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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2026-000221
Docket No. 24-ALJ-07-0232-CC

South Carolina Department of Environmental Services and
South Carolina Coastal Conservation League Respondents-Appellants,
v.

Rom Reddy,.....Appellant-Respondent.

RECORD ON APPEAL – VOLUME 3 OF 16
(pp. 850-1065)

E. Brandon Gaskins
Moore & Van Allen PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
brandongaskins@mvalaw.com

Jeremy Talcott (*Pro Hac Vice*)
Christopher M. Kieser (*Pro Hac Vice*)
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
jtalcott@pacificlegal.org
ckieser@pacificlegal.org

Attorneys for Appellant-Respondent
Rom Reddy

Bradley D. Churdar
Sallie P. Phelan
South Carolina Department of
Environmental Services
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
bradley.churdar@des.sc.gov
sallie.phelan@des.sc.gov

Attorneys for Respondent-Appellant
South Carolina Department of
Environmental Services

Leslie S. Lenhardt
Lauren Milton
South Carolina Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585
leslie@scelp.org
lauren@scelp.org

Attorneys for Respondent-Appellant
South Carolina Coastal Conservation
League

Exhibit 27

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

SOUTH CAROLINA DEPARTMENT
OF ENVIRONMENTAL SERVICES
AND SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Petitioners,

vs. DOCKET NO. 24-ALJ-07-0232-CC
ROM REDDY,
Respondent.

DEPONENT: JACQUES PREVOST
30 (b) (6)

DATE: February 06, 2025

TIME: 9:20 a.m.

LOCATION: Williams Mullen
1230 Main Street
Columbia, SC

TAKEN BY: Counsel for the Respondent

REPORTED BY: KIMBERLY T. POWER, CR

1 THE WITNESS: Please restate what you
2 think it is.

3 BY MR. WARE:

4 Q. I'm not expressing an opinion. I'm asking
5 you a question. Is the dispute in this case
6 centering around the location of the structure
7 landward of a setback line --

8 A. Yes.

9 Q. -- and whether your jurisdiction extends
10 that far? Is that the proper question?

11 A. In this case, the beaches critical area
12 extends landward of the setback line. So, yes, the
13 structure was installed in beaches critical area. At
14 least some portions of the activity had been landward
15 of that line in beaches critical area.

16 Q. And when you came in 2023, you've known no
17 other application of this statute and regulations
18 than the ones you expressed today about that
19 jurisdictional area?

20 MS. PHELAN: Objection to form.

21 THE WITNESS: I've never -- please
22 restate.

23 BY MR. WARE:

24 Q. Have you known -- have you adopted or
25 implemented any other interpretation about the

1 jurisdictional area of the state of South Carolina
2 over beaches critical area as you just described it?
3 Have you implemented it in any other way since you've
4 joined the agency?

5 MS. PHELAN: Objection to form.

6 THE WITNESS: I've looked at beaches
7 critical area at a bunch of sites, if that's the
8 question. So if there's any area where beaches
9 reached landward of the setback line, then that would
10 be the case. But I wasn't analyzing where the
11 setback line was with every site. I'm taking site
12 conditions.

13 BY MR. WARE:

14 Q. I see. Based on your inspection knowledge
15 as an inspector, personal knowledge, have you ever
16 identified an alteration or utilization of a beach
17 critical area sufficient to require a permit which
18 you did not initiate or refer to enforcement?

19 A. Well, I know there's cases where it didn't
20 need to get referred to enforcement because there may
21 have been activity occurring in beaches critical
22 area, I made contact with them, and was able to open
23 a compliance action and get it resolved before it was
24 even referred to enforcement. As in, they were able
25 to remove all that and remediate the area and restore

1 it to its natural state.

2 Q. Did any of those occur before Mr. Reddy
3 was inspected by you?

4 MS. PHELAN: Objection to form.

5 THE WITNESS: I don't think I can
6 recall one prior to that. Restate the question so I
7 can fully hear it.

8 BY MR. WARE:

9 Q. I'm just asking whether you identified any
10 alteration or utilization of a beaches critical area
11 that required a permit and did not have one which you
12 refer to enforcement or were resolved informally
13 prior to Mr. Reddy's wall being inspected by you?

14 A. Prior to?

15 MS. PHELAN: Objection to form.

16 THE WITNESS: Well, that is -- I
17 wasn't prepared to really speak outside of my area of
18 inquiry when it comes to those type of inspections,
19 so I'm not sure. There may have been. I'm not sure
20 if there was after and maybe during. I'm unsure.

21 BY MR. WARE:

22 Q. I'm asking of your personal knowledge, not
23 other people's. Did you personally observe any other
24 activities requiring a permit landward of the setback
25 line prior to Mr. Reddy's activity?

1 MS. PHELAN: Objection to form.

2 THE WITNESS: I'm unsure. I'm
3 unsure, personally.

4 BY MR. WARE:

5 Q. You personally do not have any knowledge
6 whether you did or you did not?

7 A. I will say that when I'm doing these
8 inspections and taking site conditions, I'm not
9 looking for that line -- that setback line when I'm
10 out there. I'm looking for the beaches critical area
11 and inspecting that. So in some cases, the beaches
12 critical area may not be right next to a beach dune
13 system or setback line. So, just an example, I know
14 other areas where the setback line may be landward of
15 a house and the beaches critical area is still
16 seaward of that house and I'm looking at the beaches
17 critical area there. I'm not looking at the setback
18 line in that case.

19 Q. I see. I understand what you're saying.

20 A. Site conditions are what I'm looking at.

21 Q. Either way your understanding of the
22 regulations and statutes, as you've expressed them on
23 behalf of inspectors today, is that -- is that a
24 standard which is enforced across the board at the
25 department or is --

1 A. Is what a standard?

2 Q. Your application and interpretation of
3 statutes and regulations that you expressed this
4 morning, is that uniformly enforced across the board
5 by all inspectors at the department?

6 MS. PHELAN: Objection to form.

7 THE WITNESS: I can't speak on behalf
8 of every single inspector, but I will speak in the
9 general sense that we have these guidance documents
10 that we use to guide our inspections. We have the
11 inspect form that shows what we're looking to fill in
12 for those inspections and it's to document those site
13 conditions. And it's our understanding if there's
14 ever any issue, you can talk to your manager or
15 supervisor to get clarification.

16 BY MR. WARE:

17 Q. Was Piping Plover an exception to that?

18 A. I don't know about Piping Plover.

19 Q. Okay. So my question simply is: Is your
20 interpretation that the jurisdiction extends to the
21 beaches critical area no matter where it is or the
22 setback line, whichever is most landward, is that an
23 interpretation that you're aware, to your own
24 knowledge and based on your preparation for this
25 deposition, the practice of the agency in your

1 department?

2 A. It is the understanding of the department
3 that the beaches critical area may be landward of the
4 setback lines, if that's what you're asking. So,
5 yes, that's what our inspector should understand.
6 That's what our staff understands. It's defined in
7 beaches critical area.

8 Q. Do you have any discretion to take a
9 different approach on the regulations?

10 A. I don't make the regulations. I just
11 follow them.

12 Q. So in this case if you wanted to, could
13 you ignore the regulations and the statute and not
14 enforce that interpretation we just discussed?

15 A. Restate that, please.

16 Q. Could you make a personal decision as a
17 staff member of the department -- do you have the
18 discretion not to interpret the statute and the
19 regulations to require permit authority all the way
20 to the beaches critical area even if it's landward of
21 the setback line?

22 A. I'm going to need you to rephrase that,
23 please.

24 Q. I'm just asking if you have any discretion
25 not to enforce the interpretations we've discussed?

1 A. So my responsibilities are to follow those
2 regulations, note the site conditions, and note
3 potential violations associated with those. So I'm
4 not making them up or changing them. I'm accounting
5 for what's there to the best of my ability.

6 Q. Do you have any discretion not to
7 interpret the jurisdiction of the department the way
8 we've discussed it this morning?

9 A. What does that mean, "not to interpret the
10 jurisdiction?"

11 Q. Do you have discretion to determine that
12 the beaches critical area if it's landward to the
13 setback line is not within the jurisdiction of the
14 state of South Carolina?

15 A. The beaches critical area is within the
16 direct regulatory jurisdiction of SCDES BCM.

17 Q. I'm just asking do you have discretion not
18 to take that position or interpret the law that way?

19 A. I interpret it for what it is. I don't --
20 I don't interpret it. I take it for what it is,
21 honestly. So I'm --

22 Q. Fair point.

23 A. I'm not making up regulations or
24 discounting regulations. I'm going to account for
25 all of them when I'm documenting site conditions. I

1 can't speak on enforcement policies or whatever.

2 Q. I'm not asking about enforcement. I'm
3 asking about your application of the regulations and
4 the statute when you go out to do an inspection, do
5 you have any discretion not to interpret the
6 regulation such that the jurisdiction goes all the
7 way to the beaches critical area or landward --

8 A. I'm going to interpret -- what I'm trying
9 to say is there's no interpretation here. I'm
10 looking at the beaches critical area. I'm not
11 interpreting any regulations. The beaches critical
12 area is defined. That's the definition I'm looking
13 at and any other definitions I'm looking at as well
14 to consider. Regulations, I'm pulling them from
15 directly to consider. I'm not coming up with
16 something else. I'm not making anything up.

17 Q. I think we're saying the same thing, but
18 I'm just asking you to be clear because you've
19 changed the answer.

20 A. Okay. Let's ask it again.

21 Q. The setback line you agree or stated is
22 not necessarily the same as the beaches critical area
23 line?

24 A. The beaches critical area is not
25 necessarily associated with the setback line.

1 Q. Right. And I'm just asking if the
2 activity, alteration and utilization, is landward of
3 the setback line, do you have any discretion not to
4 require a permitting authority be considered for that
5 activity?

6 A. If it's beaches --

7 MS. PHELAN: Objection to form.

8 THE WITNESS: -- critical area, it's
9 our jurisdiction and we are going to assert
10 regulatory authority.

11 BY MR. WARE:

12 Q. And you didn't just pick Mr. Reddy out to
13 enforce that. That applies to everybody?

14 A. Beaches critical area is our direct
15 regular authority. That's our jurisdiction. We're
16 looking at those areas to get authorization or
17 permits for.

18 Q. And you apply that across the board, not
19 just to Mr. Reddy, right?

20 A. I apply it --

21 MS. PHELAN: Objection to form.

22 THE WITNESS: -- to everything.
23 Across the board, yes. It's applicable to any
24 property I'm going to inspect and document the site
25 conditions. I'm going to observe the beaches

Exhibit 28

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

SOUTH CAROLINA DEPARTMENT
OF ENVIRONMENTAL SERVICES
AND SOUTH CAROLINA COASTAL
CONSERVATION LEAGUE,

Petitioners,

vs.
ROM REDDY,

DOCKET NO. 24-ALJ-07-0232-CC

Respondent.

DEPONENT: MATTHEW SLAGEL
30 (b) (6)

DATE: February 13, 2025

TIME: 9:13 a.m.

LOCATION: Williams Mullen
1230 Main Street
Columbia, SC

TAKEN BY: Counsel for the Respondent

REPORTED BY: KIMBERLY T. POWER, CR

1 BY MR. WARE:

2 Q. Are these terms binding in enforcement
3 actions or do you have discretion not to use the
4 terms the way you've just described them?

5 MS. PHELAN: Objection to form.

6 THE WITNESS: I would say broadly the
7 department has discretion to consider, you know, site
8 conditions, characteristics. As we implement the
9 laws and the regulations, I would say broadly we have
10 discretion. But when there's, you know, as you say,
11 undefined terms within a defined term, then we try
12 our best to implement those consistently.

13 BY MR. WARE:

14 Q. Is it fair to say that your staff applies
15 the terms the way you've described them this morning,
16 to your knowledge?

17 A. To my knowledge, yes.

18 Q. And it's consistent across all of the
19 regulated community?

20 A. Yes.

21 Q. Not just Mr. Reddy, for example?

22 A. Correct.

23 Q. There are some terms that we've read in
24 various documents associated with this case that are
25 not in those definitions related to 130 and I just

1 A. Yes.

2 Q. And within what context? What geographic
3 areas?

4 A. It says within the setback zones.

5 Q. What are setback zones?

6 A. I believe this is referring to the area
7 between the beachfront baseline and setback line, the
8 setback line being the landward limit of the
9 beach/dune system critical area. And then it
10 references permitting seaward of the baseline with
11 special permits as well.

12 Q. Is there any provision there for
13 permitting landward of the setback line?

14 A. Not here, no.

15 Q. Would you go over to subpart H, which is
16 toward the back. I would represent to you it's on
17 page 106.

18 A. Okay.

19 Q. What is this discussing, H?

20 A. The title of it is "Methodology and the
21 Generation and Adoption of Baselines and Setback
22 Lines."

23 Q. Would you look at subpart 3 and read that
24 and then I have a question? It's on page 106.

25 A. Okay.

1 Q. Where is the permitting jurisdiction in
2 this section?

3 A. It says on beaches and it says the
4 permitting jurisdiction on beaches is determined by
5 the location of the setback line.

6 Q. What about on beach/dune systems critical
7 area? Is it included in that provision?

8 A. It's not in three, no. I will add that
9 R. 30-21 entered into regulations in the early 1990s
10 and has not been updated since whereas other portions
11 of the regulations and statute have been.

12 Q. Would you just flip over the page and go
13 to subpart seven for that same section? Could you
14 read that to yourself and I just have a question
15 about the second sentence in that paragraph?

16 A. Okay.

17 Q. That second sentence references something
18 called a line report. What is a line report?

19 A. It is a summary document of -- that
20 explains the process that was used when the baseline
21 and the setback line are updated.

22 Q. Is it a document used to delineate a beach
23 or a beach/dune system?

24 A. It's a document that explains how the
25 beach/dune system critical area was delineated and

1 vegetation. That's what veg line means, vegetation
2 line. The smooth component of that is some GIS
3 processing that occurs back at the computer that
4 takes those individual data points and smooths them
5 out.

6 Q. Would it be fair to say that a smoothed
7 veg line may not reflect the seaward most point of
8 vegetation at a given parcel?

9 A. It would depend if -- at a given parcel
10 that interpolation was performed between adjoining
11 properties and then some straight line drawn across,
12 possibly.

13 Q. I understand that. I'm asking simply does
14 the smooth veg line tell you whether there is any
15 vegetation seaward of that vegetation line in the --
16 at that parcel at that moment in time?

17 A. The smooth veg line as you're referring
18 to, it would be collected along a line of vegetation.
19 There might be individual plants, possibly,
20 individual clumps that are seaward of that.

21 Q. When you make your determination as to
22 whether an area is a beaches critical area and you're
23 looking at the presence or absence of non-littoral
24 vegetation, do you use the smooth veg line or any
25 other indicator of vegetation?

1 A. The definition says no non-littoral
2 vegetation. So we would be looking and seeing if
3 it's -- let me back up. We wouldn't -- we wouldn't
4 take a single plant out on the beach and say that was
5 the extent of beaches critical area. It might extend
6 some distance landward to a more continuous
7 established line of vegetation because that's -- the
8 definition for beach just talks about it being
9 established.

10 Q. And established refers to a line of
11 vegetation or to a single plant or other vegetation?

12 A. It would be some sort of more continuous
13 linear feature.

14 Q. Is that enforced across the board at your
15 staff, that interpretation?

16 MS. PHELAN: Objection to form.

17 THE WITNESS: I believe it is.

18 BY MR. WARE:

19 Q. Did you just reach that conclusion from
20 Mr. Reddy's parcel or is it binding on the entire
21 regulated community?

22 A. We would determine beaches critical area
23 the same way statewide.

24 Q. Does anybody on your staff have discretion
25 not to do it that way?

1 A. No.

2 Q. What factors do you look to in order to
3 determine the establishment of vegetation?

4 A. Density --

5 Q. Of the individual plant or --

6 A. Density of plants within the entire area.
7 Rhizomes, whether you can tell that their roots are
8 starting to grow laterally throughout the planted
9 area. Just visually if they appear to be, you know,
10 brown or dead or dying or if they appear to be green
11 and thriving. I'd say those are the three primary
12 ones: Density, rhizomes, and just the overall
13 appearance of them.

14 Q. My recollection was that as a result of
15 the Solomon remand, the board recommended 60 days or
16 at least determined that was appropriate for the Isle
17 of Palms in that situation. Did you give 60 days
18 consideration of vegetation in the case involving the
19 Reddy property to determine if the vegetation was
20 established there? And I'll start with after the
21 Hurricane Idalia.

22 A. I'm trying to remember if the Reddys'
23 planted vegetation after any of these erosion events.
24 To my recollection, they put back artificial turf and
25 the various rocks and everything to support that.

1 Their fence. I don't recall them planting until they
2 planted landward up the wall later on.

3 Q. I'm just trying to keep us focused on the
4 time period when this enforcement action became
5 important and I want to focus on Idalia. Did you go
6 out and say, at the time of the inspection, we're
7 going to wait 60 days to determine if the vegetation
8 is established here? Was that ever a consideration?

9 A. I don't recall vegetation ever being
10 planted to reestablish -- or to reevaluate, rather.
11 We've collected data not just at Mr. Reddy's -- Mr.
12 and Ms. Reddys' property, but all along that area of
13 Isle of Palms several times. Like I said, I don't
14 recall the Reddys ever replanting anything to
15 reevaluate.

16 Q. When you went out to do your inspections
17 or you sent Mr. Prevost to do the inspections, was
18 there a minimum time frame given to the inspector as
19 a staff policy as to how long to wait to determine if
20 vegetation removed as the result of a storm would be
21 reestablished?

22 A. No.

23 Q. Do you have a minimum time that you
24 require your staff to consider?

25 A. We talked about dynamics before. Beaches

1 critical area is dynamic. We can reevaluate. So if
2 we go out to a site in, say, one day, today, this is
3 beaches critical area, if folks get a permit to do
4 some revegetation, we come back out and reevaluate.
5 We'll do that upon request. So beaches critical area
6 can change. It's variable.

7 Q. Yeah, I understand that. I was asking a
8 different question. I'm asking after vegetation is
9 destroyed as a result of a storm event, is there a
10 period of time you train your staff or have a
11 direction to your staff or are practices implemented
12 there as to how long you wait to determine if that
13 vegetation removed by the storm has reestablished?

14 A. No.

15 Q. Okay. You mentioned the visual
16 observation is the vegetation thriving or dying. I
17 want to ask you a couple of questions about that.
18 How do you determine the health of those plants?

19 A. I would consult with Brad James, who I
20 mentioned before, in our office if I had a question
21 about whether plants were healthy or not. He's sort
22 of our resident plant expert both within the salt
23 marshes as well as on the beachfront. But I do know
24 it's not -- it's not just simply looking at a plant
25 and saying is it brown or green, but it's really that

1 rhizome spreading is a better indicator of health.

2 Q. Did you consult with Brad James regarding
3 the Reddy property and the vegetation line there?

4 A. It was artificial turf at his property.
5 So not at his property, no.

6 Q. So Mr. James never went with you there to
7 determine vegetation?

8 A. Mr. James came out with us to other parts
9 of Isle of Palms. Those properties, the subject of
10 the final review conferences, et cetera.

11 Q. But he didn't do that for the Reddys'
12 property, is all I'm asking?

13 A. Correct. Correct.

14 Q. Now, at the Reddy property, did you
15 evaluate for the spread of rhizomes?

16 A. Artificial turf? No.

17 Q. Did you look for it at any place where the
18 wall was constructed?

19 A. We looked at natural vegetation on
20 adjoining properties, but not at Mr. Reddy's. I
21 should clarify that at his property, the escarpment
22 was our prime indicator that we were looking at.

23 MS. PHELAN: Can we take a break?

24 THE WITNESS: Five minutes?

25 MR. WARE: Yeah, that would be great.

1 pockets indicating that that's where the tidal and
2 wave action had reached.

3 Q. If there were a veg line prior to Idalia
4 and Idalia hit and that vegetation along that veg
5 line were eroded away or relocated, would the
6 department determine that vegetation to become not
7 established for purposes of the beach's definition?

8 A. Yes.

9 Q. How long -- and maybe you've already
10 answered this, but it's been a long day for me. How
11 long does it take to consider that vegetation
12 established again?

13 A. It would depend. It would depend on the
14 planting density.

15 Q. Is that that list of factors --

16 A. Rhizome growth, you know. All those
17 things, but another thing that I would add to that is
18 the planting season could be important. If they're
19 not planted at the right time of year, then they may
20 not be as likely to become established.

21 Q. So that was that list of factors we went
22 over and I -- that's what you would look to to
23 determine if it was reestablished?

24 A. Yes.

25 Q. If the vegetation was not eroded or

1 removed, but was covered with sand as a result of a
2 storm, is that vegetation line considered to have
3 been lost and the vegetation not established?

4 A. If it could be documented that that
5 vegetation is still there -- in other words, if it's
6 just a thin linear of sand that covers some, you can
7 kind of move that sand away to show that that
8 vegetation is still established. We would consider
9 that.

10 Q. Why about the rhizomes? Would you look
11 for the rhizomes --

12 A. Yes.

13 Q. -- in that kind of situation?

14 A. Yes.

15 Q. When you did your inspections and set the
16 escarpment and veg line in the September 2023 aerial,
17 did you look for rhizomes at the Reddy property?

18 A. We looked at the -- the Reddys have some
19 sort of shrub that lines the northern and the
20 southern property lines. So we looked at sort of the
21 seaward limit of those shrubs and how those looked.
22 Because across the property, otherwise, it's the
23 artificial turfs. We were using those other planted
24 species as an indicator.

25 Q. Have you ever considered historic imagery

1 to assess vegetation of a property line -- I'm sorry,
2 concerning a vegetation line?

3 A. Yes.

4 Q. Did you do that here in the Reddy
5 property?

6 A. I'm aware that in past years that there
7 was natural vegetation seaward of this area that
8 we're talking about, but I didn't do any kind of, you
9 know, digitizing or analysis of that imagery.

10 Q. Did you ever use a Trimble GeoXT to do
11 that?

12 A. That's not using imagery. That's an
13 actual handheld GPS unit in the field.

14 Q. What is an AMBUR, A-M-B-U-R?

15 A. That's an acronym. That stands for
16 analyzing moving boundaries using R. R is a
17 programming language. So it's a way to calculate
18 rates of shoreline change using a dataset.

19 Q. Over this historic imagery --

20 A. Correct.

21 Q. -- you mentioned?

22 A. Yes.

23 Q. How many years do you typically go back
24 when you're looking at historic imagery?

25 A. For what purpose?

1 not irrelevant. It's good to have that information
2 and have an understanding of how a shoreline is
3 changing over time. But in terms of where the
4 critical area is, what matters is where it is.
5 That's what we're considering in a permit
6 application, not where it might have been ten years
7 ago.

8 Q. Have you ever done it the other way,
9 looked at the historic imagery in order to make this
10 determination of beaches critical area?

11 A. Looking at it in isolation just looking at
12 imagery?

13 Q. Just looking at imagery historically.

14 A. I don't think so.

15 Q. Have you ever looked at historic imagery
16 to set a baseline?

17 A. Using historic imagery as part of that
18 dataset analysis, yes.

19 Q. Have you ever looked at historic imagery
20 to set a setback line?

21 A. As part of that analysis, again, yes.

22 Q. One last question on beaches critical
23 area. We've talked about periodic inundation and
24 we've talked about such that vegetation is
25 established or certain types of vegetation

1 established. The main lack of understanding I have
2 is how are those two factors connected in an
3 evaluation? When you're going out to do the
4 evaluation, you said you're using look at it, look at
5 how it is now. When you go out and look at it, what
6 is your process -- the department's process to
7 connect those two or do you look at them as two
8 separate factors unconnected?

9 A. I think they're connected because of
10 the -- those two words within the definition. But I
11 do, you know, reaffirm that the vegetation is the
12 primary indicator for us to determine that limit of
13 beaches critical area because beach vegetation is
14 pretty resilient. Some of the areas are kind of
15 recovering after a storm, et cetera. It will start
16 to grow back and start to kind of move further
17 seaward, again, withstand some of that salty, dry
18 environment. But in an area that's being
19 periodically inundated where you have water that's
20 getting up at some frequency that doesn't allow that,
21 that's why we use that vegetation as an indicator.
22 It's similar to freshwater wetlands. That would be
23 like the opposite side of the same coin where you
24 have to have sufficient inundation for aquatic plants
25 to live as opposed on the beach sufficient inundation

1 to preclude plants from growing. So sort of the same
2 analysis looking at jurisdiction and the Corps does
3 have the freshwater wetlands as well.

4 Q. Are there any other reasons there may not
5 be vegetation established?

6 A. There could be. If somebody is out there
7 actively destroying it. In areas that are accreting,
8 you might have windblown sand that is actually
9 blowing across the beach and that vegetation acts as
10 sand fencing, basically. Sort of drops that sand,
11 helps the dune build up bigger and bigger. So on
12 healthy beaches that could happen. Not in places
13 like we're talking about, Isle of Palms, where
14 there's been scraping and sandbags and all these
15 things for years.

16 Q. Does that move the line of the beaches
17 critical area landward when those activities occur?

18 MS. PHELAN: Objection to form.

19 THE WITNESS: I wouldn't say so.
20 Talking about the windblown sand example. You might
21 have a dune that builds up further seaward, possibly,
22 and that would actually cause the beaches critical
23 area to move seaward, not landward, as you're having
24 that sand pile up and maybe become vegetated.

25 BY MR. WARE:

Exhibit 29

STATE OF SOUTH CAROLINA
BEFORE THE ADMINISTRATIVE LAW COURT

South Carolina Department of Environmental
Services and South Carolina Coastal
Conservation League,

Petitioners,

vs. Docket No.: 24-ALJ-07-0232-CC

Rom Reddy,

Respondent.

VIDEO TELECONFERENCE

30 (b) (6)

DEPOSITION OF: SOUTH CAROLINA DEPARTMENT OF
ENVIRONMENTAL SERVICES'
REPRESENTATIVE JESSICA BOYNTON

DATE: Wednesday, February 12, 2025

TIME: 9:05 a.m.

TIME ENDED: 3:53 p.m.

LOCATION: Williams Mullin
1230 Main Street, Suite 330
Columbia, South Carolina

REPORTED BY: YVONNE R. THURSTON-BOHANNON
Registered Merit Reporter,
Certified Realtime Reporter

1 MR. WARE: I'm asking her if she's
2 prepared to testify about the practice requirements
3 of the Department implementing these regulations.

4 THE WITNESS: I'm prepared to talk
5 about my areas of inquiry. It depends on what the
6 practice requirements are that you're talking
7 about.

8 BY MR. WARE:

9 Q. I'm just asking with respect to your
10 areas of inquiry today, are you prepared to talk
11 about the practices or practice requirements of the
12 Department regarding those areas?

13 MS. PHELAN: Objection to form.

14 THE WITNESS: Regarding the areas of
15 inquiry certainly.

16 BY MR. WARE:

17 Q. Along those same lines, once these
18 policy requirements are published and become part
19 of the regulations, are they binding on the
20 regulated community?

21 A. Once they are adopted formally, once
22 they go through the full APA process.

23 Q. After that does the Department have any
24 discretion not to enforce those requirements?

25 A. There are rules in the regulation that

1 provide departmental discretion, so it would depend
2 on the area of regulation.

3 Q. I'm specifically asking if the
4 Department has discretion not to enforce a
5 regulation in Regulation 30.

6 MS. PHELAN: Objection to form.

7 THE WITNESS: The Department would be
8 required to enforce all regulations unless it
9 indicated that there was an alternative.

10 BY MR. WARE:

11 Q. Understood.

12 A. Right.

13 Q. Let's get into some of the regulations
14 which have been promulgated over time and are part
15 of this enforcement action. Would you look at
16 Regulation 30-10(B).

17 In your preparation for the test --
18 testimony today, do you have any knowledge of when
19 that regulation was promulgated?

20 A. That section of the regulation has
21 changed a number of times. I don't have all the
22 dates for all the changes.

23 (Exhibit 13, January 21, 1988, Public
24 Hearing Transcript, Bates Stamped BCM Reddy 016850
25 Through BCM Reddy 016855, marked for

1 as was originally in the statute?

2 A. It changed the location of the
3 jurisdictional lines.

4 Q. I understand that. That's not my
5 question.

6 A. Okay.

7 Q. My question is whether the language of
8 the statute changed.

9 A. The language of the statute did change
10 with Act 173.

11 Q. With respect to adding beaches critical
12 area landward of the setback lines to the
13 jurisdictional lines of the state?

14 A. It changed how the jurisdictional lines
15 were set in some areas.

16 Q. But that has nothing to do with my
17 question.

18 A. Okay.

19 Q. Let me try it again. I'm trying to
20 understand how this sentence applies today. First
21 of all, is it the current policy or practice
22 requirement of the state of South Carolina and your
23 bureau to limit jurisdictional authority or
24 permitting authority to activities within the
25 defined beach and beach/dune system critical areas?

1 A. We do exercise authority within the
2 defined beaches and beach/dune system. There is --

3 Q. And that's the extent of your
4 jurisdictional delineation today?

5 A. The defined beaches and beach/dune
6 system -- the beaches and the beach/dune critical
7 areas are within our -- our jurisdiction, correct.

8 Q. We're going to be here a long time, I
9 can see, again unnecessarily. I'm just asking you
10 if the last sentence of that paragraph reflects the
11 current policy and practice requirements of the
12 statute as you enforce them or implement them
13 today.

14 MS. PHELAN: Objection to form.

15 THE WITNESS: So the juris -- the
16 statement there that says, The jurisdictional lines
17 delineate the extent of the Department's permitting
18 authority, in areas where the beaches has eroded
19 landward of the jurisdictional lines, the
20 Department is exercising authority in those areas.

21 BY MR. WARE:

22 Q. Where is that here in that paragraph
23 sentence -- in that sentence? Excuse me. I'm just
24 asking you -- you're -- you're adding things that
25 may or may not be important. I'm not disagreeing.

1 I'm just trying to understand if the last sentence
2 of this synopsis written by the Department is
3 currently your policy and practice requirement.

4 MS. PHELAN: Objection to form.

5 BY MR. WARE:

6 Q. Is that -- is that the way your
7 regulations were promulgated and to be enforced?

8 A. I would say that the way that is
9 written is -- does not include the current
10 scenario.

11 Q. Okay. And that scenario meaning what?

12 A. The scenario being where beaches
13 critical area has eroded landward of the beach/dune
14 system.

15 Q. And your current practice is to include
16 jurisdiction over those additional areas landward
17 of the beach/dune system?

18 MS. PHELAN: Objection to form.

19 BY MR. WARE:

20 Q. Well, let me ask her. Are -- is that
21 what you're saying?

22 A. We're exercising jurisdiction over
23 beaches critical area which typically again
24 historically has been seaward of the setback in
25 some areas is now landward of the setback, and we

1 are exercising authority in that area.

2 Q. Isn't that what this case is all about?

3 A. That is a factor in this case.

4 Q. Whether the activities of Mr. Reddy are
5 within the jurisdiction of the state of the South
6 Carolina. Is that correct or incorrect?

7 A. The Department's position is that the
8 activities of Mr. Reddy were within the beaches
9 critical area of South Carolina.

10 Q. Were they within the beaches/dune
11 system critical area?

12 MS. PHELAN: Objection. Form.

13 THE WITNESS: I don't know if I've
14 done -- I don't think I've done that analysis with
15 the data.

16 BY MR. WARE:

17 Q. Was his activities landward of the
18 setback line?

19 MS. PHELAN: Objection. Form.

20 THE WITNESS: I am not familiar with
21 all of the activities that were captured in the
22 enforcement, and I'm not certain if there were any
23 of the activities that were seaward of the setback
24 line as it's set.

25 BY MR. WARE:

1 Q. As your regulations are promulgated
2 today and enforced today, if his activities were
3 all landward of the beaches critical area, would
4 there be an enforcement action?

5 A. If they were outside of the beaches
6 critical area?

7 Q. Yes, ma'am.

8 A. If they were outside of the beaches
9 critical area and the beach/dune system, then they
10 would be outside of the direct permitting
11 authority, although there may be additional review
12 from a -- a different bureau or our -- our coastals
13 and consistencies section, but outside of the
14 direct permitting authority.

15 Q. Okay. Let me ask you this. If his
16 activities are within the beaches critical area but
17 landward of the setback line, is it your policy and
18 practice requirement at the state of South Carolina
19 to require a permit for that activity?

20 A. Property owners are required to get a
21 permit or authorization for any activities within
22 critical areas which beaches would be one of those
23 critical areas.

24 Q. So is that a yes or a no?

25 A. You're asking if they would need to get

1 a permit for any activities within the beaches
2 critical area?

3 Q. Landward of the setback line.

4 A. Yes.

5 Q. Yes is the answer?

6 A. Yes -- yes is the answer.

7 Q. Thank you.

8 Is that answer you just gave consistent
9 with the last sentence in this synopsis -- of the
10 first paragraph in this synopsis?

11 A. As I mentioned, the situation along the
12 South Carolina coast has changed. I think this
13 sentence was accurate at the time it was written,
14 but now there is new scenarios unfolding.

15 Q. Is that -- one of those scenarios a new
16 interpretation or a new practice with respect to
17 permitting landward of the setback line?

18 A. I don't think it's a new practice.

19 Q. Okay. So if a member of the public
20 were to read this sentence, would they have fair
21 notice that they have to have a permit for an
22 activity that is landward of the setback lines
23 still on a beach?

24 MS. PHELAN: Objection --

25 THE WITNESS: Read --

1 MS. PHELAN: -- to form.

2 THE WITNESS: -- read in isolation
3 without any other information perhaps.

4 BY MR. WARE:

5 Q. How would you rewrite that sentence
6 today then?

7 A. I think given the changing dynamics on
8 the beachfront, that sentence could be rewritten to
9 indicate that the jurisdictional lines would
10 delineate the extent of the beach/dune system
11 critical area.

12 Q. What about the beaches critical area?

13 A. There are many places along our coast
14 still today, as there were historically, where the
15 beach/dune system would include beaches completely,
16 but there are other areas along our coast where the
17 beaches critical area would be outside of the
18 beach/dune system critical area.

19 Q. Agree.

20 My question is, How would you recite
21 that sentence to put that across to the public?

22 A. A sentence could be added indicating
23 that there may be additional critical areas to
24 consider on the beachfront outside of the
25 jurisdictional lines.

1 Q. Fair point.

2 My question is, Why is this relevant to
3 what -- to that?

4 MS. PHELAN: Objection to form.

5 THE WITNESS: Why is what relevant?

6 BY MR. WARE:

7 Q. Why is this sentence related at all to
8 what your concern is about the geographic condition
9 of the coast of South Carolina? This is describing
10 an interpretation of the statute, and I -- and you
11 keep telling me about the physical environment, and
12 I keep asking how is the physical environment
13 relevant to what you wrote in 2019?

14 A. It's relevant because when the
15 Beachfront Management Act was passed, they wanted
16 to extend the Department's authority landward of
17 the beaches critical area. They already had
18 authority in the beaches critical area, and that
19 was not considered sufficient.

20 It's relevant because the assumption
21 with the beach/dune system is that it would be
22 landward -- we would have authorities landward of
23 the beach/dune system -- the beaches system and
24 additional authorities. So for 20 to 30 years the
25 Department has had authority landward of beaches,

1 means. I was involved in some coordination,
2 developing some of the materials, and I was present
3 at the meetings.

4 Q. Did you ever speak at the meetings?

5 A. Yes, I think I spoke at at least one,
6 maybe two of the meetings.

7 Q. You've been asked to testify today as a
8 designee for the state as to the working groups,
9 their conclusions and recommendations. Do you have
10 any doubt that the meeting notes, records and other
11 information provided us about those working groups,
12 both the TAC and the stakeholder group, are
13 accurate?

14 MS. PHELAN: Objection to form.

15 THE WITNESS: The meeting summary
16 documents and the -- the technical report I think
17 are accurate. I'm not sure if there were other
18 materials provided.

19 BY MR. WARE:

20 Q. We have an array -- or received an
21 array of notes and other materials. I'm just
22 trying to determine if you are basing your opinions
23 today on accurate information or information that's
24 been manipulated in some way.

25 To knowledge has it been manipulated in

Exhibit 30

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SOUTH CAROLINA COASTAL CONSERVATION LEAGUE
AND SOUTH CAROLINA DEPARTMENT OF ENVIRONMENTAL
SERVICES,

Petitioners,

vs. DOCKET NO. 24-ALJ-07-0232-CC

ROM REDDY AND RENEE REDDY,

Respondents.

DEPOSITION OF: ELIZABETH B. VON KOLNITZ

DATE: February 19, 2025

TIME: 11:49

LOCATION: South Carolina Department of
Environmental Services
1362 McMillan Avenue, Suite 400
North Charleston, SC

TAKEN BY: Counsel for the Respondents

REPORTED BY: TERRI L. BRUSSEAU

1 A. It is part of the law, yes.

2 Q. Did you instruct the staff to enforce
3 this first sentence consistently the same way it's
4 written here?

5 A. Did I ever sit all of my staff down and
6 say you must -- you must mandate and exercise
7 jurisdiction over the beaches critical area?

8 Q. I'm asking that first. Did you?

9 A. No. They know they needed to do their
10 job.

11 Q. And does their job include enforcing
12 this sentence as it's written?

13 MS. PHELAN: Objection to form.

14 THE WITNESS: I guess I'm just
15 misunderstanding the question. Did I tell people
16 to break the law? Is that what you're asking me?
17 BY MR. WARE:

18 Q. No, ma'am. I didn't say anything about
19 breaking the law. And you're making, I think, if I
20 could adventure an opinion, making the question a
21 lot harder than it really is.

22 I'm simply asking was this statement
23 that OCRM is not expanding its authority, it has
24 existing authority and a mandate to exercise
25 jurisdiction over the beaches critical area?

1 A. Yes. I think that is an understood --
2 if that's what you're asking, that is understood
3 part of their job.

4 Q. And was that a binding provision or
5 interpretation of the law?

6 A. Is our jurisdiction over beaches
7 critical area a binding interpretation of our law?

8 Q. Yeah. Was that binding on all of the
9 regulated community?

10 A. That we have authority over beaches
11 critical area?

12 Q. Yes.

13 A. Yes, I believe that we have authority
14 over beaches critical -- they -- we -- when I
15 worked here, we had authority over the beaches
16 critical area.

17 Q. And did you have any discretion not to
18 exercise authority over beaches critical area?

19 A. I think the Department has discretion
20 in a lot of ways. Whether we utilized it in that
21 way, I don't know.

22 Q. Okay. I'm not asking about the factual
23 situation that any inspector might encounter or a
24 project manager might encounter. I'm simply asking
25 about the law and the requirement that you exercise

1 jurisdiction over beaches critical area. Did your
2 staff have any discretion not to exercise
3 jurisdiction over a beaches critical area?

4 MS. PHELAN: Objection to form.

5 THE WITNESS: I guess I'm dense. I
6 don't -- so you just said if staff in the field,
7 you're not asking whether they had discretion.

8 BY MR. WARE:

9 Q. You're right. As to a given set of
10 facts as to whether this is a beach or it's not.
11 I'm just asking about the law.

12 A. Is this the law?

13 Q. Is this the law -- did your staff have
14 the discretion to say we're not going to enforce
15 that interpretation?

16 A. Again, I -- the question you're asking
17 me is does staff have the discretion to implement
18 the law. That is a different question than is this
19 the law.

20 Q. Is that the law is my question.

21 A. Is this the law? This is the law.

22 Q. Did you require it as a matter of
23 binding obligation on all landowners in the State
24 of South Carolina?

25 A. Did I personally require it as a

1 binding. I didn't personally require binding
2 anybody to anything. The law requires what the law
3 requires.

4 Q. As the chief, did you interpret it that
5 way?

6 MS. PHELAN: Objection to form.

7 THE WITNESS: That everybody in the
8 state was bound by what I said?

9 BY MR. WARE:

10 Q. No, ma'am, that's not my question. I
11 just asked you as the bureau chief was it your
12 interpretation -- was this interpretation of the
13 law binding on all of the State of South Carolina?

14 A. In my interpretation, the law of the
15 state is the law of the state and individuals in
16 the state are bound by the law.

17 Q. Okay. And with respect to your staff,
18 could they choose not to interpret the law this way
19 that you've described it in that sentence?

20 A. It depends on the situation. If the
21 law requires them to interpret it that way, then
22 they interpret it that way. It depends on the
23 situation and whether there was discretion.

24 Q. I'm asking did they have the discretion
25 to say we do not exercise jurisdiction?

1 A. And I believe I've answered it --

2 MS. PHELAN: Objection to form.

3 THE WITNESS: -- the way I feel like I
4 can answer it to answer what I think you're asking,
5 but I'm not sure I understand what you're asking --
6 BY MR. WARE:

7 Q. Right.

8 A. -- but I think I've answered that.

9 Q. That's why I'm going to try to ask it
10 again, just to be clear.

11 A. Okay.

12 Q. There is a statement here that says you
13 exercise jurisdiction over the beaches critical
14 area.

15 A. True.

16 Q. And you say that's true --

17 A. That's true.

18 Q. -- that's a true statement?

19 A. That's a true statement.

20 Q. And that's the true application of the
21 law in South Carolina?

22 A. That the state has jurisdiction over
23 the beaches critical area. That is a true
24 statement.

25 Q. Correct. So my question is: Was that

1 statement as it's printed here binding on the
2 entire residents of South Carolina? In other
3 words, the property owners are subject to that
4 interpretation of the law?

5 A. Correct.

6 Q. And could your staff adopt a different
7 interpretation of the law in South Carolina?

8 A. It -- if legal and judges and courts
9 have determined that that is not the way to
10 interpret it, then staff can interpret it a
11 different way based on other information.

12 Q. As of the date of this letter, had
13 legal, courts or others interpreted it differently?

14 A. I don't know.

15 Q. So you wrote it and signed this
16 letter --

17 A. Signed the letter.

18 MS. PHELAN: Objection to form.

19 BY MR. WARE:

20 Q. I'm sorry. You signed this letter --

21 A. I signed this letter.

22 Q. -- and you have no disagreement with
23 that statement, you agree with it?

24 A. I agree that the State of South
25 Carolina has jurisdiction over beaches critical

1 area.

2 Q. And that interpretation you just stated
3 is applicable against all property owners and your
4 staff has no discretion but to enforce -- interpret
5 it that way?

6 A. I believe the citizens of the State of
7 South Carolina are required to follow law, and the
8 law is that we have jurisdiction over beaches
9 critical area.

10 Q. Did your staff have any discretion not
11 to interpret it that way?

12 A. Depending on if they were in the field
13 and saw something different, then there is a
14 potential that there was discretion to apply
15 something differently.

16 Q. But as to this particular
17 interpretation of the statute, not the field, could
18 they interpret this statute to not exercise
19 jurisdiction over a beaches critical area?

20 A. If they were given direction by someone
21 interpreting this legally via the courts or legal
22 counsel or someone else, it is potential that if
23 someone else had interpreted this differently they
24 could have.

25 Q. If they had not interpreted it

1 differently, what would be the result?

2 A. If it's the law, then staff followed
3 the law as best they can.

4 Q. Was that a condition of their
5 employment here?

6 A. I don't have those appointment records,
7 but everybody should strive to do their job in the
8 best way they can.

9 Q. Was that a policy that you had here?

10 A. No.

11 Q. You did not require people to follow
12 the law?

13 A. Not a written policy.

14 Q. You didn't have them follow the law?
15 I'm sorry, I'm just -- heard you answer that and
16 I'm confused.

17 MS. PHELAN: Objection to form.

18 THE WITNESS: Did I have anyone sign
19 anything that said -- I do not have employment
20 records. I hire people. And if they do their job
21 well, then they stay employed. If not, then I have
22 to follow procedures that are provided by from the
23 State of South Carolina in order to address the
24 situation.

25 BY MR. WARE:

1 A. It's fair to say I would have done
2 that, yes.

3 Q. Did you have any substantive role in
4 actually writing the report or was that done by
5 staff?

6 A. It's likely that I would have been
7 involved.

8 Q. Okay.

9 A. Review portions of editing, et cetera.

10 Q. If you would look at Page 9. There's
11 something called beachfront jurisdictional lines.
12 What is the term beachfront defined as there?

13 A. It's in combination with jurisdictional
14 lines, so that is one term, if you will. It's the
15 beachfront jurisdictional lines consist of the
16 baselines.

17 Q. Okay. What is the purpose of those
18 lines?

19 A. Those lines define our beach/dune
20 system.

21 Q. Okay. If you'll go here to the one,
22 two, third sentence, it states the purpose of these
23 lines. Could you read that? I have a question
24 about that.

25 A. Yeah, it's probably a mistake that was

1 written.

2 Q. What's the mistake? I'll read it and
3 you tell me where the mistake is. The purpose of
4 these lines -- and there's no disputing that those
5 were the setback line and the baseline, correct?

6 A. Correct.

7 Q. The purpose of these lines is to
8 delineate the extent of DHEC-OCRM's direct
9 permitting authority for activities within the
10 defined beaches and beach/dune system critical
11 areas, end quote. What's the mistake?

12 A. It's incorrect because they define the
13 authority within the beach/dune system.

14 Q. Why not beaches here?

15 A. Because beaches can be outside of the
16 baseline and setback line. Historically the
17 baseline and setback line -- the baseline and
18 setback line typically were landward of beaches.
19 The beaches typically in the past, prior to all of
20 this, had been seaward. So the activity seaward of
21 these would have been covered and that would have
22 been the beaches. But the beaches currently can
23 live in many places landward of the setback line;
24 therefore, that jurisdiction -- the setback line
25 and the baseline are specific to what can happen in

1 the beach/dune system, but do not govern what can
2 happen in the beaches.

3 Q. But it's fair to say this states it
4 differently than what you just said, correct?

5 A. Well, it -- it captured it as long as
6 the beaches are seaward of the beach/dune system,
7 but it does not define the activities allowed
8 landward.

9 Q. Okay. I can see how you said that.
10 I'm just stating looking at this -- I'm just
11 looking at this sentence in its entirety. And it
12 says this delineates the extent of OCRM's
13 permitting authority. You don't agree with that?

14 A. I do not.

15 MS. PHELAN: Objection to form.

16 BY MR. WARE:

17 Q. Okay. And is it fair to say then that
18 you do not agree that that delineates the
19 permitting authority for activities, quote, within
20 the defined beaches as well?

21 A. The baseline and setback line do not
22 define the beaches.

23 Q. Has nothing to do with the beaches, is
24 that your understanding?

25 A. No, that's not what I said.

Exhibit 31

SOUTH CAROLINA STATE REGISTER

PUBLISHED BY
THE LEGISLATIVE COUNCIL
of the
GENERAL ASSEMBLY

ASHLEY HARWELL-BEACH, DIRECTOR
DEIRDRE BREVARD SMITH, EDITOR
REBECCA FUDGER TURNER, ASSOCIATE EDITOR

P.O. BOX 11489
COLUMBIA, SC 29211
TELEPHONE (803) 212-4500

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Volume 47 Issue No. 7

This issue contains notices, proposed regulations, emergency regulations, final form regulations, and other documents filed in the Office of the Legislative Council, pursuant to Article 1, Chapter 23, Title 1, Code of Laws of South Carolina, 1976.

22 PROPOSED REGULATIONS

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

Under Title 7 the 1976 South Carolina Code of Laws, as amended, certain non-partisan and petition candidates must present their filings for candidacy and petitions to be placed on the ballot to county boards of voter registration and elections. The proposed regulation is intended to ensure that the county boards present information relating to these candidates to the SEC in a timely manner in order to facilitate statewide tracking of candidates and production of the ballots to be used in elections.

DETERMINATION OF COSTS AND BENEFITS:

The SEC does not anticipate that any additional cost to the State or its political subdivisions will result from the proposed amendment of Regulation 45-14.

UNCERTAINTIES OF ESTIMATES:

None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

None.

Statement of Rationale:

The proposed regulation is intended to ensure that county boards of voter registration and elections report certain information relating to non-partisan candidates for elective office, and petition candidates for elective office, to the SEC in a timely manner in order to facilitate statewide tracking of candidates and production of ballots to be used in elections.

Text:

The full text of this regulation is available on the South Carolina General Assembly Home Page: <http://www.scstatehouse.gov/regnsrch.php>. Full text may also be obtained from the promulgating agency.

Document No. 5200
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 30
Statutory Authority: 1976 Code Sections 48-39-10 et seq.

- 30-1. Statement of Policy.
- 30-2. Applying for a Permit.
- 30-11. General Guidelines for All Critical Areas.
- 30-13. Specific Project Standards for Beaches and the Beach/Dune System.

Preamble:

South Carolina's beachfront policies and jurisdictional authorities are established under the South Carolina Beachfront Management Act (S.C. Code Sections 48-39-250 et seq.). Over the past three decades, these rules have guided where and how areas along the state's beachfront can be developed. In 2018, Act 173 amended the Beachfront Management Act to replace the state's 40-year policy of retreat with a policy of beach preservation. However, Coastal Division regulations currently lack specific guidance to effectively implement the new policy. In 2022, the Department of Health and Environmental Control ("Department") convened the Beach Preservation Stakeholder Workgroup ("Workgroup"), which represented a wide range of backgrounds and constituencies, to provide input and diverse perspectives on beach preservation in South Carolina. The Workgroup's recommendations and key findings were the primary basis for developing the proposed amendments to R.30-1, R.30-2, R.30-11.D, and R.30-13 to establish a regulatory definition for beach preservation, provide for a process and standards to permit pilot projects proposed within the beaches or beach/dune system critical areas, and provide for consistency in the application of standards for activities across beaches and beach/dune system critical areas. The proposed amendments will provide clarity for the regulated community, guidance for regulatory staff, and allow the Department to more effectively implement the state's beach preservation policy. The proposed amendments also include corrections for clarity and readability, grammar, punctuation, codification, and other such regulatory text improvements. The Administrative Procedures Act, S.C. Code Section 1-23-120(A), requires General Assembly review of these proposed amendments.

The Department had a Notice of Drafting published in the February 24, 2023, South Carolina State Register.

Section-by-Section Discussion of Proposed Amendments:

Section	Type of Change	Purpose
R.30-1.C(5)(a)-(c)	Technical Correction	Stylistic amendment to correct tabbed indentation.
R.30-1.C(6)	Revision	Amend language to reference the state's current policy of beach preservation and to clarify reference to the Coastal Zone Management Act.
R.30-1.D(1)	Technical Correction	Amend to correct punctuation.
R.30-1.D(3)	Technical Correction	Amend to correct punctuation.
R.30-1.D(4)(a)	Technical Correction	Amend to correct punctuation.
R.30-1.D(4)(b)	Revision, Technical Correction	Amend language to reference the state's current policy of beach preservation, amend for stylistic clarity, and to correct punctuation and spelling.
R.30-1.D(4)(c)	Technical Correction	Amend to correct punctuation.
R.30-1.D(5)	Technical Correction	Amend for Code reference and stylistic clarity.
R.30-1.D(6)	Addition	Add new definition 6 to clarify beach preservation characteristics.
R.30-1.D(6)-(13)	Technical Correction	Renumber definitions 6 through 13 after addition of new beach preservation definition.
New R.30-1.D(8)	Technical Correction	Amend to correct spelling.
New R.30-1.D(11)(a)-(b)	Technical Correction	Amend for stylistic clarity.
New R.30-1.D(12)	Technical Correction	Amend to correct punctuation.

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R.30-1.D(14)	Deletion	Delete definition of Coastal Zone Management Appellate Panel to conform with statute.
R.30-1.D(15)	Technical Correction	Amend to correct punctuation.
R.30-1.D(17)(a)-(c)	Technical Correction, Revision	Amend for stylistic clarity and to add clarifying article.
R.30-1.D(19), (19)(c)-(e)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(20)	Technical Correction, Revision	Amend for Code reference clarity and to correct punctuation.
R.30-1.D(21)	Technical Correction, Revision	Amend for Code reference and stylistic clarity, and to correct wording.
R.30-1.D(23)	Technical Correction	Amend to correct punctuation.
R.30-1.D(24)	Technical Correction	Amend to correct punctuation.
R.30-1.D(26)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(31)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(33)(c)-(d)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(35)	Technical Correction	Amend to correct punctuation.
R.30-1.D(44)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(45)	Technical Correction	Amend to correct capitalization and punctuation.
R.30-1.D(47)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(49)	Technical Correction	Amend for stylistic clarity.
R.30-1.D(52)	Technical Correction	Amend to correct capitalization.
R.30-1.D(54)	Technical Correction	Amend for stylistic clarity.
R.30-2.B(8)(a) and (b)	Reorganization, Technical Correction	Divide subsection into multiple items, amend to correct punctuation and capitalization, and amend for Code reference clarity.
R.30-2.B(8)(c)	Addition	Add a third item to the subsection to reference additional required information for pilot project permit applications.
R.30-11.D	Revision, Technical Correction	Amend language to clarify that activities in beaches critical area are subject to applicable laws and policies and to conform with the title of R.30-11.D, General Guidelines for Beaches and the Beach/Dune System. Amend for Code reference clarity.
R.30-11.D(1)	Revision	Amend to include the beaches critical area to conform with the title of R.30-11.D and to reference the state's current policy of beach preservation.

R.30-11.D(2)	Revision	Amend to include statutory reference regarding impacts to the beach from hardened erosion control structures, to reference the state's current policy of beach preservation, and to clarify activities that do not support beach preservation.
R.30-11.D(5)	Revision, Technical Correction	Amend to clarify that beaches critical areas are susceptible to impacts from construction activities. Amend to correct punctuation and for Code reference clarity.
R.30-11.D(6)	Revision, Technical Correction	Amend to clarify that destruction of beach or dune vegetation within the beaches critical area is also prohibited. Amend to correct punctuation.
R.30-13.B	Revision	Amend language to clarify that the Department applies requirements for new habitable structures consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13, Specific Project Standards for Beaches and the Beach/Dune System.
R.30-13.B(2)	Technical Correction	Amend for stylistic clarity.
R.30-13.B(4)	Technical Correction	Amend for Code reference clarity.
R.30-13.B(5)	Revision	Amend to clarify that the Department may authorize habitable structures seaward of the baseline under a special permit.
R.30-13.C	Revision	Amend language to clarify that the Department applies requirements for additions to habitable structures consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.C(1)	Technical Correction	Amend for stylistic clarity.
R.30-13.C(4)	Revision	Amend language to clarify that the Department applies requirements for additions to habitable structures consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.C(5)	Addition	Add new items to ensure that additions to habitable structures are not constructed on the primary oceanfront sand dune or on active beach and to clarify that the Department may authorize additions to habitable structures seaward of the baseline under a special permit.
R.30-13.D	Revision, Technical Correction	Amend language to clarify that the Department applies requirements for repair and renovation of habitable structures consistently within the beaches and beach/dune system critical areas, to ensure that habitable structures are not constructed on active beach, and to conform with the title of R.30-13. Amend to correct punctuation.
R.30-13.E	Revision, Technical Correction	Amend language to clarify that the Department applies requirements for replacement or rebuilding of habitable structures consistently within the beaches and beach/dune system critical areas, to conform with the title of R.30-13, and to clarify required notice and documentation to the Department. Amend to correct punctuation.

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R.30-13.E(4)	Technical Correction	Amend to correct punctuation.
R.30-13.E(5)	Revision, Technical Revision	Amend to provide reference to implementing regulations associated with cited statutes and for Code reference clarity.
R.30-13.E(7)	Addition	Add new item to ensure that replacement habitable structures are not constructed on the primary oceanfront sand dune or on active beach.
R.30-13.F	Revision, Technical Correction	Amend language to clarify that the Department applies requirements for landscaping, earthmoving, and fill for landscaping consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13. Amend to correct punctuation.
R.30-13.F(1)	Technical Correction	Amend to correct punctuation.
R.30-13.F(7)	Revision	Amend to ensure that landscaping, earthmoving, and fill for landscaping activities shall not occur on active beach and add clarifying article.
R.30-13.G	Revision	Amend language to clarify that the Department applies requirements for fences, lighting, trash receptacles, sidewalks, and signs consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.G(2)	Technical Correction	Amend for stylistic clarity.
R.30-13.G(5)	Revision	Amend to add clarifying article.
R.30-13.D(6)	Revision	Amend to clarify that lighting within the beaches critical area shall be designed to shield the beach from illumination.
R.30-13.H	Revision, Technical Correction	Amend language to clarify that the Department applies requirements for emergency vehicle access ways, small wooden decks, gazebos, and other structures consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13. Amend to correct punctuation.
R.30-13.H(1)(c)-(e)	Technical Correction, Revision	Amend to correct punctuation, for stylistic clarity, and to add clarifying article.
R.30-13.H(2)	Technical Correction	Amend to correct punctuation.
R.30-13.H(2)(a)	Revision	Amend criteria to allow wood-like material to be used for small wooden decks and to conform to statute, and amend language to improve sentence structure.
R.30-13.H(2)(b)-(f)	Technical Correction	Amend to correct punctuation. Amend for stylistic clarity, to improve sentence structure, and to add clarifying article.
R.30-13.I	Revision	Amend language to clarify that the Department applies requirements for construction and/or repair of drives and parking lots consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.I(7)	Technical Correction, Revision	Amend to correct punctuation and to add clarifying article.

R.30-13.I(8)	Revision, Technical Correction	Amend to clarify that no new driveways or parking lots shall be constructed seaward of the baseline without a special permit and to ensure that driveways and parking lots are not constructed on active beach. Amend for Code reference clarity.
R.30-13.J	Revision	Amend language to clarify that the Department applies requirements for the installation or repair of underground and overhead water, sewer, gas, electrical, telephone lines, and cable service lines consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.J(1)	Revision	Amend to ensure that service lines are not placed within active beach and provide an exception for subsea cables.
R.30-13.J(4)	Revision	Amend to add clarifying article.
R.30-13.K	Revision	Amend language to clarify that the Department applies requirements for drainage structures consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.K(1)	Technical Correction	Amend to correct spelling, capitalization, and punctuation.
R.30-13.K(4)	Revision	Amend language to clarify that requirements of local drainage plans also apply within the beaches critical areas.
R.30-13.K(5)(a)	Revision	Amend to add clarifying article.
R.30-13.L	Revision, Technical Correction	Amend language to clarify that the Department applies requirements for sand fences, minor beach renourishment, and dune revegetation consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13. Amend to add clarifying article and to correct punctuation.
R.30-13.L(1)(h)	Revision	Amend language to clarify that the Department evaluates impacts from sand fencing consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.L(2)	Revision	Amend to correct spelling.
R.30-13.L(2)(a)	Revision	Amend language to generally refer to the Department's recommendations for planting dune vegetation.
R.30-13.M	Revision	Amend language to clarify that sand that has drifted out of the beaches and/or beach/dune system critical areas may be returned to them, to clarify that the Department applies requirements for returning sand consistently within the beaches and beach/dune system critical areas, and to conform with the title of R.30-13.
R.30-13.M(1)	Revision	Amend to add clarifying article.
R.30-13.N(2)(c)-(d)	Technical Correction, Revision	Amend to add clarifying article and correct punctuation.
R.30-13.N(3)	Technical Correction	Amend to correct punctuation.
R.30-13.N(3)(a)	Revision	Amend language to clarify that the Department applies restrictions for erosion control structures consistently

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		within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.N(3)(c)-(d)	Technical Correction	Amend to correct punctuation and for Code reference clarity.
R.30-13.N(3)(e)(i)-(iii)	Technical Correction	Amend for stylistic clarity.
R.30-13.O(1), (1)(a)-(c)	Revision, Technical Correction	Amend for code reference clarity. Amend criteria to allow wood-like material to be used for walkways over dunes and to conform to statute. Amend for stylistic clarity.
R.30-13.O(1)(f)-(h)	Technical Correction, Revision	Amend for stylistic clarity, to correct punctuation, to add clarifying article, and to correct wording.
R.30-13.O(2)(a)	Technical Correction	Amend to correct spelling.
R.30-13.P	Technical Correction, Revision	Amend to correct punctuation, for Code reference clarity, and to correct wording.
R.30-13.Q(1)	Technical Correction	Amend to correct punctuation and for Code reference clarity.
R.30-13.Q(2)(c)	Revision	Amend language to clarify that the Department applies requirements for lighting associated with golf courses consistently within the beaches and beach/dune system critical areas and to conform with the title of R.30-13.
R.30-13.Q(2)(d)(iii)	Technical Correction	Amend to correct punctuation and to add clarifying article.
R.30-13.R(2)(b)	Technical Correction	Amend to correct punctuation.
R.30-13.S	Addition	Add section to include specific project standards for pilot projects within the beaches and beach/dune system critical areas.
R.30-13.S(1)	Addition	Add subsection to clarify the intended purpose of pilot projects, specify that new erosion control structures or devices will not be permitted as part of a pilot project, and reference supporting statutory language.
R.30-13.S(2)	Addition	Add subsection to list additional requirements for pilot project permit applications.
R.30-13.S(3)	Addition	Add subsection to list the standards which shall apply to permitted pilot projects.
R.30-13.S(4)	Addition	Add subsection to specify information the pilot project permittee must submit to the Department in a final report upon completion of the pilot project, and to clarify Departmental considerations of the study findings and the final report.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons may submit comment(s) on the proposed amendments to Liz Hartje of the Office of Ocean and Coastal Resource Management; S.C. Department of Health and Environmental Control, 1362 McMillan Avenue Suite 400, Charleston, S.C. 29405; hartjeen@dhec.sc.gov. To be considered, the Department must receive the comment(s) by 5:00 p.m. on August 28, 2023, the close of the comment period.

The S.C. Board of Health and Environmental Control will conduct a public hearing on the proposed amendments during its October 12, 2023, 10:00 a.m. meeting. Interested persons may make oral and/or submit written comments at the public hearing. Persons making oral comments should limit their statements to five (5) minutes or less. The meeting will take place in the Board Room of the DHEC Building, located at 2600 Bull Street, Columbia, S.C. 29201. Due to admittance procedures, all visitors must enter through the main Bull Street entrance and register at the front desk. The Department will publish a meeting agenda twenty-four (24) hours in advance indicating the order of its scheduled items at: <http://www.scdhec.gov/Agenda>.

The Department publishes a Monthly Regulation Development Update tracking the status of its proposed new regulations, amendments, and repeals and providing links to associated State Register documents at <http://www.scdhec.gov/Agency/RegulationsAndUpdates/RegulationDevelopmentUpdate/>.

Preliminary Fiscal Impact Statement:

The Department estimates minimal additional cost incurred by the state or its political subdivisions as a result of the promulgation, approval, and implementation of these proposed amendments. The Department will use existing staff and resources to implement these amendments.

Statement of Need and Reasonableness:

The following presents an analysis of the factors listed in 1976 Code Sections 1-23-115(C)(1)-(3) and (9)-(11):

DESCRIPTION OF REGULATION: R.30-1, Statement of Policy; R.30-2, Applying for a Permit; R.30-11, General Guidelines for All Critical Areas; and R.30-13, Specific Project Standards for Beaches and the Beach/Dune System

Purpose: These amendments are proposed to improve the Department's implementation of the state's policy of beach preservation, as adopted under the 2018 Beachfront Management Reform Act (Act 173 of 2018). Although the state has been utilizing beach preservation approaches, like beach nourishment, to manage the beaches and beach/dune system critical areas since the 1980s, Coastal Division regulations currently lack a definition for beach preservation. Establishing a regulatory definition for beach preservation will provide guidance for regulatory staff to ensure projects within South Carolina beaches and beach/dune system critical areas uphold the state's policy of beach preservation. The proposed regulatory definition was developed by the Workgroup, convened by the Department in 2022.

As part of the beach preservation discussion, the Workgroup examined pilot projects proposed within the beaches or beach/dune system critical areas. Pursuant to S.C. Code Section 48-39-320(C), pilot projects may be allowed if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area.

Pilot projects may have unknown risks, which could impact species and habitat, the economic benefits associated with the beaches and beach/dune system critical areas, and public use of these resources. Proposed amendments, developed in coordination with the Workgroup, specify requirements and standards for pilot projects proposed within the beaches or beach/dune system critical areas. These requirements and standards will provide clarity for those wanting to utilize or alter the beaches or beach/dune system critical areas as part of a pilot project, improve the Department's ability to properly evaluate pilot projects, and ensure their use does not conflict with the state's policy of beach preservation.

South Carolina's beaches are experiencing an increase in the rate of shoreline change which has resulted in beaches critical area being located landward of the state's beach/dune system critical area. The Workgroup reviewed the effects of this shoreline change on regulated activities that are allowed within these beachfront critical areas, including habitable structures and erosion control structures. Based on the Workgroup's

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recommendations and additional Departmental review, the proposed amendments were developed to provide for consistency in the application of standards for activities across the beaches and beach/dune system critical areas and to support the policy of beach preservation.

Legal Authority: 1976 Code Sections 48-39-10 et seq.

Plan for Implementation: The amendments will take legal effect upon General Assembly approval and upon publication in the State Register. Department personnel will then take appropriate steps to inform the regulated community of the amendments. Additionally, a copy of the regulation will be posted on the Department's website, accessible at www.scdhec.gov/regulations-table. Printed copies may also be requested, for a fee, from the Department's Freedom of Information Office.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The Department is charged with implementing the state's policy of beach preservation, as established under the 2018 Beachfront Management Reform Act. Coastal Division regulations currently lack a regulatory definition for beach preservation, have insufficient requirements and standards associated with pilot projects proposed within the beaches or beach/dune system critical areas, and need consistency and clarity in implementing activities across beachfront critical areas. The Department proposes amending these regulations to provide a beach preservation definition, define requirements and project standards for pilot projects within the state's beaches or beach/dune system critical areas, and to provide for consistency in the application of standards for activities across the beaches and beach/dune system critical areas.

The proposed amendments will provide additional guidance for regulatory staff ensuring future projects within the beaches and beach/dune system critical areas align with the state's policy of beach preservation. The proposed amendments also provide the regulated community with more clarity on the requirements for pilot projects and other activities proposed within the beaches or beach/dune system critical areas. Additionally, the proposed amendments ensure regulatory staff have sufficient information to evaluate pilot projects in these critical areas. The proposed amendments are reasonable and necessary to manage and preserve the long-term health and sustainability of the state's beaches and beach/dune system critical areas.

DETERMINATION OF COSTS AND BENEFITS:

The Department anticipates minimal additional costs to the state resulting from the administration and processing of these proposed amendments. Benefits to the state would include improved management of coastal resources by creating a regulatory definition for beach preservation, identifying requirements and project standards for pilot projects, and providing consistency for implementing activities across beachfront critical areas. The Department does not anticipate additional cost to the regulated community as a result of the proposed amendments associated with beach preservation and the beaches critical area. The proposed amendments associated with pilot projects within the beaches and beach/dune system critical areas, establishing a permitting pathway for these activities, will be subject to the administrative fee structure outlined in R.61-30.G(13), *Environmental Protection Fees*.

UNCERTAINTIES OF ESTIMATES:

None.

EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH:

Implementation of the proposed amendments seeks to benefit the environment by providing more clarity to the Department's statutory directives to manage the state's beaches and beach/dune critical areas in a manner that promotes the policy of beach preservation.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

Not implementing these proposed amendments will result in continued challenges associated with the Department's ability to properly implement the policy of beach preservation. Further, there will continue to be a lack of guidance for those wishing to utilize or alter the beaches or beach/dune system critical areas through the use of a pilot project, and there will continue to be a lack of project standards necessary for regulatory staff to sufficiently evaluate pilot projects sited within these critical areas. Finally, there will be continued inconsistencies in the application of standards for activities across the beaches and beach/dune system critical areas.

Statement of Rationale:

Here below is the Statement of Rationale pursuant to S.C. Code Section 1-23-110(A)(3)(h):

The Department is charged with implementing the state's policy of beach preservation, as established under the 2018 Beachfront Management Reform Act. Coastal Division regulations currently lack a regulatory definition for beach preservation, lack requirements and project standards associated with pilot projects proposed within the beaches or beach/dune system critical areas, and need consistency in the application of standards for activities across the beaches and beach/dune system critical areas.

The Department proposes amending these regulations to provide a beach preservation definition, identify requirements and project standards for pilot projects that would utilize or alter the state's beaches or beach/dune system critical areas, and provide for consistent application of standards within the beaches and beach/dune system critical areas. Recommendations and key findings from the Beach Preservation Stakeholder Workgroup were the primary basis for developing these proposed amendments.

Text:

The full text of this regulation is available on the South Carolina General Assembly Home Page: <http://www.scstatehouse.gov/regnsrch.php>. Full text may also be obtained from the promulgating agency.

Exhibit 32

Transcript of Recorded
South Carolina Department of
Health and Environmental Control
Board Meeting

- - - - -

Date on Recording: June 13, 2023

- - - - -

In Re: SCDES, et al., v. Reddy, et al.

Transcribed by: Audrey S. Beebe,
Southern Reporting, Inc.

1 designed to be fairly easily to -- you know, you
2 slice them, sand comes out.

3 MR. KINNEY: Okay. Oh, and then the sand --

4 MS. VON KOLNITZ: And then you can remove them. So it
5 should not take very long to do that.

6 MR. KINNEY: Okay.

7 MS. VON KOLNITZ: But, absolutely, you know, we will
8 work with them on timing and -- and needed a
9 standard for things not to just stay out there.

10 MR. KINNEY: Don't know what the outcome of all that's
11 going to be but are very interested in seeing since
12 I live on the coast.

13 MS. VON KOLNITZ: Yes, yes. Absolutely.

14 MR. KINNEY: And -- and I know that it's been used in
15 other states and stuff. Just -- just -- you know,
16 I think we've been given an opportunity to -- to
17 check it out and see with all of the changes that
18 are taking place. It may end up being an effective
19 project. It may have been just a total waste. But
20 I think --

21 MS. VON KOLNITZ: Yes, sir.

22 MR. KINNEY: -- we need to watch it very closely.

23 MS. VON KOLNITZ: Yes.

24 MR. JOYE: Madam Chairman, I have a question if you can
25 hear me. This is Chuck.

1 CHAIRWOMAN SHRIVASTAVA-PATEL: Please go ahead.

2 MR. JOYE: Do I understand these amendments to -- and
3 additions to the regulations are going to allow
4 DHEC to exercise control landward of the setback?

5 CHAIRWOMAN SHRIVASTAVA-PATEL: Does somebody want to
6 answer that? One of the experts?

7 MALE: Setback.

8 MS. BOYNTON: Sure. So in areas -- so DHEC OCRM already
9 has jurisdiction over the four critical areas, and
10 that would include coastal waters, beaches, and the
11 beach dune system. So we're not getting any more
12 authority than we previously had. In areas where
13 beaches has moved landward of the setback line, we
14 would apply the same standards that we would
15 seaward of the setback. And I'll turn to Elizabeth
16 to see if she has anything she'd like to add.

17 MS. VON KOLNITZ: Yeah, no. I -- I -- Jessica
18 eloquently stated that we are.

19 MR. JOYE: I need a -- I need a yes-or-no answer.

20 MS. VON KOLNITZ: We are not expanding the areas that we
21 have jurisdiction over. It's clarifying that
22 activities in the beaches area that are seaward of
23 the setback --

24 MR. KINNEY: -- aren't under your control.

25 MS. VON KOLNITZ: -- are under our control.

1 MR. KINNEY: Right. But not landward?

2 MS. VON KOLNITZ: The language says "seaward of the
3 setback," but -- but also allows regulatory
4 standards in beaches. So there's a conflict in the
5 language of the fact that we apply things in
6 beaches, we apply things in the beach dune system.
7 The language isn't clear in the regulatory
8 standards. So it's not expanding our jurisdiction.
9 It's when the setback area is in the water or the
10 setback area is well on active beach, clarifying
11 that those activities don't happen on active beach.

12 MR. KINNEY: But it's only -- y'all's only authority is
13 seaward, not landward, like you say? That's kind
14 of --

15 DIRECTOR SIMMER: But it would be landward of the
16 setback line --

17 MS. VON KOLNITZ: It would be --

18 DIRECTOR SIMMER: -- if the setback line's in the water,
19 for instance.

20 MS. VON KOLNITZ: Correct.

21 DIRECTOR SIMMER: Right.

22 MS. VON KOLNITZ: It would be landward of the setback
23 line when the setback line is seaward of another
24 critical area that we have authority over.

25 DIRECTOR SIMMER: And, Elizabeth, can you tell them what

1 discussed that need for clarity to ensure that the
2 application of the regulations and the standards,
3 as indicated in the title, had -- were being
4 properly applied.

5 I kind of basically say, you know, it's hard
6 to imagine, when you're talking about a dune system
7 -- when you name a beach dune system, logically,
8 dune systems you would think would be landward of
9 the beach, right? But we have cases now it's
10 termed a "dune system," but that dune system is now
11 out in some cases in the water, and the beach is
12 landward of what is termed in regulatory as a "dune
13 system." So this is to clarify that language that,
14 you know, when you think of a dune system, you're
15 going to think of that being landward, right? And
16 it's up in where the grasses are -- I mean, up
17 above the grasses, where there's some woody stuff
18 up on the upland. We don't have that scenario in a
19 lot of places now. So it's clarifying --

20 MR. JOYE: This is -- this is Chuck again.

21 MS. VON KOLNITZ: (Inaudible.)

22 MR. JOYE: And speaking on behalf of, you know, beach
23 owners and the public, you know, the setback is
24 something that everybody can understand, and it's
25 basically, you know, the "line in the sand," so to

1 speak. But what you're creating, in my opinion, is
2 -- I understand there are exceptions where
3 basically high tide is beyond the setback. I'm
4 sure we have those along our coast. But I think
5 it's too nebulous, and I think it's too case-by-
6 case dependent upon what DHEC or official of DHEC
7 may say is okay or not okay. I think it opens up a
8 Pandora's box, fellow Board members. I'm not
9 comfortable with it at all.

10 MR. KINNEY: Is it the --

11 CHAIRWOMAN SHRIVASTAVA-PATEL: Rob, do you have a
12 question?

13 MR. KINNEY: Go ahead, Rob.

14 DR. MORGAN: I'll wait for Mr. Joye to finish that
15 thought process before going to my question,
16 please.

17 MR. JOYE: Oh, please proceed.

18 MS. BOYNTON: So a couple of things that I'll just point
19 out, and I think I'm just going to zip back so we
20 can --

21 MALE: Oh, sorry.

22 (Indiscernible cross-talk.)

23 MS. BOYNTON: If you guys recall the -- the visual slide
24 where we show -- we show the -- let me just get to
25 it real quick.

1 highlighted as a need to address.

2 MR. JOYE: I think it's DHEC overreaching, myself.

3 MS. BOYNTON: So --

4 MR. JOYE: Of course, there always will be exceptions
5 to, you know, a line or a -- you know, a hard
6 regulation, but I think we probably have 99 percent
7 of our setback lines that are accomplishing what
8 needs to be accomplished from a standpoint, you
9 know, protecting the beach and dune systems. I
10 think it just opens up too much latitude from the
11 standpoint of interpretation and to the detriment
12 of property owners.

13 DIRECTOR SIMMER: Jessica, can you give us a rough
14 estimate of what percentage of our setback lines
15 are now either on active beach or even in the
16 water?

17 MS. BOYNTON: So I can't give you a distance, but I can
18 certainly calculate that. But we have 28 beaches
19 in South Carolina with jurisdictional lines, and
20 more than 50 percent of them have at least a
21 portion of the beach with this scenario. So as I
22 said, it is really a widespread issue that is
23 affecting the majority of our beaches.

24 MALE: Yeah.

25 MS. VON KOLNITZ: And so I would give an example in this

1 scenario like this where, for example, your parking
2 pad for your house, in the -- in the normal
3 scenario that we think of with beach dune systems,
4 there are restrictions on where you can place the
5 parking pad of your house. See one of your setback
6 line. In a scenario like this, there's not -- you
7 -- there's not clarity of whether or not you can
8 put a parking pad out there on the beach. And I
9 don't think when anybody's looking at this, would
10 it be wise for us to construct things like that out
11 on a beach that are going to be impacted by wave
12 action, that are going to then cause debris or
13 going to result in a structure that is not
14 protected. So it's not that we're necessarily --
15 again, it's not that the beaches critical area
16 isn't already regulated. It's just clarifying to
17 someone who comes in that putting a house out on a
18 dry sand beach, it's -- it's -- it's in the regs
19 where it says beaches and beach dune system that
20 that beaches is captured under that regulation to
21 help guide again, that, you know, active beach is
22 not the appropriate locale to be placing a parking
23 pad or a -- or a house in an that is actively being
24 either inundated by waves or potentially by higher
25 tides that can be impacted by that -- that dynamic

1 system.

2 DIRECTOR SIMMER: So would it be fair to say that
3 part --

4 MR. JOYE: That can be -- that can addressed when the
5 setback line is reestablished.

6 MS. BOYNTON: And I think the issue with that, as
7 Elizabeth had alluded to earlier, is that with
8 these lines only being set every seven to ten
9 years, these situations could persist from -- for
10 many years, even a decade at a time, which is a
11 significant amount of time to have this -- this
12 sort of gap in clarity of what can happen.

13 I'll also just build on Elizabeth. She gave
14 some great examples. Other things within 30-13
15 that we're talking about, we're talking about power
16 lines and gas lines and, you know -- and I don't
17 think that anybody is of the mind that we would
18 want those out there on active beach where we would
19 be, again, having inundation from the tides and the
20 waves. So those are the kind of things that these
21 proposed amendments are trying to address.

22 DIRECTOR SIMMER: Yeah. And that's --

23 MR. JOYE: Ladies, you're missing my point. The point
24 is that you're saying that the setback line is
25 going to apply in these instances, and the setback

1 line is not going to apply in these instances. So
2 for all kind of purposes you negate the purpose of
3 the -- the intentions of the Legislature as far as
4 the setback line.

5 DIRECTOR SIMMER: But I think, Mr. Joye -- this is Ed
6 Simmer. I think what we are trying to do, though,
7 is right now, the way it's written, it conflicts,
8 and regulations that conflict with each other don't
9 tend to lead to good outcomes. And so I think what
10 we're trying to do is resolve that conflict, and
11 some of that is inherent in the nature of the fact
12 that the setback line, as you said, is only done
13 every seven to ten years. The beach moves a lot in
14 seven to ten years in many places in South
15 Carolina. And let's face it, we have a relatively
16 small team. They do their very best to keep up
17 with this, but it is hard. You know, and so I
18 think -- I think what we're trying to do here is
19 resolve the conflict so that it's clear to everyone
20 what the rules are, because right now it's not
21 because there are conflicts in the regulation. So
22 we're trying to make this so it's clear to everyone
23 what the rules are, what is and is not protected.
24 Recognizing that the -- you know, if the beach
25 moves and makes the setback line now basically

1 obsolete before we have the time or the ability to
2 fix that, there's still a fallback position that
3 shows exactly what everyone should -- what the
4 rules are, and it applies fairly to everyone. Is
5 that fair, Elizabeth and Jessica?

6 MS. BOYNTON: Yes.

7 MS. VON KOLNITZ: Yes.

8 MR. JOYE: All due respect, Dr. Simmer, you know, some
9 of us viewed the -- the setback as -- as a
10 government take. And I think really the benefits
11 were persuasive enough to indeed allow it to become
12 applied, and indeed it's being enforced. But now
13 we're talking about potentially an additional take
14 of property owners. And so I said that's the part
15 that I guess fundamentally I feel uncomfortable
16 with.

17 DIRECTOR SIMMER: No. Understood. I think my concern
18 is that -- and we've talked extensively about this
19 with the team and in the Board team, too -- is that
20 was probably at least half of the beaches having
21 setback lines that are completely inaccurate now.
22 They're on the active beach. They're in the water.
23 That's not an isolated situation. That's happening
24 now in a lot of places. The setback line in and of
25 itself is no longer something that we can rely on

1 DIRECTOR SIMMER: Right. And you already have
2 jurisdiction over the yellow?

3 MS. VON KOLNITZ: We already have jurisdiction over
4 that. Correct.

5 MS. BOYNTON: And so it's really just clarifying in the
6 body of the text that it matches the title of the
7 -- of the regulation so that -- I think the intent
8 initially -- let me flip back to this one. When it
9 was written, they had beaches and beach dune system
10 in the title of the regulation and then after that,
11 it said "seaward of the setback," because the
12 assumption was, "Well, of course beaches and beach
13 dune system are all going to be seaward of the
14 setback line." But as we kind of talk through,
15 given the increased dynamic nature of our coast and
16 the timeframe for the lines to be changing, being
17 seven, up to ten years, we're seeing situations
18 exposed where we have beaches that are landward.
19 And so we're simply clarifying in the body of the
20 text that the same standards and requirements would
21 apply to both of those critical areas.

22 MR. JOYE: This is Chuck again. Could you go back to
23 the previous slide, please?

24 MS. BOYNTON: Sure.

25 MR. KINNEY: The yellow.

1 MS. BOYNTON: This slide here?

2 MR. JOYE: Yeah. There you go.

3 MS. BOYNTON: Yeah.

4 MR. JOYE: And so I'm -- I'm one of these property
5 owners in this slide, and am I understanding you to
6 say that the yellow area -- I understand it's a
7 critical area, but if I want to build a pool or any
8 kind of activity in the yellow area landward of the
9 setback, I have to get your blessings?

10 MS. BOYNTON: So pools do not --

11 MR. JOYE: Or am I free to do whatever I wish landward
12 of the setback?

13 MS. BOYNTON: So --

14 MR. JOYE: I realize this in the yellow critical area,
15 as you described.

16 MS. BOYNTON: Right.

17 MR. JOYE: But my understanding was -- and maybe that's
18 where the disconnect is -- that the -- the landward
19 side of the setback, the property owner had
20 beneficial use of his land as he saw fit.

21 MS. BOYNTON: So again --

22 MR. JOYE: Is that correct or not?

23 MS. BOYNTON: So two things. Pools -- and I'm going to
24 get Matt to double-check with. Pools are not
25 regulated.

1 MR. JOYE: I don't need an explanation. I just -- is
2 that correct or not correct?

3 MR. SLAGEL: Mr. Joye, Matt Slagel. I'm -- I'm the
4 Beachfront Management Section Manager, so I review
5 all permit applications along South Carolina's
6 beaches. Any alteration to a critical area would
7 require some type of review and authorization from
8 the Department. So with this being beaches
9 critical area, that would require our blessing, as
10 you say.

11 DIRECTOR SIMMER: And, Matt, that would be true today
12 even without these changes, correct?

13 MR. SLAGEL: Correct. Correct. That would be true
14 today regardless of if these proposed amendments
15 were to move forward. One other thing I just
16 wanted to mention while I'm standing up here is
17 that I think it's important to keep in mind that
18 the Legislature changed the policy of retreat to a
19 policy of beach preservation. So we feel that
20 these proposed amendments to the regulations are in
21 line with that statutory change, because what we're
22 talking about is, you know, clarity with preserving
23 the beach, the beach preservation policy as the
24 Legislature has -- has directed us to.

25 MR. KINNEY: Where is this slide?

1 understand how somebody can come into the
2 Department, apply for a pilot project with -- with
3 some clear guidance there.

4 The -- the one that we are talking about now
5 is that consistency and application, and the
6 necessary reasoning behind this is what Jessica had
7 mentioned before was the change in that policy. So
8 we now have policy in this State where we are
9 supposed to be doing beach preservation.
10 Understanding the definition of beach preservation,
11 how do we apply standards in that beach critical
12 area that is consistent with that policy?

13 So it's not that it necessarily conflicts;
14 it's just that the standards were very specifically
15 stated in the regulation that these things happened
16 seaward of the setback. Because the setback was
17 intended, the way we read it, to have been the most
18 landward critical area. We are finding that the
19 setback is not the most landward critical area that
20 we regulate. The beaches has become the most
21 landward critical area in some places. So to
22 clarify the language now to make it consistent with
23 the headings so that these activities are regulated
24 in the beaches and beach dunes system where we
25 already have jurisdiction. So I don't know if that

1 helped explain that, but it can be confusing when
2 you're --

3 MR. KINNEY: It's not a conflict; it's a clarification.

4 MS. VON KOLNITZ: It's not a conflict; it's a
5 clarification. Yes, sir. Just to ensure that
6 those standards and those that are applying for
7 uses of these critical areas understand what they
8 can do in the critical areas, and it is the same
9 then in the beaches and the beach dune system.

10 MR. KINNEY: And pilot projects are going to be
11 necessary if we're going to try and find ways to
12 save our beachfronts. You know, even though we
13 stumbled onto the DeBordieu thing -- and it's not
14 there yet; we don't know. We certainly need to be
15 trying some things because you can look and see
16 that the levels change. The beachfronts are
17 changing constantly.

18 DR. RICHMOND: The bottom line: This is clarification.
19 There's no additional authority. It just makes it
20 obvious to everybody: this is the intent; this is
21 what is said; this is what we're going to do.

22 MS. BOYNTON: That's right.

23 MR. KINNEY: Hopefully there'll be less questions,
24 maybe, or confusion.

25 MS. VON KOLNITZ: And I'm sure some of the work group

Exhibit 33

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Transcript of Recorded

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South Carolina Department of

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Health and Environmental Control

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Board Meeting

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Date Recorded: October 12, 2023

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In Re: SCDES, et al., v. Reddy, et al.

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Transcribed by: Audrey S. Beebe,

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Southern Reporting, Inc.

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1 to see where the dune was (inaudible).

2 CHAIRWOMAN SHRIVASTAVA-PATEL: Okay.

3 BOARD COUNSEL: All right. All right. Keep moving. So

4 we've got one other person signed up to speak. Amy

5 Armstrong.

6 MS. ARMSTRONG: Do I need a microphone or anything? I

7 just sound loud.

8 MR. KINNEY: You sound pretty good there.

9 CHAIRWOMAN SHRIVASTAVA-PATEL: No. We can hear.

10 MS. ARMSTRONG: Okay. Great. My name's Amy Armstrong.

11 I'm the Executive Director of the South Carolina

12 Environmental Law Project. I've been an attorney

13 practicing environmental law for over 21 years and

14 have spent many of those years working on shoreline

15 and beachfront issues, including a case that I want

16 to talk about a little bit later on, the McQueen

17 case, which is probably a really important case for

18 this Board to consider in light of some of the

19 prior comments it's taken in this case.

20 But first, I want to say I was part of that

21 beachfront technical advisory committee, the TAC

22 and the work group. And Jessica already talked

23 about a lot of the stakeholders that were involved.

24 The environmental groups were absolutely in the

25 minority in all -- across all fronts, because there

1 was the homeowners association, Blanche Brown, the
2 consultants that actually do work for the property
3 owners, and the interests that represent property
4 owners themselves. And so I think it's really
5 important to -- to note that that -- those voices
6 were very present, which led to long discussions
7 and a lot of compromise on the recommendations. We
8 kind of whittled them down to make sure that the
9 recommendations that came out of the work group
10 were unanimous. That was -- that was the point.
11 We weren't going on consensus. We were going on
12 unanimity, and that took a lot of work with the
13 group.

14 I attended every single work group meeting. I
15 was really impressed with the staff at being able
16 to lead this group of people with a lot of diverse
17 opinions into coming up with some recommendations.
18 And the recommendations -- I want to just note one
19 of the key points was about how do we -- what do we
20 do about seawalls? And some of the environmental
21 consultants were much more aggressive and thought
22 we should not have seawalls at all, all the way
23 back to the road, which was -- you know, I think we
24 -- we couldn't do that because there isn't any
25 statutory authority to do it. But the reason is

1 because the Legislature, the General Assembly, when
2 they passed the Beachfront Management Act, they
3 made real specific findings about how shore
4 parallel structures have not proven effective. And
5 I want to just read that language because this is
6 from the General Assembly. This is what they've
7 said. "These devices give a false sense of
8 security to beachfront property owners. In
9 reality, these hard structures have increased the
10 vulnerability of beachfront property while
11 contributing to the deterioration and loss of the
12 dry sand beach." That's in 48-39- 290. So that's
13 -- that's something that the Legislature has
14 already said. The Legislature also gave DHEC
15 authority over critical areas that are defined to
16 include not just the beach dune system, but
17 beaches. And so when you look at the definition of
18 "beaches," that extends all the way up to where
19 there's no non-littoral vegetation. So in some
20 cases that may be landward of the jurisdictional
21 lines. We've got highly erosional beaches in this
22 state.

23 So to suggest that this is adding anything to
24 the existing authority of the Agency is just -- is
25 inaccurate. The Agency already has regulatory

1 authority over critical areas, and under 48-39-130
2 DHEC is required to issue -- have -- issue a permit
3 for any activity in any critical area. So the --
4 the Agency is kind of caught in a difficult
5 situation right now, and staff is in a difficult
6 situation because the act says you have to issue a
7 permit for any activity in the critical area. Yet
8 there's this area of beaches critical area that has
9 not been clearly defined how the Agency is going to
10 do that.

11 And so the recommendations that came out of
12 the work group were to make sure we include that --
13 that beaches critical area when the Agency is
14 making permitting decisions. And that's really
15 what they went back and did.

16 So -- you know, like also on -- on the topic
17 of seawalls that everyone agrees, I think, that we
18 want dry sand beaches, but we've got findings from
19 the General Assembly that seawalls don't allow dry
20 sand. They -- that's what they stop. They
21 interfere with the dry sand beach. And we would
22 agree that renourishment, which was also discussed
23 at length during this work group process -- that
24 renourishment is the way you get the dry sand
25 beach. And the property owners are free to apply

1 for renourishment permits. They're allowed to do
2 that. The law allows them to do that. It's
3 something that happens, you know, very routinely.
4 I live up in Pawley's Island. The south end of
5 Litchfield Beach Inlet Point, the property owners
6 there did their own renourishment project. I think
7 it was within the last year or two, something like
8 that. So it's done. And that's the way you really
9 preserve the dry sand beach in front of houses.

10 I didn't -- I didn't hear a lot of discussion
11 about the definition of "beach preservation." I'm
12 really proud of the work that we did to find
13 language that everyone agreed on. So I hope that's
14 something that stays because the Legislature didn't
15 give -- give any kind of clear guidelines. They
16 just said, "We're going to have a policy of beach
17 preservation." And so the Agency needs to know
18 what that actually means because it affects how --
19 how regulatory decisions are made.

20 I think -- you know, we're -- I'm -- you know,
21 we're in support of the pilot project language,
22 including the amendments that followed after the
23 public comment period. Those also were -- there
24 was a lot of unanimity in trying to make sure that
25 we have a mechanism in place for -- for those kinds

1 of projects, that they're vetted, that there's a
2 process that we can have different possibilities in
3 what exists under current law.

4 I think I want to spend the rest of my time
5 turning to comments made by the prior speaker. And
6 it's worth noting that if you own beachfront
7 property or property that adjoins a tidal land, you
8 have some inherent limitations in your property.
9 Because what the law says is, if there's accretion
10 in front of your property, you get the benefit of
11 that accretion. The law also says when there's
12 erosion, you suffer the detriment because you lose
13 some of the property. And so I think we need to be
14 clear that there is no right to protect your
15 property against mother nature at the expense of
16 the public benefit to our beaches.

17 I mentioned the case of McQueen vs DHEC. That
18 case is one that I worked on very, very early in my
19 legal career. It was a case where Sam McQueen, who
20 lived -- or owned two lots in North Myrtle Beach,
21 Cherry Grove area, had -- his lots were eroding.
22 He was on a tidal creek, not the beachfront, but
23 still critical area, and the lot -- his lots were
24 eroding away so much so that there really wasn't --
25 you couldn't build anything on those lots. And he

1 applied for permits to build a bulkhead and to fill
2 -- backfill in the area that he lost so that he
3 could build on those lots. And that case went all
4 the way up to the Supreme Court because he argued
5 the same thing that the prior speaker alluded to,
6 that this is somehow a takings. And he argued that
7 it was a takings because he couldn't protect his
8 property and build this wall and fill it back in.
9 And the Supreme Court definitively said that's not
10 a taking because mother nature is going to give and
11 take and so there's not that right to go in and
12 reclaim public trust property.

13 It's really -- it's -- you know, it's an
14 incorrect statement of the existing law and legal
15 principles to say that this is an overreach of the
16 police powers or -- or a takings, because again,
17 the General Assembly has already given the Agency
18 regulatory authority. And so really, the -- you
19 know, the remedy is to go to the Legislature and
20 say, "Okay, we think -- we think this Act goes too
21 far." But that's not this -- this body, and this
22 Agency doesn't -- can't rewrite the statute. You
23 can only -- you can approve these regulations that
24 clarify what the Agency -- and give more direction
25 to the Agency when it's reviewing these kind of

1 permit decisions.

2 And so with -- with that, I would strongly
3 encourage this Board to recommend the approval of
4 the regulations as they were drafted. It's been an
5 honor to be able to work with the staff to -- to
6 try and strengthen our beachfront protections and
7 balance both private interest and the public
8 interest in public trust resources.

9 MR. KINNEY: In your experience, have you found a way
10 that can reach that balance? I mean, is just
11 pumping sand from the ocean back onto the beach the
12 only way to do it, or is there -- is there another
13 way that we can kind of do both? That we may can
14 get our dry sand back and protect the -- the -- you
15 know, property owner?

16 MS. ARMSTRONG: Well, I mean, groins are currently
17 allowed. That's something that DeBordieu has done
18 as a way to try to hold this dry sand on the beach
19 for longer to extend the life of a renourishment
20 project. Something allowed under existing law.
21 But dry sand has to -- how do you keep it there?
22 It's going to -- you've got wave and tidal action.
23 So it's really, really quite challenging. There
24 have been -- you know, I'm not a scientist or
25 technical expert on that topic, but we've seen

1 renourishment projects to be successful in

2 maintaining the dry sand beach. And that's --

3 MR. KINNEY: And they are expensive. I mean --

4 MS. ARMSTRONG: They are expensive. Yeah. They are.

5 Thank you.

6 BOARD COUNSEL: Thanks, Ms. Armstrong. All right. So

7 don't have anybody else signed up to speak, but I

8 see some people raising their hands so --

9 MS. VANDERHAM: I'd like to. I didn't sign up.

10 BOARD COUNSEL: Oh, yeah. Certainly can come up and

11 speak. Just please state your name and the

12 organization if you represent an organization for

13 the court portal, please.

14 MS. VANDERHAM: Cherylee Vanderham, 302 Ocean Boulevard,

15 Isle of Homes. I appreciate you asking from

16 homeowners because we're the ones that have the

17 investment. We have the stake in this. And I

18 lived there in 2016 and 2018, and I beg to differ

19 with what the previous speaker just said. We don't

20 get any more answers as a homeowner than you guys

21 are getting today on who's responsible. Our

22 contention is, if the dry land beach was --

23 renourishment was done according to what laws are

24 already on the books, we would not have the problem

25 we have today. And as a homeowner, that's our



1 and reasonableness of proposed amendment of
2 Regulation 30-1, statement of policy; Regulation
3 30-2, applying for a permit; Regulation 30-11,
4 general guidelines for all critical areas; and
5 Regulation 30-13, specific project standards for
6 beaches and the beach dune system, Document Number
7 5200, grant approval for submission to the General
8 Assembly for review.

9 CHAIRWOMAN SHRIVASTAVA-PATEL: Can I get a second?

10 MALE: Second.

11 CHAIRWOMAN SHRIVASTAVA-PATEL: All right. Any
12 discussion?

13 MR. JOYE: Madam Chairman, this is Chuck. I raised some
14 concerns I think several meetings back and,
15 regretfully, those concerns have not been
16 satisfied. You know, we talked about in these
17 amendments further defining the critical area and
18 setback and also the baseline, and that concerns me
19 a great deal. And for that reason -- and
20 consequently, it will give our Department more
21 authority, more control over beachfront property
22 owners. And I'm going to vote against the
23 amendment.

24 CHAIRWOMAN SHRIVASTAVA-PATEL: Would you like to put in
25 a different motion?

1 MR. JOYE: No, not this point.

2 CHAIRWOMAN SHRIVASTAVA-PATEL: Okay. Any other
3 discussion? All in favor, say aye.

4 BOARD MEMBERS: Aye.

5 CHAIRWOMAN SHRIVASTAVA-PATEL: All opposed, say nay.

6 MR. JOYE: Nay.

7 CHAIRWOMAN SHRIVASTAVA-PATEL: I don't know what the
8 count was. Do you?

9 BOARD COUNSEL: Did you abstain?

10 MR. KINNEY: Yeah.

11 BOARD COUNSEL: So it's -- it's two to one.

12 CHAIRWOMAN SHRIVASTAVA-PATEL: Do I vote?

13 BOARD COUNSEL: You can vote. You can vote to -- to tie
14 or you can vote to -- or not vote or leave it as it
15 is.

16 CHAIRWOMAN SHRIVASTAVA-PATEL: Leave it as is because
17 it's two to one.

18 BOARD COUNSEL: Yeah.

19 CHAIRWOMAN SHRIVASTAVA-PATEL: Yeah. I'll leave it as
20 is. Thank you very much.

21 MALE: So, Marshall, the motion carried.

22 BOARD COUNSEL: Yes, the motion carries.

23 CHAIRWOMAN SHRIVASTAVA-PATEL: Myra, when you bring that
24 information to Sonny, will you please make sure I
25 understand that, too. And Chuck also and address

Exhibit 34



November 13, 2023

Via email at crawfomd@dhec.sc.gov

DHEC Board Chairwoman Shrivastava-Patel
c/o Denise Crawford, Clerk of DHEC Board
2600 Bull Street
Columbia, South Carolina 29201

Re: Information Requested by DHEC Board – Authority for proposed R.30 &
20-foot limitation in definition for imminently threatened structures

Dear Ms. Crawford:

At the Board hearing held on October 12, 2023, for the Request for Final Approval on the proposed amendments to Regulation 30, the Board members had some concerns and questions for which we are providing additional information. These questions concerned (1) the existing authority over the beaches critical area landward of the setback line and (2) the definition of imminently threatened structures. We hope this information will be helpful and provide some insight into both the proposed and existing regulations.

Existing Statutory Authority for OCRM's Jurisdiction Over the Beaches Critical Area

OCRM is not expanding its authority through the proposed regulations to R.30 as OCRM has existing authority and a mandate to exercise jurisdiction over the beaches critical area. This is true even when the beaches critical area is landward of the setback line, as it is statutorily defined as a separate and distinct critical area. Section 48-39-130 requires all persons to obtain a permit from the department if they seek to alter the use of a *critical area*. Section 48-39-10 defines critical areas to include 4 areas:

(J) "Critical area" means any of the following:

- (1) coastal waters;
- (2) tidelands;
- (3) beaches;
- (4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

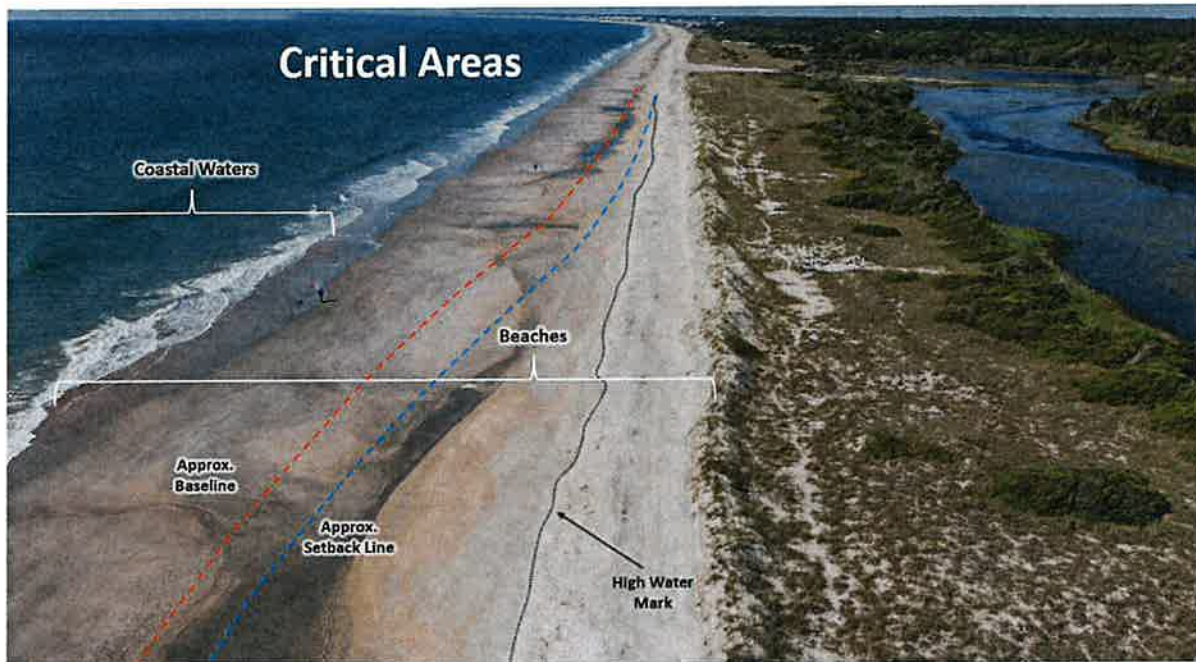
Although the beach/dune system definition is tied to the setback line, the beaches critical area is not. Rather the beaches critical area is defined by tidal inundation and the absence of nonlittoral

BCM Reddy 019196

ROA 000947

vegetation. (Section 48-39-10(H): "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.)

The following picture illustrates the beaches and coastal waters ocean-front critical areas.



As shown in this picture, the shore has eroded past the setback area so that the beaches critical area extends landward of the setback line. In this stretch of the beach, the beach/dune system does not even exist because it is defined as the area from the high-water mark *landward* to the setback line, and the setback line is *seaward* of the high-water mark. However, since this is beaches critical area then pursuant to Section 48-39-130, a person wishing to alter this critical area must apply for and obtain a permit.

The ALC specifically addressed the question of whether OCRM has jurisdiction over the beaches critical area when it is landward of the setback line, and the ALC held that it did. The ALC addressed this issue in the 1998 case of *Summer House Horizontal Property Regime v. SCDHEC, et al.*, 97-ALJ-07-0403-CC & 97-ALJ-07-407, that involved three houses that were built landward of OCRM's setback line and were not required to obtain permits at the time they were built. Sometime after their purchases, the property owners submitted permit applications for activities on the beachfront. At the time of their applications, the houses were located in the beaches critical area. The Department denied the permit applications since the property owners were proposing alterations of the beaches critical area in a manner inconsistent with coastal division regulations. The property owners appealed the denial and in upholding the Department's decision, the ALC stated:

Once the tide reached the setback line and the erosion began, OCRM had jurisdiction over the area. Once jurisdiction was established, the Petitioners needed a permit to alter the critical area unless subject to an exemption.

The ALC expressly rejected the property owners' arguments that the statutes and regulations did not confer upon OCRM authority to regulate construction landward of the setback line. The Court explained that the legislature defined the areas over which OCRM has control and this defined area includes beaches. The ALC further explained that *"the delineation and creation of the setback line and baseline did not divest OCRM of jurisdiction over those areas landward of the setback line when oceanfront beaches are subject to tidal wave action."*

As demonstrated by the statutory language and by the ALC holding set forth above, OCRM has had jurisdiction over the beaches critical area since the inception of the program in 1977. Therefore, the proposed changes to Regulation 30 do not give more authority to OCRM than it already has, rather they provide clearer guidance to both the public and the agency for how the beaches critical area is regulated.

The Department has been charged with exercising its full authority over the valuable and irreplaceable critical areas in our State. The Department must continually balance protecting beach access and the beach system held in trust for the public with private individual rights. The clearer guidance offered in the proposed amendments to the regulations will clarify the legislative mandates with which the agency is charged and will help educate the public about the existing restrictions and authorization requirements on ocean front property.

Regulation 30-15.H addressing emergency orders contains the twenty-foot limitation in the definition of imminent danger.

Structures are determined to be in imminent danger for purposes of issuing emergency orders when erosion comes within twenty feet of the structure. Regulation 30-15 provides:

H. Emergency Orders: Emergency situations before or after a storm event may prompt the Department, or an appointed official of a county or municipality or of the state to issue emergency orders under R.30-5, allowing property owners to construct temporary barriers against wave uprush. A structure is determined to be in imminent danger when the erosion comes within twenty feet of that structure.

....

The 20-foot limitation was increased from 10 feet when the regulations were amended in 2016. This amendment along with the other 2016 amendments were a result of a comprehensive and thorough review by stakeholders over several years including those who participated in the Shoreline Change Advisory Committee and the Blue Ribbon Committee on Shoreline Management appointed by the DHEC Board.¹ The amendment allowing Emergency Orders to be issued when erosion is within 20 feet (instead of ten feet) directly resulted from the

¹ The Shoreline Change Advisory Committee was formed and consisted of 23 members from academia, resource agencies, the private sector, nonprofit organizations, and the public. Their work culminated in recommendations outlined in a report entitled "A Foundation for Improved Management and Planning in South Carolina" dated April 2010. Based on the Shoreline Change Committee's recommendations, the Board appointed the Blue Ribbon Committee on Shoreline Management which also consisted of representatives from a myriad of backgrounds and included elected officials, and leading legal and academic experts.

recommendations contained in The Blue Ribbon Committee on Shoreline Management Final Report submitted to the DHEC Board in 2013.

To change the regulation's definition of imminent danger, the Administrative Procedures Act must be followed which would include stakeholder engagement (as was done with the 2016 amendments), public notice of drafting and proposed amendments, and General Assembly review. The enacted regulation has the force of law, therefore the Department does not have the authority to change it without going through the full promulgation process.

Please let us know if there are any remaining questions and if we can provide any additional information.

Respectfully,



Elizabeth B. von Kolnitz
Chief, SCDHEC-OCRM

cc: Dr. Edward Simmer, Director SCDHEC
Myra C. Reece, Director of Environmental Affairs, SCDHEC
W. Marshall Taylor, General Counsel, SCDHEC

Exhibit 35

South Carolina Beach Preservation Stakeholder Workgroup

Final Report

January 2023



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Introduction

South Carolina's beaches are dynamic places, with inherent variability. Some beachfront shorelines accrete or gain sand while other shorelines erode. These changes to the coastline occur over time and are due to ocean currents, fluctuating tides and sea levels, tropical and extratropical weather systems, as well as beach use and maintenance activities. Beaches and dunes have the capacity to protect life and property along the coast, and the protective value of the beach/dune system is identified in South Carolina statute.¹ These forms of natural infrastructure are the first line of defense against coastal hazards, including storms and King Tides.

South Carolina beaches also provide essential habitat for wildlife, including sea turtles and shorebirds. There are approximately 185 miles (~300 kilometers) of ocean-facing sandy beaches in South Carolina that provide suitable nesting habitat for sea turtles. To date, loggerhead, green, leatherback and, rarely, Kemp's ridley sea turtle nests have been recorded on South Carolina beaches.² Throughout the year, South Carolina beaches provide essential habitat for hundreds of thousands of shorebirds and seabirds. During the summer, beach nesting birds, including Least terns, Wilson's plovers, and American oystercatchers, congregate along the South Carolina coast to breed. The State's beaches are also important feeding and resting areas for migratory shorebirds. South Carolina provides important migration and wintering habitat for the federally threatened piping plover and red knot.³

South Carolina beaches are also vital to the State's coastal tourism industry. In 2019, domestic visitor spending in five coastal counties (Beaufort, Charleston, Colleton, Horry, Georgetown) totaled \$15.1 billion, accounting for 63% of all visitor spending in the state.⁴ Spending in these five coastal counties has increased 77% since 2005 (\$8.5 billion).⁵ In addition to supporting tourism and coastal economies, beaches provide space for a variety of outdoor recreation activities. Numerous studies have highlighted the health benefits of outdoor recreation, not only the physical health benefits, but also the emotional and social benefits. Outdoor recreation also provides opportunities to build stronger relationships and

¹ S.C. Code of Laws § 48-39-250(1)(a)

² [South Carolina Department of Natural Resources, Marine Turtle Conservation Program.](#)

³ ["Share the Beach with South Carolina's Coastal Birds" brochure by South Carolina Department of Natural Resources, et al.](#)

⁴ "The Economic Impact of Travel on South Carolina Counties 2019" report by the US Travel Association, Washington DC.

⁵ "The Economic Impact of Travel on South Carolina 2005" report by the Travel Industry Association of America, Washington DC.

bring families and communities together.⁶ In 2021, beachgoing was listed as the top activity for in-state leisure travel (i.e., state residents who traveled at least 50 miles to a destination in South Carolina), with 42% of travel parties indicating that they traveled to a beach during their trip.⁷

Recognizing that the beach/dune system is extremely important to the State, the South Carolina General Assembly enacted the Beachfront Management Act in 1988 ([Act 634](#)) and amended it in 1990 ([Act 607](#)). The Beachfront Management Act states that the policy of the state of South Carolina is to protect, preserve, restore, and enhance the beach/dune system. The Beachfront Management Act calls for promoting wise use and development of the State's beachfront by implementing regulatory standards in the beachfront critical areas. The South Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management's (DHEC OCRM) beachfront authority is established under the Coastal Tidelands and Wetlands Act, which includes the Beachfront Management Act, and the State's Coastal Division Regulations. Over the past three decades, these laws and regulations have guided where and how areas along the State's beachfront can be utilized.

Beachfront Management Reform Act

On May 3, 2018, [Act 173](#), the Beachfront Management Reform Act, was signed by Governor Henry McMaster. The Act established a new policy of beach preservation. In light of this change and the increasingly complex challenges faced by local and state governments, it is necessary to evaluate current and future beachfront management approaches.

Beach Preservation Stakeholder Workgroup

Charge

DHEC OCRM convened a South Carolina Beach Preservation Stakeholder Workgroup (Workgroup) to identify recommendations as the State implements a policy of beach preservation. In addition to defining beach preservation, the Workgroup examined several beach preservation topics including beach nourishment, pilot project processes, and the State's role in the beaches critical area, as well as issues associated with land management practices. Potential recommendations and actions related to these topics were discussed,

⁶ "South Carolina Statewide Comprehensive Outdoor Recreation Plan 2019" report by South Carolina Department of Parks, Recreation, and Tourism

⁷ "In-State Leisure Travel in South Carolina 2021" report by South Carolina Department of Parks, Recreation, and Tourism and Omnitrak Group

and six final recommendations were identified by the Workgroup. These recommendations along with other key findings are outlined in this report, and will assist DHEC OCRM with identifying opportunities for internal process improvement, potential changes in law, and actions where additional partner involvement is necessary to provide more effective beachfront management.

Workgroup Members

Seventeen members participated in the Workgroup representing various backgrounds and constituencies including federal, state, and local government representatives, community associations, the real estate community, academic and legal professionals, conservation organizations, private-sector consultants, industry representatives, and non-profit organizations. Workgroup participants and affiliations are provided below.

- Amy Armstrong, Executive Director, South Carolina Environmental Law Project
- Keith Bowers, President, Biohabitats
- Jenny Brennan, Science and Policy Analyst, Southern Environmental Law Center
- Blanche Brown, General Manager, DeBordieu Colony Community Association, Inc.
- Alex Butler, Resilience Planning Director, South Carolina Office of Resilience
- Emily Cedzo, Senior Program Director of Land, Water and Wildlife, Coastal Conservation League
- Melissa Chaplin, Biologist, U.S. Fish and Wildlife Service
- Nicole Elko, Executive Director, South Carolina Beach Advocates
- Paul Gayes, Executive Director of Burroughs and Chapin Center for Marine and Wetland Studies, Coastal Carolina University
- Justin Hancock, Director of Recreation, Grants and Policy, South Carolina Department of Parks, Recreation and Tourism
- Iris Hill, Town Administrator, Town of Edisto Beach
- Aaron Pope, City Administrator, City of Folly Beach
- Jack Smith, Attorney, Nelson Mullins
- Don Thomas, Managing Broker, Peace Sotheby's International Realty
- Steven Traynum, Vice President, Coastal Science and Engineering
- Rod Tyler, President, Green Horizons Environmental, LLC
- Robert Young, Director of Program for the Study of Developed Shorelines, Western Carolina University

Summary of Workgroup Activities

A series of seven workgroup meetings were held between June and December 2022. All meetings were held from 9:30 a.m. to 2:30 p.m. at the Town of James Island Town Hall, except

for the final two meetings, which were held virtually via Microsoft Teams. Meetings were facilitated by DHEC staff from the Office of Environmental Affairs. Additional details including agendas, meeting notes, and presentation slides can be found for each meeting on the [Beach Preservation Stakeholder Workgroup](#) webpage.

Background

Beachfront Management

History

In 1977, the South Carolina General Assembly enacted the Coastal Tidelands and Wetlands Act, also known as the SC Coastal Zone Management Act, “[t]o protect and, where possible, to restore and enhance the resources of the State’s coastal zone for this and succeeding generations.” The Act created a new state agency, the South Carolina Coastal Council, and charged it with the responsibility of administering and enforcing the statute. This legislation, however, proved ineffective for managing the beach/dune system because regulatory authority over these areas given to the Coastal Council was insufficient. Lacking adequate authority, the Coastal Council was unable to prevent structures from being sited too close to the eroding shore, thus making them extremely vulnerable to the effects of storms and high tides.

In 1986, a Blue Ribbon Committee on Beachfront Management was convened by the former South Carolina Coastal Council (now DHEC OCRM) in response to the growing recognition that the existing law was inadequate to protect the fragile beach/dune resource. The Committee determined that the beach/dune system was in a state of crisis and concluded that “over fifty-seven miles of our beaches are critically eroding. This erosion is threatening the continued existence of our beach/dune system and thereby threatening life, property, the tourist industry, vital state and local revenue, marine habitat, and a national treasure”.⁸ Recognizing the threats of chronic erosion, sea level rise, increased shoreline development, and a lack of comprehensive beachfront planning and management, the Committee developed recommendations that provided guidance to state regulators and legislators in developing state beach management policies.

⁸ S.C. Code Ann. Regs. 30-1(C)(3)

In 1988, in response to the Blue Ribbon Committee, the South Carolina Beachfront Management Act⁹ was enacted by the South Carolina General Assembly. The Beachfront Management Act established a comprehensive statewide beachfront management program and included several key legislative findings, which are:

- the importance of the beach and dune system in protecting life and property from storms, providing significant economic revenue through tourism, providing habitat for important plants and animals, and providing a healthy environment for recreation and improved quality of life of all citizens;
- unwise development has been sited too close to and has jeopardized the stability of the beach/dune system;
- the use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures has not proven effective, has given a false sense of security, and in many instances, has increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach;
- inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the longshore transport of sand, may deprive downdrift beach/dune systems of their natural sand supply;
- it is in the state's best interest to protect and promote increased public access to beaches for visitors and South Carolina residents alike;
- a coordinated state policy for post-storm management of the beach and dunes did not exist and that a comprehensive beach management plan was needed to prevent unwise development and minimize adverse impacts.

The Beachfront Management Act then established eight state policies to guide the management of ocean beaches:

1. Protect, preserve, restore, and enhance the beach/dune system;
2. Create a comprehensive, long-range beach management plan and require local beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system, each promoting wise use of the state's beachfront to include a gradual retreat from the system over a forty-year period¹⁰;

⁹ S.C. Code of Laws § 48-39-250 et seq.

¹⁰ As discussed throughout this report, the policy of retreat has been replaced with a policy of beach preservation.

3. Severely restrict the use of hard erosion control devices and encourage the replacement of hard erosion control devices with soft technologies which will provide for the protection of the shoreline without long-term adverse effects;
4. Encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;
5. Promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;
6. Preserve existing public access and promote the enhancement of public access for all citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;
7. Involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest; and
8. Establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

DHEC OCRM is responsible for implementing these policies through a comprehensive management program that includes state and local planning, regulation and enforcement, data development and technical support, and outreach and education activities.

Policy of Retreat

The 1986 Blue Ribbon Committee referenced above found that it was in both the public and private interest to plan a gradual retreat from the beach/dune system by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to retreat. The Committee concluded:

- "a retreat from the beaches over a 30-year transition period, in combination with selective beach nourishment, is the only practical approach to our coastal erosion problems"
- "retreat implemented over 30 years will allow owners of structures sited too close to the beach to realize the economic life of their structures and adjust their plans over a reasonable 30 year time period"
- "retreat must be based on sound state and local comprehensive beach management plans, which, when implemented, will result in the preservation, protection, restoration, and enhancement of our beach/dune system for the enjoyment of this and future generations"

Most of the Committee's recommendations were adopted into law through the Beachfront Management Act of 1988, including establishing "a forty-year policy of retreat from the shoreline."

Policy of Beach Preservation

In the two decades following the passage of the 1988 Beachfront Management Act and associated regulations, hard stabilization of the beachfront was reduced yet development in high hazard areas persisted. Planning and regulatory efforts outlined in the Beachfront Management Act endeavored to balance economic development and private property rights with public access and conservation of valuable public trust resources. However, the challenges addressed by the 1986 Blue Ribbon Committee persisted, and new challenges began to emerge along the beachfront.

In 2007, in response to these challenges, DHEC OCRM established a Shoreline Change Initiative to organize existing data collection and research efforts, identify additional research needs, and formulate policy options to guide the management of South Carolina's beachfront and estuarine shorelines. DHEC OCRM established the Shoreline Change Advisory Committee (SCAC), comprised of representatives from various stakeholder groups, to discuss the past two decades of experiences under the SC Beachfront Management Act. The SCAC released a final report, [Adapting to Shoreline Change: A Foundation for Improved Management and Planning in South Carolina](#), in April 2010.

Based on the findings and recommendations of the SCAC, the DHEC Board appointed a new [Blue Ribbon Committee on Shoreline Management](#) in October 2010 and charged the Committee with developing specific statutory and regulatory recommendations to help guide the stewardship of South Carolina's beachfront and estuarine shorelines.

With respect to beach preservation, the Committee concluded:

- "Ultimately, the committee recommends that the policy of the state should emphasize the preservation of the beach and beach/dune system rather than promote a policy of retreat that is vague and often impracticable or unattainable."
- "For the purpose of this recommendation, the term 'preservation' includes the implementation of coastal management techniques such as beach nourishment, the landward movement and/or removal of habitable structures whenever necessary and feasible, the conservation of undeveloped shorelines and sand dune creation and stabilization using sand fencing and native vegetation."

On May 3, 2018, [Act 173](#), the Beachfront Management Reform Act, was signed by Governor Henry McMaster. The Act replaced the 40-year policy of retreat and established a new policy of beach preservation. Although the State has been utilizing beach preservation approaches, like beach nourishment, to manage the beaches and beach/dune system since the 1980s, this Workgroup provides an opportunity to formalize the definition of beach preservation and clarify beach preservation approaches. The findings and final recommendations of the Workgroup are outlined in the following section.

A timeline of significant legislation and Committee or Workgroup efforts is shown below in Figure 1.

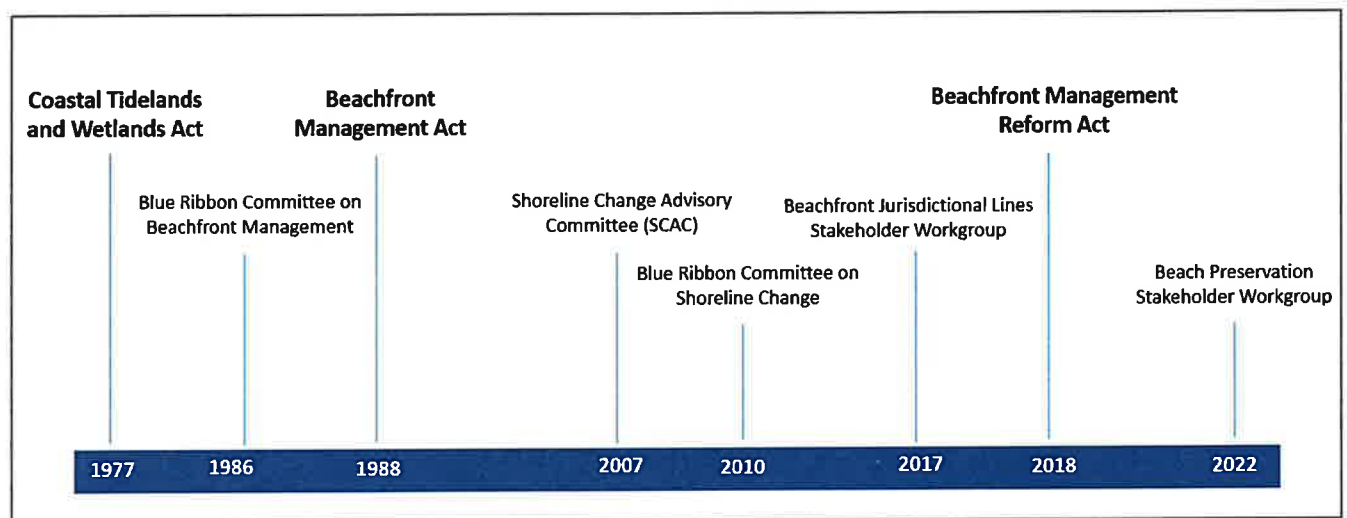


Figure 1: South Carolina Beachfront Management Timeline

Workgroup Findings

The Workgroup was convened to identify recommendations as the State implements a policy of beach preservation. In addition to defining beach preservation, the Workgroup examined several beach preservation topics including beach nourishment, pilot project processes, and the State's role in the beaches critical area, as well as issues associated with land management practices. Potential recommendations and actions related to these topics were discussed, and six recommendations were identified by the Workgroup. These recommendations, outlined below, will assist DHEC OCRM with identifying opportunities for internal process improvement, potential changes in law, and actions where additional partner involvement is necessary to provide more effective beachfront management.

In discussing the topics outlined in this report, the Workgroup identified groups of stakeholders that may be impacted by these issues. These stakeholders, identified in Table 1, were considered during the discussion and the development of the final recommendations.

Academics	Business Owners	Conservationists	Coastal Engineers	Developers
Elected Officials	Future Generations	General Public	Industry	Local Governments
Infrastructure	Natural Resources	Non-human species	Property Owners	Public Beach Users
Realtors	Regulatory Agencies	Resource Agencies	Tourists	Utilities

Table 1: Stakeholders that may be impacted by these topics.

Beach Preservation

The State's Beachfront Management Act of 1988 established a policy of retreat from the beach/dune system in order to protect natural resources and reduce impacts to development. However, in practice, retreat did not occur at a large scale, and in 2018, the Beachfront Management Reform Act transitioned the policy of retreat to a policy of beach preservation based on recommendations from the 2010 Blue Ribbon Committee.

Although the State has been utilizing beach preservation approaches, like beach nourishment, to manage the beaches and beach/dune system since the 1980s, this Workgroup provides an opportunity to formalize a definition and clarify the approaches included in beach preservation.

Definition

As a first step toward clarifying the policy of beach preservation, the Workgroup considered the need to formalize a definition. Discussions focused on various components of the policy including the location (beach) and the function (preservation). The Workgroup agreed that the location subject to this policy was identified within the State's statute and included 'beaches' and the 'beach/dune system' critical areas. The State's beaches critical area is defined as "those lands subject to periodic inundation by tidal and wave action so that no

nonlittoral vegetation is established".¹¹ This definition encompasses several beachfront environments, including the wet sand beach down to the low tide mark, the dry sand beach, and the vegetated beach seaward of any nonlittoral vegetation. The beaches critical area frequently overlaps with the beach/dune system critical area which is defined as "the area from the mean high water mark to the setback line as determined in S.C. Code of Laws § 48-39-280."¹²

The priority functions of the beach and beach/dune system were discussed, including supporting natural coastal processes and habitat, the opportunity for beach recreation and tourism, and the protection of life and property in the adjacent beachfront communities. The Workgroup agreed that the State's priority is to protect, preserve, restore, and enhance the beaches and beach/dune system using a variety of beach preservation approaches.

Through these discussions, the Workgroup acknowledged that not all beaches are the same and may have different challenges depending on the local geomorphology and level of beachfront development. They recognized the challenge along developed shorelines of balancing coastal development with protecting the natural processes associated with the beach and beach/dune environments and indicated that there needs to be a variety of beach preservation approaches available to address these challenges.

The Workgroup also acknowledged that maintaining the current 'status quo' along many developed beaches would require consistent planned renourishment to maintain the beaches and beach/dune systems as well as protect landward development. In addition, multiple lines of evidence indicate that the rate of rising seas is accelerating¹³, thus making nourishment as an approach for preservation more challenging. Long-term planning and coordination within and between agencies and organizations will be critical to the continuation of beach preservation.

The Workgroup considered the 2010 Blue Ribbon Committee on Shoreline Management's definition of "preservation" which states:

"the term "preservation" includes the implementation of coastal management techniques such as beach nourishment, the landward movement and/or removal of habitable structures whenever necessary and feasible, the conservation of undeveloped shorelines and sand dune creation and stabilization using sand fencing and native vegetation."

¹¹ S.C. Code of Laws § 48-39-10(H)

¹² S.C. Code of Laws § 48-39-10(J)(4)

¹³ ["NASA Study: Rising Sea Level Could Exceed Estimates for U.S. Coasts" news release November 15, 2022.](#)

After discussing location and function of beach preservation, recognizing the challenges in the beachfront environment, considering the dynamic nature of the coast, and acknowledging various stakeholders, the Workgroup determined that the following key guiding principles should be utilized in the development of the definition of beach preservation:

- Protect, preserve, and enhance priority natural beach functions, including supporting natural coastal processes and habitat, the opportunity for beach recreation and tourism, and the protection of life and property in the adjacent beachfront communities;
- Protect the highly dynamic ecological processes and functions that shape, form and maintain the beach, dunes and nearshore habitat; and
- Balance habitat and environmental concerns with consideration for existing development.

Based on these principles, the Workgroup developed a recommendation for the definition of beach preservation.

Recommendation 1: Definition of Beach Preservation

The Workgroup recommends that the term “Beach Preservation” be defined as:

“maintaining the natural processes and functionality and benefits of the beaches and the beach/dune system critical areas to support storm protection, habitat, tourism, public access, recreation opportunities, and aesthetics”

Beach Preservation Approaches

During discussion of the beach preservation definition, the Workgroup indicated that a variety of preservation approaches would be needed to address various scenarios along the South Carolina coastline.

The Workgroup considered specific approaches that may be utilized to balance preserving both the location and function of the beach and beach/dune system. The Workgroup further discussed the Blue Ribbon Committee on Shoreline Management’s recommendations and reached agreement that beach nourishment, inlet management, sand dune restoration (including sand fencing and native vegetation), and the conservation of undeveloped shorelines are coastal management approaches that should be used for beach preservation.

The Workgroup also discussed several other approaches, including the landward movement and/or removal of structures wherever necessary or feasible, the maintenance of existing

groins, and projects designed to increase the amount of sand or provide for the natural migration and dispersion of sand within the nearshore system. While there was not consensus, some Workgroup members thought these approaches should be considered by the Department for beach preservation under specific circumstances and should be evaluated on a project-by-project basis. Despite lack of consensus on all approaches, the Workgroup agreed that shore-parallel erosion control structures do not support beach preservation.

Beach Nourishment

While the Workgroup identified a number of beach preservation approaches, the discussion focused primarily on beach nourishment.

Beach nourishment is defined as “the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide”.¹⁴

Large-scale beach nourishment projects replace or add sand to the beach that has been lost due to erosion or longshore drift. This engineered process widens the beach and shifts the high-water mark seaward. Successful nourishment projects provide a measure of storm protection for the beach and beach/dune system, thereby providing protection of beachfront structures. Beaches with dry sand beach and a healthy beach/dune system also provide habitat for flora and fauna, and space for citizens and visitors to recreate.

The Workgroup reviewed the current statutory definition of “beach nourishment”¹⁵, and discussed the benefits that these projects can provide. The Workgroup agreed that nourishment is a valid preservation technique but expressed concerns over the challenges associated with these efforts. The Workgroup identified issues and challenges associated with large-scale nourishment projects including planning and project-level specifications. Beach nourishment requires long-range planning to ensure funding is available and all necessary authorizations are in hand prior to project commencement. This level of planning can be a challenge and requires an understanding of coastal processes in order to effectively anticipate when a nourishment project will be needed and determine what volume of sand is necessary to provide sufficient protection. Identifying nearshore borrow areas with the necessary quantity of sand and locating beach quality sand sources that meet project standards is not only challenging, but costly.

¹⁴ S.C. Code of Laws § 48-39-270(4)

¹⁵ S.C. Code of Laws § 48-39-270

Additionally, regional scale approaches where multiple communities coordinate nourishment efforts can be beneficial because they combine assets and resources; however, these coordinated efforts can also pose challenges related to the size of the projects and varied goals of participating communities. These partner efforts often extend the timeframe needed for project completion which adds additional complexity. Project timing windows must be considered to protect and avoid critically important and federally listed species such as sea turtles, shorebirds, right whales, and other marine mammal migration and nesting seasons. Unforeseen issues may arise which make utilizing such windows challenging, especially for larger scale projects that require a longer window to accomplish the project.

The Workgroup identified the need for flexibility with respect to some project specifications, while recognizing the need to strengthen and clarify guidelines for other standards. The Workgroup recommends additional expert discussions with state and federal resource agencies, to further clarify where there may be flexibility on project specifications. They recommended assembling an expert technical advisory committee to review specifications such as sand quality, timing windows, use of specific dredge technology, flexibility in project footprint and borrow areas, requiring a bond for potential downdrift impacts, long-term monitoring, and impacts to flora and fauna (at both the beach and borrow sites) including beach, benthic, and threatened and endangered species.

Recommendation 2: Establish a Beach Nourishment Technical Advisory Committee

The Workgroup recommends that a technical advisory committee be established to further investigate beach nourishment project specifications, including:

- Sand quality
- Timing windows
- Dredge type
- Project footprint and borrow area flexibility
- Long-term monitoring
- Downdrift impact analysis
- Bond requirement
- Impacts to flora/fauna at beach and borrow sites (beach, benthic, threatened & endangered species)

South Carolina Beach Preservation Fund

The Workgroup also discussed the need for adequate and reliable funding for beach preservation efforts. They acknowledged that 1) establishing and funding a South Carolina Beach Preservation Fund is necessary for the State to implement a more effective beach

preservation program, and 2) consistent and reliable funding is necessary for beachfront communities to effectively plan for beach preservation at the local level. The Workgroup considered various aspects of beach preservation funding including estimating cost, identifying a dedicated funding source, determining funding responsibility, and eligibility requirements. Eligibility requirements included both beach preservation approaches that would be eligible for funding as well as applicant eligibility criteria.

Estimating Cost

When analyzing beach preservation costs, the Workgroup determined that the State should take a proactive approach and consider long-range planning (20-30 years). Additional cost-benefit analysis is needed, as well, and could be integrated into funding eligibility requirements.

Identifying a Funding Source

In addition to identifying funding for short-term beach preservation projects, funds should be set aside for long-range beach preservation efforts. When discussing funding sources, it was suggested the State research how other states support similar funds. Specific funding source suggestions offered by Workgroup members included the expanded use of state and local accommodations taxes, beachfront real-estate transaction fees, as well as funds from offshore renewable energy. The Workgroup acknowledged that local governments should be given more support to increase assessments and taxes and more flexibility in how those accrued funds can be used. Without the identification of a specific funding source(s), some Workgroup members noted that the source of the funding would influence their opinion of how the funds should be utilized.

Funding Responsibility

Workgroup discussions also touched on funding responsibility. It was concluded that oceanfront residents who benefit the most from beach nourishment and other preservation approaches need to bear some percentage of the funding responsibility for beach preservation projects. The Workgroup identified the importance and need to establish a tiered level of funding responsibility based on location (beachfront & community).

Eligible Beach Preservation Approaches

The Workgroup concluded that beach nourishment can be an effective approach for implementing beach preservation. However, sand resources are finite, and as other factors, including sea-level rise, become more prevalent, having consistent planned funding for beach nourishment will become even more important. The eligibility of additional approaches was discussed. Some Workgroup members felt removal of hazardous structures

and property buyouts should be eligible approaches, while others felt maintenance and repair of existing groins should be eligible for funding. Consensus was not reached on which approaches should be eligible for funding under the Beach Preservation Fund.

Applicant Eligibility Criteria

The Workgroup also discussed eligibility criteria for applicants to receive funding. The Workgroup proposed that the South Carolina Department of Parks, Recreation & Tourism codify formal criteria and requirements for state funding assistance, closely aligning with those required under their [Beach Renourishment Funding Assistance Grant Program](#).

The Workgroup agreed that the following criteria should be included for eligibility.

- State-approved Local Comprehensive Beach Management Plan (LCBMP),
- Local Comprehensive Plans that include a section on beachfront management and resilience planning,
- Requirement that local oceanfront residents contribute a percentage of match, in addition to local accommodations taxes, and
- Approved project permits

In addition, while many Workgroup members were in support of communities demonstrating “full and complete” public access, as outlined under the State’s Beach Management Plan¹⁶, in order to receive state funding, other members felt some percentage of funds should be available for use by private communities.

It was noted that there is a need for additional preservation planning and coordination between the State and local governments. However, it was acknowledged that additional funding and/or capacity at the State level would be required to assist with additional planning mandates. It was noted that support for community planning assistance could be built into the fund.

Acknowledging that limited funding availability will result in increased competition, additional discussion around eligibility criteria and prioritization of projects should occur in coordination with the South Carolina Department of Parks, Recreation, and Tourism.

While there was general agreement from the Workgroup on the importance and need for a Beach Preservation Fund, a number of members were not in support of formally

¹⁶ S.C. Code Ann. Regs. 30-21.F(2)

recommending establishment of the Fund without including specific eligibility requirements that would apply.

Planning and Coordination

Local Government Coordination

Local, state and federal entities play a role in regulating activities along the South Carolina beachfront. The State's authorities are based in State statute and regulations which guide activities coastwide. Likewise, federal agencies are directed by national policies and rules. Local governments develop ordinances that are specific to meeting the goals and needs of their individual beaches.

In some places, local entities have taken the initiative to create ordinances which further guide activities, landward and seaward of the State's beachfront jurisdictional lines. These ordinances are designed to guide development away from high hazard areas and to protect coastal resources.

The Workgroup discussed scenarios in which the State issues permits for activities within its beachfront permitting jurisdiction that are inconsistent with stricter requirements at the local level. These situations can be time consuming and costly for the State, the local entities, and the applicant.

While the State currently provides local entities with notice of general and major permit applications, Workgroup members discussed modifying the process to avoid the State approving what a local entity would not. They discussed the State confirming that the applicant has received approval from any local governing bodies that have jurisdiction prior to issuing any DHEC OCRM authorization or acknowledgment seaward of the setback line.

The Workgroup was made aware that if a project meets the conditions outlined in statute and regulation, the Department is currently required to move forward with permit issuance, even if the project does not meet the requirements of the local entities with jurisdiction.

To change the order of permit review, there may need to be modifications made at the local and state levels to ordinances, statutes, and regulations.

While no formal recommendation was reached, several Workgroup members indicated interest and support for this pathway.

Long-Term Planning

There are a variety of planning documents that are created and maintained by local entities and state government, including comprehensive plans, inlet management plans, marsh management plans, groundwater plans, sea level rise plans, resilience plans, local comprehensive beach management plans, and others. The Workgroup discussed the need for plans to be more comprehensive and interconnected in order to better encompass whole ecosystems. The Workgroup considered whether these plans could include topics such as habitat management and ecosystem functions and discussed the possibility of combining plans to streamline efforts. Coordinating and expanding these plans would present opportunities to create shared terminology, prioritize topics and funding, improve timing, reduce duplication of effort, increase the utility of the plans, and increase awareness to stakeholders.

The Workgroup also discussed the need for long term planning to be able to address the various challenges facing the beachfront, including sea level rise, increased coastal storms, erosion, and tidal flooding. Members suggested that developing robust adaptation and resilience plans will be critical to meet these types of challenges in the future. Developing and implementing these types of plans will allow communities to be proactive, rather than reactive when responding to emergency situations. The Workgroup acknowledged that developing, expanding, and coordinating these types of plans would require additional resources.

Pilot Projects

The Workgroup was additionally charged with examining pilot project processes, as part of a broad examination of beach preservation approaches. Since 1977, State statute has provided a permitting exception for research activities conducted by State agencies and educational institutions provided that the research activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area¹⁷.

In 2014, [Act 219](#) allowed pilot projects on the beachfront to address erosional issues. Specifically, the language states:

Notwithstanding any other provision of law contained in this chapter, the board, or the Office of Ocean and Coastal Resource Management, may allow the use in a pilot project of any technology, methodology, or structure, whether or not referenced in this chapter, if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a

¹⁷ S.C. Code of Laws § 48-39-130(D)(2)

beach or dune area. If success is demonstrated, the board, or the Office of Ocean and Coastal Resource Management, may allow the continued use of the technology, methodology, or structure used in the pilot project location and additional locations.¹⁸

While the original statute language associated with research activities provides some guidance in terms of sponsor and limitations (e.g., no material harm), both sections of law are limited in project standards and specifications. S.C. Code of Laws § 48-39-320(C) does not identify the type of erosional issue, specific success criteria, or provide a process for assessing a pilot project proposal.

The Department has received several requests to conduct pilot projects in the past eight years for both beachfront and non-beachfront areas, highlighting a need for clarity in terms of project standards, specifications, and process.

The Workgroup considered current processes and project-level specifications and identified opportunities for process improvement, refinement, and the overall need for additional project specificity. Tables 2 and 3 summarize the Workgroup's suggestions for pilot project process and requirements.

Pilot Project Review and Acknowledgement Process

Process	Current	Workgroup Suggestion
Submittal of Study Proposal	Internal Review	Internal Review; Ad Hoc Technical Committee Review
Public Notice	No Public Notice	Provide opportunity for public comment; Separate notification to adjacent property owners and local government
Resource Agency Coordination	Discretionary	Resource Agency Coordination; Participation on Ad Hoc Technical Committee
Authorization	DHEC OCRM Written Acknowledgement	Align Authorization with Permitting Process
Appeal	Request for Review to DHEC Board	At a minimum maintain current process

Table 2: Pilot project submittal and review process current and recommended.

¹⁸ S.C. Code of Laws § 48-39-320(C)

Specific Requirements for Pilot Project Study Proposal and Findings

Specifics	Current	Workgroup Suggestion
Sponsor	State Agency or State Educational Institution	Undetermined
Study Design Specifics	Undefined	Study hypotheses, timeline, expected outcomes, monitoring, reporting, and other details should be required in the proposal.
Bonding	Required if considered a Pilot Project under 48-39-320(C); Cost of removal	Require for removal, and restoration of any damages as a result of the pilot project
Project Standards	Minimum requirements: No material harm to flora, fauna, physical or aesthetic resources; Reasonably anticipated that the use will be successful in addressing an erosional issue	Proposal reviewed by Ad Hoc Technical Committee to provide recommendations to DHEC OCRM. Require criteria for monitoring and reporting, established control site and comparisons analysis. No adverse impacts to the study site, adjacent areas, flora, or fauna. No introduction of invasive or non-native species.
Success Criteria	Undefined	Demonstration of how study/project addresses an erosional issue and how success will be determined should be required in the proposal and final report.
Reporting / Determination of Meeting Success Criteria	DHEC OCRM review and determination; resource agency input	All data and study report(s) should be sent to DHEC OCRM and the Ad Hoc Technical Review Committee for a determination of meeting success criteria
Public Comment on Final Results and Department Determinations	Undefined	Notice on DHEC OCRM website; gather public comment at end of study timeframe

Table 3: Pilot project proposal and project requirements current and recommended.

The Workgroup discussed the need to better understand the following as it relates to pilot projects seeking to address an erosional issue:

- What specific erosional issue is being addressed?
- How is the erosional issue defined?
- What criteria are used to determine if the pilot project is successful?
- When should it be determined if a pilot project has been successful?

When demonstrating how a research study or pilot project addresses an erosional issue, the Workgroup agreed that the primary objective should be the preservation of the dry sand

beach and beach/dune system. As a secondary benefit, preservation of the dry sand beach and beach/dune system may result in enhanced protection of properties or habitat adjacent to or landward of these critical areas. As noted above, the Workgroup agreed that shore-parallel erosion control structures do not result in preservation of the dry sand beach.

The Workgroup discussed the need for a clear set of guidelines and criteria that will be required when submitting pilot project proposals. Suggested guidelines and criteria included:

- Providing evidence and previous findings of any existing or similar technology that has been implemented or studied in other areas/states;
- Providing clearly stated proposal descriptions of purpose, hypothesis, methodology, target goals, anticipated and reasonable level of success, and timeframe;
- Providing sufficient proof of concept and supporting data;
- Providing details on control sites for study comparison;
- Providing a plan for monitoring all study locations and areas adjacent to and neighboring the technology being deployed;
- Providing a summary of anticipated impacts to flora, fauna, and adjacent properties;
- Providing a plan for local government coordination; and
- Providing documentation of federal resource agency coordination, including threatened and endangered species.

The Workgroup also discussed the current statutory language, specifically the initial wording of the statute: "Notwithstanding any other provision of law contained in this chapter". There is a need to better understand the intent and implications of this language. There was concern among Workgroup members that this language in the statute would allow a pilot project to employ a technology or approach that would be in direct conflict with or violate current statute or regulation. They concluded that these pilot projects should be reviewed for potential impacts and should not be allowed to pose a material harm to the beach environment, flora, or fauna. In addition, the current statutory language does not specifically reference *new* technology. The Workgroup was concerned that the omission of this word could result in the use of previously studied technologies shown to have negative outcomes.

Recommendation 3: Establish A Pilot Project Ad Hoc Technical Advisory Committee

The Workgroup recommends establishing an Ad Hoc Technical Advisory Committee to evaluate pilot project study proposals, provide written comments and recommendations on project standards and success criteria, and evaluate the findings of such studies. Appointed by DHEC OCRM based on recommendations from stakeholders, this 7-member committee would be comprised of unbiased technical and scientific coastal experts from academia, state and federal resource agencies, coastal engineers, and other subject matter experts. The review and approval process should be rigorous and thorough.

Recommendation 4: Enhance the Pilot Project Authorization Process

The Workgroup recommends that pilot project applications undergo a formal, prescribed process similar to other activities within the State's critical area. This process would include internal and committee review, an opportunity for public comment, resource agency coordination, and an appeals process. The Workgroup recommends that process requirements include detailed study design, timeline, monitoring, demonstration of how the project will address the erosional issue, criteria for success, bonding for removal and restoration, and no material harm to the beach environment, flora, or fauna.

Recommendation 5: Modify Pilot Project Statutory Language

The Workgroup recommends that the statutory language under SC Code of Laws Section 48-39-320(C) be amended to remove the wording: *"Notwithstanding any other provision of law contained in this chapter"* and include language in the statute to ensure that pilot projects do not cause material harm to the beach environment, flora, or fauna.

The Workgroup also recommends revising the language from *'the board, or the Office of Ocean and Coastal Resource Management'* to *"the Department"*.

Beaches Critical Area

South Carolina has two beachfront critical areas, beaches and the beach/dune system. The State's beaches critical area is defined as "those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established".¹⁹ This definition encompasses several beachfront environments, including the wet sand beach down to the low tide mark, the dry sand beach, and the vegetated beach seaward of any nonlittoral vegetation. The beaches critical area frequently overlaps with the beach/dune system critical area which is defined as "the area from the mean high water mark to the setback line as determined in S.C. Code of Laws § 48-39-280."²⁰ However, there are areas along the South Carolina coast where the setback line is either located on the dry sand beach or below the high tide mark, and the beaches critical area is landward of the beach/dune system in these areas.

DHEC OCRM's regulatory authority over the beach/dune system and the beaches critical areas is established in Coastal Division Regulations.²¹ However, specific project standards and regulations within S.C. Code Ann. Regs. 30-13 focus primarily on the beach/dune system and do not adequately address activities in the beaches critical area.

Per statute, the Department is required to "Provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas."²²

The Workgroup discussed several scenarios (Maps 1 and 2) where the beaches critical area is landward of the beach/dune system. They also reviewed relevant statutory^{23,24} and regulatory^{25,26} definitions and guidance related to beachfront critical areas. The Workgroup discussed the State's regulatory authority and role within the beaches critical area, including what types of activities the Department should regulate within the beaches critical area.

¹⁹ S.C. Code of Laws § 48-39-10(H)

²⁰ S.C. Code of Laws § 48-39-10(J)(4)

²¹ S.C. Code Ann. Regs. 30-10

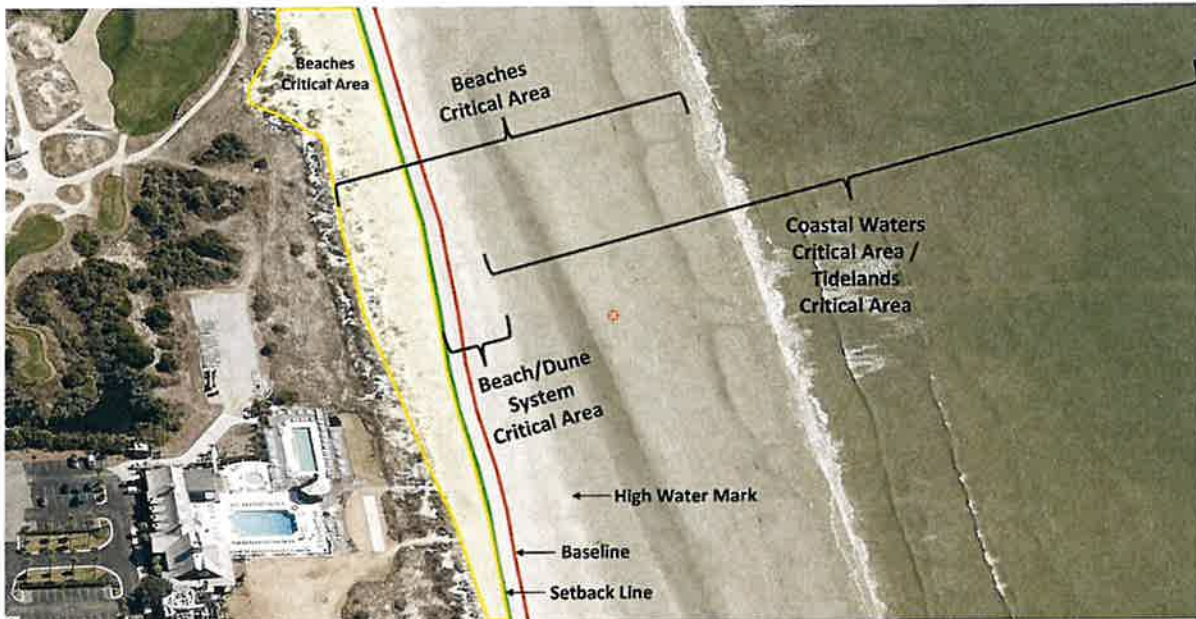
²² S.C. Code of Laws § 48-39-80

²³ S.C. Code of Laws § 48-39-10

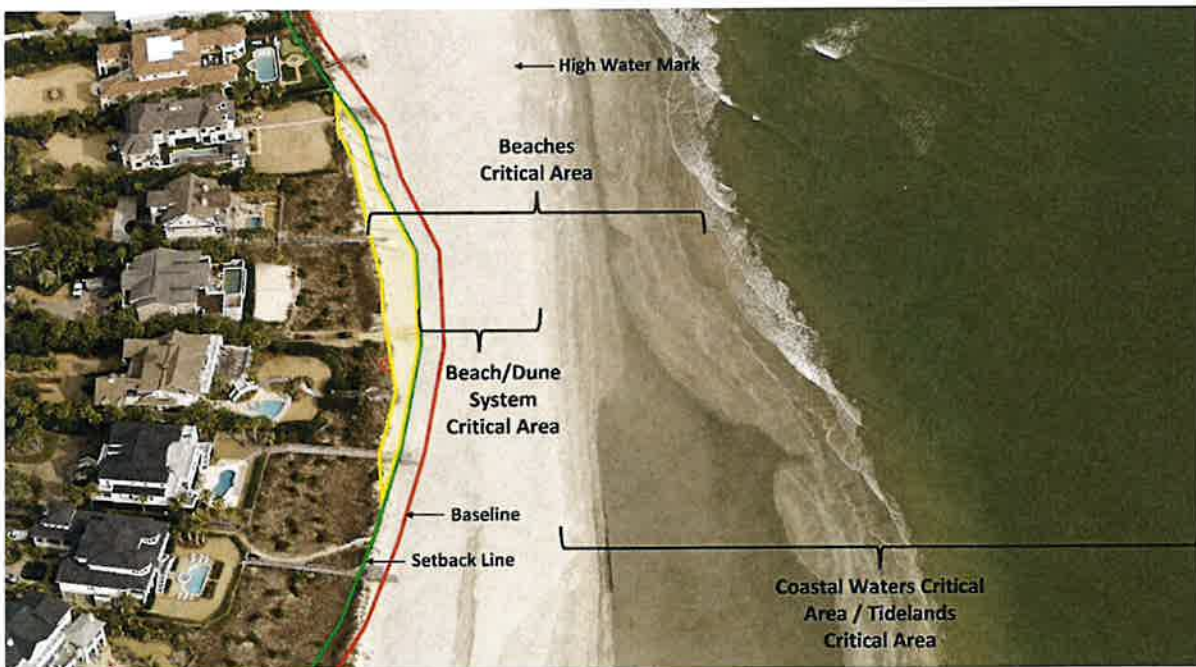
²⁴ S.C. Code of Laws § 48-39-80

²⁵ S.C. Code Ann. Regs. 30-10

²⁶ S.C. Code Ann. Regs. 30-13



Map 1: Depicts the State's critical areas, including the beach/dune system and beaches critical areas. Identifies beaches critical area landward of the State's setback line.



Map 2: Depicts the State's critical areas, including the beach/dune system and beaches critical areas. Identifies beaches critical area landward of the State's setback line.

The Workgroup agreed that DHEC OCRM should assert jurisdiction in the beaches critical area and that additional detail and specificity is needed in the regulations to support this authority.

The Workgroup considered the following activities within the beaches critical area: erosion control structures, habitable structures, and pools. They discussed new construction, repair of structures, and impacts to structures post-storm. The Workgroup reviewed scenarios depicting these types of structures being located within the beaches critical area.

Erosion Control Structures

In the Beachfront Management Act, the General Assembly found that “The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.”²⁷

Current statute prohibits new erosion control structures from being constructed within the beach/dune system (seaward of the State’s jurisdictional setback line). Existing erosion control structures seaward of the setback line that are destroyed more than 50% (above grade) cannot be repaired and must be removed. However, regulatory standards related to erosion control structures in the beaches critical area landward of the beach/dune system critical area are unclear. While the title of S.C. Code Ann. Regs. 30-13 includes both beaches and beach/dune system critical areas, the language within that regulation primarily focuses on the beach/dune system critical area, making it uncertain if erosion control structures are also prohibited in beaches critical areas.

The Workgroup discussed multiple scenarios of erosion control structures within the beaches and beach/dune system critical areas and agreed that provisions that apply to erosion control structures within the beach/dune system should apply to those structures within the beaches critical area. This provides consistency within beachfront critical areas for implementing the beach preservation policy. There was consensus that shore-parallel erosion control structures do not support beach preservation, and they agreed that new

²⁷ S.C. Code of Laws § 48-39-250

erosion control structures should be prohibited within the beaches critical area, including areas landward of the beach/dune system.

The Workgroup further agreed that additional discussion is needed regarding repair of existing erosion control structures within the beaches critical area, but that the priority of focus should remain on prohibiting new erosion control structures within this environment.

In addition to these beachfront critical areas, many of South Carolina's beaches have substantial dunes which stretch landward from the defined critical areas. These dunes are a valuable environment, providing additional habitat and protection from coastal hazards like tidal flooding, sea level rise, and storms. While the beach/dune system critical area typically encompasses some of the dune system, portions of this ecosystem are frequently excluded from regulatory jurisdiction. The Workgroup acknowledged the importance of these dune fields, especially when considering the stressors South Carolina beaches will likely continue to face in the next 20-30 years. As sea levels rise and coastal storms become more frequent, these dune fields could act as a buffer for coastal development, preventing damage from hazards, and provide the space for the dry sand beach to migrate. Having established that shore-parallel erosion control structures do not support beach preservation, the Workgroup discussed the possibility of excluding erosion control structures from this dune environment, as well as the defined critical areas. The Workgroup concluded that additional discussion is needed on the spatial extent of excluding erosion control structures.

Habitable Structures and Pools

In the Beachfront Management Act, the General Assembly found that, prior to 1988, "without adequate controls, development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect this system from this unwise development."²⁸

Current statute prohibits new habitable structures or pools from being constructed on the primary oceanfront sand dune or on active beach seaward of baseline. If a habitable structure is built seaward of the baseline via a Special Permit and becomes located on the active beach, the Department will monitor the beach for a minimum of one year. If the Department determines that the structure is permanently on active beach, then the structure must be removed or moved landward by the owner.²⁹ Similar to erosion control

²⁸ S.C. Code of Laws § 48-39-250(4)

²⁹ S.C. Code Ann. Regs. 30-14(I)

structures, regulatory standards regarding habitable structures or pools within the beaches critical area landward of the beach/dune system critical area are unclear.

The Workgroup reviewed habitable structure and pool scenarios in the beachfront critical areas landward of the baseline and setback line. They discussed new construction, repairs, and situations where structures become situated within the beaches critical area following a storm event. The Workgroup did not come to consensus on how to address these structures but indicated that additional internal DHEC OCRM discussion and consideration is needed regarding habitable structures and pools within the beaches critical area, landward of the beach/dune system.

Recommendation 6: Prohibit New Erosion Control Structures within the Beaches Critical Area

The Workgroup recommends that new erosion control structures should be prohibited within the beaches critical area landward of the setback line. The same provisions that apply to new erosion control structures within the beach/dune system (seaward of the State's jurisdictional setback line) should also apply to those within the beaches critical area.

Real Estate Disclosures & Education

South Carolina's beaches are dynamic places, changing over time with the tides and currents, and sometimes changing dramatically with coastal storms. Some areas along the coast are more vulnerable to change than others due to the nature of the coastline and the environment.

Real estate disclosures, which are required to inform buyers of potential hazards associated with structures and/or properties, are found under multiple titles within South Carolina law. The majority of the disclosure requirements are located under SC Code of Laws Section 27-50-10 et seq.

The State prescribes disclosures specific to the beachfront under SC Code of Laws Section 48-39-330. These disclosure requirements are designed to inform potential buyers to possible hazards associated with oceanfront property. This statute requires that sellers of beachfront property disclose whether the property may be affected by the beachfront jurisdictional lines (baseline and setback line) if any part of the property is located seaward

of the setback line. Sellers are also required to include the local erosion rate most recently made available by the Department and the seaward corners of all habitable structures.³⁰

Despite these disclosure requirements, beachfront property owners or those looking to purchase beachfront homes are often unaware of, or misunderstand the hazards associated with these properties.

The Workgroup discussed the limitations with the current real estate disclosures and expressed the need to increase public awareness of coastal hazards associated with beachfront properties and to make information about coastal hazards, including flooding and erosion, more readily available. The Department provided an overview on the types of data available, including erosion rates, erosion control structures, emergency orders, renourishment projects, and special permit projects. DHEC OCRM is currently developing a web-based outreach tool, which will feature these datasets and serve as a coastwide Beach Atlas.

The Workgroup discussed the development of more robust real estate disclosures, in combination with education and outreach, to increase public awareness of the hazards associated with beachfront property and the most vulnerable locations along the coast. Changes to real estate disclosures will involve additional and continued input and coordination from stakeholders, including the SC Realtors Association, Real Estate Commission, and attorneys.

Summary and Next Steps

The South Carolina Beach Preservation Stakeholder Workgroup efforts described herein resulted in six recommendations. In addition to these recommendations, there were several notable Workgroup findings. A summary of recommendations, notable findings, and next steps is provided below.

Recommendations

The South Carolina Beach Preservation Stakeholder Workgroup efforts resulted in the following formal recommendations as detailed in this report.

1. Define Beach Preservation
2. Establish a Beach Nourishment Technical Advisory Committee
3. Establish a Pilot Project Ad Hoc Technical Advisory Committee

³⁰ S.C. Code of Laws § 48-39-330

4. Enhance the Pilot Project Authorization Process
5. Modify the Pilot Project Statutory Language
6. Prohibit New Erosion Control Structures within the Beaches Critical Area

Notable Findings

Although the Workgroup did not make formal recommendations regarding the following points, there was agreement among members that the State should:

- Consider beach nourishment, inlet management, sand dune restoration (including sand fencing and native vegetation), and the conservation of undeveloped shorelines as appropriate beach preservation approaches. Shore-parallel erosion control structures do not support beach preservation.
- Seek opportunities for greater coordination between state and local governments including coordination on permitting requirements, as well as short- and long-range planning for beach preservation efforts.
- Pursue forward-thinking, comprehensive approaches to beach preservation and planning in light of sea level rise, specifically resilience and ecosystem-based approaches to create a more adaptable and resilient South Carolina coast.
- Increase public awareness of coastal hazards associated with beachfront properties and make information about coastal hazards, including flooding and erosion, more readily available.

The Workgroup discussed other pertinent topics and considered the following as issues of importance that needed additional dialogue and further engagement to address:

- The Workgroup discussed several other beach preservation approaches, including the landward movement and/or removal of structures wherever necessary or feasible, the maintenance of existing groins, and projects designed to increase the amount of sand or provide for the natural migration and dispersion of sand within the nearshore system. While there was not consensus, some Workgroup members thought these approaches should be considered by the Department for beach preservation under specific circumstances and should be evaluated on a project-by-project basis.
- There was general agreement from the Workgroup on the importance and need for a South Carolina Beach Preservation Fund; however, consensus was not reached on the specific activities that would be eligible for funding or applicant eligibility requirements.

Next Steps

The Workgroup evaluated the State's policy of beach preservation, examined topics including implementation approaches, pilot projects and authority within the beaches critical area, and worked toward consensus on many issues related to beach preservation. The resulting six recommendations, outlined in this report, will assist DHEC OCRM with improving internal processes, and identifies opportunities to provide clarity and guidance through potential changes in state law.

The Workgroup also highlighted actions where additional discussion and partner involvement is necessary to provide more effective beachfront management. These topics include eligibility criteria associated with the South Carolina Beach Preservation Fund, coordination related to differing beachfront permitting requirements between state and local authorities, and changes to real estate disclosures.

Acknowledgments

The Beach Preservation Stakeholder Workgroup process would not have been possible without the dedication of time and energy from the Workgroup members and DHEC staff. DHEC recognizes and appreciates the effort required to organize, attend, and document all the meetings.

DHEC Staff Contributors:

Elizabeth von Kolnitz, DHEC OCRM, Bureau Chief

Adam Bode, DHEC OCRM, Coastal Planner

Jessica Boynton, DHEC OCRM, Coastal Services Section Manager

Kristy Ellenberg, DHEC Office of Environmental Affairs, Director of Collaborative Partnerships and Strategic Initiatives

Liz Hartje, DHEC OCRM, Coastal Services Project Manager

Tara Maddock, DHEC OCRM, Program Coordinator II

Matt Slagel, DHEC OCRM, Beachfront Management Section Manager

Exhibit 36



SC Beach Preservation Stakeholder Workgroup

Meeting Summary

September 21, 2022

OVERVIEW

The SC Department of Health and Environmental Control's (DHEC) Office of Ocean and Coastal Resource Management (OCRM) convened the SC Beach Preservation Stakeholder Workgroup on Wednesday, September 21st at James Island Town Hall in Charleston, SC to discuss the topic of land management and further refine and define the Workgroup recommendations identified thus far in the process.

This workgroup brings together representatives of diverse stakeholder groups including residents of coastal communities, state and federal government agency representatives, academic professionals, conservation organizations, consulting engineers and policy experts with a commitment to actively participating in this process. Meetings scheduled in the coming months will present resources and information to promote further dialogue and solution-based discussions. The group was encouraged to maintain the perspective of the full SC coastline and to strive for consensus. DHEC OCRM staff will value all perspectives and take all discussions consideration in determining the agency's recommendations which will be outlined in a final report as the stakeholder process concludes.

There will be opportunities for broader stakeholder and members of the public to provide comment throughout the process and a webpage will be established to provide updates and seek additional feedback. The public participation process and opportunities to comment would extend into any subsequent process of drafting regulations related to the issues discussed by the workgroup.

WELCOME & INTRODUCTIONS

At 9:30 a.m., S.C. DHEC OCRM Chief Elizabeth von Kolnitz welcomed the Workgroup members and noted the importance of this process and the perspectives they bring.

Adam Bode, Coastal Planner for DHEC's OCRM and Kristy Ellenberg, Director of Collaborative Partnerships & Strategic Initiatives in DHEC's Office of Environmental Affairs introduced themselves and noted they would be serving as co-facilitators throughout the meeting.

The following Stakeholder Workgroup members were in attendance:

Bradley Craig, SC Office of Resilience
Emily Cedzo, Coastal Conservation League
Steven Traynum, Coastal Science & Engineering
Don Thomas, Peace Sotheby's International Realty
Amy Armstrong, South Carolina Environmental Law Project
Iris Hill, Town of Edisto Island
Aaron Pope, City of Folly Beach
Rob Young, Western Carolina University

A full list of stakeholder workgroup members is included as an appendix to this meeting summary. DHEC facilitators and staff will follow-up with those unable to attend to gather perspectives to be shared with the group.

Also in attendance were members of the DHEC's OCRM staff Jessica Boynton, Coastal Services Section Manager; and Matt Slagel, Beachfront Management Section Manager; and Liz Hartje, Project Manager.

LAND MANAGEMENT TECHNIQUES AND APPROACHES

Workgroup members we provided with the following examples of land management techniques and approaches for consideration and discussion:

- Real-estate Disclosure
- Education
- Better Building Practices
- Setbacks and/or Buffers (local & state)
- Property Buyouts & Land Acquisition

Workgroup members were asked to identify examples of other land management techniques and approaches that may be missing and consider whether each is proactive or reactive in nature as well as the temporal scale of each.

Property Buyouts & Land Acquisition

- Need to consider and discuss derelict structures on the beach.
- Consider looking at the enforcement of state special permits and the conditions of what is currently allowed. Specifically, reviewing the size of structures.
- This will become a larger issue and one that the state legislature will need to address to deal with the eventuality of having derelict houses on public beach. There are a lot of houses that may end up on the active beach in locations that don't have long term renourishment.

- There are examples where houses are falling over and/or into the water, the local municipality is willing to pay to remove it, but the town or city is being threatened with a lawsuit. Legislation is needed to enable the local municipality to remove these structures without the risk or threat of litigation.
- In unincorporated areas, the Homeowners Associations are suing property owners (and vice versa) while in the meantime, houses are on the beach and in the water. Safety issues, impacts surrounding property values.
- Need a solution on how to deal with derelict homes that are on the beach or under water that not only decreases liability but addresses the safety issues and impacts to surrounding property values.
 - Examples: Pritchards and Hunting Island
- With respect to funding the removal of derelict structures, this could be some that could be funded through the new Beach Preservation Fund.
- May want to consider some level of relief for the current homeowner if the structure is condemned and removed.
- Need to realize that in many instances, these are investment properties (not primary residences) and sometimes people make a bad investment. Could consider a little compensation but the state and/or municipality should not have to buy out properties at a high price, which would make it prohibitive. This put more onus on the property investor to take responsibility for their own investment.
- Funding should be allocated for the cost of removal, not for compensation.
- A previous bill included funding for the cost of removal so there may be legislative support.
- Still need to consider and discuss how to handle such structures on private communities (Harbor Island, for example) who may not be eligible for the Beach Preservation Fund.
- The state of North Carolina recently did an exhaustive search for models in other states for how houses were ordered off public beach by local or state government. North Carolina is dealing with the same issue of houses on the beach or in the water. The state's superintendent would like to order houses off the beach before they collapse. State was unable to find any models of where this has been done successfully. For example, in Surfside, Texas a case went to court to have a structure removed but it was unsuccessful. Largely, language is very general and there is no legislation with specific details about how this could work.

Real Estate Disclosure & Education

- Real estate disclosures and education go hand in hand. Stronger and more targeted language and warnings need to accompany disclosures. Realtors aren't experts on the hazards, but education and information are needed to be able to tell the investor what they need to investigate.

- A standard form from DHEC OCRM would be helpful. Could include information such as: property is on the beachfront, property may experience hazards such as erosion and storm damage, property is located on a public beach, current adopted erosion rate, and emergency permits authorized.
- Although some of this information is already shared (flood claims, flood insurance), it is only required for a mortgage.
- Draft disclosure legislation is currently being drafted as the current language is vague and allows for checking 'no representation'. Using South Carolina Association of Counties (SCAC) recommendations to include more information for coastal hazards, including
 - flood disclosures
 - erosion control structures
 - shoreline change and erosion rates
 - emergency orders
 - renourishment projects
 - construction authorized under special permit
 - septic

Conceptually, this could be a form with the information above and links to publicly available data for both the seller and prospective buyer.

- Broad agreement that making this information and data easily available is important otherwise disclosures will be difficult.
- Currently, national organizations are trying to produce parcel by parcel risk maps, i.e., flood risk, but this is often of mixed quality. Concerned that if the State doesn't proactively determine the information that will be made available, others will fill this void and the information may be less accurate.
- SCDHEC OCRM already has several mapping applications that allow the public end user to view and download data. The following were displayed during the meeting:
 - SC Beachfront Jurisdictional Lines Viewer ([LINK](#))
 - Baseline, Setback, shoreline change rates (i.e., long-term erosions rates)
 - SC Beach Renourishment Viewer ([LINK](#))
 - Provides an overview and detailed information for completed beach nourishment projects (by beach, year, and project)
 - SC Beach Erosion Research & Monitoring (B.E.R.M.) Explorer ([LINK](#))
 - Provides beachfront communities, researchers, and the general public access to topographic and bathymetric data for SC beaches. Volume tool can be used to estimate the volume of sand over multiple years.
- SC Office of Resilience is working with the [First Street Foundation](#) on GIS data and recently updated coastal modeling recently. Since counties keep and maintain their

own parcel level data and metadata isn't often standardized, access can be challenging.

Better Building Practices

- Establishing better building practices may be more important for flood zones. If structures are built in locations that may end up inundated by water, it may not ultimately matter how it's built.
- There have been improvements made in structural engineering as better building practices still won't save a structure from sea level rise, storm surge, or other threats.
- There may be an opportunity to take a closer look at smaller scale, for example Mobi-Mats rather than beach dune walkovers. These could be used for individual walkovers instead of building a structure all the way out to the active beach.
- In addition to structures (houses, pools, erosion control structures), may need to consider if regulatory changes are needed to deal with non-structure issues. These include septic tanks, which are currently tied to the mean high-water line.
 - North Carolina is currently crafting new regulations regarding septic tanks on the beach.
- On Edisto Beach, Hurricane Matthew impacted the first four blocks and included significant damage to septic tanks and the concrete pads under beachfront houses. The beach had to be closed due to public safety issues. Unfortunately, septic systems were often reconstructed in the same location, which is a concern for future storms.
- Septic regulations are not under the purview or authority of DHEC OCRM but regulated by the DHEC Bureau of Environmental Health Services (BEHS). Additional standards could be recommended for BEHS consideration.

LAND MANAGEMENT TECHNIQUES AND APPROACHES – FUNCTION OR LOCATION

Following the large group discussion summarized above, workgroup members worked within small groups to identify whether specific land management techniques or approaches seek to preserve the beach function, the beach location, or both. The following summarizes the input and information gathered during the large group report out:

Preserves the Function of the Beach

- Property Buyouts
- Land Acquisition
- Removal of Hazardous or Derelict Structures
- Setbacks and/or Buffers
- Closing Jurisdictional Gap (i.e., OCRM "Beaches Critical Area")

Balances the Function and Location of the Beach

- Beach Preservation Fund
- Real-estate Disclosures & Education
- Better Building Practices
- Septic System Regulation

Preserves the Location of the Beach

- Property Buyouts & Land Acquisition
- Setbacks and/or Buffers

GROUP DISCUSSION: PRIORITY RECOMMENDATIONS FOR LAND MANAGEMENT

Following the discussion to identify the techniques and approaches that preserve the location, function, or balance both, Workgroup members were asked to identify priority recommendations for land management and provide additional information relating to:

- How this technique or approach would be accomplished?
- Who is responsible or needs to be involved?
- Would this require a policy (statute, regulatory, both) change?

Real-estate Disclosures & Education

- Real estate disclosures and education go hand in hand. Need to increase public awareness. A brochure or pamphlet could be used to disseminate information with links to other data and information websites and clearinghouses online.
- The SC Realtors Association, Real Estate Commission, and attorneys need to be involved.
- Requiring real-estate disclosures would require a legislative change.

Setbacks and/or Buffers

- The State setback for septic tank systems needs to be reviewed. If the setback remains at the mean high water, septic tanks will continue to be an issue.
- The City of Folly Beach has adopted additional setbacks from the state Setback Line on the beachfront and have been successful in enforcing. For example, new construction has been prohibited within these areas.
- The Town of Edisto Island also regulates septic systems. Issues arise where DHEC permits an activity under current state statute/regulatory requirements, but the local government cannot according to local ordinances. These instances place the local government in a difficult position.
- Opportunity to modify state permitting process to allow local government review and feedback (indicate that it would need to comply with local ordinances) prior to DHEC review. Need to consider the order of reviews between local governments and state.

- Example - Process by which landfill project applications are reviewed by DHEC. Must meet state requirements and certify that local requirements are met as well.

Property Buyouts & Land Acquisition

- The State should take responsibility for the removal of houses and structures from the active beach as these impact the public trust resource
- Local governments should be given more flexibility and support to increase assessments, and taxes in order to manage their own resiliency at the local level. Currently, the State caps or limits the ability of local governments to raise and utilize additional funds.
- Beach preservation fund needs to be able (eligible) to fund property buyouts and structural removals.
- SC Parks Recreation and Tourism (SC PRT) may not be the appropriate entity to oversee and administer funds for property buyouts and hazardous structure removal. More appropriate for the SC Office of Resilience.

GROUP DISCUSSION: THE STATE'S ROLE IN THE BUILT ENVIRONMENT

Matt Slagel, DHEC OCRM's Beachfront Management Section Manager, provided background information on OCRM's direct permitting authority for beachfront permitting based on the state's jurisdictional lines (baseline, setback) and outlined broader coastal policies that apply in these areas. The state's definition of "beach" and "beach/dune system," as described in [SC SECTION 48-39-10](#) were provided as background information to guide the subsequent group discussion:

(H) "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.

(4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

Workgroup Discussion

- The current definition of "beaches" is inadequate and there is a lack of regulatory specifics to support the state's authority in "beach" areas that are landward of the jurisdictional lines.
 - **Recommendation:** DHEC OCRM should assert its regulatory authority in areas that meet the definition of beach/dune system but are currently landward of the setback line (i.e., "beaches critical area").
- Defining boundaries based on stabilized vegetation becomes problematic over the long-term as geomorphologic features change. With this in mind, considering jurisdiction between beachfront structure (house, pool) and the mean high-water line for erosion control structures may be an option.

- **Recommendation:** No new erosion control structures should be allowed within the beaches critical area.

GROUP DISCUSSION: REFINING WORKGROUP RECOMMENDATIONS AND DEFINITIONS

The meeting concluded with a brief overview of the draft workgroup recommendations and definitions, which are based on the feedback received thus far in the stakeholder workgroup process. Prior to the next workgroup meeting, members were asked to provide their input on the draft language for consideration (see below).

Recommendation – Beach Nourishment Definition

Current Statute Language for reference

SECTION 48-39-270. Definitions.

(4) Beach nourishment means the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide.

Recommendation Language for Consideration

Add or cross out language as desired. Circle all options from the list below that should be included.

The definition of Beach Nourishment should be expanded to include the benefits that these types of projects provide, including support for:

- Storm protection
- Habitat
- Tourism and economics
- Recreation opportunities
- Aesthetics

Recommendation – Beach Nourishment Project Specifications

Add or cross out language as desired. Circle all options from the list below that should be included.

Establish a technical advisory committee to further investigate beach nourishment project specifications, including:

- Sand quality
- Timing windows
- Other project specifications
- Placement and borrow area refinements and flexibility
- Dredge type
- Other: _____

Recommendation – Beach Preservation Fund
Recommendation Language for Consideration

Add or cross out language as desired. Circle all options from the list below that should be included.

- Retain and support current Fund which is called "South Carolina Beach Restoration and Improvement Trust Fund" and is described in SECTION 48-40.
- Establish a dedicated funding source to adequately and reliably fund the "South Carolina Beach Preservation Fund" and expand the purpose, appropriations, and designation of funds to include additional beach management options.
- Identify funding source for current or new fund.
- Recommend that Parks, Recreation & Tourism Department codify formal criteria or requirements for state dollars. Minimal requirements should include:
 - Approved LCBMP
 - With approved LCBMP, private beach communities could apply for a certain percentage or tiered level of funding.
 - Approved comprehensive plan with a section on beachfront management
 - Full and Complete Public access
 - No requirement based on access
 - Other _____

Recommendation – Expand Use and Flexibility of Local Accommodation Taxes

Currently, local governments are allowed to retain ____% of the 3% of local accommodation taxes for the purposes of tourism-related projects and programs.

Local governments can charge up to an additional 3% in Accommodations Tax. The proceeds must be used for tourism-related projects and programs as defined in [SC Code Section 6-1-530](#)

SECTION 6-1-530. Use of revenue from local accommodations tax.

(A) The revenue generated by the local accommodations tax must be used exclusively for the following purposes:

- (1) tourism-related buildings including, but not limited to, civic centers, coliseums, and aquariums;
- (2) tourism-related cultural, recreational, or historic facilities;
- (3) beach access, renourishment, or other tourism-related lands and water access;
- (4) highways, roads, streets, and bridges providing access to tourist destinations;
- (5) advertisements and promotions related to tourism development; or
- (6) water and sewer infrastructure to serve tourism-related demand.

Recommendation Language for Consideration

Add or cross out language as desired. Circle all options from the list below that should be included.

To increase the percentage of local accommodation taxes that local governments retain from ____% to ____%. To increase the flexibility to use these local funds as needed for match for state funding for beach preservation/renourishment, rather than _____.

Recommendation – Beach Preservation Definition

Current Statute Language for reference

SECTION 48-39-280. Beach preservation policy established; notice requirements; appeals procedures.

- (A) A policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. The department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone.

Definition Language for Consideration

Add or cross out language as desired. Circle all options from the list below that should be included.

Beach Preservation is defined as maintaining the functionality and benefits of the natural beaches and beach/dune system to support:

- Storm protection
- Habitat
- Tourism and economics
- Recreation opportunities
- Aesthetics

Recommendation – Beach Preservation Policy Statement

Current Statute Language for reference

SECTION 48-39-280. Beach preservation policy established; notice requirements; appeals procedures.

- (B) A policy of beach preservation is established. The department must implement this policy and utilize the best available scientific and historical data in the implementation. * The department must establish a baseline that parallels the shoreline for each standard erosion zone and each inlet erosion zone.

Implementation Language for Consideration

Add or cross out language as desired. Circle all options from the list below that should be included.

Beach preservation will be implemented using the following techniques:

- Beach nourishment
- Inlet management
- Sand dune restoration
- Sand dune stabilization using sand fencing and native vegetation
- Conservation of undeveloped shorelines
- Landward movement and/or removal of habitable structures wherever necessary or feasible

*Suggested language would be added here

Recommendation - Additional coordination and planning between state, county, and local entities

Language for Consideration

There are several plans that state, county, and local entities develop and maintain, including comprehensive plans, local comprehensive beach management plans, and resilience plans. Increased coordination and syncing of these various plans would help to formalize public engagement, reduce duplication of effort, and streamline timing.

If the South Carolina Beach Preservation Fund is created and fully funded, there will need to be additional coordination between state, county, and local entities. A portion of this Fund could be designated to support these coordination efforts.

Note: Statutory change will be required for changes to Local Comprehensive Beach Management Plans (LCBMPs).

Appendix A – SC Beach Preservation Stakeholder Workgroup Member List

Ross Appel
Attorney & Charleston City Council Member

Amy Armstrong
South Carolina Environmental Law Project

Keith Bowers
Biohabitats, Inc.

Jenny Brennan
Southern Environmental Law Center

Blanche Brown
DeBordieu Colony Community Association, Inc.

Alex Butler
SC Office of Resilience

Emily Cedzo
Coastal Conservation League

Melissa Chaplin
U.S. Fish & Wildlife Service

Nicole Elko
SC Beach Advocates

Paul Gayes
Coastal Carolina University

Justin Hancock
South Carolina Department of Parks, Recreation & Tourism

Iris Hill
Town of Edisto Beach

Lindsey Jackson
SC Realtor's Association

Michelle Pate
SC Department of Natural Resources

Aaron Pope
City of Folly Beach

Queen Quet (or designee)
Gullah/Geechee Nation

Jack Smith
Attorney

Don Thomas
Peace Sotheby's International Realty

Steven Traynum
Coastal Science & Engineering

Rod Tyler
Industry - New technology/Living shoreline products/Property Owner on Marsh in Murrels Inlet

Robert Young
Western Carolina University

Exhibit 37



SC Beach Preservation Stakeholder Workgroup Beach Preservation Meeting

Date/Time: October 25, 2022 9:30am – 2:30pm

Meeting Location: James Island Town Hall (1122 Dills Bluff Road, Charleston, SC 29412)

Agenda

9:15 am	Arrival
9:30 am	Welcome and Opening Remarks
9:45 am	South Carolina Beaches Critical Area
10:45 am	BREAK
11:00 am	New Technology Discussion
12:30 pm	LUNCH
1:00 pm	Refining Workgroup Recommendations & Definitions
2:15 pm	Wrap-up – Timeline, Next Steps, and Final Report
2:30 pm	Adjourn

Beach Preservation Stakeholder Workgroup - Meeting #5 Process Flow

9:30 Welcome, Timeline

9:40 South Carolina Beaches Critical Area

- Elizabeth prompts discussion. Continuation of discussion from meeting #4 about defining the state's regulatory authority and role in the beaches critical area.
 - Slides
- Group Discussion - Beaches Critical Area—State's Role and Authority in Built Environment and Critical Area in forwarding a policy of beach preservation
 - Location (*where*)
 - "Active Beach" -- "Dry Sand Beach" -- "Beach/Dune System"
 - Use printed maps to guide discussion of location.
 - Scope (*what*)
 - Identify specific activities within the Beaches Critical Area (ie, erosion control structures)
 - Project Standards (*how*)

Important

- Adam/Kristy remind the workgroup of the guiding principle to focus on issue at a state / coastwide scale. We're not focusing on one specific example (HHI, S Garden City, etc)
- Keep in Mind - We would need to promulgate regulation if the WG wants OCRM to exert authority in the beaches critical area. Currently no specifics in the policy. There would need to be a recommendation specific to this to move forward, ie "WG recommends that OCRM promulgates regulation to x,y,z..."
- If there is no consensus, we can note this. Need to be careful walking through this topic to avoid discussing current litigation and not "influencing" workgroup toward a recommendation.

10:45 Break

11:00 New Technology Discussion

- Current Process – Optimal Process
 - Public Notice
 - Review
 - Authorization
 - Appeal
- Project Specifics (Current vs Optimal)
 - Sponsor (state)

- Permit (currently exempt)
- Bonding
- Project Standards
- Success Criteria (bring up specific law “if successful in addressing an erosional issue” what does this mean and implications)
- Discuss TAC recommendation to form an Ad Hoc Science Advisory Panel

12:30 Lunch

1:00 Workgroup Recommendations and Definitions

- Quick Update
 - Thank for feedback, process to reconcile comments, next steps
 - Printed/digital versions to be distributed
- Discuss Outstanding Questions
 - Beach Nourishment Project Specifications
 - Long-term monitoring (including potential downdrift impacts)
 - Impacts to flora/fauna (beach, benthic, threatened & endangered species)
 - Beach Preservation Fund
 - Criteria
 - Full and Complete Public Access
 - Requirement for local oceanfront residents to contribute a percentage of match, in addition to and outside of accommodations taxes
 - Approved Project Permits (i.e., shovel-ready projects)
 - Local Accommodations Tax Recommendation
 - Remind about DHEC Reg / Statute, Other Agency Reg / Statute activity. This recommendation could be for another group to consider. Who would be responsible for analyzing).
- New Recommendations (potential from morning discussion)

2:30 Wrap-up

Exhibit 38

bSC Beach Preservation Stakeholder Workgroup Recommendations Analysis

DHEC Policy

- Statutes
 - Definition of Beach Preservation
 - Real Estate Disclosure
 - Establish Beach Preservation Fund
 - DHEC, DNR, PRT (dependent on funding mechanism)
 - Accommodations Tax Changes
 - Jurisdictional Lines
 - Local Comprehensive Beach Management Plan Requirement for Comprehensive Plan
 - Tiered Level of Funding Responsibility
 - Exemption for Local Permit for Sand Fencing
 - Allowable so long as consistent with LCBMP
 - 10yr permit
- Regulations
 - Definition of Beach Nourishment
 - Flexibility with Permit Modifications
 - Need public notice and opportunity to challenge
 - General Permit for Sand Fencing
 - Remove requirement for newspaper posting and 15 public notice period
 - Linkage with LCBMP
 - Timing Windows for Beach Nourishment Based on Species/Gear Type
 - OCRM Needs Regulations to Support its Jurisdiction in "beaches" critical area (already in Statute)
 - SOP for Nourishment Project QA/QC
 - Sediment Quality
 - Include enforcement monitoring when dredge pulls up incompatible sand
 - Define beach compatible
- Both
 - Definition of Beach Preservation
 - Definition of Beach Nourishment

Exhibit 39



SC Beach Preservation Stakeholder Workgroup Meeting Summary October 25, 2022

OVERVIEW

The SC Department of Health and Environmental Control's (DHEC) Office of Ocean and Coastal Resource Management (OCRM) convened the SC Beach Preservation Stakeholder Workgroup on Tuesday, October 25th at James Island Town Hall in Charleston, SC to discuss the state's regulatory authority and role in the beaches critical area, new technology, and revisit the definitions and recommendations that the Workgroup has created thus far in the process.

This workgroup brings together representatives of diverse stakeholder groups including residents of coastal communities, state and federal government agency representatives, academic professionals, conservation organizations, consulting engineers and policy experts with a commitment to actively participating in this process. Meetings scheduled in the coming months will present resources and information to promote further dialogue and solution-based discussions. The group is encouraged to maintain the perspective of the full SC coastline and to strive for consensus. DHEC OCRM staff will value all perspectives and take all discussions consideration in determining the agency's recommendations which will be outlined in a final report as the stakeholder process concludes.

There will be opportunities for broader stakeholder and members of the public to provide comment throughout the process and a webpage will be established to provide updates and seek additional feedback. The public participation process and opportunities to comment would extend into any subsequent process of drafting regulations related to the issues discussed by the workgroup.

WELCOME & INTRODUCTIONS

At 9:30 a.m., S.C. DHEC OCRM Chief Elizabeth von Kolnitz welcomed the Workgroup members and noted the importance of this process and the perspectives they bring.

Adam Bode, Coastal Planner for DHEC's OCRM and Kristy Ellenberg, Director of Collaborative Partnerships & Strategic Initiatives in DHEC's Office of Environmental Affairs

introduced themselves and noted they would be serving as co-facilitators throughout the meeting.

The following Stakeholder Workgroup members were in attendance:

Alex Butler, SC Office of Resilience
Emily Cedzo, Coastal Conservation League
Steven Traynum, Coastal Science & Engineering
Don Thomas, Peace Sotheby's International Realty
Amy Armstrong, South Carolina Environmental Law Project
Blanche Brown, DeBordieu Colony Community Association, Inc.
Nicole Elko, SC Beach Advocates

A full list of stakeholder workgroup members is included as an appendix to this meeting summary. DHEC facilitators and staff will follow-up with those unable to attend to gather perspectives to be shared with the group.

Also in attendance were members of the DHEC's OCRM staff Jessica Boynton, Coastal Services Section Manager; and Matt Slagel, Beachfront Management Section Manager; and Liz Hartje, Project Manager.

SOUTH CAROLINA BEACHES CRITICAL AREA

Prior to a facilitated group discussion on defining the state's regulatory authority and role in the beaches critical area, Elizabeth von Kolnitz provided summary level information on the following (see meeting slides for more information):

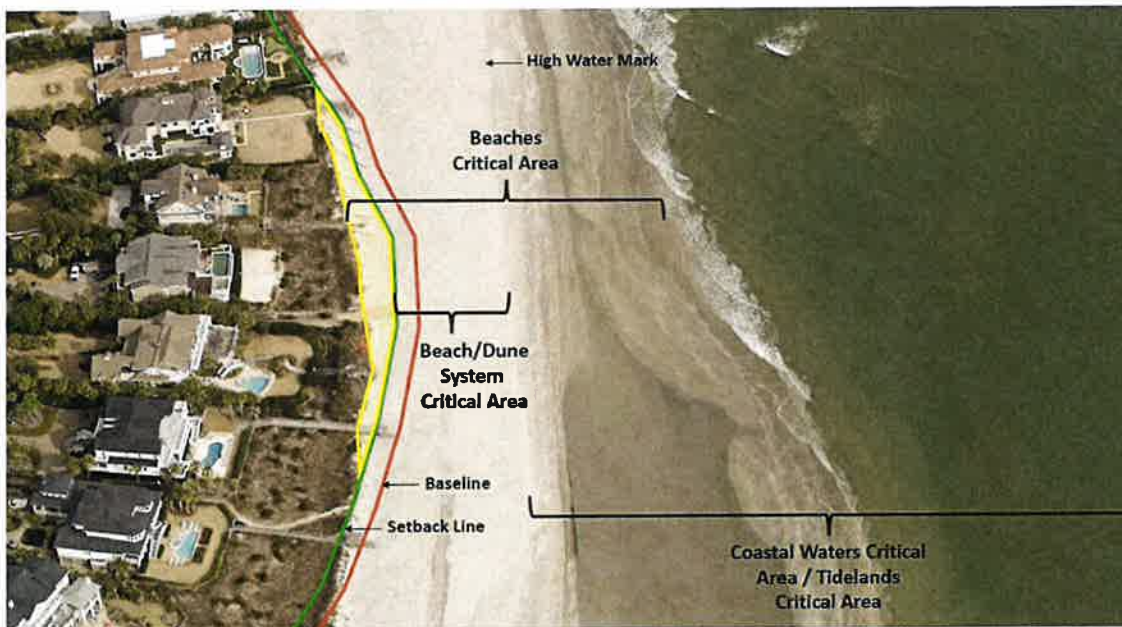
- OCRM Beachfront Critical Areas
 - Coastal Waters/Tidelands
 - Beach/Dune System
 - Beaches
- Statute
 - Section 48-39-10 Definitions
 - Tidelands
 - Coastal Waters
 - Beaches
 - Beach/Dune System
 - Section 48-39-80 Development of Coastal Management Program
 - The department shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the department shall:
 - (A) Provide a regulatory system which the department shall use in providing for the orderly and beneficial use of the critical areas.

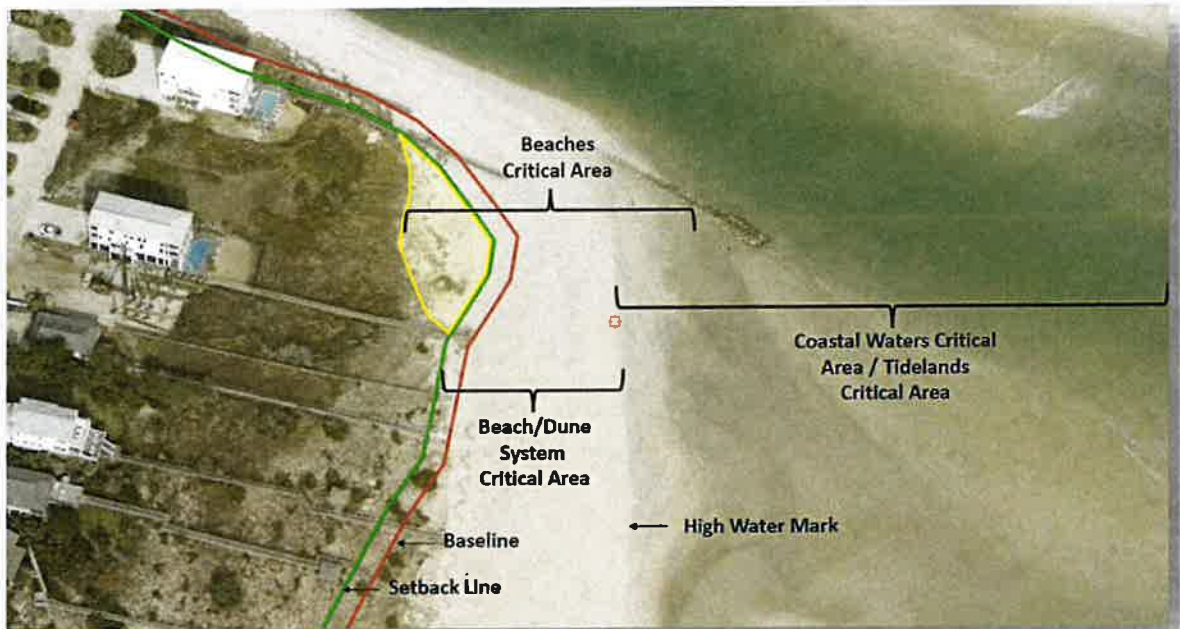
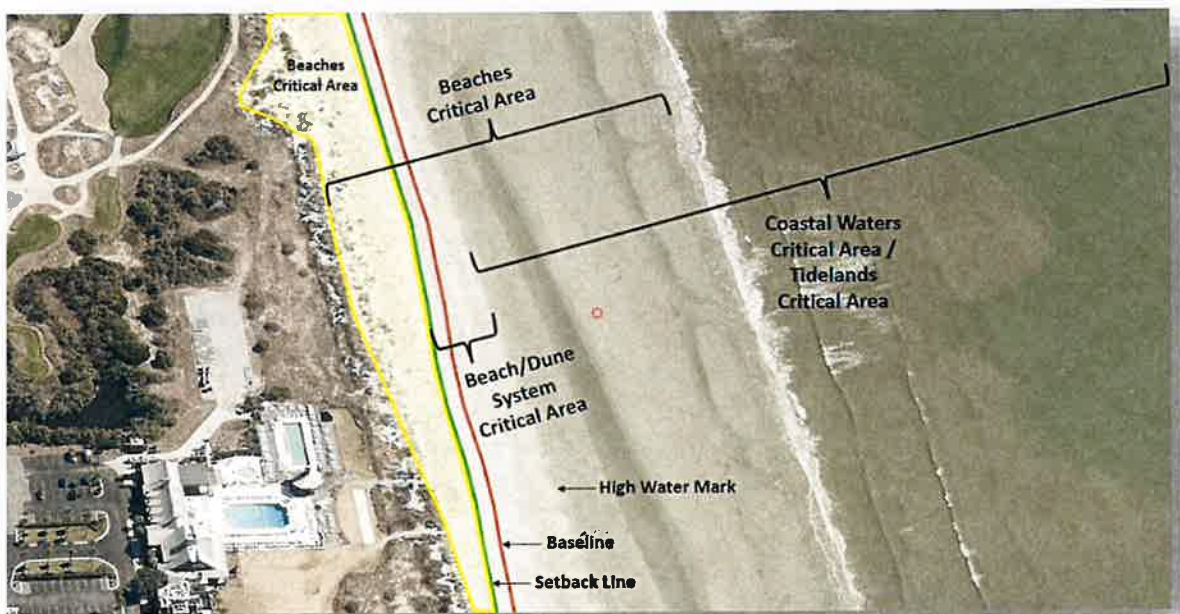
- Regulations Related to Beachfront Critical Area(s)
 - R.30-10 Critical Area Boundaries
 - B. Beaches and Beach/Dune System: The Department has permitting authority over beaches and the beach/dune system. In determining the boundaries of this critical area, the Department will be guided by Section 48-39-270, Section 48-39-280 and Section 48-39-360*.

**48-39-270 references Definitions. 48-39-280 references the policy of beach preservation and the setting of the baseline and setback line. 48-39-360 references the inland limit from an inlet for jurisdictional lines.*

- R.30-13 Specific Project Standards for Beaches and the Beach/Dune System
 - Language in this section addresses habitable structures, pools, erosion control structures, and other activities.
 - Only refers to areas seaward of the setback line (the beach/dune system critical area).
 - No specific indications for 'Beaches' Critical Area.

Workgroup members were presented with several maps (below) depicting examples where the Beaches Critical Area is landward of the Beach/Dune System Critical Area.





Members were asked to consider the following as it relates to the state's authority in advancing beach preservation within these areas:

- Location
- Specific Activities
- Project Standards

The following summarizes the input and information gathered during the large group discussion:

- In reference to the statute, there is already a provision for requiring a permit for activities in all critical areas (i.e., docks, walkovers) so if the area is "beaches" critical area, a permit should be required. The statute already gives Department the authority to regulate the beaches critical area even if the regulations are unclear.
- Currently, there are no specific details about the rules and/or project standards for critical area landward of the setback. Need to start with what specific activities need to be regulated in this area.
- Concerned about having a single rule that applies everywhere along the coast given dynamic and varied nature of the coast.
 - The current jurisdictional lines (baseline, setback) differ along the whole coast.
- OCRM should be able to assert jurisdiction in beaches critical area, but detail and specificity is needed in the regulation to support their statutory authority.
- The current definition of beach/dune system is arbitrary and in many places, it does not capture the entire beach/dune system as there are dunes landward of the setback line.
- One option would be to delineate beach/dune system based on topography.
- Another option would be to delineate so that the backside of primary oceanfront dune would be the end of the beach/dune system.
- Determine if changing the project standards to apply to the most landward of either the beach/dune system or the beaches critical area line would be effective.
- How does beach renourishment come into play or effect these scenarios?
 - The baseline and setback line are established through the jurisdictional line process and review every 7-10 years. From a renourishment standpoint, it would not affect the baseline as it cannot move further seaward. Renourishment could move the wet/dry line further seaward.
 - Depending on the renourishment project scope, the beaches critical area could move seaward. With respect to beach renourishment and vegetation growing over time, if communities renourished and created or reestablished a dune that then became vegetated, this could move the beaches critical area seaward.

- Agreement that OCRM should be involved in the area landward of the setback line. The same activities that are currently regulated on the beachfront should be in the beach/dune system (i.e., beaches critical area).
- Another option would be to allow local communities to establish zones on their own. In some instances (Pawleys Island, for example), local municipalities may be more restrictive than the current setback line.
 - Concern that this then puts pressure on the local governments who often end up in court because of these more restrictive lines and ordinances.
- These recommendations for beaches will not impact most properties but would solve important issues at the minority of areas.
 - **Recommendation** - Change definition of beach/dune system or include "beaches critical area" in the existing project standards.
- Still need more defined guidance on timeframes (pools, nourishment and revegetation, etc.)
- Suggest requiring communities to have a clearly identified and defined renourishment program or beach management program. Communities that set aside funds for renourishment demonstrates that a renourishment project is not just a one-off.
- Communities are advised that it often takes two years for a vegetated dune to look natural or become more established following a renourishment project.
- As it relates to storm impacts, OCRM could continue to determine whether a structure (house, pool, erosion control structure) has been damaged beyond repair (DBR). If a structure is not damaged beyond repair, a property owner would continue to be allowed to make repairs. If a structure is deemed damaged beyond repair, it would need to be removed and could not be rebuilt within the beaches critical area.
- Suggest considering 18 months as the period to evaluate a project, both when there has been negative (storm damage) or positive (dune restoration) impacts.
- Suggest considering 3 years as the period to evaluate whether a pool could be rebuilt in the beaches critical area.
- Agreement that erosion control structures should also be prohibited in the beaches critical area. Since there is clear prohibition seaward of setback line, this should also apply to beaches critical area.

NEW TECHNOLOGY

Elizabeth von Kolnitz introduced the topic and provided an overview of current statutes (below) regarding pilot projects.

SECTION 48-39-130(D)(2)

It shall not be necessary to apply for a permit for the following activities:

(2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, [replenishment] and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

SECTION 48-39-320(C)

Notwithstanding any other provision of law contained in this chapter, the board, or the Office of Ocean and Coastal Resource Management, may allow the use in a pilot project of any technology, methodology, or structure, whether or not referenced in this chapter, if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area. If success is demonstrated, the board, or the Office of Ocean and Coastal Resource Management, may allow the continued use of the technology, methodology, or structure used in the pilot project location and additional locations.

Workgroup members were led through a facilitated discussion focused on the process and project specifications currently used to evaluate new technology. The following summarizes the input and information gathered during the large group report out:

PROCESS

Submittal of Study Proposal

- How it's currently handled
 - Internal Review
- How it should be handled
 - Form Ad Hoc Committee
 - 5-7 members
 - Academia, resource agencies (USFWS, DNR), technical experts
 - 3-year term with renewal
 - Appointed via recommendations
 - Evaluate the study proposal, written recommendations with input on success criteria, evaluate the findings of the study
 - Proposal should include - purpose, hypothesis, methodology, criteria, reasonable level of success, defined area and potential impact area(s), timeframe, what happens when study ends

Public Notice

- How it's currently handled
 - No Public Notice
- How it should be handled
 - Placing a structure or altering shoreline should trigger public notice
 - Provide opportunity to comment
 - Notify adjacent property owners

Resource Agency Coordination

- How it's currently handled
 - Discretionary
- How it should be handled
 - Include Resource Agency(ies) to participate and provide input as part of Ad Hoc Committee

Authorization

- How it's currently handled
 - OCRM Written Acknowledgement
- How it should be handled
 - Align authorization with permitting process
 - Authorization should consider and factor in public comments and guidance from Ad Hoc Committee
 - OCRM Written Acknowledgement "May Allow"

Appeal

- How it's currently handled
 - RFR to DHEC Board
- How it should be handled
 - Need to better understand the legislative intent of Board reference in 48-39-320(C)
 - At a minimum, maintain the current process (Agency decision, contested case, RFR to DHEC Board)

PROJECT SPECIFICATIONS

Sponsor

- How it's currently handled – State Agency or University
- How it should be handled
 - Unbiased institution should be involved
 - Consider expanding to include private community / company

Study Design Specifications

- How it's currently handled - Undefined
- How it should be handled
 - Although these are largely dependent on the type of study, timeline (length/duration) and other high-level details should be required.
 - Action – These specifications need to be further discussed to identify common, required elements.

Bonding

- How it's currently handled – Required if considered a Pilot Project under 48-39-320(C); Cost of removal
- How it should be handled
 - Require for removal and restoration

Project Standards

- How it's currently handled – No material harm to flora, fauna, physical or aesthetic resources; Reasonably anticipated that the use will be successful in addressing an erosional issue
- How it should be handled
 - Standards should be reviewed by Ad Hoc Committee
 - Criteria for monitoring
 - Control site and comparisons analysis
 - Need to identify general standards in addition to what is reviewed currently
 - Ensure no adverse impacts and non-invasive species

Success Criteria

- How it's currently handled – Undefined
- How it should be handled
 - Need criteria for monitoring
 - Compare to existing methods (nourishment, for example)
 - Ensure that impacts do not occur to beach dune and critical area

Reporting / Determination of Meeting Success Criteria

- How it's currently handled – OCRM; Resource Agency Input
- How it should be handled
 - Report(s) and determination of meeting success criteria should be sent to OCRM and the Ad Hoc Committee
 - Should address how the study/project addressed erosion or accomplished beach preservation

Public Comment on Final Results and Department Determination

- How it's currently handled – Undefined
- How it should be handled
 - Publish on the OCRM website and gather public comment at the end of the study timeframe

GROUP DISCUSSION: REFINING WORKGROUP RECOMMENDATIONS AND DEFINITIONS

Prior to the meeting, workgroup members provided input on the draft workgroup recommendations and definitions. The meeting concluded with a brief discussion of several revised workgroup recommendations and definitions that required additional discussion to clarify.

Recommendation – Establish a Beach Nourishment Technical Advisory Committee

Establish a technical advisory committee to further investigate beach nourishment project specifications, including:

- Sand quality
- Timing windows
- Placement and borrow area refinements and flexibility
- Dredge type
- ***Long-term monitoring (including potential downdrift impacts)***
- ***Impacts to flora/fauna (beach, benthic, threatened & endangered species)***

Based on feedback from the workgroup, the last two bullets (in bold italics) were added. There was no objection from workgroup members on these two additions.

Members would like to ensure that the Beach Nourishment Technical Advisory Committee was separate from the Ad Hoc Committee (as noted in New Technology Section above)

Recommendation – Establish A “South Carolina Beach Preservation Fund”

Establish a dedicated funding source to adequately and reliably fund the “South Carolina Beach Preservation Fund” and expand the purpose, appropriations, and designation of funds to include additional beach management options.

Recommend that Parks, Recreation & Tourism Department codify formal criteria or requirements for state nourishment grants. Minimal requirements should include:

- Approved LCBMP
- Approved comprehensive plan with a section on beachfront management and resilience
- ***Full and Complete Public Access***

- ***Requirement for local oceanfront residents contribute a percentage of match, in addition and outside of accommodations taxes***
- ***Approved Project Permits (i.e., shovel-ready project)***

Workgroup members were asked to provide any additional input on the minimum requirement of "Full and Complete Public Access" as well as the last two bullets (in bold italics), which were added based on feedback received prior to the meeting. The following captures the feedback received:

- Minimum requirements should be:
 - Approved LCBMP
 - Approved comprehensive plan with a section on beachfront management and resilience
 - Full and Complete Public Access
- The last two items (below) could serve as additional review criteria to prioritize and/or incentivize participation.
- Approved Project Permits (i.e., shovel-ready projects)
 - Although this requirement may be difficult for some communities as it relates to long term or future budgeting, the project should be well into the planning and permit application process.
- Oceanfront resident contributing a match.
 - If the oceanfront residents contributed, community could be eligible to receive either a higher percentage of the state match or they could receive additional prioritization points

Recommendation – Expand Use and Flexibility of Local Accommodation Taxes

Based on the varied allocation and utilization of local accommodations taxes across the state, coastal counties, and local communities, the workgroup agreed that this recommendation would be better suited for further investigation with the Department of Revenue and as such, should be removed as a recommendation.

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Attorney & Charleston City Council Member

Amy Armstrong
South Carolina Environmental Law Project

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Biohabitats, Inc.

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Paul Gayes
Coastal Carolina University

Justin Hancock
South Carolina Department of Parks, Recreation & Tourism

Iris Hill
Town of Edisto Beach

Lindsey Jackson
SC Realtor's Association

Michelle Pate
SC Department of Natural Resources

Aaron Pope
City of Folly Beach

Queen Quet (or designee)
Gullah/Geechee Nation

Jack Smith
Attorney

Don Thomas
Peace Sotheby's International Realty

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Coastal Science & Engineering

Rod Tyler
Industry - New technology/Living shoreline products/Property Owner on Marsh in Murrels Inlet

Robert Young
Western Carolina University

Exhibit 40



SC Beach Preservation Stakeholder Workgroup Meeting Summary November 17, 2022

OVERVIEW

The SC Department of Health and Environmental Control's (DHEC) Office of Ocean and Coastal Resource Management (OCRM) convened the SC Beach Preservation Stakeholder Workgroup on Thursday, November 17th via Microsoft Teams to further discuss the state's regulatory authority and role in the beaches critical area and define success criteria and other pilot project specifications.

This workgroup brings together representatives of diverse stakeholder groups including residents of coastal communities, state and federal government agency representatives, academic professionals, conservation organizations, consulting engineers and policy experts with a commitment to actively participating in this process. Meetings scheduled in the coming months will present resources and information to promote further dialogue and solution-based discussions. The group is encouraged to maintain the perspective of the full SC coastline and to strive for consensus. DHEC OCRM staff will value all perspectives and take all discussions consideration in determining the agency's recommendations which will be outlined in a final report as the stakeholder process concludes.

There will be opportunities for broader stakeholder and members of the public to provide comment throughout the process and a webpage will be established to provide updates and seek additional feedback. The public participation process and opportunities to comment would extend into any subsequent process of drafting regulations related to the issues discussed by the workgroup.

WELCOME & INTRODUCTIONS

At 9:00 a.m., S.C. DHEC OCRM Chief Elizabeth von Kolnitz welcomed the Workgroup members and noted the importance of this process and the perspectives they bring.

Adam Bode, Coastal Planner for DHEC's OCRM and Kristy Ellenberg, Director of Collaborative Partnerships & Strategic Initiatives in DHEC's Office of Environmental Affairs introduced themselves and noted they would be serving as co-facilitators throughout the meeting.

The following Stakeholder Workgroup members were in attendance:

Alex Butler, SC Office of Resilience
Emily Cedzo, Coastal Conservation League
Steven Traynum, Coastal Science & Engineering
Rob Young, Western Carolina University
Keith Bowers, Biohabitats
Rod Tyler, Green Horizons Environmental
Amy Armstrong, South Carolina Environmental Law Project
Blanche Brown, DeBordieu Colony Community Association, Inc.
Nicole Elko, SC Beach Advocates
Iris Hill, Town of Edisto Beach
Tiarra Pitts, South Carolina Realtors Association
Jenny Brennan, Southern Environmental Law Center

A full list of stakeholder workgroup members is included as an appendix to this meeting summary. DHEC facilitators and staff will follow-up with those unable to attend to gather perspectives to be shared with the group.

Also in attendance were members of the DHEC's OCRM staff Jessica Boynton, Coastal Services Section Manager; and Matt Slagel, Beachfront Management Section Manager; and Liz Hartje, Project Manager.

PILOT PROJECTS

Elizabeth von Kolnitz reintroduced the topic of pilot projects, specifically highlighting the statutory language that relates to addressing an erosional issue and whether the project is successful.

[SECTION 48-39-320\(C\)](#)

Notwithstanding any other provision of law contained in this chapter, the board, or the Office of Ocean and Coastal Resource Management, may allow the use in a pilot project of any technology, methodology, or structure, whether or not referenced in this chapter, if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area. If success is demonstrated, the board, or the Office of Ocean and Coastal Resource Management, may allow the continued use of the technology, methodology, or structure used in the pilot project location and additional locations.

A summary of input gathered during the previous meeting was provided to the Workgroup to highlight major takeaways from the focused discussion on the process and project specifications currently used to evaluate pilot projects.

Pilot Project Process

Process	Current	Workgroup
Submittal of Study Proposal	Internal Review	Internal Review; Ad Hoc Technical Committee Review
Public Notice	No Public Notice	Provide opportunity to comment; Notify adjacent property owners
Resource Agency Coordination	Discretionary	Resource Agency participation in Ad Hoc Technical Committee
Authorization	OCRM Written Acknowledgement	Align Authorization with Permitting Process
Appeal	RFR to DHEC Board	At a minimum maintain current process

Pilot Project Specifics

Specifics	Current	Workgroup
Sponsor	State Agency or University	Unbiased Institution
Study Design Specifics	Undefined	Timeline and other high-level details should be required
Bonding	Required if considered a Pilot Project under 48-39-320(C); Cost of removal	Require for removal and restoration
Project Standards	No material harm to flora, fauna, physical or aesthetic resources; Reasonably anticipated that the use will be successful in addressing an erosional issue	Reviewed by Ad Hoc Committee. Criteria for monitoring. Control site and comparisons analysis. No adverse impacts and non-invasive species
Success Criteria	Undefined	Demonstrate how study/project addresses an erosional issue and how success will be determined.
Reporting / Determination of Meeting Success Criteria	OCRM; resource agency input	Report(s) and determination of meeting success criteria should be sent to OCRM and the Ad Hoc Committee
Public Comment on Final Results and Department Determinations	Undefined	OCRM website; gather public comment at end of study timeframe

As it relates to addressing an erosional issue in a beach or dune area, Workgroup members were asked to consider the following questions:

- What is the erosional issue being addressed and how is the issue defined?
- How do we determine when and if a pilot project has been successful?
- What measures determine if a project is successful in addressing an erosional issue and how are success criteria established?

The following summarizes the input and information gathered during the discussion:

- Need to better understand the intent and implications of the statutory language "notwithstanding any other provision."
- In addition to notwithstanding any other provision, how far could a potential pilot project go in violating the law (i.e., existing regulations)? Could a pilot project propose a new seawall that is similar to a rock revetment even though new seawalls are prohibited? The language doesn't specifically say new technology, just any technology.
- How do we evaluate if it addresses the erosional issue? What if the technology is causing more erosion in one place but preventing erosion where it is sited?
- One possible solution would be to remove, modify, or at a minimum clarify the statutory language. As it stands now, it creates a giant hole in how we manage the coast as erosion is dependent on the reference point. Whole passage needs clarification.
- Pilot projects could serve as an opportunity to investigate new technologies but that's not what the current statute says.
- As it relates to addressing an erosional issue, we need to be clear that we are talking about the dry sand beach, not the property behind the dry sand beach.
- Although not comprehensive, the pilot project proposals should include:
 - Review to evaluate project(s) against existing or similar technology
 - Purpose, hypothesis, methodology, target goals, reasonable level of success, and timeframe
 - Provide sufficient proof of concept, supporting data and/or research information
 - Control sites for comparison
 - Plan for monitoring locations adjacent to and neighboring the technology being deployed
 - Consideration for the scale of potential impacts
 - Plan for local government coordination
- Need to discuss what happens if a pilot project proves to be ineffective and the applicants wants or needs to add a traditional option (sandbags, for example) for stabilization. If there is evidence that the system isn't working, it needs to be removed.

- "Products' or other physical infrastructure need to be tested in a controlled environment before being deployed in an emergency type setting.
- A significant amount of time, effort and resources are required to verify if something works. Control sites are necessary as a means of comparison and monitoring area adjacent to the location where the technology is deployed are needed. Also need to monitor the beach in front of the structure or location where it is located.
- The review and approval process should be rigorous and thorough. It shouldn't be a low bar for experimenting along and with our coast.

Workgroup Recommendation – Establish Ad Hoc Technical Advisory Committee

The Workgroup recommends establishing an Ad Hoc Technical Advisory Committee to evaluate pilot project study proposals, provide written comments and recommendations on project standards and success criteria, and evaluate the findings of such studies. Appointed via recommendations, this 7-member committee would be comprised of unbiased technical and scientific experts from academia, resource agencies (USFWS, SCDNR) and other coastal engineers.

Workgroup Recommendation – Modify Pilot Project Statutory Language

The Workgroup recommends that the following statement should be removed from pilot project policy statement - *"Notwithstanding any other provision of law contained in this chapter"*. The following revised statute language reflects the Workgroup's recommendation:

SECTION 48-39-320(C)

The Department may allow the use in a pilot project of any technology, methodology, or structure, whether or not referenced in this chapter, if it is reasonably anticipated that the use will be successful in addressing an erosional issue in a beach or dune area. If success is demonstrated, the board, or the Office of Ocean and Coastal Resource Management, may allow the continued use of the technology, methodology, or structure used in the pilot project location and additional locations.

SOUTH CAROLINA BEACHES CRITICAL AREA

The meeting facilitators reintroduced the topic and provided a summary of the discussion and major takeaways from the previous meeting. These include:

- OCRM should be able to assert jurisdiction in the beaches critical area
- Detail and specificity is needed in the regulation to support this authority
- Need to identify activities to be regulated in this area
- Agreement that new erosion control structures should be prohibited in the beaches critical area.

Elizabeth von Kolnitz provided additional background information along with visual aids to guide the discussion. Workgroup members were asked to consider the following:

- Erosion Control Structures
 - Current Law
 - Prohibits new erosion control structures seaward of the setback line.
 - Erosion control structures seaward of the setback line that are destroyed more than 50% (above grade) cannot be repaired and must be removed.
 - Scenarios to Consider within Beaches Critical Area
 - New erosion control structures within the beaches critical area that are landward of the setback line
 - Repairing existing erosion control structures landward of the setback line if destroyed
- Habitable Structures and Pools
 - Current Law
 - Prohibits new habitable structures or pools on dry sand beach or active beach areas seaward of baseline.
 - If a habitable structure is built seaward of the baseline via a Special Permit and is on the dry sand beach or active beach for more than 1 year, it must be removed.
 - Scenarios to Consider within Beaches Critical Area
 - New habitable structure or pool within the beaches critical area that are landward of the setback line
 - Repairing existing habitable structures and pools on dry sand beach or active beach that are landward of the setback line
 - Habitable structure or pool that is on dry sand beach or active beach landward of the setback line for more than 1 year

The following summarizes the input and information gathered during the virtual discussion:

- Erosion Control Structures
 - The same, if not greater, provisions that apply to erosion control structures seaward of the setback line should also apply to those within the beaches critical area. Really more of a clarification of the legislative intent to capture this gap area.
 - Needs to be some considerations for emergency order applications ahead of storms to reduce impacts.

- The focus recommendations on new structures, not the repair of existing structures.
- Consider strengthening the restriction to include no new development within the beaches critical area.
- Need to consider the scenarios where an area is considered beaches critical area, nourishment occurs, but within 6-9 months the area will likely become beaches critical area again. Could request or ask for a letter of agreement from the local municipality that there is a long-term beach preservation project or approach in place that would reduce likelihood of property becoming critical area again.
- The existing damaged beyond repair language allows longer erosion control structures to be repaired.

Workgroup Recommendation

Prohibit new erosion control structures in the beaches critical area. The same, if not greater, provisions that apply to erosion control structures seaward of the setback line should also apply to those within the beaches critical area.

- **Habitable Structures and Pools**
 - Consider including Special Permit provisions for any beachfront habitable structure to require removal a structure once it's on the active beach
 - Need to have a coordinated effort between local municipalities and DHEC before special permits are issued. There are instances where a local municipality has lost an appeal to a denied variance for a lot that received a special permit from DHEC and the municipality denied a variance. Municipalities are now facing more habitable structures being built where there is no buildable area.
 - OCRM could require local approvals prior to issuing special permits.
 - Need to include a timeframe for review so that a special permit habitable structure is not built on an area that was recently active beach.
 - OCRM should pursue adding beachfront septic system reviews or coordination to its regulatory authority. It's an important issue that OCRM should have the ability to regulate.

Appendix A – SC Beach Preservation Stakeholder Workgroup Member List

Ross Appel
Attorney & Charleston City Council Member

Amy Armstrong
South Carolina Environmental Law Project

Keith Bowers
Biohabitats, Inc.

Jenny Brennan
Southern Environmental Law Center

Blanche Brown
DeBordieu Colony Community Association, Inc.

Alex Butler
SC Office of Resilience

Emily Cedzo
Coastal Conservation League

Melissa Chaplin
U.S. Fish & Wildlife Service

Nicole Elko
SC Beach Advocates

Paul Gayes
Coastal Carolina University

Justin Hancock
South Carolina Department of Parks, Recreation & Tourism

Iris Hill
Town of Edisto Beach

Lindsey Jackson
SC Realtor's Association

Michelle Pate
SC Department of Natural Resources

Aaron Pope
City of Folly Beach

Queen Quet (or designee)

Gullah/Geechee Nation

Jack Smith
Attorney

Don Thomas
Peace Sotheby's International Realty

Steven Traynum
Coastal Science & Engineering

Rod Tyler
Industry - New technology/Living shoreline products/Property Owner on Marsh in Murrels Inlet

Robert Young
Western Carolina University

SC Beach Preservation Stakeholder Workgroup

State Policy related to Beach Nourishment

Option 1 (no change) - "promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible"

Option 2 - "permit carefully planned nourishment as a means of beach preservation and restoration where economically feasible"

Option 3 - "allow carefully planned nourishment as a means of beach preservation and restoration where economically feasible"

Option 4 - "permit carefully planned nourishment as a means of beach preservation and restoration where economically and ecologically feasible"

Option 5 - "allow carefully planned nourishment as a means of beach preservation and restoration where economically and ecologically feasible"

Option 6 - (4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system such as carefully planned nourishment as a means of beach preservation and restoration where economically feasible

Option 6 combines items (4) and (5) in Section 48-39-260

SECTION 48-39-260. Policy statement.

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

- (1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:
 - o (a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;
 - o (b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;
 - o (c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;
 - o (d) natural habitat for indigenous flora and fauna including endangered species;
- (2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront;
- (3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as

approved by the department which will provide for the protection of the shoreline without long-term adverse effects;

- (4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;
- **(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;**
- (6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;
- (7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;
- (8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

SECTION 48-39-270. Definitions.

As used in this chapter:

(1) Erosion control structures or devices include:

(a) seawall: a special type of retaining wall that is designed specifically to withstand normal wave forces;

(b) bulkhead: a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline;

(c) revetment: a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion.

(2) Habitable structure means a structure suitable for human habitation including, but not limited to, single or multifamily residences, hotels, condominium buildings, and buildings for commercial purposes. Each building of a condominium regime is considered a separate habitable structure but, if a building is divided into apartments, then the entire building, not the individual apartment, is considered a single habitable structure. Additionally, a habitable structure includes porches, gazebos, and other attached improvements.

(3) Department means the Department of Health and Environmental Control.

(4) Beach nourishment means the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide.

(5) The beach/dune system includes all land from the mean highwater mark of the Atlantic Ocean landward to the setback line described in Section 48-39-280.

(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.

(7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

(8) Master plan means a document or a map prepared by a developer or a city as a policy guide to decisions about the physical development of the project or community.

(9) Planned development means a development plan which has received local approval for a specified number of dwelling and other units. The siting and size of structures and amenities are specified or restricted within the approval. This term specifically references multifamily or commercial projects not otherwise referenced by the terms, master plan, or planned unit development.

(10) Planned unit development means a residential, commercial, or industrial development, or all three, designed as a unit and approved by local government.

(11) Destroyed beyond repair means that more than sixty-six and two-thirds percent of the replacement value of the habitable structure or pool has been destroyed. If the owner disagrees with the appraisal of the department, he may obtain an appraisal to evaluate the damage to the building or pool. If the appraisals differ, then the two appraisers must select a third appraiser. If the two appraisers are unable to select a third appraiser, the clerk of court of the county where the structure lies must make the selection. Nothing in this section prevents a court of competent jurisdiction from reviewing, de novo, the appraisal upon the petition of the property owner.

(12) Pool is a structure designed and used for swimming and wading.

(13) Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean.

HISTORY: 1988 Act No. 634, Section 3; 1990 Act No. 607, Section 3; 1993 Act No. 181, Section 1235.

SC Beach Preservation Stakeholder Workgroup

Beach Preservation Definition

"preservation" includes the implementation of coastal management techniques such as beach nourishment, the landward movement and/or removal of habitable structures whenever necessary and feasible, the conservation of undeveloped shorelines and sand dune creation and stabilization using sand fencing and native vegetation.

- 2013 Blue Ribbon Committee (BRC) on Shoreline Management

- ***Maintaining*** the current state or status quo
- ***Preserving*** natural functions
- ***Pro-actively*** maintaining the functionality of the beach/dune system
- ***Protecting*** and ***enhancing*** natural beach processes
- ***Balancing*** habitat and environmental concerns with current development
- ***Protecting*** the highly dynamic ecological processes and functions that shape, form and maintain the beach, dunes and nearshore habitat.

SECTION 48-39-10. Definitions

(H) "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.

SECTION 48-39-260. Policy statement.

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;

(c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;

(d) natural habitat for indigenous flora and fauna including endangered species;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the department which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

https://www.scstatehouse.gov/sess123_2019-2020/prever/869_20191211.htm

<https://www.scstatehouse.gov/code/t48c039.php>

<https://www.scstatehouse.gov/code/t48c040.php>

Exhibit 41

Fw: BCM General Permit update

From Christopher M. Stout <Christopher.Stout@des.sc.gov>

Date Tue 7/23/2024 5:25 PM

To Myra C. Reece <Myra.Reece@des.sc.gov>

Myra

I wanted to forward this along for your awareness as well. We are making the updates to this GP a priority to continue to work with the Town and the property owners. I can keep you posted, as well on the progress.

Regards
Chris

Christopher Stout
Chief
Bureau of Coastal Management

O: 843.953.0691

C: 843.340.3112

Christopher.Stout@des.sc.gov

DES.SC.gov



From: Christopher M. Stout

Sent: Tuesday, July 23, 2024 5:24 PM

To: dkerr@iop.net <dkerr@iop.net>

Cc: Matt J. Slagel <Matt.Slagel@des.sc.gov>; Sallie P. Phelan <Sallie.Phelan@des.sc.gov>

Subject: BCM General Permit update

Good evening Douglas

I just wanted to reach out after Sallie, Matt, and myself were talking earlier today regarding some of our beachfront activity related general permits. I wanted to let you know that we are working to make an update to our GP for beach renourishment.

The current GP references that the work is allowed seaward of the Setback and Baseline, but considering the efforts we recently went through with updating our regulations to provide clarification on our beachfront jurisdiction and the GP needs to be updated to reflect that, as well. We are planning to public notice an amended GP by the end of the week which will reference the work being allowed within the beaches and beach/dune system critical areas. The amended GP will have a 15-day comment period.

Following the close of the comment period, we would then be able to start authorizing coverage for projects looking to place beach compatible sand on beaches critical area when that occur landward of the Setback line.

Matt mentioned that he just received the Town's GP application and we will look to review this request under the updated GP. Hopefully this will help provide some relief to the erosion being experienced, and streamline the review process from

BCM Reddy 017979
ROA 001033

requiring a major permit review.

If you have any questions, please feel free to reach out to us.

Regards
Chris

Christopher Stout
Chief
Bureau of Coastal Management

O: 843.953.0691

C: 843.340.3112

Christopher.Stout@des.sc.gov

DES.SC.gov



SC DEPARTMENT of
ENVIRONMENTAL
SERVICES

Exhibit 42

Register
Federal Property

TUESDAY, JULY 19, 1977

PART II



DEPARTMENT OF DEFENSE

Department of the Army,
Engineers Corps



REGULATORY PROGRAM
OF THE CORPS OF
ENGINEERS

Title 33—Navigation and Navigable Waters
CHAPTER II—CORPS OF ENGINEERS,
DEPARTMENT OF THE ARMY

Regulatory Programs of the Corps of Engineers

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rules.

SUMMARY: We are revising and reorganizing all regulations governing the permit programs of the Corps of Engineers. The new format is designed to make the policies and procedures more understandable to a person desiring to perform work in the waters of the United States. The Section 404 program (discharging dredged or fill material into the water) is being revised to clarify many terms and to provide for the issuance of nationwide permits. The new regulations should enable a person to get a quicker decision on his application. In the case of nationwide permits, no application at all is required.

EFFECTIVE DATE: July 19, 1977.

FOR FURTHER INFORMATION CONTACT:

Mr. Curtis Clark or Mr. Bernie Goode, Regulatory Functions Branch, phone: 202-693-5070 or Mr. William Hedeman, Chief Counsels Office, phone: 202-693-6169.

SUPPLEMENTARY INFORMATION: Because of the rapidly changing nature of the Corps' regulatory programs, we have prefaced this supplementary information with a historical background discussion.

HISTORICAL BACKGROUND

The Department of the Army, acting through the Corps of Engineers, is responsible for administering various Federal laws that regulate certain types of activities in specific waters in the United States and the oceans. The authorities for these regulatory programs are based primarily on various sections of the River and Harbor Act of 1899 (33 U.S.C. 401 et seq.), Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). Each of these laws will be discussed in further detail below.

THE RIVER AND HARBOR ACT OF 1899

Until recently, the regulatory programs of the Corps of Engineers were administered only pursuant to various sections in the River and Harbor Act of 1899. These include: Section 9 (33 U.S.C. 401); Section 10 (33 U.S.C. 403); Section 11 (33 U.S.C. 404); and Section 13 (33 U.S.C. 407).

Section 9 requires a permit from the Corps of Engineers to construct any dam or dike in a navigable water of the United States. The consent of Congress is also required if the navigable water is interstate, and the consent of the appropriate state legislature is required if the water is intrastate. Bridges and causeways con-

structed in navigable waters of the United States also require permits under Section 9, but the authority to issue these permits was transferred to the U.S. Coast Guard in 1966 when the Department of Transportation was created.

Section 10 identifies other types of structures or work in or affecting navigable waters of the United States that are prohibited unless permitted by the Corps of Engineers. However, unlike Section 9, the consent of Congress or a State legislature is not required. Section 10 requires permits from the Corps for structures in navigable waters such as piers, breakwaters, bulkheads, revetments, power transmission lines, and aids to navigation. It also requires permits for various types of work performed in navigable waters, including dredging and stream channelization, excavation and filling. In addition, any work that is performed outside the limits of a navigable water which affects its navigable capacity may also require a Section 10 permit.

The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters. Section 11 focuses on this basic concern by allowing the Secretary of the Army to establish harbor lines landward of which piers, wharves, bulkheads, and other structures or work could be built or performed without a Corps permit. However, as will be noted below, these harborlines now serve only as guides to defining the offshore limits of these activities from the standpoint of their impact on navigation. They can no longer be relied upon as a substitute for the requirement to obtain a permit under the 1899 Act.

Violation of the provisions and requirements of Section 9, 10, or 11 of the 1899 Act can result in criminal prosecution. Section 12 specifies criminal fines that range between \$500 and \$2,500 per day of violation and/or imprisonment, either or both of which may be imposed upon conviction. In addition, Section 12 also provides for injunctive relief that may be sought by the United States to respond to violations of these Sections, including the restoration of the area to its original condition. See *U.S. v. Moretti*, 478 P. 2d 418 (5th Cir. 1975).

Until 1968, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's waters. The permit requirements of the Act were limited in their application to waters that were presently used as highways for the transportation of interstate or foreign commerce.

On December 18, 1968, the Department of the Army revised its policy with respect to the review of permit applications under Sections 9 and 10 of the 1899 Act. It published in the *FEDERAL REGISTER* a list of additional factors besides navigation that would be considered in the review of these applications. These included: fish and wildlife; conservation; pollution; aesthetics; ecology; and the general public interest. (33 CFR 209.120.)

The 1968 change in policy identified this new type of review as a "public interest review." It was adopted in re-

sponse to a growing national concern for environmental values as they related to our nation's water resources and in response to related Federal legislation, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), that required the consideration of some of these concerns in Federal decision-making. Enactment of the National Environmental Policy Act on January 1, 1970 (42 U.S.C. 4331 et seq.) gave further support to this change in policy.

The "public interest review" received its first judicial test in the case of *Zabel v. Tabb*, 430 F. 2d 199 (15th Cir. 1970), cert. den. 401 U.S. 910 (1972) in which the Court upheld the denial by the Corps of a landfill permit for fish and wildlife reasons (and not reasons related to navigation). In reaching this decision, the Court reaffirmed the Department of the Army's position that it was "acting under a Congressional mandate to collaborate and consider all of these factors" when it reached that decision.

In further response to the adoption of this public interest review, the Department of the Army revised its harborline regulation (33 CFR 209.150) on May 27, 1970. This revision made it clear that permits were required for any work commenced landward of an established harborline after May 27, 1970, and that these permit applications would receive a full public interest review. Of course, navigation concerns in this public interest review will be guided, in large part, by the presence of established harborlines.

During 1972, the Corps of Engineers reviewed all judicial decisions in which the term "navigable waters of the United States" had been interpreted in order to identify all waters to which Sections 9 and 10 of the 1899 Act could be applied. This analysis was made in response to the Federal government's growing concern over the protection of the nation's water resources and the need to protect those resources through the full mandate of available Federal laws.

On September 9, 1972, the Corps of Engineers published an administrative definition of the term "navigable waters of the United States" in the *FEDERAL REGISTER* (subsequently codified as 33 CFR 209.260). This definition was intended for use in the Corps' administration of Sections 9 and 10 of the 1899 Act, and included the following: (1) all waters presently used to transport interstate or foreign commerce (see *Daniel Ball v. United States*, 77 U.S. 557 (1871)); (2) all waters used in the past to transport interstate or foreign commerce (see *Economy Light and Power Company v. United States*, 256 U.S. 113 (1921)); all waters susceptible to use in their ordinary condition or by reasonable improvement to transport interstate or foreign commerce (see *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940)); and all waters subject to the ebb and flow of the tide (see *United States v. Moretti*, supra). The landward limit of this jurisdiction for freshwater was established as the ordinary high water mark and the shore-

ward limit, for tidal water was established as the mean high water mark (mean higher high water mark on the West Coast).

On April 4, 1974, the Corps of Engineers published final revisions to its permit regulation (33 CFR 209.120) (Proposed revisions were published for interim guidance on May 10, 1973). These revisions were made for the following reasons:

a. To incorporate new permit programs established under Section 404 of the FWPCA and Section 103 of the MPRSA (discussed in more detail below);

b. To incorporate the requirements of new Federal legislation related to the review of the Federal permit applications, including: other sections of the FWPCA and the MPRSA; the National Environmental Policy Act of 1969, and the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.).

c. To adopt additional factors of concern in the public interest review, in response to this related legislation, including, in addition to those previously announced, the following: economics, historic values, flood damage prevention, land use classification, recreation, water supply, and water quality.

d. To adopt criteria that would also be considered in the evaluation of each permit application including the desirability of using appropriate alternatives; the extent and permanence of the beneficial and/or detrimental effects of the proposed activity; and the cumulative effect of the activity when considered in relation to other activities in the same general area;

e. To adopt a wetlands policy that would protect wetlands within the Corps jurisdiction from unnecessary destruction; and

f. To implement procedures that insured compliance with these new statutory and policy review requirements.

As previously noted, regulations have been published throughout the past years to implement Sections 9, 10, 11, and 13 of the 1899 Act. These regulations have all been included in Part 209 of Title 33 of the Code of Federal Regulations as follows:

- a. 209.120. Permits for Activities in Navigable Waters and Ocean Waters.
- b. 209.125. Dams and Dikes Across Waters.
- c. 209.131. Permits for Discharges of Deposits into Navigable Waters.
- d. 209.150. Harbor Lines.
- e. 209.240. Definition of Navigable Waters of the United States.

THE REFUSE ACT PERMIT PROGRAM

On April 7, 1971 the Corps of Engineers implemented the first nationwide program to regulate the discharge of pollutants into the nation's waters. Authority for this permit program was based on Section 13 of the River and Harbor Act of 1899 (33 U.S.C. 407), commonly referred to as "The Refuse Act", which prohibits the discharge of "refuse matter" into navigable waters of the United States or their tributaries, or onto the banks of such waters if the "refuse matter" is likely to be washed into a navi-

gable water. Regulations to implement this permit program were published in 33 CFR 209.131. On December 24, 1971, the permit program was enjoined by the District Court for the District of Columbia in the case of *Kaluz v. Resor*, 335 F. Supp. 1, (D.D.C. 1971).

The Refuse Act permit program remained suspended until October 18, 1972, when Congress enacted the FWPCA. Section 402 of the FWPCA established the National Pollutant Discharge Elimination System program, which subsumed the Refuse Act permit program. Section 402(a)(5) provides that no permits may be issued under Section 13 of the 1899 Act for discharges into waters of the United States after 18 October 1972. However, the Refuse Act prohibitions can only be lifted by the issuance of an NPDES permit, and the Refuse Act remains a viable Federal enforcement mechanism for the discharge of pollutants into these waters without such a permit.

SECTION 404 OF THE FWPCA

On October 18, 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 with the announced purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. The FWPCA established a number of goals, requirements, prohibitions, and programs to achieve this purpose, and addressed the problems of water pollution by using many different approaches. The Amendments provide Federal financial assistance for major research and demonstration projects and the construction of publicly owned waste treatment works. They also provide programs to deal with various sources and types of pollution, including toxic, oil, and hazardous substances. Section 208 of the Act provides for the development and implementation of areawide waste treatment management planning processes to control all sources of pollution.

Section 301 of the FWPCA prohibits the discharge of pollutants from discernible conveyances (defined as "point sources") into "navigable waters", (defined in the FWPCA as "the waters of the United States, including the territorial seas"), unless the discharge is in compliance with Section 402 or 404 of the Act. As noted above, Section 402 establishes the National Pollutant Discharge Elimination System to regulate industrial and municipal point source discharges of pollutants into the Nation's waters. The NPDES permit program is administered by the Administrator of the Environmental Protection Agency, and provides an opportunity for the Administrator to transfer this responsibility to those States that have the authority and capability to assume responsibility for the administration of the NPDES program.

Section 404 of the FWPCA establishes a permit program, administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge, into the waters of the United States, of dredged material and of those

pollutants that comprise fill material. Applications for Section 404 permits are evaluated by using guidelines developed by the Administrator of EPA, in conjunction with the Secretary of the Army (See 40 CFR 230). The Chief of Engineers can make a decision to issue a permit that is inconsistent with those guidelines if the interests of navigation require. Section 404(c) gives the Administrator, EPA, further authority, subject to certain procedures, to restrict or prohibit the discharge of any dredged or fill material that may cause an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Violation of the prohibition specified in Section 301 of the FWPCA against discharging pollutants into the waters of the United States without a required permit under Section 402 or 404, or permit conditions, or of other requirements of the FWPCA, can result in civil fines of not more than \$10,000 per day of violation, criminal fines of up to \$50,000 per day of violation, imprisonment, and/or injunctive relief, including restoration of the area to its original condition. The exact provisions for Federal enforcement of the FWPCA are established in Section 309. (33 U.S.C. 1319).

As part of the revisions to its April 3, 1974 permit regulation, the Department of the Army published regulations to implement the Section 404 permit program. These regulations limited the Section 404 permit program to the same waters that were being regulated under the River and Harbor Act of 1899: waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher water mark on the West Coast) and/or waters that are presently used, were used in the past, or are susceptible to use to transport interstate or foreign commerce.

The Natural Resources Defense Council and the National Wildlife Federation challenged this limitation on the jurisdiction of Section 404 as being inconsistent with the intent of Congress to regulate "all waters of the United States," as expressed in the FWPCA's definition of "navigable waters." Concern was expressed over the need to regulate the entire aquatic system, including all of the wetlands that are part of it, rather than only those aquatic areas that are arbitrarily distinguished by the presence of an ordinary or mean high water mark. (A major portion of the coastal wetlands are above the mean high water mark and were outside the permit review requirements of Section 404 by this interpretation.) Concern was expressed over the need to regulate the many tributary streams that feed into the tidal and commercially navigable waters (all of which were subject to regulation under the Refuse Act and NPDES programs) since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material. And concern was expressed for the many

other waters, including lakes, isolated wetlands, and potholes whose degradation, destruction, and disappearance continues to increase at alarming rates.

On March 27, 1975, the District Court for the District of Columbia ordered the revocation and rescission of that part of the Department of the Army's regulation "which limits the permit (Section 404) jurisdiction of the Corps by definition or otherwise to other than the waters of the United States." The Court further ordered publication of proposed regulations within 15 days (later amended to 40 days) which clearly recognized the full regulatory mandate of the FWPCA with respect to Section 404, and final regulations within 30 days of the date of the order (later amended to 80 days). *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

Responding to this court order, the Corps published four alternative proposed regulations in the *FEDERAL REGISTER* for comment on May 6, 1975. Over 4,500 comments were received in response to these proposed regulations. Many of these comments assisted the Corps in developing an administrative definition of "navigable waters" that was consistent with the intent and objectives of the FWPCA, and also in developing a program that was responsive to many of the concerns raised by the comments.

On July 25, 1975, the Corps of Engineers published an interim final regulation in the *FEDERAL REGISTER*. The interim final regulation essentially melded revisions to the Section 404 program into the previously published April 3, 1974 regulation. It included administrative definitions of "navigable waters", "dredged material", and "fill material", and procedural mechanisms to avoid unnecessary duplicative review in those states that have permit programs similar to Section 404.

The interim final regulation administratively defined the term "navigable waters" to include: coastal waters, wetlands, mudflats, swamps, and similar areas; freshwater lakes, rivers, and streams that are used, were used in the past, or are susceptible to use to transport interstate commerce, including all tributaries to these waters; interstate waters; certain specified intrastate waters, the pollution of which would affect interstate commerce; and freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to the above described lakes, rivers, and streams, and that are periodically inundated and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.

The regulation also specified that permits would not be required for discharges beyond the "headwaters" of a river or stream unless the interests of water quality required assertion of jurisdiction above the headwaters. "Headwaters" was defined as "the point on the stream above which the flow is normally less than 5 cubic feet per second"

Any material that is excavated or dredged from a water of the United States and reintroduced into a water of

the United States is considered to be the "discharge of dredged material" for purposes of Section 404.

"Fill material" was defined to include the following activities: the creation of fastlands, elevations of land beneath waters of the United States, or impoundments; the building of any structure or impoundment requiring rock, sand, dirt, or other pollutants for its construction; site-development fills; causeway or road-fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, and breakwaters; beach nourishment; levees; and backfill for various structures and utility lines.

The regulation also identified certain types of activities that were excluded from the program because they do not involve the discharge of dredged or fill material into water. Plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products were included in this list of excluded activities. Also excluded from the program was material placed for maintenance and emergency reconstruction of existing fills.

The July 25 regulation adopted a phase-in schedule to implement the permit requirements of Section 404 for discharges in the above defined waters, and also included authority for District Engineers to issue general permits for those discharges that cause only a minor individual and cumulative impact to the environment. Phase I began immediately upon publication of the regulation, and included all waters subject to the ebb and flow of the tide and/or waters that are, were, or are susceptible to use for commercial navigation purposes (waters already being regulated by the Corps) plus all adjacent wetlands to these waters (thus eliminating the artificial ordinary high water and mean high water mark distinctions). Phase II became effective on September 1, 1976 (originally scheduled for July 1, 1976, but postponed for 80 days by Presidential action), and included primary tributaries to the Phase I waters and lakes greater than five acres in surface area, plus wetlands adjacent to these waters. Phase III, requiring permits for discharges of dredged or fill material into all waters of the United States, became effective on July 1, 1977. Discharges that occur in a particular waterbody before a scheduled phase-in date are permitted by the regulation, subject to six specified conditions. Also permitted by the regulation are certain minor discharges, again subject to the same conditions.

Various policies and procedures were also included in this regulation to allow joint review and processing of applications for Section 404 permits in those states with programs similar to Section 404.

On September 5, 1975, EPA published interim final guidelines to be used in the evaluation of proposed discharges of dredged or fill material. These interim guidelines are published in 40 CFR Part 230.

A number of courts have had occasion to consider whether particular waters, including wetlands, are "waters of the

United States" within the scope of the FWPCA. The first case to address whether wetlands beyond the mean high water mark of traditional navigable waters of the United States were subject to the FWPCA was *United States vs. Holland*, 373 F. Supp. 685 (M.D. Fla., 1974) in which the Court held:

The court is of the opinion that the mean high waterline is no limit to Federal authority under the FWPCA. While the line remains a valid demarcation for other purposes, it has no rational connection to the aquatic ecosystems which the FWPCA is intended to protect. Congress has wisely determined that Federal authority over water pollution properly rests on the commerce clause and not on past interpretations of an act designed to protect navigation. And the Commerce clause gives Congress ample authority to reach activities above the mean high water line that pollute the waters of the United States.

Other Courts have pursued the same theme, and often use the Holland rationale to support their position. These include the following: *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), involving discharges of oil into a tertiary tributary to a navigable water of the United States; *United States v. P.F.Z. Properties, Inc.*, 393 F. Supp. 1370, 1381 (D.D.C. 1975) and *Leslie Salt v. Froehke*, 403 F. Supp. 1292, 1296-1297 (N.D. Cal. 1974)—each involving discharges of dredged or fill material into navigable waters of the United States; *Conservation Council of North Carolina v. Costanzo*, 398 F. Supp. 633, 673 (E.D. N.C. 1975); *United States v. Smith*, 7 ERC 1936, 1938-1939 (E.D. Va. 1975); *United States v. Golden Acres, Inc.*, No. 76-0023-CIV-4, slip opinion p. 5-6 (E.D. N.C., Jan. 13, 1977); *United States v. Riverside Bayview Homes, Inc.*, Civil Action No. 77-76041 (E.D. Mich. Feb. 24, 1977)—all involving discharges into wetlands adjacent to navigable waters of the United States or a primary tributary thereof in which the wetland area is located above the mean high tide line or ordinary high water mark but is still periodically inundated and covered with aquatic vegetation; and *United States v. Byrd and Elder*, ERC 1275 (N.D. Ind., August 13, 1978) involving the discharge of fill material into a natural freshwater lake.

SECTION 103 OF THE MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT OF 1972

Five days after enactment of the FWPCA, Congress enacted the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413). This Act, commonly referred to as the "Ocean Dumping Act", has many provisions that resemble the approach taken by the FWPCA to regulate activities that can pollute or otherwise adversely affect the ocean waters.

Section 102 of the Act vests authority in the Administrator, EPA, to issue permits, after notice and opportunity for public hearing, for the transportation from the United States of material that is intended to be dumped in ocean waters. "Material" is defined in the Act to include most liquid, solid, or suspended solid substances. Before issuing a permit,

the Administrator is required to determine that the proposed dumping will not unreasonably degrade or endanger human health, welfare or amenities, or the marine environment, ecological systems or economic potentialities. The Act also requires him to establish ocean dumping criteria to be used in making this evaluation.

Section 103 of the Ocean Dumping Act is similar to Section 404 of the FWPCA in that it creates a separate permit program to be administered by the Secretary of the Army, acting through the Chief of Engineers, to regulate the ocean dumping of dredged material. The Act requires the Corps of Engineers to make the same evaluation that is required of the Administrator for the ocean dumping of other materials, and to make this evaluation, by using the ocean dumping criteria developed by the Administrator. The Act also requires the Corps of Engineers to utilize ocean dumping sites that have been designated by the Administrator, EPA, to the maximum extent feasible.

If the EPA criteria prohibit ocean dumping, the Act requires the Corps of Engineers to make an independent determination as to the need for the proposed dumping based upon an evaluation of the potential affect that would occur to navigation, economic and industrial development, and foreign and domestic commerce of the United States if a permit were denied. An independent determination as to other proposed methods of disposal of dredged materials and appropriate locations for ocean dumping must also be made by the Corps of Engineers in the review of applications for ocean dumping.

No permit may be issued to dump dredged material in the oceans if the dumping does not comply with the EPA criteria unless the Secretary of the Army seeks a waiver of the criteria from the Administrator after certifying that there is no economically feasible method or site available other than the proposed dump site under consideration. The Act requires the Administrator to grant this waiver unless he finds that the proposed dumping will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries, or recreational areas.

The EPA criteria for evaluating the ocean dumping of all material, including dredged material, are published in 40 CFR Parts 220-228. These criteria were revised by EPA, and the revisions are published in the *FEDERAL REGISTER* dated 11 January 1977 (42 FR 2462).

Violation of any provision or requirement of the Ocean Dumping Act can result in criminal or civil penalties of not more than \$50,000 per day of violation, imprisonment, and legal actions to enjoin imminent or continuing violations of the Act.

REVISIONS TO REGULATIONS

The Corps of Engineers published its July 25, 1975 regulation as an interim final regulation, and provided a comment period of 90 days in which inter-

ested members of the public could comment further on the regulation before it was finalized. Today, we are finalizing that regulation. We wish to take this opportunity to thank again those 2,000 individuals, government officials, special interest groups, and companies who responded to this opportunity for additional comment. Many of you will find that your suggestions have been developed in the revisions to our regulation.

In addition to the 2,000 comments received on the interim final regulation, the Corps of Engineers held four nationwide public hearings on the Section 404 program and 243 information meetings that have assisted us in these revisions.

We now have almost two years of experience in administering the Section 404 program as revised by the July 25, 1975 regulation, and over three years of experience in the administration of our other permit programs since publication of the April 3, 1974 regulation. This experience has revealed some problem areas that require correction. Our District and Division offices have raised these concerns with us, and we have attempted to respond to these problems in revisions to the regulation.

One of the primary criticisms of the existing regulation was its length, organization and wordiness. We have responded to this concern by deleting redundant paragraphs, rewording sentences, and completely reorganizing the regulations. This includes a new format that incorporates related regulations into an orderly sequence.

Today, we are rescinding the following regulations:

- a. 33 CFR 209.120, "Permits for Activities in Navigable Waters or Ocean Waters";
- b. 33 CFR 209.125, "Dams and Dikes Across Waterways";
- c. 33 CFR 209.131, "Permits for Discharges or Deposits into Navigable Waters";
- d. 33 CFR 209.133, "Public Hearings";
- e. 33 CFR 209.150, "Harbor Lines"; and
- f. 33 CFR 209.260, "Definition of Navigable Waters of the United States."

We are also, today, publishing the following new regulations, each of which generally corresponds with one of the above cited regulations that is being rescinded. All regulations that pertain completely to the permit programs of the Corps of Engineers, are being published in a new series of Title 33 of the Code of Federal Regulations, and will be included in Parts 320 to 340. This new series is organized as follows:

- a. Part 320, "General Regulatory Policies";
- b. Part 321, "Permits for Dams and Dikes in Navigable Waters of the United States" (Section 9 of the River and Harbor Act of 1899);
- c. Part 322, "Permits for Structures or Work in or Affecting Navigable Waters of the United States" (Section 10 of the River and Harbor Act of 1899);
- d. Part 323, "Permits for Discharges of Dredged or Fill Material into Waters of the United States" (Section 404 of the FWPCA);
- e. Part 324, "Permits for Ocean Dumping of Dredged Material" (Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972);

- f. Part 325, "Processing of Department of the Army Permits";
- g. Part 326, "Enforcement";
- h. Part 327, "Public Hearings";
- i. Part 328, "Harbor Lines";
- j. Part 329, "Definition of Navigable Waters of the United States";
- k. Parts 330-339 (Reserved).

The following is an explanation of each new part of this regulation, including the reasons for significant changes that have been made. We will also respond to significant comments that were made in response to various provisions in this regulation.

PART 320

This Part describes the general and related statutory authorities that are used by the Corps of Engineers in administering the various permit programs to regulate activities in waters of the United States and the oceans. The part also describes the general policies that are used by the Corps in the review of each permit application, including: (1) The public interest review described above; and (2) policies on wetlands; fish and wildlife; water quality; historic, scenic, and recreational values; effects on limits of the territorial sea; interference with adjacent properties or Federal projects; and requirements for other Federal, State, or local permits or certifications. This part generally corresponds to the provisions in paragraphs (a), (b), (c), (f), and (g) (1), (3), (4), (5), (6), (10) and (18) of rescinded § 209.120.

We have added descriptions of each of the following Federal statutes to the list of "related legislation" in § 320.3 of this Part, since each of these laws is involved with or related to the review of applications for Federal permits. These include: The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); The Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.); The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.); Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 et seq.); and Section (f) of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4 et seq.).

In § 320.4(a), we have added three additional items to the list of factors that comprise our public interest review: Energy needs, safety, and food requirements.

Several modifications have been made to our wetlands policy in § 320.4(b). We identified those wetlands "whose destruction or alteration would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns or environmental characteristics," as one of the types of wetlands that is important to the public interest. (Previously this valuable wetlands function was only recognized if the wetlands that perform it were located next to the wetlands described in the first two subsections.) We also added to the list of functions those wetlands which through natural water filtration processes, serve to purify water. Finally, we have attempted to clarify our guidance on determining whether a particular wetlands

alteration is "necessary". The change now requires the District Engineer to consider whether the proposed activity "is primarily dependent on being located in or in close proximity to the aquatic environment and whether feasible alternative sites are available." Applicants are required to provide sufficient information to make this evaluation. We believe that this change more closely corresponds to the wetlands policy in the Section 404 Guidelines (40 CFR 230.5(b)(8)).

At the request of the Department of the Interior, we have added sites acquired under the Recreational Demonstrations Projects Act of 1942 (PL 77-594) to the types of sites for which the policy in § 320.4(e) on historic, scenic, and recreational values is applicable.

Clarifying language has been added to our policy in § 320.4(j) on other permits or certifications required for the same activity to ensure that it is applicable to all Federal, State and/or local permits or certifications. Under this policy, we will process permit applications concurrently (and in many cases we plan to do this jointly) with other required applications for Federal, State and/or local permits or certifications. If another required permit or certification is denied, we will not issue a permit.

To ensure that this policy cannot be used as a mechanism to delay decision-making on our permit application processing and decision-making, however, we also have modified it to allow the District Engineer to process a permit application to conclusion if the responsible government agency fails to take any definitive action to issue or deny its permit or certification within three months of our public notice.

We have added two new general policies to the review of all applications for permits. Section 320.4(k) includes a policy on the safety of impoundment structures that requires the District Engineer to condition permits for these types of structures to require the permittee to operate and maintain the structure properly to ensure public safety. This policy is not applicable, however, to impoundment structures for which an adequate safety inspection program is required or which are under the control of another Federal agency. Section 320.4(l) includes a policy on the review of permit applications in floodplains as required by the May 24, 1977 Executive Order 11988.

PART 321

This part describes the special policies and procedures that are followed in the review of applications for dams or dikes to be located in a navigable water of the United States. As noted above, this review is made under Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). The general policies described in Part 320 and the general procedures described in Part 325 are also applicable to the review of these applications.

Part 321 replaces 33 CFR 209.125, which has been rescinded. We have defined the terms "navigable waters of the United States", "dam", and "dike" in this part to specify the types of waters to which

Section 9 is applicable, and the type of structures that will require Section 9 permits. We anticipate that our administrative definitions of "dam" and "dike" in Section 321.2 will assist in distinguishing these types of structures from those that would otherwise be regulated under Section 10 of the River and Harbor Act of 1899.

In all other respects, the language in Part 321 resembles that in rescinded § 209.125.

PART 322

This part prescribes the special policies and procedures to be followed by the Corps in the evaluation of applications for structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899. The general policies specified in Part 320.4 and the general procedures specified in Part 325 also are applicable to this evaluation. Furthermore, some of the activities that fall under this Part will also require permits under Section 404 of the FWPCA and Section 103 of the Ocean Dumping Act.

This Part corresponds to those sections of rescinded 33 CFR 209.120 that incorporated the Section 10 program. These include paragraphs (d)(1), (e)(1) and (4), and (g)(2)(7), (8), (9), (11), (13), (14), (15) and (16).

We have adopted administrative definitions of the terms "structure" and "work" to identify the types of activities that will require Section 10 permits (Sec. 322.2).

The 1975 regulation administratively "grandfathered" certain types of activities performed in navigable waters of the United States (see rescinded 33 CFR 209.120(g)(12)(vii)) and exempted others altogether from the need to obtain Section 10 permits (see rescinded 33 CFR 209.120(e)(1)). This latter category included the placement of aids to navigation by the U.S. Coast Guard and structures placed in artificial canals, the connection of which previously was authorized by a Section 10 permit.

Today, instead of again exempting or grandfathering these activities, we are permitting them through the issuance of nationwide permits that are incorporated into this regulation. We have also included other small structures in these nationwide permits that are often placed in navigable waters and have only a de minimus impact on the environment. We are issuing nationwide permits for these activities because we feel that this administrative device is preferable to those affected by it, and is a better administrative approach than relying on a "grandfathering" or "exemption" provision to satisfy the requirements of the 1899 Act.

The following activities are subject to these nationwide permits (see § 322.4):

1. The placement of aids to navigation by the U.S. Coast Guard;
2. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water already has received a Section 10 permit;
3. Repair, rehabilitation, or replacement of any previously authorized, cur-

rently serviceable structure, or of any currently serviceable structure constructed prior to the requirement for a Section 10 permit (no deviation from original plans is authorized);

4. Marine life harvesting devices, such as pound nets, crab pots, eel pots, and lobster traps;

5. Staff and tidal gages, water recording devices, water quality testing and improvement devices, and similar scientific structures;

6. Survey activities including core sampling; and

7. Structures of work completed before December 18, 1968 (the date on which we adopted our public interest review) or in navigable waters over which the District Engineer has not asserted jurisdiction.

The nationwide permit imposes conditions on each of these structures, primarily to protect navigation.

Besides the nationwide permit, three other types of authorizations are used to issue Section 10 permits. These are:

1. Letters of permission—an individual permit issued following the abbreviated review procedures outlined in § 325.5(b);

2. Individual permits—permits issued following a case-by-case analysis of an application; and

3. General permits—permits issued for future minor work or structures in a particular region of the country that will have only minimal individual and cumulative impact on the environment.

We have included definitions of each of these terms in the regulation (§ 322.2). A person needing a Section 10 permit should first check to see whether the proposed project has already been permitted by a general permit or in this Part through a nationwide permit.

In all other respects, this regulation remains basically the same as published in 1975.

PART 323

This Part prescribes the special policies and procedures to be followed by the Corps in the evaluation of applications for permits to discharge dredged or fill material into the waters of the United States pursuant to Section 404 of the FWPCA. Again, as we have noted in Parts 321 and 322, the general policies specified in Part 320 and the general procedures specified in Part 325 also would be applicable to this evaluation. Furthermore, some of the activities that fall under Section 404 will also require permits under Sections 9 and 10 of the River and Harbor Act of 1899 (Parts 321 and 322).

This Part corresponds to those sections of the rescinded 33 CFR 209.120 that incorporated the Section 404 program. These include paragraphs (d)(3), (4), (5), (6), (7) and (8) and (g)(17).

Section 404 provides that the Corps of Engineers may issue permits, after notice and opportunity for public hearing, for "discharges of dredged or fill material into navigable waters". The majority of comments received on the July 25, 1975 interim final regulation were in response to our definitions of terms "navigable waters", "dredged material", and "fill material".

The legislative history of the term "navigable waters" specified that it "be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." (H.R. Report No. 92-1465 at 144; A Legislative History of the FWPCA at p. 327). Article I, Section 8 of the Constitution gives the Federal Government the authority "to regulate commerce with foreign Nations and among the several states." We have interpreted the guidance contained in this legislative history to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce as interpreted by the Supreme Court on several occasions. *Perez v. United States*, 402 U.S. 146 (1970); *Katsenbach v. McClung*, 379 U.S. 294 (1974); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); and *Wickard v. Filburn*, 317 U.S. 111 (1943).

Water pollution is one such activity, for as the Court stated in *U.S. v. Holland*, supra, "Congress has wisely determined that Federal authority over water pollution properly rests on the commerce clause. And the commerce clause gives Congress ample authority to reach activities . . . that pollute the waters of the United States." (See also the cases cited above on defining "waters of the United States" which affirmed the constitutionality of Congress' broad assertion of jurisdiction.)

We followed this basic premise in the development of our administrative definition of "navigable waters" for the July 25, 1975 regulation, and we have followed it again in our efforts to clarify that definition in this regulation.

Our definition of "navigable waters" in the 1975 regulation included the following:

(1) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast);

(2) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;

(3) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(4) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark;

(5) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(6) Interstate waters landward to their ordinary high water mark and up to their headwaters;

(7) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:

(a) By interstate travelers for water-related recreational purposes;

(b) For the removal of fish that are sold in interstate commerce;

(c) For industrial purposes by industries in interstate commerce; or

(d) In the production of agricultural commodities sold or transported in interstate commerce;

(8) Freshwater wetlands, including marshes, shallows, swamps, and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction; and

(9) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)-(8), a decision on jurisdiction shall be made by the District Engineer.

Many suggested that we change the nomenclature of the term "navigable waters" and refer to our jurisdiction under Section 404 as "waters of the United States." This is the definition given to that term in Section 502(7) of the FWPCA. We have adopted this suggestion and feel that it will assist in distinguishing between the Section 404 program and the types of waters that are subject to the permit programs administered under Sections 9 and 10 of the 1899 Act.

We have consolidated the 1975 list of waters in our new definition to include four basic categories. We believe that this consolidation will assist in clarifying those waters that are subject to the Section 404 program.

CATEGORY 1

Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands.—This category corresponds to those waters identified in sections (1), (2), (3), and (8) of the old definition. Through consolidation, we believe that many of the ambiguities raised in the old definition will be clarified.

The Federal government's authority to regulate all activities in or affecting navigable waters of the United States has always been recognized. As we have noted above, waters that fall within this category are also regulated under the River and Harbor Act of 1899. They include natural and artificial waters that are subject to the ebb and flow of the tide and/or that are used, were used in the past, or are susceptible to use to transport interstate or foreign commerce.

CATEGORY 2

Tributaries to navigable waters of the United States, including adjacent wetlands.—This category corresponds to sections (4), (5), (6), and (9) of the old definition.

The Federal government's authority to regulate activities on the rivers and streams that feed into navigable waters

of the United States also has been historically recognized. As we noted in our historical background discussion, Section 10 of the River and Harbor Act of 1899 can be used to regulate activities outside the jurisdictional limits of navigable waters of the United States if those activities affect the navigable capacity of those waters. Section 13 of the 1899 Act also prohibits the dumping of any refuse matter into any tributary of a navigable water of the United States, or onto the banks of such waters where the material is likely to be washed into the water.

More recently, courts have recognized that the FWPCA is applicable to tributaries of navigable waters. In *U.S. v. Ashland Oil*, supra, the Court stated:

Pollution control of navigable streams can only be exercised by controlling pollution of their tributaries.

We have adopted the suggestion of many commenters that we incorporate into our definition (and not in the Preamble as we did in 1975) the statement that nonflood drainage and irrigation ditches that feed into navigable waters will not be considered "waters of the United States" under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Sections 308 and 402.

CATEGORY 3

Interstate waters and their tributaries, including adjacent wetlands.—This category corresponds to those waters listed in sections (6) and (9) of the old definition.

The effects of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA Amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government's traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.

CATEGORY 4

All other waters of the United States not identified in Categories 1-3, such as isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.—This category corresponds to sections (7), (8), and (9) of the old definition.

Waters that fall within categories 1, 2, and 3 are obvious candidates for inclusion as waters to be protected under the Federal government's broad powers to regulate interstate commerce. Other waters are also used in a manner that makes them part of a chain or connection to the production, movement, and/or use of interstate commerce even though they are not interstate waters or part of a

tributary system to navigable waters of the United States. The condition or quality of water in these other bodies of water will have an effect on interstate commerce.

The 1975 definition identified certain of these waters. These included waters used:

- (1) By interstate travelers for water-related recreational purposes;
- (2) For the removal of fish that are sold in interstate commerce;
- (3) For industrial purposes by industries in interstate commerce; and
- (4) In the production of agricultural commodities sold or transported in interstate commerce.

We recognized, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category. The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over "other waters", such as intermittent rivers, streams, tributaries and perched wetlands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.

We received many comments and criticisms concerning the waters covered in sections (7) and (9) of the 1975 definition, particularly with respect to uncertainty over the types of waters covered by section 9, and as to whether section 404 permits are required to discharge dredged or fill material into these latter waters.

We have responded to these comments by noting in the definition of these waters that they are the type, the degradation or destruction of which could affect interstate commerce. We have also incorporated an explanatory footnote at the end of this category which further explains this connection to interstate commerce.

We are responding to the concern of uncertainty over the need to obtain a permit in these waters by issuing today a nationwide permit for discharges into most of these waters. We believe that if the common sense conditions, guidelines and management practices provided in these nationwide permits are followed, the concern for water quality, as it affects the production, movement and/or use for interstate commerce, ordinarily will be satisfied with respect to these discharges.

Wetlands. Prior to enactment of the FWPCA, the mean tide line (mean higher tide line on the West Coast) was used to delineate the shoreward extent of jurisdiction over the regulation of most activities in tidal waters under the 1899 Act as well as for mapping, delineation of property boundaries, and other related purposes. In freshwater lakes, rivers and streams that are navigable waters of the United States, the landward limit of jurisdiction has been traditionally estab-

lished at the ordinary high water mark.

The regulation of activities that cause water pollution cannot rely on these artificial lines, however, but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.

The July 25, 1975 regulation identifies "coastal" and "freshwater" wetlands contiguous or adjacent to other waters of the United States as separate categories of waters for inclusion in our overall definition of the term "waters of the United States." Many comments and suggestions were received on these terms.

Both "coastal" and "freshwater" wetlands as used in the July 25, 1975 regulation require that the area in question be "periodically inundated" by either saline, brackish or freshwater and "normally characterized by the prevalence of" salt or brackish water vegetation or vegetation that requires saturated soil conditions for growth and reproduction. Some felt that the criteria for delineating a wetland should not require both "periodic inundation" and the "prevalence of" vegetation, as either condition should suffice from the standpoint of protecting the entire aquatic system. Others raised concern over the vagueness of terms such as "periodically inundated", "normally", and "prevalence", and the lack of any definition for the terms "contiguous" or "adjacent".

In response to these comments, and with the assistance of the Departments of Interior and Agriculture and the Environmental Protection Agency, we have adopted the following definition of "wetlands":

Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

This definition is intended to eliminate several problems and achieve certain results. The reference to "periodic inundation" has been eliminated. Many interpreted that term as requiring inundation over a record period of years. Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. This inunda-

tion or saturation may be caused by either surface water, ground water, or a combination of both.

The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program.

We have responded to the concern for the vagueness of the term "normally" by replacing it with the phrase " * * * and that under normal circumstances to support * * * ". We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

Concerns were also expressed over the types and amount of vegetation that would be required to establish a "wetland" under this definition. We have again used the term "prevalence" to distinguish from those areas that have only occasional aquatic vegetation interspersed with upland or dry land vegetation.

At the same time, we have changed our description of the vegetation involved by focusing on vegetation "typically adapted for life in saturated soil conditions." The old definition of "freshwater wetlands" provided a technical "loop-hole" by describing the vegetation as that which requires saturated soil conditions for growth and reproduction, thereby excluding many forms of truly aquatic vegetation that are prevalent in an inundated or saturated area, but that do not require saturated soil from a biological standpoint for their growth and reproduction. We intend to publish shortly vegetation guides to indicate the types of vegetation intended to be included in this definition, and to rely on the assistance of biologists, scientists and other technical experts from other Federal and State agencies to assist in delineating those wetland areas intended to be included in this definition.

Several comments questioned the need for separate definitions of salt and brackish water wetlands (e.g. coastal wetlands) and freshwater wetlands. Others questioned whether salt and brackish water wetlands in nontidal waters and freshwater wetlands contiguous or adjacent to coastal wetlands were intended to be included in the definition, since these wetlands are part of the aquatic system. Still others ques-

tioned whether these definitions were also applicable to isolated wetlands that are not contiguous or adjacent to coastal waters and freshwater lakes, rivers, and streams, but which still contribute to interstate commerce.

The old definition was intended to include all fresh, brackish and salt water wetlands contiguous or adjacent to coastal waters and freshwater lakes, rivers, streams and other waters included in the definition of "waters of the United States." It was also intended to be used to identify isolated wetlands. We agree, however, that this intent was not clearly expressed. To remedy this situation, we have adopted one definition of wetlands. This definition will be applicable to those wetlands adjacent to coastal waters and freshwaters that are identified in the definition of "waters of the United States," and also to those isolated wetlands that are not adjacent to any lake, river, stream, or other coastal or freshwater. (See the discussion, above, on waters in Category 4.)

We have also responded to the concerns raised over the absence of any definition of the terms "adjacent" or "contiguous" as those terms relate to the location of wetlands. Since "contiguous" is only a subpart of the term "adjacent," we have eliminated the term "contiguous." At the same time, we have defined the term "adjacent" to mean "bordering, contiguous, or neighboring." The term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river bars, beach dunes, and similar obstructions.

Finally, to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further clarify our intent to include only truly aquatic areas.

"High tide line." Many aquatic areas along the coast are located above the mean or mean higher high tide lines but do not fit within the definition of "wetlands" discussed above. These include sandflats, mudflats, and similar areas, that, while not covered with vegetation, are inundated with sufficient frequency and regularity to be included as part of the aquatic resource. While these areas are identified in our previous definition of waters of the United States, some commenters suggested the need for more definitive guidance in delineating the shoreward limit of jurisdiction in coastal areas when these circumstances exist. We have, therefore, adopted the term "high tide line" to delineate these areas. "High tide line" has been defined as "a line or mark laid upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide." The term is intended to include areas covered by spring high tides and other high tides that occur with periodic frequency, but does not in-

clude those areas that are covered by tidal water as a result of storm surges, hurricanes, or other intense storms.

Ordinary high water mark. A number of comments criticized the definition of "ordinary high water mark" adopted for purposes of delineating the landward limit of jurisdiction in freshwaters (absent adjacent wetlands). The comments indicated that other methods to define the ordinary high water mark have already been refined to a point of reasonable reliability based on the hydrologic movement of freshwaters, and that a second methodology under Section 404 would be administratively cumbersome. In addition, other concerns were expressed over the manner in which a "25% inundation" factor could be determined.

Responding to these comments, we have returned to our definition of "ordinary high water mark" used in the administration of our 1889 Act permit program. We believe that in waters where no wetlands are present, this definition will include those areas that are part of the aquatic system along these freshwater lakes, rivers and streams, as this mark is intended to include those areas where water will be present with predictable regularity.

Headwaters: The July 25, 1975 regulation established a cutoff point, referred to as the headwaters, for each river and stream identified as a water of the United States. "Headwaters" was defined as "the point on the stream beyond which the flow of the waterbody is normally less than five cubic feet per second." Waters above the "headwaters" cutoff point were also included as "waters of the United States," but only if the District Engineer determined that regulation of these waters was necessary to protect water quality.

Many comments and criticisms were received concerning the vagueness of our definition of "headwaters" and the legality of excluding waters in rivers and streams above the headwaters from the definition of waters of the United States. We have responded to these concerns and criticisms by: (1) including the entire length of rivers and streams in our definition of waters of the United States; (2) utilizing the "headwaters" concept to establish the point on the stream below which an individual or general permit will be required to discharge dredged or fill material (discharges above headwaters are being permitted through the issuance today of a nationwide permit which is discussed in greater detail below); and (3) redefining the term "headwaters."

We have adopted the recommendations of a number of commenters and have redefined the term "headwaters" as the point on a freshwater (nontidal) stream above which the average annual flow is less than five cubic feet per second. Since precision is not required in establishing the headwater point, the definition allows the District Engineer to use approximate means to compute it. The drainage area that will contribute an average annual flow of five cubic feet per second can be estimated by approximating the proportion of the average annual

precipitation that is expected to find its way into the stream. Having the area that will produce this flow, the "headwater" point can be approximated from drainage area maps.

However, we also recognized that streams with highly irregular flows, such as occur in the western portion of the country, could be dry at the "headwater" point for most of the year and still average on a yearly basis a flow of five cubic feet per second because of high volume, flash flood type flows which greatly distort the average. We therefore added an option for the District Engineer, after notifying the Regional Administrator of EPA, to establish the headwater based on the median rather than the average flow. A median flow of five cubic feet per second means that 50% of the time the flow is greater than five cubic feet per second and 50% of the time the flow is less than this value. This approach more realistically represents normal base flows of such streams.

We emphasize that the "headwaters" concept used in this new regulation is the point on the stream above which individual or general permits ordinarily will not be required. It is not to be construed as the point beyond which a stream ceases to be a water of the United States under Section 404 or the programs to regulate industrial and municipal discharges and oil and hazardous substances under other sections of the FWPCA. We also refer you to the discussion below on the nationwide permits that are being issued today for various discharges of dredged or fill material, including those that occur above the headwater. We believe that the common sense conditions and management practices reflected in these nationwide permits will, if followed, avoid potential water quality problems for most of these discharges.

Lakes: The 1975 regulation defined "lakes" as "natural bodies of standing water greater than five acres in surface area and all bodies of standing water created by the impounding of waters of the United States."

A number of comments and criticisms were received concerning this definition. Some felt that the size limitation on natural lakes was too small, while others felt it was not small enough. Others questioned the legality of imposing any size limitation on natural lakes, since a lake less than five acres in size is just as much a "water of the United States" as one that is more than five acres in size.

Many raised questions about the manner and time for measurement of the five surface acres because of the seasonal fluctuations in water content exhibited by most lakes. Others suggested that we add to the list of artificial open bodies of water that are not included in the definition of lakes. (The 1975 definition excludes stock watering ponds and settling basins that are not created by impounding a river or stream.)

We have responded to these comments and criticisms in several ways. First, we have established definitions for two new terms: "natural lake" and "impoundment." We believe that these two sepa-

rate definitions will assist in alleviating the confusion expressed over the broad definition of "lake" as cited in the 1975 regulation.

At the suggestion of EPA, we have defined "natural lake" as "a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not part of a surface river or stream." We believe that this definition reflects the three types of situations in which a natural lake may exist.

We have defined the term "impoundment" as a "standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area." Responding to several suggestions, we have clarified what is not included in the term "impoundment" by stating that it does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

Unlike the 1975 definition, no size limitation has been placed on the definitions of "natural lake" or "impoundment". Instead, we are permitting, today, through the issuance of nationwide permits, discharges of dredged or fill material into natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are either fed or drained by a river or stream above the headwaters, or isolated and not a part of a tributary system to navigable waters of the United States or interstate waters. (Discharges into natural lakes below the headwaters and isolated natural lakes greater than ten acres will require individual or general permits to satisfy the requirements of Section 301 of the FWPCA.) We are also issuing today a nationwide permit for discharges of dredged or fill material into non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters. (Again, discharges into impoundments below the headwaters of a river or stream will require an individual or general permit.) We refer you to our discussion of nationwide permits, below, for further details on this action.

We believe that the inclusion of adjacent wetlands as part of the 10 acre measurement of these natural lakes that are included in this definition will alleviate many concerns raised over how and when this measurement must occur. Since our definition of "wetlands" requires aquatic vegetation, we anticipate that the lake's measurement normally can be made on the basis of the presence of this vegetation, which generally remains fixed throughout the year, even if the water levels in the lake fluctuate.

Dredged and Fill Material. The 1975 regulation provided definitions for "dredged material", "discharge of dredged material", "fill material", and "discharge of fill material". Several comments and two years of experience

have revealed the need to make certain changes to these definitions.

To respond to many misunderstandings over activities that require Section 404 permits, the 1975 regulation stated, in the definitions of "dredged material" and "fill material" that "material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products" was not included. We intended, by this statement, to make it clear that activities such as plowing, seeding, harvesting, cultivating and any other activity by any industry that do not involve discharges of dredged or fill material cannot be included in the program. However, many interpreted this language as an exclusion of all practices by the farming and forestry industry including those that do involve discharges of dredged or fill material into water. The FWPCA does not allow us to make such an exemption or exception for any industry. (See *NRDC vs. Train*, 366 F. Supp. 1393 (D.D.C., 1975).) We have, however, clarified our intent by stating at the end of our definitions of "discharge of dredged material" and "discharge of fill material" that plowing, seeding, cultivating and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program.

The 1975 definition of "fill material" also excluded "material placed for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Since maintenance and emergency reconstruction of these types of fill often involve discharges into water, we do not have authority to exclude these activities from the permit requirements of the FWPCA. We have, therefore, eliminated this exclusion from our definition of "fill material". At the same time, we are issuing, today, a nationwide permit for discharges of dredged or fill material that involve maintenance and emergency reconstruction of existing fills. The nationwide permit contains basic common sense conditions and management practices which, if followed, will achieve the objectives of the FWPCA. Of course, if the maintenance or emergency reconstruction does not involve a discharge in water, no permit is required.

During the two years of experience with the Section 404 program, several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of "fill material" but which were intended to be regulated under the NPDES program. These include the disposal of waste materials such as sludge, garbage, trash, and debris in water. In some cases involving the disposal of these types of material in water, the final result may be a land-

fill even though the primary purpose of the discharge is waste disposal.

The Corps and the Environmental Protection Agency feel that the initial decision relating to this type of discharge should be through the NPDES program. We have, therefore, modified our definition of fill material to exclude those pollutants that are discharged into water primarily to dispose of waste. We will process Section 404 permits for these types of activities to the extent that a levee or other type of containment structure must be placed in the water as part of the overall disposal plan. We will not, however, take any final action on the Section 404 permit application until a decision on the NPDES permit has been made (See 33 CFR 230.4(j)).

Individual, general, and nationwide permits: As we did in the regulation on our Section 10 program, we have included definitions of "individual", "general" and "nationwide" permits to distinguish between the three types of authorizations that will be used to satisfy the requirements of the FWPCA.

If a discharge requires an individual permit, an application must be made to the District Engineers following the procedures specified in 33 CFR Part 325 and the discharge cannot begin until and unless the permit is issued.

Before applying for an individual permit, however, a person needing a Section 404 permit should check to see whether the proposed discharge has already been permitted by a general permit, or a nationwide permit published in this regulation. District Engineers are issuing general permits for particular regions of the country that cover a wide variety of discharges that cause only minimal individual and cumulative adverse environmental impact. Nationwide permits apply throughout the country, and cover many types of minor activities. If a general or nationwide permit already covers your discharge, you should not have to get an individual permit to satisfy the requirements of the FWPCA.

Nationwide Permits

On May 18, 1977 we published proposed nationwide permits in the *Federal Register* to authorize discharges of dredged or fill material into certain waters of the United States and also certain specific categories of discharges. We received 163 letters commenting on these nationwide permits, the majority of which supported the concept but suggested additions, modifications and/or deletions to the activities covered and the conditions imposed.

Today, we are issuing nationwide permits for discharges into most of the Category 4 waters, discussed above, (isolated natural lakes larger than 10 acres are not included) and for certain specific categories of discharges into other waters. These nationwide permits are being incorporated into § 323.4.

We wish to take this opportunity to express our appreciation to **every** one who commented on these nationwide permits. The following is a discussion of the sub-

stantive changes that were made as a result of your comments.

Management practices. The Environmental Protection Agency expressed concern over the potential for adverse cumulative effects that may be caused by some of the discharges that are subject to the nationwide permit. To minimize these potential effects, EPA suggested that we identify certain basic common sense management practices that should be followed, to the maximum extent possible, to minimize these potential adverse effects on the aquatic environment. We have adopted this suggestion. These management practices pertain to all discharges subject to these nationwide permits and are listed in § 323.4(b). We anticipate that compliance with these practices will avoid the potential for cumulative adverse water quality impacts that may be caused by these discharges.

We intend to remain aware of potential cumulative impacts that may occur on a regional basis as a result of these nationwide permits. If adverse cumulative impacts are anticipated from any of the discharges subject to these nationwide permits, we intend to take appropriate administrative action including the exercise of authority expressed in § 323.4-4 to require individual or general permits for these activities.

Discharges prior to effective dates of phasing (§ 323.4-1). The 1975 regulation authorized discharges of dredged or fill material that occurred before a particular phasing date. We have republished this authorization by including it in this nationwide permit. The conditions remain the same as were published in 1975.

Discharges into certain waters of the United States (§ 323.4-2). Many commenters expressed confusion over the types of waters that were covered by this nationwide permit, specifically with reference to those that are described in § 323.4-2(a)(4) as "non-tidal waters of the United States that are not part of a surface tributary system to interstate waters or navigable waters of the United States." We intended by this description to include those waters identified in "Category 4," above with the exception of isolated lakes larger than 10 acres. Thus, discharges of dredged or fill material into most of the "Category 4" waters are subject to this nationwide permit.

Numerous letters questioned whether wetlands adjacent to these "Category 4" waters were included as part of this nationwide permit. Discharges into these adjacent wetlands are included. Several environmental groups expressed concern over expanding the size limitations for natural lakes including prairie potholes to 10 acres, which they viewed as an apparent expansion from the present 5 acre lake "exclusion" contained in the Corps' 1975 regulations. As we have already indicated in our discussion on lakes above, the 5 acre standard, measured by surface area, was difficult to determine since, in many regions, the surface area of small lakes is subject to extreme seasonal variation. However, we have found that in most cases, the wetlands adjacent to these small natural

lakes are more easily delineated and are relatively stable despite fluctuations in water levels. In order to simplify the identification of natural lakes described in § 323.4-2(a)(2) and (3) we adopted a standard for surface area measurement by including adjacent wetlands. Since these surrounding wetland areas are now included in the measurement, we increased the size limitation for lakes from 5 acres to 10 acres. Again, we emphasize that this size limitation is only used for determining whether an individual or general permit in lieu of this nationwide permit, is required.

We share the concern of the environmental groups that prairie potholes and many other isolated lakes are disappearing. The safeguards contained in the new management practices section of this permit, as well as the authority vested in the District Engineers to process individual or general permits where the concerns of the aquatic environment (as expressed in the EPA Guidelines) so require, will, we believe, adequately protect the broad range of water quality concerns and the public interest in "prairie potholes, small lakes, and other waters described by this section." Moreover, § 323.4-4 provides another safeguard through which EPA can bring concerns for water quality as expressed in the Section 404(b) Guidelines to the attention of the District Engineer.

Several commenters indicated that the third condition of this nationwide permit, dealing with erosion, was vague and overly broad. The condition has been changed to make our intent clear: the fill must be maintained in a manner to prevent erosion and other non-point sources of pollution.

EPA recommended that we include a condition that the discharge would not destroy members of a threatened or endangered species. We concur and this change has been made in this nationwide permit, as well as in the nationwide permit that authorizes discharges for certain types of activities. (See §§ 323.4-2(b)(1) and 323.4-3(b)(3).) We cannot agree to requests from industries to delete this condition altogether since Section (7) of the Endangered Species Act requires the Corps to protect threatened and endangered species in all waters subject to its regulatory jurisdiction.

We received a great number of comments from Resource Districts in opposition to the exception in our nationwide permits (§ 323.4-2(c)) for dams located above the headwaters which would be greater than 25 feet in height or 50 acre feet in impoundment capacity. As was pointed out, this exception would automatically require an individual permit for many dams above the headwaters which, in most cases, were exempt from individual permit requirements by the 1975 regulation. We are excluding this exception since we feel that our original reason for including it will now be satisfied by inclusion of the new management practices, discussed above. The deletion of § 323.4-2(c) means that any dam located above the headwater of a stream will be authorized by the nation-

wide permit unless the District Engineer applies his discretionary authority under § 323.4-4.

Specific categories of discharges. Comments on the types of activities and proposed conditions included in this portion of the nationwide permit ranged from environmental groups, who favored greater restrictions on permitted activities, to industry groups who proposed additional categories to be permitted to cover their particular activities. We feel that we have struck a reasonable balance between these concerns and requests through the addition of the management practices, discussed above. At the same time, we are committed to reviewing other classes and categories of discharges of dredged or fill material that may be, in the future, candidates for nationwide permits.

Utility lines (§ 323.4-3(a)(1)). This section has been amended to clarify that any excess material beyond that needed to restore the bottom contour to its pre-construction status must be removed to an upland disposal area. Such a requirement was envisioned in the proposed permit, but not clearly expressed. At the suggestion of EPA, we have explicitly stated this requirement to insure compliance and avoid misunderstanding.

Numerous commenters suggested further clarification on what was intended by the use of the term "utility line." We have defined the term to include any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, and any cable, line, or wire for the transmission of energy, telephone, radio, or television communication.

Despite several suggestions for pre-notification requirements and fill length and volume restrictions, we do not believe that these conditions are necessary. We feel, instead, that upland disposal of excess material and compliance with the management practices will limit any sedimentation or disruption of water flow in streams as a result of these activities.

Bank stabilization (§ 323.4-3(a)(2)). We have modified this category of discharge to make it clear that only necessary bank stabilization for erosion prevention is being permitted. While some suggested that we include a pre-notification requirement, we do not feel that this is necessary.

Minor road crossing fills (§ 323.4-3(a)(3)). This category of activity generated more specific comment than any other of the proposed nationwide permits. We have made certain changes to respond to these comments.

At the request of many commenters, we have removed the 30 day advance notification requirement for discharges between 100 and 200 cubic yards in quantity. We believe that this is impractical to administer and that the basic intent for the notification has been offset by the inclusion of management practices.

Our proposed nationwide permit provided that a crossing must be culverted or bridged to prevent the restriction of normal flow. In response to comments by

EPA and environmental groups "normal" has been changed to "expected high flows." This change will provide more effective drainage and reduce erosion during expected flood stage levels.

Forest industry commenters were almost unanimous in their calls for deleting the 100 to 200 cubic yard reporting requirement (see above) and increasing both the 200 cubic yard fill limit and the 50 foot wetland width limitation. They indicated that many minor road crossings with little or no direct or cumulative environmental impact would not qualify under our proposed permit. Their main source of concern was the 50 foot limit on wetlands adjacent to the waterbody to be crossed. In reviewing the comments it became apparent that confining road crossing activities in adjacent wetlands to 50 feet on either side of the ordinary high water mark of the waterbody would result in excluding many small roadfills from this nationwide permit. On the other hand, others applauded our 50 foot limit and urged a reduction in the allowable level of fill. After carefully considering all comments on this permit we decided that the allowable wetland width to be crossed could be increased from 50 to 100 feet on either side of the stream as long as this allowance was applicable to non-tidal streams. In tidal waters, where adjacent wetlands are more dependent on frequent tidal flushing, and therefore circulation impairments from road fills are more damaging, we concluded that even the 50 foot wetland fill needed to be controlled through an individual or general permit. We, therefore, divided the road fill permit into tidal and non-tidal waters. For non-tidal waterbodies, we increased the adjacent wetland width from 50 to 100 feet. For tidal water crossings (Section 323.4-3(a)(4)), we included only the fill placed incidental to the construction of the bridge itself. Any approach fills or causeways associated with the crossings of tidal waters will require an individual or general Section 404 permit if located in waters of the United States.

One commenter expressed concern that no restriction had been placed on the total amount of fill above the ordinary high water mark, since this could lead to erosion on steep slopes between the ordinary high water mark and the road surface. The letter also feared that without a total fill limit, vast amounts of wetlands could be filled at right angles to the waterbody for roads or turn around areas. We share this commenter's concerns. However, we believe that adherence to the management practices suggested by EPA will minimize erosion and other non-point sources of pollution. As for his second concern, it must be noted that § 323.4-3(a)(3) only permits minor road crossings and attendant features. It does not authorize general road building in wetlands above the ordinary high water mark. We will construe attendant features narrowly. Major activities appurtenant to the road crossing will not be permitted by this section. These require an individual or gen-

eral permit issued pursuant to procedures in 33 CFR Part 325.

Many commenters expressed confusion over the 100/200 cubic yard measurement as it pertains to these roadfills. We intended to use that measurement to define the size of the crossing, and to use the ordinary high water mark to determine that size. Thus, up to 200 cubic yards of material can be discharged below the plane of ordinary high water of a waterbody under this nationwide permit, and additional cubic yards of material can be discharged into the 100 foot strip of adjacent wetlands, as necessary, to construct the road provided the conditions to protect those wetlands are satisfied. We have expressed this intent by including a definition of "minor road fill" in the nationwide permit.

Repair, rehabilitation and replacement of existing fills (§ 323.4-3(a)(4)). As we have previously indicated, the 1975 regulations excluded material placed for maintenance and emergency reconstruction of fills from the definition of "fill material." We have added this previously excluded activity to the list of those that are being permitted today by this nationwide permit.

EPA, Conservation Commissions, and environmental groups noted that the condition in subparagraph (f) that the discharge not disrupt the migration of indigenous aquatic life was not sufficient to safeguard the passage of nonmigratory aquatic life. The final nationwide permit condition reflects this concern by changing "migration" to "movement."

Subparagraph (6) has been amended to clarify its intent to control erosion and other non-points sources of pollution. This subparagraph is consistent with changes made in § 323.4-2(b)(3).

A new condition has been added at the request of the Department of the Interior to exclude components of National and State wild and scenic river systems (established pursuant to the Wild and Scenic Rivers Act) from the nationwide permit programs (§ 323.4-2(b)(4) and 323.4-3(b)(7)).

Discretionary authority to require individual or general permits (§ 323.4-4). Comments received from industry groups suggested that this section was superfluous since by definition any activity performed in accordance with the conditions in §§ 323.4-2 or 323.4-3 would have minimum adverse water quality impact and would not trigger EPA Guideline concerns. On the other hand other commenters suggested more stringent controls over erosion, water quality, chemical use, restoration of abandoned projects and wildlife protection. In order to make our regulatory program work, we are relying on decentralization and our flexibility to respond to local conditions. Moreover, if we overburden this nationwide permit with specific conditions, its intent and usefulness is reduced. On the other hand, we realize that local conditions may be such that special restrictions are required for activities otherwise acceptable in most areas and certain waters of the United States otherwise

covered by a nationwide permit require special restrictions. We believe the most efficient means to do this is to grant our District Engineers the authority to require individual or general permits, as needed, to respond to these local conditions. To this end we invite the help of private groups, citizens, and Federal and State agencies to help our District Engineers respond to these localized concerns.

All Federal agencies that commented expressed support for the concept of nationwide permits, as did 81% of the public comment letters. We believe these new nationwide permits represent a major step forward in reducing unnecessary reviews and delay associated with regulation of minor discharges of dredged or fill material into waters of the United States.

An environmental assessment and a Findings of Fact have been prepared for these nationwide permits as well as for the Section 10 nationwide permits and are available for review in the Office, Chief of Engineers, Forrestal Building, Room 5F-036, Washington, D.C. 20314.

PART 324

This Part prescribes the special policies and procedures that will be used to evaluate applications for permits to transport dredged material for purposes of dumping in ocean waters pursuant to Section 103 of the Ocean Dumping Act. These policies and procedures must also be read in conjunction with the applicable general policies of Part 320 and general procedures of 325. If you need a permit to dump dredged material in the oceans, you should also refer to Part 322 since a permit will be required under Section 10 of the 1899 Act to dredge in navigable waters of the United States.

Part 324 corresponds to Sections (d) (3), (e)(2), and (g)(17) of rescinded 33 CFR 209.120.

We have adopted the definitions of "oceans waters", "dredged material", and "transport" as used by the Ocean Dumping Act.

In accordance with recent revisions to EPA criteria for the evaluation of the ocean dumping of dredged material we have included requirements for additional specific information that must be included as part of a public notice for a proposed ocean dumping of dredged material. We have also specifically included the requirement that District Engineers consider the availability of land based alternatives during the evaluation of applications for ocean dumping permits. (See also § 320.4(a)(2)).

Procedures have also been included in this Part for those cases in which EPA objects to the proposed dumping of dredged material in ocean waters as being inconsistent with the EPA criteria. (See § 324.4(c)-(e)).

PART 325

This Part describes the procedures for processing all applications for Department of the Army permits, and for mod-

tying or revoking permits that have been issued. It corresponds to and supersedes paragraphs (h) through (s) of rescinded 33 CFR 209.120. The following is a summary of the major changes:

The material was reorganized for clarity. For example, public notice and environment impact statement (EIS) procedures, which were discussed in a number of different places in the rescinded regulation, were consolidated into single paragraphs.

The EIS procedures were revised to allow for a public hearing at completion of the draft EIS rather than the proposed final EIS; to require a public notice of the final EIS filing; and to provide for transmittal of the District Engineer's report to higher authority for decision, if required, after completion of the 30 day comment period on the final EIS (§ 325.4).

Permit file documentation requirements have been clarified. The District Engineer must prepare an impact assessment document (either an environmental assessment or an EIS) for each application and a decision document (either a Findings of Fact or, if the case is sent forward for decision, his report on the application) (§ 325.2(a)).

District Engineers have been delegated expanded authority to deny permits, including those which he determines are not in the public interest. (Their previous denial authority was limited to navigational conflicts and denial of a related state or local certification or authorization.) District Engineers have also been given the authority to issue most permits found to be in the public interest over unresolved objections of another Federal agency if that agency indicates that it does not desire to refer the application to a higher level of authority for review. (§ 325.8(b)).

Litigation potential and objection from a member of Congress have been deleted as reasons for automatically having to refer an application to the Chief of Engineers for decision. (§ 325.8(d)).

Procedures relating to the Coastal Zone Management Act have been made compatible with new regulations of the National Oceanic and Atmospheric Administration to be published as 15 CFR 930 (§ 325.2(b)(2)).

PART 326

This Part prescribes the policies and procedures that will be used by the Corps in the enforcement of the requirements of the River and Harbor Act of 1899, the FWPCA, and the Ocean Dumping Act. The Part corresponds to rescinded 33 CFR 209.120(g)(12), and is generally a restatement of the provisions in that rescinded section.

We have made several additions and clarifications to this enforcement regulation. On August 22, 1975, the Chief of Engineers delegated authority to District Engineers to refer certain types of cases involving unauthorized activities directly to the local U.S. Attorney. This delegation included the following types of cases: (1) All unauthorized structures or work falling exclusively within the

scope of Section 10 of the 1899 Act for which a criminal fine or penalty under Section 12 of that Act is considered appropriate; (2) all civil actions involving small unauthorized structures, such as piers, which require restoration or modification by judicial order because efforts to secure voluntary compliance have failed; (3) all violations of Section 301 of the FWPCA involving unauthorized discharges of dredged or fill material into waters of the United States, unless the case involves a substantial question of law or fact, or a request for substantial restoration; and (4) all cases for which a temporary restraining order and/or preliminary injunction is appropriate following non-compliance with a cease and desist order issued by the District Engineer.

We have restated this delegation of authority in this regulation, as well as certain basic policy guidance (also previously included in the August, 1975 delegation) for use by the District Engineer in determining whether civil and/or criminal action is appropriate. We have also incorporated the policies and procedures expressed in a Memorandum, dated June 1, 1976, entitled "EPA Enforcement Policy for Noncompliance with Section 404 of the FWPCA", which was signed by the Assistant Administrator for Enforcement of EPA and concurred in by the Assistant Attorney General and the Chief Counsel of the Corps of Engineers.

Authority to refer certain types of cases directly to the local U.S. Attorney has not been delegated to the District Engineer either because of the extreme seriousness of the case or because the law on the particular type of case has not developed to the point to which Departmental level attention is no longer required.

We intend to propose revisions to this regulation in the near future that will provide further policy and procedural guidance and that will incorporate other enforcement authorities.

PART 327

This Part prescribes the policies and procedures to be followed by the Corps in the conduct of public hearings. A public hearing may become necessary in the evaluation of an application for a Department of the Army permit. The Part restates the policies and procedures that were prescribed in rescinded 33 CFR 209.133.

PART 328

This Part prescribes the policies and procedures used in the establishment of harborlines pursuant to Section 11 of the River and Harbor Act of 1899 (33 U.S.C. 404). As previously indicated, harborlines are only used as guidance to the District Engineer concerning the impact that a particular activity may have on navigation. Activities occurring landward of established harborlines must still have permits under Sections 9 or 10 of the 1899 Act, and may also require permits under Section 404 of the FWPCA and Section 103 of the Ocean Dumping Act. This part

restates the policies and procedures expressed in rescinded 33 CFR 209.150.

PART 329

This Part corresponds to rescinded 33 CFR 209.260 and provides the administrative definition of the term "navigable waters of the United States" as used throughout Parts 320-325.

Two changes have been made to this regulation. First, pursuant to the decision of *United States v. Stocco Homes, Inc.*, 498 F.2d 597, (3rd Cir., 1974), cert. den.; 420 U.S. 927 (1975), we have included artificial waters subject to tidal action within our administrative definition of navigable waters of the United States. Second, we have delegated authority to Division Engineers to make determinations of navigability. (Previously, this authority existed with the Chief of Engineers.) Accordingly, 33 CFR 209.120, 209.125, 209.131, 209.133, 209.150 and 209.260 are revoked and reserved and 33 CFR 320 through 329 are added as set forth below.

NOTE.—The Department of the Army has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107. (33 U.S.C. 401; 33 U.S.C. 403; 33 U.S.C. 1344; 33 U.S.C. 1413.)

Dated: July 13, 1977.

DRAKE WILSON,
Brigadier General, USA,
Deputy Director of Civil Works.

Chapter II of 33 CFR is amended as follows:

PART 209—ADMINISTRATIVE PROCEDURES

§§ 209.120, 209.125, 209.131, 209.133, 209.150, and 209.260 [Reserved]

1. The above sections are revoked and reserved.

2. The following parts 320 through 329 are added:

PART 320—GENERAL REGULATORY POLICIES

Sec.

- 320.1 Purpose and scope.
- 320.2 Authorities to issue permits.
- 320.3 Related legislation.
- 320.4 General policies for evaluating permit applications.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

§ 320.1 Purpose and scope.

(a) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR 321-329) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal legislation applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable

Exhibit 43

204 Curtis Kay



204 Curtis Kay



Flag Placement at 130 Ocean Blvd Solomon



ROA 001052



/// 18

BCM Reddy 009432

130 Ocean Blvd Flags Solomon



ROA 001053



/// 19

BCM Reddy 009433

130 Ocean Blvd Flags



ROA 001054



130 Ocean Blvd Flags



ROA 001055



/// 21

BCM Reddy 009435

Gandolfo – 126 – orange flag is OCRM pink flags are depicting the IOP no build line.



Gandolfo – 126 – orange flag is OCRM pink
flags are depicting the IOP no build line.



Gandolfo – 126 – orange flag is OCRM pink flags are depicting the IOP no build line.



Flags at Stein Property – 122 Ocean Blvd.



Flag Placement at 122 Ocean Blvd. Stein



Exhibit 44

RE: Final Review Conferences

From Mary D. Shahid <MShahid@maynardnexsen.com>

Date Fri 4/26/2024 10:03 AM

To Crawford, Denise <crawfomd@dhec.sc.gov>; Phelan, Sallie P. <phelansp@dhec.sc.gov>

Cc DeBruhl, Janet H. <debruhjh@dhec.sc.gov>; Slagel, Matt <slagelmj@dhec.sc.gov>; Biggers, Ashley <biggerac@dhec.sc.gov>; Ted Brashier <tedbrashier87@yahoo.com>; Paul Jorgensen <paulwjorgensen@gmail.com>; Richardson, Wayne <Wayne.Richardson@hdrinc.com>

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Confirming the information below.

Mary D. Shahid

Shareholder | Environmental

P: (843) 720-1788

MShahid@maynardnexsen.com

205 King Street Suite 400

Charleston, South Carolina 29401



From: Crawford, Denise <crawfomd@dhec.sc.gov>

Sent: Friday, April 26, 2024 9:53 AM

To: Mary D. Shahid <MShahid@maynardnexsen.com>; Phelan, Sallie P. <phelansp@dhec.sc.gov>

Cc: DeBruhl, Janet H. <debruhjh@dhec.sc.gov>; Slagel, Matt <slagelmj@dhec.sc.gov>; Biggers, Ashley <biggerac@dhec.sc.gov>; Ted Brashier <tedbrashier87@yahoo.com>; Paul Jorgensen <paulwjorgensen@gmail.com>; Richardson, Wayne <Wayne.Richardson@hdrinc.com>

Subject: Re: Final Review Conferences

Mary,

Thank you for your email. To confirm, you are withdrawing the Requests for Final Review listed below.

Docket No. 24-RFR-53, Tideview Properties, LLC

Identification of landward limit of beaches critical area at 132 Ocean Boulevard, Isle of Palms, Charleston County

Docket No. 24-RFR-54, Claire M. Richardson Trust

BCM Reddy 019987

ROA 001062

Identification of landward limit of beaches critical area at 128 Ocean Boulevard, Isle of Palms, Charleston County

Docket No. 24-RFR-55, Paul and Meredith Jorgensen

Identification of landward limit of beaches critical area at 116 Ocean Boulevard, Isle of Palms, Charleston County

M. Denise Crawford

Clerk of the Board, South Carolina Board of Health and Environmental Control

Clerk of the Council, South Carolina Mining Council

S.C. Dept. of Health & Environmental Control

Office of General Counsel

2600 Bull Street

Columbia, SC 29201

Columbia Office: (803) 898-3309

Mobile: (803) 360-8126

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From: Mary D. Shahid <MSshahid@maynardnexsen.com>

Sent: Friday, April 26, 2024 8:46 AM

To: Crawford, Denise <crawfomd@dhec.sc.gov>; Phelan, Sallie P. <phelansp@dhec.sc.gov>

Cc: DeBruhl, Janet H. <debruhjh@dhec.sc.gov>; Slagel, Matt <slagelmj@dhec.sc.gov>; Biggers, Ashley

<biggerac@dhec.sc.gov>; Ted Brashier <tedbrashier87@yahoo.com>; Paul Jorgensen

<paulwjorgensen@gmail.com>; Richardson, Wayne <Wayne.Richardson@hdrinc.com>

Subject: RE: Final Review Conferences

*** Caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. ***

Denise, as relates to the three RFR that the Board has agreed to hear on May 2, my clients are withdrawing their RFR's. It is my understanding in speaking with Ms. Phelan that if any of these three requestors want the relief that the Board granted other similarly situated property owners at its meeting in April, they can submit a permit application for Mr. Slagel to review. Thank you for your many courtesies and let me know if this email is sufficient to withdraw

BCM Reddy 019988

ROA 001063

the RFRs submitted on behalf of Jorgensen, Richardson, and Tideview Properties.

Mary D. Shahid

Shareholder | Environmental

P: (843) 720-1788

MShahid@maynardnexsen.com

205 King Street Suite 400

Charleston, South Carolina 29401



From: Crawford, Denise <crawfomd@dhec.sc.gov>

Sent: Tuesday, April 23, 2024 9:45 AM

To: Mary D. Shahid <MShahid@maynardnexsen.com>; Phelan, Sallie P. <phelansp@dhec.sc.gov>

Cc: DeBruhl, Janet H. <debruhjh@dhec.sc.gov>; Slagel, Matt <slagelmj@dhec.sc.gov>; Biggers, Ashley <biggerac@dhec.sc.gov>

Subject: Final Review Conferences

Counsel of Record:

The SC Board of Health and Environmental Control will hold the Final Review Conferences in Docket Nos. 24-RFR-53, 24-RFR-54, and 24-RFR-55 on Thursday, May 2, 2024. All three matters are similar, therefore, will you consent to the Board considering all three matters together?

If you have any questions or concerns, please let me know.

M. Denise Crawford

Clerk of the Board, South Carolina Board of Health and Environmental Control

Clerk of the Council, South Carolina Mining Council

S.C. Dept. of Health & Environmental Control

Office of General Counsel

2600 Bull Street

Columbia, SC 29201

Columbia Office: (803) 898-3309

Mobile: (803) 360-8126

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BCM Reddy 019989

ROA 001064

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BCM Reddy 019990

ROA 001065