



The Effect of Regulatory Requirements and Intervening Groups on Road Construction in South Carolina

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and
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16. Abstract The primary objective of this study was to assess the impact of temporal delays to SCDOT road projects caused by legal challenges brought by individuals and external entities with environmental-based concerns. Specifically, the focus was to assess the use of the automatic stay provision along with the associated contested case in the Administrative Law Court, a state-specific judicial court in South Carolina. Relevant project material was reviewed and interviews conducted with appropriate personnel to assess the impact of challenges to four SCDOT projects. One involved a delay associated with challenges to the SCDHEC issuance of a Section 401 Water Quality Certification permit, two projects were delayed due to USACE issues, and one SCDOT project which did not experience delays. A fifth project in South Carolina was included that was county-based, and which did experience a delay involving the ALC court. Of the 13 SASHTO states contacted for this study, only eight had automatic stays within statutes that were not associated with Bankruptcy Court. Three states provided information to review, four states responded that they did not have any relevant projects for the study, and five states did not respond to requests for material; of these five, two were included in the study based on external resource review for the projects. The majority of the SASHTO project delays occurred in federal court; one state (North Carolina) had a delay equivalent to the ALC automatic stay in South Carolina.			
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Executive Summary

This study was designed to evaluate delays occurring during the highway construction process, specifically delays resulting from the Clean Water Act (CWA) permitting process, and to evaluate how other state Departments of Transportation (DOT) in the Southeastern Association of State Highway and Transportation Officials (SASHTO) (with the exception of Puerto Rico) respond to these impacts. The study focused on construction project delays that were caused by potential impacts to wetlands and streams under the CWA, in as much as these are the issues, based on information provided by South Carolina DOT (SCDOT), that have historically received challenges. Furthermore, for challenges to state agency decisions, an appeal to the Administrative Law Court (ALC) provides for an automatic stay, which may result in a delay in the construction process. While National Environmental Policy Act (NEPA) challenges have also been brought, the primary intent of this study is to evaluate those issues that require US Army Corps of Engineers (USACE) permitting and SC Department of Health and Environmental Control (DHEC) water quality certification. Although the focus of this study is on the delay impact to SCDOT and other SASHTO state DOTs, other government agency construction requests for CWA wetland permits were reviewed for delays and impacts related to the SC Administrative Law Court (ALC) actions.

The researchers developed a questionnaire to obtain uniform information for each highway project studied and to ensure that necessary dates, time frames, and delay issues were reviewed. Information to complete the questionnaires for SC projects was obtained by a review of the SCDOT files, the SCDOT website information, and from in-depth interviews with the appropriate project personnel. Information for projects in other states was obtained by interviews, electronic communication, DOT website reviews, and other publically available information (i.e., newspapers and non-governmental websites). Based on project information obtained from SCDOT and other information, five highway construction projects were reviewed in South Carolina; four of which experienced delays in their project timelines, and six projects were reviewed from other SASHTO states. The delays for all of the projects reviewed can be apportioned into four distinct categories: projects with no delays, projects with delays occurring at the stage of Section 401 Water Quality Certification (WQC), projects with delays occurring during the USACE section 404 permitting or permit modification process, and those delayed as a result of NEPA or other Federal statute challenges.

Summarizing the results of the five SC highway projects, the delays for four of the projects involved the ALC for an appeal of a DHEC decision of the WQC. Of the four projects, three were SCDOT projects: the I-85/I-385 Interchange, the Carolina Bays Parkway, and the 601 Bridge Replacement and the fourth was a county project: The International Drive project in Horry County. The fifth project, the ACE Basin, was delayed by USACE issues related to the CWA section 404 wetland permit. The 601 Bridge Replacement also was delayed by an appeal of USACE permit.

For those projects, which involved a delay related to the DHEC Section 401 WQC permit, the first project, the I-85/I385 Interchange, delay was due to a complaint filed by a landowner for a review of the DHEC Notice of Decision to issue the WQC permit. Although DHEC declined to review its initial decision and the landowner did not appeal the DHEC decision, the 30-day period available for a contested case to be filed with the ALC had been triggered. The process of awaiting decisions by DHEC, coupled with the plaintiff's time frame allowed for appeal, delayed the active project timeline by approximately 60 days. The second project, the Carolina Bays Parkway, involved a right-of-way disagreement with a

developer. The case went to the ALC. According to available documents, the conflict was resolved via settlement approximately one month after the Section 401 WQC permit had been issued. The third project, the 601 Bridge Replacement, had delays related to the WQC issuance and appeal to the ACL as well as a third party appeal of the USACE finding in federal court. The combined appeals resulted in an approximately four-year delay (two years related to the ACL WQC appeal and four years related to the USACE permit appeal). The 601 Bridge Replacement project was suggested for inclusion near the end of the grant and, while included, detailed interview materials are not as extensive. The fourth project delay, associated with the International Drive project, is approximately one year and includes the delay from the time that the initial notice that the Section 401 WQC permit would be issued on June 25, 2015 to the ALC court decision on July 7, 2016, which upheld the Section 401 WQC permit.

The second significant source of extended delays was with regard to USACE approval of Section 404 permits or permit modifications, and with mitigation and permitted area compliance. The Carolina Bays Parkway project, which has a delay of approximately two years, was due to a USACE prompted re-evaluation of mitigation requirements and compliance. The fourth project reviewed, the ACE Basin project, experienced a delay of 118 days due to necessary communications with USACE regarding wetland mitigation. The 601 Bridge Replacement had a delay of approximately four years.

In response to the SCDOT's and our team's request for information from 12 of the SASHTO states' representatives, project information for review was received from three SASHTO states, Louisiana (LA), Tennessee (TN), and Texas (TX). Eight states indicated that they had no sites that were delayed based on an automatic stay or a CWA certification or permit, and three states did not respond. Of the states that provided sites for review, the projects from LA did not involve litigation, but delays were incurred related to USACE-issued permits. The LA- 3421 Highway LA project was delayed in the design/planning stage due to additional environmental review but the delay preceded the permitting process. The second LA project, the I-12/1088 Interchange, required a mitigation modification which delayed the project for 114 days. The projects from TN and TX involved delays with litigation at the federal level. The on-going status of the TX project presents a challenge, as future delays or continuations of current litigation are still possible. The lawsuit in TX for the TX-45-SW did not delay the selection of a contractor, which occurred while the case was being decided; however, the project is still in its early stages could be further delayed beyond the initial two-year delay.

Review of the Bonner Bridge Replacement Project in NC illustrated a similar use of the ALC by plaintiffs. While the main litigation regarding occurred in Federal court due to the challenge of NEPA regulations, the case also had a component in state court. When NC denied a request for a review of a state-issued bridge permit, it was taken to the Administrative Office of Hearings as a contested case. This prevented approval of a bridge permit from the Coast Guard while the lawsuit was ongoing, as the Coast Guard will not issue permits to projects with active legal challenges.

In summary, the environmental related delays reviewed for highway construction projects for this report, include: 1) no delay, 2) delays from challenges of the state WQC and state court actions, 3) delays resulting from challenges to the USACE section 404 permits or modifications in federal court, and 4) delays from challenges to NEPA or Endangered Species Act in Federal court. Based on the construction projects reviewed in South Carolina, the average length of delay was slightly longer for Federal Court challenges related to 404 permits (1.6 years) versus state court 401 WQC challenges (0.9 years). However, based in all construction projects reviewed, the length of delay was similar between Federal Court challenges and state court challenges with each being approximately 1.5 years.

Frequent Focus Points for Legal Challenge; Potential Project Delays

Section 401 Water Quality Certification	Section 404 Permit Approval/ Modification	NEPA Grounds
<ul style="list-style-type: none"> • KY: Ohio River Bridges • NC: Bonner Bridge • SC: I-85/385 • SC: Horry County International Drive <ul style="list-style-type: none"> ○ KY- project finished ahead of schedule; no delay ○ NC- delay began before construction initiated; approx. 3 years behind planned timeline ○ SC- ongoing project, 60-day delay before contract initiated ○ SC- Ongoing project, delay occurred before construction initiated. 362 day delay. 	<ul style="list-style-type: none"> • LA: Hwy 3421 • LA: 1088 Interchange • SC: ACE Basin • SC: Carolina Bays Parkway <ul style="list-style-type: none"> ○ LA- Project ongoing. No construction delay; approximately 4-year delay in planning/design phase before permitting. ○ LA- Permit deviation issue resolved in 114-day period; no construction delays. ○ SC- Delay occurred while contract phase initiated. 118-day active construction delay. ○ SC- Near completion. 2-year delay occurred while between contract phases. 	<ul style="list-style-type: none"> • TN: SR-840 • TX: SH-45-SW <ul style="list-style-type: none"> ○ TN-Project complete; challenge occurred while contract ongoing. ○ TX- Project in initial stages; challenge occurred before construction initiated.

Figure 1. Frequent Focus Points for Legal Challenge; Potential Project Delays for SC projects (excluding the US 601 Bridge Replacement project) and SHASTO state projects (excluding Puerto Rico).

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I. Introduction and Background

A. Introduction

South Carolina depends on its highway system for economic growth, including inter- and intra-state movement of goods, as well as for an efficient transportation system for our society, whether in times of emergency, daily pursuits, or tourism. Given the high population centers and existing highways in the eastern portion of South Carolina, coupled with the high percentage of land in eastern South Carolina that contains wetlands, the construction of new highways or sections of highways in South Carolina may impinge on wetlands. Due to the protection afforded wetlands under the Clean Water Act¹, if the construction proposes to impact wetlands, permits allowing such impact are required to be obtained pursuant to the Clean Water Act. For South Carolina Department of Transportation (SCDOT) highway projects that require permitting under the Clean Water Act (CWA), water quality certification is required from the SC Department of Health and Environmental Control (DHEC) and a wetland permit is required to be obtained from the US Army Corps of Engineers (USACE). At various times throughout the certification and permitting process, a party with standing, may intervene in the process. If the party is aggrieved by a final decision in the agency process, the party may file a petition for a hearing with the South Carolina Administrative Law Court² if aggrieved by a DHEC decision or with the US Circuit Court if aggrieved by a federal agency decision (i.e., USACE). The petition from a DHEC decision to the South Carolina Administrative Law Court (ALC), triggers an automatic stay which may delay the construction process. The petitioner does not provide additional information and the record is reviewed by the ALC. If the record on appeal were not sufficient to uphold the ruling, SCDOT would bear the burden of proof to lift the stay, if the SCDOT is named as the defendant in the ALC petition. If a complaint is filed in Federal court, the complainant may request an injunction to halt or delay the work while the case is being heard. The length of time of the delay is evaluated in this study and is compared to impacts in other SASHTO states, excluding Puerto Rico. The SCDOT, based on the findings of this report related to the length of time of the delays, may subsequently evaluate the financial impact to SCDOT related to the delays, based on its knowledge of each project's associated costs.

B. Study Objectives

The primary objectives of this study are to:

- 1) To evaluate the impact caused by delays in the permitting process, specifically related to the automatic stay. The impact is based on examples from prior SCDOT or other SC projects, as appropriate, which were provided by the SCDOT agency to the Principal Investigator. Other

¹ Federal Water Pollution Control Act (the "Clean Water Act") 33 U.S. Code. §§1251-1387. Section 1344, also referred to as Section 404, establishes a program to regulate the discharge of dredged and fill material into waters of the United States, including wetlands. Section 1341, also referred to as Section 401, requires a water quality certification be obtained from the state for such discharges.

² Administrative Law Court (S.C. Code Ann. §1-23-600 et seq.). The Administrative Law Court is an autonomous quasi-judicial agency within the executive branch of state government. The Court was created by the South Carolina General Assembly by Act No. 181 of 1993, to provide an independent forum for hearing the contested cases of state agencies. <http://www.scstatehouse.gov/code/t01c023.php>

agency or organizations seeking similar types of permits may also be impacted by delays and, to the extent possible, examples of such delays were reviewed.

- 2) To evaluate how other states in the Southeastern Association of State Highway and Transportation Officials (SASHTO) (with the exception of Puerto Rico) respond to permitting delays and challenges.

C. Background

For road construction projects that may impact wetlands, the SCDOT submits an application to the USACE for a review of the wetland impacts and a determination of the need for a permit to allow the discharge of fill material into the wetland, if certain conditions are met, (404 permit) (see: <https://www.epa.gov/cwa-404/section-404-permit-program>). After submission of the request and a determination by the USACE and/or DHEC of the need for a permit, applications may be filed with the USACE for a section 404 permit and with DHEC for a Section 401 Water Quality Certification permit. Prior to approval of the 404 permit, the SC Department of Health and Environmental Control (DHEC) must issue a Water Quality Certification ((WQC) (also sometimes referred to as a Section 401 WQC permit)). Within 15 days of the submission of the application for a certification, a notice of such application is published. Comments are received and a public hearing, if requested, will be held. Responses to concerns raised may result in application modifications to address those concerns. A final decision on the application is issued by DHEC. At the issuance of a certification, a request for a final review may be made by a party within 15 days. DHEC has 30 days to review the request and if the request is not granted, a party having good cause, then has 30 days to file for a contested case hearing before the South Carolina Administrative Law Court (ALC). This petition triggers an automatic stay issued by the ALC, which may cause delays in the permitting and, subsequently, the construction process. The ALC will review the record and therefore, to lift the stay, the SCDOT or the party seeking the certification, has the burden to show that no irreparable harm to the environment will occur as a result of the WQC for the project.

The state Section 401 WQC permit is required prior to the issuance of the USACE Section 404 permit. Therefore, one set of delays may occur during the certification process. If the final certification is issued, the permitting process for the Section 404 permit may proceed, which also provides for periods of public comments, a public hearing and responses to comments. When the USACE permit decision is rendered, a party with standing and cause may contest the permit decision in Federal court.

This study was designed to determine the impact (time) caused from delays in the state permitting process and to evaluate how other state Departments of Transportation in the Southeastern Association of State Highway and Transportation Officials (SASHTO) respond to such impacts in their states. While Puerto Rico is a member of SASHTO, due to significant differences in their projects as well as differences in governance (territory vs state), Puerto Rico was excluded from the study and such exclusion was approved prior to the initiation of this study. Florida was originally excluded, but was added back to the study in August 2016.

The delays that are caused by potential impacts to wetlands and streams under the Clean Water Act will be the focus of the study in as much as these are the issues that SC DOT considered to have historically received challenges. While other Federal challenges, including the National Environmental Protection Act (NEPA) and the Endangered Species Act, have been invoked for issues such as noise

walls, etc., the primary intent of this study is to evaluate those issues that require DHEC water quality certification as related to the USACE permit process. Within this process, from application to automatic stay, the extent of public access to concerns raised and responses to those concerns will also be reviewed. While the focus of this study is on the impact to SCDOT, one other government agency construction requests for Section 401 WQC and section 404 wetland permitting requests was reviewed for delays and impacts related to ALC actions.

The results of this study may also provide evidence regarding the impact on the taxpayers as a result of the delays and examples of legislation in other states regarding the permitting challenges and automatic stays. This information may also be of assistance during the legislative review of Senate Bill S165 considered during the 2016-2016 term and Senate Bill S105 considered during the 2017-2018 term. The additional information obtained for this study, may assist with review of the pending legislation and the study will, therefore, review the legislation and its potential impact on how the Administrative Law Court handles contested hearing requests and the resulting stays.

The impacts are addressed in terms of project delay. SCDOT, based on its expertise, may translate this report's findings related to highways construction delays into financial impacts. In as much as this varies widely by project, an evaluation based on timing will be inclusive of a wider variety of projects. It was projected that the length of time for project delays may be able to be based on court filings and the SCDOT agreed to provide examples of specific projects to include in the review. In advance of the project, we anticipated that dates could be tracked by pre-construction contracts versus the resulting contract when the project stay has been lifted and the contract is let. However, since the majority of the projects are Design Build, this model could not be utilized for this review.

Understanding the impact of delays and how other SASHTO states respond, evaluate and determine the impacts from environmental, and specifically wetland, challenges, will provide SCDOT with a framework within which to understand those delays which are unavoidable and those in which shifting the burden of proof with regard to the impact, may be encouraged. The SCDOT would also be provided with a working knowledge of the time effected by the automatic stay in SC and in surrounding states.

II. Clean Water Act Permitting of Highway Construction Projects and Appeals of Agency Decisions: The Legal Framework

A. General Provisions for Wetland Permitting under the Clean Water Act

1) Section 401, 33 U.S.C.A. § 1341

Section 401 of the CWA requires any applicant for a federal license or permit to conduct an activity that may lead to a discharge of pollutants into the waters of the United States, to obtain a certification from the state in which the discharge will originate. This certification must state that the discharge complies with applicable water quality standards. The certification requirement includes applications for US Army Corps of Engineers (USACE) permits pursuant to Section 1344.

<https://www.epa.gov/cwa-404/clean-water-act-section-401-certification>

2) Section 404, 33 U.S.C.A. § 1344.

Section 404 of the CWA requires that a permit be obtained from the USACE before beginning any activity involving the discharge of dredged or fill material into the waters of the United States. For example: prior to placing any discharge into the navigable waters of the US, which include wetlands, the person or entity must obtain a Section 404 permit from USACE. They must also obtain a Section 401 WQC permit from SC DHEC, for a wetland in South Carolina.

B. Overview of Contested Case Procedures in South Carolina and the Automatic Stay Process

When an entity or state agency applies for a permit or certification and a final agency decision has been reached, a party with standing, may request a contested case hearing before the Administrative Law Court (<http://www.scalc.net/>) by submission of a request for a review of the agency decision within 30 days. (S.C. Code Ann. § 1-23-600 D) <http://www.scstatehouse.gov/code/t01c023.php>

In relation to CWA permits, after the applications are filed for the Section 401 WQC with DHEC and 404 permits with the USACE, a notice of application of permit (NAP) must be filed by the agencies within 15 days. Following the NAP, the following may occur:

- a. Comments on the application are received by the agency and a public hearing may be held concerning the permit.
- b. The party filing for the permit must respond to the comments and provide those responses to the agency. This may lead to modification of the permit application.
- c. A final decision is then made by the agency concerning whether to grant or deny the application request.
- d. If the permit is granted, a request to the agency for a final review of the permit can be made within 15 days of the decision. The agency then has 30 days to issue a determination of whether it will review the agency decision.
- e. If this request is not granted, a party with good cause (granted at the discretion of the court) has 30 days to file a request for a contested case hearing before the ALC. This triggers the 30 day automatic stay (S.C. Code Ann § 1-23-600 H(2)). The burden of proof is on the agency to prove that the permitted project will not cause irreparable harm. (See Rules of Procedure for the ALC, Section III, Paragraph 34. [http://www.scalc.net/pub/5officialrules2016\[1\].pdf](http://www.scalc.net/pub/5officialrules2016[1].pdf))

Under SC Code Ann. § 37-6-414,³ a person who has exhausted all other Administrative Law Court (ALC) remedies, and is still aggrieved by the final judgment, may appeal the decision of the administrative law judge. The request must be made within 30 days of the final decision of the ALC Judge (§1-23-610) and must be served on all parties.

Senate Bill S-0165 was introduced in the Senate in 2015 to amend sections of SC Code Ann. §1-23-600 and was last acted upon on 05/31/16 when the Senate recommitted the Bill to the Committee on Judiciary; it was not passed in 2016. The primary provisions of the Bill which could have impacted the automatic stay are that the bill proposed to: 1) delete the requirement that a hearing must be held within 30 days to lift the automatic stay or for a determination of the applicability of the automatic stay; 2) delete the requirement that the judge must issue an order no later than 15 business days after the hearing is concluded; and 3) provide that any injunction ordered by the administrative law court shall require the posting of a bond or other security sufficient for the cost and expense of the litigation and project delay as demonstrated by an affidavit made on a good faith estimate of such cost and expense.

Senate Bill S-0105 was introduced in the Senate in January 2017 to amend sections of SC Code Ann §1-23-600 and was last acted upon on 3/13/17 when the House referred the bill to the Judiciary Committee after it had been passed in the Senate and had received a first reading in the House. The primary provisions of the bill proposed: 1) that a stay of an agency order remains in effect for 30 days, rather than for an undetermined term, or until an order has been issued regarding a preliminary injunction; 2) to revise the procedure for stays concerning the revocation, suspension, or renewal of a license and payment of fines; 3) to delete the provision that the court shall lift the stay for good cause shown or if no irreparable harm will occur and also delete the requirement that a hearing must be held within 30 days to lift the automatic stay or for a determination of the applicability of the automatic stay; 4) to provide that any preliminary injunction ordered by the administrative law court may require the posting of a bond or other sufficient security; and 5) to exempt state agencies from the requirement to post a bond under this section.

The issues in Bill S-0105, if passed, could affect the length of time that the automatic stay is imposed and would also require the aggrieved party, if not a state agency, to post a bond reflecting the impact of the delay on the project. (See Appendix II for copies of filed bills).

Contested Case Delays Generally

Actions by third parties, or by state or federal agencies, to contest a decision of an agency may result in a contested case as noted above. The contested case may delay the construction either due to the assigned state court with jurisdiction (i.e., ALC in SC) having an automatically imposed statute provision that stays or stops the construction while the complaint is being adjudicated, or by the State or Federal court imposing an injunction while the issue is being resolved.

³ <http://www.scstatehouse.gov/code/t37c006.php>

1. Automatic Stay

If a request for a final review of a Section 401 WQC permit is denied by the issuing state agency, or the plaintiff is not satisfied with the final review decision, the aggrieved party may request a contested case hearing with the Administrative Law Court (ALC). (SC Code Ann § 1-23-600). The requested case filing initiates the automatic stay. If the contest case Hearing Request is granted and a hearing scheduled, the agency WQC decision is stayed until the ALC hears the case (within 30 days if a request is made for the stay to be lifted) and issues its decision (within 15 days if a hearing is held on lifting the stay) related to the issuance of the Section 401 WQC permit. During the time of the appeal of the WQC, other permits such as the 404, which are dependent on the issuance of the WQC, may not be issued. The length of this delay is dependent on whether the stay is requested to be lifted and when the hearing is therefore scheduled. <http://www.scstatehouse.gov/code/t01c023.php>

2. Injunction

If an automatic stay is not applicable, such as when the case is in a state court other than the ALC, or if there is a federal agency review, which would be appealed to Federal court, then an injunction requesting that the construction be stopped, may be requested. In the reviewed cases, this request was associated with cases in federal court. Depending on the terms of the injunction, the injunction could require all project construction activities to cease, regardless of whether permits had been or not been obtained. However, the filing of the request for an injunction does not immediately halt project activities as does the contested case request and automatic stay in the SC ALC. The injunction at the federal level, if granted, however, may serve the same purpose as a stay; however, the party seeking the injunction (as noted below) bears the burden of proof to justify imposition. According to an American Bar Association article: http://www.americanbar.org/publications/insights_on_law_and_society/14/winter-2014/understanding-injunctions.html

a. Types of Injunctions

Injunctions may be issued by courts at the federal, state, or local levels. While federal courts issue certain injunctions, the types of injunctions available at the local level vary from state to state. Generally, in SC for an appeal of an agency decision, the ALC has jurisdiction. Injunctions are organized by how long they are enforceable:

- Temporary injunction—Also known as a temporary restraining order (TRO), it is intended to be a short-term measure in effect until the court is able to issue a lasting resolution, such as a preliminary injunction. For example, a temporary restraining order issued without notice by a federal court cannot exceed ten days without additional court proceedings. Temporary restraining orders may be issued without a court hearing and without informing the opposing party and are often issued by state and local courts to prevent contact between parties. They were not used in any of the cases reviewed for this project.
- Preliminary injunction—These generally preserve the status quo of action or inaction, pending a final decision of a case. Unlike temporary restraining orders, preliminary injunctions cannot be issued without advanced notice to the other party in the case. Preliminary injunctions remain in effect, unless otherwise modified or dissolved, during the pending court case.

- Permanent Injunction—These are meant to preserve a status of action or inaction permanently. They are generally issued as final judgments, or rulings, in a case. In some cases, the conditions established by the preliminary injunctions are continued as permanent arrangements. Permanent injunctions are less common.
http://www.americanbar.org/publications/insights_on_law_and_society/14/winter-2014/understanding-injunctions.html

b. Issuing Injunctions

Though considerations may vary from state to state, generally courts consider four factors before issuing an injunction:

- Irreparable harm—The significance of threat to the requesting party if the injunction is not granted is reviewed.
- Balance—The effects of issuing, or not issuing, the injunction on both parties is then considered. While the requesting party may be harmed if the court does not issue the injunction, the other party may be harmed if granted (i.e., harm to the environment vs cost of delay to the citizens).
- Likelihood of success—Whether or not the party requesting the injunction has a potentially successful case—that is, one that is likely to “succeed on the merits” at the end of litigation.
- Public interest—The injunction’s possible effect on the public interest.

After a court issues an injunction, both parties must be made aware of the order if they were not present. If one party was absent from court proceedings, as might be the case with a temporary restraining order, the injunction is served by the court on that party. Sometimes the parties consist of not only the named plaintiffs and defendants of the case, but also their “officers, agents, servants, employees, and attorneys,” as well as those persons “in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” The injunction will specify who is bound by the order. Injunctions issued by federal courts, are enforceable across the United States, even if the parties cross state lines. http://www.americanbar.org/publications/insights_on_law_and_society/14/winter-2014/understanding-injunctions.html

C. Overview of Automatic Stay statutes or regulations in SASHTO States.

The Departments of Transportation from Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, Texas, Virginia and West Virginia are the member states of SASHTO. With the exception of Puerto Rico, each of the SASHTO member’s laws and regulations were reviewed in 2016. Below is a summary of these findings.

1. Alabama

Is an automatic stay option available?

Yes, Pursuant to the Alabama Rules of Civil Procedure, an Automatic Stay is applicable in the Bankruptcy Court.

Statute Language:

(a) Automatic stay; exceptions. Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration 30 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal. (See: AL ST RCP Rule 62, <http://judicial.alabama.gov/library/rules/cv62.pdf>)

No environmental cases could be located related to an Automatic Stay in Alabama.

2. Arkansas

Is an automatic stay option available?

Yes, The Automatic Stay option is applicable in both the Bankruptcy Court and the Arkansas Administrative Code.

Statute language: (related to Abandoned Mine Land Reclamation)

The filing of a notice of appeal shall not automatically stay enforcement of the Commission's action, but the reviewing court may do so if

- (a) All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
- (b) The person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and
- (c) Such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources. Code Ark. R. 014.06.2-960.4

No environmental cases could be located related to an Automatic Stay in Arkansas.

3. Florida

Is an automatic stay option available?

Yes, in Florida an Automatic Stay is applicable in the Bankruptcy Court and in the rules of Civil Procedure. (FL Stat. Title VI, §45.045) and the Florida Rules of Appellate Procedure, Rule 9.310. Stay Pending Review.

Statute Language:

§45.045 Limitations on supersedeas bond; exception.—

- (1) Except for certified class actions subject to s. 768.733, in any civil action brought under any legal theory, the amount of a supersedeas bond necessary to obtain an automatic stay of execution of a judgment granting any type of relief during the entire course of all appeals or discretionary reviews, may not exceed \$50 million for each appellant, regardless of the amount of the judgment appealed. The \$50 million amount shall be adjusted annually to reflect changes in the Consumer Price Index compiled by the United States Department of Labor.
- (2) In any civil action brought under any legal theory, a party seeking a stay of execution of a judgment pending review of any amount may move the court to reduce the amount of a supersedeas bond required to obtain such a stay. The court, in the interest of justice and for

good cause shown, may reduce the supersedeas bond or may set other conditions for the stay with or without a bond. The court may not reduce the supersedeas bond if the appellant has an insurance or indemnification policy applicable to the case. This subsection does not apply to certified class actions subject to s. 768.733.

(FL. R. App P.) RULE 9.310. STAY PENDING REVIEW

(a) Application. Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.

(b) Exceptions.

(2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

No environmental cases could be located related to an Automatic Stay in Florida.

4. Georgia

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court and in the Public Service Commission regulations.

Statute language:

Georgia Public Service Commission; (related to Trade secrets)

Any party or intervenor, the Commission staff, the Consumers' Utility Counsel, or the Commission on its own motion, may challenge the designation of information as a "trade secret" by filing a motion to that effect with the Commission. In such a case, the affected party or utility shall have the burden of proving that the information constitutes a trade secret. If, after a hearing and an in-camera inspection, the Commission determines that the information provided does not constitute a trade secret or only a portion of the information is a trade secret, or that the protected information must be disclosed in part or in whole in connection with any hearing, or otherwise, then the Commission shall issue an order to that effect, which order shall be automatically stayed for 30 days from the date of the order.

Ga. Comp. R. & Regs. 515-3-1-.11

No environmental cases could be located related to an Automatic Stay in Georgia.

5. Kentucky

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court and one environmental law case was also noted as follows:

Green Valley Environmental Corp. v. Clay

Supreme Court of Kentucky. November 1, 1990. 798 S.W.2d 141

Headnote: Court of Appeals did not abuse its discretion in granting stay of further administrative proceedings on application for solid waste landfill permits during pendency of judicial appeal.

6. Louisiana

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court and is available in the Louisiana Administrative Code.

Statute language:

LA Admin Code – Title 33. Environmental Quality. § 1123. Stay of Action

A. The filing of a request for declaratory ruling shall not automatically stay any other department action.

La. Admin. Code 33, Pt I, §1123. (<http://www.doa.la.gov/Pages/osr/lac/LAC-33.aspx>)

No environmental cases could be located related to an Automatic Stay in Florida.

7. Mississippi

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court.

No environmental cases could be located related to an Automatic Stay in Mississippi.

8. North Carolina

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court.

Stay available related to air permits.

Sec. 4.17 of S.L. 2015-286 amends the process for filing a contested case regarding an air quality permit decision of the Environmental Management Commission (EMC) by:

- Providing that the filing for a contested case by a permit applicant or permittee would stay the EMC's decision while the filing for a contested case by a person who is not the permit applicant or permittee would not automatically stay the EMC's decision.
- Limiting these contested case provisions to permit application decisions rather than other types of permit decisions, such as permit modification, suspension, or revocation.

This section also directs the Department of Environment and Natural Resources to study whether these changes to contested cases for air quality permits should be expanded into other programs administered by the Department. The Department will report the results of the study to the Environmental Review Commission by March 1, 2016. This section became effective October 22, 2015.

[http://www.ncleg.net/Applications/Dashboard/Chamber/Services/BillSummary.aspx?sSessionCode=2015&sBarcode=H765-SMSB-38\(sl\)](http://www.ncleg.net/Applications/Dashboard/Chamber/Services/BillSummary.aspx?sSessionCode=2015&sBarcode=H765-SMSB-38(sl))

9. South Carolina

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court and in the SC Administrative Law Court (ALC).

Statute Language (see above and SC Code Ann section 1-23-600 H(2) and H(4)).

(2) A request for a contested case hearing for an agency order stays the order. ...

(4) After a contested case is initiated before the Administrative Law Court, a party may move before the presiding administrative law judge to lift the stay imposed pursuant to this subsection. Upon motion by any party, the court shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted. A hearing must be held within thirty days after the motion is filed with the court and served upon the parties to lift the automatic stay or for a determination of the applicability of the automatic stay. The judge must issue an order no later than fifteen business days after the hearing is concluded. <http://www.scstatehouse.gov/code/t01c023.php>

Under the ALC rules, a party with good cause (granted at the discretion of the court) may file a request for a contested case hearing before the ALC. This triggers the 30-day automatic stay (the burden of proof is on the party attempting to lift the stay to prove that the permitted project will not cause irreparable harm.) (See Rules of Procedure for the ALC, Section III, Paragraph 34).

[http://www.scalc.net/pub/5officialrules2016\[1\].pdf](http://www.scalc.net/pub/5officialrules2016[1].pdf)

10. Tennessee

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court and pursuant to the Administrative Procedures Act.

Statute Language:

T.C.A. § 4-5-322. Judicial review.

(a) (1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. ...

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured and if no bond amount is sufficient, the stay shall be denied. The reviewing court shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the reviewing court consider a stay unless the petitioner has previously sought a stay from the agency or demonstrates that an agency ruling on a stay application cannot be obtained within a reasonable time.

<http://www.tnind.net/actia/docs/tca-uapa.html>

11. Texas

Is an automatic stay option available?

Yes, in Texas, an Automatic Stay is applicable in the Bankruptcy Court and pursuant to the Civil Practice and Remedies Code.

Statute language:

Civil Practice and Remedies Code, Title 2, Subtitle D.

Sec. 51.014. APPEAL FROM INTERLOCUTORY ORDER.

(c) A denial of a motion for summary judgment, special appearance, or plea to the jurisdiction described by Subsection (a)(5), (7), or (8) is not subject to the automatic stay under Subsection (b) unless the motion, special appearance, or plea to the jurisdiction is filed and requested for submission or hearing before the trial court not later than the later of:

(1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or
(2) the 180th day after the date the defendant files:

(A) the original answer;

(B) the first other responsive pleading to the plaintiff's petition; or

(C) if the plaintiff files an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a defense to the new cause of action under Subsection (a)(5), (7), or (8), the responsive pleading that raises that defense.

<http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.51.htm>

12. Virginia

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court.

No environmental cases could be located related to an Automatic Stay in Virginia

13. West Virginia

Is an automatic stay option available?

Yes, an Automatic Stay is applicable in the Bankruptcy Court.

No environmental cases could be located related to an Automatic Stay in West Virginia

D. Summary of Automatic Stay States and Statutes

Of the 13 SASHTO States reviewed (Puerto Rico excluded), all states had automatic stays in place for bankruptcy proceedings and eight had automatic stays available for use in permitting or licensing appeals. (Table 1). In the states with automatic stay provisions available in proceedings other than bankruptcy court, the statute or regulation usually requires an appeal from either an agency final decision or a trial court decision, and that an automatic stay would not stay the decision without the appeal. In all states, a party may appeal from a final agency decision, upon appropriate cause, showing, etc., but not all states will automatically stay the decision during the appeal process.

In state highway construction projects, whether an appeal from an agency or court decision is subject to an automatic stay provision has ramifications related to highway construction delays. If the activities being contested are automatically stayed with the appeal, it was hypothesized that the delays would be longer and more significant than if no automatic stay provision was available. However, even without an automatic stay, the aggrieved party may appeal and request an injunction to halt or stay the project during the appeal process. Therefore, states, even without an automatic stay provision, may have delays during the appeal of final agency or trial court decisions.

The next section of this report will lay out the highway construction projects that were reviewed to evaluate whether the automatic stay provisions of the South Carolina Administrative Law Court rules or the other states, impact the delays which occurred with these highway projects. The first set of highway construction projects discussed are five projects from South Carolina. Four of them are SCDOT highway projects and one is a South Carolina county highway project. Following the discussion of the South Carolina projects, the other SASHTO state projects which experienced delays based on similar circumstances will be discussed.

State	A.S. in Bankruptcy Ct	A.S. in Other State Statute or Reg.	Environmental Cases Related to Automatic Stay
AL	Yes	No	No
AR	Yes	Yes- Adm. Code/mining	No
FL	Yes	Yes- Adm. Code & App. Proc.	No
GA	Yes	Yes- Public Serv. Comm.	No
KY	Yes	No	1- Solid Waste permit case stay
LA	Yes	Yes- Adm. Code, Env. Quality	No
MS	Yes	No	No
NC	Yes	Yes- relates to air permits	No
SC	Yes	Yes- Adm. Law Court	No
TN	Yes	Yes- Adm. Proc. Act	No
TX	Yes	Yes- Civil Practice & Remedies	No
VA	Yes	No	No
WV	Yes	No	No

Table 1. Summary of 13 SASHTO states with Automatic Stays (A.S.); Puerto Rico excluded

III. Highway Projects Subject to Delays related to Legal Challenges

The projects for this study represent recent highway construction projects identified by SC DOT for which delays may have occurred for environmental issues related to wetlands or water quality and projects that may have been subject to an automatic stay during the permit review and issuance process, and/or the construction process. The reviewed projects were primarily Design-Build projects, a method intended to improve the efficiency of a project timeline by selecting a contractor to both design and construct the project. It is an especially advantageous method for large and complex projects as it strengthens the communication and understanding between all involved DOT and contractor personnel, thus allowing the project to be completed more quickly and more cost effectively. The other common method of construction is the Design-Bid-Build, where the design and building portions are completed separately under individual contracts. The DOT or equivalent agency is responsible for the design of the project, a bidding period occurs, and the selected contractor builds the project to the DOT specifications.

Delays related to: Section 401 WQC permit Approval

The communication noted above is a valuable tool to allow the expectations and the concerns of the public and the agencies to be addressed through a public process and which are incorporated in the DOT's plans for highway construction. In the projects reviewed for this study, the expectations and concerns are related to the environmental issues associated with the land over or through which the construction will occur and, more specifically, to the wetland or water quality issues related to the proposed construction. Given the high percentage of wetlands in the southeast, one of the steps often required prior to obtaining construction approval is obtaining a Water Quality Certification (WQC) from the state environmental agency. As noted earlier in the report, the WQC is required to be obtained prior to approval of the wetland section 404 permit from the USACE. At the conclusion of the environmental agency review of the WQC, a contested case may be initiated once imminent approval of this key certification/ permit has been announced. In the reviewed cases, challenges of a Section 401 WQC permit approval originated with civilian third parties. The impact of this delay on highway construction time frames varied, and appeared to be dependent on the strength of the petitioners standing, and the number of appeals.

Based on the highway project cases reviewed, there are three primary points during a project when a delay may occur. These three points exclude the time during which extensive communication occurs between relevant agencies as the project need is being outlined, and excludes the period allowed for public comment and feedback. These exchanges can continue for months or years, but occur before timelines and contracts are formalized. Projects may undergo extensive revisions based on agency feedback and public input before it is determined that the project is ready to move forward with permit applications.

Delays related to: USACE 404 Permit Approval/Permit Modification

If the WQC is approved by the state, then the USACE would then move forward with its review of the section 404 permit. If the 404 permit is issued, lawsuits against the 404 permit issuance from civilian third parties followed a similar outline as with Section 401 WQC permit challenges. In addition, if modifications are required to the initial highway construction plan, a modification to the section 404 permit, may be required and a request for a permit modification is also subject to review, prior to a final

decision. The delay associated with permit modification approval most often originated with the USACE, due to an unanticipated or undiscussed action occurring that was not previously covered by the permit, thus reinitiating the period of interagency feedback. This delay varied in significance in the cases reviewed. In general, timelines do not account for extended delays at the permit modification point, with the presumption that the majority of necessary discussions have occurred during the initial interagency feedback periods.

Delays after: Construction Initiated

Delays have been identified during the period after permit approval and after construction has been initiated. This period has some overlap with the Permit Modification section, in as much as depending on the project design, construction may be actively ongoing when the modification is sought. If project permits are challenged after construction has started, this can cause a significant delay as the official timeline has been initiated. The expected milestones have been agreed upon by formal contract, and a delay due to litigation does not pause that contract or associated costs. This delay may impact both the DOT and the highway construction contractor depending to the challenge brought to the project and the ensuing delays.

A. SCDOT Projects Subject to Delay

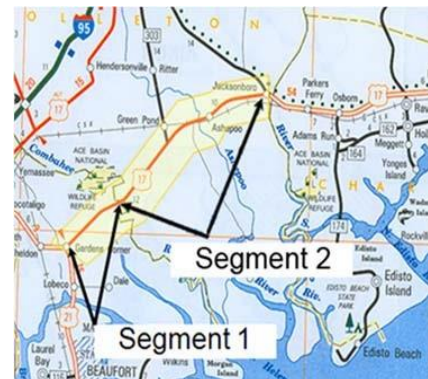
1). ACE Basin Highway Project: Construction status - Complete

The ACE (Ashepoo, Combahee, and Edisto) River Basin project is otherwise known as the US Route 17 Widening and Combahee River Bridge Replacement project. The expansion was to an existing roadway in Colleton and Beaufort Counties, SC; specifically, the two-lane highway was widened to four lanes to improve safety. The 22-mile project was constructed in two segments from a design and permitting perspective. The two segments were built under Design-Build contracts.

Section 1: The Environmental Assessment (EA) was approved in 2005. A Finding of No Significant Impact (FONSI) was approved April 7, 2006. Application for the Section 401 WQC permit was in June of 2006, and it was approved on September 14, 2006. The USACE Section 404 permit was also approved September 14, 2006. Compensatory mitigation agreement, as approved by the 404 permit, required the debiting of the Huspa Creek Mitigation Bank and the debit of Sandy Island Mitigation Bank. The Notice to Proceed (NTP) was received March 1, 2007.

The Section 401 permit was approved September 10, 2009. The construction of Section 1 proceeded according to plan with no notable delays.

Substantial completion was May 27, 2011. **Delay: no notable delays**



Section 2: NTP was received May 18, 2010. The initial application for the USACE Section 404 permit for the second segment was on July 14, 2010. Of the 7 404 permit modifications needed for the project, the sixth modification caused a notable delay for the second segment.[1] The delay was in reference to mitigation credits required for the wetland acres impacted by the second section. Clarification

and modification was required relative to the number of credits required to be purchased from the Sandy Island Mitigation Bank. The time necessary to communicate between SCDOT and USACE exceeded the standard time allotted for permit procurement, after which the delay can impact the construction timeline. This procurement period was exceeded by six months – a delay of 118 construction days. The revised 404 permit modification was submitted on December 10, 2010. The Section 401 WQC permit was received on January 1, 2011, along with the approved 404 permit from USACE. Substantial completion of Section 2 was October 30, 2013.

Delay: 118 construction days

2). I-85/385 Interchange: Construction Status - Ongoing

The I-85/385 Interchange is an ongoing reconstruction project of an existing interstate interchange in Greenville County. The project involves the disturbance of 149.5 acres, with 306.8 acres requiring permits to alter. The area adjacent to the project corridor was estimated to be 70% Urban (Commercial/Service), 10% Urban (Manufacturing), 10% Urban/Suburban (residential), and 5% Urban (tree cover/Brush/Wetland/Streams). It is constructed under a Design-Build contract.



The highway construction plan received the SCDOT Notice To Proceed (NTP) on October 30, 2014.[2] Once the NTP has been received, the contractor has 410 calendar days to achieve the design phase. A separate NTP was issued for an expected 1,035 day construction phase. This NTP for the construction phase, dated December 15, 2015, allowed clearing activities before permits have been approved. DHEC approval of the CWA Section 401 WQC permit was received January 19th, 2016. Parties have 15 days to petition for a request for review of the WQC and before WQC becomes final.

On January 31, 2016 a local resident requested a final review of the section 401 WQC permit, due to concerns that trash and hazardous debris would flow from a drainage culvert under the highway onto his property without appropriate management; the segment of the property with the culvert would become right-of-way SCDOT property.[3] “No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair. If the Board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court”.[4]

The DHEC staff response was a request that the Board not conduct a final review, their response dated to February 11, 2016⁴ (nine days after receipt of the resident's request). The agency decision would then become the Board's decision after this notice was provided to the complainants. By declining to schedule a final review conference, DHEC indicated that the project activities were not in violation of the Section 401 WQC permit and all best management strategies were being utilized. A 30-day window was

⁴ Based on SCDHEC Environmental Quality Control documentation of citizen complaint

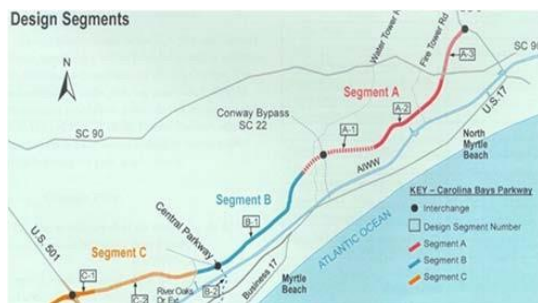
triggered wherein the plaintiff may have requested a contested case with ALC; they did not do so. The initial complaint associated with the Section 401 WQC permit and the time necessary for DHEC to determine their action, and to allow the plaintiff the option to take the case further, delayed the project by approximately 39 days.

With DHEC's decision and no further action taken by the plaintiff, the Section 401 WQC permit received final certification April 7, 2016; approximately 60 days after the request for review. The USACE 404 permit was then issued April 26, 2016. The 404 permit will not be issued if there is any question or legal challenge to the Section 401 WQC permit. The permit is subject to all best management practices being implemented, and compensation for the unavoidable environmental impacts. It required the purchase of 5,904 stream mitigation credits from the Grove Creek Mitigation Bank, and the debiting of 1.45 acres from the Black River Mitigation Bank.

Substantial completion for the project is anticipated May 21, 2019 (interchanges and roads open to traffic), with final completion in November 21, 2019 (contractor and equipment off site). Thus far the Section 401 WQC permit appeal has been the only legal challenge and it constituted 60 days of delay.[5] As of December 15, 2016, the project is progressing and is 150 days behind schedule. **Delay based on Section 401 WQC permit appeal: approximately 60 days**

3). Carolina Bays Parkway: Construction Status - Near Completion

The Carolina Bays Parkway was a new project in Horry County that began in the late 90's as a



Design Build construction. The project included the construction of a six-lane highway predominantly paralleling the Atlantic Coast to alleviate traffic and local area congestion of the Grand Strand, and also includes two four-lane connectors in North Myrtle Beach and Myrtle Beach. The total project length is approximately 30 miles in length, with the impact of 233 acres of wetland.

The Carolina Bays Parkway was built in three major stages; SC-9 to US 501, 501 to 544, and 544 to SC 707. Planning of the third section involved a major change to the project design, as widening activities on SC 707 were incorporated into the SC 31 (Carolina Bays Parkway) extension.[6]

The Record of Decision was in November 1998. The Section 401 WQC permit was issued November of 1999.[7] A conflict arose during this period with a residential development that had begun construction of several houses in an area designated as part of the Carolina Bays alignment. It was an issue of conflicting permits in the same region, and ultimately went to the ALC. It was resolved via settlement in December of 1999 and involved the purchase and movement of 13 houses .[8] The USACE Section 404 permit was issued March 7, 2000. A 36-month contract for the first segment was initiated March 10th, 2000, with a completion date set for July, 2003. The first segment was completed in December of 2002, seven months ahead of schedule. The contract for the second segment was signed in May of 2003, and was completed in March of 2005.

The delay on the third segment came primarily from a miscommunication between SCDOT and USACE regarding the interpretation of the 404 permit stipulations. In 2010, SCDOT had initiated a permit modification request for the third section, the project having undergone the previously noted alignment revision. Part of that design change had resulted in the removal of a mile of previously planned road construction. Removing this mile of road removed 10% of the total wetlands affected by the project. SCDOT thus requested a modification to the mitigation credit requirements. At this time, the issue regarding the permit stipulation was made apparent, specifically in what was entailed by the buffer zone component of the mitigation agreements. Verbatim from the 404 permit, “naturally vegetated buffer strip along both sides of the mainline will be maintained to protect both wetlands and upland communities.” The intended meaning is for the buffer to preserve a set upon number of wetland acres, while SCDOT inferred it to reference a set upon amount of land area alone. When the project was initially started, Myrtle Beach was commercialized while the area of the Carolina Bays was more rural and agricultural in profile, with less development. Due to the length of time between the mitigation agreement and when SCDOT purchased the land for the buffered zone of the roadway, a period of several years, the condition of the land had often changed. The number of wetlands acres in the specified zone had changed in some cases due to activities of other developments in the area, so that SCDOT was not able to meet the number of wetland acres to be preserved in the buffer zone. This prompted USACE to place a stay on the permit which delayed the letting of the third section by two years while SCDOT purchased the required property for the buffer zone.

To mitigate for the disturbance of the wetlands, the Sandy Island Mitigation Bank was closed out and the title transferred to The Nature Conservancy. The start of Phase 3 had been anticipated for 2011 with a 2014 completion. The stay was removed and the 404 permit was approved for the third section May 24, 2013. Construction let in October of 2013. The NTP was in December of 2013, and construction completion is anticipated in the Spring of 2017.

Delay based on 404 modifications: Two years (approx. 730 days).

4) Conway Bypass: Construction Status - Complete

The Conway Bypass (Highway 22) was a Design-Build 28.51-mile long multi-lane freeway improving access to Myrtle Beach and North Myrtle Beach. It was located in an area of significant environmental sensitivity; 60% of the area was classified as wetlands. It impacted 433 acres of wetland, 112.5 of which were unavoidable complete loss requiring mitigation.



Significant interagency cooperation was required to finalize mitigation efforts, though these communications occurred before application for any environmental permits were initiated. Limited Notice to Proceed with the project was received January 18, 1998. The first section of the Conway Bypass opened in June of 2000, 17 months sooner than expected. The second section from SC 90 to SC 905 was complete in November 2000, complete 13 months ahead of schedule. The final section officially opened in May of 2001. It was the largest Design-Build project in SC at the time and received many awards for engineering excellence.[9] **Delay: 404 issues, but no Delay; completed 17 months and 13 months (total 30 months) ahead of schedule**

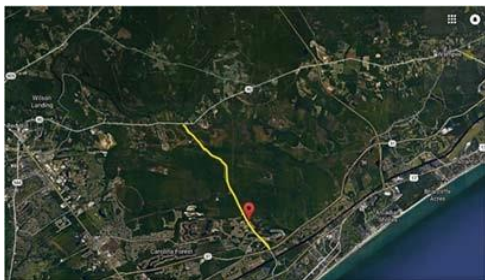
5) US 601 Bridge Replacement

The U.S 601 Bridge Replacement project was located in Richland and Calhoun Counties, directly adjacent to the Congaree National Park. The replacement of several bridge spans was contested by the various environmental groups, including the SC Environmental Law Project (SCELP) primarily in federal court. The project was not provided to us by SCDOT as a research candidate, as it did not match the parameters considered applicable to this project. However, the 601 Bridge Replacement project was suggested for addition near the end of the grant and, while included, detailed interview materials are not as extensive as for as the other sites.

Over the course of several years from 2006 until 2011, one state ALC contested case was filed and two federal court cases; one in 2006 and a second in September 2010, were filed. A contested case at the ALC was filed by SCDOT in October 2006 in response to the WQC issued with special conditions. An ACL decision was rendered in favor of SCDOT in November 2008. Environmental groups filed for a DHEC review of the record in Oct 2006, but the ALC ruled that DHEC no longer had jurisdiction as the case was now before the ACL. Also in October 2006, Environmental groups and SCELP challenged the USACE finding of no significant impact (FONSI) in federal court. [10,11] The case was heard in 2008 and an additional Environmental Assessment (EA) was required to be completed by FHWA and SCDOT. The EA is completed in 2010 and the construction contract is awarded and construction begins. A second federal case filed in 2010, challenged the sufficiency of the second EA; the federal court in April 2011 ruled the EA to be sufficient. The original research parameters concerned contested cases raised by environmental organizations and it was the preference not to address federal cases, as they were outside the scope of the state-level automatic stay proceedings. Therefore, the project was not initially provided to us for review by SCDOT. Specific details of the timeline associated with this project for both state ACL and federal court can be found in Appendix I, pages 62-3. **Delay: Approximately 4 years.**

B. SC non-SCDOT Projects Subject to Delay

1) International Drive: Construction Status - Ongoing



A county project being funded and built by Horry County, though upon completion the management of the road would be transferred to SCDOT. The project is an improvement and expansion of an impassable dirt road known as International Drive, which directly borders the Lewis Ocean Bay Heritage Preserve (“Preserve”).

Developing the road would provide an alternate route to US 501 between Conway and Myrtle Beach; the 5.6 mile road would go from Carolina Forest to SC 90. Horry County and the SC Department of Natural Resources (DNR), which maintains the Preserve, reached an agreement for Horry County to purchase the necessary right-of-way property in exchange for certain provisions in 2010. Due to the environmental profile of the area and black bear population, the development of the road was originally intended to be 2-lane, incorporate bear tunnels and wildlife crossings, as well as fencing and barrier control gates to minimize wildlife-car collisions.[12] The project did not move forward for three years, due to the delayed progress of another county-funded roadway. In 2013, the project moved forward with

several amendments made to the agreement with DNR. The project was increased to a 4-lane roadway and removed the bear tunnels and barrier fencing. In November of 2013 Horry County applied for the permit to repave and realign International Drive, which would require the impact of 24.88 acres of wetland. Requirements for wetland mitigation bank credit purchase and monitoring wells were arranged between the County and USACE and DHEC, a process that was finalized in 2015.[13]

On June 25, 2015, DHEC issued the Notice of Decision, which informs all interested parties that that the Section 401 WQC permit would be approved in 15 days. On July 10, 2015 (the 15th day of the initial challenge period), the pending Section 401 WQC permit was appealed by the S.C Environmental Law Project (SCELP) on behalf of the SC Coastal Conservation League and the SC Wildlife Federation. Among the concerns listed is a request for DHEC to enforce the original 2010 project agreement.

July 29, 2015, DHEC issued notice that they declined the SCELP request for review. As provided by state laws and regulations, the DHEC Board's written decision triggered the 30 - day window in which SCELP is able to file an additional appeal with the Administrative Law Court (ALC). This appeal is formally known as a "contested case hearing". SCELP formally filed a "contested case hearing" (appeal) with the ALC on August 28, 2015, which was the last day of the allotted 30 - day appeal period. On November 10, 2015, the ALC formally scheduled the hearing dates, which were set for February 16 – 18, 2016.

July 7, 2016, the ALC upheld the DHEC issuance of the Section 401 WQC permit. With the state environmental permit approved, USACE then issued the 404 permit on July 22, 2016. A month later on August 22, 2016, Horry County began clearing right-of-way along the corridor and leveling the road, activities estimated to require 40 days to complete. On September 1st, 2016, SCELP challenged the federal permit issued by USACE (404) in U.S District Court. They requested a motion of stay, alleging that the USACE 404 permit was improperly approved and that the environmental assessment had been insufficient to assess the potential impacts of the project. The district judge approved a temporary restraining order on September 23, 2016, requiring the clearing activities to halt. This order was dissolved on November 18, 2016, upholding the USACE 404 permit. While these legal proceedings were ongoing, Horry County proceeded with plans to subcontract the rest of the construction, with the deadline for bid submissions on November 30, 2016.

On December 20, 2016, SCELP filed an appeal to the U.S Fourth Circuit of Appeals. The court granted the appeal, ordering a stay on all construction activities.[14] The order was reversed a month later, allowing construction to continue with the stipulation that the road not be allowed open to the public. In February, the conservation groups asked the S.C Supreme Court to prevent the project from continuing. The final stage of the project was given the go-ahead from Horry County officials to begin on March 7, 2017.[15]

As of March 2017, the delay relevant to the automatic stay on the Section 401 WQC permit and subsequent litigation was 362 days. The delay relevant to the federal courts' restraining orders of the USACE 404 was approximately 84 calendar days. **Delay based on Section 401 WQC permit: 362 days; Delay based on 404 permit: 84 days. Total delay- 446 days.**

A summary of the delays for SC projects is provided in Figure 2.

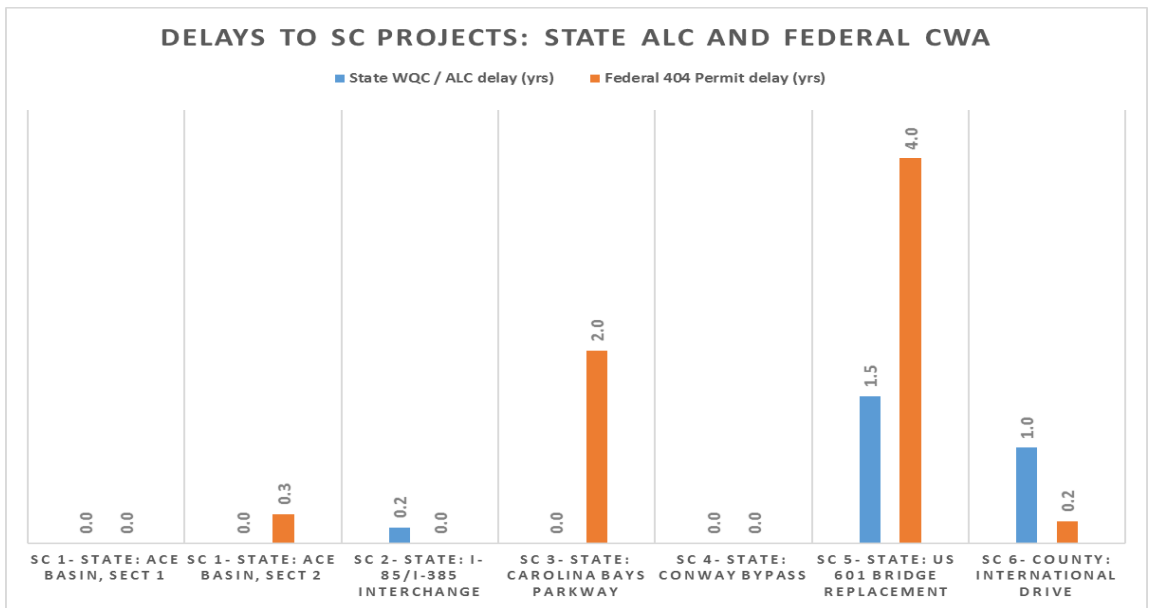


Figure 2. Delays to SC highway projects based on whether the delay occurred 1) as a result of the appeal of the Section 401 WQC permit to the Administrative Law Court (ALC), or 2) due an appeal of a Section 404 wetland permit or modification involving Federal issues.

C. SASHTO State Projects: States providing Projects for Review (No Automatic Stay)

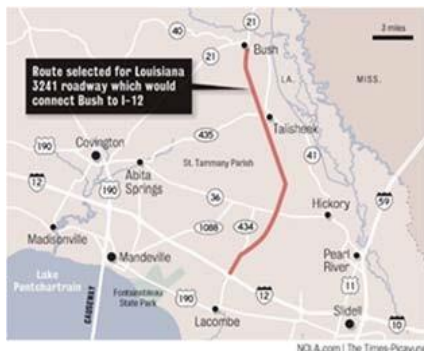
Some project reviews include information from SASHTO contact and also from an external source review due to ongoing litigation.

1) Louisiana

Louisiana experienced two projects with some delay, though primarily due to communications/permitting from USACE and not an outside party.

Project 1. Construction Status - Ongoing

Highway LA - 3241: A proposed four-lane arterial highway connecting I12 to Bush in St. Tammany Parish, LA. The project had been in discussion for decades. Louisiana Department of Transportation (LADOT) submitted application for the necessary USACE 404 permit in October of 2006.[16] USACE prepared an Environmental Assessment (EA) in August of 2008, and determined that the proposed action would have significant environmental impact, initiating the need for an Environmental Impact Statement (EIS) under NEPA regulations.[17]



USACE served as lead on the EIS development. On November 18, 2008, USACE published their Notice of Intent to prepare an EIS to address the potential impacts of the various alternatives for the project. The Draft EIS (DEIS) was released on September 9, 2011 for a 45-day comment period. The completed Final EIS (FEIS) was published in March of 2012. Five alternatives were considered, the two favored were as such:

- Alternative P: Route preferred by LADOT. Approximately 17.4 miles in length, required the direct impact of 358 acres of wetland, as well as the construction of seven bridges. Necessary mitigation credits were estimated to be 9380.1 acres, to the USACE preferred alternative requirement of 6869.8 acres.
- Alternative Q: Preferred by the USACE; this route is approximately 19.8 miles in length, requires the direct impact of 305 acres of wetland and three bridges, but would incur the least amount of damage to wetland and wildlife habitat. Both alternatives would require culverts.

The original 404 permit application was rejected on June 7, 2012 by USACE.[18] Reasons given included the need for a Section 401 WQC permit, which had not been issued, the need for a mitigation plan, and the need to consider the findings of the FEIS, now complete.

The Federal Highway Administration (FHWA) released the Adopted FEIS as prepared by USACE in July of 2015. The FHWA published its ROD on April 12, 2016, approved the selection of Alternative Q for the project alignment. The LADOT is currently working on the mitigation plan development before submitting applications for Section 401 WQC and 404 permits. The project will be broken into three design segments; believed to be planned as Design-Bid-Build. This delay occurred in the interagency discussion and negotiation time period, before permits were obtained. **Delay prior to permitting; no construction delay; 4-year delay in planning/design stage.**

Project 2. Construction Status - Completed

The **LA - 1088 Interchange project** was a new construction, adding access points to I-12 in St. Tammany Parish via a new interchange where LA-1088 crossed over I-12. The overall project size was 102.07 acres. The EA developed in 2001 resulted in a September 2001 FONSI decision. Preliminary designing occurred, until an engineering analysis conducted by LADOT resulted in a change in the geometric layout of the interchange. The design of the interchanges was changed from a mixed diamond/cloverleaf to a full diamond interchange. FHWA provided a Supplemental EA in May 2007, and a second FONSI was approved August 16, 2007. This documented the increase of directly impacted jurisdictional wetlands from 16.73 acres to 18.35 acres. The USACE 404 permit was issued September 8, 2009. It approved the mitigation plan for the restoration of 56.1 acres for the Bayou Lacombe Mitigation Bank. Construction began in January, 2010. A compliance inspection in April 2010 resulted in a May 6, 2010 notice to LADOT that construction was occurring outside of the permitted right-of-way and the USACE required further explanation of this deviation. A revised 404 permit was approved on August 27, 2010. 18.67 acres of jurisdictional wetland impacts had been previously permitted; the revised 404 updated this with an additional 15.13 acres. It approved the mitigation plan to purchase 45.4 wetland acres worth of credit at the Mossy Hill Mitigation Bank. It was indicated that this issue did not require construction activities to be halted while the impacted acreage was corrected and mitigation agreement modified. The project completion was in April of 2011. Delay occurred after permit had been obtained and construction begun, due to deviation from USACE permit stipulations. **Delay: 114 days. Delay was document related; construction was not required to stop while the issue was resolved.**

2) Tennessee: Construction Status - Complete

The project of interest is **Tennessee-840**, funded and built as a state route. The project itself has a long history, initially approved by the state Governor in 1986. The roadway is a 78 mile corridor following a 25-mile radius arc south of Nashville, TN. Three Environmental Assessments were prepared in the initial stages of the project; two involved cloverleaf intersections with federal interstates, and the third addressed the length of the approximately 53-mile highway corridor. For the two cloverleaf intersection EAs, the FHWA issued FONSI in 1989 and 1990.[19] No decision was rendered for the third EA. Construction began in 1991, and proceeded in three separate segments until completion in 2012.[20] Federal agency approval was required for the second and third segments, specifically from the USACE. These sections required Nation-Wide Permits (NWP) for stream-crossing and the 404 permit in order to fill approximately four acres of wetland. The NWP was approved in 1996; the 404 in 1997.



A complaint was brought against the Commissioner of Tennessee Department of Transportation (TDOT), the Secretary of the U.S. DOT, and the Acting Administrator of FHWA by the Southwest Williamson County Community Association, Inc. The plaintiffs claimed that the defendants had not complied with certain NEPA provisions, as well as the Intermodal Surface Transportation Efficiency Act. They sought a preliminary injunction to halt the continued construction of TN-840 and declaratory relief pending compliance with the violated statutes, filed August 7 1997. Specifically, the plaintiffs argue that the EAs were inadequate, and that a full EIS should have been required. The district court dismissed NEPA related claims on statute-of-limitation grounds. In this case, the statute of limitations is six years from the time the claim accrues, or from the time of final agency action (i.e., two FONSI decisions). The District Court denied the plaintiffs application for a preliminary injunction on September 15th, 1997. The plaintiffs appealed the decision within the 60 day period; on April 29th, 1999, the Sixth Circuit Court of Appeals upheld the District Court dismissal.[21] A second appeal was argued September 12th, 2000. The previous decision was upheld on March 14th, 2001. The overall project had initially been planned as a loop around Nashville, however the northern portion has been on indefinite hold since 2003 due to budget constraints and environmental concerns. The southern loop was completed in 2012. Specific anticipated completion dates are unclear; TDOT had indicated the project would not be complete any sooner than 2018. **Delay: TN is an Automatic Stay state, had stays in place during the appeal process from April 29, 1999 to March 14, 2001, approx. 22 months.**

3) Texas: Construction Status - On-Going

Texas 45 SW Expressway.

The project of interest is an on-going expansion in the area of South Austin. There are three separate sections of the MoPac South expansion which the Texas Department of Transportation (TxDOT) and the Central Texas Regional Mobility Authority (CTRMA) began considering in 2013.

TxDOT conducted an environmental study for the Texas 45 Southwest Expressway project in June 2013. This project is a 3.6 mile-long, four-lane new construction in the South Austin area. A FEIS was completed in January of 2015, with the TxDOT ROD issued March 5th, 2015. The construction contract was awarded in July, 2016. CTRMA was responsible for the project design; CTRMA is an

independent government agency created to improve transportation systems in Williamson and Travis counties.

A local organization, Save Our Springs Alliance (SOS), brought a suit against CTRMA and TxDOT in February of 2016.[22] They sought a more thorough environmental analysis in the form of an EIS of the 45-SW proposal and two projects it would connect to: MoPac Intersections and MoPac South. The road is to be built in an environmentally sensitive area, crossing an aquifer recharge zone and habitat for several endangered species.[23] The District Court ruled in September 2016 that the TxDOT was required to comply with Section 7 of the ESA and consult with the US Fish and Wildlife Service regarding the species of potential concern. Also in September 2016, the CTRMA approved two contracts with two separate firms selected to work on the SH-45-SW project; one for engineering and inspection, one for work site environmental compliance. A preliminary injunction hearing was held on October 12, 2016, in District Court, with a decision on October 19, 2016. The Court ruled that the plaintiffs failed to make their case; the standard for granting an injunction requires the Plaintiffs to have a reasonable chance of winning the case.[24] It was concluded that the toll road is a not a major federal action and is not subject to the NEPA EIS requirement; the project relies on state tax funding; therefore, the state environmental review is sufficient. Ground-clearing activities began November 8th, 2016.[25] The Plaintiffs appealed the decision in the Fifth Circuit Court on October 26, 2016, on a motion for an emergency preliminary injunction.[26] The Court of Appeals upheld the original ruling. That same day, SOS filed the 60-day notice of intent to sue under the ESA.[27] They pursue their original argument; that the Texas 45 Southwest project should be considered a federal project, though it is state-funded, because it is linked to two other South MoPac Boulevard projects which are federally funded. The suit is anticipated to be filed in January, 2017.

Legal push-back

The Texas Department of Transportation and Central Texas Regional Mobility Authority decided to do separate environmental reviews for these three projects. A pending lawsuit contends they should be studied as a group, which could delay construction on any of them indefinitely.



The lawsuit has delayed the progression of the environmental study for the SH-45-SW tollway project approximately two years, though no construction phase had been initiated (no contracted construction days delayed).[28] The new 2017 filing could affect the start-date of actual construction and paving.

- The MoPac Improvement Project is an expansion project of the MoPac Boulevard, adding express toll lanes.[29] CTRMA and TxDOT conducted a federal environmental study in July 2010, with a FONSI issued in August 2012. A Design-Build contract was issued in Spring of 2013. Completion was initially anticipated for Fall of 2015. Weather and material delays pushed the project past its expected completion date, with the initial phased opening not occurring until late 2016. For this delay, the contractor was found in default.
- TxDOT conducted a federal review of the MoPac Intersections project in 2013, which involves the construction of underpasses at MoPac/Slaughter Lane and MoPac/LaCross Avenue intersections.[30] The DEA was released on June 30, 2015, with a FONSI issued on December 22, 2015. Construction was initially slated for 2016, though this was delayed due to the lawsuit regarding SH-45-SW. TxDOT will design and construct the project. **Delay: delay is on-going.**

D. SASHTO State Projects: States with No Applicable Projects (or no response to inquiry)

On May 3, 2016, our team met with Ms. Heather Robbins and Mr. Terry Swygert of SCDOT to discuss appropriate projects in South Carolina and to discuss the SASHTO representatives that should be contacted. During May, we drafted a questionnaire to be used to all interviews to be able to capture consistent data on each project related to project delays. (See appendices for completed questionnaires) We then contacted and interviewed the SCDOT officials who could respond in depth to the delay issues related to the SCDOT projects outlined above.

On July 6, 2016, after all appropriate SASHTO representatives had been identified by SCDOT, an introductory email was sent by Ms. Heather Robbins, SCDOT, to SASHTO state DOT representatives to introduce them to the project and to ask them to cooperate with the study and our requests for information. Our team contacted SASHTO members by email on July 8, 2016, with follow up emails sent by us on July 26, 2016. Additional follow-up phone calls and emails occurred at various dates. The various responses or lack of responses are listed.

- 1) AL: Initial response indicated no awareness of any recent projects involving stay as described. No further response to two follow-up emails.
- 2) AR: Initial response indicated that there were no appropriate projects; did not change after follow-up email providing more details.
- 3) FL: Initially, FL was not part of the study, but due to the number of states that did not identify projects related to our study, Florida was added in August 2016. No response to introductory email on August 8, 2016 or follow-up contact.
- 4) GA: Response indicated that there were no projects with environmental issues at legal level.
- 5) KY: Email correspondence requesting clarification of stay, followed by no further response to two follow-up emails.
- 6) MS: No response to introductory email or three follow up contacts.
- 7) NC: No response to introductory email or three follow up contacts.
- 8)VA: Expressed no awareness of projects involving work injunctions as described.
- 9)WV: No response to introductory email or two follow up contacts.

E. SASHTO State Projects: State Project Data Found via External Resource Review

1) Kentucky: Louisville-Southern Indiana Ohio River Bridges Project

Construction Status: Completed

Study of interest in Kentucky was the Louisville-Southern Indiana Ohio River Bridges Project. The project prioritized two bridges; the Downtown Crossing connecting downtown Louisville, Kentucky with Jefferson, Indiana (parallel to an existing bridge) and the East End Crossing, located eight miles upstream and connecting Prospect, Kentucky and Utica, Indiana.[31] The project was a joint effort between the states of Kentucky and Indiana, with The Kentucky Transportation Cabinet (KYTC) in charge of funding, designing, and constructing the Downtown Crossing. The Indiana Department of Transportation and Indiana Finance Authority were likewise the lead for the East End Crossing. Comments regarding the legal suit involve the project as a whole, comments for the timeline after this will focus on the Downtown Crossing, which was a Design-Build project.



The Notice of Intent to produce an EIS was issued by the FHWA in March of 1998. The Draft EIS was published in November 2001, followed by the mandatory 101-day public comment period. The Final EIS was published two years later in September of 2003. That same month, the FHWA issued the Record of Decision, ratifying the Selected Alternative (which included the construction of the East End and Downtown Crossings).

Between 2007 and 2010, the sources and methods for financing the project were considered and identified. Due to a shortfall in necessary funds available via traditional sources, the project was updated to incorporate tolling on all of the bridges in order to provide the necessary revenue.[32] This included both new bridges and renovating an existing bridge to toll-capable. In September 2011, the FHWA provided a supplemental EIS, which was prepared as a result of the design and funding alterations. The Supplemental Final EIS followed in April 2012. The revised ROD was published June 2, 2012, approving the modified Selected Alternative. The relevant state agencies and institutions involved in the Project entered an agreement authorizing the modified Project in July, 2012. The original suit was filed in September of 2012. The Design-Build contract was awarded November 12th, 2012.

Twenty claims made by CART against the Defendants were characterized by four themes; NEPA procedural mandate violations, FAHA funding regulation violations, threatening water and air quality, and civil right violations. Those claims of particular relevance for this study are mentioned briefly. CART claimed that the joining of the Downtown Crossing and East End Crossing bridges under the same EIS was an improper action; “For actions to be ‘connected’ under NEPA there must be more than mere relatedness or tangential association.” According to NEPA regulations, Connected Actions 1) automatically trigger other actions which may require environmental impact statements; 2) cannot/will not proceed unless other actions are taken previously or simultaneously; and 3) are interdependent parts of a larger action and depend on the larger action for their justification. The Court found them to be justified as Connected Actions under NEPA procedure.

Another claim of relevance was one regarding the potential for detrimental environmental impact. CART contended that the Defendants did not adequately address the placement and disposal of 350,000 tons of excavation material/spoilage, from a tunnel leading to the KY entrance of East End Crossing. The Court determined that this issue was adequately addressed in the Revised ROD. Two claims challenged the Supplemental Final EIS, contending that Defendants improperly applied the CWA Section 401 WQC permit for the East End Crossing after the ROD had been revised. In essence, according to the Court, the claims challenged the adequacy of the Defendants analysis and consideration of the potential environmental impacts.

Ultimately, the Court dismissed all claims against the Defendants on July 17th, 2013.[33] Construction of the Downtown Crossing began June 18th, 2013. Upon Appeal, the Sixth U.S Circuit Court of Appeals upheld the dismissal of the lawsuit on August 7, 2014.[34, 35] A separate lawsuit brought forth by the National Trust for Historic Preservation and River Fields was filed in 2009, and was settled in January 2013.

Substantial completion of the Downtown Crossing was reported on November 18, 2016. This was after three and a half years of construction, on budget and slightly ahead of schedule.[36] **Delay: Although several legal challenges were brought by the citizen group, the project was completed ahead of schedule - No Delays.**

2) North Carolina – Bonner Bridge Replacement Project Construction Status: On-Going



The 2.5-mile long Herbert C. Bonner Bridge spans the Oregon Inlet, connecting Bodie and Hatteras Islands of North Carolina, coastal barrier islands of the Outer Banks. Built in 1962, its service-life was nearly ended and replacement alternatives had been considered since 1990. The North Carolina Department of Transportation (NCDOT) and the FHWA issued a DEIS in 1993 and a 2005 SDEIS outlining the possible alternatives. A FEIS was issued in September of 2008, which included two alternatives of note: a replacement

bridge built close and parallel to the existing Bonner Bridge, and a longer replacement bridge that would bypass environmentally sensitive areas, including erosion-prone spots as well as the Pea Island National Wildlife Refuge located on the northern end of Hatteras Island. In response to numerous environmental-related public comments, a modification was made to the preferred alternative, in that it would include an adaptive management and joint planning process for future decision-making in the Southern portion of the Project area (Parallel Bridge Corridor with NC 12 Transportation Management Plan alternative). The longer, 17.5-mile alternative was determined to be impractical due to financial cost and significant funding necessary to construct a bridge of this length in one construction phase, in addition to reducing public access to the Refuge.[37]

A May 2010 EA detailed the changes that had occurred. On December 20th, 2010, NCDOT and FHWA issued the ROD approving the selected alternative, a 2.5 mile bridge parallel to the existing Bonner Bridge. A Design-Build contract was issued on July 26th, 2011 with construction scheduled to start in early 2013. A suit against NCDOT and FHWA was brought by the Southern Environmental Law

Center (SELC) on behalf of the Defenders of Wildlife and National Wildlife Refuge Association organizations in 2011, challenging the ROD and related documents.

NCDOT had also received the necessary water quality permit and USACE permits. The project also required a permit from the Coast Guard, as the bridge crossed navigable waterways. The Coast Guard will not issue a bridge permit until other necessary permits are obtained and a project is clear of legal challenges; therefore the project could not move forward while in litigation. The case was dismissed in federal court on September 16, 2013, the District Court denying claims that NCDOT violated NEPA provisions by selecting the parallel bridge alternative. Upon appeal in August of 2014, the Fourth Circuit Court of Appeals remanded, in part, the District Court decision. Specifically, the Fourth Circuit required the District Court review again federal regulations relevant to transportation projects in a wildlife refuge.⁴³ It must be proved that the DOT has eliminated or minimized harm to the wildlife refuge to the maximum capability, and has not inappropriately rejected other alternatives.

While this suit was ongoing, the Department of Environment and Natural Resources Division of Coastal Management issued the Coastal Area Management Act permit for the bridge in September, 2012. SELC challenged this permit issuance in October 2012 at the state level.[38] It ultimately led to the filing of a contested case with the Office of Administrative Hearings in August 2013. A settlement agreement was reached in June 2015, and the two related suits were officially dropped the following August.[39, 40] The settlement allowed NCDOT and partner agencies to move forward with the selected Bonner Bridge replacement, per conditions regarding a separate NCDOT Outer Banks project. The Design Phase had been completed in 2013 as per the original contract, further progress with construction phase delayed by litigation.[41] Construction started in March of 2016 with completion expected in 2018/2019. **Delay: Approximately three years behind planned construction start date.**

A summary of the delays for the SASHTO projects above is provided in Figure 3.

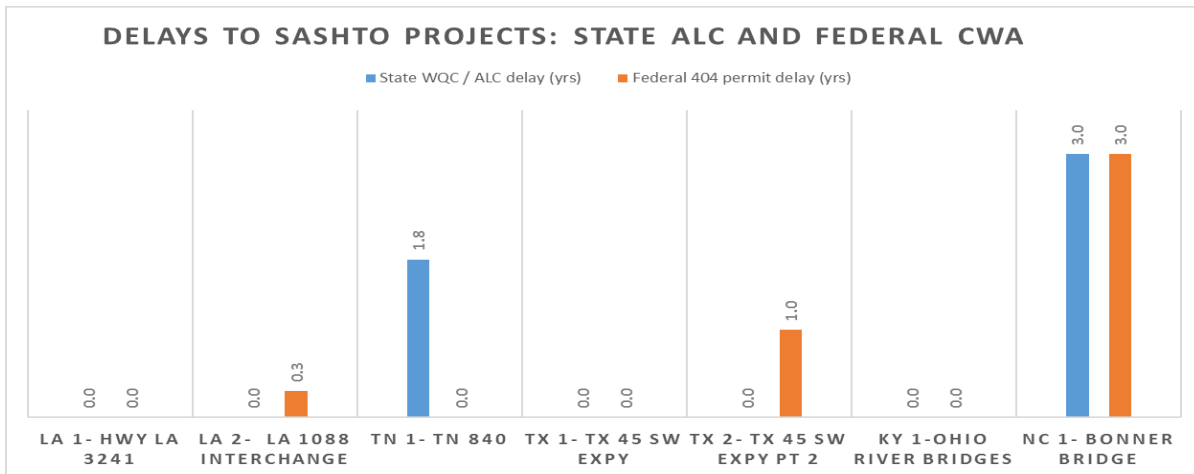


Figure 3. Delays to SASHTO reported highway projects based on whether the delay occurred 1) as a result of the appeal of the Section 401 WQC permit, or 2) due an appeal of a Section 404 wetland permit or modification involving Federal issues

IV. Summary and Comparison of Highway Projects Subject to Delays

A. Delays incurred at the time of Construction Approval/ Record of Decision

1. **NC - Bonner Bridge Replacement:** The ROD for this project was published in 2010, the Design-Build contract issued in July of 2011 and construction anticipated to begin by 2013. The ROD was challenged in 2011 by SELC and their clients, and the litigation occurred in federal court as the legal challenge also referenced NEPA violations. The court did not issue a decision (upholding NCDOT ROD) until September of 2013, and further appeals continued until 2015 when a settlement was agreed upon. Construction began in March of 2016, approximately three years behind the planned timeline. The suit also incorporated a similar challenge in state court challenging a CMA permit in 2012, which led to a filing of a contested case hearing with the NC Office of Administrative Hearings. This challenge was included in the settlement agreement.

Delay: Approximately three years.

B. Delay Incurred at State WQ Certification

1. **SC - I-85-385 Interchange:** SC DHEC had approved the Section 401 WQC permit in February, 2016, after which a local resident challenged the permit on grounds that the project was impacting his property, specifically trash flowing from a drainage culvert. DHEC staff responded with a request not to conduct a final review, providing justification. The decision of the DHEC Board of Review was to not conduct a final review as requested by the plaintiff. At this point, the plaintiff could have appealed to the ALC for a contested case at which time the Automatic Stay is triggered. The plaintiff did not pursue the complaint further, though the process of awaiting SC DHEC's decision and any additional action by the plaintiff caused an approximate 60-day delay. After the Section 401 WQC permit complaint was filed, minor ground clearing activities continued, however the process of obtaining the Section 404 permit and proceeding with construction activities was delayed. **Delay:**

60 days.

2. **SC- US 601 Bridge Replacement:** SC DHEC approved the Section 401 WQC in June 2006, approximately one year after application, but with additional special conditions. SCDOT appealed to DHEC Board for review and after review, SCDOT files for a contested case with ALC. SCDOT contests the special conditions of the permit and permit issuance is stayed. ALC rules in 2008 that special conditions be removed and WQC be issued. In October 2006, Environmental groups and SCELPA challenged the USACE finding of no significant impact (FONSI) in federal court (10,11). The case was heard in 2008 and an additional Environmental Assessment (EA) was required to be completed by FHWA and SCDOT. The EA was completed in 2010 and the construction contract was awarded in 2010 and construction begins. A second federal case was filed in 2010, challenging the sufficiency of the second EA; the federal court in April 2011 ruled the EA to be sufficient. **Delay based on Section 401 WQC permit challenge by SCDOT: 2 years; Delay based on 404 permit: 4 years. Total delay: 4 years**

3. **SC- International Drive:** The Horry County project did involve an Automatic Stay. After the SCDHEC Review Board decision not to review the Section 401 WQC permit, SELC petitioned the ALC for a contested case hearing. The time necessary to arrange hearing dates, hear testimony, and for the court to render their decision, took approximately one year. The original

Section 401 WQC permit was issued in July of 2015, SELC filed in September, and the ALC court upheld the 401 in July, 2016. An additional delay occurred at the federal level. After the Section 401 WQC permit was upheld, SELC challenged the federally issued Section 404 permit in district court. An injunction was granted in September, 2016, halting activities for two months (49 construction days) before the district judge dissolved the order. This delay is brief compared to the Section 401 WQC permit delay; however, there is still potential for SELC and plaintiffs to appeal the decision and push back the project timeline. In comparing the Automatic Stay observed in the International Drive case and the potential for one in the I-85/I-385 Interchange case, the burden of proof should be considered. Had the plaintiff pursued the complaint and requested a contested case hearing with the ALC, SCDOT would have been required to show that no irreparable harm was occurring. Regarding the project development and permit details for I-85/I-385 Interchange, it is evident that best management practices were in use and that SCDOT was not deviating from standards or responsibilities. While this may have been proven in court, there would have been the necessary delay for arranging hearing dates, allowing testimony, and court decisions. This scenario did not occur, though the potential for it was a cause for concern to SCDOT. **Delay based on Section 401 WQC permit: 362 days; Delay based on 404 permit: 49 days. Total delay- 411 days.**

C. Delays Incurred At US ACOE permit / state WQ certification

1. **SC- Carolina Bays Parkway:** An on-going project that has been constructed in several phases over a period of approximately 17 years. A two-year delay occurred when the state attempted to let the third phase for construction in 2011, which required a modification to the USACE 404 permit. Because the projects were built separately, this delay occurred before construction was given the go-ahead. **Delay: Approximately three years**
2. **SC - ACE Basin:** Similar to the Carolina Bays Parkway, in that the project was built in segments. ACE Basin required separate Section 401 WQC and Section 404 permits. Discussion and clarification of mitigation requirements as related to the 404 permit exceeded the allotted permit procurement period. **Delay: 6 months, or 118 construction days.**
3. **LA - Highway LA - 3241:** A proposed four-lane arterial highway connecting I-12 to Bush in St. Tammany Parish, LA. The LADOT is currently working on the mitigation plan development before submitting applications for 401 and 404 permits. The project's first 404 permit was submitted in 2006 and has been through various negotiations. **Delay of approximately four years** has occurred, but prior to permit being issued.
4. **LA - The LA - 1088 Interchange project:** A new construction, adding access points to I-12 in St. Tammany Parish via a new interchange where LA-1088 crossed over I-12. Interchange changed from diamond-cloverleaf combination to diamond which increased area of disturbance, Additional 404 permit modifications based on design changes; no work stoppages. Delay occurred after permit had been obtained and construction begun, due to deviation from USACE permit stipulations. **Delay: 114 days.**

D. Legal Challenge with no Delay in Project

1. **KY - Ohio River Bridges Project:** This litigation occurred in federal court as the challenge grounds included NEPA violations. The suit occurred in September of 2012, two months after the ROD had been finalized. The Design-Build contract was awarded in November of 2012. The district court dismissed the claims in July of 2013; construction had already begun a month previously. The Court of Appeals upheld the District Court decision in August of 2014. Without an injunction order while litigation was ongoing, and with permits in place, the project was able to proceed in the midst of the suit. The KY portion of the project, the Downtown Crossing, was completed a month ahead of schedule. **No Delay**
2. **TX - 45 Southwest Expressway Project:** This challenge was on grounds of NEPA violations, in particular the requested requirement of an EIS and a preliminary injunction on the project until this requirement was met. TxDOT had conducted its own environmental study of the project area, as the project was not receiving federal funds which would require the adherence to NEPA guidelines. The construction contract had been awarded in July of 2015, with the lawsuit filed in February, 2016. While the District Court did require TxDOT to consult with the USFWS regarding ESA regulations, the Court decision in October of 2016 dismissed the request for an injunction, primarily because the plaintiffs did not have a reasonable chance of winning their case; the project did not qualify as a federal action. As the project was still in the design phase, the litigation does not appear to have delayed the project timeline thus far. However, the plaintiffs have indicated that they intend to pursue the suit in January of 2017, so there is potential for construction delay. **No Delay to date**

E. Challenge while Construction Ongoing

1. **TN - 840:** The specific litigation discussed for this project regards a suit that was filed in August 1997, in District Court, requesting a preliminary injunction on the on-going project until a more thorough EIS was completed. The EA’s for the project had been conducted in 1989 and 1990; the suit was dismissed in September 1997 primarily because it exceeded the statute-of-limitations, which was six years from the time of the action. While appeals were made, the court did not approve any injunction; construction could continue while litigation was ongoing. The overall project had initially been planned as a loop around Nashville, however the northern portion has been on indefinite hold since 2003 due to budget constraints and environmental concerns. The southern loop was completed in 2012. The southern loop was delayed for approximately 22 months. Specific anticipated completion dates are unclear for the northern loop; TDOT had indicated the project would not be complete any sooner than 2018.

These delays outlined above are summarized in Table 2 and in Figure 4.

Summary of Delays	States with reviewed projects	Number of projects provided for review	Average time of delay (yrs)
Delays incurred at the time of Construction Approval/ Record of Decision	NC	1	3
Delays Incurred at State WQ Certification	SC	3	1.05
Delays Incurred At US ACOE permit / state WQ Certification	SC, LA	4	1.7
Legal Challenge with no Delay in Project	KY, TX	2	0
Challenge while Construction Ongoing	TN	1	1.83

Table 2. Summary of delays for projects reviewed by delay type

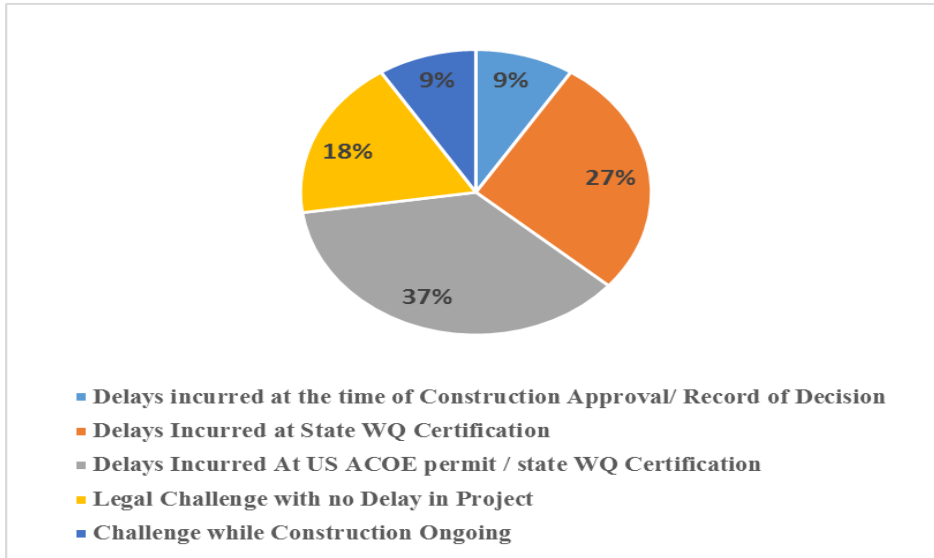


Figure 4. Percentage of delays incurred for various challenges to the permitting process for SASHTO reviewed projects.

Based on the review of the sites, the time frames of the delays and the whether the state has an automatic stay provision within its State Administrative Code, the following summary is provided in Table 3. The table does not indicate a strong correlation between states with automatic stays and length of delay. However, for those states that do not have an automatic stay, except within their bankruptcy code, those states either had no cases to report, did not respond to our inquiries or based on independent research, even with a challenge, the project was completed ahead of schedule. This apparent correlation, however, is based primarily on a lack of response from the specific states and not specifically on a review of projects and, therefore, a conclusion that there were no associated delays, should be limited by the number of sites available.

Of the eight states with automatic stays within their administrative code, five reported projects with delays at some stage in the process. Our findings determined that of the three common scenarios when challenges are brought, only one is subject to the state automatic stay (the appeal from the Section 401 WQC permit decision or other state permit challenge). Therefore, based on our findings that of those sites which had delays based on a Section 401 WQC permit issues, only three sites had delays. Of those three highway project sites, only two of three state projects that had delays, also had an automatic stay (SC and NC have automatic stays and KY does not). (See Figure 1). Given the variability of the time of delays and the reasons for the challenges, changes to the automatic stay provision, may impact challenges to the DHEC Section 401 WQC permit or other DHEC CWA permits, but the majority of the delays have been caused by challenges in Federal Court to USACE section 404 wetland permits or NEPA challenges.

<i>State</i>	<i>Automatic Stay in State Adm. Statute of Reg.</i>	<i>Information re: Hwy Project Delays</i>
AL	No	State not aware of any recent projects involving stay
AR	Yes-Adm. Code/mining	No appropriate projects
FL	Yes- Adm. Code & App. Proc	No response to request
GA	Yes- Public Serv. Comm	No projects with environmental issues at legal level
KY	No	State provided no project; project included based on research- challenges but completed ahead of schedule
LA	Yes- Adm. Code, Env Quality	Two projects provided; delayed at design or 404 permit stage; automatic stay not used. Delays of 114 days to ongoing delay
MS	No	No response to requests
NC	Yes- relates to air permits	State provided no project; project described based on research- ongoing delay of 3 yrs
SC	Yes- Adm. Law Court	Five sites: Four with delays ranging from 30 months ahead of schedule (with challenge) to 2 year delay. 1 site with no delay.
TN	Yes- Adm. Proc. Act	One site with 22 month delay with Automatic stay
TX	Yes- Civil Practices and Remedies	One site with delay based on NEPA; delay continues
VA	No	No awareness of projects involving injunctions
WV	No	No response to requests

Table 3. Summary of SASHTO states with automatic stay and highway project delays.

V. Summary and Conclusions

This study was designed to evaluate delays occurring during the highway construction process, specifically as related delays resulting from the Clean Water Act (CWA) permitting process and to evaluate how other state Departments of Transportation in the Southeastern Association of State Highway and Transportation Officials (SASHTO) (with the exception of Puerto Rico) respond to these impacts. The delays that were caused by potential impacts by the construction projects to wetlands and streams under the CWA were the focus of the study inasmuch as these are the issues that have historically received challenges. While other NEPA challenges have been brought for issues such as noise walls, bears, etc., the primary intent of this study is to evaluate those issues that require USACE permitting and DHEC water quality certification. In addition, the appeal process for a USACE permit issuance was reviewed to determine the impact on potential additional delays. While the focus of this study is on the delay impact to SCDOT and other SASHTO state DOTs, other government agency construction requests for Section 401 WQC permit and section 404 wetland permitting requests were reviewed for delays and impacts related to ALC actions.

A questionnaire was developed to assist with obtaining uniform information related to each SC highway project studied and to ensure that necessary dates, time frames, and delay issues were reviewed. Information to complete the questionnaires for South Carolina projects was obtained by a review of the SCDOT file, the SCDOT website information, and from in-depth interviews with the appropriate project engineers and are included in Appendix I. Information for projects in other states was obtained by interviews, electronic communication, DOT website reviews and other publically available information (i.e., newspapers and non-governmental websites). Based on project information obtained from SCDOT and other information, five highway construction projects were reviewed in South Carolina; four of which experienced delays in their project timelines, and six projects were reviewed from other SASHTO states. The delays for all of the projects reviewed can be apportioned into four distinct categories: projects with no delays, project delays occurring at the stage of DHEC issuing the Section 401 WQC permit project delays occurring during the USACE section 404 permitting or permit modification process and those delayed as a result of NEPA challenges.

Of the five highway construction projects reviewed in South Carolina, four experienced delays in their project timelines. Three of these involved or potentially involved the ALC; two SCDOT projects: the I-85/I-385 Interchange and the Carolina Bays Parkway, and a county project: The International Drive project. The fourth project, the ACE Basin, was delayed by agency and 404 concerns.

For those projects which involved a delay at the ALC, the first project, the I-85/I-385 Interchange, delay was due to a complaint filed by a landowner for a review of the DHEC decision. Although DHEC declined to review and the landowner did not pursue the case past the DHEC decision not to review, the 30-day period available for a contested case to be filed with the ALC had been triggered. The process of awaiting decisions by DHEC and the plaintiff's time frame allowed for appeal, delayed the active project timeline by two months. The second project, the Carolina Bays Parkway, litigation, involving a right-of-way disagreement with a developer, went to the ALC, though there were significant related communications attempting to resolve the issue that occurred before the complaint was filed. According to available documents, the conflict was resolved via settlement a month after the Section 401 WQC permit had been issued. The third project delay, associated with the International Drive project, is approximately one year, from the initial notice that the Section 401 WQC permit would be

issued was on June 25, 2015 to the ALC court decision on July 7, 2016, upholding the Section 401 WQC permit.

The other significant source of extended delays was regarding USACE approval of 404 permits or permit modifications and with mitigation and permitted area compliance. The longest delay in the SC projects was a two-year delay in the Carolina Bays Parkway project, which was due to a USACE-prompted re-evaluation of mitigation requirements and compliance. The fourth project reviewed, the ACE Basin project, proceeded without any significant interference from outside agencies, though it too experienced a delay of 118 days while on an active timeline due to necessary communications with USACE regarding mitigation.

In response to the SCDOT and our team's request for information from the SASHTO state's representatives, project information for review was received from three SASHTO states, Louisiana, Tennessee, and Texas. The projects from LA did not involve litigation, but delays incurred from issues with USACE-issued permits. One project was delayed in the design/planning stage for approximately four years due to additional environmental review and a change in the alignment of the proposed action for the I-12/1088 Interchange. The second project, the LA- 3241 Highway, required a mitigation modification due to deviation from the issued 404 permit, however this modification was made in a three-month period (114 days) and did not impact the project timeline. The projects referenced from Tennessee and Texas involved delays with litigation at the federal level. The on-going status of the Texas projects considered presents a challenge, as future delays or continuations of current litigation are still possible. The federal lawsuit in Texas for the state-funded TX-45-SW did not delay the selection of a contractor, which was able to take place while the case was still being decided. However, the overall planned timeline of the project was pushed back approximately two years. As the project is still in early stages, if the litigation is pursued as indicated, it is possible construction timelines could be impacted.

Outside review of case material for North Carolina regarding the Bonner Bridge Replacement Project illustrated a similar use of the ALC by plaintiffs. While the main litigation regarding this project occurred in Federal court due to the challenge of NEPA regulations, the case also had a component in state court. When a request for a state-issued bridge permit to be reviewed was denied, it was taken to the Administrative Office of Hearings as a contested case. This prevented an additional and necessary bridge permit from the Coast Guard to be approved while the lawsuit was ongoing, as the Coast Guard will not issue permits to projects with active legal challenges.

In summary, the environmental related delays reviewed for highway construction projects for this report, include: 1) no delay resulting from a challenge to a permit, 2) delays related to challenges of the state WQC and state court actions, 3) delays resulting from challenges to the USACE section 404 permit or modifications thereof, in federal court and 4) delays from challenges to the project pursuant to NEPA or Endangered Species Act concerns in Federal court. Based on the construction projects reviewed in South Carolina, the average length of delay was slightly longer for Federal Court challenges related to 404 permits (1.6 years) versus state court 401 WQC challenges (0.9 years). However, based in all construction projects reviewed, the length of delay was similar between Federal Court challenges and state court challenges with each being approximately 1.5 years.

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APPENDIX I
Questionnaires

Project Name: ACE Basin/US Route 17 Widening of Segments 1, 2A, and 2, Combahee and Ashepoo River Bridge Replacement

Person to Contact: Claude Ipock

Contact Information: IpockCR@scd

Location: From US 21/17 intersection in Gardens Corner to SC 64/US 17 intersection in Jacksonboro in Beaufort and Colleton Counties

Project Synopsis: Adjusting the 2 lane highway to a 4 lane to improve safety and prepare for a future influx of traffic volume, all while protecting the natural and scenic environment of the ACE Basin.

Type (Is this a new project/build, a repair, or an adjustment to an existing roadway): Adjustment (expansion/widening of an existing roadway primarily along with bridge renovation) **Automatic Stay Issued:** No automatic stay **Bid Build or Design Build:** Design Build

1. What is the size of the project (in terms of acres and/or linear miles)? 22 miles total: Section 1- Gardens Corner to Combahee River (5.83 miles), Section 2 – Combahee River to SC Route 303 intersection (5.2 miles), Section 3 – SC Route 303 to Jacksonboro (11 miles).

a. Were there any adjustments to the size of the project as it progressed? No

b. If so, what type and/or size? It is important to note that there were two project segments from a permitting, design perspective, with Segment 1 broken into Phase I, II, and III (where we then added into Colleton county), with 21.5 linear miles, including bridges. Phases I through III might have been 3 different projects, depending on their regional production groups (RPGs). 1st section went relatively according to plan; delays associated with permitting for second section

2. How many acres of wetland/streams/areas of environmental concern were proposed to be impacted or required to be mitigated on the original/pre-automatic stay corridor? Just the bridge would involve 7 wetland sites (2.15 acres of freshwater marsh). Project would include conversion of ~75 acres of wetlands to non-wetland habitats. Project's right of way limits has 183 wetland acres. Mitigation methods include debiting of the Huspah Creek Mitigation Bank (pg. 7) and debiting of the Sandy Island Mitigation Bank (pg. 21). Minimization method used also- 2:1 slope along causeway and bridge approaches to protect adjacent wetland areas. Original permit included impacting 57.7 acres of wetlands

a. Did that acreage adjust by the termination of the project? Yes

b. If so, by how much? Original plans had the areas of impact at 125 acres, but through studies with Resource Agencies it went down to 57 acres (by 2005). The 183 acres is expected to decrease to ~75. Because of vetting and then revisions (such as additional bridges, multi-use lanes), it was brought down from 74 acres to 57.7.

3. How would you describe the area adjacent to the corridors (such as: wetland, upland forest, urbanized, etc.)? Mostly agriculture and forestry~ Beaufort County, natural conservation district in Colleton County along the US 17 corridor (pg 9, 3.1). Project area described as 95% rural. Some development (such as residential, commercial property/business), marshes, river (Combahee), large old growth oaks at plantation entrance. Timberland, wetland, and agriculture

a. Is or was there a concern for potential impact to the surrounding corridor? Historic battery, plantation gates, Donnelly Wildlife Management Area because of the road widening and bridge building. Also, Combahee Ferry Historic District could be eligible for the National Register. 1/3 of area is located within ACE Basin. Colleton County is primarily zoned as a Resource Conservation District (stricter development rules). Decrease the scope of the 17/21 interchange configuration, steepening side slopes, using M&E walls, lengthening bridges, decrease typical sections along the causeways, built in a 100 year floodplain (but no apparent risk, and may affect but not likely to adversely affect three endangered/threatened species. Biggest issues are: archaeological site 38BU1216 (found in Segment 1 Phase I and II) but Section 4(f) doesn't apply, creation of Combahee Ferry Historic District (not really a

concern though because it won't impact/cause 4(f) issues, and public boat ramp (doesn't impact 4(f)). 6 documented contamination sites and 3 potential sites on the project (2 sites issued a letter of No Further Action). Preferred alternative will impact ~75 acres of wetland (conversion to non-wetland). Archaeological site 38BU1216 and 183 wetland acres within right-of-way limits.

4. If the proposed roadway is in an environmentally sensitive area, why was it selected? The roadway already exists in the area, and required expansion for unavoidable, safety and traffic improvements. Also, within Colleton construction/upscale development is encouraged. Project area is approximately 95% rural. There should be minimal impacts to wetlands within the area in the future.

a. Were there alternative review findings? The area would still be dangerous (in the case of no build). Alternate paths assessed if expansion to the north or south side of current would have different environmental impacts. Chosen path is a combination of alignment shifts, more flexibility when encountering resources that need to be avoided or minimally impacted.

5. Did outside agencies have issues/concerns regarding the project? Yes. Agencies involved in project included Ace Basin Task Force, Federal Highway Administration, Environmental Protection Agency, US Army Corp of Engineers, US Fish and Wildlife Service, National Marine Fisheries Service, Beaufort Marine Corps Air Station, SC Department of Natural Resources, SCDHEC, SCDHEC Office of Ocean and Coastal Resource Management, SC Department of Archives and History.

a. If so, which agency and what was their issue/concern? USFWS stated that there would be no likely adverse effects on the wood stork or bald eagle if DOT listens to their suggestions. USFWS: wanted steeper side slopes (1:5:1) of those impacting wetlands. EPA: EA didn't address direct, secondary, and cumulative impacts as well as it should have and it's not sufficient to support issuance of a permit at this time and are unable to determine if DOT chose least environmentally impacting design plan. Also, they are the only agency which doesn't want to use Sandy Island for wetland mitigation (in a separate meeting the on Dec. 20, 2005 when before all in-state/fed agencies agreed that Sandy Island would suffice to provide mitigation for this project. Also note that no further details have been provided on the proposed compensatory mitigation plans, which is essential for EPA approval. Also concerned with bridging across the floodplains to minimize impacts of flood flow and wildlife corridors.

Southern Environmental Law Center: because of the destruction of up to 75 acres of wetlands, they don't think that the particular project design is good enough (lacks linear buffers and curb cut limits). Also want further exploration into an EIS and states that EA failed to look at an adequate amount of alternatives. They also challenged section 4(f) for the Old Combahee Ferry Landing stating that EIS should be prepared. NOAA noted that no Essential Fish Habitat (EFH) had been submitted in November 2005. At the end of the day, the EPA was on board by 2005.

Medians: EPA: widen medians in areas of uplands/low quality wetlands. DHEC: wants plans showing wider medians. ACE: try to stay within 75 acres of impact that went out on public notices. USFWS: didn't want medians to attract wildlife.

Environmental Documentation: EPA: document needs to do a better job of addressing the indirect and cumulative impacts to wetlands and borrow pits selection (need more clarification). DHEC: coordinate restrictions on open burning if applicable.

Wetland Mitigation: EPA: wants a better job if looking for other mitigation sites within the watershed. USFWS: agrees with using Sandy Island but the project should receive all the Island's remaining credits. Corps: yes to Sandy Island if BI service area includes ACE Basin area and BI approved by all agencies. DHEC: all remaining credits should be debited for this project on Sandy Island.

Sandy Island (SI): USFWS: management issues with the Island and would like SI conveyed over for management. DHEC: SI should be cleared out with US 17 project. EPA: at first didn't accept SI but as of Jan 26, 2006 accepted SI as wetland mitigation

1,200 acres from SI debited to compensate for freshwater impacts, and the whole island was taken for debits (1600 acres). Tidal water impacts debited from Huspah Creek mitigation bank. Huspah Creek:

original impacts to tidal water were 5.72 acres. 376.05 credits were at the agencies' request, and they got the Island to count for that. This was the main issue for 404 permit modification 5 in 2009, which is why the Island went to the Nature Conservancy. Specifics of delay: Needed clarification and modification of utilization of Sandy Island Mitigation Bank credits. Initial project requested 376 credits. Ended up transferring title of Sandy Island to Nature Conservancy (around or more than 1000 credits) SC Archives and History Center: potential dispute the Edmondsbury Chapel and Temple of Sport Archaeological sites, but with recent plans DOT is avoiding both sites (minimization of impact to 38BU1216 as of Feb. 22, 2006.

DOT requested DNR's concurrence of no significant impacts to Donnelly property 3/9/06. Feb. 8, 2006: NOAA: indicated the project will adversely impact ~4.91 acres of estuarine emergent wetlands and 10.83 acres of freshwater marsh. Local mitigation banks are driven by perimeters. The farther away you are from the project, the higher the ratio will be.

b. Were these issues, as well as the responses to those concerns, made publicly available?

If so, where were the concerns/responses located at the time and are they still publicly available?

After FONSI, DOT and agencies still talked about Sandy Island.

c. Were the concerns/responses incorporated into any project modifications? USFWS: no, because steeper slopes would be more expensive and less safe for travelers. EPA: the DOT notes that contractors are held responsible to ensure that their design is complying with the restrictions put in place via the 404 permit. Also in this section specifies that the Ace Basin project will impact 57.7 acres of wetland. Noted that due to low probability of further development in the area, expected cumulative/secondary impacts are low. DOT will have 3 major wetland/open water crossings to reduce impacts to floodplain and wetland. Southern: (destruction) DOT mentioned that design features make sure that impact to environmental resources is minimal and adjust to audience needs i.e., eliminated linear buffers because of public opposition. (EIS): DOT stated that an EIS isn't necessary. (Alternatives): DOT mentions that they did and the preferred was the best one. (4(f)): an evaluation was completed on the Combahee Ferry Historic District and conclusion was that there are no feasible alternatives to avoid impacts to these alternatives. Medians/Env. Doc./Wetland: DOT will provide agencies with plans and documents reflecting this change, DOT and FHWA will write FONSI with environmental commitments, addressing comments received on EA, and more recent information on the project. DOT will show why Sandy Island is a good choice.

Feb. 8, 2006: DOT's proposed mitigative measures are sufficient enough and the National Marine Fisheries Service is ok with the project DOT submitted the EFH in January 2006/approved Feb 2006 15 ft median changed to 24 foot grassed median, including a 10 ft bike path. Also, mitigation bank credits decreased to 1,000 from Sandy Island because of additional avoidance and minimization efforts notes that no agency in consultation has offered mitigation opportunities; either privately owned land in area, or land has already been preserved. One solution offered was the Plum Creek Properties, however the tract of wetlands they were interested in was sold to private developer. Sandy Island Mitigation Bank plan is one of the only feasible plans that is in the same watershed. Jan 2006 meeting concluded that 1000 credits would be debited from Sandy Creek Mitigation Bank to compensate wetlands impacted from US 17 widening (pg 10). Also, the design was modified with some of these concerns; the EFH was included and suitable activity restrictions were put in place. The mitigation plan was further developed and justified.

6. Did the public have issues/concerns regarding the project? Yes, however we might also want to see if other projects were also safety funded.

a. If so, who were they and what was their issue/concern? Valerie Marcil (State Historic Preservation Office archaeologist) look at all sites composing 38BU1216, consider designs to minimize adverse effects, develop comprehensive mitigation plan that truly shows the importance of the site and effects of the project. Rodger Stroup (State Historic Director) there will be adverse effects to site 38BU1216, so

they want to minimize adverse effects through design and replacement and provide size appropriate mitigation.

From the November 7 and 8 meetings in 2005. Refer to pages 3 to 6 in FONSI- (Noting only comments that relate to environment) Several comments regarding need for wildlife passage, need to preserve old growth oaks, construction of road at two swamp crossings near Nemour Plantation, and want for boat ramp and construction activities to avoid impacting old growth trees.

b. Were these issues, as well as responses to those concerns, made publicly available? Yes with the FONSI along with the responses. Most concluded that the concern had already been noted and minimization of impacts was part of the design.

If so, where were the concerns/responses located at the time and are they still publicly available?

Found in the EA. All public comments received from Nov. 7 and 8 meetings were published in an official public hearing transcript found in the Project Development Office at 955 Park St., Columbia. FONSI was the last document with public comments. However, besides EA and FONSI, public comments were published in local gazettes (like the Beaufort one).

c. Were the concerns/responses incorporated into any project modifications? Most of the concerns listed in the FONSI were defended by the project EA. Some modifications that did take place included: (pg 24)

- Widening of the median along the entire corridor.
- additional endangered species/wetland surveys were conducted to assess potential impacts
- water areas impacted by the additional widening will be bridged
- also see meeting minutes, around pg. 44. Meeting occurred in December of 2005.
- According to DOT, all of the concerns were addressed in the EA, but the few that weren't (as dozen or so), were modified into the FONSI as Environmental Commitments

Did Question 5 and 6 impact the timing of the automatic stay?

Was there a deadline to answer the public's/agencies' concerns?

7. If applicable, how have you modified your project application based on concerns/responses to your project? (revisions based on public commentary are mentioned but not specified) most revisions to the project that were public concerns had already been brought up by agencies and were being addressed. Other public concerns were deemed unavoidable, such as the impact on old growth trees. A set of preliminary plans were distributed to the Agency Coordination Team during development of this project and each agency was asked to delineate any areas of concern on the plans.

SCDOT then developed avoidance or minimization measures for these resources.

Widening medians in certain points with additional cultural resource surveys, wetland delineations, and surveys for threatened and endangered species conducted and found additional wetland resources. 3 wetlands will be bridged to minimize impacts, incorporation of multi-use paths located closer to roadway in sensitive areas and reduced from 10 to 6 ft and these areas will be traversed with structures to avoid wetland impacts. Overall, 22% reduction in impacts due to avoidance and minimization issues (4/7/06). Please ask about the Environmental Commitments section on pages 26 – 27

- a. **How many times has this occurred?** Only modification after design construction was the permit delay (can't get permit without addressing concern)
- b. **Did this significantly adjust your time frame? How so?** Time wasn't specified; I don't believe these revisions created any notable delay. Several of the letter exchanges discussing the FONSI are dated around December of 2005 and January of 2006, with final exchanges around April of 2006, so concerns appear to have been addressed within a few months of the initial FONSI submission.

8. How was the contested case initiated, thereby resulting in an automatic stay?

- a. **What reason did the court use to issue a ruling for an automatic stay?**

9. How long did it take for DOT to show that no irreparable harm will occur within the permitted project, allowing DOT to resume?

a. What was included in this time frame (i.e., from issuance of an automatic stay to lifting it and resuming work)?

10. What did DOT have to do to show that no irreparable harm will occur?

11. The steps below explain the process of implementing a DOT project. Please provide the date each step was completed.

a. Funding approved for the project: Application sent December 2005. Initial funding for Seg. 1 was August 4, 2004 PE (preliminary engineering)

What percentage was federally funded versus state versus other?

Segment 1 was a safety-funded project (were 90% is paid by the feds and 10% by the state, but 80/20 is more typical). Side note: Safety-driven projects don't necessarily receive greater public support (ex. Opposition to safety-driven treecutting on 26). 44.6% federal, 51.7% state (state infrastructure bank money), and 3.7% local for a total of \$197 million.

b. Construction plan approval: Plans distributed to various resource and regulations agencies 01/20/2006 EA approved September 16, 2005.

c. If required, submission of material for DHEC's 401 certification: June 2, 2006

i. Date of issuance of DHEC's certification: Segment 1 is unknown, but Segment 2 was January 21, 2011.

ii. Contested or appealed? No

iii. Date of final resolution of permit and issuance:

September 10, 2009 (revised version of project). 401 permit approved for Segment 2 on January 21, 2011

j. Submission of permit request for ACOE's 404 wetland permit: Submitted August 2005

Date of issuance of 404 permit: 1: Sept 14, 2006.

2: submitted application on July 14, 2010, revised December 14, 2010

ii. Appeal of permit? No

iii. Date of final resolution of permit and issuance:

September 14, 2006. This permit was modified 7 times (first 5 were for Segment 1, the last 2 were for Segment 2). Permit modification 6 dealt with Sandy Island (mitigation credits), which was a result of the (6 months) 118 day construction days delay in 2010 which cost \$200 million (because they were on contract). There is an initial procurement period for permits, if the time needed exceeds this, starts causing construction delays. 118 days surpassed it.

October 2009, modification 5 was established. Segment 1: 404 permit approved September 14th, 2006. 2005-IT-260. Section 2: Submitted 404 permit application (believe initial app was July 14th, 2010, state revised December 14th, 2010, approval of mod on Jan 21 2010 with 401)

e. If required, completion date of revised construction plans based on permit:

i. Approval of revised construction plan:

Once 404 (in 2010), they had to re-baseline CPM schedule, granted contractor 118 days settlement directly related to critical path (for the entire Segment 2), which means 118 days delayed, which ended up as the final date

f. Construction begin date?

What would you define as the begin date (i.e., when site staked, equipment arrived on site, when soil was disturbed, etc.)? Work start date

(notice to proceed): March 1, 2007 for Segment 1. Second segment: Notice to

Proceed (NTP)/ begin date was May 18 , 2010. With the NTP: you may begin clearing ground/shrub while design process takes place, as no time is set aside for design portion of project

g. Date of automatic stay requested/initiated:

i. Date when the automatic stay is lifted:

ii. When work resumed:

h. When the project was completed:

i. What would you define as completed (i.e., is there still equipment on the site, etc.)?

SWC (Substantial work completion): all lanes are [that are] usable by the public. This was May 27 , 2011 for Segment 1 and October 30 , 2014 (Cait has October 30 , 2013) for Segment 2

12. Were there other issues that caused delays during the project?

13. Of all of the delays to the project: Delay cost about \$2 million for 118 day delay because under contract.

a. What caused the longest delay?

b. What caused the shortest delay? CSX railroad issue/delay: issue with DOT going over the railroad and the right-of-way, on Segment 2, but it didn't add on time because this occurred during the permit delay (118 days). 2010, railroad issue, clarification on railroad

Other permits issued: US Coast Guard Section 9 for Combahee and Ashepoo River

In the back of the FONSI is a Memorandum of Agreement which was established between GHWA, SCDOT, SC Historic Preservation Office 11/15/2005.

Project Name: I-85/385 Design Build Interchange Project

Person to Contact: Jack Valetti

Contact Information: Email: Jvaletti@scdot.org, Phone 864-603-5640

Contact Position: RCE

Location: 430 Roper Mtn Road-- Suite B, Greenville SC

Project Synopsis: Reconstruction of the Interstate 85 and Interstate 385 interchange (ADT 2015 225,000:ADT 2035 350,000) and resurfacing with Cross Slope Correction on 9 miles on I-85. Design Build project delivery method in place where the contractor (The Flatiron-Zachry Joint Venture) performs the design, permitting, and construction of the project. Design Started 10/30/2014, Construction started 12/15/2015, expected completion 11/21/2019. \$231 Million dollar bid price for Design and Construction, \$27 million dollar budget for construction inspection services.

Type: Reconstruction of an existing interstate interchange

Automatic Stay Issued:

1. What is the size of the project (in terms of acres and/or linear miles)? Disturbed area = 149.5 acres; Permitted area = 306.8 acres.

a. Were there any adjustments to the size of the project as it progressed? Not at this time. **b. If so, what type and/or size?** N/A

2. How many acres of wetland /streams/areas of environmental concern were proposed to be impacted or required to be mitigated on the original/pre-automatic stay corridor?

Open Water Fill: 0.015 acres

Stormwater pond Cut Impacts: 0.110 acres

Stormwater pond fill Impacts: 0.048 acres

Wetland fill Impacts: 0.242 acres

Stream Armoring Impacts: 47.0 LF

Stream Culvert Impact: 126.0 LF

Stream Fill Impacts: 592.0 LF

Stream Piping Impacts: 305.0 LF

Did that acreage adjust by the termination of the project? Not at this time.

a. If so, by how much? N/A

3. How would you describe the area adjacent to the corridors (such as: wetland, upland forest, urbanized, etc.)? I would estimate 70% Urban (Commercial/Service), 10% Urban (Manufacturing), 10% Urban/Suburban (single family residential/Multifamily residential), and 5% Urban (tree cover/Brush/Wetland/Streams)

a. Is or was there a concern for potential impact to the surrounding corridor? Yes, many steep slopes of 1.5:1 and retaining walls to minimize impacts to surrounding properties.

4. If the proposed roadway is in an environmentally sensitive area, why was it selected? Primary Reason: To improve the operation efficiency of the existing interchange to accommodate existing and future traffic volumes. Secondary reason: to improve the safety of the interchange.

a. Were there alternative review findings? Yes, seven (7) alternative designs plus a ‘No-build alternative’ were evaluated during the initial NEPA review process.

5. Did outside agencies have issues/concerns regarding the project? Do not believe so.

a. If so, which agency and what was their issue/concern? None that I’m aware of.

b. Were these issues, as well as the responses to those concerns, made publicly available? Overall this project had several public comment meetings.

i. If so, where were the concerns/responses located at the time and are they still publicly available? Might be able to find them on SCDOT.org website under the I-85/385 DB link.

- c. Were the concerns/responses incorporated into any project modifications? Unsure.
- 6. Did the public have issues/concerns regarding the project?
 - a. If so, who were they and what was their issue/concern? Delays, reduction in access to SC primary roads within the interchange, and construction noise.
 - b. Were these issues, as well as responses to those concerns, made publicly available? Believe so.
 - i. If so, where were the concerns/responses located at the time and are they still publicly available? Check the SCDOT .org website.
 - c. Were the concerns/responses incorporated into any project modifications? Where possible.
- 7. If applicable, how have you modified your project application based on concerns/responses to your project? No modifications have been made to the permit to date.
 - a. How many times has this occurred? 0
 - b. Did this significantly adjust your time frame? How so? N/A
- 8. How was the contested case initiated, thereby resulting in an automatic stay?
 - a. What reason did the court use to issue a ruling for an automatic stay?
- 9. How long did it take for DOT to show that no irreparable harm will occur within the permitted project, allowing DOT to resume?
 - a. What was included in this time frame (i.e., from issuance of an automatic stay to lifting it and resuming work)?
- 10. What did DOT have to do to show that no irreparable harm will occur?
- 11. The steps below explain the process of implementing a DOT project. Please provide the date each step was completed.
 - a. Funding approved for the project: 2013
 - i. What percentage was federally funded versus state versus other?
 - 70% Federal (FHWA)
 - 30% State Infrastructure Bank (with money from the Greenville Pickens Area Transportation Study (GPATS) and Act 98)
 - b. Construction plan approval: No set date for approval of construction plans since this is a design build project. Notice to proceed date for construction was set as 12/15/2015 but construction work started in the summer 2015.
 - c. If required, submission of material for DHEC's 401 certification: 12/22/2015
 - i. Date of issuance of DHEC's certification: 2/03/2015
 - ii. Contested or appealed? Yes, a local resident appealed because of concern with trash flowing from a drainage culvert under the highway onto his property. DHEC did not hear his appeal but the process took 60 days.
 - iii. Date of final resolution of permit and issuance: 4/07/2016
 - d. Submission of permit request for ACOE's 404 wetland permit: 12/22/2015
 - i. Date of issuance of 404 permit: 4/26/2016
 - ii. Appeal of permit? No
 - iii. Date of final resolution of permit and issuance: 4/26/2016
 - e. If required, completion date of revised construction plans based on permit: N/A
 - i. Approval of revised construction plan: N/A
 - f. Construction begin date: August 2015
 - i. What would you define as the begin date (i.e., when site staked, equipment arrived on site, when soil was disturbed, etc.)? When the contractor starting resurfacing asphalt on I-85.
 - g. Date of automatic stay requested/initiated:
 - i. Date when the automatic stay is lifted:

ii. When work resumed:

- h. When the project was completed:** Still on-going. Expected completion 11/21/2019
- i. What would you define as completed (i.e., is there still equipment on the site, etc.)?**
Substantial work completion date 5/21/2019 (all interchange ramps and roads open to traffic).
Final completion date 11/21/2019 (contractor and equipment off the site)
12. **Were there other issues that caused delays during the project?** Yes, added additional work to the project.
13. **Of all of the delays to the project:**
- a. **What caused the longest delay?** So far, Wetlands permit delay (60 days)
- b. **What caused the shortest delay?** So far, work added to the project (7 days)

Project Name: Carolina Bays Parkway

Person to Contact: Berry Still

Contact Information: Berry.Still@meadhunt.com

Contact Position: Program Manager for the RIDE Plan

Location: Horry County, beginning at S.C. 9 1.7 miles west of U.S. Route 17/S.C. 9 interchange and ending at U.S. Route 17, just north of Homestown Road

Project Synopsis: Construct a six lane highway (called the Carolina Bays Parkway) that will predominantly parallel the Atlantic Coast to alleviate traffic and the local area of the Grand Strand. Included will be two connectors in North Myrtle Beach and Myrtle Beach, which will be 4 lanes.

Type (Is this a new project/build, a repair, or an adjustment to an existing roadway): New Project

Automatic Stay Issued: Yes

Design: Design-build

1. **What is the size of the project (in terms of acres and/or linear miles)?**

34.8 miles, 28 miles long, close to 30

a. **Were there any adjustments to the size of the project as it progressed?**

b. **If so, what type and/or size?**

2. **How many acres of wetland/streams/areas of environmental concern were proposed to be impacted or required to be mitigated on the original/pre-automatic stay corridor?**

221.0 acres of wetlands (of which 96.4 acres from fill and 18.0 acres would be bridged) according to EA, 233 acres impacted of wetlands according to Still interview

a. **Did that acreage adjust by the termination of the project?**

b. **If so, by how much?**

3. **How would you describe the area adjacent to the corridors (such as: wetland, upland forest, urbanized, etc.)?**

Residential (single and multi-family units) and commercial/business (like shops and offices) properties, prime and statewide important farmland (prime and statewide), hotel/motels, public/semipublic (such as schools, parks, marinas, golf courses, museums), institutional (like hospitals, clinics, churches, nursing homes), industrial, and other (such as mini-warehousing, utilities, waterports, airports), *all of these categories are expected to increase in the future* and undeveloped land. Tourist attractions (theaters, malls, etc.) and golf courses. There is also the Lewis Ocean Bay Heritage Trust Preserve nearby and other parks, recreation, and unique natural areas. Development is occurring in the area. Myrtle Beach was very commercialized and at the time, the area of the Carolina Bays was very agriculture, very rural, with very little development.

a. **Is or was there a concern for potential impact to the surrounding corridor?** Impacting 221.0 acres of wetlands (could affect water quality from filling in wetlands), floodplain encroachment of 4,655.6 feet, 10 potential hazardous material sites impacted. The study area crosses the Waccamaw River Subbasin and the Little River Subbasin along with the Atlantic Intercoastal Waterway (surface water source which could be potentially polluted in the construction) and Socastee Swamp. The Surficial Aquifer which would be impacted by the proposed actions. The upland community types identified were: pine plantations, pine flatwoods, upland pine-wiregrass woodland, developed lands, bottomland hardwoods, agricultural fields, pine-scrub oak sandhill, bay forest, xeric sandhill scrubs, and oak-hickory forest. Surrounding wetland types included: rivers and canals, ponds and borrow pits, freshwater marshes, pine savannahs and wet flatwoods, bottomland hardwoods, wooded swamps, bay forests, evergreen shrub bogs, and deciduous shrub swamps. Black bear habitat. (EA info)

4. **If the proposed roadway is in an environmentally sensitive area, why was it selected?** Lower estimated cost, less right-of-way required, less commercial relocations, lower number of noise receptors impacted, less wetland impacts, lower potential impacts to hazardous material sites, benefits associated

with a north-south route in addition to U.S. Route 17, less disruption of traffic during construction, and preferences expressed by public and local officials during and after the public hearing. There are no known threatened and endangered species impacted (according to USFWS, but with the SCDNR Nongame and Heritage Trust Program, there are 12 state species with known occurrences in Horry County which are labeled as endangered in SC by SC), improvement of air quality based on reduces delays = reduced emissions. Ease transportation issues along the Grand Strand, logical investment for the Parkway (efficient and economic), enhance a hurricane evacuation, increase statewide employment and gross state product. Reduces traffic volume, which would correspond with decreased associated levels of service. It is also compatible with Grand Strand Area Transportation Study Long-Range Plan (solutions to attain an adequate level of service for the movement of traffic, people, and goods within the GSATS study area). Accommodated the Burgess Community (concern was dividing the community and displacing residents, but modifications to the project resolved that). It would also allow for traffic to move quicker. More people (public and agencies) prefer it. None of the upland community types were designated as critical habitat for any protected species by the USFWS. Limited shellfish resources according to DNR. Statistical analysis was performed and the Atlantic Intercoastal Waterway and Socastee Swamp are floodplains with base flood elevations already determined. Direct impacts: would improve intra-Grand Strand trips, trips entering and exiting the Grand Strand, and would relieve existent traffic conditions. Secondary Impacts: potential changes in traffic congestion, land use controls, housing, and recreational development, but these are minimal if non-existent. There will be vegetated buffers incorporated along the main line and its interchanges.

a. **Were there alternative review findings?** No-Build (would have adverse effects on traffic movement, air quality, and safety), Alternative 1 (preferred alternative/selected alternative), Alternative 2 (eliminated because of its high level of impacts to wetlands based on regulatory and resource agencies, more expensive, and had greater potential secondary impacts), and Alternative 3 (required more time, money, and impacted more wetlands with 2030 projections).

5. Did outside agencies have issues/concerns regarding the project?

a. If so, which agency and what was their issue/concern?

- USACE: mitigation had to be related to project, alternatives analysis had to stress what was feasible, practicable, and least damaging. SCDHEC-OCRM: avoidance of conservation easements. DHEC: minimize width of right-of-way, avoid wetlands, bridge as much as possible over wetlands, and follow BMPs for erosion control during construction. SCDNR-Heritage Trust: concern over natural communities and specific information on animals in the area. Waccamaw Audubon Society: wanted DOT to look at alternatives, environmental resources, and birds in the area. GSATS: concern over potential site and environmental resources. South Carolina Nature Conservancy: natural areas of concern exist, habitat types of concern, suggested connecting Lewis Ocean Bay Heritage Trust Preserve with Waccamaw River corridor, and recommended three community types of concern (riverine corridors, long-leaf pine savannahs, and Carolina bays). Refer to Section 7 page 12-14 for individual questions asked by agencies. ACE: Final EIS needs to include mitigation plan and an accurate wetland delineation in the selected corridor. Office of Environmental Policy and Compliance: problems with EIS, such as details lacking with wetland and other sensitive habitats, resource categorization in accordance with the Fish and Wildlife Service's Mitigation Policy is not effective, lack of concern to the secondary impacts to wetlands, problems associated justifying the selected alternative as soon as it was, FEIS needs to contain updated information regarding recent positive developments in preserved wetland systems purchased by
- DOT in the project area, conduct a thorough reanalysis of Alternative 3 for concerns with fish and wildlife resources, improving the upland identification, clarification on the pine plantations treatment, further distinguishing wetland types, inclusion of the American eel, discussing right-of-way reduction

in the minimization section, the reader cannot discern the difference in wetland quality impacted by the other alternatives, concern over impacts to the wetlands during construction, and the expanding upon the secondary and cumulative impacts of the other alternatives. SC Wildlife Federation: concern with habitat fragmentation/loss which will disturb movement and migration patterns of wildlife, negative impacts on air and water quality in the area (stormwater and auto emissions). Waccamaw Audubon Society:

Complaints against DOT not wanting to bridge wetlands because it is too expensive, there being little done to minimize or mitigate for the loss of the black bear habitat, the lack of “costly” nature stops, and the lack of appropriate wetland mitigation. OCRM: DOT should be forewarned to expect secondary impacts to the area resulting from this project, which the EIS does not do and should for wetland mitigation and stormwater drainage controls, urging minimization of wetland loss (narrow medians, crossing wetlands at their thinnest, etc). USEPA: main concern is the large amount of natural resources (wetland and upland) which will be destroyed by the highway and their secondary impacts, insistent upon minimizing and/or avoiding loss, to document inventory losses of upland plant communities. DNR: prefer Alternative 3, Alternative 1 could result with long term irreversible impacts to wildlife and other natural resources (like a large loss of wetlands), the vagueness of choosing Alternative 1 over Alternative 3, lack of strict limitations/ discussion of secondary impacts (aka development) that could have detrimental impacts on the environment, DEIS does not adequately address design alternatives/features considered in minimizing environmental impacts, the project does not include necessary bridging alternatives, discouraging the use of temporary fill roads for access (long term impact to wetlands from bridge construction access). NMFS: prefer Alternative 3, further expansion of choosing Alternative 1 over Alternative 3, discussion of meeting long term needs and consequences of each alternative, discussion of elimination/modification of habitat for wildlife, and clarifying the type, quality, and functional importance of impacted wetlands in Alternative 1 and 3. SC Department of Parks, Recreation & Tourism: recommend adding bikeways and walkways as mitigation. USACE: crossing a regulatory floodway must be designed to prevent an increase in the 100 year flood elevation and a 404 permit. Southern Environmental Law Center: the DEIS fails to satisfy the requirements on NEPA, Clean Water Act, and the Intermodal Surface Transportation Efficiency Act and therefore a supplemental DEIS should be prepared. USFWS: think that from the onsite wetland review of the project area, DOT should bridge areas over wetlands impacted, ignoring costs and promoting reduction of habitat and hydrologic fragmentation. SCDNR: from the onsite wetland review, DNR recommends minimal bridging, shifting the alignment to minimize impacts, and relocating the interchange as north as possible.

- Corps had the issue with the modification on the third segment where DOT cut off a mile (the segment from 707 to 17), which was 10% of the wetlands in the corridor, but Corps had issue with mitigation and the buffer variance.
- b. Were these issues, as well as the responses to those concerns, made publicly available?**
 - i. If so, where were the concerns/responses located at the time and are they still publicly available?** In the EA
- c. Were the concerns/responses incorporated into any project modifications?**
 - Environmental Commitments: implementing bridge construction techniques least destructive to wetlands, not impacting and preserving wherever practical wetland areas located within the major interchanges but outside the construction limits, preserving 83.4 acres of wetlands through maintaining a naturally vegetated buffer strip along the mainline, required ditches in the road right-of-way which will end at wetland edges, evaluating and installing properly sized culverts where wetland crossings will be filled to maintain hydraulic connection of the wetland system, wetland mitigation will come from Sandy Island, maintaining animal movement though flat slab bridging or large box

culverts, limiting clearing and grubbing, BMPs to minimize damage to water quality. Comments and pertinent info have been considered and addressed in the Final EIS. With the Waccamaw River, that would not be impacted when using the selected alternative. With the Office of Environmental Policy and Compliance: each comment was either noted, referred to the FHWA or USFWS letter, incorporated into the FEIS, or clarified by another comment. SC Wildlife Federation: concerns addressed within the new FEIS or comments by DOT. Waccamaw Audubon Society: Sandy Island Mitigation Bank will be the appropriate mitigation. OCRM: concerns are noted, commented back on, or discussed in the FEIS or DEIS. USEPA: concerns addressed in FEIS or reference made to FHWA letter. DNR: each comment was either noted, referred to the FHWA letter, incorporated into the FEIS, or clarified by another comment. SCDNR: each comment was either noted, referred to the FHWA letter, incorporated into the FEIS, or clarified by another comment. SC Department of Parks, Recreation & Tourism: comment addressed in FEIS. USACE: no known impacts to regulatory floodways at this time and they will be obtaining a 404 permit. Southern Environmental Law Center: DOT took their comments into consideration and believe everything is addressed adequately in the FEIS and the supplemental is not necessary.

- In 2000/2001, DOT took all of the resource agencies and walked the area to look at alternatives, which is what caused delays. All resource agencies were fine with and wanted DOT to stay where Phase 2 intended because alternatives were environmentally unsound.

6. Did the public have issues/concerns regarding the project?

a. If so, who were they and what was their issue/concern?

- Wetlands were going to be impacted. Georgetown Elected Officials: concern with alignments and natural resources. One individual representing the Winyah Group of the Sierra Club: wanted Alternative 3 because it would focus on creating the road in an already developing area. Other public concerns revolved around the placement of the parkway in relation to their property.
- Hunter's Ridge already had a permit approved in the area and was encroaching on the land DOT needed and they were the most problematic (the developer) about the location. Also, there is a place called Barefoot Landing, which is up around Phase 1 just above where SC 9 and Conway Bypass come together. The issue there was where DOT was building where Barefoot Landing had golf course building permits. Lastly, the City of North Myrtle Beach did not want to sign their municipal agreement because of the golf course issue.

b. Were these issues, as well as responses to those concerns, made publicly available?

- i. If so, where were the concerns/responses located at the time and are they still publicly available?** In the EA

c. Were the concerns/responses incorporated into any project modifications?

- An alignment shift between Central Parkway Connector and U.S. Route 501 reduced wetland impacts. Comments and pertinent info have been considered and addressed in the Final EIS.
- DOT had to buy and move 13 houses already being built; none of them were completed. This involved going through the Corps and then trying to find an alternative to their build plan and went through an administrative judge and avoided the stay there, but had to go through a settlement (buying an moving 8 or 9 houses and building a big berm) as well as moved the roadway.

7. If applicable, how have you modified your project application based on concerns/responses to your project? Avoiding or minimizing sharp curves and steep grades to reduce the braking, turning and accelerating of cars such that this would minimize pollutant loading which would decrease water quality. Incorporation of BMP and a Spill Prevention Control and Countermeasures plan to minimize potential accidental releases of contaminants into the groundwater. Further refinement of alignment to reduce and avoid wetland impacts (such as shifting the Main Street Connector and redesigning/shifting the

interchange reduced impacts by 9.8 acres). Minimization of wetland impacts also occurred as seen with reducing area of interchanges to make them more compact and using bridges over wetlands. Reduction of potential floodplain impacts. Decreasing wetland impacts by over 70 acres. (EA information)

- a. **How many times has this occurred?**
- b. **Did this significantly adjust your time frame? How so?**
8. **How was the contested case initiated, thereby resulting in an automatic stay?**
 - a. **What reason did the court use to issue a ruling for an automatic stay?**
9. **How long did it take for DOT to show that no irreparable harm will occur within the permitted project, allowing DOT to resume?**
 - a. **What was included in this time frame (i.e., from issuance of an automatic stay to lifting it and resuming work)?**
10. **What did DOT have to do to show that no irreparable harm will occur?**
11. **The steps below explain the process of implementing a DOT project. Please provide the date each step was completed.**

- a. **Funding approved for the project:** \$581 million

What percentage was federally funded versus state versus other? \$9.6 million of federal funds, \$545 million bond issue approved by SC Transportation Infrastructure Bank. Phase I paid by RIDE Program (Road Improvement and Development Effort).

Funding came from Horry County's One Cent Sales Tax for Phase 1 and some federal funding came via the State Infrastructure Bank. All of this was done under the Horry County RIDE plan, the Road Improvement Development Effort. The whole project is going to likely end up being close to \$700-\$800 million.

- b. **Construction plan approval:** Phase 1: entered a contract January 10 , 2000 and was 34 months, completed ~November 2002. Open Dec 17,2002 (<- from sun news article that doesn't appear to be archived any longer) Contract of second segment was signed May 2003. Completed March 2005. Third segment started in 2013, expected completion in 2017

- c. **If required, submission of material for DHEC's 401 certification:**

- i. **Date of issuance of DHEC's certification:** November 1999

ii. **Contested or appealed?**

- iii. **Date of final resolution of permit and issuance:**

- d. **Submission of permit request for ACOE's 404 wetland permit:** Phase 1: around February 1999
- i. **404 permit:**

ii. **Appeal of permit?**

iii. **Date of final resolution of permit and issuance:** Phase 1: April 2000 (2 month delay in getting it if the dates are correct).

- e. **If required, completion date of revised construction plans based on permit:**

- i. **Approval of revised construction plan:**

f. **Construction begin date:**

- i. **What would you define as the begin date (i.e., when site staked, equipment arrived on site, when soil was disturbed, etc.)?**

g. **Date of automatic stay requested/initiated:**

h. **Date when the automatic stay is lifted:**

- i. **When work resumed:**

j. **When the project was completed:** 1 segment was completed in December 2002 and it was a month or so ahead of schedule.

- i. **What would you define as completed (i.e., is there still equipment on the site, etc.)?**

12. **Were there other issues that caused delays during the project?**

13. Of all of the delays to the project:

a. **What caused the longest delay?** initiated from when DOT tried to let the 3 segment, and it was a 2 year impact- buffer/mitigation issue via USACE

b.. **What caused the shortest delay?**

Project Name: Conway Bypass

Person to Contact: Berry Still

Contact Information: Berry.Still@meadhunt.com

Location: U.S. 501 West of Conway to U.S. 17 North of Myrtle Beach, Horry County in SC

Project Synopsis: Constructing a multi-lane (four between US 17 and SC 905 and six lane between SC 905 and US17 divided) highway that will bypass the city of Conway (south of the bypass) to alleviate traffic congestion (due to the limited access, economic development, and transportation demand of the Grand Strand area) as well as improve access to Myrtle Beach and North Myrtle Beach, and provide an additional coastal evacuation route

Type (Is this a new project/build, a repair, or an adjustment to an existing roadway): New project
Automatic Stay Issued: No

(The information above will be filled in prior to the interview)

1. **What is the size of the project (in terms of acres and/or linear miles)?** Approximately 30 miles (28.51), approximately 1096 acres

a. **Were there any adjustments to the size of the project as it progressed?** Yes

b. **If so, what type and/or size?**

2. **How many acres of wetland/streams/areas of environmental concern were proposed to be impacted or required to be mitigated on the original/pre-automatic stay corridor?** 433 acres of wetlands within right of way, 110.4 impacted by fill, and 109 impacted by under bridges (60% of study area)

a. **Did that acreage adjust by the termination of the project?** Yes

b. **If so, by how much?**

3. **How would you describe the area adjacent to the corridors (such as: wetland, upland forest, urbanized, etc.)?** Some portions are in the 100 year flood plain. Predominantly agricultural and forests, with farmhouses and rural communities. Also wetlands (Category 2 and 3: bottomland hardwood [393 acres, 108.9 acres, 93.0 acres], pocosin [39 acres, 1.5 acres, 14.9 acres], brackish marsh [0 acres for all st three], salt marsh [0 acres for all three], and open water habitats [1.1 acres, 0 acres, 1.1. acres]) = acres of wetlands within right-of-way, 2 number = acres of wetlands impacted by fill, 3 number = acres of wetlands under bridges. There are also unique natural areas, community facilities, rural communities, extensive development, Meher Spiritual Center (wildlife sanctuary that is privately owned), historic and archaeological sites (yet it was discovered that appropriate mitigation measures for disrupted sites would best benefit from recovery of the information, not preserving the site), farms, homes. Rural with occasional low density residential land uses separated by a lot of farm- and timberland

a. **Is or was there a concern for potential impact to the surrounding corridor?** Yes, the ones mentioned above, especially wetlands! The red-cockaded woodpecker and wood stork may occur in the project's area of influence and four federally listed endangered/threatened plant species may potentially exist in the study area (maybe the Florida manatee and American alligator, red-cockaded woodpecker, short-nosed sturgeon, others are migratory fauna species and haven't appeared in the study area. Flora species it doesn't appear that they exist in the corridor). Potential surface water pollution and groundwater contamination (although impacts to groundwater are deemed slight). Preferred alternative may interfere with black bear movements because of the location of the project and the Buist game management area. Anadromous fish species in the Waccamaw River may be impacted through construction and habitat replaced by bridges. Wetlands are of concern. Terminus 7 infringes upon a tidal salt marsh. Ask if the SC Wildlife and Marine Resources Department's Heritage Trust Program's three unique natural areas in this corridor: Buist Tract, Lewis Ocean Bay, and the Bare Bone Bay, why these were areas of concern since they were far away from the bypass?

4. **If the proposed roadway is in an environmentally sensitive area, why was it selected?** The preferred alternative provides the optimum balance among various factors, such as home/business displacement, wetlands (there is not a practical alternative and that some harm to wetlands has to occur, but it will be minimized), crossing of Carolina Bays, impacted archaeological sites, and crossing streams, although impacts a substantial amount of prime farmland soils. Conceptual Wetlands Mitigation Plan depicts various measures which have been or will be taken to avoid, minimize, and compensate wetland impacts. The preferred alternative would also impact the least amount of wildlife due to habitat displacement because it affects the least amount of acres. This preferred alternative does not involve any coastal zone critical areas.

a. **Were there alternative review findings?** There were 10 alternative review findings, but the preferred alternative was chosen based on impacting wetlands and displaces fewer homes and businesses, impacts the least amount of noise receptors. Preferred also had smaller lengths of floodplain crossings and will not cause significant adverse impacts on the available floodplain resources. The No-Build alternative will improve travel conditions, but will not successfully accommodate the increased traffic in the near future, nor provide an additional route across the Intracoastal Waterway, or provide yet another evacuation route. In the alternate alignments, 13 vegetative communities were discovered (such as bottomland hardwoods, mixed pine-hardwood forest, pocosins, oak-pine forests).

5. **Did outside agencies have issues/concerns regarding the project?**

If so, which agency and what was their issue/concern? Developed connector segment C3 and assessed its impacts, additional work was put into developing a Conceptual Wetlands Mitigation Plan. State and Federal agencies have discussed the following issues:

Avoidance (slight alignment shifts in the final design), minimization (min. wetland impacts), mitigation (2:1 ratio for no “net loss”), and future coordination (to look for minimization of effects in the future) With the actual mitigation, EPA has suggestions for the mitigation plan including reforesting the restored wetland area with the native tree species of the area, transferring the topsoil, and monitoring the vegetation, hydrology, water quality, and habitat. US EPA also suggests monitoring and failure provisions and an increased emphasis on avoidance during subsequent design stages and preference for Site 1, but more information is needed and Site 2 would be given minimal credit. SC Wildlife & Marine Resources Department: recommend trestles and bridges for crossing sensitive areas, minimize clearing and ditching activities in the right-of-way, choosing mitigation site #1, 2:1 ratio, wetland monitoring plan. Corps of Engineers: establishing the proper mitigation ratio and preference for Site 1, but more information is needed, as well as “alternatives, and environmental consequences” in the draft EIS, minor adjustments to wetland delineation, debatable wetland classification, expanding the topic of mitigation in the EIS, issues with endangered and threatened species, *adjusting wetland boundaries, careful attention to compensation, discuss temporary impacts, and looking at the significance of the conservation preservation designation, better description of the effects of bridging and filling, discussing the positive effects of construction alternatives have on the project (like more bridging may avoid more road kills), incorporating minimization and avoidance topics discussed, temporary and secondary impacts, discussion of applicable coastal zone involved. DHEC: wants DOT to use temporary trestles, monitoring plan, two mitigation sites, and re-evaluating the alignment. SC Water Resources Commission: not to use preservation mitigation, having site-specific replacement ratios, should the mitigation scenarios distinctions of low-scale to high-scale mitigation be used (mostly should use high-scale), monitoring for at least 5 years, and provisions to be made for protecting this site in perpetuity. US FWS: requesting minor alignment shifts to avoid wetlands, additional exploration of wetland fill cross-section design alternatives, using the temporary trestles technique as often as possible, 2:1 ratio, monitoring for a min of 5 years, only giving minimal credit for Site #2 (preference for Site 1, although more information is needed on it and determine appropriate ratios), and a mitigation alternatives document should be included with the EIS. South Carolina Coastal Council: Site 1 is preferred, but only with documenting the construction

methods and BMPs to be used, * also want a more detailed mitigation plan, incorporating National Wetland Inventory maps, handling stormwater runoff from bridged sections, the wetland impacts to terminus 7 versus 1, properly defining a salt marsh, inaccurate “lack of evidence” available for highway runoff water quality effects, minor channelization discussions, permit requirements, outline of BMPs, and discussion of importance of wetlands.

Summary of Interagency Meeting (US EPA, Corps, Coastal Council, Coast Guard, Wildlife & Marine Resources Dept., National Marine Fisheries Service): please see the page with the summary from the November 8, 1989 meeting. SC Department of Archives and History: they have issues with the validity of certain sites not being adversely impacted by the project. *As for the endangered species, a Biological Assessment was reviewed by NOAA and states that endangered or threatened species will not be adversely affected by the project, as agreed by the USFWS, but that will change if new information/species pops up.

- a. **Were these issues, as well as the responses to those concerns, made publicly available? Yes**
 - i. **If so, where were the concerns/responses located at the time and are they still publicly available?** In the EIS
 - b. **Were the concerns/responses incorporated into any project modifications?** CZR, INC. (Environmental Consultants) were hired and deemed Site 1 to be more advantageous as well as a biological survey indicating several species are not present in the preferred alignment and USFWS confirmed that 4 species do not exist (at the time) in Horry County and they agreed that the red-cockaded woodpecker is not going to be adversely impacted, yet further field research is needed for 4 plant species and the wood stork to determine if “no effect” is accurate. In response, CZR mentioned that field surveys were conducted and the four plant species were not identified and the wood stork has never been seen in Horry County and should not have suitable habitat so we should not expect to see it in the alignment. Coastal Council: after the asterisk all comments were included in the EIS. Corps: after the asterisk all comments were included in the EIS.
6. **Did the public have issues/concerns regarding the project?**
- a. **If so, who were they and what was their issue/concern?** Terminus 1 was shifted towards the south because of potential effects to the Meher Spiritual Center. Using Terminus A would impact Cool Spring Community and various communities, the crossing of SC Route 905 by segment B-90, opposition to Terminus 7, Terminus 1 as presented, impacting wetlands. People opposed the project because of its impacts to the area’s natural resources so people thought about widening existing roads. Mr. Caudle: noted objection to the impacts to wetlands near the alignment east of the Waccamaw River. Additional discussions of secondary impacts are needed. DOT should use National Wetland Inventory maps to identify wetlands and determine impacts. Should address stormwater management alternatives. Need specifics of mitigation options and potential sites. Need to separate discussion of wetlands impacts by fill and bridges. Page VII-7. Complying with 404(b) (1) guidelines. Outlining BMP’s used? Deleting statements in the EIS that implies the abundance of wetlands in the area justifies impacts. Compare differences in wetland impacts from Route 9-0 to termini 7 and 1. Should consider wetland loss and identify mitigation measures. Should provide more information on storm water management and storm water runoff impacts to water quality. Make accurate and useful studies of wildlife and plant life with local experts. Monitor air quality for ozone and acid rain. Monitor ongoing construction for environmental impacts. Route A-C2-90-1 minimizes wetlands and is by far the least costly and would provide the best balance of traffic onto 17 and elsewhere and I highly recommend it. Believe the EIS may not be accurate on specific point, i.e. plants were used in the report that don’t even exist in our area and rare and endangered plants that do exist within the area were not used in the report. A road plan developed by Richard Strauss provides a better alternative. What will be the impact of stormwater runoff on water quality? Non-endangered species should also be addressed. Why is wetland mitigation considered an alternative to avoidance, why is there to be

mitigation? Why was the Meher Center not mentioned as a wildlife sanctuary? Bride part of wetlands but not all of them. How will Pee Dee aquifer be impacted? How will ecosystem diversity be affected? How many birds, animals, reptiles, and amphibians, will be killed during road construction and vehicular collisions? Lack of carbon monoxide level monitoring. Clarification of how project will affect air quality. Will fences be installed and if so will there be breaks? Summary: potential impacts to Meher Spiritual Center, Inc. (534 comments), wetlands/wildlife impacts (74 comments), Project would cause more pollution (2 comments)

- b. **Were these issues, as well as responses to those concerns, made publicly available?** Yes
 - i. **If so, where were the concerns/responses located at the time and are they still publicly available?** In the EIS.
 - c. **Were the concerns/responses incorporated into any project modifications?** Terminus B was selected instead, the C-3 connector was selecting to avoid the 905 crossing, selecting Terminus 1 to avoid Terminus 7, relocating Terminus 1 such that it did not impact the Meher Spiritual Center, developing a Conceptual Wetland Mitigation Plan. Resources: if you just widened the existing roads, it wouldn't fix the problem and the preferred alternative will minimize impacts to wildlife and natural resources. Secondary impacts: social and economic impacts were discussed, but not environmental. NWI impacts: DOT's mapping wetlands and NWI maps were very closely correlated. Stormwater: Section IV.B.4 addresses that. Mitigation specifics: there are specifics in the Conceptual Wetlands Mitigation Plan. Need to separate: distinction between both is clarified in Section IV.B.9. 404(b)(1): SCDHPT and FHWA will be complying by looking at minimizing wetland intrusion, habitat loss, and will not be degrading waters/threatened or endangered species. BMPs: found on page VII-8 and 9. Statements: any statements that implied such have been deleted and wording has been revised. Comparing differences: Terminus 1 encompasses 7.5 acres of wetlands by fill, Terminus 7 encompasses 9.5 acres. Wetland impacts and mitigation measures are discussed in sections of the EIS. Stormwater management and stormwater runoff impacts are discussed in EIS. Comments from local experts have been considered in evaluating wildlife and plant life impacts. Ozone and acid rain are concerns more properly addressed on a large regional basis rather than a project-level basis and are therefore not addressed in this document. The project will be monitored by highway construction inspectors during construction to ensure compliance with construction specifications and pertinent environmental permits and regulations. The route was not selected for reasons outlined in the EIS. Published lists of endangered species contain species that could "potentially occur" in the project area, as noted by the commenter, these species may or may not actually occur in a given area, several additional species noted by local experts have been added to the list of species evaluated. Richard: this alternative was evaluated. Stormwater: in EIS. Non-endangered: in EIS. Wetland mitigation is not an alternative to avoidance, mitigation measures are implemented only for unavoidable impacts when all practicable measures have been taken to avoid and minimize impacts to wetlands, see EIS. Meher Center: no one informed DOT that it was, but it is now recognized as such, although it won't be impacted. Bridge: no bridges have been proposed solely for wetlands crossings, just coincidental. Pee Dee: see EIS. Ecosystem diversity: See EIS. Road kill: no known method to predict the amount. CO monitoring: monitoring won't be considered necessary for this project. Clarification: see EIS. Fences will be installed along the entire project except under bridges (wildlife concern).
7. **If applicable, how have you modified your project application based on concerns/responses to your project?** Black Bear: proposing fences to block the bear's routes. Anadromous fish (like the shortnose sturgeon): best management practices implemented to limit impacts during construction and countersinking culverts. Including box and pipe culverts to minimize damage to the wetlands, as well as crossing on structure, using best management practices for erosion control during construction. Best Management Practices found on page IV-44 and IV-51. Measures were taken to minimize floodplain

impacts (page IV-48). Using temporary trestles in more sensitive wetland areas. Reduction in proposed median width by 44' in the four-lane area and 20' for the six land area.

- a. **How many times has this occurred?**
- b. **Did this significantly adjust your time frame? How so?**
8. **How was the contested case initiated, thereby resulting in an automatic stay?**
 - a. **What reason did the court use to issue a ruling for an automatic stay?**
9. **How long did it take for DOT to show that no irreparable harm will occur within the permitted project, allowing DOT to resume?**
 - a. **What was included in this time frame (i.e., from issuance of an automatic stay to lifting it and resuming work)?**
10. **What did DOT have to do to show that no irreparable harm will occur?**
11. **The steps below explain the process of implementing a DOT project. Please provide the date each step was completed.**
 - a. **Funding approved for the project:**
 - i. **What percentage was federally funded versus state versus other?** \$100 million from SD DHPT Strategic Highway Plan for Mobility and Safety, \$32 million from federal highway funds
 - b. **Construction plan approval:**
 - c. **If required, submission of material for DHEC's 401 certification:**
 - i. **Date of issuance of DHEC's certification:**
 - ii. **Contested or appealed?**
 - iii. **Date of final resolution of permit and issuance:**
 - d. **Submission of permit request for ACOE's 404 wetland permit:**
 - i. **Date of issuance of 404 permit:**
 - ii. **Appeal of permit?**
 - iii. **Date of final resolution of permit and issuance:**
 - e. **If required, completion date of revised construction plans based on permit:**
 - i. **Approval of revised construction plan:**
 - f. **Construction begin date:**
 - i. **What would you define as the begin date (i.e., when site staked, equipment arrived on site, when soil was disturbed, etc.)?**
 - g. **Date of automatic stay requested/initiated:**
 - i. **Date when the automatic stay is lifted:**
 - ii. **When work resumed:**
 - h. **When the project was completed:**
 - i. **What would you define as completed (i.e., is there still equipment on the site, etc.)?**
12. **Were there other issues that caused delays during the project?**
13. **Of all of the delays to the project:**
 - a. **What caused the longest delay?**
 - b. **What caused the shortest delay?**

Other permits issued: U.S. Coast Guard (for the project crossing the Atlantic Intracoastal Waterway and the Waccamaw River: note that no adverse effects on navigation in the Waccamaw River is anticipated, but there minor be minor temporary effects for constructing the Atlantic Intracoastal Waterway)

Project Name: International Drive Paving/Improvement

Project Location: Horry County

Project Description: A 5.6 mile project in Horry County. Was one of the projects started/funded by the RIDE 2 1% sale tax initiative- a county project, not DOT. International Drive was a very rough dirt road, partially owned by the SC DNR. It borders the DNR-owned Lewis Ocean Bay Heritage Preserve

Purpose for project: to provide an alternative route to US 501 between Myrtle Beach and Conway. Strong local support for project.

Timeline for Project Development:

- 2010: DNR contracted right-of-way to Horry County, as DNR owned to the mid-point of the road Original agreement with DNR was that the project would include bear/wildlife crossings, additional fencing, and barrier control gates, and would be 2-lane road
- 2013: Contract with DNR amended. Project would be 4-lanes, and would not require bear tunnels or barrier fencing; this reasoning was discussed in the court proceedings.

2013: Horry applied for permit to realign/pave the road, with a need to fill 24.88 acres of wetland adjacent to a tributary of Waccamaw River. Original project cost was estimated at \$6.5 million, but in 10 was re-estimated at \$15.5 million

- Increased road cost was due to purchasing from DNR. There was a 2-year delay in obtaining the permits for a different project (SC-707), which in turn delayed the estimated completion of the International Drive project.

Original completion date: 2013

Had newly estimated it to be completed in 2015

Permit application/approval:

- June 25 , 2015: DHEC issued the 401 permit and Coastal Zone Consistency Certificate
 - Project was to be 4-lane road with 14-ft lanes and impact 24 wetland acres

Automatic Stay issue:

- July 10 , 2015: SCELCP requested for DHEC to hold a final review conference, which DHEC declined

- August 28, 2015: SCLEP filed a contested case in the Administrative Court for the Coastal Conservation League and the SC Wildlife Federation

- Objected to changes in road project from original description- more lanes, removal of bear tunnels

~5-days of trial/testimony in Feb-March of 2016

~July 7 , 2016: ALC upheld the DHEC certification

- Upholding the 401 permit allowed the Army Corp to issue the 404 permit on July 22, 2016

- August 22, 2016: Horry County began clearing ground- trees/vegetation in corridor. Work estimated to take 40 days.

Contracting out for construction/paving anticipated for October

- September 1 , 2016: Round 3 of legal proceedings- complaint filed in U.S District Court of S.C in the Charleston Division, SCELCP challenging the federal permit by the Army Corp. Judge Ralph Anderson
 - Filed by S.C Wildlife Federation and Coastal Conservation League, defendants are Horry County, U.S EPA, U.S ACE, and certain specific Corp and EPA officials
- Federal Court approved a temporary restraining order on ground activities – September 23, 2016.

·Oct. 6, 2016 petitioners asked that county be found in contempt of court for violating order by filling in wetlands; had aerial photos

Court denied allegations; filed documents asking court to impose sanctions on conservation groups for filing motion without evidence

○ Debating in federal court 10/28/2016

November 18, 2016; temporary restraining order is dissolved and work commences under the 404 permit.

Project: U.S 601 Bridge Replacement Project

Location: Adjacent to Congaree National Park, Richland and Calhoun Counties

Description: Covered an area of 4.2 miles and required the replacement of four bridges, totaling 4,400 linear feet. The project also included the widening of the highway.

Timeline of State-Based Legal Proceedings:

- 2005: DOT Environmental Assessment conducted for project
 - FHWA approved the FONSI based on the EA.
- 06-24-2005: DOT applied for SCDHEC permit, paid application fee on 08-16-2005. DHEC did not issue a NOPD within 60 days of permit application. SCDHEC also did not issue NOPD on permit within 180 day period (by 03-15-2006).
- 06-23-2006: SCDHEC issues Notice of Proposed Decision Water Quality Certification and Construction in Navigable Waters Permit (NOPD or Proposed Decision) for the 601 Bridge Replacement project (special conditions on the Section 401 WQC).
 - 08-10-2006: DHEC Board heard arguments from both parties. No decision made.
 - 09-14-2006: Matter continued to next month's DHEC Board meeting.
 - 10-12-2006: SCDHEC issues 401 Water Quality Certification and Construction in Navigable Waters Permit. Issued remanded permit, where they changed some conditions (removed requirement for 1:1 slope), but still required four additional spans of bridge.
 - 10-20-2006: Following the DHEC Board decision, SCDOT filed a request for contested case. Challenged the new conditions defined in the Remand Permit and determination of its rights because SCDHEC failed to act in a timely manner on the permit application.
 - 10-27-2006: Env't. Groups filed request for Final Review Conference before DHEC Board concerning Remand Permit. Sought denial of the permit or requirement of full bridging of entire floodplain. Scheduled for 12-14-2006.
 - 12-07-2006: The ALC determined that DHEC Board no longer had jurisdiction and 'cancelled' review (as they were already reviewing the same permit due to SCDOT's contested case).
 - 10-18-2007: Contested case hearing held at ALC. State appeal heard by Admin. Law Judge Ralph King Anderson, III. Ruled that DHEC had not met regulatory time limits for making decision, so lost right to impose special conditions on the Section 401 WQC; also ruled that the conditions themselves had been inappropriate. (SCELP dismissed their appeal at the state level)
 - 04-29-2008: ALC rules in favor of SCDOT, dismissing majority of SCDHEC special conditions.

Timeline of Federal-Based Legal Proceedings:

2006: South Carolina Wildlife Federation, Audubon South Carolina, and Friends of Congaree file lawsuit. Represented by SCELP. Suit stated highway officials ignored the concerns of other govt agencies about project and didn't conduct detailed study on environmental impact. Wanted federal court for stop additional work completing project until more detailed env't studies completed. Challenged the FONSI; wanted an EIS conducted.

- 2008: Case heard by Federal Judge Margaret Seymour. She ordered that the project not continue until further environmental studies were completed.
- 2010: FHWA and SCDOT prepared new EA.
- June 2010: Construction contract awarded to United Contractors Inc. Project began in August 2010.
- September 2010: SCELP filed second lawsuit after determining revised EA was no better than original.
- Work on Congaree River span was allowed to proceed while second lawsuit was pending, though other construction was suspended.
- 04-27-2011: Federal court denied legal action filed by SCELP (wanted project permanently halted). In favor of SCDOT.

Project expected to be completed in June 2013; approximately four years behind original timeline (originally anticipated for completion in 2009).

ALC proceedings

- <http://www.scalc.net/decisions.aspx?q=4&id=10751>

Internet resources

- <http://info.scdot.org/PressRelease/Lists/Posts/Post.aspx?ID=932>
- http://thetandd.com/news/local/a-new-way-bridge-work-continues-after-u-s-span/article_8ebcde00-dd23-11e2-83eb-0019bb2963f4.html
- <http://www.nationalparkstraveler.com/2011/05/update-judge-rules-against-environmental-upgrades-bridge-project-congaree-national-park8093>

APPENDIX II.

1. Administrative Law Court – Automatic Stay provision and proposed changes:
South Carolina General Assembly
121st Session, 2015-2016

South Carolina General Assembly 121st Session, 2015-2016

S. 165

STATUS INFORMATION

General Bill

Sponsors: Senators Hembree, Turner, Bennett and Massey

Document Path: I:\s-res\gh\003auto.kmm.gh.docx

Companion/Similar bill(s): 4011, 5090

Introduced in the Senate on January 13, 2015

Currently residing in the Senate Committee on **Judiciary**

Summary: Administrative Law Court

HISTORY OF LEGISLATIVE ACTIONS

<u>Date</u>	<u>Body Action Description with journal page number</u>
12/3/2014	Senate Prefiled
12/3/2014	Senate Referred to Committee on Judiciary
1/13/2015	Senate Introduced and read first time (Senate Journal-page 110)
1/13/2015	Senate Referred to Committee on Judiciary (Senate Journal-page 110)
2/19/2015	Senate Referred to Subcommittee: Hembree (ch), McElveen, Turner
4/29/2015	Senate Committee report: Favorable with amendment Judiciary (Senate Journal-page 23)
5/31/2016	Senate Recommitted to Committee on Judiciary

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VERSIONS OF THIS BILL

[12/3/2014](#)

[4/29/2015](#)

~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

April 29, 2015

S. 165

Introduced by Senators Hembree, Turner, Bennett and Massey

S. Printed 4/29/15--S.

Read the first time January 13, 2015.

THE COMMITTEE ON JUDICIARY

To whom was referred a Bill (S. 165) to amend Section 1-23-600 of the 1976 Code, relating to hearings and proceedings in the Administrative Law Court, to provide that a request for a contested case, etc., respectfully

REPORT:

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, page 2, by striking lines 14 through 33, in Section 1-23-600(H)(2), as contained in SECTION 1, and inserting therein the following:

/ (2) A request for a contested case hearing for an agency order stays the order from an agency decision granting a license stays the license. A request for a contested case hearing for an order to revoke or suspend a license stays the revocation or suspension. A request for a contested case hearing for a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite; for thirty days and, if a request for preliminary injunctive relief is filed with the Administrative Law Court, until an order granting or denying preliminary injunctive relief is issued by the Administrative Law Court at which time the stay is lifted; provided, however, that matters not affected by the request may not be stayed by the filing of the request. If the request is filed for a subsequent license related to issues substantially similar to those considered in a previously licensed matter, the license may not be automatically stayed by the filing of the request. If the requesting party asserts in the request that the issues are not substantially similar to those considered in a previously licensed matter, then the license must be stayed until further order of the Administrative Law Court. A request for a contested case hearing for a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A request for a contested case hearing of an order to revoke, enforce, or suspend a license stays the revocation or suspension. Requests for contested case hearings challenging only the amount of fines or penalties stays the obligation to pay such monetary fines and penalties until a final order is issued by the Administrative Law Court, but must be deemed does not to affect those portions of such orders imposing substantive requirements. /

Amend the bill further, as and if amended, page 2, by striking line 40, in Section 1-23-600(H)(4), as contained in SECTION 1, and inserting therein the following:

/ subsection for preliminary injunctive relief pursuant to applicable law. Upon- / Amend the bill further, as and if amended, page 3, by striking lines 4 through 8, in Section 1-23600(H)(4), as contained in SECTION 1, and inserting therein the following:

~~/ after the hearing is concluded.~~ Any preliminary injunction ordered by the Administrative Law Court may require the posting of a bond or other security sufficient for the cost and expense of the litigation and project delay as demonstrated by an affidavit made on a good faith estimate of the cost and expense. State agencies are exempt from the requirement to post a bond under this section. / Renumber sections to conform.

Amend title to conform.

GREG HEMBREE for Committee.

STATEMENT OF ESTIMATED FISCAL IMPACT

Fiscal Impact Summary

The Administrative Law Court reports that there will be no expenditure impact on the general fund, federal funds, or other funds.

Explanation of Fiscal Impact State

Expenditure

This bill pertains to hearings and proceedings of the Administrative Law Court and allows that a request for a contested case hearing stay at the agency order for 30 days. This bill also provides that once a contested case is initiated a party may request injunctive relief from the Administrative Law Judge, and further provides that any injunction ordered by the court requires posting of sufficient bond or security to cover a good faith estimate of the cost and expense of the litigation and project delay.

The Administrative Law Court reports that there will be no expenditure impact from the bill on the general fund, federal funds, or other funds.

Frank A. Rainwater, Executive Director
Revenue and Fiscal Affairs Office

S 105

Session 122 (2017-2018)

Summary: Contested cases in the **Administrative Law Court**

S 0105 General Bill, By Rankin, Goldfinch and Verdin

Similar(S 112, H 3565)

A BILL TO AMEND SECTION 1-23-600 OF THE 1976 CODE, RELATING TO HEARINGS AND PROCEEDINGS IN CONTESTED CASES IN THE ADMINISTRATIVE LAW COURT, TO PROVIDE THAT A STAY OF AN AGENCY ORDER REMAINS IN EFFECT FOR THIRTY DAYS, RATHER THAN FOR AN UNDETERMINED TERM, OR UNTIL AN ORDER HAS BEEN ISSUED REGARDING A PRELIMINARY INJUNCTION; TO REVISE THE PROCEDURE FOR STAYS CONCERNING THE REVOCATION, SUSPENSION, OR RENEWAL OF A LICENSE AND PAYMENT OF FINES; TO DELETE THE PROVISION THAT THE COURT SHALL LIFT THE STAY FOR GOOD CAUSE SHOWN OR IF NO IRREPARABLE HARM WILL OCCUR AND ALSO DELETE THE REQUIREMENT THAT A HEARING MUST BE HELD WITHIN THIRTY DAYS TO LIFT THE AUTOMATIC STAY OR FOR A DETERMINATION OF THE APPLICABILITY OF THE AUTOMATIC STAY; TO PROVIDE THAT ANY PRELIMINARY INJUNCTION ORDERED BY THE ADMINISTRATIVE LAW COURT MAY REQUIRE THE POSTING OF A BOND OR OTHER SUFFICIENT SECURITY; AND TO EXEMPT STATE AGENCIES FROM THE REQUIREMENT TO POST A BOND UNDER THIS SECTION.

12/13/16 Senate Prefiled

12/13/16 Senate Referred to Committee on Judiciary

01/10/17 Senate Introduced and read first time (Senate Journal-page 61)

01/10/17 Senate Referred to Committee on Judiciary

(Senate Journal-page 61)

01/13/17 Senate Referred to Subcommittee: Hembree (ch), McElveen,

Gambrell

01/26/17 Senate Referred to Subcommittee: Massey (ch), McElveen,

Gambrell

02/22/17 Senate Committee report: Favorable with amendment

Judiciary (Senate Journal-page 9)

03/07/17 Senate Motion For Special Order Failed

(Senate Journal-page 48)

03/07/17 Senate Roll call Ayes-25 Nays-15 (Senate Journal-page 48)

03/07/17 Senate Made Special Order Pursuant to Rule 33B

(Senate Journal-page 48)

03/07/17 Senate Roll call Ayes-24 Nays-15 (Senate Journal-page 48)

03/08/17 Senate Committee Amendment Adopted (Senate Journal-page 53)

03/08/17 Senate Amended (Senate Journal-page 53)

03/08/17 Senate Read second time (Senate Journal-page 53)

03/08/17 Senate Roll call Ayes-26 Nays-6 (Senate Journal-page 53)

03/09/17 Scrivener's error corrected

03/09/17 Senate Read third time and sent to House

(Senate Journal-page 56)

03/13/17 House Introduced and read first time (House Journal-page 16)

03/13/17 House Referred to Committee on Judiciary

(House Journal-page 16)

S. 105

~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE AMENDMENT ADOPTED AND AMENDED

March 8, 2017

S. 105

Introduced by Senators Rankin, Goldfinch, and Verdin

S. Printed 3/8/17--S. [SEC 3/9/17 12:05 PM]

Read the first time January 10, 2017.

A BILL

TO AMEND SECTION 1-23-600 OF THE 1976 CODE, RELATING TO HEARINGS AND PROCEEDINGS IN CONTESTED CASES IN THE ADMINISTRATIVE LAW COURT, TO PROVIDE THAT A STAY OF AN AGENCY ORDER REMAINS IN EFFECT FOR THIRTY DAYS, RATHER THAN FOR AN UNDETERMINED TERM, OR UNTIL AN ORDER HAS BEEN ISSUED REGARDING A PRELIMINARY INJUNCTION; TO REVISE THE PROCEDURE FOR STAYS CONCERNING THE REVOCATION, SUSPENSION, OR RENEWAL OF A LICENSE AND PAYMENT OF FINES; TO DELETE THE PROVISION THAT THE COURT SHALL LIFT THE STAY FOR GOOD CAUSE SHOWN OR IF NO IRREPARABLE HARM WILL OCCUR AND ALSO DELETE THE REQUIREMENT THAT A HEARING MUST BE HELD WITHIN THIRTY DAYS TO LIFT THE AUTOMATIC STAY OR FOR A DETERMINATION OF THE APPLICABILITY OF THE AUTOMATIC STAY; TO PROVIDE THAT ANY PRELIMINARY INJUNCTION ORDERED BY THE ADMINISTRATIVE LAW COURT MAY REQUIRE THE POSTING OF A BOND OR OTHER SUFFICIENT SECURITY; AND TO EXEMPT STATE AGENCIES FROM THE REQUIREMENT TO POST A BOND UNDER THIS SECTION.

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 1-23-600(H) of the 1976 Code is amended to read:

"(H)(1) This subsection applies to timely requests for a contested case hearing pursuant to this section of decisions by departments governed by a board or commission authorized to exercise the sovereignty of the State.

(2) A request for a contested case hearing for an agency order stays the order. A request for a contested case hearing for an order to revoke or suspend a license stays the revocation or suspension. A request for a contested case hearing for a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite; however, matters not affected by the request may not be stayed by the filing of the request. If the request is filed for a subsequent license related to issues substantially similar to those considered in a previously licensed matter, the license may not be automatically stayed by the filing of the request. If the requesting party asserts in the request that the issues are not substantially similar to those considered in a previously licensed matter, then the license must be stayed until further order of the Administrative Law Court. Requests for contested case hearings challenging only the amount of fines or penalties must be ~~deemed~~ considered not to affect those portions of such orders imposing substantive requirements.

(3) The general rule of subsection (H)(2) does not stay emergency actions taken by an agency pursuant to an applicable statute or regulation.

(4)(a) ~~After Ninety days after~~ a contested case is initiated before the Administrative Law Court, a party may move before the presiding administrative law judge to lift the stay imposed pursuant to this subsection or for a determination of the applicability of the

automatic stay. A hearing must be held within thirty days after any party files a motion with the court and serves the motion upon the parties. Upon motion by any party, the The court shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted unless the party that requested a contested case hearing proves: (i) the likelihood of irreparable harm if the stay is lifted, (ii) the substantial likelihood that the party requesting the contested case and stay will succeed on the merits of the case, (iii) the balance of equities weigh in favor of continuing the stay, and (iv) continuing the stay serves the public interest. A hearing must be held within thirty days after the motion is filed with the court and served upon the parties to lift the automatic stay or for a determination of the applicability of the automatic stay. The judge must issue an order no later than fifteen business days after the hearing is concluded. If the stay is lifted, action undertaken by the permittee or licensee does not moot and is not otherwise considered an adjudication of the issues raised by the request for a contested case hearing. Notwithstanding the provisions of this item, the process to lift a stay as provided in this item does not apply to a contested case concerning a permit or license involving hazardous waste as defined in Section 44-56-20(6), and a stay in such a contested case must not be lifted until the contested case is concluded and the Administrative Law Court has filed its final order in the matter.

(b) Notwithstanding any other provision of law, in a contested case arising under this subsection, the Administrative Law Court shall file a final decision on the merits of the case no later than twelve months after the contested case is filed with the Clerk of the Administrative Law Court, unless all parties to the contested case consent to an extension or the court finds substantial cause otherwise.

(5) A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.

(6) Nothing contained in this subsection constitutes a limitation on the authority of the Administrative Law Court to impose a stay as otherwise provided by statute or by rule of court."

SECTION 2. Section 1-23-670 of the 1976 Code is amended to read:

"Section 1-23-670. Each request for a contested case hearing, notice of appeal, or request for injunctive relief before the Administrative Law Court must be accompanied by a filing fee equal to that charged in circuit court for filing a summons and complaint, unless another filing fee schedule is established by rules promulgated by the Administrative Law Court, subject to review as in the manner of rules of procedure promulgated by the Supreme Court pursuant to Article V of the Constitution of this State. This fee must be retained by the Administrative Law Court in order to help defray the costs of the proceedings. No filing fee is required in administrative appeals by inmates from final decisions of the Department of Corrections or the Department of Probation, Parole and Pardon Services. However, if an inmate files three administrative appeals during a calendar year, then each subsequent filing during that year must be accompanied by a twenty-five dollar filing fee. If the presiding administrative law judge determines at the conclusion of the proceeding that the case was frivolous or taken solely for the purpose of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require, including the sanctions authorized in the Frivolous Civil Proceedings Sanctions Act, Title

15, Chapter 36, and as otherwise provided by law."

SECTION 3. This act takes effect upon approval by the Governor.

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http://www.scstatehouse.gov/query.php?search=DOC&searchtext=Administrative%20Law%20Court&category=SUMMARY&session=122&conid=8545200&result_pos=0&keyval=1220105&numrows=10