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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Docket No. 21-ALJ-07-0433-CC
Appellate Case No.2023-000006

Friends of Gadsden Creek,.....Appellant,

vs.

South Carolina Department of Health and Environmental Control, and
WestEdge Foundation, Inc.,Respondents.

RECORD ON APPEAL
VOLUME VI OF VI

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Landform: Depressions, marine terraces
Landform position (three-dimensional): Tread
Down-slope shape: Concave, linear
Across-slope shape: Concave, linear
Hydric soil rating: Yes

Cs—Coosaw loamy fine sand

Map Unit Setting

National map unit symbol: 4c1w
Elevation: 0 to 120 feet
Mean annual precipitation: 40 to 58 inches
Mean annual air temperature: 63 to 72 degrees F
Frost-free period: 240 to 285 days
Farmland classification: Farmland of statewide importance

Map Unit Composition

Coosaw and similar soils: 95 percent
Minor components: 2 percent
Estimates are based on observations, descriptions, and transects of the mapunit.

Description of Coosaw

Setting

Landform: Marine terraces
Landform position (three-dimensional): Tread
Down-slope shape: Linear
Across-slope shape: Linear
Parent material: Loamy marine deposits

Typical profile

Ap - 0 to 7 inches: loamy fine sand
E - 7 to 26 inches: loamy fine sand
Bt - 26 to 56 inches: sandy clay loam
BCg - 56 to 78 inches: sandy clay loam

Properties and qualities

Slope: 0 to 2 percent
Depth to restrictive feature: More than 80 inches
Natural drainage class: Moderately well drained
Runoff class: Low
Capacity of the most limiting layer to transmit water (Ksat): Moderately high to high (0.57 to 1.98 in/hr)
Depth to water table: About 24 to 36 inches
Frequency of flooding: None
Frequency of ponding: None
Available water storage in profile: Moderate (about 6.4 inches)

Interpretive groups

Land capability classification (irrigated): None specified
Land capability classification (nonirrigated): 3w

Hydrologic Soil Group: A
Ecological site: Loamy Rise, Moderately Wet (R153AY001GA)
Hydric soil rating: No

Minor Components

Ogeechee

Percent of map unit: 2 percent
Landform: Depressions, marine terraces
Landform position (three-dimensional): Tread
Down-slope shape: Concave, linear
Across-slope shape: Concave, linear
Hydric soil rating: Yes

Hp—Haplaquents, loamy

Map Unit Setting

National map unit symbol: 4c29
Elevation: 0 to 120 feet
Mean annual precipitation: 40 to 58 inches
Mean annual air temperature: 63 to 72 degrees F
Frost-free period: 240 to 285 days
Farmland classification: Not prime farmland

Map Unit Composition

Haplaquents and similar soils: 100 percent
Estimates are based on observations, descriptions, and transects of the mapunit.

Description of Haplaquents

Setting

Landform: Depressions, marine terraces
Landform position (three-dimensional): Tread
Down-slope shape: Concave, linear
Across-slope shape: Concave, linear
Parent material: Loamy marine deposits

Typical profile

C - 0 to 60 inches: sandy clay loam

Properties and qualities

Slope: 0 to 2 percent
Depth to restrictive feature: More than 80 inches
Natural drainage class: Moderately well drained
Runoff class: Very high
Capacity of the most limiting layer to transmit water (Ksat): Moderately low to moderately high (0.14 to 1.28 in/hr)
Depth to water table: About 0 to 12 inches
Frequency of flooding: None
Frequency of ponding: None
Available water storage in profile: Moderate (about 8.4 inches)

Interpretive groups

Land capability classification (irrigated): None specified

Land capability classification (nonirrigated): 6w

Hydrologic Soil Group: C/D

Hydric soil rating: Yes

Mo—Mouzon fine sandy loam, occasionally flooded**Map Unit Setting**

National map unit symbol: 4c2l

Elevation: 0 to 120 feet

Mean annual precipitation: 40 to 58 inches

Mean annual air temperature: 63 to 72 degrees F

Frost-free period: 240 to 285 days

Farmland classification: Farmland of statewide importance

Map Unit Composition

Mouzon and similar soils: 96 percent

Minor components: 2 percent

Estimates are based on observations, descriptions, and transects of the mapunit.

Description of Mouzon**Setting**

Landform: Flood plains

Landform position (three-dimensional): Tread

Down-slope shape: Linear

Across-slope shape: Linear

Parent material: Loamy fluviomarine deposits

Typical profile

A - 0 to 5 inches: fine sandy loam

Eg - 5 to 8 inches: fine sandy loam

Btg - 8 to 61 inches: sandy clay loam

BCg - 61 to 68 inches: sandy loam

Cg - 68 to 80 inches: sandy loam

Properties and qualities

Slope: 0 to 2 percent

Depth to restrictive feature: More than 80 inches

Natural drainage class: Poorly drained

Runoff class: Very high

Capacity of the most limiting layer to transmit water (Ksat): Moderately low to moderately high (0.06 to 0.20 in/hr)

Depth to water table: About 0 to 12 inches

Frequency of flooding: Occasional

Frequency of ponding: None

Available water storage in profile: Moderate (about 7.8 inches)

Interpretive groups

Land capability classification (irrigated): None specified

Land capability classification (nonirrigated): 6w

Hydrologic Soil Group: C/D

Hydric soil rating: Yes

Minor Components

Brookman

Percent of map unit: 2 percent

Landform: Depressions, marine terraces

Landform position (three-dimensional): Tread

Down-slope shape: Concave, linear

Across-slope shape: Concave, linear

Hydric soil rating: Yes

W—Water

Map Unit Setting

National map unit symbol: 4c2z

Elevation: 0 to 120 feet

Mean annual precipitation: 40 to 58 inches

Mean annual air temperature: 63 to 72 degrees F

Frost-free period: 240 to 285 days

Farmland classification: Not prime farmland

Map Unit Composition

Water: 100 percent

Estimates are based on observations, descriptions, and transects of the mapunit.

Wa—Wahee fine sandy loam

Map Unit Setting

National map unit symbol: 4c30

Elevation: 0 to 120 feet

Mean annual precipitation: 40 to 58 inches

Mean annual air temperature: 63 to 72 degrees F

Frost-free period: 240 to 285 days

Farmland classification: Farmland of statewide importance

Map Unit Composition

Wahee and similar soils: 96 percent

Minor components: 4 percent

Estimates are based on observations, descriptions, and transects of the mapunit.

Description of Wahee

Setting

Landform: Marine terraces

Landform position (three-dimensional): Tread

Down-slope shape: Linear
Across-slope shape: Linear
Parent material: Loamy marine deposits

Typical profile

A - 0 to 6 inches: fine sandy loam
E - 6 to 10 inches: fine sandy loam
Bt - 10 to 45 inches: clay
BCg - 45 to 65 inches: sandy clay loam
Cg - 65 to 80 inches: clay

Properties and qualities

Slope: 0 to 2 percent
Depth to restrictive feature: More than 80 inches
Natural drainage class: Somewhat poorly drained
Runoff class: Very high
Capacity of the most limiting layer to transmit water (Ksat): Moderately low to moderately high (0.06 to 0.20 in/hr)
Depth to water table: About 6 to 18 inches
Frequency of flooding: None
Frequency of ponding: None
Available water storage in profile: High (about 9.3 inches)

Interpretive groups

Land capability classification (irrigated): None specified
Land capability classification (nonirrigated): 2w
Hydrologic Soil Group: C/D
Hydric soil rating: No

Minor Components

Mouzon

Percent of map unit: 2 percent
Landform: Flood plains
Landform position (three-dimensional): Tread
Down-slope shape: Linear
Across-slope shape: Linear
Hydric soil rating: Yes

Brookman

Percent of map unit: 2 percent
Landform: Depressions, marine terraces
Landform position (three-dimensional): Tread
Down-slope shape: Concave, linear
Across-slope shape: Concave, linear
Hydric soil rating: Yes

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Appendix B. Reference Marsh Site Photos



T1 Start



T1a – offset



T1a – berm



T1b



T1d



T1e



T1f



T1g



T1 End



T2a



T2c



T2d



T2e



T2g



T2-End



T3a



T3b



T3c



T3d



T3e



T3f



T3g



T4 Start – from offshore



T4 Start



T4a



T4b



T4c



T4d



T4 End

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Permittee Responsible Mitigation Plan

Kings Grant Mitigation Site ■ North Charleston, South Carolina

August 7, 2020 ■ Terracon Project SAC-2015-00188



APPENDIX D

USACE Mitigation Credit Worksheets

WestEdge Required Wetland Mitigation Credit Worksheet

Factor	WestEdge OCRM Critical Area A	WestEdge OCRM Critical Area B	WestEdge OCRM Critical Area D
Lost Type	3.0	3.0	3.0
Priority Category	2.0	2.0	2.0
Existing Condition	1.0	0.1	0.1
Duration	2.0	2.0	2.0
Dominant Impact	3.0	3.0	3.0
Cumulative Impact	1.0	1.0	1.0
Sum of r Factors	12.0	11.1	11.1
Impacted Area	0.969	2.866	0.088
R x AA	11.628	31.813	0.977

Total Required Credits = $\Sigma(R \times AA) = \mathbf{44.4}$

WestEdge Proposed Wetland Mitigation Credit Worksheet

Factor	Kings Grant PRM Site
Net Improvement	2.5
Upland Buffer	0.0
Credit Schedule	0.3
Temporal Loss	-0.1
Kind	0.0
Location	0.4
Sum of Factors = M	3.1
Mitigation Area =A	21.7
M x A =	67.3

Proposed Wetland Mitigation Credits = $\Sigma(M \times A) = 67.3$

WestEdge Wetland Mitigation Summary Worksheet

I. Required Mitigation	Credit	Acres
A. Required Mitigation Credits	44.4	3.92
B. Has the permittee protected the remaining onsite aquatic resources? The permittee may be eligible for a 25% reduction in Required Mitigation Credits	0	N/A
C. Total Required Mitigation Credits = A - B	44.4	3.92

II. Third Party Mitigation Summary	Credit	Acres
D. Restoration and/or Enhancement	N/A	N/A
E. Preservation	N/A	N/A
F. Total Third-Party Mitigation = D + E	N/A	N/A

III. Permittee Responsible Mitigation Credit Summary	Credits	Acres
G. Restoration and/or Enhancement	67.3	21.7
H. Preservation	N/A	N/A
I. Total Third-Party Mitigation = G + H	67.3	21.7

IV. Proposed Mitigation Summary	Credits	Acres
J. Total Restoration and/or Enhancement = D + G	67.3	21.7
K. Total Preservation = E + H	N/A	N/A
L. Total Proposed Mitigation = F + I	67.3	21.7

V. Local Compensatory Mitigation Goals	Yes	No
PMC ≥ RMC Are the Credits in Row L greater than or equal to Row C?	X	
PMC Restoration and/or Enhancement ≥ ½ RMC Are the Credits in Row J greater than or equal to 50% of Row C	X	

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Permittee Responsible Mitigation Plan

Kings Grant Mitigation Site ■ North Charleston, South Carolina

August 7, 2020 ■ Terracon Project SAC-2015-00188



APPENDIX E

Long-term Steward Funding Estimate

Draft Conservation Easement

Owner / Long-term Steward Agreement

**Kings Grant Mitigation Site for the WestEdge Project Charleston, South Carolina
Annual Long-term Steward Passive Monitoring Costs- 10 Years**

Annual Monitoring		Units	Number of Units	Cost	Total Line Item Cost
Visual monitoring and screening for invasive species, trespass, trash, observing dike breaches	hour	10.00	\$ 50.00	\$ 500.00	
Mobilization (includes Mileage)	hour	2.50	\$ 50.00	\$ 125.00	
Reporting including photographs and notes	hour	5.00	\$ 50.00	\$ 250.00	
Invasive plant species removal and herbicide	hour	30.00	\$ 25.00	\$ 750.00	
Conservation sign maintenance	hour	5.00	\$ 50.00	\$ 250.00	
Trash Removal	hour	5.00	\$ 25.00	\$ 125.00	
Annual Reporting	hour	4.00	\$ 50.00	\$ 200.00	
Total				\$ 2,200.00	\$ 2,200.00
One time costs		Units	Number of Units	Cost/Unit	Total Line Item Cost
Repair creek structure as needed (every 30 years)	N/A	1.00	\$ 8,000.00	\$ 8,000.00	
				Total One-Time Cost \$	8,000.00
				Total Cost \$	30,000.00

WHEREAS, Grantor and Holder agree that third-party rights of enforcement shall be exclusively held by the Corps and the SCDHEC (“Third-Parties”) to include any successor agencies), and may be exercised through the appropriate enforcement agencies of the United States and the State of South Carolina, and that these rights are in addition to, and do not limit, the rights of enforcement under Department of the Army permit number SAC-2015-00188, or any permit or certification issued by the Third-Parties.

COVENANTS, TERMS, CONDITIONS, AND RESTRICTIONS

A. PURPOSE

1. The purpose of this Conservation Easement is to ensure the Property will be preserved in a “Natural Condition”, as defined herein in perpetuity and to prevent any use of the Property that will materially impair or interfere with the Conservation Values of the property (the “Purpose”). Grantor intends that this Conservation Easement will confine the use of the Property to such activities, including without limitation, those involving the restoration, enhancement, and/or preservation of aquatic resources in a manner consistent with the conservation purposes of this Conservation Easement.

2. The term “natural condition,” as referenced in the preceding paragraph and other portions of this conservation easement, shall mean the condition of the property, as it exists at the time this Conservation easement is executed, as well as future restoration, enhancement, or other changes to the property that occur directly as a

result of the compensatory mitigation measures required by section 404 Permit(s) pursuant [to the Kings Grant Mitigation Site PRM Plan dated August 7, 2020 (“Mitigation Plan”), the cover page and Executive Summary of which are attached as Exhibit “B,” including implementation, maintenance, and monitoring activities (collectively, “Compensatory Mitigation”).

3. **Baseline Documentation.** The current conditions (which may or may not include restoration and enhancement efforts pursuant to compensatory mitigation activities), of the Protected Property as of the date of this deed are further documented in a “Concept Design Report,” dated May 16, 2019 and prepared by Water Environment Consultants (“WEC”), which report is an appendix to the Mitigation Plan and is acknowledged as accurate by Grantor and Grantee. The present conditions report includes:

(a) a current aerial photograph of the Protected Property at an appropriate scale taken as close as possible to the date the donation is made;

(b) on-site photographs taken at appropriate locations on the Protected Property, including of major natural features; and,

(c) a surveyed plat of the Protected Property showing all relevant property lines, all existing man-made structures, improvements, features, and major, distinct natural features such as waters of the United States, and shall be recorded in the RMC office for each county in which the Protected Property is situated prior to the recording of this Conservation Easement, and is recorded at Book _____ and Page _____.

The Concept Design Report prepared by WEC has been provided to both parties and will be used by Grantee to assure that any future changes in the use of the Protected Property will be consistent with the terms of this deed. However, the Concept Design Report is not intended to preclude the use of other evidence to establish the condition of the Protected Property as of the date of this deed.

4. **Baseline Documentation Update.** After the completion of the compensatory mitigation activities on the protected property, Grantor, grantee, and third-parties agree that the baseline documentation can and should be updated to reflect the new conditions of the protected property. In the event that such an update is needed, grantor agrees to provide such necessary update, including photographs, narratives, and any other data needed to accurately reflect the conditions of the protected property.

5. Grantor certifies to Third Parties and Grantee that to the Grantors actual knowledge, there are no previously granted easements existing on the property that interfere or conflict with the Purpose of this Conservation Easement as evidenced by the title report attached at “Exhibit C.”

6. **Current Liens.** At the time of conveyance of this Easement, the Property is subject to a Mortgage or Deed of Trust, the holder of which has agreed, by separate instrument, a copy of which is attached hereto as **Exhibit B**, to subordinate its rights in the Property to the extent necessary to permit the Trust to enforce the purposes of this Easement in perpetuity and to prevent any modification or extinguishment of this Easement Deed by the exercise of any rights of the Deed of Trust holder.

NOW THEREFORE, for the foregoing consideration, and in further consideration of the restrictions, rights, and agreements herein, Grantor hereby conveys to Holder a conservation easement over the Protected Property consisting of the following:

B. PROHIBITED USES

Any activity on or use of the property inconsistent with the Purpose of this Conservation Easement and not reserved as a right of Grantor is prohibited. These Restrictions shall run with the land and be binding on Grantor's heirs, successors, administrators, assigns, lessees, or other occupiers and users, and are subject to the Reserved Rights which follow. The Following uses by Grantor, Grantee, their respective guests, agents, assigns, employees, representatives, successors, and third parties are expressly prohibited on the Property except as otherwise provided herein or unless specifically provided for in the Section 404 Permit and any amendments thereto, the Mitigation

Plan, and any easements and reservations of rights in the chain of title to the property at the time of this conveyance (as set forth on Exhibit C):

1. **General.** There shall be no filling, flooding, excavating, mining or drilling; no removal of natural materials; no dumping of materials; and, no alteration of the topography in any manner.
2. **Waters and Wetlands.** In addition to the General restrictions above, there shall be no draining, dredging, damming or impounding; no changing the grade or elevation, impairing the flow or circulation of waters, reducing the reach of waters; and, no other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, as amended.
2. **Trees/Vegetation.** There shall be no clearing, burning, cutting or destroying of trees or vegetation, except as expressly authorized in the Reserved Rights; there shall be no planting or introduction of non-native or exotic species of trees or vegetation.
3. **Activities.** No industrial activities, commercial activities, residential activities, or agricultural activities (including livestock grazing) shall be undertaken or allowed.
4. **Structures.** There shall be no construction, erection, or placement of buildings, billboards, or any other structures, nor any additions to existing structures.
5. **New Roads.** There shall be no construction of new roads, trails or walkways without the prior written approval of the Holder and Third-Parties, including of the manner in which they are constructed.
6. **Utilities.** There shall be no construction or placement of utilities or related facilities without the prior written approval of Holder and Third-Parties.
7. **Pest Control.** There shall be no application of pesticides or biological controls, including for problem vegetation, without prior written approval from the Holder and Third-Parties.
9. **Subdivision.** There shall be no legal or de facto division, subdivision or portioning of the property.
10. **Other Prohibitions.** Any other use of, or activity on, the Protected Property which is or may become inconsistent with the purposes of this grant, the preservation of the Protected Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

C. GRANTEE'S RIGHTS

To accomplish the Purpose of this Conservation Easement, Grantor, its successor and assign hereby grants and conveys the following rights to Grantee and Third Parties.

1. To preserve and protect the Conservation Values of the Property, including enforcing the terms of this Conservation Easement in order to assure the protected property remains in its "natural condition," defined herein, in perpetuity.
2. To enter upon the property at reasonable times in order to monitor compliance with and to otherwise enforce the terms of this Conservation Easement.
3. To prevent any activity on or use of the property that is inconsistent with the Purpose of this Conservation Easement and to require the restoration of such areas or features of the Property that may be damaged by any act, failure to act, or any use that is inconsistent with the Purpose of this Conservation Easement.
4. All mineral, air, and water rights necessary to protect and sustain the biological resources of the Property, provided that any exercise or sale of such rights by Grantee shall not result in conflict with the Conservation Purpose.
5. All present and future development rights allocated, implied, reserved or inherent in the properties; such rights are hereby terminated and extinguished and may not be used or transferred to any portion of the Properties.
6. The right to enforce by means, including, without limitation, injunctive relief, the terms and conditions of this Conservation Easement.

D. GRANTOR'S RESERVED RIGHTS

Notwithstanding the foregoing Restrictions, Grantor reserves for Grantor, its heirs, successors, administrators, and assigns the following Reserved Rights, which may be exercised upon providing prior written notice to Holder and to Third-Parties, except where expressly provided otherwise:

1. **Landscape Management.** Landscaping by the Grantor to prevent severe erosion or damage to the Protected Property or portions thereof, or significant detriment to existing or permitted uses, is allowed, provided that such landscaping is generally consistent with preserving the natural condition of the Protected Property.
2. **Forest Management.** Harvesting and management of timber by Grantor is limited to the extent necessary to protect the natural environment in areas where the forest is damaged by natural forces such as fire, flood, storm, insects or infectious organisms. Such timber harvest and management shall be carried out in accordance with Best Management Practices approved by the South Carolina Forestry Commission or successor agency, as amended.
3. **Recreation.** Grantor reserves the right to engage in or permit the engagement by the public in any outdoor, non-commercial recreational activities, including use of the existing S-shaped raised roadway that traverses the center of the Protected Property, as set forth in Exhibit A, and which will not be impacted by the restoration activities set forth in the Mitigation Plan, as a walking trail, hunting (excluding planting or burning) and fishing, with cumulatively very small impacts, and which are consistent with the continuing natural condition of the Protected Property. No written notice required.
4. **Mineral Interests.** Grantor specifically reserves a qualified mineral interest (as defined in § 170(h)(6) of the Internal Revenue Code) in subsurface oil, gas or other minerals and the right to access such minerals. However, there shall be no extraction or removal of, or exploration for, minerals by any surface mining method, nor by any method which results in subsidence or which otherwise interferes with the continuing

natural condition of the Protected Property.

5. **Road Maintenance.** Grantor reserves the right to maintain existing roads, trails or walkways. Maintenance shall be limited to: removal or pruning of dead or hazardous vegetation; application of permeable materials (e.g., sand, gravel, crushed) necessary to correct or impede erosion; grading; replacement of culverts, water control structures, or bridges; and, maintenance of roadside ditches.
6. **Vegetation, Debris, and Exotic Species Removal.** Grantor reserves the right to engage in the removal or trimming of vegetation downed or damaged due to natural disaster, removal of man-made debris, removal of parasitic vegetation (as it relates to the health of the host plant) and removal of non-native or exotic plant or animal species.
7. **Compensatory Mitigation.** Grantor reserves the right to perform any restoration, enhancement, and other wetland mitigation activities required by Section 404 permit's and/or Mitigation Banking Instruments, including the use of all equipment necessary to successfully complete any mitigation requirements contained therein.
8. **Other Reserved Rights.** Grantor reserves the right to engage in all acts or uses not prohibited by the Restrictions, and which are not inconsistent with the conservation purposes of this grant, the preservation of the Protected Property in its natural condition, and the protection of its environmental systems.

E. GENERAL PROVISIONS

The following General Provisions shall be binding upon, and inure to the benefit of, the Grantor, Holder and Third-Parties, and the heirs, successors, administrators, assigns, lessees, licensees and agents of each:

1. **Marking of Property.** Grantor shall install and maintain permanent signs saying "Protected Natural Area" or establish an equivalent, permanent, marking system along the boundary of any protected areas such as upland buffers, riparian zones, and aquatic resources.
2. **Rights of Access and Entry.** Holder and Third-Parties shall have the right to enter and go upon the Protected Property for purposes of inspection, and to take actions necessary to verify compliance with the Restrictions. Holder shall also have the rights of visual access and view, and to enter and go upon the Protected Property for purposes of making scientific or educational observations and studies, and taking samples, in such a manner as will not disturb the quiet enjoyment of the Protected Property by Grantor. No right of access or entry by the general public to any portion of the Protected Property is conveyed by this Conservation Easement.
3. **Enforcement.** In the event of a breach of the Restrictions by Grantor or another party, the Holder or one of the Third-Parties must notify the Grantor in writing of the breach. The Grantor shall have thirty (30) days after receipt of such notice to undertake actions that are reasonably calculated to swiftly correct the conditions constituting the breach. If the Grantor fails to take such corrective action within thirty (30) days, or fails to complete the necessary corrective action, the Holder and/or the Third-Parties may undertake such actions, including legal proceedings, as are necessary to affect such corrective action. Among other relief, Holder and/or Third-Parties shall be entitled to a complete restoration for any breach of the Restrictions. Breaches of General Provisions of this Conservation Easement shall be actionable without notice. The costs of a breach, correction or restoration, including Grantor reserves the right to engage in or permit the engagement by the public in any outdoor, non-commercial recreational activities, including use of the existing S-shaped raised roadway that traverses the center of the Protected Property, as set forth in Exhibit A, and which will not be impacted by the restoration activities set forth in the Mitigation Plan, as a walking trail, hunting (excluding planting or burning) and fishing, with cumulatively very small impacts, and which are consistent with the continuing natural condition of the Protected Property. No written notice required. the Holder's expenses, court costs, and attorneys' fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach. Enforcement shall be at the discretion of the Holder and/or Third-Parties, and no omission or delay in acting shall constitute a waiver of any enforcement right. These enforcement rights are in addition to, and shall not limit, enforcement rights available under other

provisions of law or equity, or under any applicable permit or certification.

4. **Events Beyond Grantor's Control.** Nothing herein shall be construed to authorize the Holder or Third-Parties to institute any proceedings against Grantor for any changes to the Protected Property caused by acts of God or circumstances beyond the Grantor's control such as earthquake, fire, flood, storm, war, civil disturbance, strike, the unauthorized acts of third persons, or similar causes.
5. **Obligations of Ownership.** Grantor is responsible for any real estate taxes, assessments, fees, or charges levied upon the Protected Property. Grantor shall keep the Protected Property free of any liens or other encumbrances for obligations incurred by Grantor. Holder shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the Protected Property, except as expressly provided herein. Nothing herein shall relieve the Grantor of the obligation to comply with federal, state or local laws, regulations and permits which may apply to the exercise of the Reserved Rights.
6. **Long Term Management.** Grantor will accomplish the long-term management activities identified in the approved mitigation plan, dated August 7, 2020.
7. **Extinguishment.** In the event that changed conditions render impossible the continued use of the Protected Property for the conservation purposes, this Conservation Easement may only be extinguished, in whole or in part, by judicial proceeding.
8. **Eminent Domain.** Whenever all or part of the Protected Property is taken in the exercise of eminent domain so as to substantially abrogate the Restrictions imposed by this Conservation Easement, the Grantor and Holder shall join in appropriate actions at the time of such taking to recover the full value of the taking, and all incidental and direct damages due to the taking.
9. **Proceeds.** This Conservation Easement constitutes a real property interest immediately vested in Holder. In the event that all or a portion of this Protected Property is sold, exchanged, or involuntarily converted following an extinguishment or the exercise of eminent domain, Holder shall be entitled to the fair market value of this Conservation Easement. The parties stipulate that the fair market value of this Conservation Easement shall be determined by multiplying the fair market value of the Protected Property unencumbered by this Conservation Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of this easement at the time of this grant to the value of the Protected Property (without deduction for the value of this Conservation Easement) at the time of this grant. The values at the time of this grant shall be the values used, or which would have been used, to calculate a deduction for federal income tax purposes, pursuant to Section 170(h) of the Internal Revenue Code (whether eligible or ineligible for such a deduction). Holder shall use its share of the proceeds in a manner consistent with the purposes of this Conservation Easement.
10. **Notification.** Any notice, request for approval, or other communication required under this Conservation Easement shall be sent by registered or certified mail, postage prepaid, to the following addresses (or such address as may be hereafter specified by notice pursuant to this paragraph):

To Grantor: _____

To Holder: Lord Berkeley Conservation Trust

To Third Parties: U.S. Army Corps of Engineers
 Attn: Regulatory Division
 69A Hagood Avenue
 Charleston, South Carolina 29403

11. **Assignment.** This Conservation Easement is transferable, but only to a qualified holder under 501 (C)(3) and § 170(h) of the Internal Revenue Code as described herein. As a condition of such transfer, the transferee shall agree to all of the restrictions, rights, and provisions herein, and to continue to carry out the purposes of this Conservation Easement. Assignments shall be accomplished by amendment of this Conservation Easement under paragraph 12. Grantee shall notify Third Parties at least 60 days prior to any such assignment or transfer.
12. **Failure of Holder.** If at any time Grantee is unable or fails to enforce this Conservation Easement, or if Grantee ceases to be a qualified holder under §501(c)(3) and § 170(h) of the Internal Revenue Code, and if within a reasonable period of time after the occurrence of one of these events the Grantee fails to make an assignment pursuant to paragraph 9, then the Holder's interest shall become vested in another qualified holder in accordance with an appropriate (e.g., cy pres) proceeding in a court of competent jurisdiction.
13. **Subsequent Transfer.** Grantor agrees to incorporate the terms of this Conservation Easement in any deed or other legal instrument which transfers any interest in all or a portion of the Protected Property. Grantor agrees to provide written notice of such transfer to Grantee and Third Parties at least 60 days prior to the date of transfer. The failure of Grantor to comply with this paragraph shall not impair the validity or enforceability of this Conservation Easement.
14. **Amendment.** This Conservation Easement may be amended, but only in writing signed by all parties hereto and provided such amendment does not affect the purpose of this Conservation Easement or the status of the Grantee under any applicable laws, including S.C. Code Title 7, Chapter. Any amendments must be consistent with the conservation purposes of this grant.
15. **Severability.** Should any separable part of this Conservation Easement be found void or unenforceable by a court of competent jurisdiction, the remainder shall continue in full force and effect.
16. **Warranty.** Grantor warrants that it owns the Protected Property in fee simple, and that Grantor either owns all interests in the Protected Property which may be impaired by the granting of this Conservation Easement or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Protected Property which have not been expressly subordinated to this Conservation Easement. Grantor further warrants that Holder shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement.
17. **Habendum Clause.** To have and to hold, this Easement together with all and singular the appurtenances and privileges belonging or in any way pertaining thereto, either in law or equity, either in possession or expectancy, for the proper use and benefit of the Grantee, its successors and assigns, forever.

[Signature Pages Attached]

Approval by Third-Parties

U.S. Army Corps of Engineers,
Charleston District,

By: _____

[type/print name]

Title: _____

S.C. Department of Health and
Environmental Control

By: _____

[type/print name]

Title: _____

Exhibit A

Map of Protected Property

DRAFT

Exhibit B

Mitigation Plan

DRAFT

Exhibit C

Title Report

DRAFT

2536



**OPEN SPACE
INSTITUTE
LAND TRUST**

VIA US MAIL

September 28, 2018

✓ Michael Maher
WestEdge Foundation, Inc.
P.O. Box 20549
Charleston, South Carolina 29413

Raymond H. Anderson, Jr.
City of North Charleston
P.O. Box 190016
North Charleston, South Carolina 29419

T. Ravenel
540 East Bay Street
Charleston, South Carolina 29403

Dear Sirs:

At the request of Patrick Moore enclosed herewith please find an Original Memorandum of Understanding for your files.

If you need any additional information I can be reached at (646) 813-6428.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'St S' with a horizontal line extending to the right.

Steven Sarnotsky
Paralegal

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("Memorandum") is made and entered into as of the 26th day of July, 2018, by Open Space Institute Land Trust, Inc., ("OSILT"), the City of North Charleston ("City"), Palmetto Railways, a Division of the South Carolina Department of Commerce ("Railways"), and WestEdge Foundation, Inc. (WestEdge). (City, OSILT, Railways, and WestEdge are collectively referred to herein as "Parties").

WHEREAS, OSILT is a non-profit organization founded in 1964 to protect scenic, natural and historic landscapes that has protected over 110,000 acres in direct acquisition and assisted in the protection of an additional 2,000,000 acres through loan and grant programs in the eastern United States;

WHEREAS, City is a municipal entity formed on June 12, 1972, with an interest in providing public access to nearby natural resources for the health and well-being of its inhabitants;

WHEREAS, Palmetto Railways has filed a permit application with the United States Army Corps of Engineers, Charleston District ("the Corps") and the South Carolina Department of Health and Environmental Control ("SCDHEC") for authorization to fill approximately 6 acres of federally jurisdictional wetlands in connection with Palmetto Railways' proposal to locate, build, own and operate the Navy Base Intermodal Facility ("NBIF") in North Charleston, South Carolina;

WHEREAS, WestEdge intends to file a permit application with the Corps and SCDHEC for authorization to fill or impact approximately 4 acres of federally jurisdictional wetlands in connection with WestEdge's proposed development in Charleston, South Carolina (Railways and WestEdge are collectively referred to in this MOU as "Applicants");

WHEREAS, OSILT has acquired title to the approximately 80 acres of the Kings Grant Tract as shown on Exhibit A attached hereto (the "Property"), which Property is a critical property of national significance due to its proximity to the Ashley River Historic District;

WHEREAS, Applicants will be required by the Corps and SCDHEC to mitigate for permitted wetland impacts and such mitigation may include preservation and/or restoration of properties like the Property which has been identified as providing significant conservation benefits;

WHEREAS, Applicants intend to meet their mitigation obligations through their prior funding of the cost of acquisition and future restoration of the Property;

WHEREAS, All Parties acknowledge that the respective projects and mitigation requirements of Railways and WestEdge are entirely separate and independent of each other. As such, the mitigation activities required by the Corps and SCDHEC under the respective mitigation plans are the sole obligation of the respective Applicant;

WHEREAS, Applicants' respective mitigation obligations will be embodied in two independent and final mitigation plans ("Railways Mitigation Plan" and "WestEdge Mitigation Plan," respectively and collectively "Mitigation Plans"), which will separately designate City as the long-term owner and steward of the respective mitigation sites of the Property;

WHEREAS, It is expected that a portion of the acreage of the Property will remain unaffected after the wetlands mitigation and restoration activity required by the Mitigation Plans are complete ("Unaffected Portion"), including, specifically, the existing roadway that is located on the Property;

WHEREAS, that the Unaffected Portion will not be subject to or affected by the respective conservation easements placed on the mitigation sites by Applicants in accordance with the Mitigation Plans and could provide meaningful public access to the Property, benefitting the inhabitants of the City and the public at large;

WHEREAS, In exchange for its ability to provide meaningful public access to the Unaffected Portion, the City is interested in accepting title to the Property and serving as long-term steward as provided in the Mitigation Plans; and

WHEREAS OSILT, City and Applicants have the opportunity to collaborate in the protection of the Property to satisfy mutually agreeable wetlands preservation, restoration, public access, and overall conservation goals in accordance with the mitigation requirements of the Corps and SCDHEC.

NOW THEREFORE the Parties hereby memorialize their understanding as follows:

1. Protection of Property. OSILT has the organizational capacity and resources to hold fee simple title to the Property, to protect the Property in a manner that satisfies the requirements of the Corps, and to convey the Property to the long-term steward designated in the USACE permit.

2. Acquisition of the Property. OSILT acquired the Property from its previous owner on or about March 6, 2018.

3. Management of the Property by OSILT. OSILT will retain title to the Property for up to seven (7) years while the respective wetlands restoration required by the

Railways Mitigation Plan and WestEdge Mitigation Plan is conducted by the Applicants. Thereafter OSILT will donate the Property to City subject to the conservation easements to be granted to Lord Berkeley Land Trust covering the Property pursuant to the Mitigation Plans ("Conservation Easements"). The City agrees to accept title to the Property subject to the Conservation Easements and to serve as long-term steward of the Property in exchange for its ability to provide public access to the Unaffected Portion..

4. Development of Mitigation Plans. Parties agree to work in good faith to develop individual mitigation plans for Railways and WestEdge for the Property in accordance with the terms of this Memorandum. All actions described in this MOU are subject to the approval of the U.S Army Corps of Engineers in the form of Final Mitigation Plans. To the extent the Applicants' Final Mitigation Plans require different actions than described herein, the parties agree that this MOU will be amended to include those requirements as appropriate.

5. Satisfaction of Mitigation Needs and Remaining Acreage. The acquisition of the Property by OSILT is intended to provide the restoration area necessary to fully comply with the respective requirements of the individual Corps and SCDHEC permits to Railways and WestEdge. The Parties agree that while the primary purpose of the Property is wetlands mitigation required by the respective mitigation plans, those portions of the Property not required for such mitigation purposes under the respective mitigation plans may be used for public access or other mitigation activities.

6. Long-Term Ownership and Management. In consideration for the its ability to provide public access to the Unaffected Portion, the sufficiency of which is hereby acknowledged, City agrees to act as the long-term owner and steward of the Property consistent with the Mitigation Plans. The City will only be responsible for adverse impacts after taking possession that are not a result of actions or inactions by the other parties to this agreement. Applicants will provide City with confirmation from the Corps that all permit requirements have been met prior to the City taking ownership.

7. Notice of Mitigation Plans. Applicants will provide OSILT and City with copies of their respective permits and mitigation plans once issued and completed.

8. Implementation of Mitigation Plans. Railways will be solely responsible for the costs and the performance of the work required under the Railways Mitigation Plan. WestEdge will be solely responsible for the costs and the performance of the work required under the WestEdge Mitigation Plan (work required under the respective mitigation plans collectively referred to as the "Work Plan"). Applicants agree to require their contractors performing the work to hold OSILT and City of North Charleston harmless and indemnify it from any injury to person or property or any claims arising from the Work Plans or the presence of the Applicants, their employees, contractors or invitees on the Property. In accordance with 33 CFR 332.3(l), Applicants acknowledge responsibility for implementation and performance of the Mitigation Plans until such time as the Property is donated to the City. The City acknowledges responsibility for long-term management of the Property.

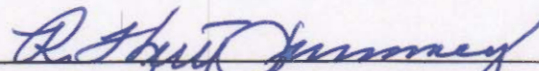
9. Long Term Management and Monitoring. If required by the Corps and SCDHEC, and following OSILT's donation of the Property to the City, Applicants agree to provide financial assurances consistent with the respective permits, once issued, for the contemplated projects and the Railways Mitigation Plan and WestEdge Mitigation Plan, respectively, to fund monitoring for a period of time which is acceptable to the Corps. City agrees that it will be responsible for any adverse impacts or conditions detected on the Property as a result of monitoring undertaken after the Property is donated to the City.

10. South Carolina Law Governs. The Parties agree that this Memorandum will be governed by the laws of the State of South Carolina, and any claims or actions brought pursuant to this Memorandum will be resolved in either the State of South Carolina Court of Common Pleas or the United States District Court, District of South Carolina.

11. No Joint Venture, etc. This Memorandum is not intended to establish any joint venture, partnership, or agency relationship of any kind between the Parties.

IN WITNESS WHEREOF, as evidenced by their signatures below, the undersigned Parties to this Memorandum agree in good faith to the terms set forth above and to use reasonable efforts to obtain permit(s) and/or authorization(s) for the Applicants' projects, pursue a conservation outcome for the Property, and to accomplish this unique project.

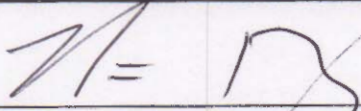
CITY OF NORTH CHARLESTON

By: 

Print: R. Keith Summey

Title: Mayor

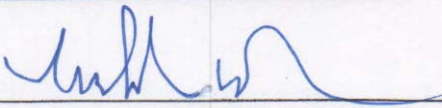
OPEN SPACE INSTITUTE LAND TRUST, INC.

By: 

Print: Nathan Berry

Title: Vice President

WESTEDGE FOUNDATION, INC.

By: 

Print: Michael Maher

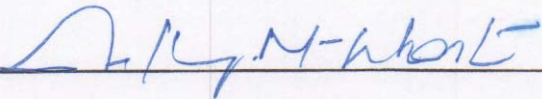
Title: President and Chief Executive Officer

By: _____

Print:

Title:

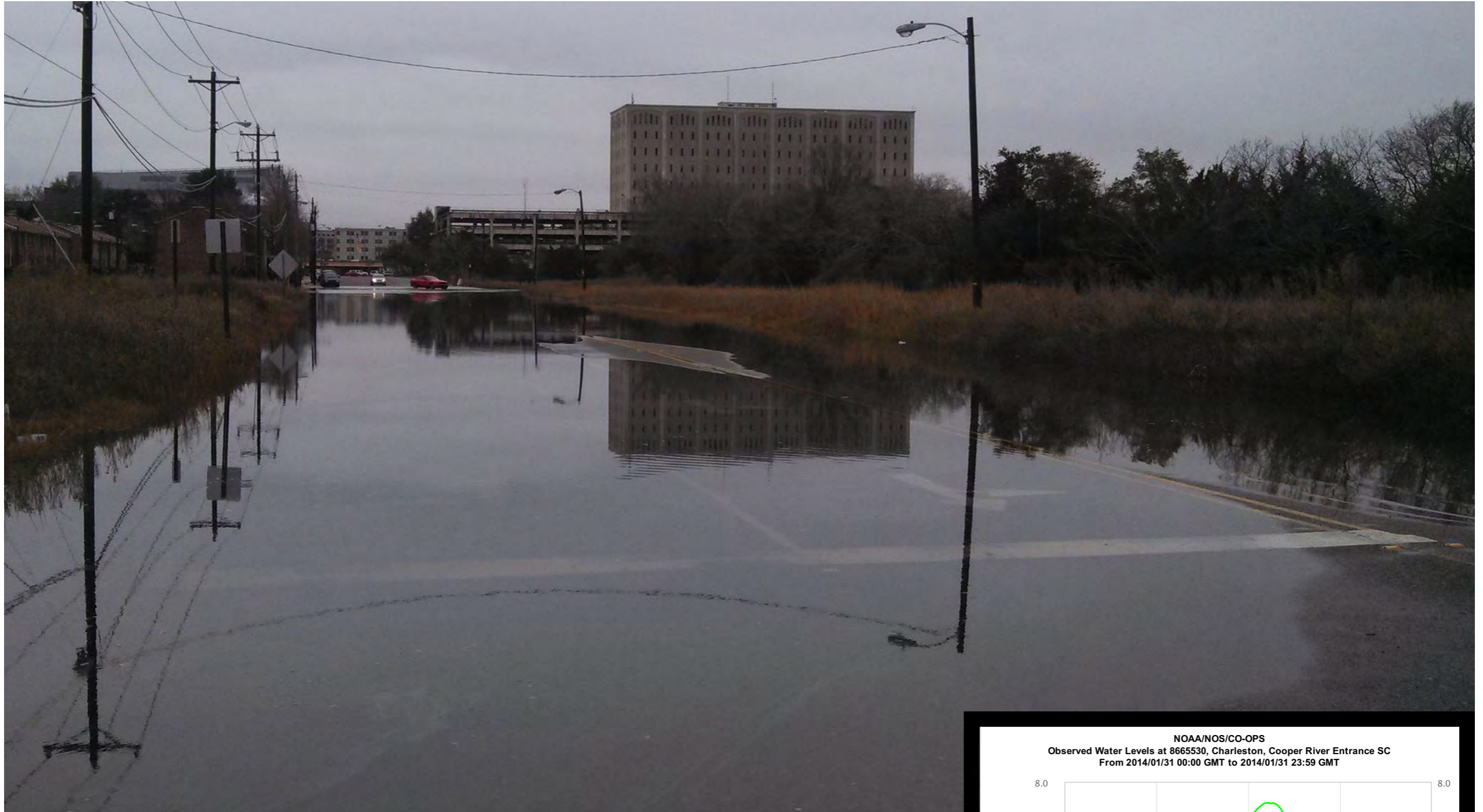
PALMETTO RAILWAYS

By: 

Print:

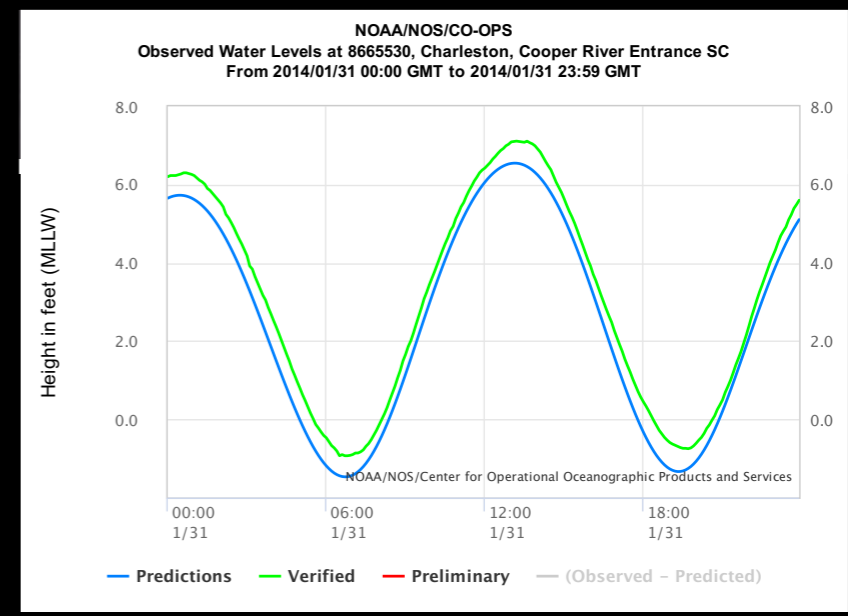
Title:





TIDAL FLOODING

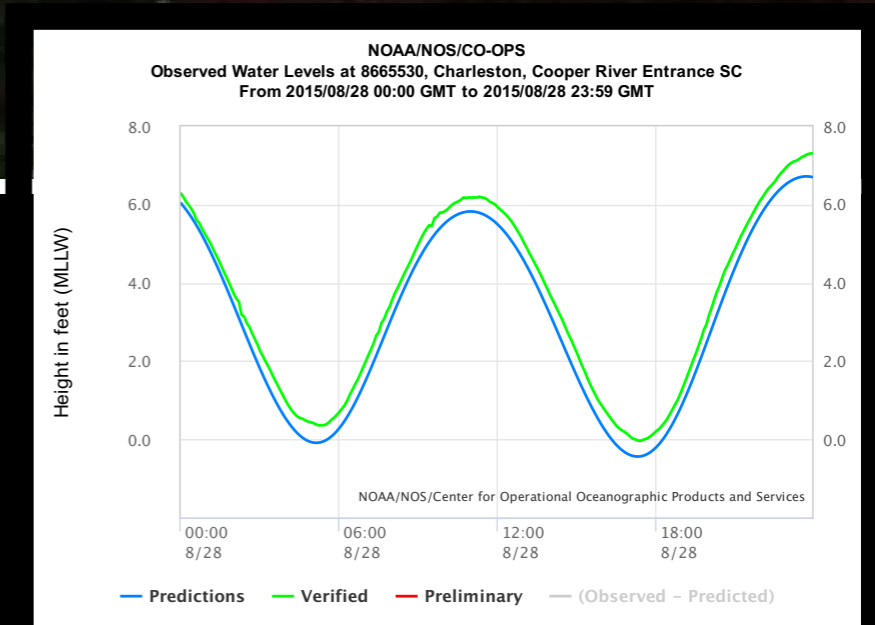
JANUARY 31, 2014 (NO RAIN)

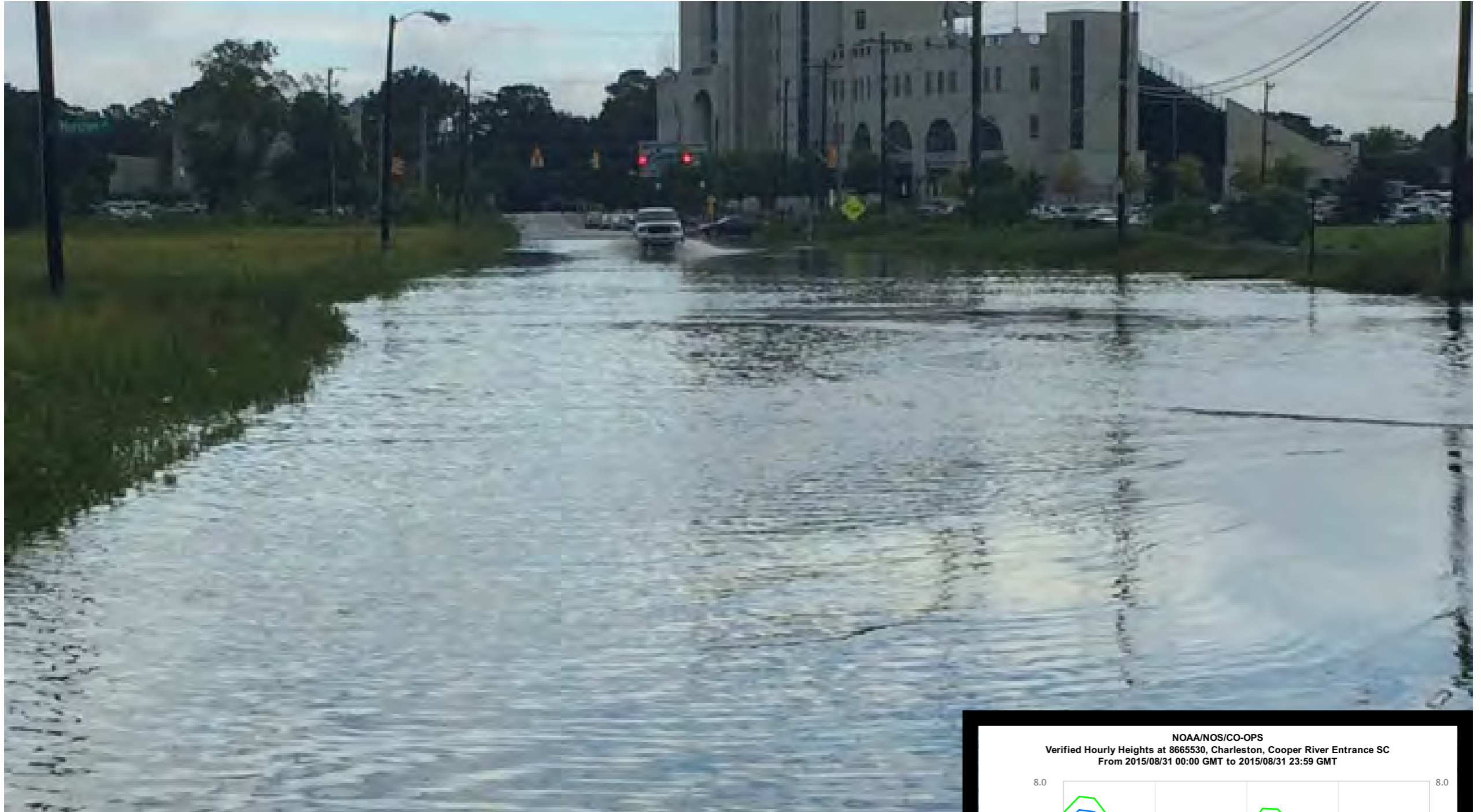




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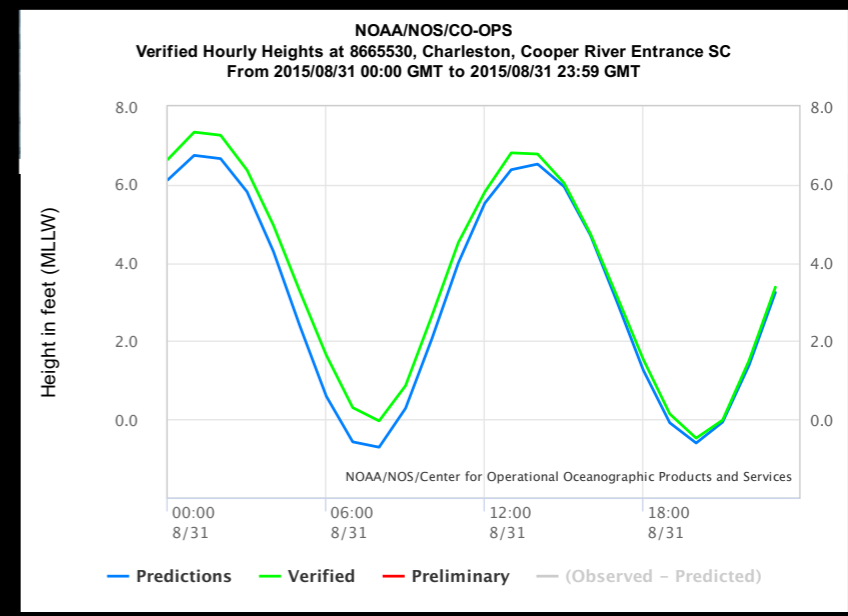
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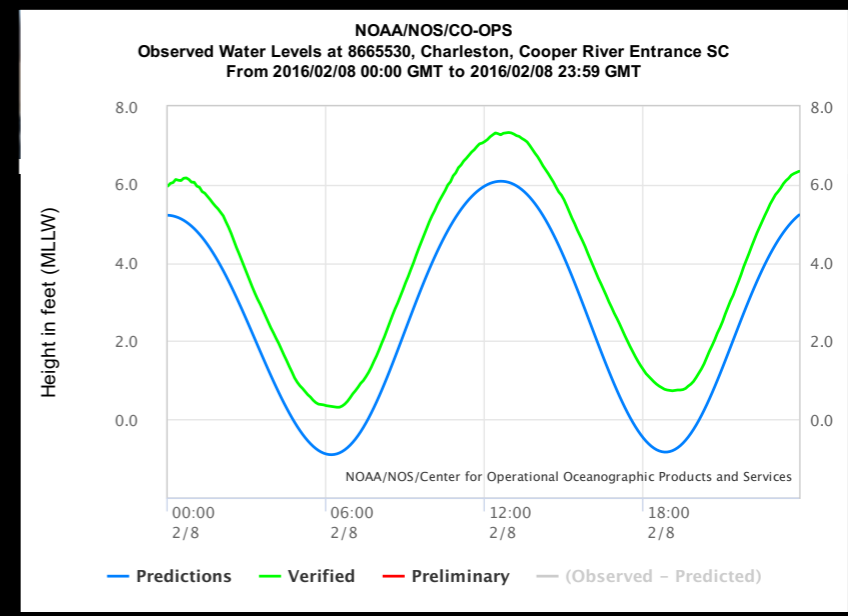
AUGUST 31, 2015 (SUNNY DAY, NO RAIN)

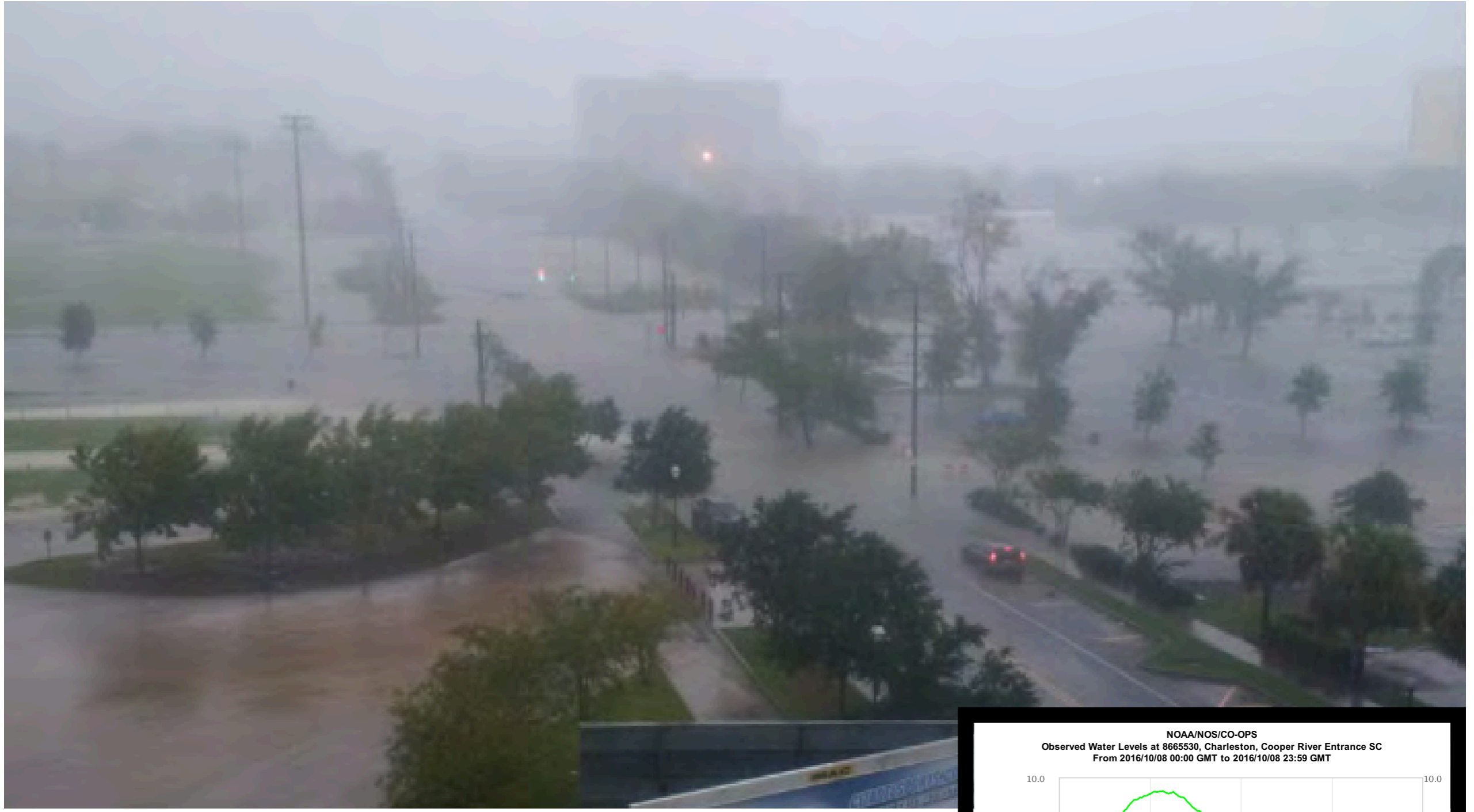




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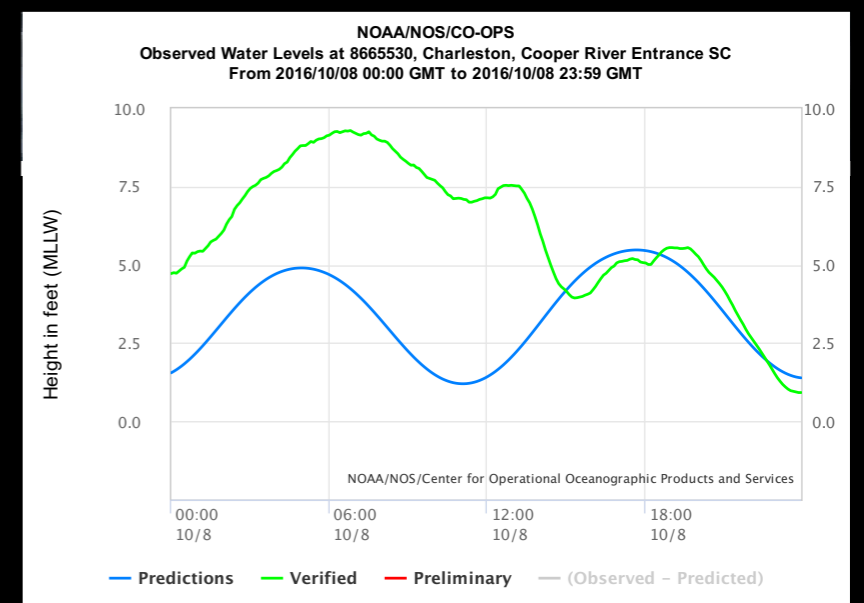
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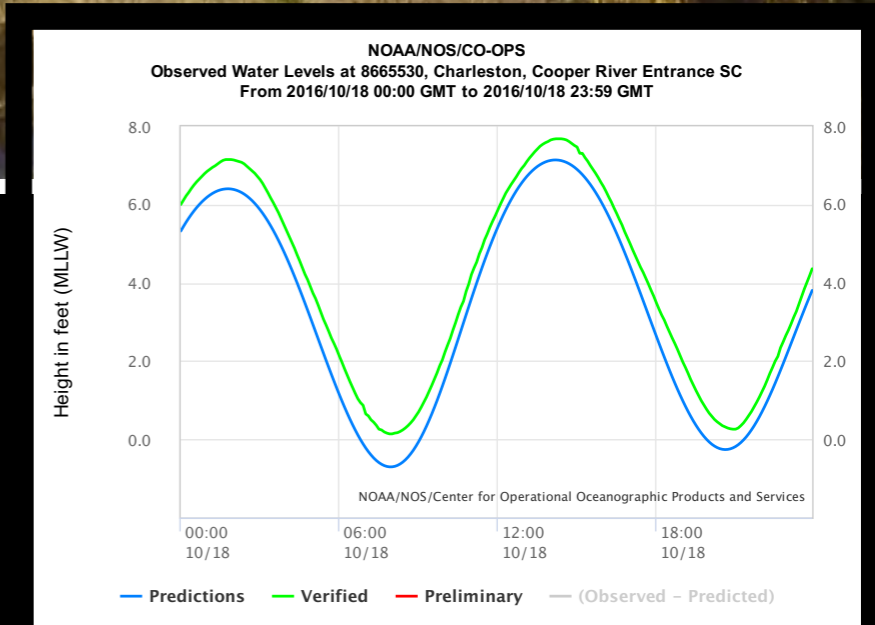
OCTOBER 08, 2016 (HURRICANE MATTHEW, CATEGORY 1)





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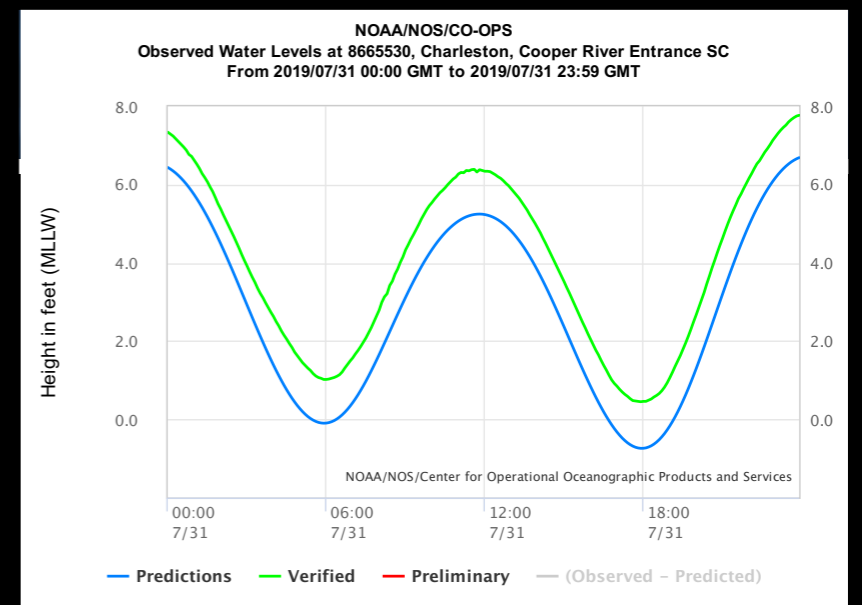
OCTOBER 18, 2016 (SUNNY DAY, NO RAIN)





TIDAL FLOODING

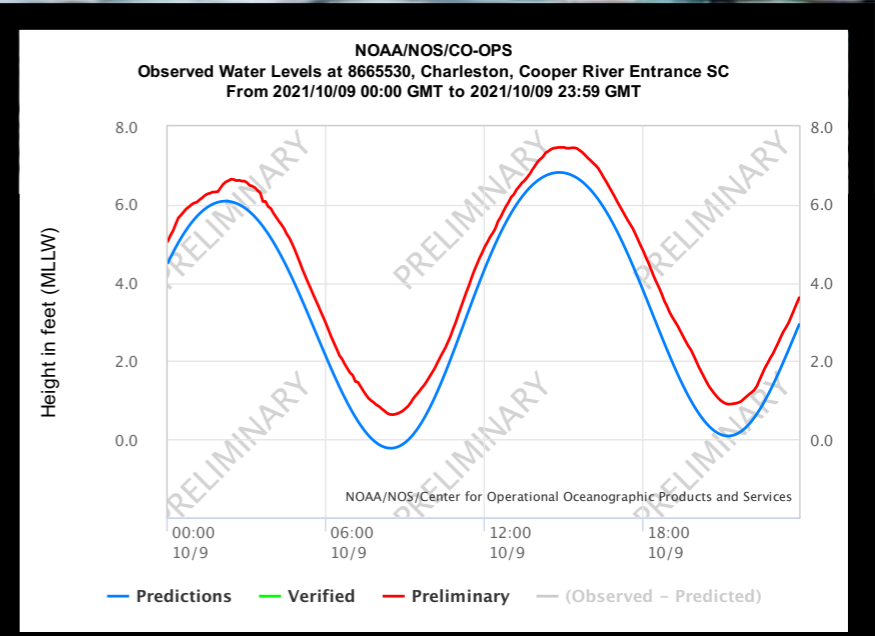
JULY 31, 2019 (STARRY NIGHT, NO RAIN)





TIDAL FLOODING

OCTOBER 9, 2021 (SUNNY DAY, NO RAIN)





The Post and Courier 69° MOSTLY CLOUDY
 FOUNDED 1802 80 WINNER OF THE PULITZER PRIZE

[E-PAPER](#)
[OBITUARIES](#)
[NEWSLETTERS](#)
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[SUBSCRIBE](#)
[MICHAEL MAHER](#)

Weather Service issues 7th consecutive flood advisory for Charleston, Colleton counties

BY JOCELYN GRZESZCZAK GRZESZCZAK@POSTANDCOURIER.COM
 1 HR AGO



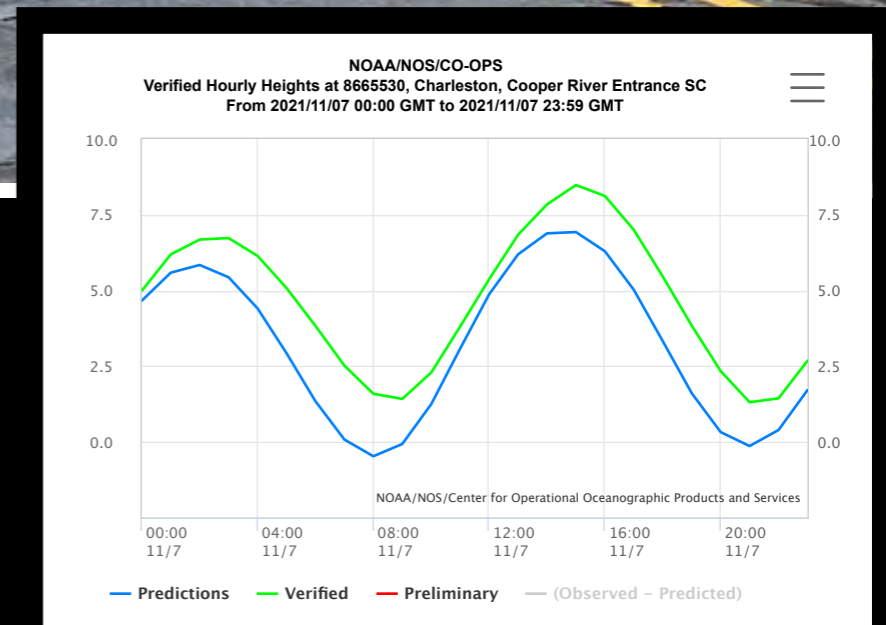
TIDAL FLOODING

OCTOBER 9, 2021 (SUNNY DAY, NO RAIN)



TIDAL FLOODING

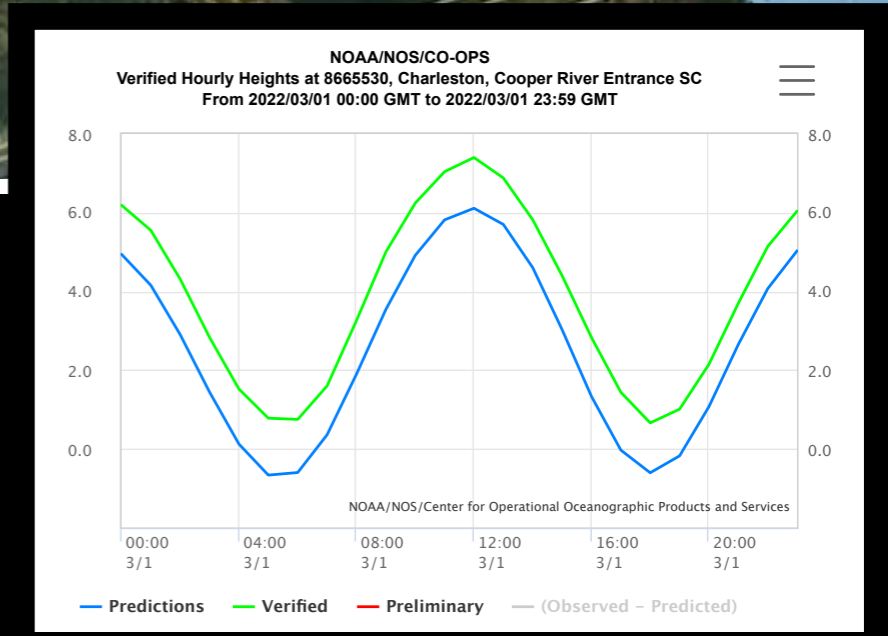
NOVEMBER 07, 2021 (SUNNY DAY, NO RAIN)





TIDAL FLOODING

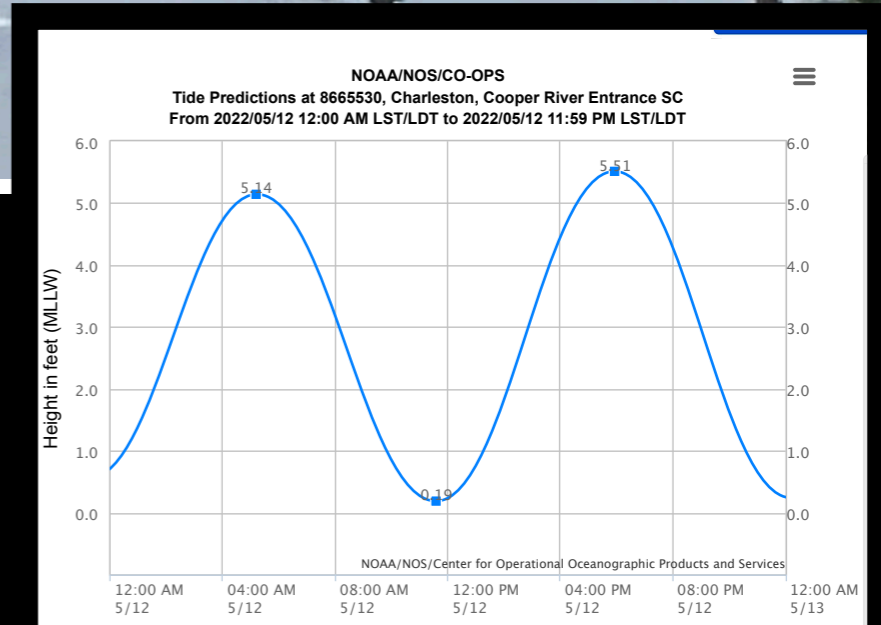
MARCH 01, 2022 (SUNNY DAY, NO RAIN)





TIDAL FLOODING

MAY 12, 2022 (SUNNY DAY, NO RAIN)



RECEIVED

May 23 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

Docket No. 21-ALJ-07-0433-CC
Appellate Case No. 2023-000006

Friends of Gadsden Creek,Appellant,

vs.

South Carolina Department of Health and Environmental Control, and
WestEdge Foundation, Inc.,Respondents.

CERTIFICATE OF COUNSEL

I certify that this Record on Appeal contains all material proposed to be included by any
of the parties and not any other material.

**SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT**

s/Benjamin D. Cunningham

Benjamin D. Cunningham (SC Bar #: 76396)

Lauren Megill Milton (SC Bar #: 100389)

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585

Office address: 510 Live Oak Drive
Mt. Pleasant, SC 29464

Telephone: (843) 527-0078

Fax: (843) 527-0540

Georgetown, South Carolina
May 23, 2023