

BRIEF

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**Jul 07 2023**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**SC Court of Appeals**

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APPEAL FROM SOUTH CAROLINA, ADMINISTRATIVE LAW COURT

Milton G. Kimpson, Judge  
Docket No. 21-ALJ-07-0144-CC

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Appellate Case No. 2023-000441

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South Carolina DHEC, Carla Varn DuPre, and Jasper Varn III      Respondents

v.

Stephen Mueller, Pro Se

Appellant

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I am appealing the final order of the Administrative Law Court of South Carolina, Docket No. 21-ALJ-07-0144-CC on June 7, 2022 to affirm the authorization of the OCRM Permit OCRM0208 which authorizes construction at 410 Palmetto Blvd., Edisto Beach S.C.

The language of the Statutes of the State of SC is included in the transcript of the ALC case which I have provided. I will not repeat it word for word in this brief.

My appeal asserts that OCRM/DHEC has violated the Statute 48-39-290(A)(6) stating that new construction on a beach/dune system may be seaward of the OCRM/DHEC situated baseline by special permit, however construction MUST NOT BE SITUATED ON A PRIMARY OCEANFRONT SAND DUNE OR ON ACTIVE BEACH. The ALC concluded without evidence that there has formed a new primary oceanfront dune (POSD) some 30' seaward of the baseline which is, according to Statute, situated on the actual POSD. The Department used the erroneous location of a new dune by permitting officer Matt Slagel to issue building permits. As a result there are DHEC building permits allowing construction and septic systems on primary dunes and Active Beach.

Relevant background is that the Town of Edisto constructed an "emergency berm to temporarily keep sand off of Palmetto Blvd." in 2018, after Hurricane Irma. I attach a photo of the berm. It is just a pile of sand bulldozed landward to protect the actual dunes. Two years later Mr. Matt Slagel, a permitting officer of DHEC identified this as a Primary Oceanfront Sand dune for the purpose of building permits.



I am seeking relief from the Order under SCRCF 60 (b). Mistakes have been made and I offer newly discovered evidence.

Errors: The Court erred in its determination that an “emergency berm” that was constructed in 2018 had become a POSD by July 2020. The court had no evidence that the berm had become a POSD other than the testimony of Mr. Matt Slagel, the DHEC permitting officer who identified it as a POSD despite the berm having no lawful characteristics of a dune.

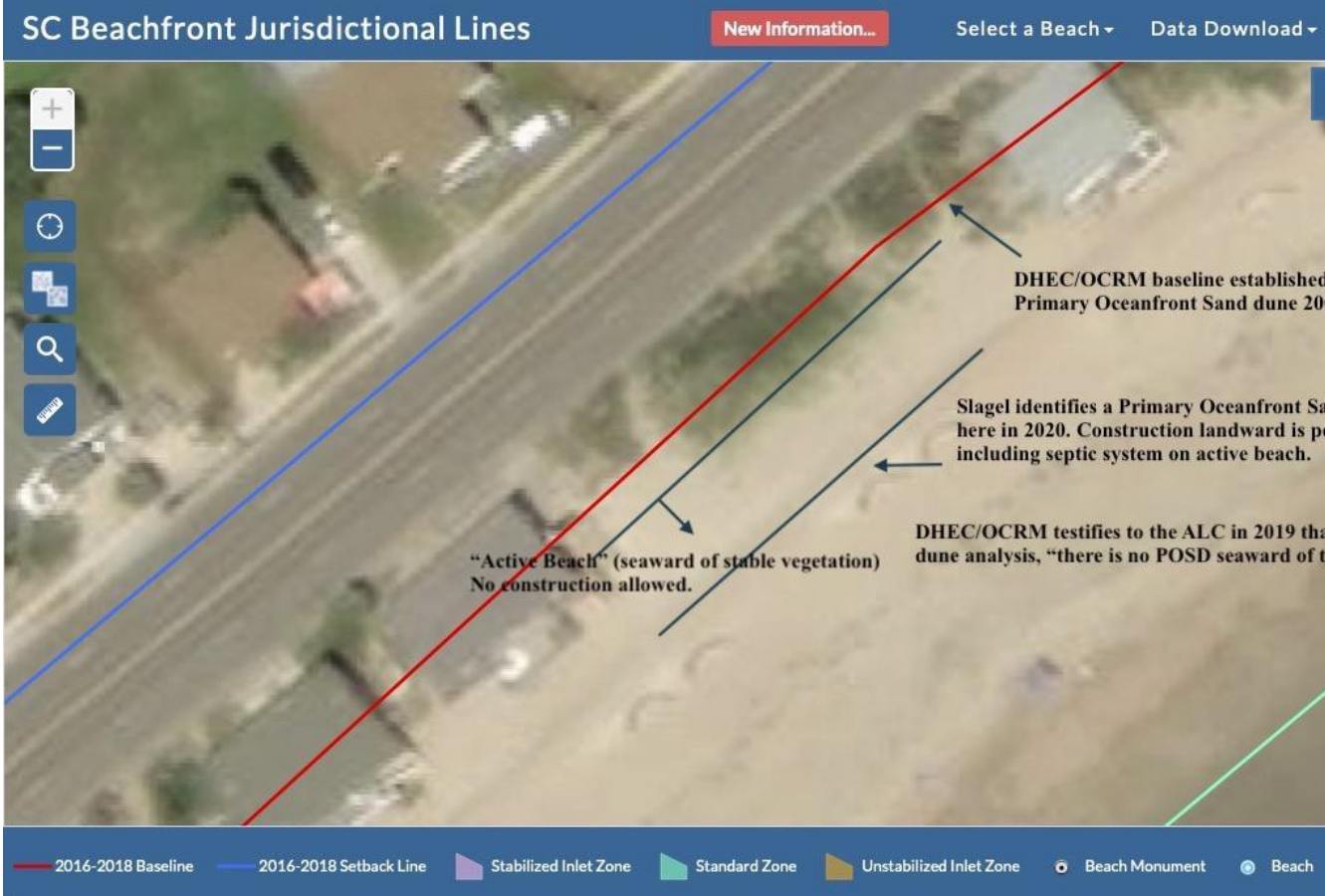
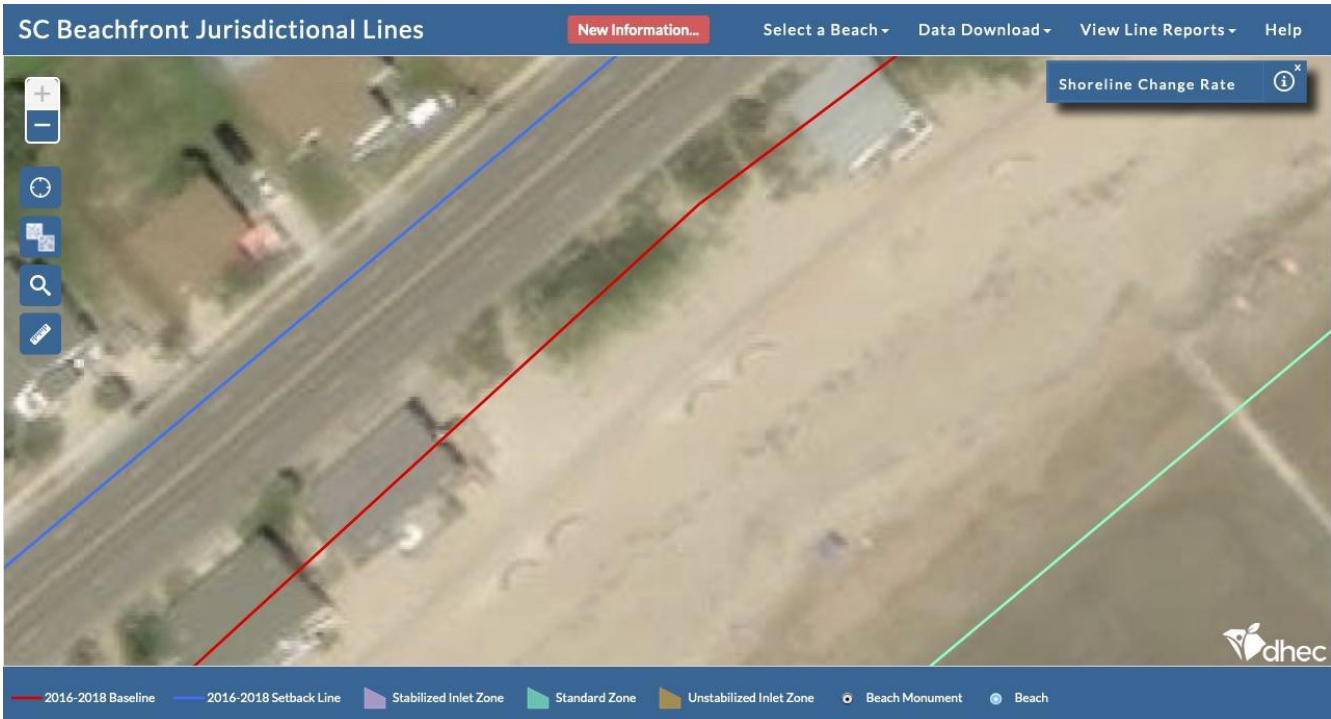
Mr. Slagel erred grievously by identifying a POSD at the location of the berm for the following reasons.

1. Eight months before his identification of the POSD, the Department in the ALC case, Docket 18-ALJ-07-0023-CC testified that “the Dept. conducted a “preliminary dune analysis” for the purpose of locating a POSD from 120 Palmetto Blvd. to 612 Palmetto Blvd.” Their testimony published Nov. 2019 was that “the Dept. did not locate a POSD seaward of the 2008 baseline”. DHEC/OCRM also has published data indicating that the current erosion rate in the area analysed is 1.5 feet per year of shoreline. Mr. Slagel's superior, Elizabeth von Klonitz signed the testimony and Mr. Slagel was copied and clearly should have understood that there was no POSD seaward of the baseline. 410 Palmetto Blvd. is the shallowest lot in the surveyed area. Furthermore

in the 8 months between Nov. 2019 and July 2020, considering erosion, there was **less** of a possibility of there being a POSD seaward of the baseline. Yet Mr. Slagel in July 2020 identified one **30' seaward** of the baseline!

2. Present was Mr. Bill Eiser of Eiser Coastal Consulting. Mr. Eiser was being compensated by the permit applicants to obtain a construction permit on the lot. Mr. Eiser, later testified at the hearing as an "expert witness". Mr. Eiser happens to be Mr. Slagel's ex-boss and mentor. The two met for lunch before the 7/2020 survey and subsequently Mr. Slagel with Mr. Eiser, made the indisputably erroneous decision. Mr. Slagel testified under oath that the two "did not talk about the dune". Perjury? Mr. Eiser wisely, because he was under oath, did not testify that the berm had miraculously become a dune but would only say that "you cannot say forever that a berm cannot become a dune". Possibly Mr. Slagel's inexperience and Mr. Eiser's influence resulted in Mr. Slagel making a very bad decision.
3. Regarding the lack of evidence, the Court relied solely on Mr. Slagel's testimony that a berm had become a dune. It also relied on Mr. Eiser as an "expert witness", even though he was a paid advocate of the applicants. The requirements of a berm becoming a dune include the feature being at an historical location of a primary dune. Mr. Eiser testified under oath that he reviewed aerial photographs of historical dunes, possibly lied, and produced none in evidence. I have found with diligent research, no evidence of primary dunes ever being in the location of the berm and I offer into evidence the attached photos back to 2007. DHEC, despite my requests, has refused to provide me with previous evidence of dunes.

For reference I offer pictures showing the location of the 2008 Jurisdictional Baseline which historically, and by Law, is located on the POSD. The primary dune is clearly visible at the baseline. In 2015 the State recommended that the baseline be located even further LANDWARD but the decision was postponed by the Legislature and the baseline was re-established at the 2008 location in 2016. Despite all evidence available to Mr. Slagel, he, and he alone (but possibly in collusion with Mr. Eiser), decided that there was miraculously formed a new POSD 30' seaward of that established by his own Dept.



Attachments:

410 2007: Aerial photography of 410 Palmetto Blvd. depicting no POSD seaward of the baseline.

410 2009 No POSD seaward

410 2017 No POSD seaward

410 2019 Shows aerial photography of 410 Palmetto Blvd. with indication of where Mr. Slagel flagged what he identified as the landward toe of a new POSD. Also depicted is beachfront geography showing no POSD seaward of the baseline even though Mr. Slagel knew that the dune must be continuous for 500' according to State regulations.

There is no historical photography as far back as 2007 showing any feature like a primary dune at the location of the berm. Furthermore Mr. Eiser testified that "in 2008 when the baseline (dune) was established, "a POSD did not exist". Ms von Kolnitz testified in 2019 that there was no dune seaward of the baseline. Mr. Slagel also testified that he "took no measurements of elevation or continuity of the "dune". He relied SOLELY on his visual observation of the feature and that "there was a change in elevation and vegetation on it". I suspect Mr. Eiser concurred for the advantage of his client. No superior, supervisor or other DHEC official checked his work. The requirement for a berm becoming a dune also includes that it is vegetated with established native vegetation and is not escaped by normal high tides. The berm was sparsely vegetated by plantings not stable but installed by the Town. The vegetation today, in 2023, is mostly gone and the berm is severely escarped by normal tides.

Under **new evidence**, I offer the following:

1. The precedent of ALC Docket 18-ALJ-07-0023-CC was not admitted at the hearing on Nov. 8, 2021.

The case concluded by DHEC's own testimony that there was no POSD seaward of the 2008 baseline on Nov. 2019, yet Mr. Slagel identified one **30' seaward** of the baseline on July 2020.

Exhibit "410 2007". The picture shows no evidence of a POSD in the area flagged by Mr. Slagel and Mr. Eiser. Both testified under oath that there historically has been a POSD seaward of the baseline.

Exhibit "410 2009" Again no evidence of a dune seaward of the baseline.

Exhibits "410 2012, 2013, and 2019" again show no evidence of a POSD seaward of the baseline.

"410 2019" is aerial photography of 410 Palmetto and areas North in 2019. Annotated on the map are lines showing the locations that Matt Slagel identified as Primary Oceanfront Sand Dunes in 2020. Mr. Slagel testified that the area of the line "became a POSD" in the 8 months after the Department said that there was none. Mr. Eiser wisely testified that "you can never say that this could not ever become a POSD" because he knew it wasn't. Mr. Slagel possibly got intimidated by Mr. Eiser, his ex-boss to do the identification. Mr. Eiser profited financially from Mr. Slagel's decision. SC Regulations define a POSD as being continuous for 500'. As depicted, the berm actually gets more severely eroded within 500' and Mr. Slagel

testified that he “did not take any measurements within 500’ of 410. Nor did he take measurements of the elevation of the berm. By Regulation a POSD must be a minimum of 36” high, vegetated by stable native vegetation, continuous for 500’ and not escarped by normal tides. The berm exhibited none of these characteristics when Mr. slagel identified it.

“Nov. 2021” shows the berm with sand fencing installed but clearly no features of a POSD, just a low pile of sand with a fence atop, None of the Regulatory characteristics of a POSD are existing.

## **410 Pametto Blvd. 03/12/2007**



03/12/2007

**410 2009**



02/21/2009

**410 2017**



**03/07/2017**

## 410 2019



02/09/2019

In conclusion, I believe by the preponderance of evidence that OCRM/DHEC, Permitting officer Matt Slagel, Mr. Slagels' supervisors who performed no oversight, and Bill Eiser identified a Primary Oceanfront Sand dune for the purpose of beachfront construction permits erroneously. The POSD by definition is at the baseline and DHEC/OCRM has permitted construction ON a POSD and ON active beach which is strictly prohibited by SC Law.

For this reason I am appealing the Final Order referenced and request a new trial or immediate revocation of the permits.

Stephen Mueller

July 7, 2023