STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley G. Robinson, Administrative Law Court Judge

Appellate Case No. 2022-001179

KDP II, LLC ..... Appellant,

v.

South Carolina Department of Health and Environmental Control ..... Respondent.

FINAL REPLY BRIEF OF APPELLANT

G. Trenholm Walker (S.C. Bar #5777)
Email: Walker@WGLFIRM.com
Direct: (843)-727-2208
Thomas P. Gressette, Jr. (S.C. Bar #14065)
Email: Gressette@WGLFIRM.com
Direct: (843)-727-2249
WALKER GRESSETTE & LINTON, LLC
Mail: PO Box 22167
Charleston, SC 29413
Phone: (843) 727-2200
Facsimile: (843) 727-2238

ATTORNEYS FOR APPELLANT
KDP II, LLC

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PRELIMINARY STATEMENT IN REPLY

At the contested case hearing, both parties asserted that the General Assembly's mandate for determining the location of the baseline and setback line on the beachfront property at Captain Sams Spit is found in S.C. Code Ann. § 48-39-280(A)(2), which states: "The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department ***as the most landward point of erosion at any time during the past forty years***." S.C. Code § 48-39-280(A)(2) (double emphasis added). However, at the contested case hearing, the Department of Health and Environmental Control (the "Department") further asserted the Administrative Law Court ("ALC") should look beyond the statute to conflicting terms included by the Department in its own regulation, S.C. Code Reg. 30-21, wherein the Department indicates instead of using "***the most landward point of erosion"*** as required by statute**,** it will set the baseline at "***the most landward shoreline***." Despite the clear contradiction and error in the Department's approach, the ALC adopted the Department's regulation and applied it. (**R. pp. 0059-0060**) The ALC's error of law in applying S.C. Reg. 30-21 in contradiction of S.C. Code Ann. § 48-59-280 was further compounded by the ALC's failure to make rulings based upon the reliable, probative, and substantial evidence on the whole record. Instead, the ALC isolated testimony and chose to prefer certain witnesses over others without regard to substantial differences in their expertise, and without examining their testimony in the context of the record as a whole. The record as a whole demonstrates, among other things, that Captain Sams Spit is, and has been, accreting over the last 40 years. This evidence is irreconcilable with the ALC's conclusion that the baseline on Captain Sams Spit should, as the Department urged, remain in the same location as it has for the last forty years. These errors and their resulting impact on Appellant amply support reversal as sought herein.

ARGUMENT IN REPLY

I. THE ALC'S ADOPTION OF THE BASELINE POSITION SET BY THE DEPARTMENT IN ITS FINAL DECISION AFTER REMAND WAS BASED UPON ERRORS OF LAW AND FINDINGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE THAT REQUIRE THE DECISION TO BE REVERSED AND THE BASELINE TO BE SET AT THE MOST LANDWARD POINT OF EROSION DURING THE PREVIOUS 40 YEARS LOCATED BY APPELLANT'S COASTAL GEOLOGIST.

A. The ALC erroneously located the baseline using S.C. Regulation 30-21's "*most landward position of the shoreline in the most recent 40 years*" and improperly ignored the plain language of S.C. Code § 48-39-280(A)(2) which mandates locating the baseline at the "*most landward point of erosion at any time during the past forty years*."

Nothing in Respondent's Brief corrects or justifies the fact that the ALC premised its entire ruling on a misapplication of S.C. Code § 48-39-280(A)(2) and S.C. Regulation 30-21, which was erroneous as a matter of law and requires reversal. As set forth in Appellant's Brief, the ALC ignored the specific standard the General Assembly mandated for determining the baseline in the inlet erosion zone, which is where Captain Sams Spit is located. (See Appellant's Brief pp. 14-18) The conflict between S.C. Regulation 30-21 and S.C. Code § 48-39-280(A)(2) required the ALC to apply the test from S.C. Code § 48-39-280(A)(2). The failure to do so requires reversal of the ALC.

South Carolina Code § 48-39-280(A)(2) provides:

> The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as ***the most landward point of erosion at any time during the past forty years***, ***unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position***.

(Double emphasis added).

This is the applicable statute that governs the determination in this case and it unequivocally requires the ALC, and the Department for that matter, to set the baseline as "***the***

most landward point of erosion at any time during the past 40 years." (Appellant's Brief at 14 (quoting S.C. Code § 48-39-280(A)(2)) (double emphasis added)) However, the ALC did not actually apply this standard; instead, at the urging of the Department, the ALC used DHEC's Regulation 30-21(H)(2), which states that in the "Unstabilized Inlet Erosion Zones, the baseline is simply ***the most landward position of the shoreline in the most recent 40 years***." (**R. pp. 0059-0060**) (citing S.C. Code § 48-39-280(A)(2) and S.C. Regulation 30-21(H)(2)) (double emphasis added))

The ALC was well aware of the difference between these standards and specifically stated it was rejecting the Department's reading of S.C. Code § 48-39-280(A)(2) and S.C. Regulation 30-21 because of the clear conflict. Following is a portion of the ALC's analysis of the conflict between S.C. Code § 48-39-280(A)(2) and S.C. Regulation 30-21.

> Here, subsection 48-39-280(A)(1) specifically and unambiguously addresses placement of the baseline in instances of an unstabilized inlet erosion zone when the shoreline is not unlikely to return to its former position. While the Department's interpretation of the regulation being an amplification of the statute is entitled to the most respectful consideration, it must be rejected whereas here, there is an unreconcilable conflict. *Kiawah Dev. Partners, II*, *supra* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694, ___ (1984) (The Court will defer to an agency's interpretation unless it is "arbitrary, capricious or manifestly contrary to the statute."). ***The statute unequivocally states in an unstabilized inlet erosion zone, the baseline must be set "at the most landward point of erosion at any time during the past forty years."***

(**R. p. 0081**) (double emphasis added) The law supports this conclusion, because "[i]t is not the Court's place to change the meaning of a clear and unambiguous statute." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578 (2000)) (**as cited in Final Order at R.p. 0071**). In its Order, the ALC also discussed multiple legal principles that command a court to prioritize the wording of a statute when the wording of a regulation is in conflict. (**R. pp. 0081-0082**) (citing Sierra Club v. S.C.

Dep't of Health and Envtl. Control, 426 S.C. 236, 256, 826 S.E.2d 595, 607 (2019); Brown v. Bi-Lo, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003))

In addition to citing the separation of powers principles that prevent a court, including the ALC, from rewriting statutes, the ALC explained why the regulation must give way to the statute:

> While regulation 30-21(H)(2) purports to set forth a methodology to discern the most landward point of erosion, it actually substitutes the statutory mandate of setting the baseline at the most landward point of erosion for "the most landward position of the shoreline." ***"[T]he most landward point of erosion" set forth in subsection 48-39-280(A)(2) is not equivalent to "the most landward position of the shoreline." Regulation 30-21(H)(2) is not a natural amplification of subsection 48-39-280(A)(2) but instead, alters it.*** See Society of Prof'l. Journalists, supra. ***As such, Subsection 48-39-280(A)(2) is controlling.***

(**R. pp. 0081-0082**) (double emphasis added); see also Appellant's Brief at 15) In other words, the ALC reviewed the statute and regulation and made a specific determination that applying the regulation, as the Department urged, would mean stepping beyond the Legislature's intent as clearly expressed in S.C. Code § 48-39-280(A)(2). The ALC further found that using the regulation's "most landward position of the shoreline" would be contrary to the rules of statutory construction, and would improperly usurp the Legislature's clear intent, as expressed through the statute's mandatory requirement that the baseline be set at "the most landward point of erosion." (**R. pp. 0081-0082**)

Despite recognizing the clear difference between the statutory test and the contradictory language proffered in DHEC's regulation, the ALC erroneously disregarded the statute in favor of the regulation. (**R. p. 0086**) Because the ALC did not apply the statute instead of the conflicting regulation, even after citing the differences and concluding the regulation improperly altered the statute, the ALC's decision was contrary to law and should be reversed.

The Brief of Respondent fails to adequately address the Appellant's analysis explaining that the ALC's erroneous use of S.C. Regulation 30-21 renders meaningless the distinction

between whether the shoreline is or is not unlikely to return to its former position, as set forth in S.C. Code 48-48-39-280(A)(2). As explained by the Appellant:

> The ALC erroneously dismissed the critical difference [between the statute and the regulation] stating, 'Nevertheless, the outcome is the same and the conflict is not of any consequence under the facts of this case.' The ALC's reasoning that rendered the distinction between the two to be meaningless was an error of law.

(Appellant's Brief p. 31) (quoting Final Order at 38; **see R. p. 0082**)

As the Brief of Appellant further points out, the ALC used the same benchmark –the most landward vegetation line over the last forty years– for locating the baseline if it is unlikely the shoreline will return to its former position and if it is not unlikely the shoreline will return to its former position. (Appellant's Brief p. 31) Respondent's only justification for its position and the ALC's error is that, "[i]n this case, it just so happens that a vegetation line is used to place the baseline in both instances. In another location of the South Carolina coast where there would be other indications of the most landward point of erosion, the results would be different." (Respondent's Brief p. 37) The Respondent's position, then, is circular, and relies on the premises that it is acceptable to substitute a vegetation line and therefore it is acceptable for the ALC to disregard the clear difference between Regulation 30-21's reference to the "***most landward position of the shoreline in the most recent 40 years***" and S.C. Code Ann. § 48-39-280(A)(2)'s mandate for locating the baseline at the "***most landward point of erosion at any time during the past forty years***." S.C. Reg. 30-21(H)(2) (double emphasis added); S.C. Code Ann. § 48-39-280(A)(2) (double emphasis added). As the Department is aware, a court's "primary role in construing [a statute] must be to ascertain and give effect to the intent of the legislature, so long as this does not lead to an absurd result." Tempel v. S.C. State Election Comm'n, 400 S.C. 374, 381, 735 S.E.2d 453, 457 (2012). This Court should not adopt the ALC's erroneous reading which

rewrites the statute by rendering meaningless a distinction the General Assembly included when it passed it.

The Respondent's Brief fails to provide any mitigation or excuse to justify the fact that the ALC based its entire ruling on a misapplication of S.C. Code § 48-39-280(A)(2) and S.C. Regulation 30-21, which was erroneous as a matter of law, rendered the distinction in language meaningless, and accordingly requires reversal.

B. The ALC erroneously found locating the baseline using S.C. Regulation 30-21's "*most landward position of the shoreline in the most recent 40 years*," instead of S.C. Code § 48-39-280(A)(2)'s mandate for locating the baseline at the "*most landward point of erosion at any time during the past forty years*," would lead to the same result.

Despite noting the clear inconsistency between Regulation 30-21's reference to the "***most landward position of the shoreline in the most recent 40 years***" and S.C. Code § 48-39-280(A)(2)'s mandate for locating the baseline at the "***most landward point of erosion at any time during the past forty years"*** and in contradiction of the multiple legal analyses that required the ALC to reject the regulation's improper modification of the statute, the ALC nonetheless found that applying either standard would result in the same location of the baseline.

In doing so, the ALC erroneously made a determination that the "the most landward shoreline" test of the regulation could be substituted for the determinative statutory test of "the most landward point of erosion." The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. See Chem–Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998); Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 597, 654 S.E.2d 284 (Ct. App. 2007); Shealy v. Doe, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (Ct. App. 2006). Likewise, the legislative intent should be derived primarily from the plain language of the statute. See Bass v. Isochem, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App.

2005) (citing State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) and Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996)); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); see also Peake, 375 S.C. at 597–98, 654 S.E.2d at 289 ("With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute."). The statute's text is the best evidence of legislative intent or will. See Peake, 375 S.C. at 598, 654 S.E.2d at 289 (citing Jones, 364 S.C. at 231, 612 S.E.2d at 724 (citing Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001)).

Respondent's Brief attempts to minimize this error by arguing that even though there is, in fact, an admitted conflict between S.C. Code § 48-39-280(A)(2) and S.C. Regulation 30-21, the conflict can be ignored pursuant to a "savings clause" from S.C. Regulation 30-9(A). In support of its position, the Department cites to the general rule that "a statute and regulation should be construed together, if possible, to give both effect." (Respondent's Brief p. 36) (citing Branch v. Myrtle Beach, 340 S.C. 405, 412, 532 S.E.2d 289, 293 (2000) ("If the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.")) The problem with this position is that it cannot overcome the plain language of the statute, which takes precedence over the regulation. A savings clause within a conflicting regulation cannot allow that regulation to replace the statute.

The ALC erred in failing to prioritize the plain language of S.C. Code § 48-39-280(A)(2) over the contrary and inapplicable modification from S.C. Reg. 30-21 espoused by the Department. The error requires reversal.

C. The ALC's use of the most seaward line of vegetation as a proxy for the most landward point of erosion is unsupported by any testimony in the record.

The ALC's use of the most seaward line of vegetation as a proxy for the most landward point of erosion constitutes an error of law because it is contrary to geological proof and because it is unsupported by any testimony in the record.

The applicable legal standard from S.C. Code § 48-39-280(A)(2) is "***the most landward point of erosion at any time during the past forty years***." (double emphasis added) Confirming the Department's reliance on the conflicting regulation's reference to the "***most landward position of the shoreline in the most recent 40 years***" instead of the statute, Department witness Boynton testified, "the Department uses vegetation lines as the landward position – the landward shoreline" (**R. p. 0085, lines 4-6**)

As cited in Appellant's Brief, the only specific testimony in the record that addresses comparison of (and the considerable difference between) a shoreline and point of erosion came from KDP's expert coastal geologist, John Hodge, who testified: an accreting beach is not a point of erosion. Mr. Hodge testified as follows:

2	Q:	In coastal geology is a beach, an accreting
3		sand beach like the one at Captain Sam's,
4		considered a point of erosion?
5	A:	No. Because it's accreting, it cannot be a
6		point of erosion. A point of erosion refers
7		to some -- in other words, there has to be
8		some history; that, in other words, the
9		vegetation is not moving seaward, the dunes
10		aren't moving seaward, it's actually going in
11		the reverse direction and there's a -- and
12		you would have some evidence of that. And so
13		I think that an accreting beach in it of
14		itself does not indicate a point of erosion
15		at all.

(**R. p. 0535, lines 2-15**)

The Department chose not to name a geologist and, as such, presented no testimony sufficient to contradict Mr. Hodge's expert conclusion. The Department is also unable to refute that the distinction testified to by Mr. Hodge is also recognized in the definition of "active beach" in the Beachfront Management Act. According to the Act, "Active beach is that area seaward of the escarpment ***or the first line of stable natural vegetation, whichever first occurs, measured from the ocean***." S.C. Code Ann. § 48-39-270(13) (double emphasis added).

Respondent's Brief likewise does not sufficiently answer Appellant's argument that the ALC's use of the most seaward line of vegetation as a proxy for the most landward point of erosion is unsupported by any testimony in the record. Respondent's Brief does discuss the testimony of Department witness Jessica Boynton. (Respondent's Brief p. 24) However, the testimony cited is merely the witness's assertion that "there is support in the scientific literature for a vegetation line being an indicator of erosion on the seaward side of that." (Respondent's Brief pp. 24-25) Ms. Boynton was not offered as an expert and although the witness is an employee of the Department, the conclusory testimony that some unidentified literature supports vegetation as "an indicator of erosion" does not sufficiently answer expert geologist Hodge's explanation of why the shoreline does not indicate erosion on an accreting beach like Captain Sams. Even if the lay witness's testimony was of equal merit to that of expert Hodge, which it is not, the testimony of witness Boynton did not provide comparable substance to address the important question at hand. Merely citing to an unquantified amount of "support in the scientific literature," is unclear, and it certainly is not a substantial basis for any scientific conclusion.

Respondent's Brief also asks this Court to consider the testimony of Christopher Jones as potential support for the ALC's use of the most seaward line of vegetation as a proxy for the most landward point of erosion. In doing so, Respondent's Brief cites to testimony of Mr. Jones that

"the Department's methodology is consistent with" recommendations made in a 1990 report prepared by a private consultant. (Respondent's Brief p. 10) The ALC, nor this Court, can rely upon this testimony to conclude anything more than what it purports to state – that the Department's methodology is "consistent with" a private consultant's report.

Respondent's Brief further takes issue with Appellant's assertion that the ALC's conclusion that the vegetation line is a proxy for the point of erosion should be reversed because it is premised on a legal error and not supported by any expert testimony at trial. (See Respondent's Brief pp. 26-27) In support of reversal of the ALC, Appellant's Brief correctly points out that reversal is proper when an administrative judge's findings on a subject that involves expertise is not supported by expert testimony. (See Appellant's Brief p. 21) (citing Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 422 S.C. 632, 637, 813 S.E.2d 691, 694 (2018).) In this case, the ALC's determination, without any expert support, that a vegetation line is an accepted proxy for a point of erosion should be reversed. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, supra, (Supreme Court reversing the ALC's decision because the ALC "impermissibly" made findings and conclusions regarding scientific matters without any evidentiary support).

None of the qualified experts in this arena, John Hodge or Christopher Jones, testified that a vegetation line can be an accepted proxy for a *point of erosion*. They testified that a vegetation line is an accepted proxy for locating the *shoreline*. The ALC's finding and conclusion that the vegetation line is a proxy for the point of erosion are not supported by the facts adduced at trial.

Respondent attempts to counter Appellant's reliance on Kiawah Dev. Partners, II by citing Maull v. S.C. Dept. of Health & Env't. Control, 411 S.C. 349, 768 S.E.2d 402 (Ct. App. 2015). However, the Department's reliance on Maull is misplaced. In Maull, the Court of Appeals stated

that when there is ample evidence in the record, the ALC acting as the factfinder is not restricted to accept only expert testimony – but only ***if*** there is other substantial, reliable evidence. See Maull v. S.C. Dep't of Health & Env't Control, 411 S.C. 349, 359, 768 S.E.2d 402, 408 (Ct. App. 2015) (citing White v. S.C. Dep't of Health & Envtl. Control, 392 S.C. 247, 252, 708 S.E.2d 812, 814 (Ct. App. 2011). In order for Maull to justify the ALC's decision, there must be substantial evidence to support the ALC's conclusion, as there was in Maull. In this matter, there is no support, expert or otherwise, for the ALC's ruling that a vegetation line is an accepted proxy for a point of erosion. Accordingly, Respondent's reliance on Maull does not sufficiently counter the Appellant's grounds for reversal.

The ALC's use of the most seaward line of vegetation as a proxy for the most landward point of erosion constitutes an error of law because it ignores the plain language of S.C. Code § 48-39-280(A)(2), and because it is unsupported by any testimony in the record. The ALC should be reversed.

D. The ALC committed legal error in determining that the shoreline was unlikely to return to its former position when it was not an issue in dispute and in inventing a standard for locating the baseline under those circumstances when the General Assembly did not create one.

As previously stated herein, S.C. Code § 48-39-280(A)(2) is the applicable statute that governs the determination in this case. The ALC specifically noted that KDP opened the hearing by presenting one issue – where the most landward point of erosion is over the past forty years for purposes of establishing the baseline. (**R. p. 0047**) KDP was clear that its case would be focused solely on a single issue – the most landward point of erosion. Counsel for KDP explained:

> We are not going to have our expert testify to whether the best available scientific and historical data of the inlet and adjacent beaches, right here, indicate the shoreline is unlikely to return to its former position. And why are we doing that? Because it doesn't change at all, where the baseline should be. The baseline should be -- we are agreeing that the baseline should be the most landward point of erosion.

> In every single publication, filing, line report, the Department has asserted that the baseline should be just as stated here, the most landward point of erosion at any time during the past 40 years.

(**R. pp. 0314-0315**)

The Department's counsel and its witnesses all agreed with KDP that S.C. Code Ann. § 48-39-280(A)(2), mandates that the baseline must be located at ***the most landward point of erosion at any time during the past forty years***:

Department Counsel	(R. p. 0480, lines 3-5 and R. p 0793, lines 16-25);
Department Witness Boynton	(R. p. 0842, lines 2-4);
Department Witness Jones	(R. p. 1093, lines 2-9); and
Department Witness Slagel	(R. p. 1128, lines 14-17).

The record is clear and the ALC noted that the Department and KDP agreed that "the test to be utilized in setting the baseline is the most landward point of erosion at any time during the past forty years for the reason that the shoreline is 'not unlikely' to return to its former position." (**R. p. 0052**) However, as stated in Appellant's Brief, the ALC erroneously embarked on an additional analysis of whether the shoreline was unlikely to return to its former position, even though neither of the parties presented the issue to the ALC for determination.

This was an error of law. "A judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs, and be in accordance with the theory of the action upon which the pleadings are framed and the case was tried." Parker Peanut Co. v. Felder, 207 S.C. 63, 68-69, 34 S.E.2d 488, 490 (S.C. 1945). Even in a court of equity where the factual issues are not submitted to a jury, "the incidental or auxiliary relief granted must be within the limits of the issues made by the pleadings and be of the same general nature." Id.

The ALC decided it disagreed with the parties and reported its conclusion that the shoreline is unlikely to return to its former position. (**R. pp. 0052-0053**) Having made this determination, the ALC was boxed in because, as Appellant pointed out to the ALC, "subsection 48-39-280(A)(2)

does not set forth the standard for determining the placement of the baseline for an inlet erosion zone that is not stabilized by jetties in the instance when the shoreline is unlikely to return to its former position." (**R. p. 0059**) Rather than noting the absence of a proper test, the ALC in error turned to S.C. Regulation 30-21 and ruled the regulation "provides that 'in Unstabilized Inlet Erosion Zones the baseline is simply the most landward position of the shoreline in the most recent 40 years.'" (**R. p. 0059**) The ALC went on to apply its view of the facts to this standard, a standard that did not come from the Legislature. The ALC created its own test because the statute does not direct where to set the baseline if the shoreline is 'not unlikely' to return to its former position, a finding the ALC made despite the fact that the question was not properly before the court.

The ALC committed legal error in determining that the shoreline was unlikely to return to its former position when it was not an issue in dispute, and in inventing a standard for locating the baseline under those circumstances when the General Assembly did not specify one.

E. The ALC committed legal error in considering evidence of the historical position of the shoreline over the last 250 years instead of the last 40 years as specified in the statute, and the ALC's ultimate ruling is contrary to the substantial evidence regarding the accretion at Captain Sams within the forty-year lookback.

As explained in Appellant's Brief, S.C. Code § 48-39-280(A)(2) mandates that the baseline "must be set by the department as the most landward point of erosion at any time during the past forty years, unless … [data] … indicates that the shoreline is unlikely to return to its former position." Section 48-39-280(A)(2) implements a forty-year lookback, by its plain language. Clear and unambiguous statutes require no statutory construction and should be applied by courts according to their literal meaning. See Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005); Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). The analysis of the best historic and scientific evidence relates to the location of the shoreline over the

last 40 years. There is absolutely nothing in the statute to suggest that the determination should consider the shoreline position hundreds of years ago.

As to what period of data should be used, the Legislature was clear in the text and in the very title of the statute – "Forty-Year Retreat Policy." The ALC, however, ignored the Legislature's direction and used instead an exaggerated period of the last 200 years. Employing this extended period of review constitutes legal error.

It must also be noted that the Appellant provided the ALC with competent, reliable expert testimony regarding the accretion at Captain Sams within the forty-year lookback. KDP geologist Hodge conducted separate series of measurements based on rectified aerial photography and the Department's beach monument survey data[1] from the last 30 years to determine if the shoreline of Captain Sams was accreting or retreating. (**R. p. 0502, line 19; R. p. 0533, line 22**) (Hodge testifying regarding monument data, on-site investigation, and aerial photography; Hodge testifying his use of imagery and profile data for each "as a check against the other" for confirmation) Hodge then specifically testified to his determination that the shoreline of Captain Sams was consistently accreting except for a brief period of intense storm and hurricane activity between 2015 and 2017. (**R. p. 0532, line 3; R. p. 0533, line 22**); (**see also R. p. 0533, line 22** (Hodge testifying "To a reasonable geological certainty, the beach at Captain Sam's is accreting and has been accreting over the last 40 years."))[2] The Department's Monument 2620 is the

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[1] S.C. Code Ann. § 48-39-280(E)(1) requires the Department to conduct beach profile surveys: "In order to locate the baselines and the setback lines, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean…."

[2] Without sufficient justification the ALC criticized Hodge's exclusion of two storm events. Even considering the effect of those storms, Hodge calculated that the annual average rate of accretion on Captain Sams was 5.8 feet per year on average. **(R. p. 0525; R. p. 1346)** Hodge also testified that the Department's own published data documents accretion of 5.22 feet per year at Monument 2625 and 6.15 feet per year at Monument 2620. **(R. pp. 0531-0532**; (**see also Pet. Exs.9g and 9h at R. p. 1344; R. p. 1349**)

monument next to the neck of Captain Sams. Hodge testified to similar annual rates of accretion at that location. The accretion of the beach at an average of 6.2' per year means the shoreline is moving seaward at that same rate, 6.2' per year. For the 18 years between 1999 and 2017, this average annual accretion rate means the shoreline moved 111.6' seaward (i.e., 18 years x 6.2'/year). The ALC even found that the beach is accreting and noted the Department agreed. (**R. p. 0053**) ("Jones found that long-term accretion rates at Monument 2620 were 6.2 feet per year on average.").

With all of this evidence of accretion, as noted by the ALC, it is wholly implausible that the result in this case would be that the shoreline (the Department's asserted measure of the baseline) did not advance at all, despite this accretion. But, that is what happened.

Even though the evidence and published information of the Department establishes 5 to 8 feet of accretion every year at Captain Sams, the Department has not moved the baseline any appreciable distance seaward since 1999. (**See p. 3 of Joint Ex. 3 at R. p. 1224**); (**see also Petitioner's Ex. 4 at R. pp. 1330-1331 and R. pp. 0350-0352**); (**see also p. 3 of Final Order at R. p. 0047**) (ALC finding that the baseline determined by the Department in 2009 "was virtually the same as it was in 1999. In October 2017, the Department released its preliminary delineation of the jurisdictional lines for the Spit [and] placed the line in essentially the same location as the two prior delineations.")

Viewing the Department's baseline delineation in light of this undisputed fact renders its conclusion – and therefore its methodology – fundamentally flawed. It is not logical nor is it scientifically defensible to assert a baseline would not move seaward any appreciable distance at all over 18 years when the beach is rapidly accreting seaward during that same period as well as during the 40 years previous to the date of each of the Department's delineations. If the shoreline

is the measure of the baseline, as the Department contends, the baseline must move seaward as the shoreline moves seaward. The baseline on a demonstrably accreting beach cannot remain in the same place over 18 years. Yet, that is what the Court ultimately ruled.

The substantial evidence establishes the immutable fact that the shoreline has consistently advanced during the last 40 years. This was unquestionably demonstrated by the Department's own exhibit that superimposed Hodge's determination of the most landward point of erosion after Irma on the 1988 aerial. (**<u>See</u> Respondent's Ex. 139 at R. pp. 1605-1610**) Respondent's Exhibit 139 demonstrates the beach accreted considerably between 1988 and 2017 (even after withstanding Hurricane Matthew's and Irma's storm erosion) and the shoreline moved considerably seaward with the accretion of the beach. The ALC ruled against the substantial evidence, including the universally acknowledged annual accretion rate of over 6 feet/year of the beach at the neck. This evidence is irreconcilable with the Court's conclusion that the most landward shoreline has been in essentially the same location over the last forty years as determined in 1999, 2009, and 2017. Again, that is impossible.

The ALC's ruling situating the baseline in 2017 at virtually the same location as in 1999, despite the undisputed accretion of the shoreline during the intervening 18 years, is both contrary to the statutory criterion, arbitrary and capricious, and not based on substantial evidence.

F. The ALC's finding that the 1982 aerial depicted an escarpment is not supported by the evidence and was speculative. Further, there was no proof as to when the escarpment was created even if the hypothetical marking was an escarpment, which is entirely speculative.

Respondent's Brief fails to sufficiently rebut the Appellant's argument regarding the 1982 photograph that the Department never referenced until after the deposition of KDP expert Tolleson. This 1982 aerial photograph is the one that Department witness Slagel testified he

located because he was looking for data to attempt to refute Mr. Tolleson's deposition testimony. (**R. p. 1149, lines 11-19**)

Without qualification, Slagel boldly concluded he could see an escarpment in the photograph:

> A. … [I]n 1982 when this image was taken -- and I think we can maybe see better on the next slide -- that on the ocean side there was a clear escarpment that had been cut into the beach. It's this linear feature right where the, sort of, flat beach sand transitions to the dune field. So right along this straight line. There was an escarpment on the beach in 1982 at the neck of Captain Sam's Spit.

(**Slagel Testimony at R. p. 1149, line 23-R. p. 1150, line 7**) The ALC, in turn, and without any further discernment, stated in footnote 3 of the Order, (**R. p. 0048**) "The Court notes, however, that subsequent to the issuance of the final determination on remand, the Department located a 1982 aerial photograph that indicates an escarpment line that is nearly in the same location as the 1988 vegetation line (reviewed)." This potential connection between 1982 and 1988 could perhaps be useful, if it was sufficiently reliable, which it was not, and if it was presented in conjunction with reliable, trustworthy testimony, which it was not.

First and foremost, there is nothing in the record to establish Mr. Slagel has sufficient and reliable expertise to identify an escarpment in the photograph. The Department chose not to attempt to qualify Mr. Slagel as an expert, choosing instead to ask the ALC to merely rely on the fact that Mr. Slagel testified in his employment with the Department he is "constantly looking at aerial photography." (Respondent's Brief p. 44) Further, the Department asserts that this basic representation is somehow enough to make the leap to S.C. Code Ann. § 1-23-330(4) which the Department cites for the principle that the "'agency's experience, technical competence and

specialized knowledge may be utilized in the evaluation of the evidence' in a contested case before the ALC." (Respondent's Brief at 44) The Appellant disagrees, and the record includes other more reliable evidence.

KDP expert Andy Tolleson, a licensed professional engineer, a licensed professional GIS (geographic information system) surveyor, and a diplomate in the Academy of Geo-Professionals, was qualified and admitted without any objection to testify as an expert in civil engineering, professional GIS surveying, and remote sensing.[3] (**R. p. 0707, line 22-p. 0710, line 1**) Mr. Tolleson reviewed the 1982 photograph on which Mr. Slagel claimed to see an escarpment. Based upon the angle and type of photograph, Mr. Tolleson testified it is not proper for topographic interpretation:

A. … This is a flat piece of media, so it's scanned in a two-dimensional form. But when we talk an escarpment, from the definitions that I've heard in this courtroom, that involves like a vertical displacement, like a cut or an erosion of some kind. And the vertical resolution in an image like this is actually absent. It's not intended for stereographic or topographic interpretation. So ironically, if you wanted to see something with elevational or contour relief, instead of being directly over the object with the aircraft, you'd actually be off to the side.

Q: Based on your many years of experience and based on what you just told us, to reasonable degree of certainty is there an escarpment that's visible from that photograph?

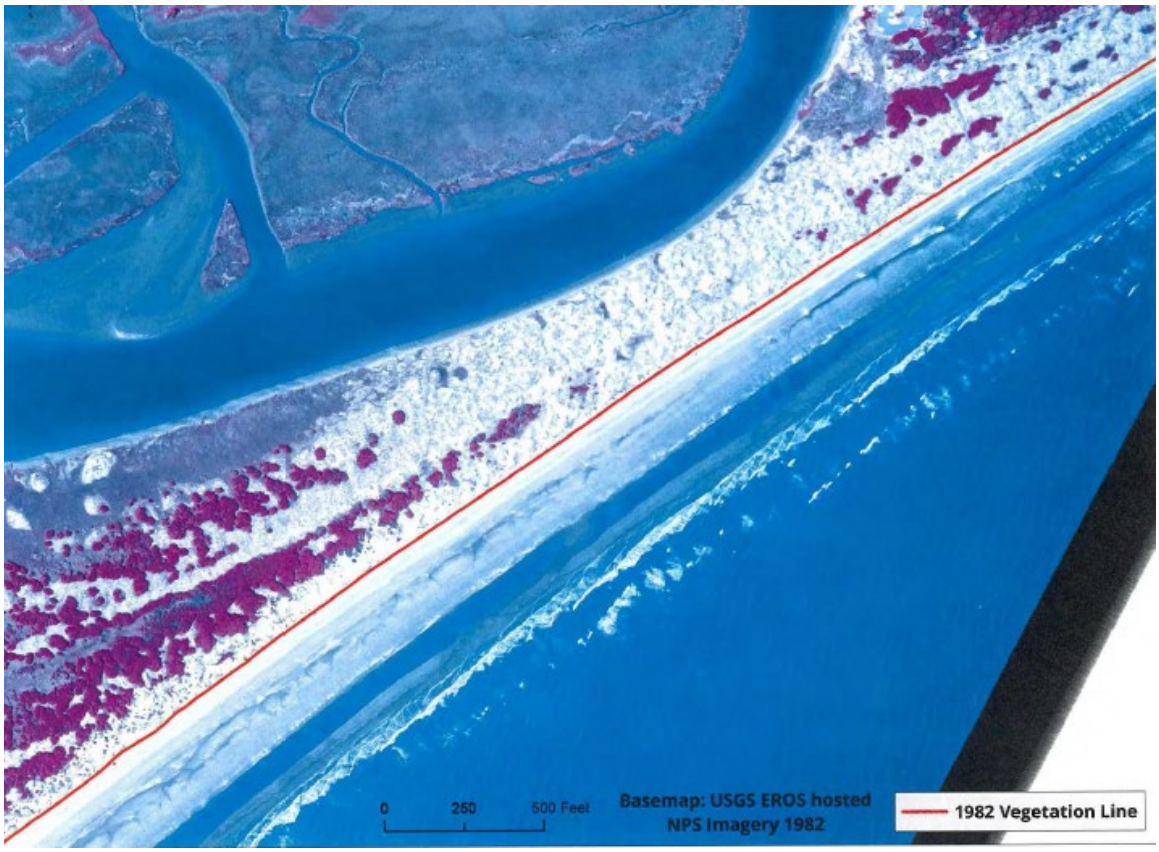
A: Not that I can see.

[3] "Remote sensing is the process of detecting and monitoring the physical characteristics of an area by measuring its reflected and emitted radiation at a distance (typically from satellite or aircraft). Special cameras collect remotely sensed images, which help researchers 'sense' things about the Earth." https://www.usgs.gov/faqs/what-remote-sensing-and-what-it-used (via U.S. Geological Survey (USGS) – U.S. Dept. of Interior).

(**R. p. 1188, line 16-R. p. 1189, line 8**) The ALC improperly relied on Mr. Slagel's testimony to conclude there was "evidence of escarpment (which is a geomorphic expression of erosion) and a stable vegetation line depicted in a 1982 photograph in the same vicinity as the 1988 vegetation line" thereby, in turn, providing support for the ALC's conclusion that "there are shorelines and points of erosion more landward of Petitioner's 2017 post-Irma escarpment line." (**R. p. 0086**) The basis of Mr. Slagel's testimony and the basis of the ALC decision is without support.

Other portions of Mr. Slagel's testimony were also erroneously relied upon by the ALC. For example, Mr. Slagel testified regarding a line he superimposed on the 1982 photograph. (See Respondent's Ex. 15 at **R. p. 1481**) He testified that the red line depicted on the image of Respondent's Exhibit 15 was "the escarpment" (which Tolleson explained could not be identified from the type and angle of the 1982 photograph); Slagel described the alleged escarpment as a "vertical cliff of erosion." (**R. p. 1151, lines 112-14**) He further testified that this marked line was also the "vegetation line" because it was his opinion that [the alleged escarpment and vegetation line] were, as he called it, "one in the same." (**R. p. 1151, line 8**)

The image follows:



(**R. p. 1483**)

As clearly shown, Mr. Slagel identified a nearly straight line on Exhibit 15 for his identification of an alleged escarpment as well as his belief as to a vegetation line. The line extends nearly the entire length of the spit. Mr. Slagel also testified that the Department looks to identify "the first line of stable natural vegetation, not individual plants, not a clump here and a clump there, but a line of vegetation." (**R. p. 1138, lines 14-18**) The problem is that vegetation does not grow in a straight line and escarpments are not created in straight lines, as depicted by the Department in Respondent's Exhibit 15. While it is true that on a photograph that is properly suited for analysis, there may be slight portions of an escarpment that appear linear, it is wholly implausible a that both an escarpment and a vegetation line occur at the exact spots in tandem in a straight line for this kind of distance. The testimony is simply not reliable.

Mr. Hodge, KDP's expert coastal geologist, also explained why the line shown in Respondent's Exhibit 15 cannot actually be an escarpment, as the Department suggests:

> Q: You were here for Mr. Slagel's testimony. Based on your many -- let me ask you. Have you seen escarpments on the beach over the years?
> A: Yes. Quite commonly.
> Q: Would you please describe the characteristics of those escarpments to The Court and whether they proceed in a uniform line?
> A: Yes.
> Q: A straight line?
> A: Yes. Your Honor, you might recall the scarp that we showed in the videos and the photographs after Hurricane Irma. And I made a comment that my line was very wavy, because that scarp went in and out, it wasn't a straight line. And generally speaking, you don't have erosional scarps that will go for half a mile in a straight line; they have indentations that go in and out. And I would have to say, in my professional judgment, looking at aerial photographs such as the one that -- the 1982 photograph that's placed there, I think it would be very difficult, if not impossible, to detect a scarp, especially one that would be a straight line. They just don't occur in straight lines for very long.

(**R. pp. 1201, line 3-R. p. 1202, line 3**) So, in order to rely upon Mr. Slagel's testimony on these points, the ALC had to ignore the substantial evidence and the expert testimony of Mr. Tolleson (a licensed professional engineer, a licensed professional GIS (geographic information system) surveyor, and a diplomate in the Academy of Geo-Professionals) as well as the testimony of Mr. Hodge (a coastal geologist). There was no proof whatsoever at the hearing that Mr. Slagel had the professional education, experience, and training to determine if a feature on an aerial photograph displayed an escarpment, or that he had expertise sufficient to warrant the ALC's reliance upon his testimony given the contrary evidence from KDP. The ALC's reliance upon Mr. Slagel's testimony

over the testimony of KDP experts Mr. Tolleson and Mr. Hodge is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, it was arbitrary and capricious, and demonstrates a clearly unwarranted exercise of discretion.

CONCLUSION

S.C. Code Ann. § 48-39-280 (A)(2) is clear and unequivocal – "the baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years…." S.C. Code Ann. § 48-39-280 (A)(2). The single erosional feature attested to at the hearing by any witness was an escarpment. The only landward escarpment that was identified with sufficient reliability and expertise by a qualified witness as occurring during the preceding 40 years was the escarpment marked by Hodge and surveyed by Byrnes soon after named-storm Irma in October 2017. The Appellant, through Hodge, provided the sole credible proof of the most landward point of erosion over the last 40 years and his post-Irma line tracking the most landward escarpment for the length of Captain Sams should be the location of the baseline under Section 48-39-280(A)(2).

For the reasons set forth, the Order of the ALC should be reversed and the baseline set at the most landward point of erosion over the last 40 years that was flagged by Hodge and surveyed.

Respectfully submitted,

/s/ Thomas P. Gressette, Jr.
Thomas P. Gressette, Jr. (S.C. Bar #14065)
Email: Gressette@WGLFIRM.com
Direct: (843)-727-2249
G. Trenholm Walker (S.C. Bar #5777)
Email: Walker@WGLFIRM.com
Direct: (843)-727-2208

WALKER, GRESSETTE & LINTON, LLC
P.O. Box 22167
Charleston, SC 29413
Phone: (843) 727-2200
Facsimile: (843) 727-2238

ATTORNEYS FOR APPELLANT
KDP II, LLC

May 19, 2023
Charleston, South Carolina

CERTIFICATE OF COMPLIANCE

By signing below, I hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

Thomas P. Gressette, Jr. (S.C. Bar #14065)
Email: Gressette@WGLFIRM.com
WALKER GRESSETTE & LINTON, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200 telephone
(843) 727-2238 facsimile

May 19, 2023
Charleston, South Carolina

ATTORNEYS FOR APPELLANT
KDP II, LLC

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ADMINISTRATIVE LAW COURT
Shirley G. Robinson, Administrative Law Court Judge

Appellate Case No. 2022-001179

KDP II, LLC..... Appellant,

v.

South Carolina Department of Health and Environmental Control .....Respondent.

PROOF OF SERVICE

I certify that I have served the **Appellant's Final Reply Brief,** by regular and electronic mail on May 22, 2023, addressed to the attorneys of record:

Sallie P. Phelan (SC Bar No. 14150)
(phelansp@dhec.sc.gov)
Bradley D. Churdar (SC Bar No. 12829
(churdabd@dhec.gov)
South Carolina Department of Health & Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Denise Musso

Denise Musso,
Paralegal