location or principal office and notifying people, organizations, or the media, as may request. Since ACRET did not hold regular meetings, we categorized all of their meetings as special. Proper notice was given for all but two meetings.

Quorum

We reviewed whether a quorum existed at each of ACRET's meetings and found that it did not always have a quorum. ACRET's by-laws defined a quorum as a majority of the number of trustees in office (filled seats) immediately before a meeting began. Also, ACRET's by-laws prohibited voting by proxy. During both 2011 meetings, trustees proxied their votes to other trustees. In making determinations about whether a quorum existed for each meeting, we classified trustees present by proxy as absent. As a result, there was no quorum for the August or September 2011 meetings. Decisions made in those meetings could be viewed as invalid.

Conclusion

We could not determine the benefit of creating a nonprofit entity to accomplish this particular purpose. One former board member stated that ACRET was a good way to get a variety of stakeholders involved — the agencies that approve the sites, the company seeking the permit, and the organizations that are knowledgeable. However we found several significant issues:

- One board member implied that this structure made the process less efficient.
- A Corps official referred to this method of wetlands mitigation as "unique."
- A DOC official characterized the process as an expensive way to accomplish this goal.
- While ACRET's tax-exemption application states that it was "operated, supervised or controlled by the DOC", the DOC did not provide oversight. The oversight that was provided came from the board which consisted primarily of representatives from environmental groups and state and federal regulatory agencies (League (2), SC Conservation Bank (1), DHEC(2), DNR(1), National Oceanic and Atmospheric Administration (1), U.S. Fish and Wildlife Service (1)).

Recommendations

8. The S.C. Department of Commerce should not create a nonprofit entity to accomplish compensatory wetlands mitigation again.

9. If the S.C. Department of Commerce creates a nonprofit entity, it should ensure that the entity complies with state laws governing public bodies and its formation documents.

Wetlands Mitigation Credits

In this section, we discuss the issue of compensation for the destruction of wetlands by generating mitigation credits. We found that two purchases made by ACRET cost $743,255 and met the Army Corps of Engineers total mitigation requirements. Most of ACRET's other purchases in the amount of approximately $4.6 million were not needed to satisfy the Corps' total mitigation credit requirements.

The Corps has a standard operating procedure (SOP) for determining the required wetland mitigation credits. For the Vought project, it was determined that approximately 450 of these credits were required. Vought was required to come up with a mitigation plan for how the mitigation credits would be generated. According to a Corps official, Vought's plan was vague but was approved by the Corps. Currently, mitigation plans are required to be more specific.

According to Vought's mitigation plan, it was going to preserve and buffer more than 1,000 acres of wetlands, which would have generated more than 3 times the number of mitigation credits required by the Corps. Vought's mitigation plan also included the creation of ACRET to perform the mitigation purchases on Vought's behalf. ACRET was given $4.75 million to make the mitigation purchases and was expected to expend all of the money within three years. In actuality, it took ACRET over six years to expend all of the funds.

Mitigation Credits

When a company comes to South Carolina and wants to build a plant or other structure, some wetlands might be impacted or destroyed in the process of construction. According to federal law, when wetlands are destroyed, the company must generate mitigation credits to offset the impacts to the land where the plant or structures were built.

Mitigation credits are given by the Corps when other wetlands are:

- Preserved.
- Enhanced.
- Restored.
- Created.

The Corps prefers that the land which will be preserved, enhanced, restored, or created is in the same watershed and is the same type of land as the land that is destroyed.

As examples, wetlands can be preserved by purchasing the land and conserving it. Wetlands can also be enhanced by increasing or improving the wetland, such as buying a buffer that will protect wetlands farther down the watershed.

Wetlands can be restored if there were previously wetlands on a land area, but they no longer exist. A group can restore the wetlands to their original state (i.e. make the land into wetlands again). According to a Corps official, restoration may not be successful and groups that take on this task are taking a risk. The creation of wetlands is the most difficult way to generate credits and the least common. The Corps prefers restoration and enhancement mitigation, but allows for the use of preservation and creation mitigation as well.

Mitigation Banks

Usually, restoration, enhancement, or creation is done by independent groups that establish mitigation banks. The Corps rewards the mitigation banks with credits. These mitigation banks can then sell these credits to businesses in need of mitigation credits. Mitigation banks can generate credits through all four mitigation methods (preservation, enhancement, restoration, and creation); however, it is generally from restoration.

According to the Environmental Protection Agency's website:

> A mitigation bank is a wetland, stream, or other aquatic resource that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 or a similar state or local wetland regulation.

Often times, businesses prefer to purchase credits from a mitigation bank instead of mitigating wetlands directly, because the business does not have to do any actual mitigation of land, it just has to purchase the credits. Corporations are allowed to perform all of their mitigation by purchasing credits from mitigation banks. There are currently 29 mitigation banks in South Carolina.

Corps Standard Operating Procedure

The Corps has an SOP regarding the destruction of wetlands. The building of the Vought plant fell under the Corps' 2002 SOP document. The 2002 SOP required that Vought/ACRET generate mitigation credits as described in Table 5.1.

Table 5.1: Mitigation Credits — Types and Allowed Amounts

TYPE	MINIMUM	MAXIMUM
Preservation	0%	50%
Restoration, Enhancement*, or Creation	50%	100%

*Only 25% of Enhancement credits could come from buffering.

Source: U.S. Army Corps of Engineers

ACRET elected to generate 50% of the required 450 credits through preservation, 25% through enhancement (buffering), and 25% through restoration.

An environmental consulting group was hired to develop a plan to meet the Corps' requirements. A summary of the plan is presented in Table 5.2.

Table 5.2: Environmental Consulting Group's Plan

MITIGATION	CREDITS GENERATED	ACRES*	AMOUNT
Millbrook Plantation Upland Buffer	74.9	53.5	$462,005
Millbrook Plantation Wetlands	312.2	276.5	
Pigeon Pond Mitigation Bank	112.5	37.5	$281,250
TOTAL	**499.6**	**367.5**	**$743,255**

* This was the amount of acres that was originally planned to be purchased.

Source: Environmental consulting group

These two purchases created 499.6 mitigation credits, which exceeded the Corps required total of 450 mitigation credits. However, this plan fell short of meeting the Corps' 50% restoration/enhancement requirement. The requirement could have been met by the purchase of another 37.6 credits from a mitigation bank.

ACRET only purchased 112.5 credits from Pigeon Pond Bank, even though a total of 270.4 credits were available at the time. Also, there was another mitigation bank in the Santee River Basin at the time where more credits could have possibly been purchased.

The Corps approved ACRET's purchases of land. Once the 450 mitigation credits were met, the remaining land purchases were a bonus to the Corps, but not a requirement.

These two purchases cost ACRET $743,255. Most of ACRET's other purchases in the amount of approximately $4.6 million were not needed to satisfy the Corps' requirements. For example, the Poplar Grove purchase contributed zero mitigation credits towards the Corps' requirement (see *Chapter 4*). However, according to Corps officials, it is common for large companies to do more than is required to "sweeten the pot" so that environmental groups would not object to a project and thus speed up the permitting process.

Recommendations

10. The S.C. Department of Commerce should ensure that timetables in mitigation agreements are met.

11. The S.C. Department of Commerce should consider requiring businesses to perform all mitigation through the purchase of credits from mitigation banks.

12. The S.C. Department of Commerce should ensure that wetlands mitigation does not exceed the requirements of the U.S. Army Corps of Engineers.

South Carolina Certification Process

We were asked to review South Carolina's water quality certification (WQC) and coastal zone management (CZM) consistency certification process to determine the delays allowed by state law. We found that state regulation requires DHEC to issue a certification decision within 180 days, which is within the deadline set by federal statutes. However, the agency may temporarily stop the 180-day clock for a maximum of 60 days for a public hearing.

After the initial decision to issue a certification, a person may challenge the agency's decision administratively and then judicially. To challenge an initial certification decision, a person must file within 15 days for an agency review conference; the request to the decision can last as long as 90 days.

A person may then file for a contested case hearing with the Administrative Law Court (ALC) within 30 days, which results in an automatic stay of the certification until lifted by the ALC; there is no set timeframe for case resolution. While we did not review the judicial appeals process, appeals can be made through the court system and cases can last for several years.

We also agreed to review the processes in neighboring states and found differences between our process and those in other states, however, these differences were relatively minor.

Background

In 2004, Vought requested permission to develop approximately 400 acres which included filling approximately 40 acres of wetlands in the coastal area of South Carolina. For this type of development, the federal government required a Section 404 permit from the Army Corps of Engineers (Corps) which, in turn, first required a state WQC. Also, due to the coastal location of the facility, the state required a CZM certification.

The federal Clean Water Act and the federal Coastal Zone Management Act each authorize South Carolina to issue WQC and CZM certifications, respectively. The acts also require these certifications prior to the issuance of a Section 404 permit for a regulated activity, such as filling wetlands. These statutes simply require a public notice and a decision deadline for issuing these certifications; the federal Clean Water Act deadline is within one year and the federal Coastal Zone Management Act deadline is within six months. The associated federal regulations also encourage coordinated efforts between state and federal agencies to streamline the process and avoid duplication of effort.

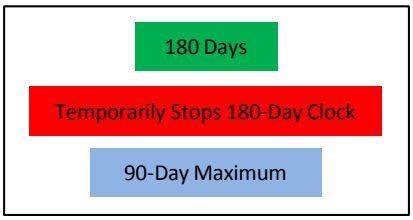
Coastal Zone Consistency and Water Quality Certification Processes

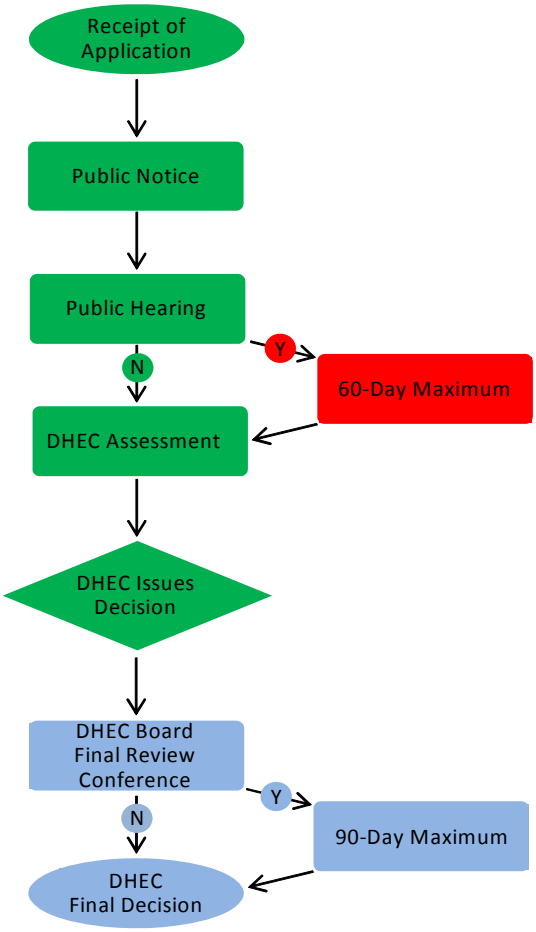
South Carolina

In South Carolina, the certification process is coordinated between DHEC's Bureau of Water (BOW) and the Office of Ocean and Coastal Resource Management (OCRM). Throughout the process, the divisions cooperate with each other and with the Corps.

According to BOW and OCRM staff, the current WQC and CZM certification process is the same as during the time of the Vought application and certification decision. Chart 6.1 outlines the certification process in South Carolina.

Chart 6.1: South Carolina Certification Process





Prior to filing, applicants are encouraged to participate in a pre-application consultation to discuss the project and certification requirements. The formal process begins when the applicant files a joint application with the Corps, BOW, and OCRM. The application includes contact information, project description, ownership of property, and, among other items, a statement of consistency with the coastal program. After receipt of an application, the Corps issues a joint public notice for approximately 30 days to announce the project and request public comment. During the public notice phase, each division works within its own area of concern to make a determination on the respective certifications.

During the public notice period, if 20 or more people submit a written request for a public hearing, BOW, OCRM, and the Corps coordinate to host a joint public hearing. The department coordinates with the applicant to set a date for the public hearing, typically notifying the public by 30 days. After the public hearing, the public comment period is extended for an additional two weeks. According to department staff, public hearings are very uncommon occurrences.

During the public notice and public hearing period, OCRM assesses the project for consistency with the state's coastal management program. OCRM adheres to federal law, issuing CZM determinations within 6 months (180 days) of receipt of a completed application. According to agency staff, it is agency practice to issue decisions within 30 days. At the time OCRM makes a CZM determination, the division forwards the decision to BOW. OCRM's decision is unofficial at this time and meant for internal use only, as BOW and OCRM issue a joint certification decision. OCRM may concur or object to the applicant's statement of consistency.

BOW simultaneously conducts a review to ensure the project does not contravene the state's water quality standards. State regulation requires BOW to issue a WQC decision within 180 days. BOW may deny, issue, or issue with conditions a certification. If both divisions approve certification, BOW issues a dual certification for both the WQC and CZM certifications. The decision is a staff decision and becomes the official agency decision at the end of 15 days. According the department staff, in calendar year 2005, DHEC issued 65 joint WQC and CZM certifications; there was no data for challenged certification decisions. Department staff also stated that in calendar year 2014, DHEC issued 34 joint certifications; 2 were challenged with the board, upheld by the board, and then filed with the Administrative Law Court for a contested case hearing.

North Carolina, Georgia, and Alabama

We reviewed the WQC and CZM certification processes in North Carolina, Georgia, and Alabama with regard to developing a large manufacturing facility which would require filling waters within the coastal area of each of these states. Like South Carolina, these states are bound by both the federal Clean Water Act and the federal Coastal Zone Management Act.

It is important to note that these are two separate certifications managed by different divisions within the same state environmental agency, with the exception of Alabama. However, in each of these states, the processes run concurrently and, when possible, the application, public notice, and public hearing is coordinated between the divisions and the Corps, as encouraged by federal regulation.

In South Carolina, BOW and OCRM issue a joint decision for the two certifications. In North Carolina and Georgia, the certifications are separate and the coastal divisions' determinations are contingent upon the WQC. In Alabama, the same division will simultaneously issue the WQC and CZM certifications. Generally, the major differences between the states are the fees, public hearings, and decision deadlines. The following bullets outline some differences:

- Alabama charges the applicant $21,600 for the two certifications and the requestor $7,040 for a public hearing. The next highest fee is $1000.
- South Carolina is the only state that hosts a public hearing with enough requests. In all other states, a public hearing is discretionary.
- Staff from all states indicated that public hearings were uncommon.

Table 6.2 outlines the WQC and CZM certification processes in South Carolina, North Carolina, Georgia, and Alabama.

Table 6.2: Certification Process

		SOUTH CAROLINA	NORTH CAROLINA	GEORGIA	ALABAMA
STATUTORY AUTHORITY	WQC	Regulations 61-101 Water Quality Certification	N.C.Gen.Stat. Chapter 143 Article 21	Water Quality Control Act Ga. Code §12-5-20 *et seq.*	Environmental Management Act Ala. Code §22-22A-1 *et seq.*
	CZM	Coastal Tidelands & Wetlands Act S.C. Code §48-39-10 *et seq.*	Coastal Area Management Act N.C.Gen.Stat. §113A-100 *et seq.*	Coastal Marshlands Protection Act Ga. Code §12-5-280 *et seq.*	Ala. Code §9-7-10 – §9-7-20
RESPONSIBLE AUTHORITY	WQC	Dept. of Health & Environmental Control Bureau of Water	Dept. of Environment & Natural Resources Division of Water Resources	Dept. of Natural Resources Environmental Protection Division	Dept. of Environmental Management
	CZM	Dept. of Health & Environmental Control Office of Ocean & Coastal Resource Management	Dept. of Environment & Natural Resources Division of Coastal Management	Dept. of Natural Resources Coastal Resource Division	
FEE	WQC	$1,000	$475 Coastal Area Management Act major permit (includes 401 & coastal zone consistency)	No Fee	$21,600 (includes 401& coastal zone consistency)
	CZM	No Fee		$500 Coastal Marshlands Protection Act permit (includes coastal zone consistency)	
PUBLIC NOTICE PERIOD	WQC	Approximately 15–60 days	Minimum 45 days (prior to proposed final action)	Approximately 30 days	Minimum 15 days
	CZM	Minimum 10 days	Minimum 20 days	Minimum 7 days	
PUBLIC HEARING	WQC	Discretionary (&/or with 20 or more written requests)	Discretionary	Discretionary	Discretionary (Fee $7,040)
	CZM		No statutory requirement	Discretionary (&/or with "sufficient" public interest)	Discretionary
CERTIFICATION DECISION DEADLINE	WQC	180 days	60 days (option to extend to 90 days)	120 days	180 days
	CZM		75 days (option to extend 75 days)	90 days	
ISSUES DECISION	WQC	Dept. of Health & Environmental Control (joint from BOW and OCRM)	Environmental Management Commission	Agency Director	Dept. of Environmental Management
	CZM		Division of Coastal Management	Coastal Marshland Protection Committee	

Source: Federal and state statutes and regulations.

Appeals

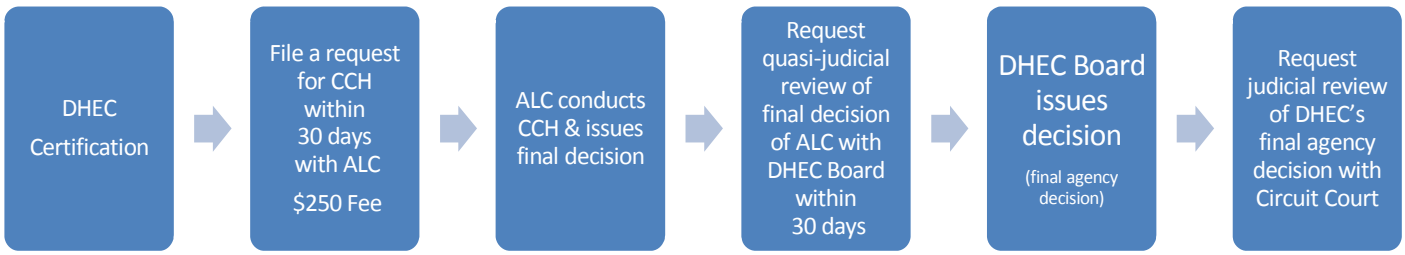
The S.C. Administrative Procedures Act enables persons aggrieved by agency decisions, including certification decisions, the right to challenge through the Administrative Law Court (ALC). The ALC is an agency of the executive branch that hears challenges to agency decisions called contested case hearings (CCH). Since the creation of the ALC in 1993, amendments to the Administrative Procedures Act have altered the sequence of the appeals process.

2005 Appeals Process

In 2005, at the time DHEC issued the joint WQC and CZM certification for the Vought facility, a person aggrieved by the certification had the right to the following recourse to challenge DHEC's decision (see Chart 6.3).

Filing a request for a contested case hearing with the ALC required a $250 fee. Also, there was no statutory requirement to automatically stay the agency decision during the proceedings. Rather, the ALC's rules of procedure deferred to judicial discretion to issue an injunction, a court order prohibiting a person from doing some specific act. Furthermore, there were no statutory or procedural requirements limiting the court's time to resolve a hearing. While there was no challenge to the 2005 joint WQC and CZM certification issued to Vought, the agency's 2005 accountability report shows the court averaged 182 days for disposing of 59 environmental permitting cases; environmental permitting cases may include other types of water certifications, or air or land certifications. In 2006, the average was 288 days for 34 cases.

Chart 6.3: Appeals Process for Agency Decisions



Sources: 2004 S.C. APA and DHEC.

Current Appeals Process

In 2006, the General Assembly amended §1-23-600 and §1-23-610 of the Administrative Procedures Act and also S.C. Code §44-1-60 to include the following appeals process. Once DHEC issues a decision, any person may challenge the decision by filing a request for a review conference with the DHEC board and remitting a fee of $100. A decision from the board may take as long as 90 days after filing. Any person aggrieved by the board decision may file a request for a contested case hearing with the ALC within 30 days of the decision and remit a $500 fee. Again, there is no statutory requirement for the ALC to resolve a case within a set timeframe. The agency's 2014 accountability report indicates that the ALC disposed of 6 environmental permitting cases within 261 days. During this period, the agency action is automatically stayed. Any person aggrieved by the ALC's decision may file with the Court of Appeals. According to DHEC staff, appeals can last for years.

North Carolina, Georgia, and Alabama also provide opportunities for persons to challenge an agency's certification decision. Table 6.4 outlines the appeals process for each of these states. There are few variations among the states, some of which are bulleted below:

- South Carolina and North Carolina have a preliminary review period and require a filing fee for the administrative court.
- North Carolina's CZM certification is the only certification without an absolute automatic stay.
- Staff in South Carolina, North Carolina, and Georgia stated that when an aggrieved person challenges an agency decision, it can last for several years.

Of the four states, North Carolina requires a unique approach to managing outside opposition to CZM certification decisions. North Carolina offers a preliminary review process to persons whom are nonparties, those other than the applicant and the agency. These nonparties, aggrieved by the certification decision, must first file with the Coastal Resource Commission, which determines whether a contested case hearing is appropriate. The commission then evaluates the case on its merits and either authorizes or denies the nonparty to file a contested case hearing with the Office of Administrative Hearings.

Table 6.4: Water Quality and Coastal Consistency Certification Appeals Processes

	SOUTH CAROLINA	NORTH CAROLINA		GEORGIA	ALABAMA
BOARD/COUNCIL PRELIMINARY REVIEW	Any person	CZM	WQC	No	No
		Other persons (non-applicant/s) only; applicants apply directly with Office of Administrative Hearings	No		
	$100 Fee	No Fee			
	Reviewing Authority: DHEC Board	Reviewing Authority: Coastal Resource Commission			
	Filing Deadline: within 15 days of staff decision	Filing Deadline: within 20 days of decision			
	Length: review conference within 60 days	Decision Deadline: within 15 days after request			
	Decision Deadline: within 30 days of review conference				
CONTESTED CASE HEARING: REQUESTOR	Any person	Any person		Any person	Any person
CONTESTED CASE HEARING: AUTHORITY	Administrative Law Court	Office of Administrative Hearings		Office of State Administrative Hearings	Environmental Management Commission
CONTESTED CASE HEARING: FILING DEADLINE	Within 30 days (of contested action)	Within 20 days (of contested action)	Within 30 days (of contested action)	Within 30 days (of contested action)	Within 30 days (of contested action)
CONTESTED CASE HEARING: FEE	$500	$20		No Fee	No Fee
STAY OF CERTIFICATION DECISION	Automatic stay	No automatic stay	Judicial discretion	Automatic stay	Commission discretion
CONTESTED CASE HEARING: DECISION DEADLINE	No statutory requirement	No statutory requirement		Within 30 days (of close of hearing)	Within 30 days (of close of hearing)
JUDICIAL REVIEW AUTHORITY	Court of Appeals	Superior Court		Superior Court	Circuit Court
FILING DEADLINE	Within 30 days (of ALC's decision)	Within 30 days (of OAH's decision)		Within 30 days (of OSAH's decision)	Within 30 days (of Commission's action)
STAY OF FINAL AGENCY DECISION	Judicial discretion (ALC and/or Court of Appeals)	Judicial discretion		Judicial discretion	Departmental or judicial discretion

Source: State statutes and regulations.

North Carolina is also the only state we reviewed without an automatic stay for CZM certifications. In 2013, North Carolina's General Assembly removed the automatic stay requirement from the CZM portion of the law. Rather, the certified person may begin work on the project regardless of whether another person challenges the certification. According to agency staff, there have been no noticeable effects as a result of the removal of the automatic stay, however, there has yet to be a challenge to an agency decision to test the impact of the new law. Staff also indicated that an unintended consequence of removing the automatic stay may be a lawsuit against the agency for first issuing the certification.

Current Applicable Legislation

During the 2015–2016 session, H. 4011 was introduced as the companion bill to the originally-filed S. 165 to amend S.C. Code §1-23-600. If passed, the legislation would amend the current statute from an automatic stay to a 30-day temporary stay of an agency order. The legislation also states that a party may move for injunctive relief. On April 14, 2015 the Senate Judiciary Committee voted to amend the language of Senate bill 165 to allow judicial discretion for the posting of a bond or security for the cost of the litigation and project delay; House bill 4011, introduced on April 16, 2015, requires the posting of a bond or security. The cost associated with expensive projects, such as the 2005 Vought facility, could prevent any challenges to DHEC's decision to issue the joint WQC and CZM certification. Finally, this legislation is not exclusive to DHEC certifications, but extends to any agency orders.

Appendix

Nikki R. Haley
Governor

SOUTH CAROLINA
DEPARTMENT OF COMMERCE

Robert M. Hitt III
Secretary

April 28, 2015

K. Earle Powell
Director
Legislative Audit Council
1331 Elmwood Avenue, Ste. 315
Columbia, SC 29201

RE: S.C. DEPARTMENT OF COMMERCE: *A Review of the Economic Development Bond for Wetlands Mitigation at the Boeing Manufacturing Site*

Dear Mr. Powell:

Thank you for giving the South Carolina Department of Commerce ("Commerce") an opportunity to respond to the above referenced report. My understanding is that your staff was very professional in its dealings with my staff during the course of the investigation by the Legislative Audit Council ("LAC") of wetlands mitigation at what is now the site of Boeing South Carolina.

As you know, many of the facts underlying the LAC's report occurred over a decade ago, very early in the Sanford administration and long before I was appointed to my current position. In fact, when the idea was conceived for the Ashley Cooper Environmental Trust ("ACRET"), I was an employee of BMW Manufacturing and in the midst of assisting in the implementation of the first economic development bond-funded project in this State. I am proud of the fact that our State was a leader in finding innovative ways to attract significant job creation and investment via the enactment of the State General Obligation Economic Bond Act. South Carolina has reaped tremendous economic benefits from its bond-funded support of BMW, Vought Aircraft, and Boeing.

Because I was not at Commerce when ACRET was conceived and implemented, in the interest of factual accuracy, I am attaching the Affidavit of John Hodge, Esquire who was the "brainchild" of ACRET and negotiated with the South Carolina Coastal Conservation League ("SCCCL") on behalf of Commerce ten years ago concerning how to structure and implement this new environmental trust concept. Mr. Hodge has first-hand knowledge of the issues reviewed by the LAC, and, accordingly, I attach his Affidavit as a supplement to this response and to address various factual statements in the report.

What I do have first-hand knowledge of is how the Commerce, the State Treasurer's Office, and other state partners worked tirelessly with BMW to implement BMW's economic development bond-funded expansion. The Vought project came on line before BMW's project was fully implemented and our state partners, led by Commerce, managed to implement over $220 million of bond funding for these complex projects despite having to create new processes at every level in order to do so. For that reason, regardless of any conclusions readers of the LAC report reach concerning whether ACRET was a good idea or whether project mitigation could have or should have been handled differently, I encourage all interested parties to not lose sight of the overall successful implementation of these economic development bond-funded projects.

As Secretary of Commerce, I do not dispute that environmental stakeholders have significant influence on how parties involved in development projects implement those projects. That is reality. In any business transaction, parties with leverage use that leverage to achieve their goals. My understanding, however, is that neither the SCCCL nor any other environmental stakeholders used their influence in the Vought project to leverage a certain result or benefit for a particular environmental stakeholder or the environmental community generally. Instead, Commerce made a commitment to Boeing in an effort to win the first 787 assembly line, and Commerce honored that commitment when Boeing brought Vought to Commerce with a supplier project for the 787. The fact that the amount of that commitment may have exceeded the actual impacts that were later determined has no relevance to the fact that the parties involved agreed before those impacts were known on a solution that would, and in fact did, expedite a permit for a significant economic development opportunity.

Again, as I understand it, all parties involved understood and agreed from the outset how the mitigation would be accomplished. All environmental stakeholders had a seat at the table and the United States Army Corps of Engineers approved all grants made by ACRET, even those grants that the LAC contends did not comply with Corps requirements. In hindsight, a decade later, perhaps Commerce staff should have or could have done more to oversee the process, but arguably, Commerce, which has no environmental expertise or regulatory authority, would have been challenged to provide meaningful oversight over expenditures that were proposed by the environmental stakeholders and approved by the Corps. My understanding is that Commerce staff involved certainly believed at the time that the necessary controls were in place with the individuals and entities with the knowledge and expertise to implement ACRET in the manner intended by all parties involved.

The bottom line is that ACRET was an innovative way to implement Commerce's commitment to mitigate the Vought/Boeing site and obtain buy in from environmental stakeholders to support the impacts associated with a significant economic development project. While Commerce has no plans to create and oversee a non-profit like ACRET to mitigate projects in the future, the mitigation trust achieved the intended result, and the State was able to leverage state dollars to achieve a larger environmental benefit. In my view, that is a win-win.

Commerce has no objection to pending legislation that would limit an automatic stay when parties appeal an environmental permit. However, according to John Hodge in his attached Affidavit, ACRET was created primarily to address a federal wetlands permit, and the proposed legislation would be inapplicable to appeals of federal permits. Commerce does object to any recommendation by the LAC or others that would purport to limit Commerce's ability to negotiate solutions under applicable law. For large economic development projects, using only mitigation credits is not only impractical, it may be impossible if sufficient credits are not available. But, in any event, Commerce requires flexibility to negotiate economic development deals based on the facts of each project.

Thank you again for the opportunity to provide these comments to the final report.

Sincerely,

Robert M. Hitt III

RMHIII/km/vw

Attachment

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

AFFIDAVIT OF JOHN ADAMS HODGE

I, John Adams Hodge, first being duly sworn, do hereby depose and state the following:

1. My name is John Adams Hodge. I am over 21 years of age, and I am competent to give this affidavit.
2. I am an environmental lawyer and Registered Professional Geologist with over 30 years of experience in the field of environmental law in South Carolina that includes permitting before state and federal environmental agencies. I also practice aviation law.
3. In approximately 2004, I was retained as a contract attorney by the South Carolina Department of Commerce ("Department" or "DOC") to assist in obtaining necessary permits for an economic development project that was called Project Emerald. I later worked for the permit applicant, and we were ultimately successful in obtaining necessary environmental permits in near record time.
4. The site for Project Emerald was at the Charleston International Airport, and it involved an industrial prospect that was identified as the Boeing Company that intended to manufacture a revolutionary carbon fiber jet transport. The aircraft became known as the Boeing 787. Due to project dynamics, the site was initially developed by Vought Aircraft Industries to build the B-787 fuselage; however, Boeing later acquired the facility from Vought and proceeded to build a B-787 assembly plant at the site.
5. In order to make a competitive proposal to land this prospect in South Carolina, our team was tasked with obtaining necessary permits such that the site development process would not be encumbered by regulatory delays in obtaining permits.
6. At the time, I understood that other states were competing for this project, and the State of South Carolina was focused on providing a site that would be ready for development at the earliest possible date.
7. I was in charge of permitting the site and am considered to be the chief architect of the Ashley Coopers Environmental Trust, which was created to address offsite mitigation that was required by the U.S. Army

JAH

Corps of Engineers (the "Corps" or "USACE") and the South Carolina Department of Health and Environmental Control ("DHEC").

8. I have reviewed the draft report of the Legislative Audit Council (LAC) dated April 2015 at the request of the Department.

9. Even though I was the person who was in charge of obtaining permits for Project Emerald, the LAC chose not to interview me for the aforementioned report. It was suggested to the LAC staff by persons who were interviewed that I had knowledge regarding the details and strategy involved in permitting the Project Emerald Site and that I should be interviewed for their report, but the LAC made no attempt to contact me for the purpose of receiving input.

10. I am not being compensated by the Department for reviewing the LAC report or for preparing this affidavit, but after having read the inaccuracies and omissions contained in the March and April 2015 LAC reports, I believe that the people of South Carolina deserve to know that DOC acted diligently and in the public's interest to ensure that South Carolina received this project, which would become the centerpiece of aerospace manufacturing in the region for the benefit of all South Carolinians.

11. The conclusion that ACRET spent $4.6 million dollars more than was necessary is incorrect. At the time, the intention was to conduct mitigation sufficient to reasonably satisfy future projects at the site. It was represented to us that three aircraft product lines would eventually be built at the Site. We were asked by the Corps not to piecemeal this project, but to consider the overall project purpose and design within the context of the initial permit. As such, it was the intention of the applicant, some members of the ACRET Board, and the permitting team to exceed the minimum requirements and to provide sufficient credits that would allow future modification of the permit to occur with little or no additional mitigation obligation. The statement by the LAC that "Most of ACRET's other purchases made with the $4.6 million dollars were not needed to satisfy the Corps' requirements" ignores the intention to mitigate for future expansion at the site.

12. DOC and the applicant expressed an intention to provide the additional mitigation needed for expansion up front; thus, the permitting team sought to use the funding as a means of having a site that was nearly "shovel ready" for expansion.

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13. The LAC report erroneously states that "DOC did not have oversight or monitoring provisions for the nonprofit's spending." On the contrary, we regularly reported to DOC officials the status of the mitigation program. In addition, the ACRET Board provided oversight and approved the transactions for wetlands mitigation. The ACRET Board was made up of a mix of state and federal government agency personnel from environmental resource and regulatory agencies, environmental groups, and the permit applicant. The Board was structured in such a fashion as to have sufficient checks and balances so that no one group could effectively dominate the decisions made by the Board.

14. The LAC report is selective in its recitation of the facts in a manner that could lead the Legislature to the conclusion that the process was not in the public interest. For example, it points out that some purchases were not for wetlands; however, the LAC ignores that fact that mitigation credit is allowed for upland buffers that serve to prevent degradation of wetlands from upland sources of pollution. The LAC claims that some wetlands were acquired "out of watershed," but this claim is misleading. While there was a preference for protecting wetlands in the Ashley-Cooper Watershed, ACRET received proposals from different land conservation organizations. By far the best proposal with the most pristine wetlands in need of protection was in the vicinity of the Four Hole Swamp. Even though this site was technically part of the Edisto Basin, it met other criteria set forth by the Memorandum of Understanding (MOU) that created ACRET, and it was a superior site. Technically, the project site sits on a divide between the Ashley and Cooper Rivers. While the LAC chooses to state that the project site is in the Santee Watershed, this is also misleading, as the site does not drain into the Santee River which is over 50 miles to the Northeast.

15. The LAC report states that the mitigation sites were "a substantial distance from the Vought site," but the LAC ignores the fact that ACRET disseminated an RFP for site proposals and that decisions were made based upon the extent to which each proposal met the criteria set forth in the MOU. With the exception of the use of a mitigation bank, ACRET could not choose a site where there was no proposal.

16. The LAC does not make apparent that the permitting agencies approved each of the mitigation proposals, and if the Corps and DHEC had a problem with the type of wetlands, the applicable watershed(s), the amount of

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upland buffers, or other aspects of these transactions, it could have vetoed each of these transactions from going forward.

17. The LAC is critical of the amount of time that it took to spend the ACRET funds; however, the recipients of the grants were required to meet standards set by ACRET and by the Corps to ensure the integrity of the process. In some cases, meeting such standards took additional time to ensure that the Corps was satisfied with the transactions and the language in the easements. The LAC report seeks to criticize the amount of time that it took to complete these transactions; however, the time was necessary to ensure that the grantees understood the expectations of both the ACRET Board and the Corps. With the exception of transactions using interest generated by the ACRET account, most transactions were committed within the two to three years that were contemplated in the MOU.
18. The permitting team looked at satisfying all mitigation credits for this site, including potential future expansion, through the use of a mitigation bank early in the process, but we determined that the amount of credits needed could overwhelm existing banks.
19. The LAC recommends that bond funds be allocated only for the amount of credits that are required in a permit. In practice, the final number of credits is often decided in a negotiation with the permitting and resource agencies. An applicant is required to avoid and minimize wetland impacts. Often, applicants must engage in a process that is subject to negotiation and a facility realignment to avoid and minimize wetlands. In large projects, one may not be able to predict to a reasonable certainty the exact number of credits that are required until the final stages of the process. The LAC report lacks context regarding the dynamics of environmental permitting. No two projects are identical.
20. Due to the importance of the project to the economic development of the State, the team elected to use an alternative method of satisfying the mitigation obligation for the entire site. The B-787 production schedule had a very tight window to obtain permits and begin site development, and the permitting team determined that a minimalist approach would have the potential for disaster. Rather than negotiating with the Corps, DHEC, and a host of state and federal resource agencies about the specific number of credits that were to be achieved in mitigation, the team chose a bold approach to agree to satisfy more credits than the minimum,

while having extra credits for future expansion to avoid a protracted negotiation with the permitting and resource agencies over additional mitigation that they might seek to require. The U.S. Fish and Wildlife Service (FWS) initially was quoted in the press as opposing the permit; however, once we explained that the goals of ACRET were aligned with the goals of the Service, the Charleston office of the FWS publically supported the project.

21. I drafted the MOU that governed the mitigation for the Vought permit, and I negotiated its terms with the Coastal Conservation League. The negotiation focused on accomplishing the required mitigation for this project and giving due consideration for future expansion of the site. Due to the League's contacts with land conservation organizations, they were a logical party to work with. A requirement for the issuance of a Section 404 permit is that the project be in the public interest. We believed that a collaborative approach toward permitting would build broad public consensus for the project and that wetlands losses would be deemed to be acceptable to the environmental community. In taking this approach, we asked the environmental community to support the permit as in the public interest.
22. The LAC report contains and erroneous assumption. The report is purportedly prepared in support of H. 4011 and S. 165 (that eliminate the automatic stay) as indicated on page 41. ACRET was designed to address primarily a federal Section 404 permit, and the aforementioned state legislation, if passed, would be inapplicable to appeals of federal permits.
23. At the groundbreaking of the aircraft manufacturing facility, the Governor and Secretary of Commerce both spoke about not only the jobs that were being created, but also the acres of wetlands that were being preserved. At the time, the Corps told us that this was the second fastest "major permit" that they had issued.
24. Obtaining this permit quickly ultimately allowed the B-787 to call Charleston home, and it represented the crucial step in the economic development of the aviation-manufacturing sector in South Carolina. Had we taken a minimalist approach as recommended by the LAC, there is a substantial possibility that neither Vought nor Boeing would have located in South Carolina.
25. By showing that South Carolina is business friendly, and – just as important – that we care about our natural resources, we were able to attract these major economic development projects. In addition to building an

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aircraft manufacturing facility, we built public consensus that our decisions were sound by taking bold steps, and we delivered this project on schedule.

26. FURTHER affiant sayeth not.

So sworn this 27 day of April, 2015

Sworn to and subscribed
before me this 27th day
of April 2015.

Sharon A. Hodge
Notary Public

My commission expires:

April 17, 2025

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