

A merits hearing was subsequently held on April 26th and 27th, 2023. On the second day of trial and at the conclusion of Petitioner's case, both Respondents moved for a directed verdict pursuant to Rule 50(a), SCRPC and SCALCR 68 ("[t]he South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules"). The Court denied the motion for directed verdict on all grounds except that of exhaustion of administrative remedies. The Court requested additional authority on this issue and permitted the parties to supply any such authority to the Court no later than May 9, 2023. Post-trial motions, if any, were due on the same date.

On May 9, 2023, Respondent Simmons Family Holdings, LLC ("Simmons") submitted its renewed motion for directed verdict and statement of additional legal authority. Petitioners submitted a response. Respondent South Carolina Department of Health and Environmental Control joined Simmons Family Holdings motion.

The Court denied the motion for directed verdict or involuntary nonsuit by Simmons and proceeds to a ruling on the merits. On April 27, 2023, at the conclusion of trial the parties were given 30 days to submit proposed orders in lieu of closing arguments following the completion of the hearing transcript. On July 13, 2023, the parties both filed proposed orders.

For the reasons discussed below, the Court directs the Department to issue the critical area permit subject to the additional conditions set forth herein.

Findings of Fact

Background:

1. SFH, and the Simmons family more generally, has owned property located at 111 Simmons Road, Hilton Head Island, in Beaufort County, South Carolina (the "SFH Property") since at least the 1940s.¹
2. The SFH Property is waterfront property on Broad Creek, a tidal waterway and coastal waters "critical area" subject to DHEC's permitting authority under critical area regulations (S.C. Regulation 30-1 et seq) (Supp. 2022).
3. The SFH Property has historically been used for commercial purposes including as a base for ferry boats, and the home of a fish camp style restaurant,² and has been used since at

¹ Tr. 257:1 – 6.

² Tr. 259:18 – 261:13.

least 2016 for the operation of the then newly-constructed Fish Camp at Broad Creek (the "Fish Camp"), a waterfront restaurant operated by Brendan Reilly.³

4. The SFH Property has also historically (since at least 1989) had its own permitted dock extending into Broad Creek, which has been used for commercial purposes including, among other things, as a base for kayak and dolphin tours.⁴ The former SFH dock was severely damaged during a hurricane prior to 2018, leaving only a portion of the dock's walkway extending from the SFH Property.⁵
5. The SFH Property is located immediately east and adjacent to the Broad Creek Marina ("BCM"), a commercial marina used by recreational boaters for wet and dry boat docking.⁶ A concrete pier runs from the BCM property over marsh perpendicular to Broad Creek and connects with the commercial marina's slips in Broad Creek itself.
6. The Petitioners own a 99-year lease on a barge landing at Broad Creek Marina (Petitioner's Exhibit 42). The barge landing loading and unloading structure is located at the end of a tidal creek known as "Barge Creek," which runs perpendicular to Broad Creek, a much larger tidal waterway that basically bisects the interior of the Hilton Head Island in Southern Beaufort County.⁷ Barge Creek sits immediately to the west of the SFH Property.
7. For purposes of discussion hereinafter, the area the barge utilizes for ingress and egress between the BCM pier and the proposed location of SFH's marina will be referred to as the "Area of Concern."
8. Petitioners have operated a commercial barging operation out of Barge Creek on Hilton Head Island, to Daufuskie Island, also located in Southern Beaufort County, for some 45 years, beginning in 1977.⁸ The barge docks at Freeport Marina on Daufuskie Island⁹. Over the years, using a variety of barges and landing crafts, the Petitioners have transported construction materials, equipment, tractors, U-Hauls, bulls, cows, chickens, dump trucks,

³ Tr. 379:8 – 380:9.

⁴ Tr. 388:3 – 388:7.

⁵ Tr. 264:9 – 21.

⁶ Tr. 214:12 – 215:9.

⁷ See page 147 of Respondent OCRM's Exhibit 1.

⁸ Tr. 102. At the time of the contested case hearing, the J&W barge was not operating from the BCM location, but from another location in Bluffton, while BCM underwent construction Tr. 18:16-25.

⁹ Tr. 21:4-6

tankers, and a multitude of construction-related materials between Hilton Head Island and Daufuskie Island.¹⁰

9. Petitioners' barge is the only South Carolina-based barging operation serving Daufuskie Island and there are no other barge landing sites in Beaufort County aside from Barge Creek¹¹. Another barging operation serves Daufuskie Island, but this operation originates from within the neighboring state of Georgia.
10. The Petitioners' barge runs generally three days a week (depending on the demands of the economy). The barge is generally loaded on Hilton Head beginning about one hour after low tide and then pulls out of Barge Creek, directly beside the area where SFH has been permitted to build its marina, at about two hours past low tide. It takes about an hour and a half to make the trip to Freeport Marina's barge landing on Daufuskie Island, where the barge is off-loaded. The barge then sits at Freeport for about two hours to allow transported workers and their vehicles to complete certain tasks, and then begins its return journey to Hilton Head right at high tide¹².
11. In 1990, Petitioners sought a permit to build a dock on the edge of SFH property near Barge Creek. Mr. Scurry objected to the construction of this SFH dock on the grounds that its construction would impede the ability to operate his barge from that location.¹³ The SFH dock objected to was ultimately constructed as depicted below.

¹⁰ See transcript pp. 101 and Petitioners Exhibits 5 and 6.

¹¹ Transcript p. 133.

¹² Transcript pp. 40-41.

¹³ Tr.267:11 – 20; SFH Exhibit 9.



Aerial Image from SFH Exhibit 14 depicting BCM pier, J&W barge, and former SFH dock.

12. From its construction until it was damaged in 2016, kayak tours were operated from the edge of the SFH dock out into Broad Creek.
13. From roughly 1990 until the former SFH dock was damaged in 2016, Petitioners' barge navigated a gap of less than 100 feet between the BCM concrete pier to the west and the former SFH dock to the east in order to exit its mooring and navigate to Freeport Marina.¹⁴ Capt. Daley, William P. Scurry, and Eric Lundee, all of whom have piloted the push-boat and barge frequently over the last ten years, testified that safely entering and exiting Barge Creek into Broad Creek is a challenging proposition because of tidal movement and routine winds. There is no evidence in the record to demonstrate that J&W suffered any interruption or interference to its barging enterprise as a result of the presence of the former SFH dock. No evidence was presented that the J&W barge ever collided with or damaged

¹⁴ Tr. 422:21 – 423:7.

the SFH dock. Similarly, there was no evidence that anyone using a kayak near the SFH dock during the time period before the SFH dock was damaged came into contact with the barge.¹⁵

The Proposed Marina

14. In 2018, two years after the former SFH dock was severely damaged, SFH submitted an application to DHEC's Office of Ocean and Coastal Resource Management ("OCRM") requesting a permit to build a marina ("SFH Marina") in the location occupied by the former dock.
15. SFH proposes to build the marina with the following specifications and as depicted in Exhibit A hereto:

[A]n 8' x 250' walkway leading to a 20' x 20' covered pierhead. Channelward of the pierhead, a 6' x 40' aluminum ramp leading to a 20' x 98' floating dock with an 8' x 108' center float. Six 6' x 45' finger piers will be attached to the 8' x 108' center floating dock. A 6' x 66' "L" shaped kayak pier is to be installed at the upland side of the 20' x 98' floating dock. Floodside and landward of the 20' x 98' floating dock, a 4' x 12' catwalk will access a 12' x 13' four-pile boatlift.¹⁶

16. The SFH Marina would provide short-term moorage for customers of the Fish Camp, and potentially provide space for kayak tours to return to that location on Broad Creek. According to the owner of the Fish Camp, Brendan Reilly, the SFH Marina's purpose is to serve the public desire for "docking and dining."¹⁷
17. It is designed to provide slippage for up to 28 boat (depending on the size of the boats) with up to four boats being able to tie up between each set of finger piers on both the east and west sides of the center floating dock, as well as on the channelward side of the finger piers furthest from shore.¹⁸ This design would necessitate that any boats docking at or leaving slips on the western finger piers briefly navigate in the Area of Concern.

¹⁵ One witness did describe what he referred to as a near miss. Mr. Lundy testified to the following: "the only time I ran into something with, with Simmons Dock the way it used to be when he was renting kayaks was I came back one day, and I came around the boats in the marina and of course blew the horn, that was part of the approach procedure. . . . I had visibility problems, there was things in front of me, you know, vans or whatever, I don't remember the exact makeup of the cargo, but I couldn't see very well. And as we got around, we're going into the, into the slip, and I look off to the left and there's a paddler, a kayaker going across in front of me. And I went, good Lord, you know, and I pulled the throttles back into full reverse and the guy, I think, went under the ramp and popped out the other side. p 192 - 193

¹⁶ See Permit, DHEC Exhibit 1 at 86-87.

¹⁷ Transcript p. 384.

¹⁸ Tr. 419:21 - 420:5; DHEC Ex. 1 at 95 (Permit page 10 of 13).

18. Between 2018 and November 12, 2021, (the "Review Period") DHEC received public comments associated with the permit application and conducted a technical review of the application, including requesting additional information from SFH and conducting a site visit to the SFH Property.
19. During the Review Period, Petitioners submitted several comment letters and otherwise communicated with DHEC staff their objections to the permit application.¹⁹ The principal objection raised by Petitioners in these communications was that the proposed SFH Marina would interfere with the safe operation of J&W's barge, and would "restrict the reasonable navigation or public use of State land and waters" in violation of critical area regulations, S.C. Regulation 30-12(E)(1)(j) (Supp. 2022).²⁰
20. As a direct result of Petitioners' comments during the Review Period, the SFH Marina design was revised in two ways.²¹ First, SFH requested permission from its eastern-adjacent neighbor to locate the marina along the shared property line, such that the footprint of the marina was shifted an additional twenty feet further from the BCM concrete pier. This resulted in an increased separation between the BCM pier and the SFH Marina from approximately 82 feet in the original permit application to approximately 102 feet in the final permit. Second, mooring dolphins were required to be installed at the end of the "ebbside" (western) finger piers closest to the Area of Concern.
21. Mooring dolphins generally are wooden piles installed together in clusters (the number of piles varies) frequently utilized near docks and marinas for protection of the structure and vessels navigating nearby.²² The witnesses on both sides agreed that dolphins would give the barge something to lay against in the Area of Concern, protecting the barge from the marina and the marina from the barge.²³
22. On November 12, 2021, DHEC issued the SFH Permit authorizing construction of a marina as described above. Petitioners submitted a Request for Review to the DHEC Board on November 23, 2021, challenging the issuance of the Permit. The DHEC Board issued a

¹⁹ Pet. Exh. 18, 19, 20.

²⁰ As Petitioners' concerns were clarified at the contested case hearing, the overall safety concern can be broadly divided into concerns over the position of the SFH marina structure itself, and concern over interactions between the barge and recreational boaters in the Area of Concern.

²¹ Tr. 432:3 – 12.

²² Tr. 74:15 – 22; 83:23 – 84:8; 188:2 – 189:18; 432:18 – 24; 437:12 – 16.

²³ Tr. 74:15 – 22; 83:23 – 84:8; 188:2 – 189:18; 432:18 – 24; 437:12 – 16.

letter on January 4, 2022 determining that it would not conduct a Final Review Conference, making the staff decision (the issuance of the Permit) the final agency decision. The Petitioners requested a contested case hearing on January 31, 2022.²⁴

Fish Camp and Intended Use of the Marina

23. Brendan Reilley is a restaurateur with over a decade of experience in food service who currently owns and/or operates several restaurants in and around Hilton Head Island, including the Fish Camp located on the SFH Property.
24. At least four other restaurants Mr. Reilley currently manages are waterfront locations that maintain docks with boat slips for customer use.²⁵ Mr. Reilley also has personal knowledge of other waterfront restaurants throughout Hilton Head Island and has observed that it is very common for such restaurants to maintain dock slips for short-term customer use.²⁶
25. Mr. Reilley testified to his observation that customer boat slips are a significant benefit for waterfront restaurants. He testified that many customers enjoy the experience of boating to dinner or observing boats coming and going while dining. He also testified that boat slips can supplement ground parking, and that the Fish Camp has insufficient surface parking presently and has lost some business because customers could not find a place to park.²⁷
26. Mr. Reilley testified to the typical hours of operation and periods of higher customer traffic experienced at the Fish Camp. The restaurant is open from approximately 11 A.M. to 10 P.M., with shorter hours in the winter. Customer traffic is heaviest during the dinner hours, from 6 P.M. to 8 P.M.²⁸
27. Mr. Reilley estimates the marina slips would provide approximately \$500,000 in additional sales annually, assuming each boat is worth approximately \$250 in sales, and the restaurant receives, on average, 5-6 boats a night for dinner.²⁹ Based on observations from his other restaurants and his knowledge of restaurants in Hilton Head generally, his expectation is that Saturdays and Sundays would produce the most boating traffic to the SFH Marina, since those are the biggest boating days for recreational boaters.³⁰

²⁴ Request for Contested Case Hearing Form and attachments.

²⁵ Tr. 383:24 – 384:10.

²⁶ Tr. 384:15 – 24.

²⁷ Tr. 384:15 – 385:19.

²⁸ Tr. 380:16 – 25.

²⁹ Tr. 398:19 – 399:18.

³⁰ Tr. 399:10 – 14.

28. Petitioners raised concerns regarding the safety of operating a barge in the vicinity of recreational boaters who have been consuming alcohol at the Fish Camp. Mr. Reilley testified that Fish Camp holds a valid beer and wine permit and liquor license issued by the State of South Carolina, and has never had any violations associated with those authorizations.³¹ He further testified that he has personally undertaken training on alcohol service and has required his staff to undertake the same training.³² He stated his personal view that it was unacceptable to over-serve a customer, and testified that he did not over-serve or allow over-service at the Fish Camp and has no intention of changing that practice if the marina is constructed.³³ Petitioners offered no evidence contradicting Reilley with respect to his business practices in regards to alcohol service or any specific testimony regarding alcohol service at the Fish Camp or any of Mr. Reilley's other restaurants.
29. Further according to the Fish Camp owner, alcohol sales make up approximately 20 percent of the Fish Camp's annual five to seven million dollars in revenue³⁴ and he expects an increase in revenues from the "docking and dining" boaters, of approximately \$500,000 a year. Each arriving boat is projected to spend approximately \$250 at the Fish Camp.
30. The Fish Camp has an outdoor bar and daily "Happy Hours" from 4 p.m. until 6 p.m.³⁵ but Mr. Reilly testified that he was not concerned about the safety aspects of his Fish Camp diners accidentally pulling their boats out of the southwest facing marina slips into Barge Creek potentially in front or behind an entering or existing barge, because "we won't serve somebody in excess."³⁶
31. All three testifying barge operators for the Petitioner expressed concerns about recreational boaters "docking and dining" at the Fish Camp restaurant and then returning to their boats and accidentally pulling in front of the moving barge entering or existing Barge Creek, especially if alcohol had been consumed. Capt. Daley testified that he has had experiences with recreational boaters who did not appreciate the size and movement of the barge and that people will "kinda cut you off or they'll get in front of you at you know, maybe 15 feet, 20 feet and try to take a picture of it or something like, not, not realizing that if

³¹ Tr. 399:24 – 400:10.

³² Tr. 400:11 – 15.

³³ Tr. 400:16 – 401:6.

³⁴ Tr. 390:16

³⁵ Tr. 390-392,

³⁶ Tr. 393

something was to occur to their boat to where they stopped or something, you know, you wouldn't be able to stop in time to assist them or get out of their way...³⁷ Capt. Daley went on to testify that it would take 10 to 15 seconds to stop the barge in the event a recreational boater mistakenly pulled out of the marina into his on-coming path. William Scurry predicted that a kayaker or other boater might die in a collision between the barge and a smaller boat if the permit is granted. Cap. Lundy testified to his concern that the barge would collide with the finger piers on the western side of the SFH Marina.

Freeport Marina:

32. Mr. Reilley also testified to his knowledge of a restaurant located at Freeport Marina, where the J&W barge docks at the other end of its regular run. The barge docks in Freeport Marina with a significantly easier maneuver according to testimony from Mr. Daley because of the movement of the tide.³⁸
33. Mr. Reilley testified that the Freeport Marina patrons are largely customers of the restaurant there, which also serves alcohol.
34. The Freeport Marina and restaurant are both owned by Mr. Scurry.³⁹
35. As evidenced by photographs in the record, the Freeport Marina is significantly larger and accommodates more recreational boating traffic than the SFH marina is designed to accommodate.⁴⁰
36. At Freeport, J&W is already operating in an environment with high recreational boater traffic, including boaters who have alcohol service available to them.⁴¹ There is no evidence J&W has experienced any interruption or interference to its business at Freeport as a result of the fact that alcohol is served at the Freeport Marina.

Petitioners' Barge Operation

37. Petitioners have operated a barge or other forms of marine transportation from the location at BCM since the late 1970s⁴², principally running goods and equipment to Daufuskie Island.

³⁷ Tr. 63-64

³⁸ Tr. 41:18

³⁹ Tr. 81:2 – 9.

⁴⁰ SFH Exhibit 3 (exhibiting at least fifty boats present within Freeport Marina at a single time).

⁴¹ Tr. 455:1 – 457:9

⁴² Tr. 100:20 – 101:17.

38. Daufuskie Island is located in Beaufort County, South Carolina and has no roads or bridges connecting it with the mainland. The island's residents are largely dependent on boats, ferries, and barges for personal transportation to and from the island and for delivery of goods and services.
39. There are other barges which serve Daufuskie Island. Petitioners have operated a commercial barging operation out of Barge Creek on Hilton Head Island, to Daufuskie Island, also located in Southern Beaufort County, for some 45 years, beginning in 1977. Over the years, using a variety of barges and landing crafts, the Petitioners have transported construction materials, equipment, tractors, U-Hauls, bulls, cows, chickens, dump trucks, tankers, and a multitude of construction-related materials between Hilton Head Island and Daufuskie Island⁴³.
40. Petitioners currently utilize a 120 foot by 30-foot barge, with a 40-foot ramp affixed to the front of the barge, which is pushed and pulled by a "push boat" known as the "Jake Washington."⁴⁴ The barge is connected to the push-boat via metal cables attached to two large winches which can be adjusted based on the weight of the cargo on the barge.⁴⁵
41. The push-boat includes a captain's tower from which Mr. Daley can see over the cargo on the barge and operate the push-boat.⁴⁶ The tower consists of an engine house, topped by a cab, with a third level "triumph" on top of the cab.⁴⁷ The tower as a whole provides an estimated twenty feet of height and visibility from the level of the water.⁴⁸
42. The current routine practice utilized by Petitioners when exiting Barge Creek and entering Broad Creek is to pull the barge out of Barge Creek into Broad Creek on an incoming or "flooding" tide. This practice results in the push-boat and back of the barge being moved northeast up Broad Creek as the push-boat and back of the barge enter the current of Broad Creek. Witnesses Daley, Scurry and Lundee were qualified as experts by the Court in the field of barge operations in the area of the Barge Creek and Broad Creek confluence. They took the position that if the marina were built as permitted, the barge would routinely come

⁴³ See transcript pp. 101 and Petitioners Exhibits 5 and 6.

⁴⁴ Transcript pp. 36-37.

⁴⁵ Tr. 37:8 – 15.

⁴⁶ Tr. 89:10 – 91:8.

⁴⁷ Tr. 448:8 – 23.

⁴⁸ Tr. 448:8 – 23. Neither Captain Daley nor Mr. Scurry were able to provide an estimate of the tower's height. See Tr. 91:4 – 8; 140:17 – 19.

in contact with the outermost southwest fingers of the marina as it exits Barge Creek because of the tidal movement of the barge.

43. Mr. Daley testified regarding the normal operations of the J&W barge on its run to Daufuskie. The barge leaves dock at BCM shortly after low tide once the water is deep enough for the barge to float. Navigation to Freeport Marina at Daufuskie generally takes between an hour and fifteen to an hour and a half, and which time the crew unloads the barge and waits at Freeport for approximately two hours, then starts the return trip at or shortly after high tide.⁴⁹
44. Mr. Daley testified that the barge typically runs about 3 days a week – on Tuesdays, Wednesdays, and Fridays⁵⁰ – and that the barge does not run on weekends because of the amount of recreational boater traffic seen at Freeport Marina on Daufuskie on the weekends.⁵¹ This general schedule is sometimes modified due to adverse weather conditions or due to holidays falling midweek.⁵²
45. The current routine practice utilized by Petitioners when returning from Broad Creek and entering Barge Creek is to return against a falling tide, which enables the push-boat captain to safely maintain control of the barge by pushing it directly into the falling tide as it comes up Broad Creek toward Barge Creek. However, to then turn the barge to its left and enter Barge Creek, the captain of the push-boat must carefully calculate the tidal movement and wind, and then timely turn the bow of the barge left, directly toward the designated placement of the new marina, apply full throttle and quickly pushing the barge into the safe, non-moving waters of Barge Creek before the outgoing tide of Broad Creek sweeps the barge into the concrete dock of Broad Creek Marina that runs parallel to Barge Creek to the south.
46. There is no dispute that the J&W barge operation, and commercial vessels more generally, regularly encounter and interact with recreational boaters in and around Hilton Head Island.⁵³ The J&W barge regularly encounters recreational boaters at the Freeport Marina, the BCM Marina, and at points in between.⁵⁴

⁴⁹ Tr. 40:11 – 41:13.

⁵⁰ Tr. 78:25 – 79:5.

⁵¹ Tr. 82:23 – 83:3.

⁵² Tr. 79:6 – 10; 109:23-25.

⁵³ Tr. 425:20 – 426:5.

⁵⁴ Tr. 87:4 – 19.

47. Because the schedule of the barge is dictated by the tides, which change times daily, both Mr. Daley and Mr. Reilley confirmed that there are frequent occasions when the barge's ingress or egress from BCM and through the Area of Concern falls outside the Fish Camp's operating hours or occurs during particularly slow intervals for restaurant business.⁵⁵
48. From the time Mr. Daley starts pulling the barge away from its mooring until it has cleared the Area of Concern and entered Broad Creek proper, the entire process takes approximately two minutes. The docking procedure at BCM, from exiting Broad Creek to full stop at the barge mooring, similarly takes about two minutes.⁵⁶
49. At four minutes per roundtrip, and three trips per week, J&W's barge is spending approximately twelve minutes per week in the Area of Concern. The evidence establishes that some of this time is likely to be during intervals that the Fish Camp is not operating or is operating without significant customer traffic, and none of this time is during the Saturday and Sunday operating period that is expected to bring the most boating traffic to the Fish Camp.
50. Commercial barges are required by U.S. Coast Guard regulations to be equipped with certain safety equipment, including a horn for warning nearby boaters and for use when docking or leaving dock, and a powerful light.⁵⁷ Mr. Daley confirmed that the J&W barge is equipped with such equipment, and that he and the mate on the barge use it regularly when entering or exiting the mooring at BCM as required by Coast Guard regulations.⁵⁸ Mr. Daley agreed that any boaters utilizing the SFH Marina would be able to hear the horn blast.⁵⁹

Entering and Exiting the BCM

51. Petitioners currently utilize a 120 foot by 30-foot barge, with a 40-foot ramp affixed to the front of the barge, which is pushed and pulled by a "push boat" known as the "Jake Washington."⁶⁰
52. The current routine practice of pulling the barge out of Barge Creek into Broad Creek on an incoming or "flooding" tide, results in the push-boat and back of the barge being moved

⁵⁵ Tr: 79:11 – 25 (Daley); Tr. 381:16 – 382:13 (Reilley).

⁵⁶ Tr. 80:1 – 21.

⁵⁷ Tr. 444:24 – 445:18.

⁵⁸ Tr. 70:19 – 71:10; 88:5 - 24

⁵⁹ Tr. 88:25 – 89:9.

⁶⁰ Transcript pp. 36-37.

northeast up Broad Creek as the push-boat and back of the barge enter the current of Broad Creek. According to Daley, Scurry and Lundee, each of whom was qualified as an expert by the Court in the field of barge operations in the area of the Barge Creek and Broad Creek confluence, if the marina is built as permitted, the barge will possibly come in contact with the outermost southwest fingers of the marina as it exits Barge Creek because of the tidal movement of the barge during suboptimal operating conditions⁶¹. However, according to Mr. O'Quinn, who was qualified as an expert witness and testified at the behest of SFH, opined that the process would be as simple as laying against the mooring dolphins and then going with the flooding tide.⁶²

53. Mr. Daley⁶³ and two former J&W barge captains – Mr. Scurry⁶⁴ and Eric Lunde⁶⁵ – all testified regarding their experience entering and exiting the barge mooring at BCM. Each expressed concerns that the hard turn frequently required to return the barge to its mooring at BCM after the run to Freeport would place the barge in danger of colliding with the SFH marina under certain conditions. They further expressed concerns that, if a boater was present in the Area of Concern when the barge was returning from Freeport and did not move out of the barge's path, the barge might be unable to stop in time to avoid a collision⁶⁶.
54. Each of the following three witnesses was qualified as an expert in barge operations and in the tidal and other conditions at the location where the barge enters Broad Creek based on their specific experience captaining the J&W barge. The experience of each of the three captains is described below:
- a. Teron Daley has had his commercial captain's license since 2019. His navigational experience has been limited to his employment with J&W, primarily captaining and working on the barge on the route at issue in this matter and working as a mate on two ferries owned by Petitioners which operated on essentially the same route.⁶⁷

⁶¹ Tr. 40:19 – 41:18;

⁶² Tr/ 437:11-438:14

⁶³ Tr: 66-67

⁶⁴ Tr. 120

⁶⁵ Tr. 183

⁶⁶ Tr. 148

⁶⁷ Tr. 47:1 – 17.

- b. Eric Lunde worked for J&W from 2002 to 2011 as an Assistant Manager, and operated the J&W barge personally from 2006 to 2011.⁶⁸ He obtained a Coast Guard captains license in 2006 to operate the J&W barge, and allowed it to lapse in 2016.⁶⁹ He ceased all commercial captaining in 2011, and his experience navigating commercial vessels was limited primarily to operating the J&W barge on the route at issue in this matter.⁷⁰
- c. Mr. Scurry is the owner of J&W and has overseen the barge operation since it originated in the late 1970s. He captained the push-boat and barge personally for five or six years.⁷¹ While he has held a Coast Guard captain's license in the past, he does not currently hold one.⁷²
55. Capt. Daley specifically testified that while he was concerned about the safety of boaters, "he was not worried about hitting the marina or anything like that."⁷³
56. SFH presented the testimony of Duncan O'Quinn, the owner of a marine construction company who has designed and constructed thousands of docks and marine structures,⁷⁴ and has over forty years of experience captaining a push boat to navigate barges, including boats and barges of similar size and configuration to those used by J&W.⁷⁵ This experience includes the frequent transporting of heavy equipment and materials throughout the creeks, rivers, and coastal areas of Beaufort County (including on Broad Creek) in a variety of weather, tidal, and traffic conditions. Mr. O'Quinn was qualified as an expert in commercial and recreational navigation, barge captaining, navigation of tidal channels, and marina and dock construction.⁷⁶ Unlike the witnesses presented by J&W, Mr. O'Quinn had not piloted a barge into or out of Barge Creek. Mr. O'Quinn has spent considerable time on Broad Creek.
57. Mr. O'Quinn opined that the marina as proposed would not impede the reasonable navigation of public water, or navigation by J&W's barge.⁷⁷ Mr. O'Quinn relied in part on

⁶⁸ Tr. 172:22 – 23.

⁶⁹ Tr. 179:24 – 180:12

⁷⁰ Tr. 180:13 – 23.

⁷¹ Tr. 104:15 – 23.

⁷² Tr. 104:3 – 7.

⁷³ Tr p. 92 p. 48-50

⁷⁴ Tr. 404:5 – 24.

⁷⁵ Tr. 408:1 – 23.

⁷⁶ Tr. 414:17 – 415:20.

⁷⁷ Tr. 424:3 – 425:6.

the width of Broad Creek and the available space to maneuver and navigate at this location in forming his opinion.⁷⁸ He also relied upon his personal knowledge of the tidal conditions described by Petitioners,⁷⁹ his own familiarity with performing the type of navigational maneuver they described,⁸⁰ his experience navigating a barge of the size used by J&W through gaps of similar size,⁸¹ the fact that J&W navigated its barge through a narrower gap for years while the former SFH dock was present,⁸² the addition of dolphin pilings to the permitted design,⁸³ and the availability of other approaches or tidal schedules the barge could utilize.⁸⁴

58. Mr. O'Quinn testified that docking the barge as described by Petitioners would be achievable with the SFH Marina in place, particularly in light of the modifications from the original permitted design that provided an additional twenty feet of room for navigation and provided dolphin pilings for the barge to lay against, protecting both the barge and the marina.⁸⁵ Mr. O'Quinn also pointed out that the preferred schedule of J&W's operations – returning on an ebb tide, which is the cause of some of the challenges described by Petitioners – is not the only time the barge could return.⁸⁶ In his opinion, a return to BCM at flood tide would be a substantially easier maneuver.⁸⁷ He testified unequivocally that, if the SFH Marina was constructed, he could navigate the J&W barge in and out of its berth at BCM.⁸⁸

59. The current routine practice of returning the barge to Hilton Head against a falling tide, enables the push-boat captain to safely maintain control of the barge by pushing it directly into the falling tide as it comes up Broad Creek toward Barge Creek. However, to then turn the barge to its left and enter Barge Creek, the captain of the push-boat must carefully calculate the tidal movement and wind, and then timely turn the bow of the barge left, directly toward the designated placement of the new marina, apply full throttle and quickly

⁷⁸ Tr. 424:3 – 425:6; 432:25 – 433:5.

⁷⁹ Tr. 418:1 – 20.

⁸⁰ Tr. 418:21 – 419:17

⁸¹ Tr. 428:19 – 430:2.

⁸² Tr. 430:16 – 431:7

⁸³ Tr. 432:13 – 24.

⁸⁴ Tr. 437:11 – 16.

⁸⁵ Tr. 433:6 – 437:10.

⁸⁶ Tr. 430:3 – 15.

⁸⁷ Tr. 437:11 – 16.

⁸⁸ Tr. 461:15 – 19.

pushing the barge into the safe, non-moving waters of Barge Creek before the outgoing tide of Broad Creek sweeps the barge into the concrete dock of Broad Creek Marina that runs parallel to Barge Creek to the south.⁸⁹

60. Scurry, who piloted the push-boats from the mid-1970s intermittently until approximately five years ago, testified that the falling tide entry is the only practical method of entering Barge Creek⁹⁰.
61. Capt. Lundee testified that he operated the push-boat and barge on at least 200 trips back and forth to Daufuskie Island between 2006 and 2011, and opined that the marina as constructed will block the barge from safely entering Barge Creek, stating "I would say under certain circumstances it would be almost impossible."⁹¹ Capt. Lundee, a retired Army pilot and formerly certified USCG captain, when asked specifically for his opinion as to whether the marina will create a dangerous impediment to navigation, replied: "I believe it would, especially if the small finger piers on the southside, if you will, one, two, three, four, if those are there that's not a good thing."⁹²

Recreational Boaters:

62. Mr. O'Quinn testified to additional steps Petitioners could take to mitigate the perceived challenges associated with entering and exiting the berth at BCM, including installing dolphin piles on the opposite side of their berth nearest the BCM pier,⁹³ making an inexpensive modification to give the captain access to the horn in the top of the push-boat tower (which in his opinion corrects a significant safety deficiency in J&W's operation),⁹⁴ installing a remote lighted beacon on a dolphin piling to warn of the barge entering or exiting its berth,⁹⁵ or – as they already do at Freeport Marina – Petitioners could have an employee at BCM warn any boaters using the SFH marina when the barge was inbound.⁹⁶
63. Mr. Daley expressed concern about recreational boaters in the mooring channel because he asserts the barge's return to the BCM berth involves a short blind spot caused by the boats docked at BCM under some operating conditions. He testified that when the barge is

⁸⁹ Tr. 120:15-25

⁹⁰ Tr. 120:15-25

⁹¹ Tr. 183.

⁹² Tr. 185 and Petitioner's Exhibit 13.

⁹³ Tr. 439:19 – 22.

⁹⁴ Tr. 445:10 – 446:10.

⁹⁵ Tr. 459:12 – 17.

⁹⁶ Tr. 459:18 – 460:2

heavily loaded, he sits lower in the water relative to boats docked at BCM and cannot see over those boats to see what activity would be going on at SFH Marina.⁹⁷ This testimony is disputed by Mr. O'Quinn, however, who pointed out that only the barge, and not the separate push-boat where the captain stands, would be affected by heavy loads.⁹⁸ As Mr. O'Quinn explained, the cables connecting the push-boat to the barge would necessarily have to be let out for a heavier load, or the barge would pull the bow of the push-boat down, force the stern up, and bring the wheels out of the water.⁹⁹ Mr. O'Quinn testified that the Captain's visual height in the tower of the push-boat relative to other boats in BCM Marina or the SFH Marina would remain constant, as tides would impact all of the boats equally.¹⁰⁰

64. Mr. Daley expressed concerns that, in the top level of the push-boat tower, he has no control over the horn to warn any boaters he does observe that the barge is approaching.¹⁰¹ Mr. O'Quinn testified that this is a serious safety deficiency, and one that is inexpensively corrected.¹⁰² The Court strongly advises Petitioner to correct this problem.

65. Mr. O'Quinn also testified to the rules and regulations applicable to recreational boaters, which are administered by the South Carolina Department of Natural Resources.¹⁰³ These rules include when a recreational boater must give way to other vessels.¹⁰⁴ He testified that, so long as both boaters and barges are observing the rules and regulations applicable to them, it is unlikely a collision would take place.¹⁰⁵

66. Mr. O'Quinn was questioned about whether he believed that recreational boaters pulling into Barge Creek from the new marina structure would restrict the reasonable navigation of state waters by the barge, he replied "Well, that's a whole different story. If there was a boat in the middle of the river would be impeding the barges path. So if it was in the way, and it was out in the middle of it, it could, but so could a boat leaving the Broad Creek Marina impede the navigation of the barge." Mr. O'Quinn noted that recreational boaters

⁹⁷ Tr. 90:12 – 91:3.

⁹⁸ Tr. 447:23 – 450:7.

⁹⁹ Tr. 449:5 – 14.

¹⁰⁰ Tr. 449:15 – 450:7.

¹⁰¹ Tr. 91:8 – 14.

¹⁰² Tr. 445:19 – 446:10.

¹⁰³ Tr. 451:6 – 453:18; SFH Exh. 29.

¹⁰⁴ Tr. 452:3 – 10.

¹⁰⁵ Tr. 460:21 – 461:14.

will make the process of entering Barge Creek more challenging, but it can be done. Further, Mr. O'Quinn concluded that it would not adversely affect the barge work.¹⁰⁶

Scurry Proposed Alternative:

67. Mr. Scurry testified regarding a proposed alternative design for the SFH Marina, one which was initially proposed by Petitioners during settlement negotiations (hereinafter, the "Scurry Alternative").¹⁰⁷ A drawing of Mr. Scurry's proposal is attached hereto as Exhibit B. The Scurry Alternative design maintains the same dock space as the permitted design but changes the current layout from a central walkway with 45 foot finger piers extending from each side to a main walkway on the west (BCM-facing) side of the marina with 90 foot finger piers extending east. As Mr. Scurry explained it, this would force all of the boaters using the SFH Marina to enter or exit the slips from the east side, away from the Area of Concern.¹⁰⁸ Mr. Scurry admitted that the Scurry Alternative was something he could navigate around, and that it kept the SFH Marina at the same location and footprint (save a small reduction in the most channelward finger pier), relative to the BCM pier and the Area of Concern, as the currently permitted design.¹⁰⁹
68. Mr. O'Quinn testified to his opinion on the Scurry Alternative as an expert in marina and dock construction. In his expert opinion, the only difference between the Scurry Alternative and the permitted design, in terms of the potential navigational impediment the structure would create, was a slight shortening of the final finger pier.¹¹⁰ Given Mr. Scurry's admission that the marina footprint would be sufficient with this reduction in the length of the final finger pier the court is convinced that the barge could be safely operated with the finger pier shortened.
69. Mr. O'Quinn testified that the longer 90-foot finger piers of the Scurry Alternative, combined with the 30-foot permitted gap between each finger pier, made it highly likely that recreational boaters backing out of slips would be making contact with other boats in the marina.¹¹¹ The Freeport Marina, which has finger piers that are as long or longer than

¹⁰⁶ Tr. 425

¹⁰⁷ Tr. 124:7; Pet. Exhibit 33.

¹⁰⁸ Tr. 126:1 – 7.

¹⁰⁹ Tr. 145:16 – 146:17.

¹¹⁰ Tr. 427:25 – 428:18.

¹¹¹ Tr. 461:23 – 463:23

the Scurry Alternative, also has those finger piers spaced 50 feet apart, which Mr. O'Quinn testified was a significant difference.

70. Mr. O'Quinn also expressed concerns that, if the Scurry Alternative were built, recreational boaters unfamiliar with the SFH Marina would attempt to tie up on the Area-of-Concern-side of the main walkway where there would be no intended slippage or cleats to tie off, and thus this design would create a safety issue.¹¹²

O'Quinn Design

71. Mr. O'Quinn testified to a proposed alternative design he prepared in the course of settlement negotiations between SFH and Petitioners (hereinafter, the "O'Quinn Alternative").¹¹³ A drawing of the O'Quinn Alternative is attached hereto as Exhibit C. The O'Quinn Alternative is essentially the same as the permitted design – a central walkway with finger piers extending from both sides – but with the most channelward finger pier on the western (Area of Concern) side reduced from 45 feet to 30 feet, and the remaining finger piers on that side reduced from 45 feet to 40 feet. The O'Quinn Alternative also included five-pile mooring dolphins in contrast to the three-pile dolphins currently permitted.
72. Mr. O'Quinn testified that he proposed the O'Quinn Alternative to try and satisfy Petitioners concerns so that the permit could move forward,¹¹⁴ but also made clear his opinion that a five-pile dolphin was more appropriate for this location given the weight of the barge that may be laying up against it.¹¹⁵¹¹⁶
73. Mr. O'Quinn then concluded his testimony by identifying Petitioners' Exhibit 43, a drawing he believes is the preferred design for the Simmons marina, which removed 15 feet from the outlying finger, shortened the other southwest fingers to 40 feet and installed five-pile dolphins, substantive changes from the as-permitted marina before the Court. "That was my design and the way I think it should be built. I'm not speaking for Simmons

¹¹² Tr. 476:16 – 477:2.

¹¹³ Tr. 473:11- 475:2; Pet. Exh. 43.

¹¹⁴ Tr. 474:10-11.

¹¹⁵ Tr. 439:3 - 15

¹¹⁶ At the close the contested case, SFH stipulated that they would accept modification of the permit consistent with Mr. O'Quinn's design.

Family Holdings. That's just if I were designing the marina, and I think that is a very fair, safe assessment, to make it safe for all parties.¹¹⁷ "

74. The court notes the dimensions of the O'Quinn alternative are substantially the same dimensions of the last pier as the Scurry Alternative. The only difference is in the O'Quinn alternative boaters can exit on to Barge Creek and, in the Scurry Alternative, boaters cannot do so. The Court finds that these dimensions will allow the barge to safely navigate into Barge Creek, the remaining issue is the safety of recreational boaters.
75. At the close of the hearing, SFH stipulated on the record that it would agree to modify the SFH Marina to comply with the O'Quinn Alternative if a permit was issued.¹¹⁸

Regulatory Review:

76. The Department presented testimony from Blair Williams, the manager of the Critical Area Permitting Program of OCRM, regarding the agency review of the permit application, public comments and additional information submitted on the permit, and the final agency decision.
77. Mr. Williams has personally been involved in over 1000 critical area permitting decisions in his fifteen years as Critical Area Permitting Section manager at OCRM, including several hundred dock and marina permitting decisions.¹¹⁹
78. Mr. Williams testified that the project manager assigned to the SFH Marina permit application changed during the time it was under OCRM review, and the project manager responsible for the final staff decision left the agency for another opportunity, but that Mr. Williams oversaw the work of both project managers and was very familiar with all aspects of the permitting review and decision.¹²⁰
79. The Department administers the statutes and regulations governing the use and alteration of "critical areas" in the state of South Carolina, including permitting structures to be constructed in tidal waters. The Department recognizes that waterfront property owners have riparian rights within their extended property lines, and have the right to enjoy those

¹¹⁷ Tr. p. 473-474.

¹¹⁸ Department and Respondent's Proposed Order, page 35; Tr. P 483, l.11 to 15.

¹¹⁹ Tr. 330:17 – 331:1.

¹²⁰ Tr. 291:19 – 293:8; 347:21-23.

riparian rights, but acts as a neutral decision maker with respect to individual permit applications presented to OCRM.¹²¹

80. Mr. Williams testified that the Department reviewed the SFH Marina permit application in light of the general permitting requirements of South Carolina Regulation 30-11 and the applicable specific project criteria of Regulation 30-12.¹²²

Regulation 30-11

81. Regulation 30-11, sometimes referred to as the "ten general considerations"¹²³, are criteria applicable to all projects, but which the Department consider as part of a balancing test such that no single criteria is determinative of whether a project may be approved or not.¹²⁴ These include consideration of the extent to which a given project will cause erosion, impact marine wildlife, affect the habitat of rare and endangered species, create adverse environmental impacts, and affect existing public access to critical areas.
82. Mr. Williams testified that the Department determined the SFH Marina could be permitted under the criteria set forth in Regulation 30-11.¹²⁵

Regulation 30-12

83. Regulation 30-12 sets forth specific criteria for different types of critical area permitting projects. Regulation 30-12(A) sets forth the criteria, including technical requirements, alignments, and environmental protections, for all docks and piers. Regulation 30-12(E) sets forth the criteria applicable to marinas in particular.
84. Mr. Williams explained that marinas are a type of dock which are capable of docking 10 or more boats and have 250 linear feet or more of effective docking space.¹²⁶ Thus, the criteria of both Regulation 30-12(A) and 30-12(E) would apply to the SFH Marina.
85. Mr. Williams testified that the SFH Marina met all the criteria for Regulation 30-12(A).¹²⁷
86. The specific regulatory criterion at issue is found in Regulation 30-12(E)(1)(j), which provides that "[m]arinas shall not restrict the reasonable navigation or public use of State lands and waters. "

¹²¹ Tr. 366:10 – 25.

¹²² Tr. 331:12 – 333:24.

¹²³ These considerations are also set forth in statute. See S.C. Code Ann. § 48-39-150.

¹²⁴ Tr. 331:12 – 332:15.

¹²⁵ Tr. 331:12 – 332:15.

¹²⁶ Tr. 329:18 – 330:16.

¹²⁷ Tr. 332:16 – 333:6.

87. Mr. Williams stated that the only regulatory criteria he was aware of which was raised during OCRM's review to oppose the permitting of the SFH Marina were the navigational concerns raised by Petitioners, which address regulation 30-12(E).^{128 129}
88. Mr. Williams also testified that, while the Department may review safety concerns raised in public comments on a particular project, there are no specific regulatory criteria related to marina safety in the critical area regulations.¹³⁰
89. Regulatory requirements protecting public navigation are not solely applicable to permitting decisions on marina projects. OCRM must make a determination whether a particular project unreasonably restricts navigation, not only for every dock and marina project, but for every mariculture project, every living shoreline project, and every mooring buoy permitting decision.¹³¹
90. Mr. Williams stated that the Permit was issued for construction in Broad Creek, and that Broad Creek at the location of the SFH Marina and BCM Marina is approximately 1000 feet wide, and that there is approximately 500 feet of clearance in Broad Creek beyond the BCM Marina (which is further channelward than the SFH Marina is permitted to be constructed).¹³²
91. Mr. Williams testified that OCRM considered numerous factors to determine whether the SFH Marina would restrict reasonable navigation, including the width of Broad Creek and space available for maneuvering at the project location,¹³³ the width of the J&W barge relative to the gap between the SFH Marina and BCM pier,¹³⁴ the fact that the former SFH dock was closer to the BCM pier than the SFH Marina at issue in the permit,¹³⁵ the

¹²⁸ Tr. 333:7 – 24.

¹²⁹ The Court notes that Petitioners also raised the application of Regulation 30-11(B)(10) – the extent to which the proposed project could affect the value and enjoyment of adjacent owners – at the contested case hearing. However, the only evidence Petitioners presented which could apply to this provision was related to the navigational impact of the SFH Marina on Petitioners' barging operation. As the navigational provisions of R.30-12(E) are more specific than the ten general considerations under R. 30-11, the Court views the argument regarding value and enjoyment as part of the navigational issues argument rather than as an independent argument against the permit.

¹³⁰ Tr. 309:7 – 310:2.

¹³¹ Tr. 334:9 – 335:12.

¹³² Tr. 320:17 – 321:23.

¹³³ Tr. 322:7 – 13; 334:9 – 16.

¹³⁴ Tr. 334:9 – 19.

¹³⁵ Tr. 322:14 – 324:5.

- permittee's revision of the permitted design to allow an additional twenty feet between those structures, and the addition of dolphin pilings at the suggestion of Mr. Scurry.¹³⁶
92. Mr. Williams testified that Mr. Scurry verbally represented to OCRM staff prior to the final permitting decision that the addition of the dolphin pilings would allow him to safely navigate the barge in and out of its mooring at BCM.¹³⁷ While Petitioners' counsel cross-examined Mr. Williams thoroughly on this testimony, no contradictory testimony was offered by Mr. Scurry.¹³⁸
93. Mr. Williams acknowledged that the Department's decision in this matter was a "very tough one."¹³⁹ Ultimately, however, Mr. Williams testified that the SFH Marina would not create an unreasonable restriction on navigation or public use of state lands and waters, and that OCRM would not have issued the permit had it believed otherwise.¹⁴⁰ Mr. Williams noted that the Department had taken action to address the safety concerns raised by Petitioners, including moving the location of the proposed marina from the location at which was originally proposed to "as far away as possible from the barge operation that they could by locating the marina on the most northern extended property line shared with the next adjacent owner."¹⁴¹ "
94. When asked about the factors that brought the Department to the conclusion that navigation was not a basis to deny the permit, he responded: "And given the geographic setting of this area, that is a very, very large river. There's a lot of room in the river to do the same maneuvering techniques that has been described here in the past two days to be able to move in and out of Broad Creek into the small portion of Barge Creek."¹⁴² "
95. During the entirety of the Department's three-year review of the proposed permit application, no one from OCRM ever determined where and at what physical point in the "turning arc" of the water it was necessary to be clear for the barge to be able to safely turn into Barge Creek from Broad Creek. "Not after the point that Mr. Scurry admitted that he'd be able to in—access in and out safely."¹⁴³ "

¹³⁶ Tr. 353:7-9; 363:16-24.

¹³⁷ Tr. 318:21 – 319:13; 345:23 – 346:6.

¹³⁸ Parts of Mr. Scurry's testimony appeared to confirm Mr. Williams' statement. *See* Tr. 109:18 – 110:5.

¹³⁹ Tr. 315

¹⁴⁰ Tr. 340:2 – 10.

¹⁴¹ Tr. 316

¹⁴² Tr. 322

¹⁴³ Tr. 355

96. No independent testing was performed nor were markers placed in the water designating the layout of the to-be-permitted marina to see if the barge could safely turn into the Barge Creek.¹⁴⁴

Safety of Recreational Boaters:

97. The Court commends Petitioners and their witnesses for their concerns about possible collisions between the barge and boaters or kayakers who might be located in the Area of Concern during barge maneuvers in that area.

98. However, other than the naked opinions themselves, Petitioner presented no evidence to support these concerns. No statistics or data relating to boating accidents in similar situations were presented. No assessment was made to determine the amount that traffic in the Area of Concern would increase. Petitioner did not call an accident reconstruction expert or other safety analyst.

99. Additionally, key pieces of evidence and party admissions undercut these concerns.

100. Between 1990 and 2016, the SFH dock was in place at the end of Barge Creek. This dock was 20 feet closer to Barge Creek than the proposed SFH Marina and had approximately the same length at the proposed SFH Marina. During this same period, kayak tours were launched from the end of the dock, and nothing prevented recreational boaters from entering Barge Creek. J&W was able to conduct its barge operations without striking the dock and without injuring any kayakers or boaters in the Area of Concern. That J&W was able to so for more than 15 years strongly suggests that J&W could continue to safely conduct its operations if the SFH Marina were constructed.

101. The Court recognizes that construction of the SFH Marina may increase the number of recreational boaters who may be in the Area of Concern at any particular time. However, that increase in traffic is most likely to occur on weekends, when the barge is not operating.

102. As discussed above, in a typical week, Petitioner's barge is maneuvered in and out of Barge Creek for approximately 12 minutes.

103. Perhaps most telling is Mr. Scurry's admission to Mr. Williams that the addition of the dolphin pilings would allow him to safely navigate the barge in and out of its mooring at BCM. Stated differently, Mr. Scurry admitted that neither the length of the catwalk on the

¹⁴⁴ Tr. p. 358.-359

Marina nor the existence of finger pier on the western side of the dock would be of import if dolphin pilings were added. Mr. Scurry testified to the contrary at trial, this admission weakens his arguments.

104. In conclusion, the Court notes that the determination regarding safety of recreational boaters was difficult, and, had more concrete evidence measuring the increased risk to boaters been presented, the Court might have reached a different conclusion. The lack of such evidence combined with the other factors discussed above, however, requires the Court to conclude Petitioners have not demonstrated that construction of the proposed Marina will materially increase the risk to boaters over the risk which existed while the SFH dock was in place from 1990 to 2016, particularly in light of the other conditions to the permit which will be discussed below.¹⁴⁵

Conclusions of Law

1. The ALC "has only the powers conferred on it by law and must act within the authority created for that purpose." *SGM-Moonglo, Inc. v. S.C. Dep't of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008). Section 1-23-600(A) of the South Carolina Code (Supp. 2022) grants the ALC jurisdiction to conduct administrative hearings to review agency decisions. It provides in pertinent part: "An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases"
2. "Contested case" is defined in section 1-23-505(3) of the South Carolina Code (Supp. 2022) to mean "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing." With regard to cases arising from decisions of DHEC in particular, Section 44- 1-60 of the South Carolina Code (Supp. 2022) sets forth the procedure for review of DHEC decisions.

¹⁴⁵ The Court notes that Petitioner's witnesses have indicated that, even in the absence of the SFH dock and the SFH Marina, a blind spot exists in which barge operators may not see or be aware of recreational boaters.

Subsection (A) of Section 44-1-60 provides: "All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section." This matter is a contested case, seeking review of the Department's determination to grant a critical area permit. The Court concludes it has jurisdiction to hear the dispute.

3. Section 48-39-50 authorizes DHEC to promulgate regulations to carry out the provisions of Chapter 39 of Title 48 of the Code. S.C. Code Ann. § 48-39-50 (Supp. 2022). OCRM is the subdivision within DHEC charged with implementing the state's coastal zone policies and issuing permits in coastal zone areas. OCRM's predecessor (the South Carolina Coastal Council) promulgated Regulations 30-1 through 30-21 as the applicable regulations governing the management, development, and protection of the "critical areas" of the coastal zone of the State. S.C. Code Ann. Regs. 30-1 to -21 (Supp. 2022). The critical areas of the state include coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J) (Supp. 2022).
4. The proposed marina in the instant case is located in and over tidelands, as defined in the Coastal Zone Management Act and OCRM regulations. *See* S.C. Code Ann. § 48-39-10(G) (Supp. 2022); S.C. Code Ann. Regs. 30-1(C)(12) (Supp. 2022). Tidelands are considered critical areas under the Coastal Zone Management Act. S.C. Code Ann. § 48-39-10(J) (Supp. 1998).
5. Any person wishing to alter a critical area must obtain a permit from OCRM. S.C. Code Ann. Regs. 30-2(B) (Supp. 2022). In determining whether a permit application is approved or denied, OCRM shall base its determination on the individual merits of each application and the policies specified in sections 48-39-20 and 48-39-30, applying the ten general guidelines contained in section 48-39-150(A). S.C. Code Ann. § 48-39-150(A) (Supp. 2022).
6. An agency's decision carries a presumption of validity, and the appellant bears the burden of proof. 2 Am. Jur. 2d Administrative Law § 538 In the present case, Petitioners claim that OCRM's issuance of the permit and certification (permit number 98-1D-368-P) violated Regulations 30-11 (2011), 30-12(F) (Supp. 2022), 30-12(N) (Supp. 2022), and 61-101 (2012); therefore, Petitioners assert the affirmative in the present case. Accordingly,

Petitioners must prove, by a preponderance of the evidence, that OCRM's issuance of the permit and certification violated Regulations 30-11(B) (2011), 30-11(C) (2011), 30-12(A) (Supp. 2022), 30-12(E) (Supp. 2022). *See Anonymous v. State Board of Medical Examiners*, 329 S.C. 371, 496 S.E.2d 17 (1998) (standard of proof in administrative proceedings is the preponderance of the evidence).

7. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See South Carolina Cable Television Ass'n v. Southern Bell Telephone and Telegraph Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). Furthermore, a trial judge who observes a witness is in the better position to judge the witness's demeanor and veracity and to evaluate his testimony. *See McAlister v. Patterson*, 278 S.C. 481, 299 S.E.2d 322 (1982); *Peay v. Peay*, 260 S.C. 108, 194 S.E.2d 392 (1973); *Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985); *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984).
8. The Court may assign an expert's testimony the weight and credibility it determines appropriate. *Florence Cty. Dep't of Soc. Servs. v. Ward*, 310 S.C. 69, 425 S.E.2d 61 (Ct. App. 1992).
9. The Court may also consider the Department staff's utilization of its specialized knowledge and expertise in making a determination. *See S.C. Code Ann. § 1-23-330(4)* (Supp 2022).
10. Petitioner argues that the permit violates S.C. Code Ann. § 48-39-150(A)(5) as well Regulation 30-12(E)(1)(j). Section 48-39-150 provides that in determining the merits of an application for a permit, the Department shall base its decision on a number of factors, including “[t]he extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.” S.C. Code Ann. § 48-39-150(A)(5). This statute does not require the Department to deny a permit if it has any effect on existing public access,¹⁴⁶ but only to consider the extent of possible interference with public access.
11. The Department’s regulations more specifically describe these considerations. Regulation 30-12(E) governs marinas, and states that several factors apply to all structures defined as

¹⁴⁶ This “standard” is different from the regulation at issue in *Kiawah*, where the Supreme Court took issue with an interpretation of regulatory language that required an evaluation of the “degree to which public access is affected.” *Kiawah*, 411 S.C. at 38, 766 S.E.2d at 720 (“Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.”).

marinas, specifically including that “[m]arinas shall not restrict the reasonable navigation or public use of State lands and waters.” S.C. Code Ann. Regs. 30-12(E)(1)(j).

Regulation 30-12(E)(1)(j) makes it explicit that a permit for a marina should not issued if the marina would unreasonably interfere with navigation or public use.

12. Interference with reasonable navigation or public use is the primary reason for which Petitioner believes the permit should be rescinded.
13. The Department’s purview in considering challenges to a critical area permit on the basis of interference with navigation or public use is limited. In *Dorman v. Department of Health and Environmental Control*, 350 S.C. 159; 565 SE 2d 119, (Ct. of App. 2002), the Administrative Law Court, the now defunct Coastal Zone Management Appellate Panel, and the Court of Appeals considered the extent of the Department’s authority to resolve private, navigational disputes between neighbors. The Appellate Panel issued its position that the Department is not charged with resolving private, navigational disputes between neighbors, and that “navigation, as contemplated in the regulation ... only applied to the *general public’s use of State waters*.” *Id* at 167, 565 S.E.2d at 124. The Court of Appeals expressly adopted the Appellate Panel’s interpretation of navigation. *Id* at 171, 565 S.E.2d at 126. In a later decision, *George White v. SCDHEC and Coffin Point HOA*, 392 S.C. 247, 708 S. E. 2d 812 (Ct. App. 2011), the Court of Appeals expanded its analysis to consider disputes that may be commercial in nature. In that case the Court of Appeals ruled adversely on the Department’s after the fact permit for a constructed dock that demonstrably interfered with the ability of customers – multiple members of the public at large - of a commercial business to navigate to the business’ commercial dock.
14. The instant case presents elements of both private and commercial navigational disputes. The barging operation is undisputedly commercial in nature, and Petitioners have argued that it serves a public purpose by providing necessary services to Daufuskie Island. Petitioners submitted evidence at trial that the barge is a primary means of transporting vehicles, equipment, machinery, and other supplies to and from the citizens of Daufuskie Island; that if the proposed marina is constructed as permitted, there is a danger that the barge will collide with the marina; that the proposed marina will also be used for commercial purposes; and that those purposes include tethering boats and launching kayaks in the Area of Concern, where a collision between the barge and the marina may occur.

15. Petitioners submitted evidence that the proposed marina would interfere with navigation of the barge. Petitioners' three expert witnesses all testified that the marina, as proposed, would interfere with the maneuver J&W typically uses to enter Barge Creek on its return trip from Freeport Marina. This evidence was disputed, as Mr. O-Quinn testified that a different maneuver could be made in Broad Creek, allowing J&W to continue barge operations even if the marina were constructed.
16. SFH argues that evidence that navigation of J&W's barge, by itself, is insufficient to bring this matter within the purview of the Department. It submits that *White* is distinguishable from this case because, here, it is the navigation of the barge itself which may be affected as opposed to the navigation of barge's customers or other boaters. The court in *White* did discuss the argument of the appellant in that case in which the Appellant argued that the ALC had focused too narrowly on the possible impairment to navigation faced by White's customers when traveling to his dock. *Id.* at 256-57, 708 S.E.2d at 817. The *White* court, however, rejected this argument. It concluded that it was appropriate to consider any impairment to navigation which would be suffered by White's customers because the customers navigation to and from the dock constituted "reasonable public use the water" within the meaning of the Coastal Management Program [Act (the Act)]." *Id.* at 257, 708 S.E.2d at 817. Notably, the Court in *White* did *not* conclude that absent a restriction on navigation suffered by customers of a commercial enterprise, a dispute is private rather than public. *White* instead provides only that it was appropriate to consider the navigational restriction suffered by customers of the enterprise in determining whether the construction of the permitted dock would work material harm to the purposes of the Act. *White* does not go so far as SFH suggests.
17. The Court in *White* concluded that case did not involve a "mere private navigational dispute" because the facts of the case raised issues such as the disruption of a commercial enterprise and its customers, the needs of the appellant's customers, members of the public, and the local shrimping industry. *Id.* at 256, 708 S.E.2d at 816-17. Safety concerns related to the public's use of the waterway were also present in *White*. *Id.* at 258, 708 S.E.2d at 817-818 (noting customers explained at trial that the amount of space between White's dock and the other dock, combined with the size of their boats, presented a danger of their boats colliding with the Coffin Point dock); *see also Maull v. South Carolina Department*

of *Health and Environmental Control*, 411 S.C. 349, 361 768 S.E.2d 402, 409 (Ct. App. 2015) (characterizing the issue presented in *White* as whether substantial evidence supported the ALC's finding there were serious safety concerns raised by the new dock).¹⁴⁷ Safety concerns were a primary focus of the trial of this case.

18. The Court recognizes that evidence relating to the question of whether this matter is public or private is disputed. However, the Court believes that *White*, *Maull*, and other cases cited by SFH do not extend quite so far as SFH suggests, and therefore resolves this dispute in favor of exercising jurisdiction.
19. The Court now moves to whether Petitioners have demonstrated that the marina will interfere with reasonable navigation or public use. As discussed herein, the Court does not believe Petitioners have an adequate showing that the marina would unreasonably interfere with navigation or public use.
20. “[R]easonable navigation” is not defined in Regulation 30-12 or elsewhere in the critical area regulations or Coastal Zone Management Act. “Unreasonable” is defined by Black’s Law Dictionary, 11th edition, as “not guided by reason; irrational or capricious.”
21. Petitioner makes two arguments that the marina would unreasonably interfere with navigation or public use. First, it argues that the structure of the marina itself would unreasonably interfere with navigation, primarily because J&W will have difficulty navigating the barge in and out of Barge Creek if the marina is constructed. Second, J&W relies on concerns regarding boater safety.
22. There is no dispute with the Department’s testimony that the SFH Marina, as permitted, complies with the applicable requirements of Regulations 30-11 and 30-12, with the exception of navigation related criteria of Regulation 30-12(E)(1)(j). The undisputed provisions of those regulations govern details such as siting requirements, height, width, and length criteria, restriction of water flow, and effect on the environment. The sole question to be answered in this matter is whether the SFH Marina “restrict[s] the reasonable

¹⁴⁷ While the court in *Maull* ultimately rejected the contention that the dispute was a public dispute, the Court views the different outcomes in *White* and *Maull* to be driven by the applicable standard of review rather than the particular facts of the case. In *White*, the ALC determined that the dispute was public, and our court of appeals affirmed this result under the substantial evidence standard. In *Maull*, the ALC ruled that the dispute was private, and our court of appeals affirmed this result under the substantial evidence standard. There were conflicting facts in both cases.

navigation or public use of State lands and waters.” R.30-12(E)(1)(j). With respect to Petitioner’s concerns that the structure of the proposed marina will interfere with navigation, the Court concludes that the Petitioners have failed to meet their burden on this question.

23. The Court concludes that the structure of the proposed marina presents no navigational issues when J&W is exiting Barge Creek. Capt. Daley specifically testified that while he was concerned about boater safety, he was not concerned with hitting the marina.
24. Mr. O’Quinn testified that docking the barge as described by Petitioners would be achievable with the SFH Marina in place, particularly in light of the modifications from the original permitted design that provided an additional twenty feet of room for navigation and provided dolphin pilings for the barge to lay against, protecting both the barge and the marina.¹⁴⁸
25. The Court finds Mr. O’Quinn’s testimony on this issue compelling. It is consistent with other evidence in the case. For example, from 1990 until 2016, J&W was able to navigate its barge in and out of Barge Creek even though the SFH Dock was in place. This dock was of the same general length as is the proposed marina and was also located 20 feet closer to J&W’s route of travel than the proposed marina would be. Additionally, Mr. Scurry submitted a proposed alternate design which would locate the marina in the same position as currently permitted but remove the finger piers on the western side of the marina. Mr. Scurry testified that he could safely navigate in and out of Barge Creek if the marina were built with his design. Accordingly, the Court concludes that neither the location nor the length of the proposed marina would interfere with the navigation of J&W’s barge.
26. Moreover, J&W’s contention that the finger piers on the western side of the proposed marina is undercut by Mr. Scurry’s admission to Mr. Williams that the addition of the dolphin pilings would allow him to safely navigate the barge in and out of its mooring at BCM. The Court’s requirement herein that the permit be modified to be constructed according to the O’Quinn design, which reduces the length of certain of the finger piers on the western side of the marina further alleviates any structural navigation concerns which J&W might have with the proposed marina.
27. The Court now turns to J&W’s concerns regarding boater safety.

¹⁴⁸ Tr. 433:6 – 437:10.

28. The Coastal Zone Management Act and critical area regulations authorize OCRM to permit alteration of the critical area, including the construction of docks, marinas, and other marine structures. These laws do not authorize the Department to regulate individual *persons* or afford OCRM police powers over navigational or recreational boater activity. As a creature of statute, the Department may only exercise those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.” *Captain’s Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). While any marina or dock will invite boating traffic, and OCRM may implicitly consider the safety aspects of such boating activity in the context of its permit decisions, there are no specific regulatory provisions applicable to this Permit which address the boater concerns raised by Petitioners, and the boater concerns presented to this Court were not thoroughly presented to OCRM for its consideration in making the Permit decision in this matter. Nonetheless, the Court considers this matter *de novo*. While the Court concludes that under existing case law, safety concerns may be considered in a determination regarding navigation and public use, Petitioners have failed to meet their burden of showing that the recreational boater use of SFH Marina will “restrict the reasonable navigation or public use of State lands and waters.”
29. It is difficult for the Court to conceive of a recreational boat or group of recreational boats, under power and capable of giving way or navigating away from another vessel, as creating a restriction on reasonable navigation within the meaning of the regulations governing permanent marine structures and alterations to critical areas. This is particularly apparent when contrasted with the more permanent navigational issues presented by the dock structure in *Coffin Point HOA*. 392 S.C. 247, 708 S. E. 2d 812. The Court can conceive of contexts in which a given vessel might be momentarily in the way of another, but it is hard to find that such temporary obstacles would be *unreasonable* restrictions to navigation. The undisputed testimony of all parties is that recreational boating is common in and around Hilton Head Island, and that barge captains must always navigate with care and consciousness of those boaters. J&W encounters recreational boaters at all points on its route to and from Daufuskie – at BCM, on open water, and at Freeport Marina – and no evidence was presented that the existence of these boaters on the water is or ever has been insurmountable or presented serious interference with J&W’s operations.

30. Petitioners assume that the boaters using SFH Marina will act outside their own interest by boating under the influence, failing to give the right of way to the barge, or otherwise acting recklessly in interacting with the barge. Mr. O'Quinn testified that recreational boaters are subject to rules and regulations administered by the South Carolina Department of Natural Resources and gave his expert opinion that no collision is likely to occur as long as both J&W and the recreational boaters at SFH Marina are observing the rules and regulations to which they are subject. This testimony was not disputed by the Petitioners, whose witnesses did not opine that boaters following the rules would still cause collisions, but rather shared hypothetical concerns of boaters failing to give the right of way, heed warning, or operating a vessel while inebriated. No specific evidence was offered which tends to show these hypothetical situations are likely to occur at the SFH Marina. Petitioners raised the issue of alcohol sales at the Fish Camp but presented no evidence that the restaurant or its proprietor engage in over-service of alcohol or any other unsafe or illegal practices with respect to such service. Petitioners' speculation regarding the potential behavior of individual boaters is insufficient grounds to find an unreasonable restriction on navigation is created by the SFH Marina.
31. Petitioners' safety concerns regarding the SFH Marina are also undermined by the Petitioners' operations at Freeport Marina which, along with a marina-adjacent restaurant that serves alcohol to recreational boaters, is owned by Petitioner Scurry. The testimony on the record demonstrates that J&W is able to operate in and around Freeport Marina with no interference in its operations, despite the fact that Freeport Marina accommodates significantly more boats than the SFH Marina is permitted for. Captain Daley testified that J&W avoids barge runs on the weekends to avoid the heaviest boating traffic at Freeport. These are also the days Mr. Reilley anticipates the heaviest boating traffic for the Fish Camp, based on his experience at other waterfront restaurants. Captain Daley also testified that a J&W employee at the Freeport Marina informs recreational boaters that the barge is incoming when boating traffic is particularly heavy at Freeport. No reason was offered by Petitioners why a similar approach would not be effective at BCM adjacent to the SFH Marina.
32. Moreover, as discussed above, the period of time in which a safety issue *might* be present is limited to about four minutes three times per week. Because these instances will occur

on weekdays, rather than weekends when the proposed marina is predicted to bring increased traffic, Petitioner's boater safety concerns are further diminished.

33. The Court does not take Petitioner's concerns of a possible accident lightly but holds only that the evidence regarding safety concerns presented in this case does not create an unreasonable impediment to navigation or public use. Indeed, J&W's use of the waterway is already limited by U.S. Coast Guard regulations which require the barge and push-boat equipped with certain safety equipment, including a horn for warning nearby boaters and for use when docking or leaving dock, and a powerful light. The public's use of the waterway is similarly limited by the requirement that boaters maintain a proper lookout, heed warning indicators such as horns or lights, and give way to a larger stand-on-vessel. Operation of a boat by a captain who is under the influence is already illegal. Overserving a customer at the Fish Camp who arrives by boat is also already illegal.
34. The Court does not find that the proposed marina is inconsistent with state policies governing critical area permits.
35. The policies outlined in the governing statute are, in relevant part: (B) Specific state policies to be followed in the implementation of this chapter are: (1) to promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone; (2) to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations; (3) to formulate a comprehensive tidelands protection program; (4) to formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes; and (5) to encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation. S.C. Code Ann. §48-39-30(B) (Supp. 2022).

36. The marina would promote economic and social improvement to citizens of South Carolina. Construction of the marina would allow more people to use and enjoy the waterway and return kayakers to this area of Broad Creek. By generating additional income at the Fish Camp, the marina would also increase tax revenues for the state. Finally, the parties have raised no concern that the marina poses an environmental threat to Broad Creek of any kind.
37. The Court's conclusion is also influenced by the fact that the Department joins in SFH's request that the Court affirm the permit as modified. The Court notes that the Department's staff possesses specialized knowledge and expertise in making a determination. *See* S.C. Code Ann. § 1-23-330(4) (Supp 2022).
38. To the extent that any conclusion of law stated herein may be more in the nature of a finding of fact, it may be considered as such, and vice versa.¹⁴⁹

ORDER

IT IS THEREFORE ORDERED that the decision of the Department is **AFFIRMED AS MODIFIED HEREIN**. The Permit shall be amended to:

(1) conform the design of the SFH Marina to the O'Quinn Alternative, including the reductions to the length of the finger piers on the Area-of-Concern side of the marina and the increase from three-pile to five-pile dolphins; and

(2) require that SFH post and maintain a readable sign at the end of the marina catwalk to warn recreational boaters, including kayakers who might launch from the end of the marina into Broad Creek or Barge Creek of the risk of collision with barge when conducting maneuvers in the

¹⁴⁹ In the conclusion section of the proposed order, petitioner raises a potential violation of regulation 30-11(C)(1)-(3), but neither its order nor the trial transcript contains any citation to authority or substantive argument regarding this issue. Accordingly, the Court deems this issue to have been abandoned or waived. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n. 4, 677 S.E.2d 32, 36 n. 4 (Ct.App.2009) (deeming an issue waived on appeal if it is not argued in the appellant's brief); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (an issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct.App.2005) (an issue is deemed abandoned on appeal when no legal authority is cited to support the argument); *see* Rule 208(b)(1)(D), SCACR (requiring argument of each issue in an appellant's brief to include discussion of the issue as well as citations to authority).

Area of Concern. While the Court does not intend to dictate the exact content of the sign, it must, at a minimum, notify boaters that the barge enters and exists Broad Creek in proximity to the SFH Marina; that boaters should avoid the Area of Concern during barge maneuvers so that a collision does not occur; and that boaters should not enter or should exit the Area of Concern immediately after the barge sounds its warning horn.

AND IT IS SO ORDERED.

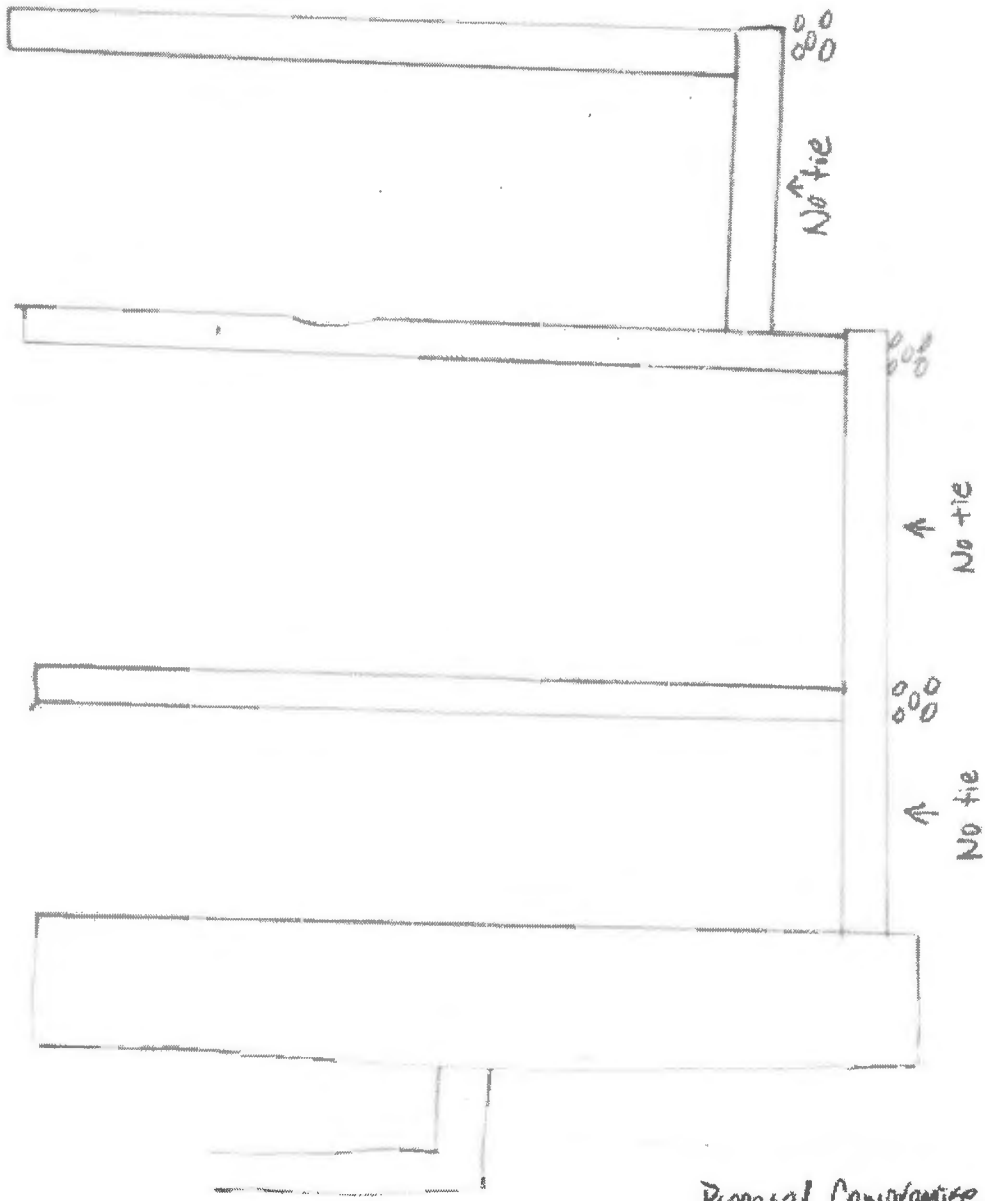


Robert L. Reibold
Administrative Law Judge

August 16, 2023
Columbia, South Carolina

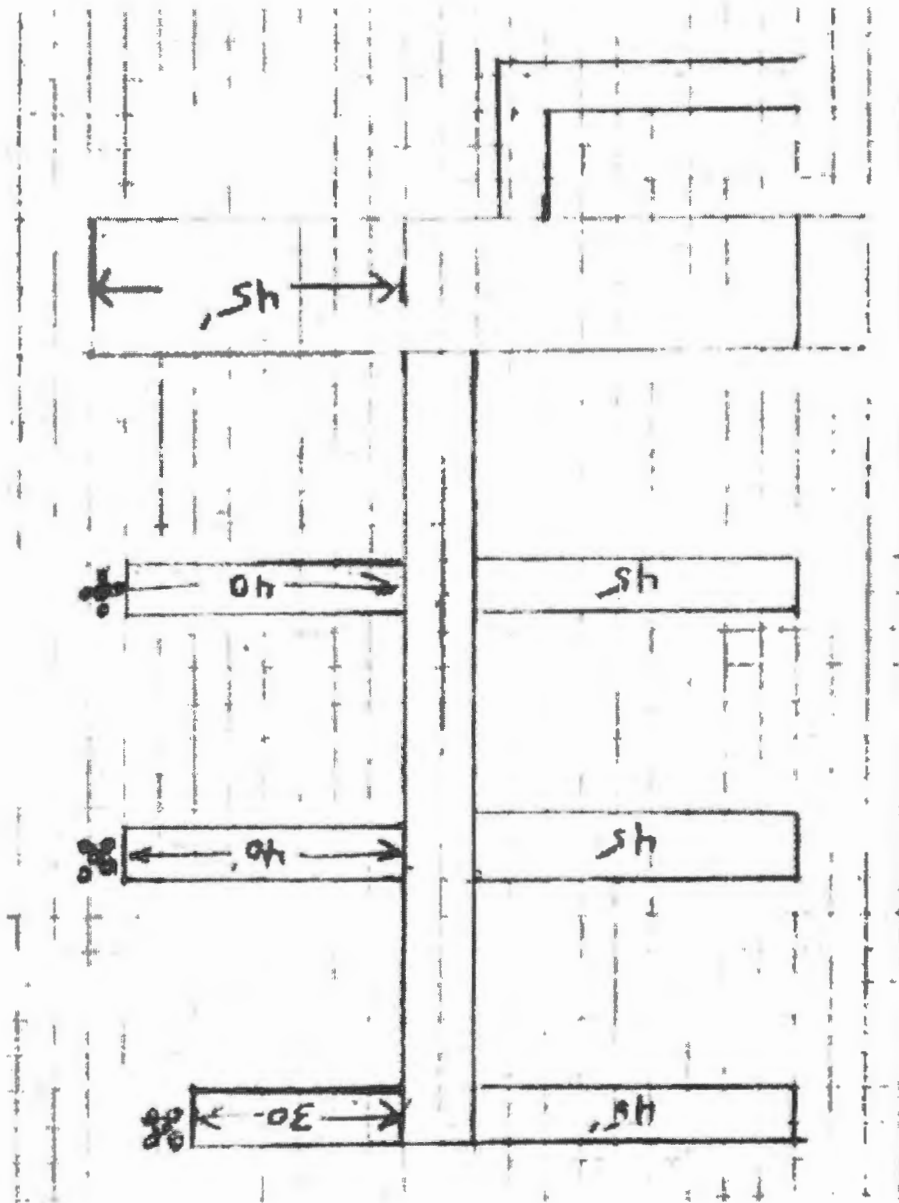
Appendix A:

Appendix B:



BARGE CREEK

Appendix C:



CERTIFICATE OF SERVICE

I, George Cox Beighley, Junior, hereby certify that I have on this date served this order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



George Cox Beighley, Junior
Judicial Staff Attorney

August 16, 2023
Columbia, South Carolina