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JUN 19 2014

S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

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

Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-0039-CC

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is Appellant,
and Kiawah Development Partners, II, is Respondent.

**RESPONDENT'S REPLY TO THE RETURN OF APPELLANT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO MOTION TO
LIFT SUPERSEDEAS OR, IN THE ALTERNATIVE, TO REQUIRE POSTING OF A
BOND OR OTHER SECURITY**

In its Return to the Motion to Lift Supersedeas filed by Respondent Kiawah
Development Partners, II ("KDP"), Appellant South Carolina Department of Health and
Environmental Control, Office of Ocean and Coastal Resource Management, ("DHEC")

rehashes arguments of supposed harm that were rejected by the Administrative Law Court. DHEC also advances several inaccurate assertions:

1. That the revetment formed of a mat of articulated concrete blocks ("ACB") constitutes a concrete wall that excludes the possibility of public access and use of the shoreline;
2. That the "only thing denying KDP the opportunity to develop their [sic] upland property on Captain Sam's Spit is KDP itself" (DHEC Return, p. 3);
3. That the Court should conclude there is no continuing erosion of the riverbank west of Beachwalker County Park because KDP did not submit pictures depicting it;
4. That the survey of the location of the escarpment as of March 14, 2014, attached to the Affidavit of John T. Byrnes, III (Exhibit 3 to KDP's Motion) should be disregarded because he did not have DHEC certify the escarpment as the current critical line; and
5. That Ray C. Pantlik's affidavit (Exhibit 5 to KDP's Motion) should not be considered to the extent it refers to the imminent damage to the vehicular beach access of the Town of Kiawah Island ("Town") because Pantlik is purportedly not authorized to speak on behalf of the Town.

DHEC's Return does not create any credible or material issue as to the significant loss of upland by KDP over the last four years. Nor does DHEC challenge the erosion's immediate threat to the parking lot of Beachwalker County Park, the vehicular beach access of the Town, and other upland of KDP along the bend of the Kiawah River. Accordingly, KDP respectfully requests that its Motion to Lift the

Supersedeas or, in the Alternative, to Require Posting of a Bond or Other Security be granted.

I. DHEC's argument of harm from the bulkhead-revetment is unsupported by references to the record or other proof and was rejected by Judge Anderson, the administrative law judge, whose findings are supported by substantial evidence

In his Amended Final Order and Decision, Judge Anderson weighed and rejected the arguments raised by DHEC and Appellant Coastal Conservation League (the "League") of harm to wildlife or marine life from either the proposed erosion control structure or the possible limited future residential development on but 20 of the more than 100 acres of Captain Sam's Spit. (R.pp.11-31). "Here, neither the proposed bulkhead-revetment nor the possible future residential development will have a material adverse effect on wintering piping plovers, diamond-back terrapins, the habitat for either, or other marine life or wildlife." (R.p.19). Judge Anderson elaborated on the basis for his factual findings that are supported by substantial evidence and not subject to collateral attack. See Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Env'tl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014) (noting that the ALC presides as the fact-finder in contested permitting cases, and that this Court's review is limited to a determination of whether the ALC's factual findings are supported by substantial evidence).

DHEC also belatedly advances new theories of harm that no witness testified to in the contested case hearing. For example, DHEC alleges in its return that the revetment would "eliminate important habitat used by a vast diversity of migratory birds that depend on that habitat" (DHEC Return p.3), but neither of Appellants ornithologists -- Jeff Mollenhauer (the League's ornithologist) or Melissa Hughes, Ph.D., (DHEC's

ornithologist) -- offered that opinion. DHEC fails to include any record reference for this broad and inaccurate statement.

The testimony at the contested case hearing from the three ornithologists focused on one bird species—wintering piping plovers. There was *no* evidence that wintering piping plovers used the location of the revetment on the river shoreline as habitat, nor has there ever been a confirmed siting of a wintering piping plover in the location of the proposed revetment or proposed limited future residential development. (R.p.13-14; p.932:19-25; pp.936:24-938:20; pp.944:10-945:4; p.948:10-25; p.950:7-11; pp.952:3-958:10; p.960:14-23; p.962:3-12; p.965:14-966:6; pp.966:20-967:15).

Judge Anderson thoroughly considered all the proof relating to whether there were any material adverse cumulative effects on wildlife and marine life from either the proposed erosion control structure or the future limited residential development and determined that there was none. To the extent that DHEC makes new, unsubstantiated claims of harm to wildlife outside the trial record, the Court should not consider these baseless assertions for purposes of the pending Motion.

II. DHEC makes numerous inaccurate assertions that not only should be disregarded but also fail to refute KDP's showing of irreparable harm from the continued erosion along the bank of the Kiawah River during the four (4) years of this appeal.

A. DHEC inaccurately asserts that the ACB mat is a "concrete wall" that excludes "the possibility of public access and use of the shoreline."

Succumbing to the temptation of misleading hyperbole, DHEC has taken to describing the revetment as a "concrete wall." (DHEC Ret. p.2). It isn't. There will be no "concrete wall" that "would cover up 2.63 acres" of critical area tidelands, as DHEC suggests. (DHEC Return pp. 2-3).

As reflected in KDP's application for a permit submitted in February 2008 (R. pp.295:4-295:12; pp.2095-2122), the proposed revetment consists of a mat composed of thin articulated concrete blocks ("ACB") attached together that are perforated to allow the growth of aquatic plants and attached together. The mat rests on the shore and extends from the bottom of the bulkhead toward the river channel. DHEC has approved articulated concrete block mats as an effective, sensitive (especially in comparison to loose riprap) erosion control method, approving its installation in other locations including Kiawah Island. (R.p. 290:8-15; p.594:13-25; pp.647:24-648:3).

There was no proof that DHEC has ever characterized the use of ACB *mat* in other locations where DHEC has approved and permitted it as a "concrete wall." It is a flexible mat that lays on the bottom, not a wall. As Judge Anderson recognized: "These and other types of revetments have been historically approved by the Department, including on Kiawah Island, for these same protective purposes." (R.p.19). In fact, in its publication titled "Adapting to Shoreline Change – A Foundation for Improved Management and Planning in South Carolina " issued in 2010, DHEC specifically refers on page 121 to the use of a cellular ACB mat as an example of a "living shoreline" stabilization method that had been installed at the North Inlet-Winyah Bay National Estuarine Research Reserve.

Judge Anderson also found, sitting as the trier of fact, that the ACB mat does not block access as a wall would: "In fact, kayaks and small boats can still be pulled up on the ACB mat, the same as what might occur on concrete boat ramps or landings in South Carolina's waters." (R.p.15). Moreover, Judge Anderson placed conditions on the permit that reduce the mat's width from 40 feet to 8 feet for the western-most 900

feet. (R.p.31) (Amended Final Order, p. 31; R.pp. 528-529). This condition reduced the size of the mat by .65 acre. This is a small point, but one necessary of correction given DHEC's repeated inaccurate references to the size of the mat.

B. DHEC's unsupported assertion that KDP has no obstacles to implementing its development on the highland of Captain Sam's Spit is misleading and known by DHEC not to be true.

Knowing well its inaccuracy, DHEC makes the following incredible assertion in its return:

The Department would also point out the reality that neither its permitting decision nor the writ of supersedeas is preventing KDP from developing its upland property. KDP has made a conscious decision not to develop its upland property without their desired revetment/bulkhead installed on public trust property. The only thing denying KDP the opportunity to develop their upland property on Captain Sam's Spit is KDP itself.

(DHEC Return, p.3).

DHEC's assertion that KDP is free to proceed to install the access road and underground utilities for its limited residential development of less than 20% of the Captain Sam's peninsula without the revetment-bulkhead is astonishing since DHEC itself has halted processing other necessary applications of KDP until this Court has decided this appeal. Indeed, DHEC's position is that DHEC will not grant KDP any of its storm water approvals, and other construction permits required for KDP to proceed with development of its upland property unless KDP obtains and installs an erosion control device, which DHEC itself is preventing by virtue of this appeal.

Any development on Captain Sam's must comply with the ordinances of the Town of Kiawah Island. The Town's ordinances require a paved roadway that complies with its road ordinances. (R.pp. 268-269). Judge Anderson took careful note of this

practical point:

It is unlikely that KDP could satisfy the Town of Kiawah Island's Ordinances governing subdivision and road construction without stabilization of the riverbank and a protected right of way. Moreover, as to the Department's and CCL's argument that KDP 'can still sell lots on Captain Sam's without the revetment,' the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated in the future. The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homes, especially given today's informed buyers.

(R.p.8).

DHEC has recognized this same reality in its processing of other, later applications by KDP concerning its development on Captain Sam's and completely stopped further action on them for this same reason.

As evident from the Supplemental Affidavit of Ray Pantlik, KDP's development director, attached hereto as Exhibit 1, the Planning Commission for the Town of Kiawah Island approved KDP's preliminary subdivision plat for the limited residential development on Captain Sam's on August 3, 2011. (Town's letter of August 9, 2011, attached as Exhibit A to Pantlik's Supplemental Affidavit, Exhibit 1 hereto).

As required by law, KDP then applied to DHEC for an NPDES permit for its proposed roadway and for approval of its storm water management plan. DHEC's position was (and is) that it will require, as a condition for its approval, that the riverbank be stabilized because of the demonstrated history of riverbank erosion. DHEC has also taken the position it will not make the required determination of whether the proposed access road is consistent with the South Carolina Coastal Zone Management Program ("CZMP") until this Court has rendered a final decision. For these reasons, in its letter

of June 25, 2012 to Mr. Pantlik, DHEC notified KDP it is not going to make a decision on KDP's applications until final resolution of this appeal by this Court. (Exhibit B to Pantlik's Supplemental Affidavit, Exhibit 1 hereto).

DHEC knows it is wrong in arguing that the "only thing denying KDP the opportunity to develop their upland property on Captain Sam's Spit is KDP itself." Indeed, DHEC's refusal to issue the required permits and approvals, together with the extended pendency of this appeal and the resulting damage to KDP's property, are the primary impediments to KDP's development efforts.

C. DHEC's misplaced assertion that the absence of photographs showing the advancement of the escarpment over the entire length of the proposed revetment does not support DHEC's conclusion that there has been no erosion in the area over the past four years.

DHEC makes the illogical suggestion that the erosion must not be advancing in any location on the riverbank not shown in Mr. Permar's photographs (Exhibit 2 to KDP's Motion). DHEC's inference is unsupported and incorrect.

KDP submitted photographs with its motion of the advancing escarpment next to Beachwalker County Park and the Town's vehicular beach access because those areas have improved public facilities that are in immediate danger. Those constructed improvements merely highlight the need for an erosion control structure to protect them from the advance of the erosion over the last four years. The absence of photographs depicting the escarpment in other locations to the west as exhibits to KDP's Motion does not support an inference that the relentless erosion process miraculously stopped west of the Town's beach access four years ago.

To eliminate any doubt, KDP hereby submits the supplemental affidavit of Mark Permar (Exhibit 2 hereto) with photographs of the large escarpment along the riverbank

to the west of the locations shown in his photographs submitted with KDP's Motion. As he attests in his supplemental affidavit and his photographs reveal, the erosion has significantly advanced over the last four years in those areas, as well.

In its motion, KDP alluded to the diminishment of its upland in describing the various effects of the ongoing erosion over the last four years, though it did not submit photographs at that time: "[T]he access corridor across the neck has narrowed even more on the riverside." (KDP Motion, p. 2). Permar's supplemental affidavit establishes the obvious—that erosion of the bank in the river bend has occurred on the western side as well as the eastern side of the proposed bulkhead-revetment over the last four years and will continue.

D. DHEC's certification of the critical line as of March 17, 2014 would not change the location of the escarpment on that day.

In his affidavit (Exhibit 3 to KDP's Motion), John T. Byrnes, III, does not purport to establish the current location of the critical line as intimated by DHEC in its return. In his affidavit, Byrnes makes clear that his survey of March 17, 2014, located "the *escarpment* adjacent to Beachwalker Park and the beach access of the Town of Kiawah Island." (Byrnes Affidavit, Ex. 3 to KDP Motion, ¶5) (emphasis added). The survey attached as Exhibit 1 to his affidavit differentiates between locations of the escarpment that were certified by DHEC as being the critical line on past surveys as distinct from those where the surveyor did not seek to obtain certification. Byrnes makes this distinction clear in paragraph 6 of his affidavit:

6. Also shown on Exhibit 1 are previous locations of the critical line, or escarpment, as determined by Southeastern Surveying (or later SW&A), including: survey dated November 5, 2009, survey dated July 27, 2010 with critical line certified by DHEC-DHEC; and survey dated May 2,

2011, with critical line certified by DHEC-DHEC.

(Aff. of Byrnes, Ex. 3 to KDP Mot., ¶6).

Byrnes's calculations of the distances the erosion has advanced over the last four years are measured from the location of the escarpment on March 17, 2014, *not* the critical line. (Aff. of Byrnes, Ex. 3 to KDP Mot., ¶¶8-9). Byrnes never requested certification of the critical line on his March 17, 2014 survey because there was no need to. (Aff. of Byrnes, Ex. 3 to KDP Mot., ¶¶8-9). It is the advance of the escarpment through persistent erosion of the bank in the river bend that is taking KDP's valuable highland and threatens not only Beachwalker Park's parking lot, but also the Town's vehicular access. DHEC has not shown that Byrnes's survey and sworn testimony establishing the location of the escarpment on March 17, 2014, are subject to question.

E. The imminent danger to the Town's beach access, evident from Permar's pictures, and the Town's concern about this danger, does not depend on whether Pantlik is an employee or agent of the Town.

The location of the Town's unimproved vehicular beach access beginning at the far end of Beachwalker County Park and its proximity to the escarpment are plainly evident from Mr. Permar's initial photographs. (Photographs on pages 6, 8, 9, and 12 of Exhibit A to Permar Affidavit, Exhibit 2 to KDP's Motion). These obvious physical facts are unaltered by whether Mr. Pantlik is an employee of the Town or not.

To respond to the League's and DHEC's assertion that the Town is not concerned about the danger to its unpaved beach access, KDP has submitted the affidavit of Charles R. Lipuma, Mayor of the Town of Kiawah Island, attached as Exhibit 1 to KDP's Reply to the League's Return. Mayor Lipuma's affidavit eliminates any doubts about the importance of the beach access to the Town and the Town's concerns

about the risk of losing it:

4. Over the last three or four years the erosion in this location along the Kiawah River has increased the escarpment to where it is now very close to the vehicular access.
5. This beach access is important because [it] is also used by emergency vehicles, if necessary, to gain access to the beach on the western end of Kiawah Island.
6. The Town considers the stability of this beach access to be important to the health, safety, and welfare of the citizens of the Town, their guests, and visitors to Kiawah Island.
7. The Town is unable to use the beach access as it currently exists.

(Aff. of Lipuma, Exhibit 1 to KDP's Reply to the Return of the League).

CONCLUSION

Nothing in DHEC's Return calls into question: (a) the continued, destructive erosion in the river bend and loss of upland over the last four years; (b) the immediate damage and potential danger to public facilities and KDP's remaining land; or (c) the need to stabilize the bank in the river bend to prevent further loss of upland and prevent a portion of the relief being sought from becoming moot.

For the reasons stated in its Motion, its Reply to the Return of the League, and its Reply to the Return of DHEC, KDP respectfully requests that this Court grant its Motion to Lift the Supersedeas or, in the alternative, require the posting of a bond or other adequate security.

Respectfully Submitted,

BY:

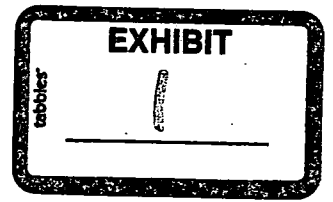
G. Trenholm Walker

G. Trenholm Walker
Daniel S. McQueeney
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
Telephone: 843-727-2208
gtw@p-tw.com
dsm@p-tw.com

GEDNEY M. HOWE, III, P.A.
Gedney M. Howe, III
P.O. Box 1034
Charleston, SC 29402
Telephone: 843-722-8048
ghowe@gedneyhowe.com

Attorneys for Respondent, Kiawah
Development Partners, II

June 16, 2014
Charleston, South Carolina



STATE OF SOUTH CAROLINA
In The Supreme Court

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

Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

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South Carolina Coastal Conservation League, Appellant,

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South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is Appellant,
and Kiawah Development Partners, II, is Respondent.

SUPPLEMENTAL AFFIDAVIT OF RAY C. PANTLIK

Personally appeared before me, Ray C. Pantlik, who, being duly sworn under
oath, avers and states as follows:

1. I have personal knowledge of the matters stated herein.
2. I am submitting this affidavit to supplement my earlier affidavit to respond

to the assertion in the Reply of South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("DHEC") that the "only thing denying KDP the opportunity to develop their upland property on Captain Sam's Spit is KDP itself." (DHEC Return, p. 3).

3. Kiawah Development Partners, II ("KDP") has undertaken to obtain other permits and approvals for the limited residential development on Captain Sam's Spit even though the permit for the bulkhead-revetment is tied up in the appeal now before this Court.
4. The ordinances of the Town of Kiawah Island (the "Town") require that new development have approved paved access in accordance with all the technical requirements of its road code, and water distribution and sewage collections systems are required pursuant to the Town's Land Use Planning and Zoning Regulations.
5. One of the first steps towards constructing a paved road and the installation of the necessary utilities is to obtain approval of a preliminary subdivision plat that shows the layout of the roadway and homesites for the project.
6. KDP applied for and obtained the approval of the Town's Planning Commission of its preliminary subdivision plat for development of 20 acres of Captain Sam's on August 3, 2011, as indicated in the letter of the Town dated August 9, 2011, confirming that approval, attached as Exhibit A hereto.

7. Because the installation of a road "disturbs" the land, a developer must obtain a NPDES permit and approval of a storm water management plan from DHEC. In addition, the developer must obtain construction permits for the proposed water and sewage collection system from DHEC. Given this project lies within the one of the coastal counties of South Carolina, this project must receive Certification from DHEC that the project is consistent with South Carolina Coastal Zone Management Plan before the water and sewage collection permits can be issued by DHEC.
8. KDP applied to DHEC for a NPDES permit, approval of a storm water management plan, Coastal Zone Consistency Certification, and for the water and sewage collection construction permits for the proposed subdivision approved by the Town for the subdivision of the 20 acres of Captain Sam's.
9. Directly and through its outside engineer, Thomas & Hutton, KDP communicated back and forth with DHEC about DHEC's comments on the subdivision project and, we believe, managed to answer or resolve all of DHEC's questions about the technical specifications of the drainage and storm water management plan.
10. DHEC staff interpreted the policies of the South Carolina Coastal Zone Management Plan to require as a condition of its Coastal Zone Consistency review for the subdivision project that KDP install an erosion control structure to stabilize the bank in the bend in the Kiawah River. Because the permit for the bulkhead-revetment has been subject to litigation for

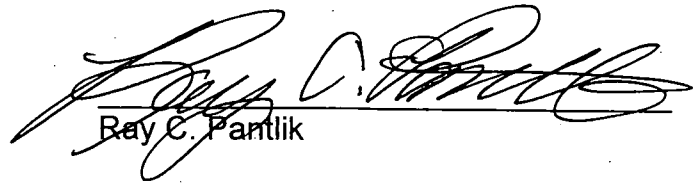
more than five years, KDP cannot now meet this condition for approval.

11. DHEC has decided not to make the necessary consistency determination until after final resolution of this appeal by this Court.
12. I have attached the letter of DHEC's Tara C. Maddock of June 25, 2012, (Exhibit B hereto) to me confirming DHEC's position.
13. In her letter Ms. Maddock expresses DHEC's requirement of a permitted erosion control structure as follows: "Erosion rates along this area of the riverbank are undisputed and therefore the residential development project as submitted cannot be granted consistency with the SCCZMP without an adequate plan in place to prevent or limit any direct negative impacts on the adjacent critical areas."
14. Ms. Maddock of DHEC goes on to say in her letter that "[d]ue to your contingency plan for stabilization resting solely on a permit currently under review by the South Carolina Supreme Court, the Department has decided to hold this coastal zone consistency request in abeyance pending the resolution of the Court regarding permit OCRM-08-11 7-E."
15. Even though DHEC is holding our application for approval of the storm water aspects and other required permits for our subdivision project, KDP has continued to obtain other necessary approvals.
16. For example, KDP obtained the approval of the United States Army Corps of Engineers that the proposed bulkhead-revetment is authorized by a Department of the Army Nationwide Permit. The Army Corps issued its approval, with conditions, in a letter from Tina B. Hadden, chief of the

regulatory division of the USACE's Charleston District, to me dated July 11, 2013.

17. KDP has been diligent in seeking the required regulatory permits and approvals for its limited residential subdivision proposed for Captain Sam's. To my knowledge KDP has gone as far as it practically can to obtain these permits and approvals.
18. It is inaccurate for DHEC to state that the "only thing denying KDP the opportunity to develop their upland property on Captain Sam's Spit is KDP itself." DHEC itself has denied KDP the opportunity to develop the upland in Captain Sam's both in DHEC's denial of the permit requested for the bulkhead-revetment in December 2008 and in its written decision in June 2012 to refrain from making the necessary consistency determination on KDP's storm water permit request until this Court has rendered its final decision.

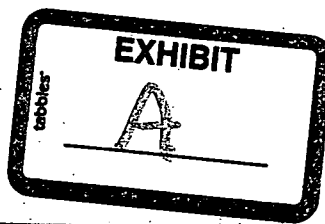
Further affiant sayeth not.


Ray C. Pantlik

SWORN before me this 16th day of June, 2014

Margaret J. Henry
Notary Public for the State of South Carolina.

My Commission Expires: 1/31/2021



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AUG 12 2011

TOWN OF KIAWAH ISLAND

21 BEACHWALKER DRIVE • KIAWAH ISLAND, SC 29455 • (843) 768-9166 • FAX (843) 768-4764

August 9, 2011

G. Steven Orban, Mayor

Council Members

Alan L. Burnaford

Charles R. Lipuma

Greg A. VanDerwerker

Fran Wernuth

Town Administrator

Tumiko Rucker

Ray Pantlik, Director of Development
Kiawah Land Development
P. O. Box 22497
Charleston, SC 29413

Re: #11492-P - Lands of Kiawah Development Partners, Inc.
Captain Sam's Spit, Parcels #12A, 12B, 13 TMS #207-05-00-001

Dear Mr. Pantlik:

The Town of Kiawah Island Planning Commission at its meeting on August 3, 2011 APPROVED the above referenced Preliminary Plat. The property is being subdivided into fifty (50) lots.

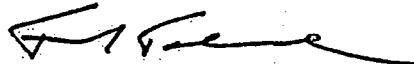
Prior to Final approval, the following contingencies must be met:

1. Street plans, profiles, and typical sections and a detailed drainage plan with drainage computations are to be submitted to the Director of Public Works for approval.
2. Tie drainage system into a maintained canal or tidal stream of adequate size as required by the Town of Kiawah Island Road Code.
3. Provide and dedicate drainage easements as required by the Town of Kiawah Island Road Code.
4. Construct paved streets and install drainage systems in accordance with the requirements of the Town of Kiawah Island Road Code, Subdivision Regulations, and approved street plans and profiles.
5. Install the necessary drainage ditches and fill where necessary so as to properly drain all lots.
6. Construct stub streets along with other streets in the subdivision.

Ray Pantlik
Page Two
August 9, 2011

7. Erect street name signs and required traffic control signs of the approved type. All street name signs must be approved and reserved by the E-911 Section of the Charleston County Planning Department.
8. Approval of this plat does not necessarily give approval to the width of any drainage easements shown.
9. Submission of a Certificate of Title or sworn Affidavit of Ownership of each person or persons dedicating streets and/or easements to the public.
10. Lots must comply with the provisions of the Subdivision Regulations pertaining to final plats and final approval.
11. This Preliminary approval in no way constitutes Final approval of any individual lot in this subdivision.
12. Provide water supply system and sewer collection system per Kiawah Island Zoning Ordinance, Article 112A-401.

Sincerely,



Frank Toland
Planner II

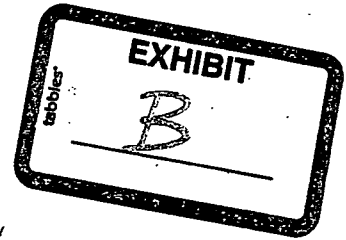
FJT/sll

cc Southeastern Surveying of Charleston, 1035-B Jenkins Road, Charleston, SC 29407
Town of Kiawah Island, 21 Beachwalker Drive, Kiawah Island, SC 29455



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment



Via Certified Mail No. 91 7199 9991 7030 0134 0129

June 25, 2012

Mr. Ray Pantlik
Kiawah Development Partners II, Inc.
14 North Adgers Wharf
Charleston, SC 29401

Re: Coastal Zone Consistency Review for Cape Charles Phase 1.

Dear Mr. Pantlik:

Under the South Carolina Coastal Zone Management Program (SCCZMP) policy "Activities in Areas of Special Resource Significance - Barrier Islands," DHEC-OCRM is tasked with protecting environmentally sensitive areas of South Carolina's coast. Because Captain Sam's Spit is part of a barrier island (Kiawah Island), the proposed residential development falls within the scope of this policy. The project as proposed involves the construction of a roadway, bio-swale stormwater management infrastructure, a community dock site, and several single-family residences very near or adjacent to the critical area of the Kiawah River. By submitting a critical area permit application for a 2,783 foot long articulated concrete block revetment on the Kiawah River, Kiawah Development Partners II, Inc. acknowledges the erosion along this riverbank. Erosion rates along this area of the riverbank are undisputed and therefore the residential development project as submitted cannot be granted consistency with the SCCZMP without an adequate plan in place to prevent or limit any direct negative impacts on the adjacent critical areas.

The Department received the attached response letter provided by Rick Karkowski, P.E. of Thomas and Hutton Engineering on May 4, 2012. Mr. Karkowski's response to Coastal Zone Consistency Review Comment No. 1¹ in reference to the contingency plan to stabilize the erosional nature of the shoreline in this area of the Kiawah River is inadequate. Mr. Karkowski's proposed solution to address this erosion issue is based on a favorable ruling from the South Carolina Supreme Court regarding permit OCRM-08-117-E. However, since the Supreme Court has not yet issued a final opinion, the location and dimensions of the erosion control structure are uncertain. Thus, until the Court renders a final ruling on the above mentioned permit, the Department is unable to make a sound and informed decision on the consistency of this residential development project with the SCCZMP.

¹ This comment was included in the January 23, 2012 email from the Department to Ray Pantlik, Bill Fellers, Tony Woody, Shannon Hicks and Rheta DiNovo.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Ocean and Coastal Resource Management

Charleston Office • 1362 McMillan Avenue • Suite 400 • Charleston, SC 29405 • Phone: (843) 953-0200 • Fax: (843) 953-0201 • www.scdhec.gov

Due to your contingency plan for stabilization resting solely on a permit currently under review by the South Carolina Supreme Court, the Department has decided to hold this coastal zone consistency request in abeyance pending the resolution of the Court regarding permit OCRM-08-117-E. Once the Court has rendered a final opinion, we will resume the consistency review of this project. Furthermore, in order for the Department to fully and satisfactorily evaluate this project, Kiawah Development Partners II, Inc. will need to provide additional information.

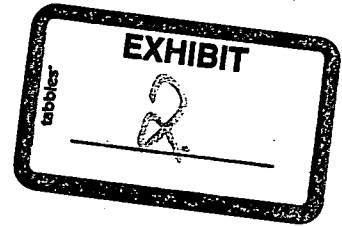
As always, the Department is willing to meet with you to discuss any issues pertaining to this matter.

Sincerely,



Tara C. Maddock
Project Manager
Coastal Zone Consistency Section
Regulatory Division

cc: Tony Woody, PE, Thomas and Hutton Engineering
Rick Karkowski, PE, Thomas and Hutton Engineering
Carolyn Boltin-Kelly, OCRM Deputy Commissioner
Rheta DiNovo, Director, OCRM Regulatory Division
Curtis Joyner, Manager, OCRM Coastal Zone Consistency Section
Shannon Hicks, PE, Manager, EQC BOW Coastal



STATE OF SOUTH CAROLINA
In The Supreme Court

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

Docket No. 09-ALJ-07-0029-CC

Kiawah Development Partners, II, Respondent,

v.

South Carolina Department of Health and Environmental Control, Appellant.

Docket No. 09-ALJ-07-0039-CC

South Carolina Coastal Conservation League, Appellant,

v.

South Carolina Department of Health and Environmental Control and
Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is Appellant,
and Kiawah Development Partners, II, is Respondent.

SUPPLEMENTAL AFFIDAVIT OF MARK PERMAR

Personally appeared before me, Mark Permar who, being duly sworn under oath, avers and states as follows:


- I have personal knowledge of the matters stated herein.
- I am providing this supplemental affidavit to respond to arguments by both Appellants in their Returns that the only inference is there has been no significant erosion or advance of the escarpment over the last four years in locations in the bend in the Kiawah River other than adjacent to Beachwalker County Park and the beach access of the Town of Kiawah Island ("Town") next to Beachwalker County Park because I did not submit photographs depicting it.
- The pictures attached to my initial affidavit were to illustrate the erosion next to the public facilities of Beachwalker County Park and the Town's beach access that are in

MRP

immediate danger of damage from the continuing erosion, not to show the only erosion occurring.

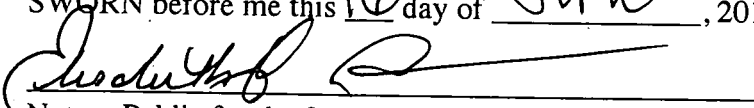
- I did not say in my initial affidavit, nor did I mean to imply, that there had been no additional erosion over the last four years to the west of the area shown in those photographs.
- As indicated in my initial affidavit, I live on Kiawah Island and for many years have tracked the erosion of the KDP's land along on the bank adjacent to the bend in the Kiawah River where the bulkhead-revetment is proposed.
- I took the photographs that showed the condition and location of the escarpment for the entire length of the proposed bulkhead-revetment at the time of the contested case hearing that were admitted as KDP's Exhibit 78 in that proceeding.
- As part of the design and planning of the limited residential development on Captain Sam's I make visits to the site and have been following the erosion in the river bend since well before the application for the permit in February 2008.
- Based on my visual observations, the erosion over the area adjacent to where the bulkhead-revetment is proposed has continued at the same or greater pace after the contested case proceeding as it did for the many years before.
- There has been a significant loss of upland to erosion over the last four years the appeal has been pending.
- Attached as Exhibit A hereto are photographs I took on June 14, 2014, showing the escarpment at various locations to the west of the locations shown in the photographs attached to my initial affidavit. The eight pages of photographs are sequenced so that p. 1 starts at the western end of the proposed bulkhead-revetment and the consecutively marked pages move gradually east towards the locations shown in my first set of photographs.

Further affiant sayeth not.



Mark Permar

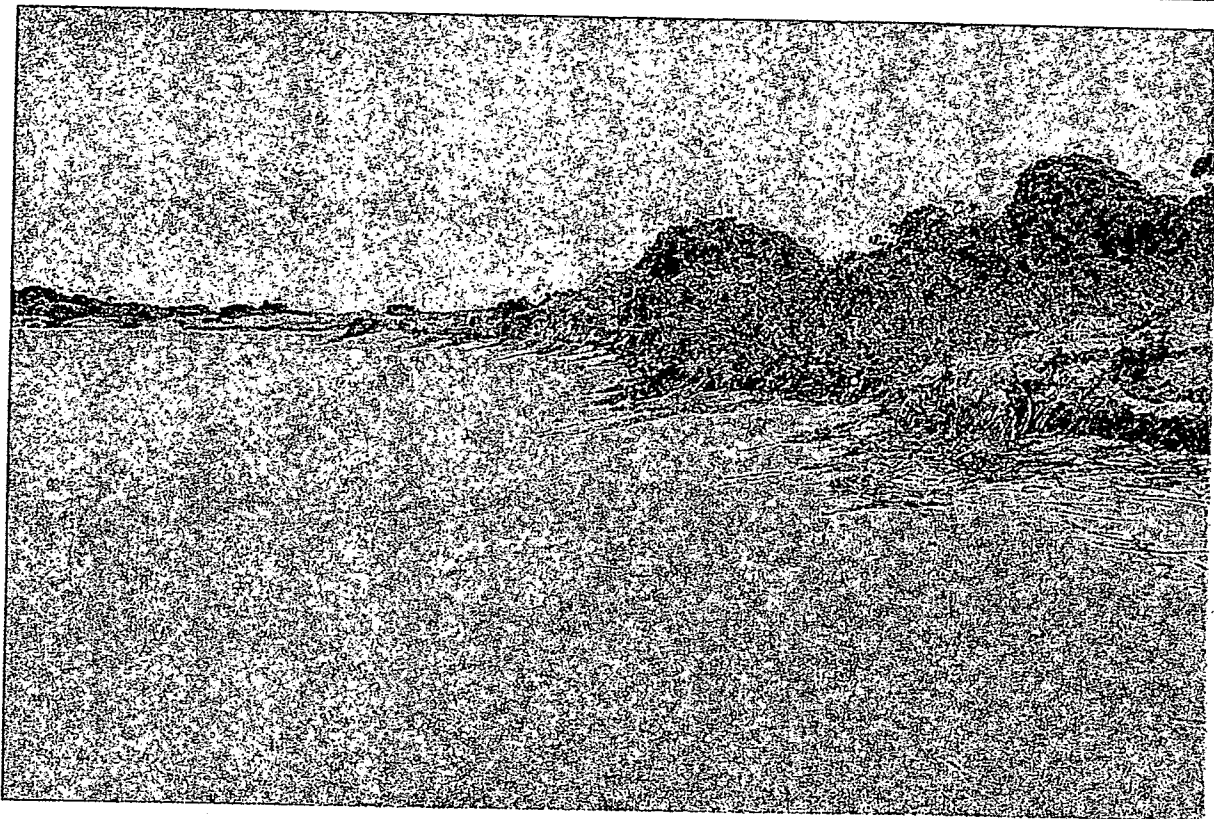
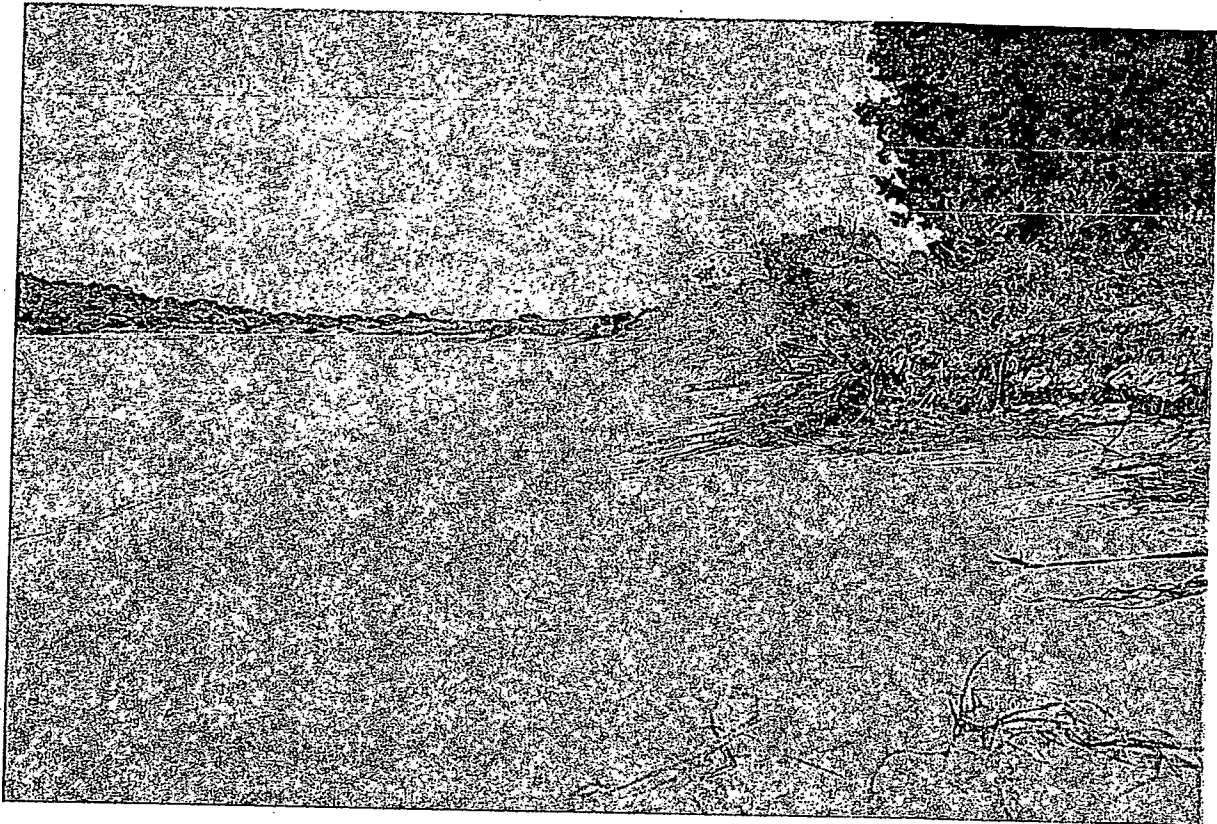
SWORN before me this 16th day of JUNE, 2014



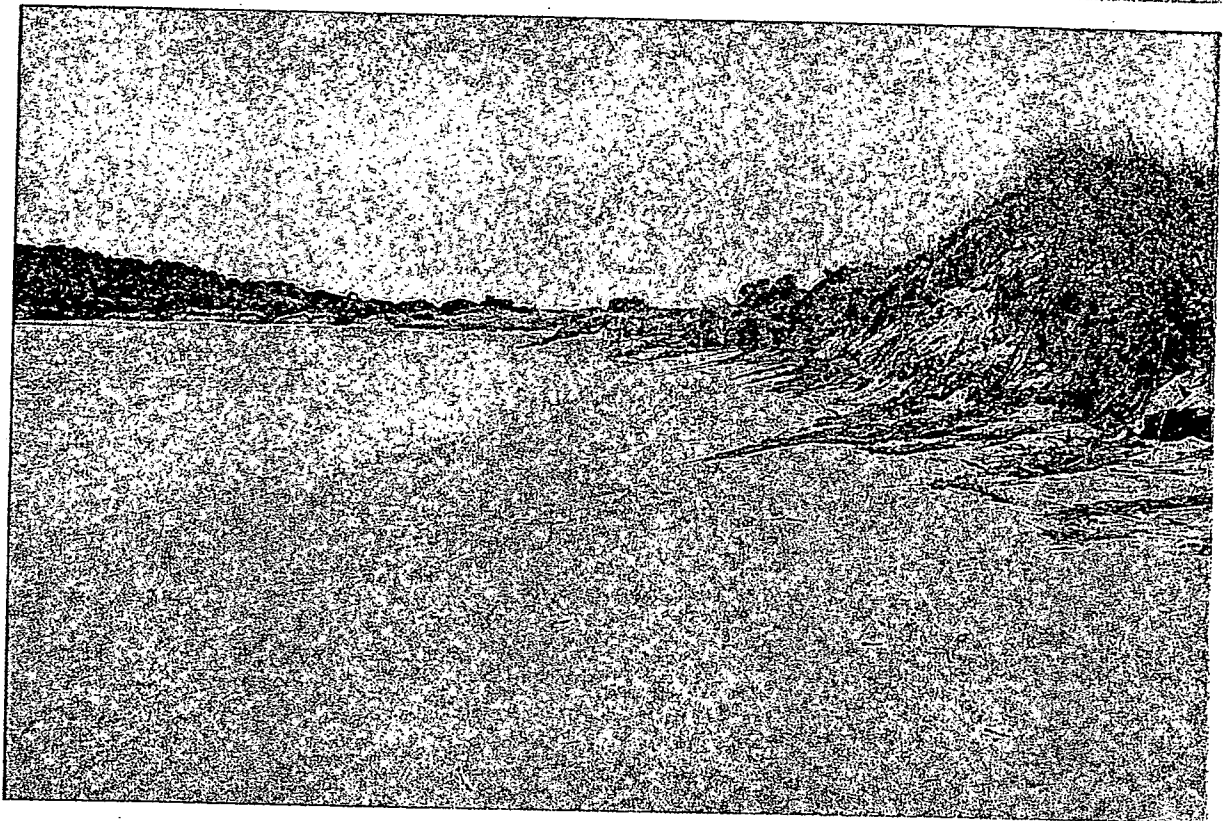
Notary Public for the State of South Carolina

My Commission Expires: 12-10-2020

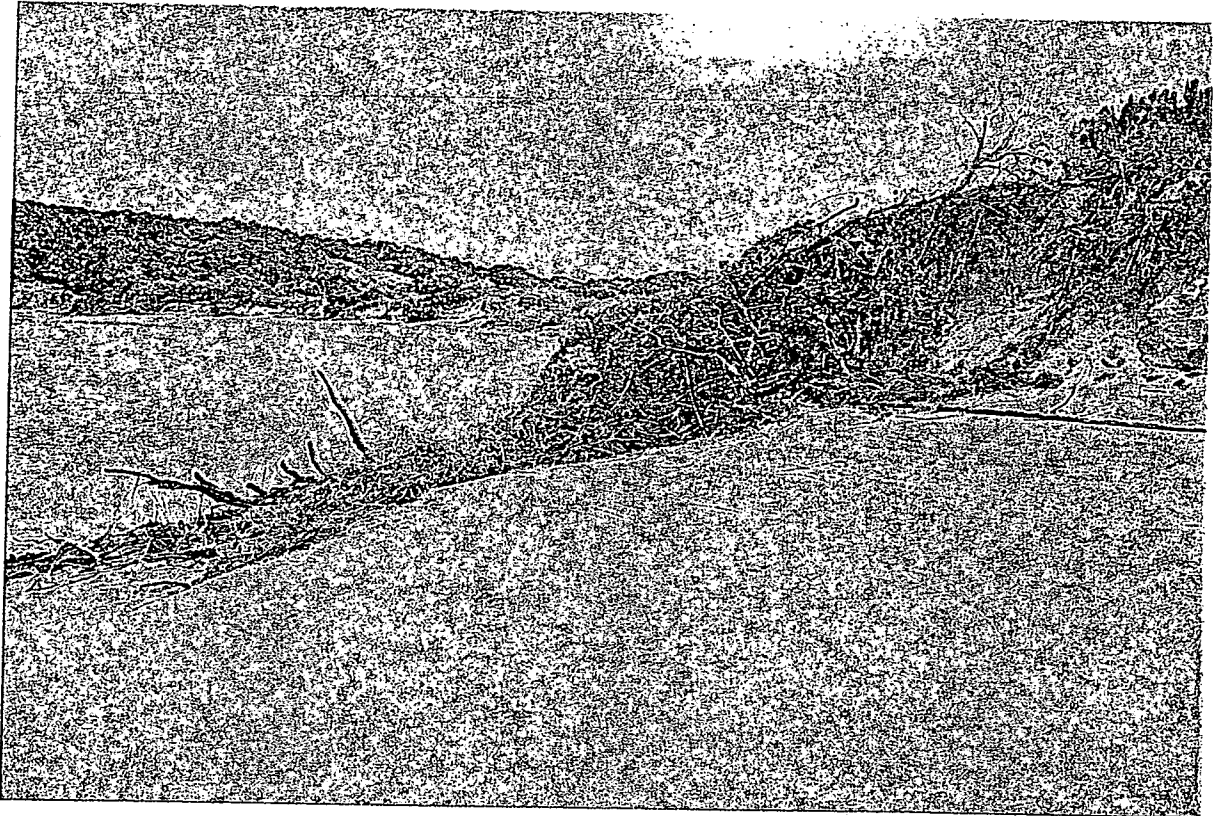




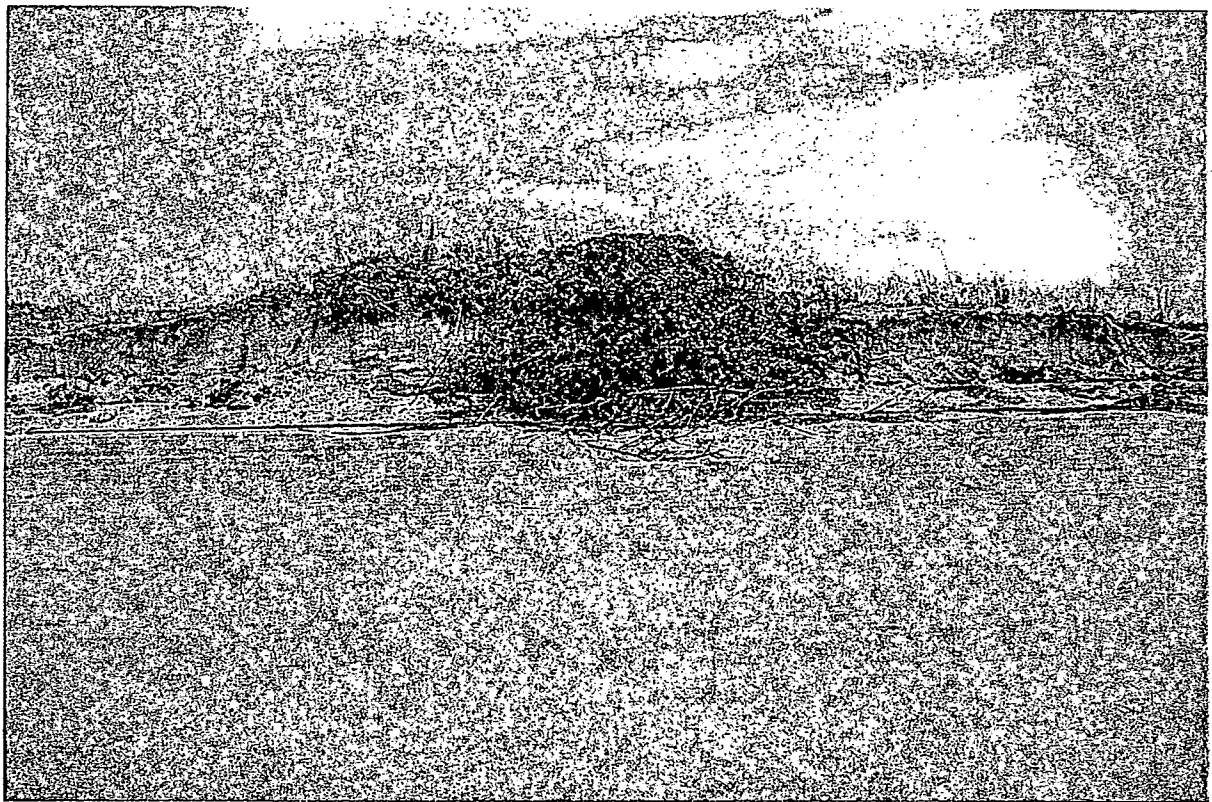
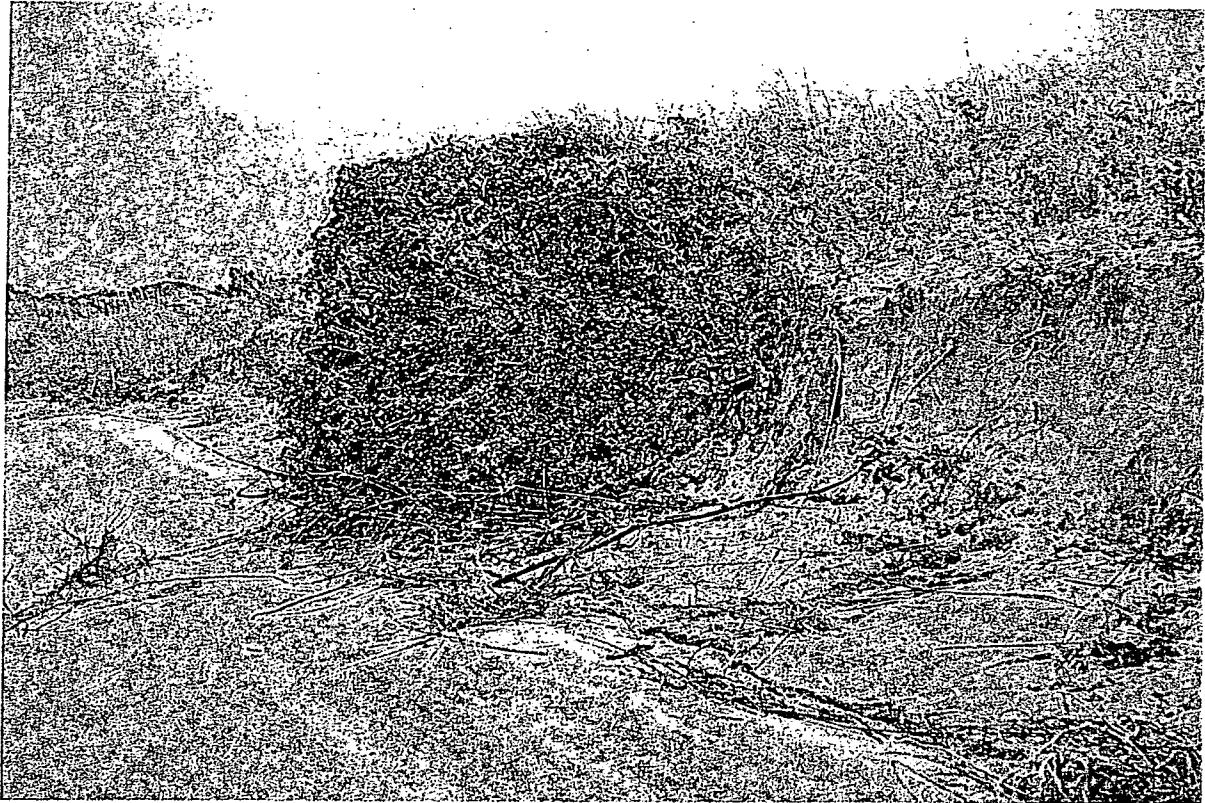
MRJ



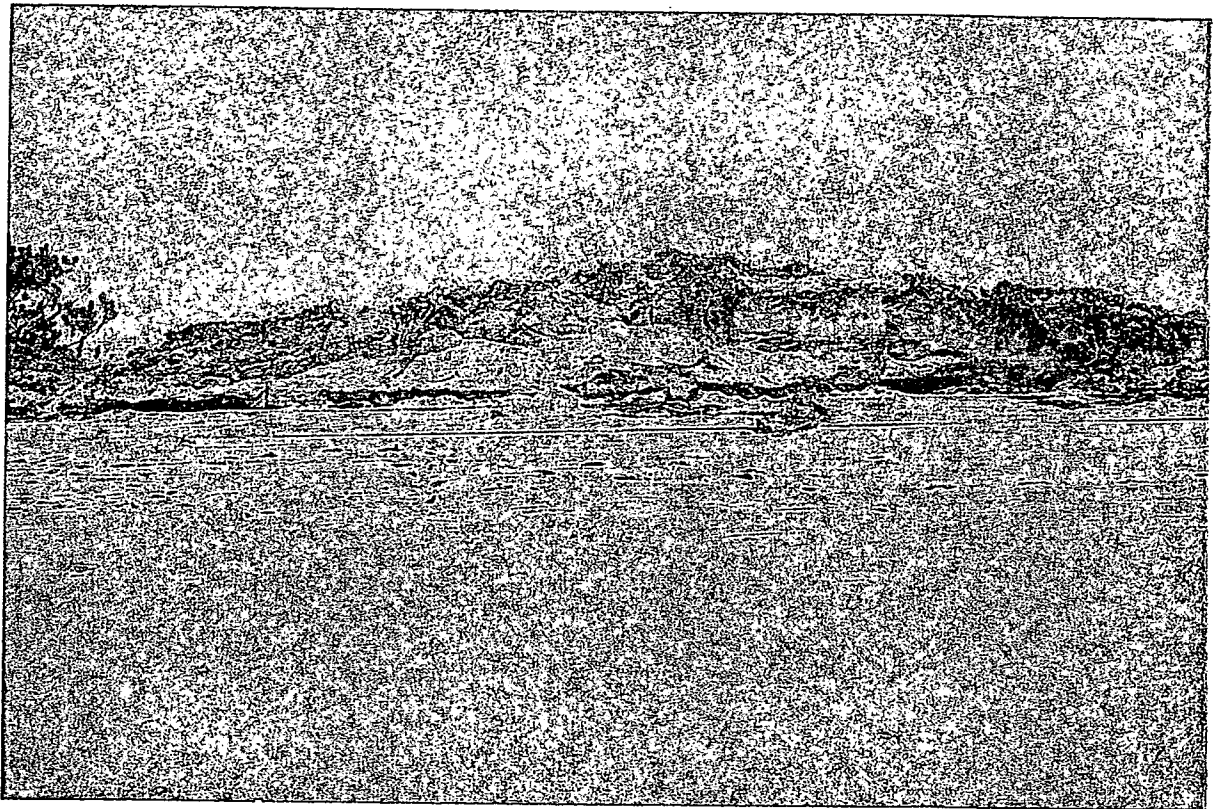
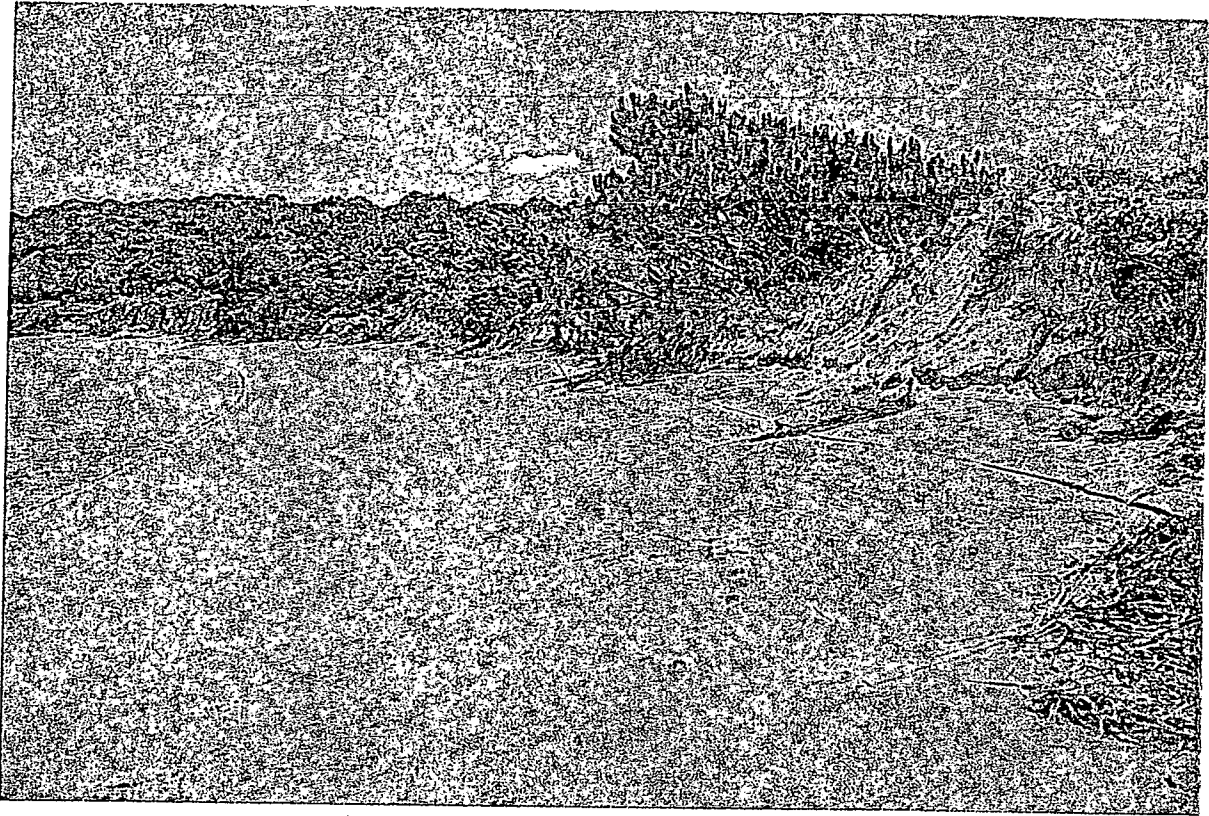
MSY



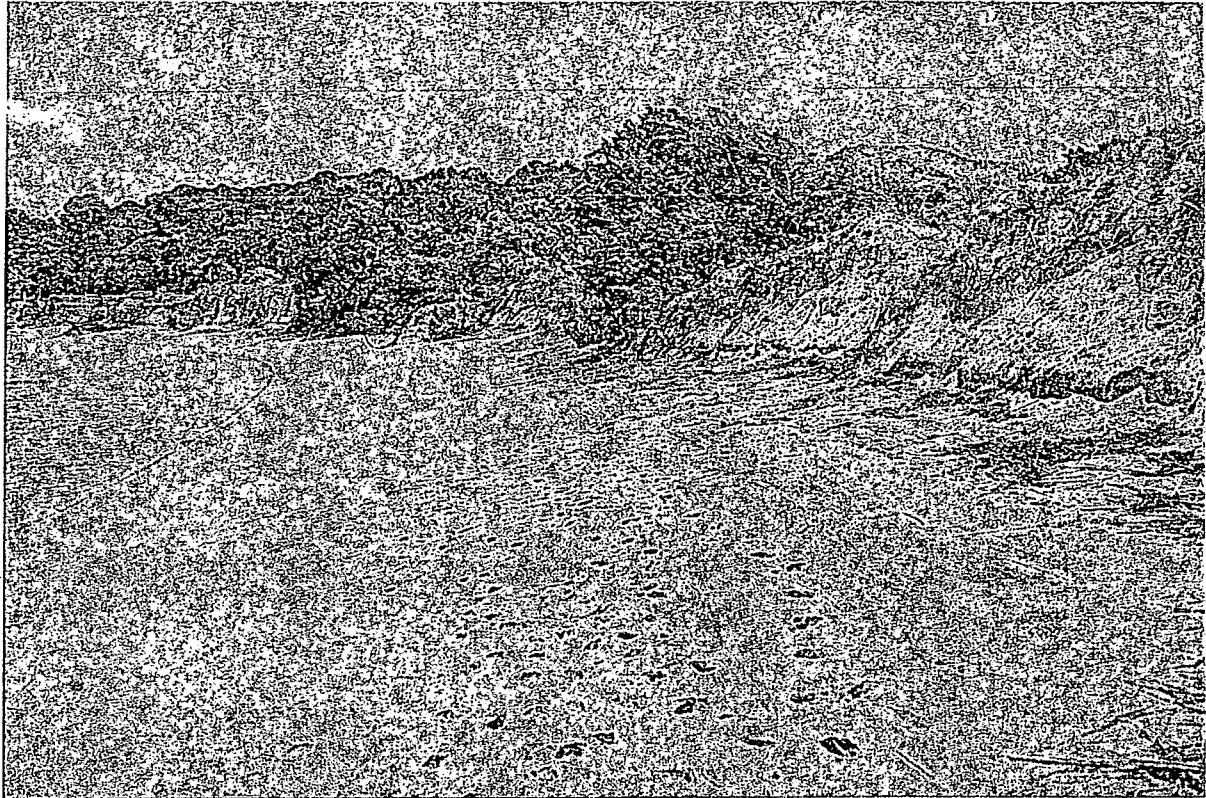
MJG



MSJ



MRJ



MSJ



MBJ



MSJ

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South Carolina Department of Health and Environmental Control is Appellant,

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Appellate Case No. 2019-155629

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 16th day of June 2014, a copy of the Respondent's Reply to the Return of Appellant South Carolina Department of Health and Environmental Control on counsel of record by placing the same in the United States mail, first-class postage pre-paid, to:

Bradley D. Churder
SCDHEC - Office of General Counsel
1362 McMillan Avenue, Suite 400
Charleston, SC 29405

Davis A. Whitfield-Cargile
McDougal Law Firm, LLC
P.O. Box 1336
Beaufort, SC 29907

Jacquelyn Sue Dickman
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201
ATTORNEYS FOR S.C. DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL

Amy E. Armstrong
S.C. Environmental Law Project
P.O. Box 1380
Pawleys Island, SC 29585

Robert T. Brockman
The Law Center
701 S. Main Street
Columbia, SC 29208
ATTORNEYS FOR SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

Alan Wilson
John W. McIntosh
Robert D. Cook
Parkin Hunter
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

A. Mattison Bogan
C. Mitchell Brown
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070
ATTORNEYS FOR SAVANNAH RIVER MARITIME COMMISSION

James B. Richardson, Jr.
1229 Lincoln Street
Columbia, SC 29211

ATTORNEYS FOR SOUTH CAROLINA MANUFACTURERS ALLIANCE

Jordan R. Israel
3621 Newark Street, NW
Apartment 110
Washington, DC 20016-3181

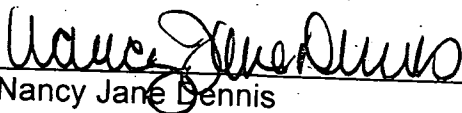
ATTORNEYS FOR INLET COVE HOMEOWNERS ASSOCIATION, KAYAK
CHARLESTON, LLC, SOUTH CAROLINA PADDLESPO RTS INDUSTRY
ASSOCIATION, and FRIENDS FO THE KIAWAH RIVER

Frank S. Holleman, III
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, SC 27516-2355

ATTORNEY FOR NATURE-BASED TOURISM ASSOCIATION

Phillip L. Lawrence
S.C. State Ports Authority
P.O. Box 22287
Charleston, SC 29413-2287

ATTORNEY FOR SOUTH CAROLINA STATE PORTS AUTHORITY


Nancy Jane Dennis

Charleston, South Carolina