

The Supreme Court of South Carolina

Kiawah Development Partners,
II, Respondent,

v

South Carolina Department of
Health and Environmental
Control, Appellant

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

ORDER

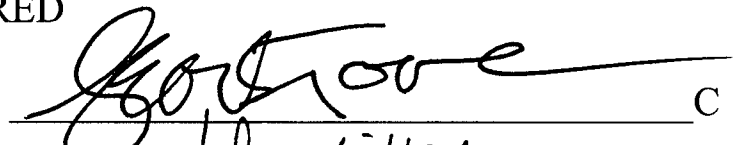
The South Carolina Coastal Conservation League (SCCCL)
moves to transfer this appeal from the Court of Appeals to this Court
pursuant to Rule 204(b), SCACR SCCCL states counsel for the South

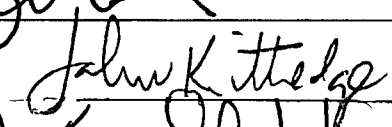
Carolina Department of Health and Environmental Control consents to the motion

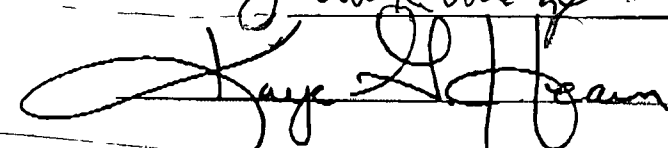
By way of return, Kiawah Development Partners, II (KDP) states it agrees with the request to transfer only because it would facilitate a more efficient and expeditious final determination. However, KDP asserts this appeal does not present an issue of significant public interest or a legal issue of major importance.

The motion is granted and this appeal is hereby certified to this Court from the Court of Appeals pursuant to Rule 204(b), SCACR.

IT IS SO ORDERED



C J


J


J
Pléicones, J, not participating

Columbia, South Carolina

June 10, 2010

cc Amy Elizabeth Armstrong, Esquire
Carlisle Roberts, Jr, Esquire
Davis Arjuna Whitfield-Cargile, Esquire
Gedney M Howe, III, Esquire
George Trenholm Walker, Esquire
The Honorable Tanya Gee

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC SUPREME COURT

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

Docket No 09-ALJ-07-00029-CC

Kiawah Development Partners, II,

Respondent,

v

South Carolina Department of Health and Environmental Control,

Appellant

Docket No 09-ALJ-07-00039-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 KIAWAH DEVELOPMENT PARTNERS, II'S RETURN TO THE
"MOTION FOR ORDER TRANSFERRING CASE TO THE SUPREME COURT"
FILED BY APPELLANT SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**

Respondent Kiawah Development Partners, II, Inc ("KDP") respectfully submits this
Return to the "Motion for Order Transferring Case to the Supreme Court" filed by Appellant
South Carolina Coastal Conservation League ("CCL")

KDP agrees with CCL's request for transfer only because a transfer of this appeal from
the Court of Appeals to the Supreme Court would facilitate a more efficient and expeditious final

determination. The significant erosion of KDP's highland on the bank of the Kiawah River that precipitated KDP's permit request is ongoing. As set forth in KDP's Returns to CCL's Petition for Supersedeas and to OCRM's Motion to Strike, this long term erosion, if not checked very soon, may destroy highland needed for the right of way required to access and serve the limited development of KDP's upland allowed under the zoning and a Development Agreement with the Town of Kiawah Island. If this erosion continues unabated, KDP's need for the permit, and hence this appeal, will be rendered moot. Time is of the essence.

**Neither the Record nor Judge Anderson's Final Orders
Support CCL's Two Grounds**

This appeal does **not** present an issue of significant public interest nor a legal issue of major importance.¹ CCL uses a few select record references, coupled with an alarmist depiction of the administrative law court's decision, in its effort to give the impression that Judge Anderson ran amok, twisting the law to sanction a wholesale impairment of significant public resources that imperils the entire coastal zone. All that is needed to reveal that CCL's assertions are unsubstantiated is to read Judge Anderson's well-reasoned, comprehensive 31-page final decision. The approved erosion control structure is essential to stabilizing the riverbank, will not significantly impair tidelands, and is fully authorized by the controlling statutes and regulations.

This Case Does Not Present an Issue of Significant Public Interest

CCL's primary argument is that the erosion control structure as approved by Judge Anderson will significantly impair public access and that this significant impairment is undisputed. Not so.

¹Although KDP agreed to review CCL's motion before filing to determine if KDP could consent to or join in the motion, CCL never provided a copy of the motion to KDP before filing.

There is plenty of proof that contradicts the “facts” CCL asserts are uncontested and substantiates Judge Anderson’s factual findings and conclusions that the public interest will not be significantly impaired by the proposed combination bulkhead-revetment

The erosion control structure will not be constructed on the beach as CCL implies² It will be constructed on a sandy riverbank (created by the sand from KDP’s eroding shoreline no less) in the intertidal zone of the critical area The articulated concrete block (“ACB”) mat comprising the revetment that is to be placed over the sloping shoreline is an accepted erosion control device approved by OCRM many times in the past that has holes, allows intertidal plant life to grow, and encourages a new suite of organisms See Pictures attached as Exhibit 11 to KDP’s Ret to CCL’s Pet for Supersedeas, Ex 1, Designated Pages of the Contested Case Hearing Transcript, pp 110 13-113 17, pp 525 14-526 8, p 620 3-22 A boater or kayaker can land his boat on the ACB mat the same as a concrete landing Ex 1, pp 466 25-467 7, 1579 22-1580 4 The ACB mat is **not** a “hardened concrete wall,” as misstated by CCL CCL’s Mot to Transfer, p 2

As approved by Judge Anderson, the ACB revetment would be 40 feet in width from the high tide line at the base of the escarpment to the low tide line for roughly 1800 feet, the ACB mat over the remaining 1000 linear feet would extend only 8 feet from the base of the escarpment, leaving roughly 32 feet of width of the bank uncovered The sandy riverbank

² The bank of a tidal river is not a beach for purposes of the Beachfront Management Act, S C Code Sections 48-39-250 *et seq* The Beachfront Management Act’s definitions state that 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 ” S C Code Ann § 48-39-270(5) The proposed erosion control structure is on the opposite side of the peninsula from the beach The statutes and regulations governing tidelands and critical areas other than the front beach specifically authorize hard erosion control structures and allow some impairment of public access if there are no feasible alternatives for stopping the erosion S C Code Ann § 58-39-120(F) and S C Reg 30-12(C)

continues beyond the end of the curtailed revetment for an additional 1000 to 1500 feet towards Captain Sam's Inlet with no erosion control structure at all **Ex 1, pp 477 15-479 12** The more than 2000 linear feet of sandy riverbank with little or no ACB mat provides ample room for landings by the random kayaker if he or she prefers not to land on the concrete block mat that may have marshgrass (*spartina alterniflora*) growing through it or be covered with sand **Ex 1, pp 448 13-449 25**

The sky is not falling

All these facts support Judge Anderson's determination that the public interest will not be significantly impacted by the erosion control device KDP seeks to put in place **Ex 2, Am Final Order & Decision p 15** His ruling is supported by the substantial evidence introduced during the contested case hearing covering the many facts already mentioned See, e.g.³ **Ex 1, pp 1298 15-1299 1, pp 1326 5-1328 6, p 1409 20-24** (Bill Eiser, the Project Manager for the Regulatory Division of OCRM, testifying the public use of this area was extremely limited and that he did not believe the public interest would be impacted to the extent that KDP's permit request should be denied), **Ex 1, pp 466 25-467 7** (Mitchell Bohannon, the primary engineer for the proposed structure, explaining that he discerned no adverse effect to public access "I don't know why people couldn't still access that area if they wanted to"), **Ex 1, 1579 1-1580 4, 1583 20-1584 25** (Leonard Long, a principal with KDP, explaining that boaters and kayakers could pull their boats up on the ACB mat and that, if they did not want to, they could use the any of the large selection of other sandy riverbanks or beaches in the immediate vicinity) CCL's argumentative assertions are not "uncontroverted," as CCL claims

³ These are just a handful of the evidentiary excerpts supporting Judge Anderson's ruling The testimony and evidence submitted at the contested case hearing includes many more examples which are not included herein for the sake of brevity

On the other hand, as Judge Anderson held in denying the motion to stay of CCL and OCRM “KDP will be significantly prejudiced and harmed by staying the permit it has waited two years to obtain so as to protect its land from sloughing off into the river ” **Ex 3, Order on Mots for Reconsid , p 7**

This Case Does Not Present a Legal Principle of Major Importance

Also contrary to CCL’s contention, this case does not involve a legal principle of major importance This appeal is as vanilla as they come due to the applicable standard of review Judge Anderson’s in-depth, 31-page order issuing a bulkhead/revetment permit to KDP to protect KDP’s 150 acres of highland from on-going erosion is supported by the substantial evidence in the record See S C Code Ann § 1-23-610(B) (“The [a]ppellate court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact ”), Olson v S C Dep’t of Health & Envtl Control, 379 S C 57, 63, 663 S E 2d 497, 500-01 (Ct App 2008) (recognizing that, in contested permitting cases, the ALC serves as the finder of fact and, therefore, an appellate court may reverse the ALC only if the ALC’s findings are affected by an error of law or not supported by the substantial evidence)

Moreover, in his amended final order, Judge Anderson addressed every statutory section and regulation CCL now claims Judge Anderson ignored See, e.g., Ex 2, pp 21-25 (addressing Regulation 30-11 C (1)⁴ and a similar requirement in the Coastal Management Program, but finding “that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland The development team also has a twenty-

⁴ In its Motion to Transfer, CCL references Regulations 30-12 C (1), but quotes Regulation 30-11 C (1) **CCL Mot to Transfer, p 8** KDP herein addresses the quoted language from Regulation 30-11 C (1) However, to the extent it may be at issue, Judge Anderson also extensively addressed Regulation 30-12(C) in his Amended Final Order and Opinion See, e.g., Ex 2, pp 26-27

two year unblemished ‘track record’ for compliance with all OCRM permits”), **Ex 2, pp 19-21** (addressing sections 48-39-20 and 48-39-30 of the South Carolina Code and finding, in pertinent part “KDP thus establishes that there are no significant negative impacts from either the bulkhead/revetment or the potential future residential development Further, neither the project nor the potential residential development is in violation of the relevant policies set forth in Sections 48-29-20 and 48-29-30 ”)

Judge Anderson correctly applied S C Reg 30-11 C (1), which specifies as follows

C Further Guidelines In the fulfilling of its responsibility under Section 48-39-150, the Department must in part base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30, and thus, be guided by the following

(1) The extent to which long-range, **cumulative effects of the project** may result within the context of other possible development and the general character of the area

(Emphasis added)

Judge Anderson interpreted this regulation to require that the court consider the cumulative effects of the “project,” rather than the cumulative effects of possible future residential development outside the critical area **Ex 2, pp 22-24** Judge Anderson simply abided by the wording of the regulation The project in this instance is the erosion control structure, not the potential future development for which no permit is being sought at this time **Ex 1, pp 1472 8-1473 8** The appellate decisions applying this same regulation have uniformly considered the “project” to be the structure or activity for which the critical area permit is sought See, e.g., Young v S C Dep’t of Health & Envtl Control, 383 S C 452, 461-62, 680 S E 2d 784, 78 (Ct App 2009) (analyzing impact of proposed boatlift only), Olson v S C Dep’t of Health & Envtl Control, 379 S C 57, 66-68, 663 S E 2d 497, 502-03 (Ct App 2008) (considering the impact of the “dock as proposed by the Olsons”), Terry v S C Dep’t of Health

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& Envtl Control, 377 S C 569, 575-76, 660 S E 2d 291, 294-95 (Ct App 2008) (discussing impact of landowner's proposed dock) Judge Anderson's interpretation falls squarely in line with the construction of this regulation applied by the appellate courts Judge Anderson's application of the regulation does not threaten to undermine the entire critical area permitting process, as CCL cries

Moreover, even though the regulation does not require consideration of the cumulative effects of future development outside the project, as CCL argues, Judge Anderson proceeded to consider them nonetheless **Ex 2, pp 24-25** This possible future residential development would be limited to approximately 20 acres with the remaining 130 acres of the peninsula being preserved in its natural state by a conservation easement **Ex 1 pp 165 19-166 12, Ex 2, p 16** Judge Anderson found this limited residential development allowed by the zoning and vested under a Development Agreement was not ill-planned and would involve an array of environmentally sensitive techniques and mitigation measures that would minimize its effects

- The Development Agreement provides that KDP can convey a maximum of twenty of these acres as home sites to purchasers, or about 14% of the total highland of the peninsula The Development Agreement requires that the remainder of Captain Sam's peninsula be preserved in a natural state, with limited exceptions (*e g*, the entry road which may be pervious material and a few boardwalks) in perpetuity through encumbrance by a conservation easement to the Kiawah Island Natural Habitat Conservancy **Ex 2, p 16**
- The Development Agreement also requires that this green space be conveyed to the Kiawah Island Community Association **Ex 2, p 16**
- Furthermore, the planned future development of detached single family dwellings on Captain Sam's will occur behind the State's setback line be separated by four to seven rows of established, high dunes well back from the beach, be placed primarily within the trees and other evolving vegetation on the northern side of Captain Sam's and the development is both limited an accommodating to the natural features of Captain Sam's peninsula **Ex 2, p 16**
- Mark Permar, the island's principal land planner for 25 or more years, plainly explained the many mitigating measures that will likely be employed by KDP to tailor the residential development to the site, such a limiting the elevation of houses to no more than one and a half stories, limiting lawns, using natural landscaping schemes, utilizing shared driveways, minimizing the number of

beach access paths and boardwalks, and having no more than two docks along more than a mile of river edge and march shoreline **Ex 2, pp 16-17**

- Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development **Ex 2, p 24**
- The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be sensitively planned, responsive to the natural features of the peninsula, attentive to flora and fauna, and without significant negative effects on the critical area **Ex 2, pp 24-25**

As demonstrated by the following testimony, substantial evidence supports these findings and conclusions

- Well, with respect to trees, if you cut down --if you absolutely can establish that there's no way around it and if you have to cut down what we consider a major tree or a grand tree, you have to replace the caliber inches, and usually more than you took down, sometimes double **Ex 1, p 80 2-7**
- [W]e try to eschew the development of typical grass yards and instead focus on native grasses, xeriscaping [zero-scaping] and all the rest of the things that we started a long time ago that you hear a lot about today Setbacks from the ocean, for example, I think Kiawah is the leader and has been ever since the Kuwaitis came along and we followed with it very strictly on the oceanfront **Ex 1, p 80 10-18**
- And our game plan, Your Honor, at Kiawah for about 15 years has been -- and it would be here -- that we only allow people to build one and a half stories of -- on a house In other words, you can't go up one story and then two story and then you start your roof The second story is always just dormer-type story, very low type dwellings And that's in most all the subdivisions we've done that are high-end like this The second thing is we would have the setbacks so that houses would be in the trees Third, it's provided in here, that we should try to use wherever practicable pervious materials instead of, say, asphalt for driveways and roads Probably the main road, because of fire trucks and whatnot, has to be in part, at least, hard surface We need to carefully plan dune walkovers so that we combine -- let's just say that there were 20 houses on the front, 20 on the back, but there would be only maybe three or four paths to the beach across the six or eight rows of dunes that are out there **Ex 1, pp 98 14-99 12**
- Unlike parts of the Kiawah which allow a lot of people to have docks, in some places, at least, we are limited here to two community docks along the mile-and-a-third length of the river **Ex 1, p 99 14-18**
- Those aren't buildings Those are buildable sites And then all the remaining land around it is less where lot lines are, but it's held in as close an existing state as possible with the natural vegetation is retained This is not an area where there are going to be grass lawns or imported exotic plant material This should be about indigenous material that exists there now The other concept is, instead of a

whole row of individual docks along here for all these lots and homesites on the river side having such, which we have in other locations, there would be one--possibly two, but one common dock area where people could launch kayaks, canoes and tie up a boat that they might have for day-tripping and so forth **Ex 1, pp 318 21-319 13**

See also **Ex 1, pp 97 17-98 6** (containing the testimony of Long that the development will be limited to no more than 50 homes on no more than 20 acres), **Ex 1, p 320 1-21** (including testimony of Permar regarding the importance of pervious surfaces and shared driveways)

CCL's assertion that Judge Anderson did not consider the cumulative effects of the potential future development outside the critical area, even though the law does not require this consideration, is wrong and misleading Judge Anderson fully took these effects into account and rejected the arguments of CCL *CCL did not introduce any evidence whatsoever to contradict the sensitive development methods KDP proved it will use* For this reason, CCL's argument about impacts of future development is doubly misleading Judge Anderson indeed considered the proof of those effects and CCL introduced no proof to contradict Judge Anderson's findings

The core of CCL's argument is that the permit should be denied because of their belief that no development at all should ever occur on KDP's land **Ex 2, p 24** They assert that the regulatory process for a critical area permit should be used to stop upland development and trump local zoning and vested rights under a Development Agreement **Ex 2, p 24** Bill Eiser, the OCRM official who handled the permit application, admitted that OCRM premised its decision to deny the permit for most of the erosion control structure on his personal belief that the 150 acres of highland of this peninsula owned by KDP land should remain in an undeveloped state forever for the benefit of the people of South Carolina **Ex 1, p 1332 6-18, p 1342 14-15**

Eiser acknowledged OCRM would likely have granted the permit if there was never to be any residential development on the peninsula **Ex 1, pp 1404 17-1405 19**

Judge Anderson found this manipulation of the critical area permitting process misguided and abusive “As asserted by KDP, it appears that the desire of certain permitting officials to preserve the upland of Captain Sam’s forever in a natural state, a goal beyond their regulatory purview, took precedence over their objective application of the clear wording of the controlling statutes and regulations” **Ex 2, p 10, note 10** There is no legal precedent for CCL’s underlying assertion that the regulations allow critical area permits to be denied to accomplish a taking of private upland as a park without compensation of the owner See S C Code Ann § 48-39-30(C) (“In the implementation of the chapter, no government agency shall issue any order so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States”)

The legal principle controlling this appeal is one that is established by statute and repeated frequently by our appellate courts The findings of the administrative law court stand unless they are unsupported by substantial evidence As for the law, the legal principles applied by Judge Anderson are those embedded in the controlling regulations and statutes This case does not present a novel principle of law of major importance

Conclusion

For these reasons, KDP agrees that, because time is of the essence, this appeal should be transferred from the Court of Appeals to the Supreme Court However neither the record nor Judge Anderson’s final order substantiates the grounds for transfer argued by CCL CCL’s grounds in this respect are incorrect and to some extent misleading

The motion should instead be granted to accomplish a final, expeditious resolution to this matter and protect the very thing KDP has sought to protect throughout this litigation—KDP's highland property, which is being lost to significant, on-going erosion of the riverbank

Respectfully Submitted,

BY 

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May 3 2010
Charleston, South Carolina

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Docket No 09-ALJ-07-00029-CC

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Kiawah Development Partners, II,

Of Whom

South Carolina Department of Health and Environmental Control is,

Appellant,

and Kiawah Development Partners, II, is

Respondent

PROOF OF SERVICE

I, Nancy Jane D Murphy, an employee of Pratt-Thomas Walker, P A , hereby certify that
I have served this 3rd day of May 2010, a copy of the Respondent's Return to Motion For Order
Transferring Case to the Supreme Court on counsel of record by placing the same in the United
States mail, first-class postage pre-paid, to

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May 3, 2010
Charleston, South Carolina

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Transcript of the Testimony of
KDP, II v. SCDHEC, ET AL

Date: August 24, 2009

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No 09-ALJ-07-0029-CC
Kiawah Development Partners, II,)
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Petitioner,)
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v)
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SCDHEC Office of Ocean and Coastal)
Resource Management,)
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Respondent)
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South Carolina Coastal Conservation)
League,)
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Petitioner,)
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Resource Management and Kiawah)
Development Partners, II,)
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Respondents)
_____)

ADMINISTRATIVE HEARING

Monday, August 24, 2009

1 04 p m - 5 37 p m

Tuesday, August 25, 2009

9 00 a m - 7 03 p m

Wednesday, August 26, 2009

9 00 a m - 7 28 p m

Thursday, August 27, 2009

9 00 a m - 6 00 p m

Friday, August 28, 2009

9 00 a m - 4 27 p m

The hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 24th through 28th day of August, 2009 before Cassandra E Vance, Court Reporter and Notary Public in and for the State of South Carolina

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Also Present

Nancy Jane Murphy, Legal Assistant to Mr Walker and
 Mr Howe

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1 Q What about with respect to trees?

(2) (A) (Well, with respect to trees, if you cut down --)
(3) (if you absolutely can establish that there's no)
(4) (way around it and if you have to cut down what)
(5) (we consider a major tree or a grand tree, you)
(6) (have to replace the caliber inches, and usually)
(7) (more than you took down, sometimes double)

8 There's a lot of other things, though,

9 Trenholm, that we try to do We try not to --

(10) (we try to eschew the development of typical)
(11) (grass yards and instead focus on native)
(12) (grasses, xeriscaping and all the rest of the)
(13) (things that we started a long time ago that you)
(14) (hear a lot about today)
(15) (Setbacks from the ocean, for example, I think)
(16) (Kiawah is the leader and has been ever since)
(17) (the Kuwaitis came along and we followed with it)
(18) (very strictly on the oceanfront)

19 Q And what, in particular, Leonard, are you
20 talking about when you talk about setbacks?

21 What is it that distinguishes the ocean
22 setbacks at Kiawah?

23 A Well, I think everybody in the world probably
24 knows that setbacks are the most important
25 thing on an island, a barrier island The

1 talking about what the town wanted based on
2 this document The document speaks for itself
3 This witness isn't qualified to speak to what
4 the town wanted

5 MR WHITFIELD-CARGILE Same objection

6 THE WITNESS I think I probably know what the town
7 wanted since I negotiated it But it's okay
8 I'll just explain it in terms of a simple way
9 to look at the document Forget about what the
10 town wanted

11 THE COURT This is interesting when you have a
12 lawyer for a witness

13 MR WALKER He hasn't cited any cases yet, Your
14 Honor

15 THE COURT Okay Well, you've modified your
16 answer, so proceed ahead

(17) (THE WITNESS) (All right) (Your Honor, it basically)
(18) (says that of the land out there -- and the)
(19) (exhibit shows how much the land is -- there's)
(20) (about 135 acres of highland that we own)
(21) (They said, "Well, listen, you can't develop all)
(22) (that ") (Obviously, some of it is outside the)
(23) (setback line and the critical line on the river)
(24) (side) ("We want you to go very low density," so)
(25) (we did) (We agreed to what this said, which is)

(1) that we can only sell of the 135 acres then --
(2) which is now about 150 acres because of
(3) accretion -- we can only sell 20 acres at the
(4) most to -- at the most 50 homesite buyers
(5) depending on our lot layout (We may layout
(6) ten, 20, 30, up to 50)

7 Our land planner, that's a job for him He'll
8 be one of the witnesses in this trial

9 Q What's his name?

10 A Mark Permar

11 Q All right

12 A It says that the structures to be sensitively
13 arranged

(14) (THE WITNESS) (And our game plan, Your Honor, at
(15) Kiawah for about 15 years has been -- and it
(16) would be here -- that we only allow people to
(17) build one and a half stories of -- on a house
(18) In other words, you can't go up one story and
(19) then two story and then you start your roof
(20) The second story is always just dormer-type
(21) story, very low type dwellings (And that's in
(22) most all the subdivisions we've done that are
(23) high-end like this
(24) The second thing is we would have the setbacks
(25) so that houses would be in the trees)

(1) (Third, it's provided in here, that we should)
(2) (try to use wherever practicable pervious)
(3) (materials instead of, say, asphalt for)
(4) (driveways and roads) (Probably the main road,
(5) (because of fire trucks and whatnot, has to be)
(6) (in part, at least, hard surface)
(7) (We need to carefully plan dune walkovers so)
(8) (that we combine -- let's just say that there)
(9) (were 20 houses on the front, 20 on the back,
(10) (but there would be only maybe three or four)
(11) (paths to the beach across the six or eight rows)
(12) (of dunes that are out there)

13 Q Does the agreement address docks?

(14) (A) (It does) (Unlike parts of the Kiawah which)
(15) (allow a lot of people to have docks, in some)
(16) (places, at least, we are limited here to two)
(17) (community docks along the mile-and-a-third)
(18) (length of the river)

19 Q Is there an exhibit that shows the -- attempts
20 to illustrate or does illustrate the area
21 behind the critical line -- excuse me, behind
22 the setback line and above the critical line?
23 And I'll direction your attention to the last
24 page of that exhibit The Bates number was cut
25 off

1 **A** **They helped us come up with a design for a**
2 **revetment**

3 THE WITNESS Your Honor, this is actually a
4 revetment and a bulkhead The bulkhead, as you
5 probably know, is the vertical piece It's
6 not -- it's oftentimes not combined with a
7 revetment It oftentimes -- you would, you
8 know, be in your boat along a creek or looking
9 out at a creek bank where there's a revetment
10 in South Carolina, of which there are literally
11 hundreds and hundreds, a number at Kiawah, and
12 you'll see just the vertical piece

(13) (What we wanted to have was a revetment that was)
(14) (a good deal more expensive, as it happens, but)
(15) (also a good deal better looking, more)
(16) (functional, would provide habitat for a number)
(17) (of species, and least interfere with the)
(18) (environment)
(19) (I was interested in the comments that)
(20) (Mr Chandler said, because we could have a)
(21) (vertical revetment and we would save millions)
(22) (It wouldn't serve the purposes that this one)
(23) (will serve and we can get into those, if you)
(24) (want)

(25) (Q) (What was your decision based on the)

(1) recommendations of Thomas & Hutton with respect
(2) to the type of material that you would put on
(3) the slope portion of the shore, the revetment
(4) portion?
(5) (A) On the slope portion of the shore, starting
(6) from the vertical bulkhead (indicating),
(7) angling down to hug the shoreline as it might
(8) move a little bit as it reaches the water,
(9) maybe a little bit beyond (It's called an ACB,
(10) articulated concrete block (And each block has
(11) holes in it, as we know, except these are a
(12) good deal larger holes)
(13) In the holes you would grow Spartina and other
(14) grasses through (We could show you how that
(15) looks in reality, because they are not brand
(16) new, but they're not as often done because of
(17) the price)
(18) But what they do is they create a shoreline
(19) with maturity, in a couple of years, looks like
(20) grass, like marsh grass (It provides habitat
(21) Besides stopping the erosion, it provides an
(22) attractive look (And that's -- that was their
(23) recommendation amongst others (We could have
(24) just put rocks, which is a typical revetment in
(25) South Carolina's Lowcountry (You know, big

(1) boulders and smaller ones and -- we could have
(2) asked for just the vertical bulkheading of
(3) various types and various materials But the
(4) recommendation of Thomas & Hutton, our own
(5) internal team of engineers at KDP, as well as
(6) Dr Basco and Dr Oertel, was to go with this
(7) approach

(8) Q Do you know whether or not articulated concrete
(9) block is used on revetments in other locations
(10) even on Kiawah?

(11) A It is It's at Kiawah in considerable length
(12) It's at Daniel Island It's at any number of
(13) islands in South Carolina's coast and it's used
(14) very, very handsomely and well It's never
(15) been turned down by OCRM

(16) Q Would you please to turn to Exhibit Six?

(17) THE COURT If you could just stop for a second

(18) MR WALKER Yes, sir

(19) THE COURT All right So the benefit of the
(20) articulated block are that it creates not only
(21) a better look, but it also promotes the growth
(22) of Spartina grass?

(23) THE WITNESS Yes, sir And other grasses

(24) THE COURT And other grasses?

(25) THE WITNESS Yes, sir

(1) (THE COURT) (Did I miss anything?)

(2) (THE WITNESS) (No, you didn't)

(3) (THE COURT) (Go ahead)

(4) (Q) (Would you please turn to Exhibit Six?)

(5) (A) (Got it)

(6) (Q) (What does Exhibit Six contain? (What are the
(7) (photos in Exhibit Six illustrate?)

(8) (A) (This is an example of some other applications
(9) (of the concrete block earlier on in the
(10) (introduction of it to the eroding shorelines
(11) (that are shown here) (These are different
(12) (shorelines in different locales where OCRM has
(13) (authorized it and you can see in some of the
(14) (photographs where it's starting -- the grass is
(15) (starting to come through) (We have others where
(16) (it's massively coming through and you can't
(17) (even see the block)

18 MR WALKER Is there any objection to our
19 introducing the four photographs that are
20 marked as Exhibit Six?

21 MR CHANDLER No objection

22 THE COURT Mr Whitfield-Cargile?

23 MR WHITFIELD-CARGILE No objection, Your Honor,
24 although I've got five

25 MR WALKER I do too, thank you

1 He doesn't have to be an expert to say that

2 he's creating habitat

3 And that goes to the cumulative impacts that

4 they constantly are arguing

5 MR WHITFIELD-CARGILE Your Honor, I would disagree

6 that he doesn't have to be an expert to say

7 that he's creating habitat

8 THE COURT I'm going to let the exhibit in for

9 notice and inquiry in that area

10 What exhibit number was that?

11 MR WALKER I'm sorry, this was Exhibit

12 Thirty-three

13 THE COURT Oh, okay

14 (KDP's Exhibit Number Thirty-three was admitted into

15 evidence)

16 Q Leonard, I don't believe you had finished

17 commenting on this letter

18 A Right

(19) (THE WITNESS) Your Honor, we said several things in)

(20) (the letter that go to the plan)

(21) (A plan, by the way,) (that) (was) (being)

(22) (thought about by) (our) (team)

(23) (We) (have) (500) (employees) (at) (Kiawah)

(24) (We) (have) (a) (lot) (of) (them) (devoted) (to)

(25) (development) (planning,) (still)

(1) (being obviously attended to in a big way)
(2) (But in this letter, what we said was, all but)
(3) (30 acres will one day be placed under a no)
(4) (development, quote, end quote, conservation)
(5) (easement with the Kiawah Conservancy, and then)
(6) (granted subject to that easement to the)
(7) (community association as pure greenspace)
(8) (These moves, as well as the far-reaching master)
(9) (plan, which we're working on with a number of)
(10) (experts and scientists will enhance, restore,)
(11) (and enlarge the amount of habitat available for)
(12) (a variety of birds and animals)

13 Now, at no time ever did we have any idea --
14 this goes to the motion in limine, maybe --
15 that we were supposed to come forward and give
16 them a master plan in connection with a
17 revetment

18 Q Mr Long, did they ever ask you for a master
19 plan in response to your offers to meet and
20 provide information?

21 A Never did And we would have been delighted to
22 do that We asked them repeatedly, "Don't you
23 want more information? Do you need any more
24 information? Call us " They never did They
25 never even said, you know, "No, we don't "

1 I hope will show up on a couple of other
2 things, is, in no particular order -- it's less
3 about laying out lots and more about finding
4 building sites, homesites, where the buildable
5 area would be And the intent would be to make
6 it as small as possible Anticipating we
7 don't -- we haven't determined what the maximum
8 square footage is, but, for example, if the
9 maximum square footage of a house is 4500
10 square feet, it doesn't need to have a big
11 footprint

12 In fact, in many of the other areas that I
13 mentioned earlier, we don't allow a single
14 structure to be any larger than a certain
15 number of square feet, that if you want to
16 reach the maximum, you need to break the house
17 apart The idea is to break the scale of the
18 house down Instead of a large mass, you might
19 have a collection of two smaller structures

20 So what this is, is the beginnings of the idea
(21) (of small, little footprint areas) (Those aren't)
(22) (buildings) (Those are buildable sites) (And)
(23) (then all the remaining land around it is less)
(24) (about where lot lines are, but it's held in as)
(25) (close an existing state as possible with the)

- (1) (natural vegetation is retained)
- (2) (This is not an area where there are going to be
- (3) (grass lawns or imported exotic plant material
- (4) (This should be about indigenous material that
- (5) (exists there now)
- (6) (The other concept is, instead of a whole row of
- (7) (individual docks along here for all these lots
- (8) (and homesites on the river side having such,
- (9) (which we have in other locations, there would
- (10) (be one -- possibly two, but one common dock
- (11) (area where people could launch kayaks, canoes
- (12) (and tie up a boat that they might have
- (13) (elsewhere for day-tripping and so forth)

14 A more difficult thing to see in this sketch is

15 there are -- one, two -- three little orange

16 squiggles This one shows up a little bit

17 more (indicating) They're about a thousand

18 feet apart The idea there is instead of each

19 one of these homesites along the ocean having

20 an individual boardwalk, you consolidate those

21 What's missing here is the roadway section We

22 have yet to test it, but the idea is to have

23 pervious material for pavement, whether it's

24 pervious asphalt or pervious concrete --

25 Q Why?

(1) A Well, the idea is to have a light touch (The
(2) whole idea in terms of the balance of this is
(3) to have a tight touch) (If you err, err on the
(4) side of less rather than more) (Square footage,
(5) less rather than more) (The infrastructure
(6) improvements, make them as narrow as practical
(7) and still maintain emergency access, but make
(8) them tight and narrow) (And if you can have the
(9) added effect of minimizing runoff by having
(10) pervious material for the pavement, that would
(11) be great)
(12) So, for example, maybe the central location
(13) could have that, but then these smaller spurs
(14) might be shell-based)
(15) The other concept that I'll share is the idea
(16) of -- which is a little harder to see) (Instead
(17) of every one of these homesites having their
(18) individual driveways, at a minimum, two
(19) homesites would share one before you get to
(20) your driveway -- let's see if I can pull that
(21) up)

22 Q Mark, you also told me about parking under the
23 house and height?

24 A I was going to get to the architecture in just
25 a minute

1 at Captain Sam's?

2 A Yes

3 Q At some point, taking into account those
4 recommendations, did you make a recommendation,
5 you, Thomas & Hutton, make a recommendation to
6 KDP about a suitable method to stabilize the
7 river bend?

8 A We did We looked at, I mean, a number of
9 alternatives investigated, bulkhead, riprap, to
10 geotubes, a number of things that could have
11 been used, and it was our recommendation that
12 they use the concrete mats

(13) (Q) (Why did you recommend that they use the)
(14) (concrete mat as opposed to the other)
(15) (alternatives you mentioned?)

(16) (A) (Well, from all the systems that we were aware
(17) (of, it seemed like that is the softest, most)
(18) (compatible system out there) (We can lay it on)
(19) (the existing ground, follow the existing slope)
(20) (There's the opportunity, we believe, it could)
(21) (fill in with sand) (Once we put it down, it)
(22) (could fill in with sand) (We've seen them used)
(23) (in other locations where they've become)
(24) (completely naturalized) (They might get filled)
(25) (in with sediments and marsh grass start growing)

(1) through them or other vegetation)
(2) So this articulated concrete block we felt like
(3) was the best solution) (It's kind of in keeping
(4) with the whole essence of Kiawah where, you
(5) know, we need engineering solutions to
(6) problems, but we also need engineering
(7) solutions that blend with the environment that
(8) we're creating)

(9) (Q) Had Thomas & Hutton designed other bulkhead or
(10) revetment projects using articulated concrete
(11) block?

(12) (A) We have, yes)

(13) (Q) What was your experience with their use in
(14) terms of performance?

(15) (A) We've had excellent results) (I mean, the ones
(16) that we've used, used them for a couple of
(17) different applications, but we've had very good
(18) results with them)

(19) In fact, one is on Kiawah itself at Cinder
(20) Creek where it's completed vegetated) (You
(21) can't even see -- can't even tell it's there)
(22) One on Daniel Island, it's becoming totally
(23) propagated with Spartina and other native
(24) grasses) (I mean, we've just had very, very
(25) good results with them)

1 A Yes

2 Q In this instance, was there anything that you
3 could perceive from an engineering standpoint
4 that would make the design you submitted a
5 safety hazard?

6 A We didn't -- no, there's nothing that we saw
7 that would create a safety hazard

8 Q Mr Bohannon, was the structure that you
9 designed to be constructed within 18 inches
10 from existing escarpments along the bank?

11 A Yes, that's -- that regulation has been in
12 place as long as I can remember

13 Q Is there any of the proposed location for the
14 revetment where marshlands are adequately
15 serving as an erosion buffer?

16 A Up next to the park, there's some of that where
17 there's an escarpment there and the marsh is
18 doing part of that But it's still -- it needs
19 to be protected, even though there's some marsh
20 there But the marsh is doing some of it, but
21 not a complete job and --

22 Q Is it still eroding despite the marsh in front
23 of it?

24 A Yes Yes, it is

(25) (Q) (From an engineering standpoint, based on what

(1) you could see and the design you came up with,
(2) does the bulkhead -- combination bulkhead and
(3) revetment prohibit -- or, excuse me, adversely
(4) effect public access?
(5) A I don't think so I don't know why people
(6) couldn't still access that area if they wanted
(7) to

8 Q Mr Bulkhead -- not Mr Bulkhead

9 MR WALKER I think I should leave now, Your Honor
10 That's a new Marvel superhero, Mr Bulkhead

11 Q Mr Bohannon, I'm looking at some of the other
12 considerations that must be taken into account
13 by the Department From an engineering
14 standpoint, does the bulkhead/revetment, will
15 it contribute to erosion?

16 A We don't believe so We actually think it's
17 going to prohibit erosion

18 Q From an engineering standpoint, do you see
19 where this structure would cause shoaling of
20 channels or create stagnant water?

21 A No That's one of the things -- one of the
22 reasons we wanted Dr Oertel and Dr Basco
23 involved, make sure it wouldn't -- evaluate the
24 entire system and make sure it wasn't going to
25 be a problem

1 Q As an engineer, do you consider these dynamic
2 principles that you just discussed in designing
3 a structure like this?

4 A All the time

5 THE COURT Your objection is overruled

6 Q Now we're down to Seventy-five-F and there's a
7 picture of you in a blue shirt

8 A Yes

9 Q Now, where are you standing?

10 A I'm standing at the terminus of this revetment
11 You can see the slope (indicating), a pretty
12 significant slope here, but you can also see
13 the edge where this marsh clearly stops here,
14 which is the end of the revetment (indicating)

(15) Q Following up on Judge Anderson's question, how
(16) high would the bulkhead part of the
(17) revetment -- well, first let me ask, do you
(18) think you, when you got to construction
(19) drawings, you would have the vertical face of
(20) a revetment -- excuse me, a vertical face of
(21) the bulkhead where the escarpment tapers off?

(22) A Actually, what I want to do when we get in the
(23) final design is, in these areas where there's
(24) a shallow enough reveal, to actually just
(25) lose -- just do away with the bulkhead and have

(1) that revetment, just like we did Daniel Island
(2) where we might just do a slight bit of fill
(3) material in here so we can take it right up to
(4) the very edge so it's just one continuous slope
(5) instead of having this vertical face

(6) Q If it's a vertical slope in that location and
(7) if there were a creature trying to come up it,
(8) assuming it -- if there's a creature that can
(9) walk over the block, would there be anything to
(10) step over when it got to the land under what
(11) you're suggesting in these areas where there's
(12) not much of an escarpment? Would it be level?

(13) A It would be basically level, right You
(14) wouldn't --

(15) Q Or uniform

(16) A Uniform, yes Level Not level, because level
(17) is level, but it would be uniform, without that
(18) vertical face (indicating)

(19) Q And Seventy-five-G, being the final picture,
(20) are you still standing in the same location?

(21) A Same location, just another shot showing how --
(22) where that zone of erosion actually really
(23) stops

(24) Q I want to go back to Seventy-five-E, which is
(25) one looking, I guess, west, the last two were

(1) (looking east) (As you go beyond this area on
(2) the bank, does the shoreline continue or does
(3) it turn into something else?)

(4) (A) (It continues) (It continues quite a ways)

(5) (Q) (And then what happens?) (Where does the marsh
(6) start?)

(7) (A) (Well, if I remember, some Spartina starts way
(8) down here (indicating), which is -- we didn't
(9) even walk that far) (It was probably another
(10) thousand, 1500 feet or so where the Spartina
(11) is, I'm guessing, but it was a good ways from
(12) where the end of the revetment would be)

13 Q All right Thank you You mentioned or we
14 talked a little bit about what you would do in
15 the construction drawings to take into account
16 the very terminus or the last run of the
17 revetment Do you have an estimation of the
18 length where you do not think it will be
19 necessary to have the vertical bulkhead part of
20 it, a plus or minus?

21 A You know, I think it's about a thousand feet
22 And, again, I'm just kind of guessing based on
23 my visit from last week, but there was a
24 fairly -- a good section of it where there was
25 a fairly shallow reveal or the escarpment was

1 it's a high tide photograph

2 **A** (Witness complies) If I recall --

3 MS ARMSTRONG Your Honor, can we just make it
4 clear for the record that this is still part of
5 the proffer?

6 THE COURT He said this was still part

7 MS ARMSTRONG All right Thank you, Your Honor

8 **A** As I recall, it comes to about right along in
9 here

10 **Q** Did you mark that with a pink magic marker --

11 **A** I did

12 **Q** -- on Seventy-six-A?

13 **A** I did

(14) (Q) (What) (has been) (your) (experience from observing)
(15) (these) (articulated) (concrete block mats as to)
(16) (whether) (they usually) (serve as -- whether)
(17) (marsh) (grass and needle grass will grow in)
(18) (them?)

(19) (THE COURT) (You're moving away from the proffer now?)

(20) (MR WALKER) (Yeah) (Thank you, Your Honor)

(21) (MS ARMSTRONG) (Okay) (Could you repeat the)
(22) (question?)

(23) (MR WALKER) (I will)

(24) (MS ARMSTRONG) (Thank you, Your Honor)

(25) (MR BOHANNON - DIRECT EXAMINATION (Continued) BY MR)

(1) WALKER

(2) Q Based on your observations at the locations
(3) where you've put this, have needle grass, marsh
(4) grass and other marsh vegetation grown in the
(5) holes in the block?

(6) A Natural vegetation has grown in the holes in
(7) the blocks in those, yes, including marsh
(8) grass, some upland species, as well

9 MR WALKER One moment, Your Honor

10 That's all we have at this time

11 THE COURT Ms Armstrong or Chandler

12 MS ARMSTRONG Thank you, Your Honor

13 MR BOHANNON - CROSS-EXAMINATION BY MS ARMSTRONG

14 Q Mr Bohannon, are you familiar with the
15 revetment on Bass Creek?

16 A Yes, I am

17 Q Is that something that Thomas & Hutton have
18 worked on, that project?

19 A We designed the original revetment there, yes

20 Q And the original revetment being a rock
21 revetment structure?

22 A It was a rock revetment, yes

23 Q So there's a concrete block structure on Bass
24 Creek right now Did Thomas & Hutton, did they
25 work on obtaining a permit for that structure?

1 fish and crab and do the other activities that
2 they do there right now

(3) (A) (Well, actually, you know, whenever you put in)
(4) (a hard structure on the coast, and we don't)
(5) (have a lot of hard structures on this)
(6) (sedimentary coast of ours, oftentimes you have)
(7) (a new suite of organisms attracted to it)
(8) (Certain fish like hard-bottom habitat and it)
(9) (may change -- I'm not going to say it's going)
(10) (to improve or change -- hurt things, because)
(11) (I'm not an expert in that area, but I think)
(12) (it's pretty well known in the popular)
(13) (literature that when you place a hard structure)
(14) (in the water, it attracts a new suite of)
(15) (organisms) (We see that through the barnacles)
(16) (and oysters that attach to groins, jetties,
(17) (structures such as that)
(18) (So I would expect that this structure, at least)
(19) (the underwater part, will create some different)
(20) (type of habitat, whether that's good or bad,
(21) (that's not for me to judge, but it's different)
(22) (habitat --)

23 Q Fair enough, but --

24 A -- which offers different recreational
25 opportunities

1 them to feed at the lower tidal cycles

2 Q Is it likely that all the plovers would just go
3 to Deveaux Banks?

4 A The thing is the plovers -- it's not accurate
5 to think of Deveaux Bank as being a separate
6 locale To the plovers, it might not be The
7 plovers, there are banded plovers that have
8 been sighted on Deveaux and over on Kiawah
9 What is much more likely to be going on is that
10 these are birds -- this is part of, as far as
11 they're concerned, the mosaic habitat They
12 use Deveaux when Deveaux has what they need
13 They use Kiawah or Seabrook when those places
14 have what they need

(15) (Q) (Are you aware of whether or not Beachwalker
(16) Park is open -- or do you know when Beachwalker
(17) Park is open?)

(18) (A) (I believe it's closed for, I believe, four
(19) months in the winter, is that correct?) (And
(20) then there's -- there's a total of seven months
(21) with reduced openness) (There's three or four
(22) months when it's closed and then the remaining
(23) three or four months, it's only open on
(24) weekends) (There's a total of seven -- yeah, I
(25) believe seven months when it has a very reduced

(1)

access

2 Q Have you formed an opinion as to whether or not
3 the revetment -- are you familiar with where
4 the proposed KDP revetment would go?

5 A Yeah, I believe so, yes

6 Q Have you formed an opinion as to whether or not
7 that might affect piping plovers?

8 A The constituent habitat of piping plover,
9 wintering piping plover habitat, the
10 constituent elements are maintained by normal
11 tidal events and storm events, but dynamic --
12 it's a dynamic environment So where the
13 revetment is proposed to be, I doubt that that
14 locale right there sees many piping plover, but
15 if the revetment -- and I -- this is -- I'm not
16 a geologist If that revetment affects the mud
17 flats downstream from it, then certainly it
18 will impact the piping plovers

19 Q Okay

20 A And if the revetment affects the likelihood of
21 overwash events, because washovers are another
22 part of their important habitat features, if
23 the revetment affects the likelihood, reduces
24 the likelihood of washover events, then it will
25 affect the plovers But I can't speak as to

1 points that are listed in here That might be
2 the best way to approach that

3 Q Okay

4 A It's a fairly short regulation It's titled

(5) "Bulkheads and Revetments (Other Than

(6) Oceanfront) " (It says, first of all, "A,

(7) Structures must be designed to conform to the

(8) critical area line to the maximum extent

(9) feasible " (They had proposed to build it

(10) within 18 inches of the critical line at the

(11) upper end, while the bottom of it is going to

(12) go 40 feet out into the river) (It talks about

(13) "constructed so that reflective wave energy

(14) does not destroy stable marine bottoms or

(15) constitute a safety hazard "

(16) (Q) When you issued the permit, did you have any

(17) reason to think that that first project

(18) standard was contravened?

(19) (A) The critical area line part, no) (The second

(20) part, I think I had some questions, but not to

(21) the level that I felt it was being contravened,

(22) no)

(23) (Q) Okay) What about the second number, B?

(24) (A) That's the one that actually says within 18

(25) inches of the existing escarpment or, if that's

(1) not feasible, wherever Department staff feels

(2) it's appropriate

(3) Q Okay

(4) A So there's no contravention there

(5) Q Okay What about the third one?

(6) A The third one says that, "Bulkheads and

(7) revetments should be prohibited in areas where

(8) marshlands are adequately serving as an erosion

(9) buffer," which is not the case here There is

(10) no marshland that's serving as a buffer

(11) Then it goes on to say "where adjacent property

(12) could be detrimentally affected by erosion,

(13) sedimentation," which I don't think is really

(14) an issue, "or where public access is adversely

(15) affected, unless upland is being lost due to

(16) tidally-influenced erosion "

(17) Q Okay

(18) A So I think that public access could potentially

(19) be adversely affected, but then it goes on to

(20) say "unless upland is being lost due to

(21) tidally-induced erosion," and I think they are

(22) experiencing upland loss due to

(23) tidally-influenced erosion

(24) Q Okay What about the last one?

(25) A Okay The last one, which is separate from the

(1) one I just read, says, "Bulkheads and
 (2) revetments will be prohibited where public
 (3) access is adversely affected unless no feasible
 (4) alternative exists "

(5) Q Okay (And how did you determine whether or
 (6) not --)

7 A Well, I think to some extent the structure will
 8 affect public access, but I didn't conclude
 9 that it's going to be adversely affected to the
 10 level where the entire structure should be
 11 denied

12 Q Okay What did you conclude?

13 A What did I conclude?

14 Q Yeah

15 A That there might be some minimal adverse effect
 16 on public access that was not strong enough to
 17 bar the permit from being issued

18 Q Based on the specific project standards?

19 A Yes, based -- yeah, just based on that
 20 regulation In other words, I could not read
 21 30-12(C) and conclude that I had to deny this
 22 permit

23 Q Okay Is that still your opinion?

24 A Well, I mean, based on the testimony I've heard
 25 here today, there may be more public use of

1 Q Okay Did you hear Mr Long testify yesterday
2 that he hasn't made any assessment of economic
3 benefits?

4 A I believe I recall hearing him say that I
5 can't really testify that I did

(6) Q Okay What are the benefits of leaving -- what
(7) are the benefits of leaving the area of the
(8) revetment itself in its unaltered state?

(9) A It would be very difficult to put a dollar
(10) value on that benefit, but I guess what I can
(11) tell you is that this is, as I mentioned, one
(12) of three tracts of oceanfront land in the
(13) entire state where the public has good access,
(14) where you can drive and park and walk out and
(15) see what a pristine undeveloped piece of
(16) oceanfront property looks like, and I think
(17) there is an extraordinary value to the people
(18) of South Carolina in preserving that

19 Q Are you aware of any report of Dr Beach?

20 A Yeah That's sort of a nickname he uses His
21 name is Steve Leatherman

22 Q Okay

23 A Yeah, but I'm familiar that every year he comes
24 up with a top ten beach ranking

25 Q Is Beachwalker Park in that?

1 How did that specific statute come into play in
2 your decision?

3 A That was relevant, as well

4 Q How?

5 A Well, we're -- I think we know that the
6 property could be enhanced economically if the
7 revetment was constructed, and I think that
8 talks about the "measurable maximum dollar
9 benefits " But it says we're not necessarily
10 supposed to look at combination of permits or
11 development that results in that
12 We're supposed to ensure the maximum benefit to
13 the people And I think the maximum benefit to
(14) (the people is to try to preserve the Kiawah)
(15) (Spit in as unaltered a state as we can)

16 Q Okay When you denied the permit for the
17 revetment, did you deny any development on the
18 upland?

19 A No

20 Q Okay Did you effectively deny any development
21 on the upland?

22 A No

23 Q Okay You heard testimony that there's a
24 set -- well, there's a set critical line,
25 right? Or set setback line, rather

1 large part, what you believed to be the
2 cumulative effects of the potential future
3 development of the spit?

4 A Yes

5 Q Isn't it also true that if you were only
6 considering the impacts of the revetment, at
7 the time you made your decision in December, if
8 there had been no development allowed as a
9 matter of law or no development that was
10 foreseeable, you would have issued the permit,
11 isn't that true?

12 A Can you say that again? I'm sorry

13 Q All right That was a jumbled question I
14 want to take this back to when you rendered the
15 decision in December of last year

16 A All right

(17) (Q) (Assuming that there was going to be no
(18) (residential development and that no residential
(19) (development was foreseeable, and that the
(20) (only --)

(21) (THE COURT) (Mr Chandler, talk a little quieter
(22) (Go ahead)

(23) (Q) (-- and that the only structure was the
(24) (revetment, isn't it true that you would have
(25) (approved it, as you said in your deposition?)

(1) MS ARMSTRONG) (Objection, Your Honor) (He's asking
(2) him to speculate on something) (It's not a
(3) decision that's before the Court) (I mean,
(4) that -- the Agency had to go -- he testified
(5) already they went through an extensive review
(6) process) (He's asking him to speculate on
(7) something that just -- he can't --)
(8) THE COURT) (I'll overrule that) (I think he can ask
(9) him about his decision-making process and the
(10) things he considered) (I mean, you are right,
(11) it is getting close to speculation, but it's
(12) not asking just gross speculation) (It's asking
(13) his decision-making process in this case and
(14) how he reached it) (And I think that's
(15) certainly pertinent, so I overrule that)
(16) A) (I think under those circumstances, it would
(17) have been more likely that we would have issued
(18) the permit for the entire revetment) (I can't
(19) guarantee that we would have)
20 We would still have been forced to look at how
21 construction of the revetment itself would
22 change the general character of Captain Sam's
23 Spit, but I think that if we knew that it was
24 impossible for houses to be built on Captain
25 Sam's Spit, it would have been more likely that

1 the character of the area, not so much as the
2 specific environmental effects that might come
3 about because of lawns or pervious surfaces and
4 that sort of thing, right?

5 A That's correct, yes

6 THE COURT Just pause Okay, go ahead

7 Q As you indicated yesterday, or as I understood
8 your testimony, the beacon, sort of, for OCRM
9 was your determination that this was one of
10 three remaining undeveloped places on the coast
11 and that residential development would
12 radically alter that and that that would have
13 a significant adverse effect on the public
14 interest, basically

15 A One of these remaining places where the public
16 has excellent public access to that site

17 Q With that qualification, was what I said a
18 reasonable synopsis?

19 A Yes

(20) (Q) (And when we talk about public access, are you)
(21) (aware that the public access, physical public)
(22) (access is along the beach and through the)
(23) (county park, correct?)

(24) (A) (Yes)

25 Q You're also aware that the county park consists

1 able to confirm that

2 Q Isn't it true that all that work in disturbance
3 of habitat has not, based on monitoring data,
4 shown any decrease in the number of wintering
5 piping plovers in that SC unit?

6 A Without referring to the monitoring report, I
7 cannot agree or disagree with that statement

(8) (Q) (You were just making a distinction between the
(9) revetment and the development) (The revetment)
(10) is the project for purposes of this
(11) application, correct?

(12) (A) (It's the activity, yes)

(13) (Q) (It's the project, correct?)

(14) (A) (I think that when we're applying the statute
(15) and the regulations we can interpret "project"
(16) to mean any activities that would result from
(17) construction of the activity)

(18) (Q) (Do you recall in your deposition when I asked
(19) you if the "project" for purposes of the
(20) application was the revetment?)

(21) (A) (For purposes of the application -- if you've
(22) got my deposition there, I'd be glad for you to
(23) tell me what I said)

(24) (Q) (You said "yes ")

(25) (A) (Okay)

(1) (Q) (Are you refuting that answer now?)

(2) (A) (Ask me the question again)

(3) (Q) (I'm going to ask you, isn't it true when I took

(4) (your deposition I asked you, when we talk about

(5) (the "project," the "project" for purposes of

(6) (the application is the revetment itself,

(7) (correct?)

(8) (A) (For purposes of the application, yes)

9 MR WALKER Your Honor, at this time, since the
10 witness has said that he considered everything
11 in the file, we would again offer the exhibits
12 that we offered earlier that were in his file
13 consisting of the comment letters from Fish --

14 THE COURT The ones you offered earlier or
15 addressed earlier?

16 MR WALKER Addressed and offered earlier

17 THE COURT Okay Oh, you mean a lot earlier in the
18 case

19 MR WALKER Early, yeah, back in our case, were the
20 comment letters from Fish & Wildlife

21 MR WHITFIELD-CARGILE Which exhibits are you
22 talking about?

23 MR WALKER It would be KDP Exhibit Eleven, KDP
24 Exhibit Fourteen, KDP Exhibit Sixteen, KDP
25 Exhibit Seventeen, KDP Exhibit -- now, this is

(1) (Q) (Is there a landing at --)

(2) (A) (There's a landing at the western end at the
(3) (resort)

(4) (THE WITNESS) (And, Your Honor, the resort, when we
(5) (refer to it, is -- 22 years ago when we bought
(6) (the island, we wanted to sell the, quote,)
(7) (resort assets, the public golf, the hotel now,
(8) (and then it was just an inn, and the tennis
(9) (centers, and that's what we call the "resort
(10) (assets ") (That's owned by an entirely separate
(11) (entity that we don't have anything to do with)
(12) (We have great relations with them, but we don't
(13) (operate those businesses) (But the resort
(14) (agreed to put a small landing for the kayakers
(15) (and canoeists and small boats just down from
(16) (the --)

(17) (Q) (County park?)

(18) (A) (Just down from county park, just around the
(19) (corner almost on the river there)

(20) (Q) (What is that landing made of?)

(21) (A) (It's made of concrete)

(22) (Q) (What are the landings in the other locations
(23) (that you've made available made of?)

(24) (A) (All the landings are made of concrete and
(25) (almost every landing in Charleston County is)

(1) probably concrete It's what you pull your
(2) boat up on so you can go get your car with the
(3) trailer, and it doesn't hurt the boat to pull
(4) it up

(5) Q Mr Long, what is the seasonal occupation of
6 houses on Kiawah?

7 A Well, this goes to the intensity of the use
8 that Mr Eiser mentioned Kiawah's very
9 unusual in that about 90 percent of our
10 property owners historically and today are
11 second homeowners, which means they aren't
12 there but six or eight weeks a year and --
13 unlike, say, Seabrook, which is almost all
14 permanent residents and -- probably 80 percent,
15 anyway, permanent residents So we've got
16 people who, at our neighborhoods around the
17 island, and there's 3500 or so dwellings, are
18 90 percent second homeowners who are there six
19 or eight weeks That shows a different
20 intensity

21 MR WALKER That's all I have, Your Honor

22 MR CHANDLER Cross examination?

23 MR LONG - CROSS-EXAMINATION BY MR CHANDLER

24 Q Mr Long, back when KRA originally bought this
25 property, this area down at the spit wasn't

1 beach, the forest, the creeks, the birds, the
2 animals that live on the island

3 Q Okay And the kayak-launching facility was
4 built right down near the spit, is that
5 correct?

6 A There's a kayak-launching facility that the
7 resort has around -- just around the river from
8 PRC's tract

9 Q Okay And so do you find it ironic that at
10 this point in the development's existence,
11 after having staked out this reputation and
12 kept it for so long, that now, instead of
13 designing with nature, that what you want to do
14 is go out and put this revetment that every
15 witness has called ugly, this revetment that is
16 going to do damage to wildlife, that's going to
17 do damage to nature and it's going to do damage
18 to the public use of that area? Do you find
19 that ironic?

(20) (A) (I don't find that to be the case) (Let me)
(21) (explain, Jimmy) (We used to say, just joking)
(22) (around, that we thought we have tried to be)
(23) (green before green was cool) (And with respect)
(24) (to this revetment, all we wanted to do is come)
(25) (up with a revetment design that the experts --)

(1) we went out and spent a good deal of extra time
(2) and funds to poll a lot of experts to come up
(3) with something that was, in fact, green, that
(4) would have grasses growing out of it, that
(5) wouldn't be unattractive, as you mentioned,
(6) that wouldn't interject itself unnecessarily
(7) But sometimes you come across not just lots
(8) where you need erosion control, but a length
(9) I was interested to have the gentleman say that
(10) with the kayaking, that he'd have no place else
(11) to go, and we've just shown there's another
(12) 1600 feet right next to -- with no escarpment
(13) backing it up, right next to the revetment
(14) area
(15) So we have tried to come up with a solution
(16) If you've got a better solution that works,
(17) we're all ears, Jimmy (We didn't get a single
(18) suggestion from Davis' client as to how we
(19) might improve or, you know, alter or amend or
(20) change our permit and we have tried, tried hard
(21) to gather that sort of assistance and help from
(22) the Agency charged with this area)
(23) No, I don't like having something that you or
(24) anybody else considers to be objectionable (I
(25) hope we can improve it still)

2

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Kiawah Development Partners II	)	Docket No 09 ALJ 07 0029 CC
	)	
Petitioners	)	
	)	
vs	)	AMENDED FINAL ORDER
	)	AND DECISION
South Carolina Department of Health and	)	
Environmental Control	)	
	)	
Respondents	)	
South Carolina Coastal Conservation	)	Docket No 09 ALJ-07 0039-CC
League	)	
	)	
Petitioners	)	
	)	
vs	)	
	)	
South Carolina Department of Health and	)	
Environmental Control and Kiawah	)	
Development Partners II	)	
	)	
Respondents	)	

APPEARANCES

Trenholm Walker & Gednev Howe for Petitioner Kiawah Development Partners II Inc
Amy E. Armstrong & James S. Chandler Jr. for Petitioner S.C. Coastal Conservation
League
Davis Whitfield-Cargile for Respondent S.C. Department of Health and Environmental
Control

STATEMENT OF THE CASE

This matter comes before the Court pursuant to S.C. Code Ann. § 1-23-600(A) and S.C. Code Ann. § 44-1-60 upon requests for a contested case hearing by Kiawah Development Partners II (KDP) and the South Carolina Coastal Conservation League (League). Respondent South Carolina Department of Health and Environmental Control (OCHS or DHFC or Department) issued a permit to Petitioner/Respondent KDP authorizing them to construct a 270 bulkhead/revetment at Beachwalker Park on Kiawah Island but denied the remainder of KDP's

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application which requested authorization to construct a 2783' bulkhead/revetment along the Kiawah River. KDP challenges the Department's decision to only authorize 270' of the 2783' structure applied for by KDP. The League challenges the Department's decision to authorize 270' of bulkhead/revetment and supports the Department's decision to deny the remainder of the request. A hearing was held before the Administrative Law Court on August 24 – 28, 2009.¹

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

Background

Kiawah Island is a barrier island fronting on the Atlantic Ocean with over 10 miles of beachfront. It is bounded on the south by the Atlantic Ocean, on the east by the Stono River inlet, on the north by the Kiawah River, and on the west by the Kiawah River where it enters the Atlantic through Captain Sam's Inlet. Captain Sam's Spit is adjacent to Captain Sam's Inlet at the Southwest end of Kiawah. The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet, and the Kiawah River. KDP owns Captain Sam's peninsula which encompasses roughly 150 acres of highland above mean high water (MHW).

In 1999, OCRM established its baseline and building setback line twenty feet landward based on the most reliable information which indicated that the oceanfront beach on Captain Sam's Spit had accreted and **not** been subject to any significant measurable erosion between 1959 and 1999.² The movement of the baseline prompted KDP to consider development of Captain Sam's Spit. As a result, in 2005 KDP and the Town amended the development agreement for Captain Sam's Spit. Thus, on February 29, 2008, KDP submitted a joint application to the United States Army Corps of Engineers (Corps) and the Department for a permit to construct a combination bulkhead and revetment in the critical area. The application sought authorization to construct a 2,783' bulkhead and 2,783' by 40' articulated concrete block

¹ The Court left the record open to receive the deposition testimony of Jeff Mollenhauer, an expert witness for CCL, who was unable to attend the trial. His deposition was taken on September 1, 2009.

² To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan. S.C. Code Ann. § 48-59-280(B).

revetment on the shoreline of the Kiawah River beginning at Beachwalker Park³ and continuing around the bend of the river along the neck of the Captain Sam's Spit for 2,783 feet.

On December 18, 2008, the Department issued the conditional permit approving the construction of the erosion control structure for a distance of 270 feet adjacent to the parking lot of Beachwalker Park.⁴ The park is adjacent to Captain Sam's peninsula and adjacent to the extreme eastern end of the proposed bulkhead/revetment. The Department refused the permit request for the remaining 2,513 feet requested based on its concerns about cumulative negative impacts including interference with natural inlet formation and possible adverse effects on wintering piping plovers. The Department also determined that the project was contrary to the policies set forth in the Coastal Zone Management Program Document (CZMP).

Kiawah Island and Captain Sam's Spit

Captain Sam's is a relatively new land mass in geological time. Very old maps and surveys indicate that over the last three hundred years or more a smaller or different version of this peninsula was formed and then either eroded, breached, or washed over at least two times. Though the cause is not known, the last time was probably sometime shortly before 1949 when the peninsula was much smaller. The Department and CCI emphasize that the Spit has been completely eroded and redeposited at least two times in the past 200 years to create the perception that the spit is unstable and inappropriate for human development. The Department extends that argument even further by suggesting this Court should conclude that the proposed revetment would facilitate a false sense of security and a perception of protection for prospective home buyers on Captain Sam's Spit.⁵ However, as Dr. Kana⁶ explained in the

³ Beachwalker Park consists essentially of changing rooms and a 150 space parking lot under a long term lease for \$1,000 by KDP to Charleston County.

⁴ Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park under a 99 year lease entered around 1976 with Charleston County on oceanfront land now owned by KDP.

⁵ The Department avers that this consideration in determining whether an applicant should receive a permit is supported by S.C. Code Ann. §§ 48-59-20 and 48-59-50. I do not find any support for this reasoning. In fact, such arguments support Petitioner's questioning of the Department's motives in this case.

⁶ Dr. Tim Kana testified as an expert in coastal geology and geomorphology. Dr. Kana, a long time University of South Carolina faculty member, has extensively studied and researched barrier islands along the coast of South Carolina for more than thirty years, concentrating much of his work on the geomorphology of Seabrook Island and Kiawah Island. He has written numerous reports on the coastal processes shaping Kiawah and Seabrook Islands. Dr. Kana has served as a consultant to the Towns of Seabrook Island and Kiawah Island, as well as certain private property owners on both islands, including the Seabrook Island Property Owners Association, on large beach projects undertaken by them.

last thirty years there have not been washovers anywhere along the neck portion of the spit. None of the dune ridges show any signs of storm water washover during the last thirty years even when subjected to hurricane forces including Hurricane Hugo in 1989.

Kiawah Island has one of the healthiest beaches in terms of positive sand supply among barrier islands on the east coast. According to Dr. Kana, the shoreline along Kiawah Island, unlike many other beaches in South Carolina or the East Coast, has actually accreted on average over the last 100 years. Some parts of Kiawah have built out nearly a mile at the east end. Sand from these enormous bar formations at the mouth of the Stono River Inlet detach over time and drift southwesterly along the coastline, thus supplying millions of cubic yards of sand to Kiawah Island's growing beachfront all the way to Captain Sam's Inlet. Additionally, the ebb tidal delta on the ocean side of Captain Sam's Inlet contributes to the deposit of sand along the beach of Captain Sam's. This ebb tidal delta formed by a build up of underwater sand in the ocean at the

Among other things, Dr. Kana is the principal architect of two successful manmade relocations of Captain Sam's Inlet in 1983 and 1996. The two relocations of the inlet separating Seabrook and Kiawah Islands used the farthest tip of Captain Sam's Spit as a source of sand for Seabrook Island's partially eroding beach. Dr. Kana has also been the primary coastal geologist in numerous other projects involving the management of beaches in South Carolina.

I found Dr. Kana eminently qualified to explain the coastal processes affecting Captain Sam's Spit. In fact, his expertise was simply more persuasive than that of CCI's expert, Dr. Young. Accordingly, when referencing Dr. Kana's testimony, I am citing evidence that I found to be distinctly persuasive.

To the contrary, throughout the hearing, OCRM and CCL referred to opinions and recommendations contained in the chapter titled "Coastal Processes and Geomorphology" of Kiawah Island that was part of a 1975 report titled "Environmental Inventory of Kiawah Island" prepared by Environment Research Center for the original developer of Kiawah Island (Environmental Inventory). CCI and OCRM urges the Court to consider the recommendations in this report in evaluating the suitability of granting a permit in this case. Interestingly, CCL and the Department did not call any of the authors of the chapter to testify. Instead, CCI and the Department had various witnesses read excerpts focusing on the author's recommendation that certain parts of Kiawah Island, including Captain Sam's, should not be developed because they were geologically too unstable.

It is notable that the information in the Environmental Inventory was compiled thirty-four years ago. It doesn't appear to reflect independent research as much as catalogue certain prior data. As Dr. Kana testified, coastal morphologists now know much more about the coastal processes affecting Kiawah Island and have had the benefit of more than thirty years of close observation that undermine many of its assumptions, projections, and recommendations found in the report. For instance, they now know that:

- The enormous sand shoals of the Stono Inlet are the main source of sand for Kiawah Island, not downdrifts and from Folly Beach and Morris Island.
- Captain Sam's has been growing bigger and bigger throughout this time.
- There have been no known overwashes of any of the dune ridges, even the primary dune ridge on Captain Sam's, in any violent storms or hurricanes over the last thirty years.

Furthermore, the conclusions and assumptions of the chapter have not withstood the test of time. For example, the report concluded that several miles of the east end of the island were too unstable for development. That same area has been not only stable but is now the location of the Osprey Beach community, the most upscale beachfront development on Kiawah Island, and other subdivisions as well. Also, the Ocean Course Golf Course, which hosted the 1991 Ryder Cup matches, was built there. I therefore find that the coastal geological chapter of the 1975 Environmental Inventory is of little to no probative value, and that the testimony of Dr. Kana is more credible.

mouth of the inlet serves as a natural groin or jetty that impairs the southwesterly drift of sand in the ocean along the Kiawah beachfront as explained by Dr. Kana. It thereby redirects sand drifting down the coastline to Captain Sam's peninsula. As this huge spit grows in length in a generally southwest direction, Captain Sam's Inlet is said to migrate southwesterly towards Seabrook Island.

The island's accretion is reflected in Captain Sam's Spit. Continuous significant accretion in the area of the Spit has occurred in the 60 years since 1949. The average rate of accretion ranges from four to ten feet per year anywhere along the spit for just about any period of time in the last 40 years. In fact, probably about four or five rows of dunes have been formed on Captain Sam's Spit within the last 30 years. Its dune ridges are some of the highest on Kiawah Island, some cresting above 15 feet MSL. In sum, the condition of Captain Sam's peninsula today is probably as healthy as it's ever been in historic times. Indeed, CCL's expert characterized the peninsula's strength as robust even at the neck.

Captain Sam's Spit is now almost a mile and one third long. At its narrowest point at the neck, adjacent to the main part of Kiawah Island, Captain Sam's peninsula is approximately 450 feet in width, measured from the critical line on the bank of the Kiawah River on the north side to the mean high water line of the Atlantic Ocean on its opposite or southern side. Captain Sam's western end that extends towards Captain Sam's Inlet (i.e., which separates Kiawah Island from Seabrook Island) reaches a high ground width of over 1,600 feet. Today Captain Sam's has unbroken rows of continuous high dune ridges for its entire length. Their number varies from four or five at the neck to up to seven at the western end next to Captain Sam's Inlet. On the side next to the river, Captain Sam's has a young and growing maritime forest. Captain Sam's peninsula is thus stable and growing. It will most probably continue to grow for many decades to come, given the enormous remaining sand supply from the shoals of the Stono Inlet and the east end of Kiawah Island.

Because of its substantial width and high dune ridges from decades of uninterrupted growth, there is very little chance that the neck of Captain Sam's would ever breach unless perhaps subjected to the forces of a Category V hurricane. A hurricane of that magnitude, however, would obviously severely damage and inundate all parts of Kiawah and other adjacent islands. Moreover, the barrier islands along the South Carolina coast suffer few breaches in comparison to barrier islands in other states because, on average, there are inlets every five miles.

or so on the South Carolina coast that serve as an outlet for receding storm surges. Notably, in this case the proximity of Captain Sam's Inlet serves as an outlet for receding surge waters making it more unlikely that the neck would breach. Additionally, even though the suitability of the upland for residential development is not one of the stated regulatory considerations for determining whether to issue a permit for a bulkhead/revetment, OCRM and CCL have raised it as an issue. I nonetheless find that Captain Sam's is suitable for the limited, low density residential development described in the 2005 Development Agreement with the Town of Kiawah Island.⁷

Erosion of Captain Sam's Bank at the Kiawah River

Captain Sam's Spit is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the "neck" of the Spit. The Kiawah River forms an elbow like bend at the "neck" of a peninsula which has been the source of erosion. The Department maintains that erosion in the area of Beachwalker Park along the Kiawah River warranted the erosion control devices proposed by KDP. However, it disagrees that the westernmost 2,513' of the bulkhead/revetment is needed. CCL contends that no bulkhead or revetment is needed for the entire 2,783' for which KDP seeks to install those erosion control devices. I find that denial of the permit would likely result in the loss of more upland and the access corridor at the neck.

At the same time the beach of Captain Sam's has been growing and moving seaward (i.e. toward the south), the northern side of the bend in the Kiawah River, at the neck of Captain Sam's Spit, has been eroding (albeit at a slower rate per year) to the south. The erosion is accelerated as a result of the growth of the river's marsh edge on its northern side (referred to as a "point bar") which has driven the river channel toward Captain Sam's peninsula and eroded the river bank in the bend along the peninsula. The erosion of the bank has been most prominent along Captain Sam's in the immediate vicinity of Beachwalker Park and all along approximately 2,000 feet of the peninsula's river edge extending from the Beachwalker Park area. While the river channel has moved in a southerly direction toward Captain Sam's peninsula for several decades, the erosion along the river's southern bank has become particularly pronounced over the last several years. This erosion is plainly evident from the escarpments along the riverbank where land, in some places with vegetation and trees, has sloughed off into the river.

⁷ In making this finding, I specifically conclude that the opinions of CCL witness Josh Martin were not probative.

The intensity of erosion is not uniform over the entire length of the proposed revetment area. The escarpment is much steeper with a higher reveal in the vicinity of the Beachwalker Park parking lot where there is visible evidence of portions of the upland vegetation and bluff sloughing off into the river. In general, the erosion decreases as you move in the westerly direction along the river shoreline from Beachwalker Park and it significantly decreases at the most westerly thousand feet of the proposed revetment. Furthermore, though the rate of erosion has been less in recent years, the change is not predictive of future events but rather more likely indicative of varying weather patterns. Nevertheless, the long term trend of erosion will most probably continue to occur along the peninsula's river bank as reflected by the current escarpment.⁸

A further consequence of the erosion of the riverbank is the migration of the OC RM jurisdictional critical line in a southerly direction in the peninsula's neck in the direction of the ocean. It moves as the river erodes into the bank at the neck. The distance between the river shoreline and the oceanfront setback line at the neck of Captain Sam's was 104 feet in September 2002, 90 feet in April 2005, and 66 feet in August 2009. The dimension has thus decreased 38 feet in nine years, or an average of just over four feet per year.

The width of the neck is significant because for development to occur on the Spit there must be sufficient space to place the access road with underground utilities, road shoulders and other improvements. To reach the peninsula's residential use acreage allowed under the zoning and road codes and vested under the Development Agreement, the right of way should be approximately sixty feet wide. However, even though the beach is accreting at the neck at approximately the same rate as the bank is eroding, the setback line has remained static. In other words, it is the setback line, not the beach, that determines the seaward limit of the buildable high ground, and hence the available area (or corridor) for installation of the road and improvements to Captain Sam's from the rest of Kiawah Island to the east.

The Court thus finds that KDP has a legitimate need for the bulkhead/revetment. The bulkhead/revetment will prevent its high land from being lost and assure that there is sufficient distance between the critical line and setback line in the neck of the peninsula to install a road.

⁸ A comparison of surveys of the river shoreline of Captain Sam's over the last thirty-five years demonstrates without question the migration of the river channel in a southerly direction into the Spit. Even though a comparison of the shoreline surveys of October 2008 and August 2009 does not clearly indicate advancement of the erosion during that very short period, there is a definite long-term trend of erosion that is unmistakable. It is undisputed that over an acre of high land on Captain Sam's along the bank of the Kiawah River has eroded since 2002.

underground utilities landscaping and improvements.⁹ In fact, it is unlikely that KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way. Moreover, as to the Department's and CCI'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 into the future. The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homesites, especially given today's informed buyers.

CCL also argued that the permit for the bulkhead/revetment for the 270 feet adjacent to Beachwalker Park was unnecessary because the Park is moving to another location. The area known as Beachwalker Park is owned by Kiawah Resort Associates. Charleston County Park and Recreation Commission holds a 100 year lease of the Park from Kiawah Resort Associates. Though the Park Commission does not own the land, it believes it would be best for the citizens of Charleston County if the County had a permanent deed. Nevertheless, it has also had discussions with Kiawah Resort Associates about relocating the Park. However, there is no agreement to move the Park to another location and the bulkhead/revetment is clearly necessary to protect the Park's highground and improvements from falling into the river in light of its current location.

The Bulkhead/Revetment's Design

KDP's application proposes an erosion control structure composed of two distinct elements. The first component would authorize a vertical bulkhead for a distance of up to 2,783 feet along the shoreline of the Kiawah River on Captain Sam's Spit adjacent to Beachwalker Park and KDP's land on the southwestern end of Kiawah Island. The height of the bulkhead will vary to follow the differing elevational contours of the adjacent highland scarps along the river extending to just under their peaks. The purpose of this vertical bulkhead is to stabilize the river's high ground shoreline in the location at the time of construction.

The other erosion control feature is a flexible mat comprised of interconnected articulated concrete blocks (ACB). The ACB mat would be installed over the sloping river shoreline extending from the bottom of the bulkhead at the base of the shoreline escarpments or

⁹ The Department has routinely granted permits for other revetments on Kiawah Island for the protection of roads including revetments such as this with an ACB mat.

scarps toward the river to a point just below the river's waterline at low tide. The revetment structure would be 2,783' long by 40' wide and would cover 111,320 square feet of the banks of the River or 2.63 acres. Most, if not all, of the mat would be covered by water at high tide.

The ACB mat is made of a series of blocks with large holes in between the blocks. It is a preferable (yet more expensive) method of reducing shoreline erosion because aesthetically the concrete can be colored to blend in with the color of the bank and because the blocks have multiple openings that would allow the growth of marsh grass and other vegetation through them. The ACB mat could also serve as habitat for other marine life including oysters. To the contrary, the evidence did not establish that the ACB mat would significantly imperil the habitat of any marine animals, organisms, or plants. It most probably will provide new habitat for oysters and other organisms. Additionally, the bulkhead portion of the structure is designed to be installed on the critical line or no more than eighteen inches behind the critical line.

The combination bulkhead and ACB mat over the sloping river shoreline, covered by water at high tide, will diffuse wave action more than a structure comprised solely of a vertical bulkhead. The proposed structure is sufficiently engineered to stabilize the riverbank and prevent erosion from the ongoing movement of the channel caused by the advance over time of the marsh point bar on the opposite side. To the contrary, the evidence did not establish that the ACB mat or the bulkhead will destroy a stable marine river bottom or constitute a safety hazard. It is nonetheless notable that the proposed structure is not designed for the purpose of preventing a breach of the riverbank in the event of a massive hurricane, and that such propensity is not relevant here. Very few bulkhead/revetments in the world are designed to withstand these forces.

Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland. CCI urged that the alternative is to do nothing and leave the property at *status quo* since, they suggested, little erosion may have occurred in the last 10-12 months. However, the testimony of Dr. Kana clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. That evidence clearly establishes a need for erosion control along the disputed shoreline.

CCI and OCRM raise issues as to the revetment's long-term success without training jetties or a wider mat. Petitioner asserts that the proposed structures should first be implemented

and if "hot spots" (meaning locations on the revetment that are susceptible to high energy forces that result in considerable scour or instability at that location) develop it can implement a remedial plan for those locations and seek permission from the Department to proceed. I nonetheless find that in light of the nature of the riverbank and its limited use discussed below, it is much more reasonable to implement a solution that has the least environmental impact and require KDP to seek further approval if a more comprehensive approach is needed.¹⁰

As noted above, the extent and rate of erosion varies along the riverbank over the length of the proposed revetment. The erosion is greatest adjacent to Beachwalker Park and along what Mitchell Bohannon¹¹ described as the "bite" on the outside—that is the Captain Sam's side—of the bend on the Kiawah River up to approximately 1,000 feet from the western terminus of the proposed revetment. Moving from the east end to the west end of the proposed structure, the severity of the erosion and height of the escarpments diminish in a westerly direction towards the inlet at approximately survey point "F" on Petitioner KDP's Exhibit 77. This location is approximately 900 feet from the western terminus of the proposed revetment (the riverbank where the revetment is proposed west of point "F" is referred to hereinafter as the "western section").

The full extent of both of the structures (i.e., the bulkhead and the ACB mat) depicted in the sketch drawing submitted with the permit application are not currently necessary to stabilize the bank for the western section. In many locations along the western section, the bulkhead may not be necessary and an ACB mat much shorter in width than forty feet may well suffice to

¹⁰ I recognize that there is credible evidence that the Department has been uncooperative during the permitting process of this case. As asserted by KDP, it appears that the desire of certain permitting officials to preserve the upland of Captain Sam's forever in a natural state—a goal beyond their regulatory purview—took precedence over their objective application of the clear wording of the controlling statutes and regulations. For instance, because the project did not involve dredging, the application qualified as a minor activity under S.C. Code Ann. Regs. 30-1 (34) and the Department was required to act on a completed application within 30 days. S.C. Code Ann. § 48-59-150(C). Rather, the Department took quite the opposite approach. By letter dated June 25, 2008, the Department attempted to cancel KDP's application because the project engineer had not provided an affidavit of publication for the published newspaper public notice within 30 days of its publication. Though the Department's staff received this affidavit June 26, 2008, it did not reinstate the application until mid July 2008. Moreover, by August 28, 2008, the Department had prepared a draft decision denying the permit application. All that then remained was internal review of the draft decision. Nonetheless, the Department waited more than three months before rendering its decision. Despite this evidence (and other concerns in the record), it is the Court's hope and belief that the Department will treat all parties in the case fairly in the future and conduct its important responsibilities in accordance with the standards and parameters prescribed by the General Assembly in a diligent, timely manner.

¹¹ Mr. Bohannon is a professional engineer with extensive experience in the design and implementation of bulkheads and revetments. I found his testimony to be persuasive.

stabilize the riverbank according to Bohannon. More specifically, the western section is best suited now and perhaps permanently to the soft approach described by Bohannon that would involve limited use of the bulkhead to locations where the reveal/scarp is greater than two feet. There is no need at the current time for the ACB mat on the western portion of the revetment to be greater than eight (8) feet in width.¹² Furthermore, the ACB mat on the far eastern end of the revetment adjacent to Beachwalker Park, where there is some marsh grass below and adjacent to the escarpment, should be adjusted in the field during initial installation to avoid unnecessarily placing the ACB mat over marsh grass. I do not find that this approach is a piecemeal approach but is rather a sound attempt to limit the impact to the environment until facts warrant otherwise.

Cumulative Impacts¹³

Piping Plovers

The Department and CCL argue that the proposed bulkhead/revetment will have adverse effects on piping plovers.¹⁴ Piping plovers are a 'threatened' species under the federal

¹² In the event that post construction monitoring of the western section of the constructed bulkhead/revetment reflects a need for the extension of the ACB mat beyond eight (8) feet in width, KDP shall be allowed to seek the Department's approval to extend the ACB mat as is determined necessary to prevent further erosion at such location(s). Nonetheless, recognizing the Department's dilatory treatment of KDP's permit, I note that any unnecessary delays should subject the Department to sanctions.

¹³ Two other issues were raised by the parties that warrant only cursory treatment. OCRM and CCL contend that one possible negative long term impact of residential development on Captain Sam's is the debris from the potential destruction of the houses and improvements if the peninsula takes a direct hit from a very powerful hurricane. No evidence was offered concerning impact of debris as a result of a hurricane. Furthermore, a storm of sufficient magnitude to breach Captain Sam's at the neck would cause widespread devastation across Kiawah Island and other nearby barrier islands. Moreover, the impact resulting from potential residential development that may occur as a result of the permitting of a bulkhead and revetment is simply too conjectural to probative and does not appear to be a pertinent inquiry for this Court in this context.

Similarly, OCRM included in its reasons for denying the permit that the potential residential development may result in impacts to freshwater and saltwater wetlands. Even if this were an issue before this Court, no evidence indicated that any wetlands will be impacted by any residential development upon Captain Sam's Spit or even the existence of any wetlands anywhere on the Spit. Thus, the evidence did not prove that there probably would be any long range impacts on freshwater or saltwater wetlands from the proposed development. Moreover, if there is ever any proposed impact to any discovered wetlands, the Department can certainly evaluate them carefully when it decides that future permit application.

¹⁴ In analyzing this issue, I find the testimony of Lee Walton to be credible and persuasive. Mr. Walton has experience studying not just shorebirds but specifically piping plovers for the U.S. Fish & Wildlife Service. Moreover, his experience has been identifying areas that were suitable for **wintering** piping plovers, which is a specific issue before this court. In fact, the United States Fish & Wildlife's designation of the wintering habitat is based upon his recommendations.

On the other hand, though the ornithologists presented by the Department and CCL seem knowledgeable (particularly Dr. Hughes), neither had any specific information as to the **current** level of activity on the beach from the Park's 50,000 annual visitors or from property owners and their guests from the thirty-five years of development over much of the island. Nor were they able to provide a reasonable approximation of increase in future activity on

Endangered Species Act. However, the piping plovers that visit South Carolina and Kiawah Island are wintering piping plovers. The migratory piping plovers that visit Kiawah Island are wintering rather than nesting or breeding piping plovers - a salient distinction. These birds winter on Kiawah Island for a few months. A wintering piping plover doesn't have a small territory. The birds begin arriving on Kiawah Island in July and into August with the biggest push in September. Some stop on the island temporarily and then continue migrating while others stay for the winter. They begin migrating back north to their breeding grounds as early as April.

Though the piping plovers do 'winter' upon Kiawah Island, their habitat is significant. There has never been a single sighting of a piping plover according to the data in the proposed revetment area on the Kiawah River or above the dune line on Captain Sam's. As explained by Mr. Walton, those areas are not critical habitat for piping plovers. Furthermore, the Court takes judicial notice of 50 C.F.R. pt. 17, 'Final Determination of Critical Habitat for Wintering Piping Plovers, Final Rule,' propounded by the United States Fish and Wildlife Service establishing the boundaries of critical habitat for wintering piping plovers. The text description of S.C. Unit 10, which controls over the associated illustration, specifies that the critical area of habitat includes the beach along Seabrook Island and extends 0.1 mile north of Captain Sam's Inlet. S.C. Unit-10 does **not** extend above the building setback line on Captain Sam's. Federal Register, Vol. 66, No. 132 at pp. 36042 (Col. 3), 36045 (Col. 3), and 36069 (Col. 2).

Nevertheless, the Department and CCL argue that the adverse effect to the piping plover emanates not from the proposed project itself, but from the future residential development that would occur as a result of the project. However, as noted above, the designated habitat does not extend into the limited developable acreage under the Development Agreement. The potential residential development will not occur in critical plover habitat, nor will it occur in close proximity. The Department and CCL assert that the proposed project will nonetheless adversely affect the piping plover because the structure will facilitate residential development and with that residential development a greater number of people and animals will use the beach. That use is not necessarily problematic. The Department and CCL further aver that the people and their

the beach if up to fifty houses, about 1% of the island's residential dwellings, were ultimately constructed on Captain Sam's.

The gist of their opinions was that any increase at all in use of the beach might be detrimental, yet they provided no credible factual support for this theory. In fact, the studies on disturbance of piping plovers Dr. Hughes and Mollenhauer referred to dealt with breeding and nesting piping plovers, not wintering piping plovers.

animals will disturb the piping plovers on the beach in front of their homes and that the disturbance will be so significant that it will adversely affect the birds' health upon returning to their nesting grounds.

I find the evidence supporting the Department's and CCL's contention conjectural. Neither Dr. Hughes nor Mollenhauer advocated that recreational activity on the beach should be prohibited. Instead, they both advocated that beachgoers use reasonable behavior as the best way to avoid or reduce any possible disturbance of these birds. There was no proof that any persons on the beach from the up-to 50 houses¹³ would engage in unreasonable behavior that would increase any theorized frequency or intensity of disturbance of these wintering piping plovers on Kiawah Island. Additionally, Kiawah is primarily a second home community in which eighty percent of the home owners spend an average of only 6 to 7 weeks at their home per year. That time is primarily during the summer months.

In fact, the mere existence of the piping plovers on Captain Sam's Spit is questionable. In 2007, only one piping plover was seen at Captain Sam's though fourteen were seen on the east end of Kiawah Island. In 2008, eleven birds were seen on Kiawah Island and no birds were seen at Captain Sam's. Furthermore, the evidence did not establish that wintering piping plovers shy away from the beach in front of the miles of developed areas on the Kiawah Island beachfront where there may be suitable mudflats or beaches, nor that Kiawah Island's beachgoers have ever been harmful to them. Wintering piping plovers have been documented on the beach for the entire length of Kiawah Island where over 4,150 properties have been sold. Beachwalker Park has more than 50,000 visitors annually, and the Sanctuary Hotel is situated on the front beach. S.C. Unit 10 also includes the fully developed beachfront on Seabrook Island.

The Court also notes that OCRM issued a permit in 2006 to the Town of Kiawah Island to scrape and alter sizeable stretches of ocean beach and tidal flats adjacent to The Ocean Course Golf Course that were located within designated habitat for wintering piping plovers that is identified as S.C. Unit 9. Even though that project directly altered the critical habitat, OCRM permitted the activity under a mitigation plan approved by the United States Fish & Wildlife Service. Here, neither the project nor the potential residential development will alter critical habitat, as occurred with the permitted project adjacent to the Ocean Course at the opposite end of Kiawah Island.

¹³ The development upon Captain Sam's will be limited to no more than fifty homes.

Therefore I find that that neither the proposed bulkhead/revetment nor potential future residential development will have a material or adverse effect on the wintering piping plovers or their critical habitat.

Diamond back Terrapins

CCL argues that the proposed bulkhead/revetment will have an adverse impact on diamond back terrapins. These particular terrapins have not been listed as an endangered or threatened species in South Carolina. Furthermore, even if these terrapins were a protected species, whether denying this permit would protect the species in the area of Captain Sam's is dubious. Mr. Limehouse testified that diamond back terrapins used to be in the river by the hundreds, now they are rarely seen.¹⁶ The accuracy of the nesting data relied upon by Dr. Dorcas is also questionable. The data was gathered more than 15 years ago before the sharp decline in the terrapin population in the several tidal creeks monitored behind Kiawah Island. Additionally, CCL's expert, Michael Dorcas, Ph.D., indicated that untended or forgotten crab traps, mostly commercial, are the primary cause of premature mortality of terrapins. Neither the bulkhead or revetment will have any bearing on the number of crab traps that are in the river now and may be placed there in the future, nor on the tendency of some to ignore the traps they have set in rivers and creeks.

It is even more unclear whether the nesting occurs in the area where significant erosional escarpment has taken place. CCL's expert, Michael Dorcas, testified that the vertical bulkhead could affect terrapins that were seeking to nest in the upland area on Captain Sam's. He did not testify that the proposed structure, to a reasonable degree of certainty, most probably **would** have a significant negative effect on terrapins. Moreover, the **vertical** bulkhead portion of the proposed structure is intended to stabilize the existing **vertical** escarpments created by erosion. The bulkhead follows the contours of those elevations. The bulkhead should not increase the vertical face that might confront nesting terrapins beyond current vertical escarpment conditions resulting from erosion.

The evidence also did not demonstrate that the terrapins will sustain any significant adverse effects from the revetment (or the potential residential development) if that were a proper

¹⁶ Though that fact lessened the need to take steps to protect those animals who are not considered endangered, I was especially struck by the sincerity of the testimony of Mr. Limehouse regarding the terrapins and the need to preserve Captain Sam's.

consideration) For instance, though CCL's expert testified that the terrapins display fidelity to previous nesting areas, he acknowledged that it is unknown whether a terrapin that is unable to nest at a particular location will seek another location. To the extent that terrapins seek possible upland nesting sites on Captain Sam's peninsula, they will still have access for the more than 3,000 feet of the peninsula's river shoreline between the western end of the proposed revetment area and Captain Sam's Inlet.¹⁷

Public Use of the Riverbank at Low Tide

The erosion of the river shoreline has contributed to the creation of a sloping sandy river bank adjacent to Captain Sam's. Kayakers and other boaters occasionally pull up on this bank. Much of this bank in the river's bend would be covered with the ACB mat and subsequently by marsh grass, which is intended to grow up through its holes. However, the use of the bank by the public is limited.¹⁸ As explained by the Department's project manager on KDP's permit application, there is 'some public use' of the riverbank at low tide, but it is not heavily used by the public. Accordingly, though there might be some minimal adverse effect on public access, that impact is not strong enough to bar the permit from being issued.

The Court therefore finds that construction of the revetment will not unreasonably eliminate public access and use. 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. Furthermore, if a boater or kayaker does not desire to land on the ACB mat (regardless of whether it is exposed concrete or covered by sand, spartina, or other vegetation), then the remaining riverbank shoreline in the immediate and general vicinity will remain available. Moreover, Captain Sam's Inlet and Seabrook Island on the opposite side have sandy shorelines offering varied landing sites for river boating and kayaking enthusiasts.

¹⁷ That is not to mention the many dozens of miles of Kiawah's other marsh shorelines and Seabrook shorelines.

¹⁸ CCI entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment. However, that evidence appears contrived. The persons depicted in the photographs were attending a planned event to raise funds to pay for CCI's legal expenses to contest the granting of this permit. CCL also presented testimony by other individuals that used the river bank area on a limited basis. Though that use is a consideration in limiting the permit, as explained above, it does not establish a basis to deny the permit. Notably, Ms. McAllister, who now lives upon Kiawah Island, which was once pristine, now wishes that a permit which would allow others to live upon the island be denied because it will interfere with her enjoying a pristine area of the island.

Development upon Captain Sam's

The large scale development of Kiawah Island as a resort residential community began in the mid 1970s. KDP and its related companies have been the master developer of Kiawah Island since June 1988 and Kiawah Island became an incorporated municipality the same year. The zoning ordinances of the Town of Kiawah Island (the 'Town') and a development agreement entered by the Town in 2005 (Development Agreement) provide for the development of no more than 50 home sites on Captain Sam's peninsula on the thirty-one or more highland acres that lie between the critical line on the river side and the OCRM set back line on the ocean side. The Development Agreement provides that KDP can convey a maximum of twenty of these acres as home sites to purchasers or about 14% of the total highland of the peninsula. The Development Agreement requires that the remainder of Captain Sam's peninsula be preserved in a natural state with limited exceptions (e.g., the entry road which may be pervious material and a few boardwalks) in perpetuity through encumbrance by a conservation easement to the Kiawah Island Natural Habitat Conservancy.

The Development Agreement also requires that this green space be conveyed to the Kiawah Island Community Association. KDP and its related entities have a history over the last twenty years of developing projects on Kiawah Island responsibly and in an environmentally sensitive manner with due regard for the natural setting. KDP and its related development entities have obtained approximately 500 permits from OCRM during this time and accomplished all of the permitted work in accordance with these permits without violation or citation. In fact, these KDP entities have responsibly developed small islands and narrow peninsulas in marshlands and along tidal creeks on and adjacent to Kiawah Island.

Furthermore, the planned future development of detached single family dwellings on Captain Sam's will occur behind the State's setback line, be served by appropriate utilities, be separated by four to seven rows of established high dunes well back from the beach, be placed primarily within the trees and other evolving vegetation on the northern side of Captain Sam's, be implemented in an environmentally sensitive manner by an experienced developer that has historically abided by its permits, and the development is both limited and accommodating to the natural features of Captain Sam's peninsula.

Mark Permar, the island's principal land planner for 25 or more years, plainly explained the many mitigating measures that will likely be employed by KDP to tailor the residential

development to the site such as limiting the elevation of houses to no more than one and a half stories, limiting lawns, using natural landscaping schemes, utilizing shared driveways, minimizing the number of beach access paths and boardwalks, and having no more than two docks along more than a mile of river edge and marsh shoreline. It is worth noting here that about 86% of the 150 acres of highland on Captain Sam's will be preserved as green space under the strict Development Agreement terms and a conservation easement to be granted the Kiawah Island Natural Habitat Conservancy. This undevelopable acreage will be owned by the Kiawah Island Community Association and will remain in its natural state. Only a maximum of twenty acres will be available for sale as home sites.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

General Findings

The proposed bulkhead/revetment is located in a critical area pursuant to S.C. Code Ann. § 48-39-10 (Supp. 2008). S.C. Code Ann. § 48-39-130(C) (Supp. 2008) requires a person or entity to obtain a permit for any alteration of the critical area of the coastal zone. The Administrative Law Court has contested case jurisdiction over those issues pursuant to S.C. Code Ann. § 1-23-600(A) (Supp. 2008) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008). Because this case involves two requests for contested case hearings which were consolidated, KDP and the CCL both have the burden of proof. KDP bears the burden of proving that the 2783 foot bulkhead/revetment complies with the Coastal Wetlands and Tidelands Act, S.C. Code Ann. §§ 48-39-10 *et seq.*, the regulations promulgated thereunder, 23A S.C. Code Reg. §§ 30-1 through 30-18, and the CZMP. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 132, 335 S.C. 530, 530 S.F.2d 643, 651 (Ct. App. 2001). CCI, as the party challenging the Department's decision to authorize 270' of revetment, has the burden of proving that the Department's decision was contrary to the Act, Regulations, and CZMP and that the bulkhead/revetment should have been denied. Id. The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Nat'l Health Corp. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 373, 380, 5 E.2d 841 (Ct. App. 1989). In addition, the Court shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge. S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008).

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. Specifically, as to diamond backed terrapins, the Court additionally concludes they are not a protected species and that the law allows individuals to possess up to two terrapins at a time provided they are not possessed for commercial purposes. See S.C. Code Ann. § 50-5-2300 (Supp. 2008). In fact, with respect to habitat concerns, the ACB mat likely will instead provide additional habitat for oysters and perhaps other marine life associated with marsh grass habitat that may spring through the mat's multiple holes. The ACB mat will thus have a limited effect on public access to tidelands because it covers a sandy river shore. However, that impairment is not substantial.

Furthermore, the project will clearly reduce and likely stop erosion rather than precipitate any erosion. The elimination of that erosion will further provide an economic benefit to KDP. In fact, the benefit from protection of its upland through stabilization of the riverbank is considerable when compared with the benefit of leaving the riverbank in its unaltered state and allowing the erosion to continue unabated into the forested highland and dune areas along the river. This erosion has no positive benefit for anyone and clearly is a detriment to the landowner. Likewise, the proposed revetment will not have an adverse effect on the value and enjoyment of adjacent owners. KDP is the only adjoining highland owner (including owning the land used for Beachwalker Park at the eastern end of the Spit). The Court cannot agree with the suggestions made by CCL that the public is the adjoining owner as a result of its right of access across KDP land to the beach from the Beachwalker Park leased area. KDP is the fee simple owner of the park parcel and seaward therefrom to the MHW line. No evidence was offered refuting this. Additionally, O'Rourke testified that Charleston County PRC, which operates the park, fully supports the entire revetment permit.

The proposed project, through its mat over the sloping surface of the bank and its bulkhead against the vertical scarps, also provides reasonable safeguards against adverse environmental impacts. These and other types of revetments have been historically approved by the Department, including on Kiawah Island for these same protective purposes. Accordingly, the revetment will not have adverse environmental impacts.

As set forth above, Section 48-39-150 also instructs the Department to be guided by the policy statements in S.C. Code Ann. §§ 48-39-20 and 48-39-30 in assessing the potential impacts

of projects in critical areas. See also S.C. Code Ann. Regs. 30-11 (Supp. 2008). The pertinent portions of Section 48-39-20 are as follows:

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.

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(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

The pertinent portions of Section 48-39-30 provide as follows:

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone.

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations.

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(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

* * *

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

These policy statements require a balancing of economic-development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project, neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas. As previously found, the potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will also be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Additionally, the Court notes that these policies refer to the role of local municipalities. Here, the Town of Kiawah Island has implemented measures to safeguard the environment in the restrictions it imposed on the potential residential development. These safeguards include the legal preservation through a conservation easement of almost all but twenty acres of the peninsula in a natural state in perpetuity. This salient requirement is certainly in furtherance of the policies in favor of protecting coastal resources. The twenty acres also appear to be not only behind several rows of high dunes but also more than 3,000 feet from the inlet.

KDP thus established that there are no significant negative impacts from either the bulkhead/revetment or the potential future residential development under S.C. Code Ann. Section 48-39-150 (A) and S.C. Code Ann. Regs. 30-11 (B). Further, neither the project nor the potential residential development are in violation of the relevant policies set forth in Sections 48-39-20 and 48-39-30.

Regulation 30-11(C)

S.C. Code Ann. Regs. 30-11(C) sets forth additional guidelines to be considered when making permitting decisions regarding activities in the critical areas:

30-11(C)(1)

The first of the guidelines in Regulation 30-11 (C)(1) requires consideration of "[t]he extent to which long-range cumulative effects of the project may result within the context of

other possible development and the general character of the area. S.C. Code Ann. Regs. 30-11(C)(1) (Supp. 2008). It is this provision which constitutes the underlying objection to this permit by CCL and, in particular, the Department. They argue that the bulkhead/revetment will allow homes to be built upon Captain Sam's which will change the character of the **upland** area. However, the controlling statutes and regulations for critical area permits do not require a determination of whether high land outside the Department's critical area jurisdiction is suitable for residential development. Instead, the pertinent inquiry is the cumulative impacts of the project **within** the critical area, not the cumulative impacts of future development on the high ground **outside** the critical area. In other words, the area for which the Department has regulatory authority is the critical area, not the high ground **outside** the critical area.¹⁹

Construing this provision otherwise would lead to a substantial expansion of the Department's authority to regulate the development of entire communities. Conceivably, the Department could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over development. In fact, the Department's project manager testified that he denied the revetment at all locations on Captain Sam's Spit other than adjacent to Beachwalker Park because he believed potential residential development would destroy the pristine nature of Captain Sam's. Thus, the Department avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process. If the General Assembly had intended to authorize such a considerable expansion of the Department's authority, it is inconceivable that it would have done so with such general language. See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal

¹⁹ The decision of the South Carolina Supreme Court in Spectre v. S.C. Dept. of Health and Environmental Control, Op. No. 26764 (S.C. Sup. Ct. filed Feb. 1, 2010) (Shearouse Adv. Sh. No. 5 at 55) does not alter this conclusion. In Spectre, the Supreme Court held that the Coastal Zone Management Plan (CZMP) had the force and effect of law, its reach extended beyond the critical areas in the eight coastal counties, and it could be applied to isolated freshwater wetlands that were not subject to the jurisdiction of the Army Corps of Engineers. Spectre did not involve a critical area permit; instead, the applicant was seeking a permit to fill isolated freshwater wetlands for a commercial development. This type of activity was expressly addressed—and discouraged—in the CZMP, which specifically provides that upland wetlands play an important role in the ecosystem and prohibits most commercial construction requiring fill of freshwater wetlands. Accordingly, the adverse effects in Spectre arose from the immediate impact of the project itself, not from some later development which might have arisen if the permit had been granted. In this case, to the contrary, the Department denied the permit for the revetment based not upon immediate adverse impacts on the critical area, but upon the assumption that the construction of the revetment would lead to the residential development of the upland portion of Captain Sam's Spit. Nowhere in Spectre did the Supreme Court rule that the CZMP authorizes the Department to deny critical area permits because of the effects of later foreseeable development on upland. Moreover, as is further discussed herein, I find that the proposed development is consistent with the CZMP.

Council 306 S.C. 48, 413 S.F.2d 13 (1991) (administrative agencies are possessed of only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged) 3 Sutherland Statutory Construction § 65.2 (6th ed.) (statutes authorizing administrative agencies to exercise powers tending to interfere with established or traditional property rights are strictly interpreted)

Furthermore, the regulations or statutes granting the Department authorization to use its permitting power do not govern highland uses. The authority to determine appropriate land uses has, over the history of our State's law, been relegated to the municipalities and counties having planning and zoning jurisdiction and expertise to best determine such planning matters. See e.g. Beal Enterprises v. County of Greenville, 319 S.C. 137, 459 S.F.2d 883 (Ct. App. 1995); Rushing v. City of Greenville, 265 S.C. 285, 217 S.F.2d 797 (1975). Thus, the governmental consideration of whether residential uses are appropriate above the critical line and landward of the setback line for Captain Sam's is a zoning matter within the province of the Town of Kiawah Island. To the contrary, the Department's actions in this case appear to be colored by its mistaken belief that it may simultaneously trump local zoning and development agreements and decree that privately owned upland property remain permanently undeveloped and in a natural state without any suggestion of fair compensation to the owner. See e.g. S.C. Code Section 48-39-30(c) ('In the implementation of the chapter, no government agency shall issue any order... so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States'). However, nowhere do the governing statutes and regulations prohibit lawful, zoned real estate development on highland parts of barrier islands above OCRM critical lines and landward of OCRM ocean setback lines in the coastal zone. Instead, they caution against ill-planned development. S.C. Code Ann. § 44-39-20(E) ('Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values').

Likewise, the focus is on whether the proposed structure satisfies the applicable South Carolina regulations and statutes governing the permitting of bulkheads and revetments in critical areas. None of these controlling regulations and statutes establish stability of the

adjacent highland as a consideration in acting on a critical area permit to construct a bulkhead or revetment or a river bank.

No regulation or statute prohibits construction of a bulkhead or revetment that retards the process of shoreline change. Another argument made by OCRM and CCL in opposition to this permit. Every bulkhead or revetment by its very nature must interfere with the natural process of erosion to do its intended job. If the General Assembly had sought to create an exception for the permitting of revetments and bulkheads where the structure might interfere with the erosion in certain instances, the legislature could have so specified. It did not. Instead, the General Assembly specifically recognized the fundamental need to protect upland from destruction from the natural process of erosion on tidal rivers. Indeed, it authorized the Department to issue permits for the construction of bulkheads and revetments in locations other than the front beach.

(F) The department for and on behalf of the State may issue permits not otherwise provided by state law for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, **the protection of public and private property from beach and shore destruction** and the continued use of tidelands, submerged lands and waters for public purposes.

S.C. Code Ann. § 48-39-120 (E) (emphasis added). See also S.C. Code Ann. Regs. 30-12 (C)(1)(c) (“Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected **unless upland is being lost due to tidally induced erosion**”)(emphasis added).

Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development. OCRM and CCL do not challenge KDP's history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that KDP will use in its limited residential development of Captain Sam's. Rather, they urge that **any** residential development at all, regardless of safeguards and protections, on the now undeveloped Captain Sam's highland peninsula along the ocean and river is **per se** ill-planned. The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam's demonstrate that this limited residential use would be

sensitively planned responsive to the natural features of the peninsula attentive to its flora and fauna and without significant negative effects on the critical area. Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland. The development team also has a twenty-two year unblemished track record for compliance with all OCRM permits.²⁰

30-11 (C)(2)

The second guideline of Regulation 30-11 (C) provides that

Where applicable, the extent to which the overall plans and designs of a **project** can be submitted together and evaluated as a whole rather than submitted piecemeal and in a fragmented fashion which limits comprehensive evaluation

S.C. Code Ann. Regs. 30-11 (C)(2) (emphasis added). The Department and CCL contend that this application was piecemeal because (i) the revetment plan submitted by KDP did not include the final construction drawings, and (ii) KDP did not submit plans for the future residential development on Captain Sam's. However, KDP submitted sufficient design plans for the proposed revetment. KDP submitted the application for the project, i.e. the revetment, as a whole.²¹ The evidence reflected that it is customary practice with a project of this nature for the Department to base its permitting decision on conceptual renderings, such as those supplied with this application, rather than requiring the applicant to incur the substantial expense of full blown construction and bid drawings. If the permit is granted, the customary and practical course is that the applicant then submits construction drawings for conformance and final approval, seeking to work out any details then. Likewise, the failure to request training jetties cannot be considered an omission in the application, as suggested by counsel for CCL and OCRM, as KDP has no intent to pursue them at this time. Obviously, it would be unreasonable to require that a permit request provide an alternative design element for every contingency that may arise.

²⁰ It also bears pointing out that this regulation specifies that OCRM "must in part base its decisions regarding permit applications on the policies specified in Sections 48-59-20 and 48-59-30" and thus be guided by the following: "30-11 (C) (emphasis added). This regulation does not state that the sole consideration, or even the primary consideration, is extent to which long range cumulative effects of the project may result within the context of other possible development and the general character of the area."

²¹ In fact, in an effort to assure that the project was submitted as a whole, KDP requested that Charleston County PRC withdraw an earlier application it had filed with OCRM to construct solely a bulkhead of 270 feet in front of Beachwalker Park. This allowed KDP, utilizing Thomas and Hutton and other experts, to develop a single engineering solution.

Additionally, if the Department had truly believed the application to be incomplete, presumably it would have so informed KDP at the time of submission of the application. It did not do so. To the contrary, throughout the application process, KDP repeatedly offered to provide any additional information that the Department desired for purposes of its determination. The Department never requested any further information from KDP. Indeed, it never responded to the several offers of more data by KDP as to either the design of the revetment or the possible future residential use on the upland on Captain Sam's Spit.

Moreover, as to the failure to submit a specific residential plan, the project under consideration is the bulkhead/revetment, not the future residential use of the upland. The applicant testified to valid reasons for not having a specific development plan for this moderate-sized neighborhood. Detailed plans fixing the precise locations and number of homesites and the exact location of the infrastructure improvements were not necessary to gauge the cumulative effects of the bulkhead/revetment.

I therefore conclude that the permit application does not violate Regulation 30-11 (C).

Regulation 30-12 (C)

S.C. Code Ann. Regs. 30-12 (C) (Supp. 1999) sets forth standards for the construction of bulkheads and revetments, erosion control structures. It provides that for bulkheads and revetments which are not ocean front:

(1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:

(a) Structures must be designed to conform to the critical area line (upland boundary) to the maximum extent feasible and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;

(b) Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site-by-site basis.

(c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion.

(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

S.C. Code Ann. Regs. 30-12(C)

Here although public access to the riverbank at low tide may be affected on a very limited basis Regulation 30-12 (C) specifically allows some adverse effect where upland is being lost due to tidally induced erosion. Clearly KDP's upland is being lost due to tidally induced erosion and there is no feasible alternative that will stabilize this eroding riverbank. Additionally although the ACB mat degrades the public uses of the shoreline where the mat is approved it does not eliminate all public access. Nevertheless there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction in the mat as ordered below.

The Court further concludes that despite the arguments of the Department and CCI that the design of the revetment is insufficient and that the revetment may fail the design is adequate to stabilize the bank under normal conditions its intended purpose. Its intended purpose is not to prevent a breach of the peninsula in the event the catastrophic hurricane. In sum the Court concludes that the proposed revetment meets all the specific criteria for bulkheads and revetments set forth in S.C. Code Ann. Regs. 30-12 (C).

Public Trust Doctrine

CCL argues further that this bulkhead/revetment should be denied for violating the public trust doctrine. The premise of CCL's argument is that the public has the right to use public trust lands and waters for recreational purposes including fishing, bathing, swimming and other recreational uses. Specifically the public has a right to pull up kayaks and boats on the sandy banks of the Kiawah River and to swim, fish and crab on the banks of the river in the location of the proposed revetment. Accordingly if the revetment/bulkhead structure were constructed as requested these public rights would be eliminated in violation of the public trust doctrine.

Clearly the above laws set forth the parameters of when coastal public trust land may be used for private purposes. In Sierra Club v. Kiawah Resort Associates, 318 S.C. 119, 456 S.E.2d 397 (1995), the Supreme Court expounded on the public trust doctrine in implementing these laws and outlined the test for determining whether a particular project violated it. The Court held that

The legislation creating the Coastal Council [now OCRM] and defining its duties while not explicit implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways. See S.C. Code Ann. § 48-39-10 et seq.

The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining

Illinois Central R. Co. v. Illinois 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). Clearly, under the South Carolina Coastal Management Act the State through the Coastal Council maintains control over the public trust lands. See e.g. Caminiti v. Boyle, 107 Wash.2d 662, 732 P.2d 989 (1987). Coastal Council's Regulations specifically state that "[n]o permit shall convey nor be interpreted to convey a property right in the land or water in which the permitted activity is located." 24A S.C. Code Ann. Regs. R. 30-4(E). Since no interest in the land or water within the public trust is conveyed by the permit, the relevant inquiry is whether the docks **substantially impair** the public interest in the public trust lands and waters. As there was testimony that the docks would not substantially impair marine life, water quality, or public access to the area, we hold that the permits at issue do not violate the public trust doctrine. We affirm.

Sierra Club, 456 S.E.2d at 402 (emphasis added). Here, the bulkhead/revetment will not substantially impair the recreational activities of boaters, kayakers, and others, nor will it substantially impair or unreasonably restrict their use of the public trust tidelands including a portion of the southerly bank of the Kiawah River.

Coastal Zone Management Plan²²

The Department and CCL contend that the proposed bulkhead/revetment will violate the several policies in the CZMP, including the policies for

- Activities in Areas of Special Resource Significance for Barrier Islands (Chapter III(C)(3)(XII)(A))
- Dune Areas (Other Than Critical Areas) (Chapter III(C)(3)(XII)(B))
- Public Open Space (Chapter III(C)(3)(XII)(D))
- Geographic Areas of Particular Concern (Chapter IV(A)(2)(a)(8))²³

²² KDP also argues that the policies in the CZMP cannot be imposed as binding norms by the Department and that the Department lacks the authority to deny a project based on policies contained in the CZMP. This issue was recently determined by the Supreme Court of South Carolina in the case of Spectre v. S.C. Dept. of Health and Environmental Control, Op. No. 26764 (S.C. Sup. Ct. filed Feb. 1, 2010) (Shearouse Adv. Sh. No. 5 at 15) in which the Court held that the CZMP has the force and effect of law. Nonetheless, I do not find the proposed project is contrary to the Coastal Zone Management Plan. Moreover, I do recognize that the General Assembly adopted the Beachfront Management Act, S.C. Code Ann. §§ 48-39-250 et seq. (BMA) well after the Department compiled the CZMP. The provisions of the BMA, including in particular those establishing the baseline, setback line, and the standards for construction in relation to them, take precedence as legislation over any provisions of the CZMP that may conflict therewith, even though the CZMP is enforceable. See In re L.C. v. Town of Mount Pleasant, 358 S.C. 406, 526 S.E.2d 716 (2000) (generally, the most recent legislation will take precedence over earlier enactments).

Chapter III (C) of the CZMP discusses Residential Development in the coastal zone. It provides that [o]f primary concern is adequate treatment and disposal of domestic sewerage from residences and that [u]ncontrolled development patterns can also degrade water quality and impact marine and aquatic species. CZMP p. III-16. The policies enumerated in this section are to provide guidance on reaching and maintaining a balance between development and conservation of coastal resources. Id.

The CZMP classifies barrier islands as an area of special significance. The policies for development of those islands include the following:

- 1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high density development may not be suitable on some barrier islands with are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated.
- 2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands).
- 3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated; for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.
- 4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural 'carrying capacity' of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.
- 5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary

²³ The Department also argued that this project triggered the CZMP Erosion Control Policies contained in Chapter IV(C)(4) and the Beach and Shoreline Access Policies in Chapter IV(D)(3)(c). Neither KPD nor CCI addressed these issues in their Proposed Orders. Nevertheless, as to the Erosion Control Policies, the project is to be made of more than acceptable materials. Moreover, the evidence clearly established the economic justification for the project that will have only limited effect upon the public use of the area. The discussion above regarding the public use of the shoreline reflects that the Beach and Shoreline Access policies will not be violated.

motivation for these efforts and where appropriate barrier islands should be maintained for recreational use based on the capacity of individual areas to accommodate human activity

CZMP Chapter III (C)(3)(XII)(A) p 70-71 The CZMP also treats dune areas which fall landward of the beach zones as areas of special resource significance The enumerated policies in the CZMP regarding these areas include the following

Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone project proposals in the secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas

CZMP Chapter III (B) p 71-72 Concerning open spaces the CZMP seeks to restrict projects which would limit the continued use of a recreational open area or disrupt the character of such a natural area unless other alternatives exist CZMP Chapter III (D) p 73 On the other hand the CZMP seeks to 'increase the amounts and distribution of public open space and recreational areas in the coastal zone Id. Finally, the CZMP sets forth that areas in which endangered and threatened species inhabit are Geographic Areas of Particular Concern

The development techniques and safeguards KDP intends to implement are consonant with the policies in the CZMP More specifically I find that the low-density development described by Long and Permar that would be employed in the residential development of Captain Sam's entail reasonable precautions No evidence was offered to alter this important point The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP Accordingly, the proposed limited residential development several rows of dunes behind the primary dune will not violate the policies of CZMP Chapter III (C)(3)(XII)(A)

Furthermore the CZMP contains no policies that would prohibit the potential residential development of Captain Sam's and the potential residential development is consistent with its terms The policies dealing with barrier islands and the dunes system specifically contemplate residential development on barrier islands These policies do not prohibit residential development that occurs landward of the primary dune if reasonable precautions are taken The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach Finally the developable area of Captain Sam's peninsula

is well **outside** Unit 10's boundaries of designated critical habitat for wintering piping plovers. It is thus not a Geographic Area of Particular Concern under the CZMP.

Therefore, I find that neither the bulkhead/revetment nor the possible future residential development is contrary to the policies of the CZMP.

ORDER

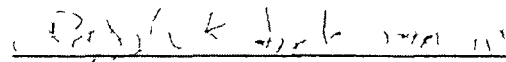
Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the permit issued by the Department is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

1. Provided:

- (i) that care is used in the installation of the requested erosion control structure near its eastern end, adjacent to Beachwalker Park, to avoid covering marsh grass, where practical, unless necessary to prevent significant highland erosion;
- (ii) that for the portion of the proposed erosion control structure to be located west of survey point 'F' on Petitioner KDP's Exhibit 77, a bulkhead shall not be used where the vertical face of the escarpment is less than 24 inches;
- (iii) that for this same western section of the proposed erosion control structure, the ACB mat shall be no greater than eight (8) feet in width; and
- (iv) that KDP shall submit final construction plans to the Department consistent with the permit requested, as modified and approved by Order of the Administrative Law Court, before commencing initial construction of the erosion control structure and after initial construction, prior to commencing construction of any necessary extensions of the ACB mat (or bulkhead to the extent herein authorized but not originally constructed) authorized by this permit.

AND IT IS SO ORDERED.


Ralph King Anderson III
Chief Administrative Law Judge

February 26, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this day
entered his order in Case No. 10-0000000-00000000 and action upon all
parties to the cause by filing a copy thereof
in the United States District Court and on the Interagency
Mail Service Unit, and to the party(ies) to which a copy(ies)
of this order is to be served.
This 26th day of February, 2010
by Charles M. Scott
Clerk of Court

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Kiawah Development Partners II	)	Docket No 09 ALJ-07-0029-CC
	)	
Petitioners	)	
	)	
vs	)	
	)	
South Carolina Department of Health and Environmental Control	)	
	)	
Respondents	)	
South Carolina Coastal Conservation League	)	Docket No 09 ALJ 07 0039 CC
	)	
Petitioners	)	
	)	
vs	)	
	)	
South Carolina Department of Health and Environmental Control and Kiawah Development Partners II	)	
	)	
Respondents	)	

**ORDER ON MOTIONS
FOR RECONSIDERATION**

A hearing was held in this matter on August 24 – 28 2009. This Court thereafter issued a Final Order and Decision (Final Decision) in which it approved a modified permit for a bulkhead/revetment upon Captain Sam's Spit. Both the Department and South Carolina Coastal Conservation League thereafter filed a timely Motion for Reconsideration of that decision. Some of the arguments warrant clarification of the original Final Decision. Accordingly, I am issuing an Amended Final Decision in this case addressing those issues. The remaining arguments will either be addressed below or are found to be completely without merit; therefore they will not be addressed.

DISCUSSION

Reopening the Record

Recently, the Department's Board issued a decision in a separate proceeding involving whether a request to construct a below ground sheet pile wall on upland above the critical line on

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the neck area of Captain Sam's Spit denying the staff's determination to approve a stormwater management plan and a National Pollution Discharge Elimination System (NPDES) general permit. CCI contends that the Board's determination in that case that the staff failed to adequately consider the possible long-range cumulative effects of the project warrants the reopening of the record in this to consider the Board's determination as evidence. CCL cites to Rule 60 SCRPC as a basis for the request in its motion. Rule 60(b)(2) SCRPC provides that [o]n motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). However, after discovered evidence refers to evidence of facts existing at the time of trial of which aggrieved party was excusably ignorant. State vs. Haulcomb, 260 S.C. 260, 195 S.E.2d 601 (1973). Generally, only facts or evidence in existence when the trial occurred but undiscovered despite the due diligence of the moving party may properly form the grounds for a Rule 60(b) motion based upon the newly discovered evidence. Republican Party of North Carolina vs. Hunt, 77 F.3d 470 (4th Cir. 1996).

Additionally, in S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008), the appellant raised new issues in a motion for reconsideration that could have previously been brought to the attention of the Administrative Law Judge. The Court held that [i]f an issue could have been initially presented to the trial court, a party cannot raise that issue for the first time in a post-trial motion. 669 S.E.2d at 915. Furthermore, [a] party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. Id.

Moreover, even if it was proper to reopen the record, this so-called evidence would not change the result. Notably, the Board's decision on the sheet pile permit request is not evidence. It is not a fact other than in the limited sense that a final Decision was made. It is an administrative ruling. Nonetheless, the Board's decision is not material and will not change the result in this case. Here, this Court considered a volume of evidence regarding the effects of the potential future residential development of Captain Sam's. The Court's findings that the potential residential development was consistent with the CZMP are supported by the evidence.

Deference to Administrative Construction

The DHEC staff argues that their interpretation of the policies contained in the CZMP is entitled to the propriety of legal deference. In Conservation League, the court recognized that [c]ourts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ.¹ S.C. Coastal Conservation League v. S.C. Dept. of Health & Environmental Control, 363 S.C. 67, 70, 610 S.E.2d 482, 486 (2005). Nevertheless, this deference has limits.¹ For instance, it is the interpretations of DHEC's Board, not its staff, which is entitled to deference from the courts. Cf. id. ('The Panel, not OCRM staff, is entitled to deference from the courts.') Neal v. Brown, 682 S.E.2d 268, 270 (2009). Additionally, in Ft. Wan Fertilizer Company v. S.C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950), the Supreme Court stated that

We have held in many cases that where the construction of the statute has been uniform for many years in administrative practice and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight and should not be overruled without cogent reasons.

60 S.E.2d at 684. Thus, an underlying requirement to draw upon the agency deference doctrine is that the construction of the statute has been uniform for many years so as to lead to the conclusion the General Assembly has acquiesced to that construction. To find otherwise would allow an agency to construe its regulations on a case-by-case basis and grant deference to that irresolute interpretation.

CCL also seeks its version of agency deference again based upon the Board's recent decision denying the staff's determination to approve a stormwater management plan and NPDES permit. CCL again contends that the Board's determination in that case that the staff failed to adequately consider the possible long-range cumulative effects of the project warrants reopening of this case and granting deference to that factual interpretation. Deference does not apply to factual findings, only to legal interpretations of ambiguities. [T]he court generally gives deference to an administrative agency's **interpretation** of an applicable statute or its own regulation.¹ Brown v. Bilio, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (S.C. 2003) (emphasis added). CCL, however, is arguing that the court is bound by the **findings** on the consistency of upland development made by the DHEC Board in a **separate** proceeding. This

¹ See Randolph R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure 15-18 (2004).

Court is not bound by the Board's factual findings much less the factual findings in a separate case based on a separate record. Moreover, as discussed in the Final Decision, the law is clear that this court determines factual matters *de novo* based on the evidence in the record in this proceeding. Deference to factual findings would eviscerate the *de novo* standard of review of this court in contested case proceedings.

CCCL also argued that the Board's interpreted CMP policy 1.7 applies not just to the critical area but also to areas outside the critical area. The extension of CCI's reasoning is that in deciding this case, the ALC must also give deference to a factually different case interpreting a different regulation that may or may not be upheld upon review. For instance, the deference principle does not apply where 'the plain language of the statute is contrary to the agency's interpretation.' Brown v. Bilio, Inc. 354 S.C. 436, 440, 581 S.E.2d 836, 838 (S.C. 2003). Here, as noted in the Final Decision, Regulation 30-11(c)(1) plainly states that the effects to be considered are those of the project. The project is the revetment, not the possible later residential development. Additionally, as explained above, this Court did ultimately consider whether the potential future residential development was consistent with the CZMP, and made factual findings supporting this consistency determination. Hence, the board's recent decision adds nothing and would not change the outcome of this case.

Modification of Proposed Permit

Quizzically, the Department argues that the ALC's modification of the permit to **reduce** the size of the structure, thereby limiting the impact to the environment, is outside of its standard of review. A trial *de novo* is one in which the whole case is tried as if no trial whatsoever had been had in the first instance. Marlboro Park Hosp. v. S.C. Dept. of Health & Envtl. Control 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) quoting in part Blizzard v. Miller 306 S.C. 373, 375, 412 S.E.2d 406, 407 (1991). Obviously, the department had and exercised its right to modify the permit in its initial review. But, now it argues that no such modifications may be made after a full five day presentation of all the evidence regarding the efficacy of this permit. I find the Department's position to be absurd.⁷ See Kiriakides v. United Artists Communications, Inc. 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (when construing a

⁷ I do recognize that this is the position of the Department's representative in this case, and not necessarily the position of the Department overall.

statute the Court will reject meaning that would lead to an absurd result not intended by the legislature)

Consideration of CZMP Policies

The Department argues that the evidence does not support the issuance of the permit under the policies of the CZMP. The Department maintains that the development agreement contains nothing that could possibly provide the required assurance regarding the existing dune ridges, drainage patterns, and natural vegetation and impacts to the other critical areas. However, in addition to the development agreement, the evidence demonstrated KDP intends to implement all the specific precautionary steps outlined in the CZMP (e.g., public water and sewer) and other protective measures that go well beyond those mentioned in the CZMP. More specifically, the evidence established that KDP requires setbacks so that the homes built upon the development will be located well within the trees. KDP also requires the use of pervious materials in construction which will aid in retaining the drainage patterns upon the spit. Tr. p. 98 line 24 to p. 99 line 4. The natural vegetation will also be retained as close as possible to the existing state. Tr. p. 171 line 14 to 24. Tr. p. 318 line 22 to p. 319 line 1. The development upon Captain Sam's spit would not impact the existing dune ridges. Mr. Long testified that

[W]e don't build on dunes. As I've said, for 22 years, we don't allow people to build on dunes, except with the most minimal little pieces of, say, a pool, a boardwalk to beach, a little tiny piece of a house, and usually they require vegetation to cover even those things.

Tr. p. 185 line 19 to 25. Likewise, Mr. Permar responded as follows:

Q So the development would be well behind the secondary dune?

A Absolutely. It would be, in this stretch right here, it would be behind the fourth dune and actually there's the beginnings of another dune over here (indicating). So today it would be behind the - four dunes systems behind the primary dune. And we don't, the proposed development doesn't reach this area down in here (indicating). So in an area right in there, there's probably a row of five dunes before it grows to be a greater dimension.

Q Your ultimate thinking is it's going to be behind all five.

A Yes. Right. And then you begin to see - I don't know if I can zoom in here. But you begin to see what happens in the evolution of the dunes to the vegetated area here (indicating) is that you see traces of vegetation, they're starting to propagate behind these dunes, because they're more protected from the salt air and so forth. That's the beginnings of what happened, you know, many years ago with this (indicating). So by

observation that's as I said the beginnings of a dune field that's propagating as opposed to going the opposite direction

Tr p 304 line 17 to p 305 line 19 Finally the development upon the Spit would be quite limited (at most fifty home sites) rather than intensive or high density I long also explained that

We have maximum 150 people or probably about 120 people that would live in ten -- excuse me that would live in 50 homes at the most The average household has two and a half people at Kiawah Almost all of them at Kiawah -- we're unusual -- say compared to Seabrook or Isle of Palms or Sullivan's Island where I live It's a second home community The people are generally from the Northeast and the Midwest and they spend on average six to eight weeks at Kiawah

* * *

Kiawah's very unusual in that about 90 percent of our property owners historically and today are second homeowners which means they aren't there but six or eight weeks a year and -- unlike -- say Seabrook which is almost all permanent residents and probably 80 percent anyway permanent residents So we've got people who at our neighborhoods around the island and there's 3500 or so dwellings are 90 percent second homeowners who are there six or eight weeks That shows a different intensity

Tr p 172 line 4 to 14 Tr p 1580 line 7 to 20

The Department also argues that the court should deny the revetment permit because it is physically possible to commence residential development on Captain Sam's without a revetment The question, however, is whether there are alternatives to protect the shoreline not whether KDP could proceed with a development without a revetment As explained in the Final Decision the statutes and regulations specifically authorize the installation of bulkheads to protect an owner's high ground from eroding Here the evidence established that the riverbank has progressively and regularly eroded over the last 10 years and will continue to erode The revetment was the only device attested by the witnesses that would prevent this erosion Insofar as OCRM argues that it might grant a permit for an access road seaward of the setback line, this assertion is unconvincing especially in light of Mr. Eiser's testimony that OCRM is adamantly opposed to any residential development on Captain Sam's regardless of whether it is authorized by local zoning and a development agreement

The above facts (which are incorporated as additional findings of fact by this Court) and the Findings of Fact set forth in the Amended Final Decision support the issuance of the permit under the CZMP In sum neither OCRM nor CCL introduced any evidence about the specifics

of the potential future development on Captain Sam's. On the other hand, Messrs. Long and Permar testified in great detail about numerous elements of the potential future development, all the precautions that would be taken, and the history of KDP's sensitive development of other similar areas on Kiawah Island, among other things. Accordingly, the Department's contention is without merit.

Stay

CCI requests that the 'effectiveness' of the Final Decision in this case be stayed until all appeal opportunities have been exhausted or concluded. In support of this motion, CCL cited ALC Rule 29 (E), SCR 65 and SCACR Rule 225. Since this case has not been appealed, the controlling rule is 29 (E) which provides that

An administrative law judge who issues a final order subject to judicial review may in the order stay its effect. At any time prior to the filing of a petition for judicial review, and upon the motion of any party, with notice to all parties, the administrative law judge may stay the final order upon appropriate terms. The filing of a motion for a stay does not alter the time for filing a petition for judicial review.

Nevertheless, though SCACR Rule 225 is not controlling, it is certainly applicable since the result of granting a stay would essentially operate as a supersedeas under that provision. See ALC Rule 68 ('[T]he South Carolina Appellate Court Rules may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules.'). Rule 241(c)(2) provides that

In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.

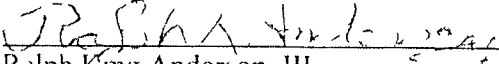
Here, as long as construction of the revetment is postponed, erosion will continue. Though Captain Sam's Spit overall is accreting in size, the ongoing erosion is reducing the width of the access corridor and jeopardizing the potential future residential development. Accordingly, KDP will be significantly prejudiced and harmed by staying the permit it has waited two years to obtain so as to protect its land from sloughing off into the river. Additionally, though CCI asserts several interests that could be harmed as a result of the decision, the evidence did not support those occurrences. Moreover, if KDP proceeds with constructing the revetment, it does so realizing that if the decision of this court is reversed, it

In making this request, I assume CCI presumes that their Motion for Reconsideration is denied.

may have to remove the structure. I therefore find that the balance of the hardships weighs in favor of denying the stay.

IT IS THEREFORE ORDERED that the Motions for Reconsideration and Motion for Stay are DENIED.

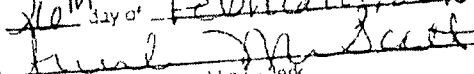
AND IT IS SO ORDERED


Ralph King Anderson III
Chief Administrative Law Judge

February 26, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy thereof in the United States mail, postage paid, or in the intermediary Mail Service addressed to the parties or their attorneys.

This 26th day of February, 2010
By 
Judicial Law Clerk

South Carolina Environmental Law Project

Lawyers for the wild side of South Carolina

a 501c3 non profit
organization

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*To protect the natural
environment of South
Carolina by providing
legal services and advice
to environmental
organizations and
concerned citizens
and by improving the
state's system of
environmental
regulation*

April 22, 2010

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SC SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

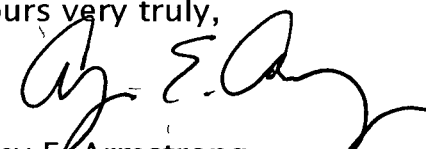
Re Kiawah Development Partners, II, Inc. & DHEC v
Coastal Conservation League, Docket Nos. 09-
ALJ-07-0029-CC & 09 ALJ-07-0029-CC

Dear Mr. Shearouse

I am enclosing for filing the S.C. Coastal Conservation
League's Motion to Transfer in connection with this matter, along
with my proof of service and filing fee.

Please return a clocked-in copy of the motion in the enclosed
envelope. Thank you for your assistance.

Yours very truly,



Amy E. Armstrong

cc Tanya Gee, Clerk, S.C. Court of Appeals
Davis Whitfield Cargile, Esquire
G. Trenholm Walker, Esquire
Gedney M. Howe, III, Esquire (without attachments)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
IN THE SUPREME COURT

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SC SUPREME COURT

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

Docket No 09-ALJ-07-00029-CC

Kiawah Development Partners, II,

Respondent,

v

South Carolina Department of Health and Environmental Control,

Appellant

Docket No 09-ALJ-07-00039-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

**MOTION FOR ORDER TRANSFERRING
CASE TO THE SUPREME COURT**

TO THE SUPREME COURT OF SOUTH CAROLINA, THE COURT OF APPEALS AND
THE RESPONDENTS

PLEASE TAKE NOTICE that the Appellant, South Carolina Coastal Conservation

League, hereby moves the Supreme Court and the Court of Appeals, pursuant to SCACR 204(b), for an order certifying this case for review by the Supreme Court before it has been determined by the Court of Appeals. Counsel for the Department of Health and Environmental Control consents to this motion. Counsel for Kiawah Development Partners, II, Inc. indicated that he would need to read this motion before giving final consent.

The reasons that the Appellant Coastal Conservation League seeks Supreme Court review are that this case involves an issue of significant public interest and a legal principle of major importance, and the Appellant believes that the public interest would best be served by final resolution of this case as expeditiously as possible. In support of this motion, the Appellant submits the following:

INTRODUCTION

The issue of significant public interest is whether the Coastal Zone Management authorizes the conversion of nearly three (3) acres of public trust sandy shoreline along the banks of the Kiawah River to a hardened, concrete wall to facilitate a residential development on Captain Sam's Spit on Kiawah Island. The legal principle of major importance presented in this case is whether the S.C. Department of Health and Environmental Control, pursuant to the Coastal Zone Management Act and its regulations and the Coastal Management Program, is authorized and required to evaluate the cumulative impacts of a project, specifically environmental impacts to areas outside of the critical area, that will result from the construction of the proposed structure.

STATEMENT OF THE CASE

The Respondent, Kiawah Development Partners, II, Inc. LLC, applied for a critical area

permit and coastal zone consistency certification to construct a 2,783' long and 40' wide articulated concrete block revetment and bulkhead system along the banks of the Kiawah River at Captain Sam's Inlet in Charleston County. On December 18, 2008, the South Carolina Department of Health and Environmental Control ("DHEC") granted a permit to construct 270' of the revetment/bulkhead along the northeastern end of the proposed project area, which is along the southwest portion of the parking lot at Beachwalker Park. DHEC denied the request for the remaining 2,513' of revetment/bulkhead.

On December 31, 2008, both the S.C. Coastal Conservation League ("League") and Kiawah Development Partners, II, Inc. ("KDP") filed requests for a Final Review Conference before the DHEC board in connection with the DHEC staff proposed decision. Kiawah Development Partners, II, challenged the denial of the 2,513' feet of the revetment/bulkhead system. The South Carolina Coastal Conservation League challenged the issuance of the 270' of revetment/bulkhead system and sought to uphold the denial of the 2,513' of structure. During a DHEC Board meeting conducted on January 8, 2009, the Board decided not to conduct a Final Review Conference and notified the Coastal Conservation League in writing of its decision on January 14, 2009.

On January 20, 2009, Kiawah Development Partners, II, Inc., filed a Request for Contested Case Hearing before the ALC. On January 29, 2009, the Coastal Conservation League filed a Request for Contested Case Hearing before the Administrative Law Court ("ALC").

The matter came before the ALC for a hearing August 24 – 28, 2009. The Administrative Law Judge issued a Final Order and Decision on January 22, 2010. The Order reversed the special condition denying 2,513' of the bulkhead/revetment, and authorized the structure for the

entire length of 2,783' with some minor limitations in specific areas \

On February 2, 2010, the Coastal Conservation League filed a Motion to Reconsider, To, Open the Record and Admit New Evidence and For Stay On February 2, 2010, DHEC filed a Motion to Reconsider

On February 26, 2010, the Administrative Law Judge issued an Order on the Motions for Reconsideration denying the requested relief, and issued an Amended Final Order and Decision *See Exhibit A, Amended Final Order and Decision*

On March 26, 2010, the Coastal Conservation League filed a Notice of Appeal and a Petition for Order of Supersedeas in the Court of Appeals On March 29, 2010, the Department of Health and Environmental Control filed a Notice of Appeal in the Court of Appeals

RULE 204(B)

Appellate Court Rule 204(b) states that the Supreme Court may certify any case for review before it has been determined by the Court of Appeals, and that certification is “normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance ” The Appellant respectfully submits that this case presents an issue that is of sufficient public interest and legal significance to warrant certification by the Supreme Court pursuant to Rule 204

ARGUMENT

The revetment/bulkhead structure proposed by KDP would be located within public trust tidelands on the banks of the Kiawah River near Captain Sam’s Inlet Captain Sam’s Spit is adjacent to Captain Sam’s Inlet at the Southwest end of Kiawah The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the

Kiawah River See Exhibit B It is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the “neck” of the Spit

The revetment/bulkhead would begin at Beachwalker Park, and continue around the bend of the river, along the neck of the Captain Sam’s Spit for 2,783 feet The structure would have two components – a vertical bulkhead wall constructed at the critical area line and a sloped concrete block revetment starting at the bulkhead and extending 40 feet into the critical area ¹ The revetment portion of the structure would be 40' wide and follow the bulkhead, beginning at the mean high water or critical area line and extending below the mean low water line and into the channel of the Kiawah River The bulkhead/revetment would be constructed entirely within critical areas The 2,783' long by 40' wide revetment/bulkhead structure would cover 111,320 square feet of the sandy beach-like banks of the River, or 2.63 acres of public trust critical area tidelands

Issue of Significant Public Interest

The League presented uncontroverted testimony of three of its members relating to the nature, characteristics and uses of the critical area tidelands that would be impacted by the revetment Greg VanDerwerker, Sophia McAllister and Sidi Limehouse are regular users of the area where the revetment is proposed to be constructed These citizens describe the area as a 20' – 30' wide sandy beach Photographs and surveys of the location of the proposed revetment depict

¹“Critical area” is defined as coastal waters, tidelands, beaches, and the beach/dune system S C Code Ann § 48-39-10(J) “Coastal waters” are defined as “the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark ” S C Code Ann § 48-39-10(F) The definition of “tidelands” includes “all areas at or below mean high tide ” S C Code Ann § 48-39-10(G) The structure KDP is proposing to construct falls entirely within critical area coastal waters and tidelands

an expanse of white sand and indicate that this sandy beach ranges from 21' – 37' in width along the location of the proposed revetment/bulkhead structure See Exhibit C

Greg VanDerwerker lives on Kiawah Island and kayaks on the Kiawah River out to Captain Sam's Inlet at least a couple times a month Exhibit D, Tr p 958 He described the area where the half mile long revetment would go as "a really nice beach at low tide, it's a wide, gorgeous sandy beach " Exhibit D, Tr p 960, lines 20-25 Every time he paddles out to the inlet he pulls his kayak up on the sandy banks of the Kiawah River, and said that "the best part of the trip is to be on that beach area " Exhibit D, Tr p 961, lines 8-9 This beach area on the back side of the spit where the revetment is proposed is "unique" because there is no nice stretch of sand anywhere else along the Kiawah River Exhibit D, Tr p 961-62 Dr VanDerwerker sees other people pulling up boats and fishing on that beach area Exhibit D, Tr p 962 He said that if the revetment looked anything like the images of the revetment presented by KDP through an Exhibit (#6), the banks of the Kiawah River would be "unusable for my purposes and any kind of boating purposes " Exhibit D, Tr p 966, lines 14-15 He said that it wouldn't be safe to walk on and that it would tear up a boat if you tried to pull it up onto the concrete blocks Exhibit D, Tr p 963-67

Sophia McAllister also lives on Kiawah and kayaks several times a week in the Kiawah River, usually going to Captain Sam's Spit Exhibit D, Tr p 1045 Ms McAllister pulls her kayak up onto the banks of the river, sits in the sand and goes swimming when its hot Exhibit D, Tr p 1025-27 She would no longer be able to do that if the revetment is constructed Exhibit D, Tr p 1030

Sidi Limehouse testified that he has been going to the Spit for many years and values the

white sand beaches along the River His “biggest concern – is the fact that that area, which is a half mile long and however wide it is, will be denied the general public The general public couldn’t use it ” Exhibit D, Tr p 1012, lines 10-12

DHEC’s Bill Eiser saw people walking along the banks of the river in the area of the proposed revetment and he saw kayaks pulled up on the banks and people fishing or crabbing Exhibit D, Tr p 1324-25 Eiser said that “it’s certainly true that if this articulated concrete block structure were built, that it would effectively remove the public’s ability to use that half-mile-long shoreline ” Exhibit D, Tr p 1325, lines 8-10

None of this testimony was controverted

Yet the ALJ ruled that even though the revetment/bulkhead structure “degrades public use of shoreline,” the bulkhead/revetment structure complies with S C Code Ann Reg 30-12 C(1)(d), which prohibits bulkheads “where public access is adversely affected unless no feasible alternative exists ” Exhibit A, p 27 And despite this testimony, he ruled that the permit does not violate the public trust doctrine because it does not “substantially impair the recreational activities of boaters, kayakers and others, nor will it substantially impair or unreasonably restrict their use of public trust tidelands ” Exhibit A, p 28

The testimony from all parties confirmed that the proposed bulkhead/revetment is significantly longer than any other bulkhead/revetment permit approved by DHEC or applied for by KDP DHEC described the structure as being about ten times larger than most revetment permits processed by the Department KDP said the structure was three times longer than any revetment permit that it had ever applied for Whether this permit application starts a trend of authorizing structures of this size and with this magnitude of impact on public use and access is

another issue of significant public interest

Legal Principle of Major Importance

The Administrative Law Judge's Order represents a drastic departure from DHEC's regulatory review authority, is plainly contrary to the plain language of the regulations and policies of the CMP, and casts into question projects requiring critical area permits and/or certification for consistency with the Coastal Management Program

Regulation 30-12 C (1) requires DHEC to consider the "extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area " S C Code Ann Reg 30-11 C (1) This regulation is found under the "General Guidelines for All Critical Areas" and is applicable to all critical area permits S C Code Ann Reg 30-11 C The Coastal Management Program contains a nearly identical requirement, which is applicable to certification review of all projects in the coastal zone, stating that DHEC must consider the "possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area " CMP, Policy I 7 at p III-14

Yet the ALJ ruled that DHEC can only review "cumulative impacts of the project **within** the critical area" and that the Department does not have regulatory authority outside the critical area Exhibit A, p 22 In ruling that DHEC could not consider impacts resulting from the project that are outside of the critical area, the ALC effectively eliminated the requirement that DHEC consider the long-range, cumulative effects in the context of future development and the general character of the area

The legal question of whether DHEC has regulatory authority outside of the critical areas

in its review of permits pursuant to Regulation 30-12 C (2) and Coastal Management Program Policy I 7 at p III-14 , is of major importance in providing instruction and guidance to the agency in its review of projects in the coastal zone and in critical areas

The second legal issue of major importance is that the ALC Order is contrary to the explicit policies of the Coastal Zone Management Act designed to protect fragile and sensitive areas, as well as public use and open space The Act finds that the “increasing and competing demands upon the lands and waters of our coastal zone occasioned by residential development, have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion ” S C Code Ann §48-39-20(B) The Act continues that “The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations ” S C Code Ann §48-39-20(D)

The Coastal Zone Management Act mandates that “Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter ” S C Code Ann §48-39-30(D) Presently, the critical area uses include sandy beach for pulling up boats and kayaks, walking, swimming, fishing and crabbing If a revetment were constructed on this critical area, effectively eliminating existing public uses and access, this critical area would no longer be providing that combination of uses that currently provides great benefit to the people, a fragile and sensitive area would be

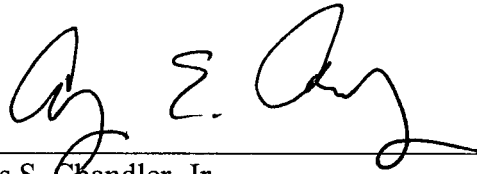
destroyed and open space for public use would be decreased

The ALC Order fails to implement this policy designed to protect the existing public use of public trust tidelands for the benefit of the citizens of this State

CONCLUSION

By reversing the erroneous decision made in this case, the Supreme Court can affirm the public's right to recreate on tidelands below the mean high water mark pursuant to the Public Trust Doctrine and affirm DHEC's regulatory authority to areas outside of the critical areas

For the above reasons, the Appellants respectfully request that the Supreme Court grant their Motion to Transfer



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April 22, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS
IN THE SUPREME COURT

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

Docket No 09-ALJ-07-00029-CC

Kiawah Development Partners, II,

Respondent,

v

South Carolina Department of Health and Environmental Control,

Appellant

Docket No 09-ALJ-07-00039-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

CERTIFICATE OF SERVICE

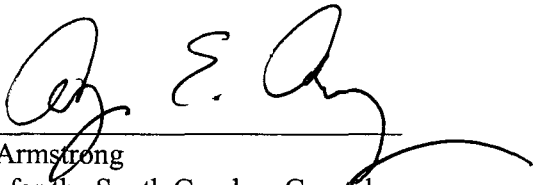
I hereby certify that on this date I served copies of the South Carolina Coastal Conservation League's Motion to Transfer on counsel for all parties by placing copies of same in the United States Mail, first-class postage prepaid, addressed to

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April 22, 2010



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Exhibit List

- 1 Exhibit A, Amended Final Order and Decision of the Administrative Law Judge, dated February 26, 2010
- 2 Exhibit B, CCL Exhibit 10(U) admitted into evidence at the ALC hearing August 24-28, 2009
- 3 Exhibit C, CCL Exhibit 10(Q) and excerpts from KDP Exhibit 78 admitted into evidence at the ALC hearing August 24-28, 2009
- 4 Exhibit D, Excerpts from hearing transcript before the Administrative Law Court, dated August 24-28, 2009

EXHIBIT A

Amended Final Order and Decision of
the Administrative Law Judge,
dated February 26, 2010

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Kiawah Development Partners II	)	Docket No 09-ALJ 07-0029-CC
	)	
Petitioners	)	
	)	
vs	)	AMENDED FINAL ORDER
	)	AND DECISION
South Carolina Department of Health and Environmental Control	)	
	)	
Respondents	)	
South Carolina Coastal Conservation League	)	Docket No 09-ALJ-07-0039 CC
	)	
Petitioners	)	
	)	
vs	)	
	)	
South Carolina Department of Health and Environmental Control and Kiawah Development Partners II	)	
	)	
Respondents	)	

APPEARANCES

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Amy E Armstrong & James S Chandler Jr for Petitioner S C Coastal Conservation
League
Davis Whitfield-Cargile for Respondent S C Department of Health and Environmental
Control

STATEMENT OF THE CASE

This matter comes before the Court pursuant to S C Code Ann § 1-23-600(A) and S C
Code Ann § 44-1-60 upon requests for a contested case hearing by Kiawah Development
Partners, II (KDP) and the South Carolina Coastal Conservation League (League) Respondent
South Carolina Department of Health and Environmental Control (OCRM or DHEC or
Department) issued a permit to Petitioner/Respondent KDP authorizing them to construct a 270'
bulkhead/revetment at Beachwalker Park on Kiawah Island but denied the remainder of KDP's

 **FILED**

FEB 26 2010

application, which requested authorization to construct a 2783' bulkhead/revetment along the Kiawah River. KDP challenges the Department's decision to only authorize 270' of the 2783' structure applied for by KDP. The League challenges the Department's decision to authorize 270' of bulkhead/revetment and supports the Department's decision to deny the remainder of the request. A hearing was held before the Administrative Law Court on August 24 – 28, 2009.¹

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence.

Background

Kiawah Island is a barrier island fronting on the Atlantic Ocean with over 10 miles of beachfront. It is bounded on the south by the Atlantic Ocean, on the east by the Stono River inlet, on the north by the Kiawah River, and on the west by the Kiawah River where it enters the Atlantic through Captain Sam's Inlet. Captain Sam's Spit is adjacent to Captain Sam's Inlet at the Southwest end of Kiawah. The Spit is a sandy land formation and is surrounded on three sides by water – the Atlantic Ocean, the inlet and the Kiawah River. KDP owns Captain Sam's peninsula which encompasses roughly 150 acres of highland above mean high water (MHW).

In 1999, OCRM established its baseline and building setback line twenty feet landward based on the most reliable information which indicated that the oceanfront beach on Captain Sam's Spit had accreted and **not** been subject to any significant, measurable erosion between 1959 and 1999.² The movement of the baseline prompted KDP to consider development of Captain Sam's Spit. As a result, in 2005 KDP and the Town amended the development agreement for Captain Sam's Spit. Thus, on February 29, 2008, KDP submitted a joint application to the United States Army Corps of Engineers (Corps) and the Department for a permit to construct a combination bulkhead and revetment in the critical area. The application sought authorization to construct a 2,783' bulkhead and 2,783' by 40' articulated concrete block

¹ The Court left the record open to receive the deposition testimony of Jeff Mollenhauer, an expert witness for CCL who was unable to attend the trial. His deposition was taken on September 1, 2009.

² To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan. S.C. Code Ann. § 48-39-280(B).

revetment on the shoreline of the Kiawah River beginning at Beachwalker Park³ and continuing around the bend of the river along the neck of the Captain Sam's Spit for 2,783 feet

On December 18, 2008, the Department issued the conditional permit approving the construction of the erosion control structure for a distance of 270 feet adjacent to the parking lot of Beachwalker Park.⁴ The park is adjacent to Captain Sam's peninsula and adjacent to the extreme eastern end of the proposed bulkhead/revetment. The Department refused the permit request for the remaining 2,513 feet requested based on its concerns about cumulative negative impacts, including interference with natural inlet formation and possible adverse effects on wintering piping plovers. The Department also determined that the project was contrary to the policies set forth in the Coastal Zone Management Program Document (CZMP).

Kiawah Island and Captain Sam's Spit

Captain Sam's is a relatively new land mass in geological time. Very old maps and surveys indicate that over the last three hundred years or more a smaller or different version of this peninsula was formed and then either eroded, breached, or washed over at least two times. Though the cause is not known, the last time was probably sometime shortly before 1949 when the peninsula was much smaller. The Department and CCL emphasize that the Spit has been completely eroded and redeposited at least two times in the past 200 years to create the perception that the spit is unstable and inappropriate for human development. The Department extends that argument even further by suggesting this Court should conclude that "the proposed revetment would facilitate a false sense of security and a perception of protection for prospective home buyers on Captain Sam's Spit."⁵ However, as Dr. Kana⁶ explained, in the

³ Beachwalker Park consists essentially of changing rooms and a 150 space parking lot under a long term lease for \$1.00 by KDP to Charleston County.

⁴ Charleston County Park and Recreation Commission (PRC) operates Beachwalker Park under a 99 year lease entered around 1976 with Charleston County on oceanfront land now owned by KDP.

⁵ The Department avers that this consideration in determining whether an applicant should receive a permit is supported by S.C. Code Ann. §§ 48-39-20 and 48-39-30. I do not find any support for this reasoning. In fact, such arguments support Petitioner's questioning the Department's motives in this case.

⁶ Dr. Tim Kana testified as an expert in coastal geology and geomorphology. Dr. Kana, a long time University of South Carolina faculty member, has extensively studied and researched barrier islands along the coast of South Carolina for more than thirty years, concentrating much of his work on the geomorphology of Seabrook Island and Kiawah Island. He has written numerous reports on the coastal processes shaping Kiawah and Seabrook Islands. Dr. Kana has served as a consultant to the Towns of Seabrook Island and Kiawah Island, as well as certain private property owners on both islands, including the Seabrook Island Property Owners Association, on large beach projects undertaken by them.

last thirty years there have not been washovers anywhere along the neck portion of the spit. None of the dune ridges show any signs of storm water washover during the last thirty years even when subjected to hurricane forces including Hurricane Hugo in 1989.

Kiawah Island has one of the healthiest beaches in terms of positive sand supply among barrier islands on the east coast. According to Dr. Kana, the shoreline along Kiawah Island, unlike many other beaches in South Carolina or the East Coast, has actually accreted on average over the last 100 years. Some parts of Kiawah have built out nearly a mile at the east end. Sand from these enormous bar formations at the mouth of the Stono River Inlet detach over time and drift southwesterly along the coastline, thus supplying millions of cubic yards of sand to Kiawah Island's growing beachfront all the way to Captain Sam's Inlet. Additionally, the ebb tidal delta on the ocean side of Captain Sam's Inlet contributes to the deposit of sand along the beach of Captain Sam's. This ebb tidal delta formed by a build-up of underwater sand in the ocean at the

Among other things, Dr. Kana is the principal architect of two successful manmade relocations of Captain Sam's Inlet in 1983 and 1996. The two relocations of the inlet separating Seabrook and Kiawah Islands used the farthest tip of Captain Sam's Spit as a source of sand for Seabrook Island's partially eroding beach. Dr. Kana has also been the primary coastal geologist in numerous other projects involving the management of beaches in South Carolina.

I found Dr. Kana eminently qualified to explain the coastal processes affecting Captain Sam's Spit. In fact, his expertise was simply more persuasive than that of CCL's expert, Dr. Young. Accordingly, when referencing Dr. Kana's testimony, I am citing evidence that I found to be distinctly persuasive.

To the contrary, throughout the hearing, OCRM and CCL referred to opinions and recommendations contained in the chapter titled 'Coastal Processes and Geomorphology' of Kiawah Island that was part of a 1975 report titled 'Environmental Inventory of Kiawah Island' prepared by Environment Research Center for the original developer of Kiawah Island (Environmental Inventory). CCL and OCRM urges the Court to consider the recommendations in this report in evaluating the suitability of granting a permit in this case. Interestingly, CCL and the Department did not call any of the authors of the chapter to testify. Instead, CCL and the Department had various witnesses read excerpts focusing on the authors' recommendation that certain parts of Kiawah Island, including Captain Sam's, should not be developed because they were geologically too unstable.

It is notable that the information in the Environmental Inventory was compiled thirty-four years ago. It doesn't appear to reflect independent research as much as catalogue certain prior data. As Dr. Kana testified, coastal morphologists now know much more about the coastal processes affecting Kiawah Island and have had the benefit of more than thirty years of close observation that undermine many of its assumptions, projections, and recommendations found in the report. For instance, they now know that:

- The enormous sand shoals of the Stono Inlet are the main source of sand for Kiawah Island, not downdrift sand from Folly Beach and Morris Island.
- Captain Sam's has been growing bigger and bigger throughout this time.
- There have been no known overwashes of any of the dune ridges, even the primary dune ridge on Captain Sam's in any violent storms or hurricanes over the last thirty years.

Furthermore, the conclusions and assumptions of the chapter have not withstood the test of time. For example, the report concluded that several miles of the east end of the island were too unstable for development. That same area has been not only stable but is now the location of the Osprey Beach community, the most upscale beachfront development on Kiawah Island, and other subdivisions as well. Also, the Ocean Course Golf Course, which hosted the 1991 Ryder Cup matches, was built there. I therefore find that the coastal geological chapter of the 1975 Environmental Inventory is of little to no probative value, and that the testimony of Dr. Kana is more credible.

mouth of the inlet serves as a natural groin or jetty that impairs the southwesterly drift of sand in the ocean along the Kiawah beachfront as explained by Dr. Kana. It thereby redirects sand drifting down the coastline to Captain Sam's peninsula. As this large spit grows in length in a generally southwest direction, Captain Sam's Inlet is said to migrate southwesterly towards Seabrook Island.

The island's accretion is reflected in Captain Sam's Spit. Continuous significant accretion in the area of the Spit has occurred in the 60 years since 1949. The average rate of accretion ranges from four to ten feet per year anywhere along the spit for just about any period of time in the last 40 years. In fact, probably about four or five rows of dunes have been formed on Captain Sam's Spit within the last 30 years. Its dune ridges are some of the highest on Kiawah Island, some cresting above 15 feet MSL. In sum, the condition of Captain Sam's peninsula today is probably as healthy as it's ever been in historic times. Indeed, CCL's expert characterized the peninsula's strength as robust even at the neck.

Captain Sam's Spit is now almost a mile and one-third long. At its narrowest point at the neck, adjacent to the main part of Kiawah Island, Captain Sam's peninsula is approximately 450 feet in width, measured from the critical line on the bank of the Kiawah River on the north side, to the mean high water line of the Atlantic Ocean on its opposite or southern side. Captain Sam's western end that extends towards Captain Sam's Inlet (ie which separates Kiawah Island from Seabrook Island) reaches a high ground width of over 1,600 feet. Today Captain Sam's has unbroken rows of continuous, high dune ridges for its entire length. Their number varies from four or five at the neck to up to seven at the western end next to Captain Sam's Inlet. On the side next to the river, Captain Sam's has a young and growing maritime forest. Captain Sam's peninsula is thus stable and growing. It will most probably continue to grow for many decades to come, given the enormous remaining sand supply from the shoals of the Stono Inlet and the east end of Kiawah Island.

Because of its substantial width and high dune ridges from decades of uninterrupted growth, there is very little chance that the neck of Captain Sam's would ever breach unless perhaps subjected to the forces of a Category V hurricane. A hurricane of that magnitude, however, would obviously severely damage and inundate all parts of Kiawah and other adjacent islands. Moreover, the barrier islands along the South Carolina coast suffer few breaches in comparison to barrier islands in other states because, on average, there are inlets every five miles.

or so on the South Carolina coast that serve as an outlet for receding storm surges. Notably, in this case the proximity of Captain Sam's Inlet serves as an outlet for receding surge waters making it more unlikely that the neck would breach. Additionally, even though the suitability of the upland for residential development is not one of the stated regulatory considerations for determining whether to issue a permit for a bulkhead/revetment, OCRM and CCL have raised it as an issue. I nonetheless find that Captain Sam's is suitable for the limited, low-density residential development described in the 2005 Development Agreement with the Town of Kiawah Island.⁷

Erosion of Captain Sam's Bank at the Kiawah River

Captain Sam's Spit is connected to the main body of Kiawah Island by a narrow strip of land, often referred to as the "neck" of the Spit. The Kiawah River forms an elbow-like bend at the neck of a peninsula which has been the source of erosion. The Department maintains that erosion in the area of Beachwalker Park along the Kiawah River warranted the erosion control devices proposed by KDP. However, it disagrees that the westernmost 2,513' of the bulkhead/revetment is needed. CCL contends that no bulkhead or revetment is needed for the entire 2,783' for which KDP seeks to install those erosion control devices. I find that denial of the permit would likely result in the loss of more upland and the access corridor at the neck.

At the same time the beach of Captain Sam's has been growing and moving seaward (i.e., toward the south), the northern side of the bend in the Kiawah River at the neck of Captain Sam's Spit, has been eroding (albeit at a slower rate per year) to the south. The erosion is accelerated as a result of the growth of the river's marsh edge on its northern side (referred to as a "point bar") which has driven the river channel toward Captain Sam's peninsula and eroded the river bank in the bend along the peninsula. The erosion of the bank has been most prominent along Captain Sam's in the immediate vicinity of Beachwalker Park and all along approximately 2,000 feet of the peninsula's river edge extending from the Beachwalker Park area. While the river channel has moved in a southerly direction toward Captain Sam's peninsula for several decades, the erosion along the river's southern bank has become particularly pronounced over the last several years. This erosion is plainly evident from the escarpments along the riverbank where land, in some places with vegetation and trees, has sloughed off into the river.

⁷ In making this finding, I specifically conclude that the opinions of CCL witness Josh Martin were not probative.

The intensity of erosion is not uniform over the entire length of the proposed revetment area. The escarpment is much steeper with a higher reveal in the vicinity of the Beachwalker Park parking lot where there is visible evidence of portions of the upland vegetation and bluff sloughing off into the river. In general, the erosion decreases as you move in the westerly direction along the river shoreline from Beachwalker Park and it significantly decreases at the most westerly thousand feet of the proposed revetment. Furthermore, though the rate of erosion has been less in recent years, the change is not predictive of future events but rather more likely indicative of varying weather patterns. Nevertheless, the long-term trend of erosion will most probably continue to occur along the peninsula's river bank as reflected by the current escarpment.⁸

A further consequence of the erosion of the riverbank is the migration of the OCRM jurisdictional critical line in a southerly direction in the peninsula's neck in the direction of the ocean. It moves as the river erodes into the bank at the neck. The distance between the river shoreline and the oceanfront setback line at the neck of Captain Sam's was 104 feet in September 2002, 90 feet in April 2005, and 66 feet in August 2009. The dimension has thus decreased 38 feet in nine years, or an average of just over four feet per year.

The width of the neck is significant because for development to occur on the Spit there must be sufficient space to place the access road with underground utilities, road shoulders and other improvements. To reach the peninsula's residential use acreage allowed under the zoning and road codes and vested under the Development Agreement, the right of way should be approximately sixty feet wide. However, even though the beach is accreting at the neck at approximately the same rate as the bank is eroding, the setback line has remained static. In other words, it is the setback line, not the beach, that determines the seaward limit of the buildable high ground, and hence the available area (or corridor) for installation of the road and improvements to Captain Sam's from the rest of Kiawah Island to the east.

The Court thus finds that KDP has a legitimate need for the bulkhead/revetment. The bulkhead/revetment will prevent its high land from being lost and assure that there is sufficient distance between the critical line and setback line in the neck of the peninsula to install a road,

⁸ A comparison of surveys of the river shoreline of Captain Sam's over the last thirty-five years demonstrates without question the migration of the river channel in a southerly direction into the Spit. Even though a comparison of the shoreline surveys of October 2008 and August 2009 does not clearly indicate advancement of the erosion during that very short period, there is a definite long-term trend of erosion that is unmistakable. It is undisputed that over an acre of highland on Captain Sam's along the bank of the Kiawah River has eroded since 2002.

underground utilities landscaping, and improvements⁹ In fact it is unlikely that KDP could satisfy the Town of Kiawah Island's ordinances governing subdivision and road construction without stabilization of the river bank and a protected right of way Moreover as to the Department's and CCI'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 into the future The bulkhead/revetment's stabilization of the bank is essential to being able to market and sell the riverside homesites especially given today's informed buyers

CCL also argued that the permit for the bulkhead/revetment for the 270 feet adjacent to Beachwalker Park was unnecessary because the Park is moving to another location The area known as Beachwalker Park is owned by Kiawah Resort Associates Charleston County Park and Recreation Commission holds a 100 year lease of the Park from Kiawah Resort Associates Though the Park Commission does not own the land it believes it would be best for the citizens of Charleston County if the County had a permanent deed Nevertheless, it has also had discussions with Kiawah Resort Associates about relocating the Park However there is no agreement to move the Park to another location and the bulkhead/revetment is clearly necessary to protect the Park's highground and improvements from falling into the river in light of its current location

The Bulkhead/Revetment's Design

KDP's application proposes an erosion control structure composed of two distinct elements The first component would authorize a vertical bulkhead for a distance of up to 2,783 feet along the shoreline of the Kiawah River on Captain Sam's Spit adjacent to Beachwalker Park and KDP's land on the southwestern end of Kiawah Island The height of the bulkhead will vary to follow the differing elevational contours of the adjacent highland scarps along the river extending to just under their peaks The purpose of this vertical bulkhead is to stabilize the river's high ground shoreline in the location at the time of construction

The other erosion control feature is a flexible 'mat' comprised of interconnected articulated concrete blocks (ACB) The ACB mat would be installed over the sloping river shoreline extending from the bottom of the bulkhead at the base of the shoreline escarpments, or

⁹ The Department has routinely granted permits for other revetments on Kiawah Island for the protection of roads including revetments such as this with an ACB mat

scaips toward the river to a point just below the river's waterline at low tide. The revetment structure would be 2,783' long by 40' wide and would cover 111,320 square feet of the banks of the River or 2.63 acres. Most, if not all, of the mat would be covered by water at high tide.

The ACB mat is made of a series of blocks with large holes in between the blocks. It is a preferable (yet more expensive) method of reducing shoreline erosion because aesthetically the concrete can be colored to blend in with the color of the bank and because the blocks have multiple openings that would allow the growth of marsh grass and other vegetation through them. The ACB mat could also serve as habitat for other marine life including oysters. To the contrary, the evidence did not establish that the ACB mat would significantly imperil the habitat of any marine animals, organisms, or plants. It most probably will provide new habitat for oysters and other organisms. Additionally, the bulkhead portion of the structure is designed to be installed on the critical line or no more than eighteen inches behind the critical line.

The combination bulkhead and ACB mat over the sloping river shoreline, covered by water at high tide, will diffuse wave action more than a structure comprised solely of a vertical bulkhead. The proposed structure is sufficiently engineered to stabilize the riverbank and prevent erosion from the ongoing movement of the channel caused by the advance over time of the marsh point bar on the opposite side. To the contrary, the evidence did not establish that the ACB mat or the bulkhead will destroy a stable marine river bottom or constitute a safety hazard. It is nonetheless notable that the proposed structure is not designed for the purpose of preventing a breach of the riverbank in the event of a massive hurricane, and that such propensity is not relevant here. Very few bulkhead/revetments in the world are designed to withstand these forces.

Moreover, evidence did not establish that there was a feasible alternative to the bulkhead/revetment that would stabilize the river shoreline and prevent the continued erosion of KDP's upland. CCL urged that the "alternative" is to do nothing and leave the property at *status quo* since they suggested little erosion may have occurred in the last 10-12 months. However, the testimony of Dr. Kana clearly established a trend of continuous and significant shoreline erosion along the riverbank for several decades. That evidence clearly establishes a need for erosion control along the disputed shoreline.

CCL and OCRM raise issues as to the revetment's long term success without training jetties or a wider mat. Petitioner asserts that the proposed structures should first be implemented

and if 'hot spots' (meaning locations on the revetment that are susceptible to high energy forces that result in considerable scour or instability at that location) develop it can implement a remedial plan for those locations and seek permission from the Department to proceed. I nonetheless find that in light of the nature of the riverbank and its limited use discussed below it is much more reasonable to implement a solution that has the least environmental impact and require KDP to seek further approval if a more comprehensive approach is needed.¹⁰

As noted above, the extent and rate of erosion varies along the riverbank over the length of the proposed revetment. The erosion is greatest adjacent to Beachwalker Park and along what Mitchell Bohannon¹¹ described as the "bite" on the outside, that is the Captain Sam's side of the bend on the Kiawah River, up to approximately 1,000 feet from the western terminus of the proposed revetment. Moving from the east end to the west end of the proposed structure the severity of the erosion and height of the escarpments diminish in a westerly direction towards the inlet at approximately survey point "F" on Petitioner KDP's Exhibit 77. This location is approximately 900 feet from the western terminus of the proposed revetment (the riverbank where the revetment is proposed west of point "F" is referred to hereinafter as the 'western section').

The full extent of both of the structures (i.e. the bulkhead and the ACB mat) depicted in the sketch drawing submitted with the permit application are not currently necessary to stabilize the bank for the western section. In many locations along the western section the bulkhead may not be necessary and an ACB mat much shorter in width than forty feet may well suffice to

¹⁰ I recognize that there is credible evidence that the Department has been uncooperative during the permitting process of this case. As asserted by KDP, it appears that the desire of certain permitting officials to preserve the upland of Captain Sam's forever in a natural state, a goal beyond their regulatory purview, took precedence over their objective application of the clear wording of the controlling statutes and regulations. For instance, because the project did not involve dredging, the application qualified as a minor activity under S.C. Code Ann. Regs. 30-1 (34) and the Department was required to act on a completed application within 30 days. S.C. Code Ann. § 48-39-150(C). Rather, the Department took quite the opposite approach. By letter dated June 25, 2008, the Department attempted to cancel KDP's application because the project engineer had not provided an affidavit of publication for the published newspaper public notice within 30 days of its publication. Though the Department's staff received this affidavit June 26, 2008, it did not reinstate the application until mid July 2008. Moreover, by August 28, 2008, the Department had prepared a draft decision denying the permit application. All that then remained was internal review of the draft decision. Nonetheless, the Department waited more than three months before rendering its decision. Despite this evidence (and other concerns in the record), it is the Court's hope and belief that the Department will treat all parties in the case fairly in the future and conduct its important responsibilities in accordance with the standards and parameters prescribed by the General Assembly in a diligent, timely manner.

¹¹ Mr. Bohannon is a professional engineer with extensive experience in the design and implementation of bulkheads and revetments. I found his testimony to be persuasive.

stabilize the riverbank according to Bohannon. More specifically, the western section is best suited now and perhaps permanently to the soft approach described by Bohannon that would involve limited use of the bulkhead to locations where the reveal/scarp is greater than two feet. There is no need at the current time for the ACB mat on the western portion of the revetment to be greater than eight (8) feet in width.¹² Furthermore, the ACB mat on the far eastern end of the revetment adjacent to Beachwalker Park, where there is some marsh grass below and adjacent to the escarpment, should be adjusted in the field during initial installation to avoid unnecessarily placing the ACB mat over marsh grass. I do not find that this approach is a piecemeal approach but is rather a sound attempt to limit the impact to the environment until facts warrant otherwise.

Cumulative Impacts¹³

Piping Plovers

The Department and CCL argue that the proposed bulkhead/revetment will have adverse effects on piping plovers.¹⁴ Piping plovers are a “threatened” species under the federal

¹² In the event that post construction monitoring of the western section of the constructed bulkhead/revetment reflects a need for the extension of the ACB mat beyond eight (8) feet in width, KDP shall be allowed to seek the Department’s approval to extend the ACB mat as is determined necessary to prevent further erosion at such location(s). Nonetheless, recognizing the Department’s dilatory treatment of KDP’s permit, I note that any unnecessary delays should subject the Department to sanctions.

¹³ Two other issues were raised by the parties that warrant only cursory treatment. OCRM and CCL contend that one possible negative long term impact of residential development on Captain Sam’s is the debris from the potential destruction of the houses and improvements if the peninsula takes a direct hit from a very powerful hurricane. No evidence was offered concerning impact of debris as a result of a hurricane. Furthermore, a storm of sufficient magnitude to breach Captain Sam’s at the neck would cause widespread devastation across Kiawah Island and other nearby barrier islands. Moreover, the impact resulting from potential residential development that may occur as a result of the permitting of a bulkhead and revetment is simply too conjectural to probative and does not appear to be a pertinent inquiry for this Court in this context.

Similarly, OCRM included in its reasons for denying the permit that the potential residential development may result in impacts to freshwater and saltwater wetlands. Even if this were an issue before this Court, no evidence indicated that any wetlands will be impacted by any residential development upon Captain Sam’s Spit or even the existence of any wetlands anywhere on the Spit. Thus, the evidence did not prove that there probably would be any long range impacts on freshwater or saltwater wetlands from the proposed development. Moreover, if there is ever any proposed impact to any discovered wetlands, the Department can certainly evaluate them carefully when it decides that future permit application.

¹⁴ In analyzing this issue, I find the testimony of Lee Walton to be credible and persuasive. Mr. Walton has experience studying not just shorebirds, but specifically piping plovers for the U.S. Fish & Wildlife Service. Moreover, his experience has been identifying areas that were suitable for **wintering** piping plovers, which is a specific issue before this court. In fact, the United States Fish & Wildlife’s designation of the wintering habitat is based upon his recommendations.

On the other hand, though the ornithologists presented by the Department and CCL seem knowledgeable (particularly Dr. Hughes), neither had any specific information as to the **current** level of activity on the beach from the Park’s 50,000 annual visitors or from property owners and their guests from the thirty-five years of development over much of the island. Nor were they able to provide a reasonable approximation of increase in future activity on

Endangered Species Act. However, the piping plovers that visit South Carolina and Kiawah Island are wintering piping plovers. The migratory piping plovers that visit Kiawah Island are wintering rather than nesting or breeding piping plovers - a salient distinction. These birds "winter" on Kiawah Island for a few months. A wintering piping plover doesn't have a small territory. The birds begin arriving on Kiawah Island in July and into August with the biggest "push" in September. Some stop on the island temporarily and then continue migrating while others stay for the winter. They begin migrating back north to their breeding grounds as early as April.

Though the piping plovers do "winter" upon Kiawah Island, their habitat is significant. There has never been a single sighting of a piping plover according to the data in the proposed revetment area on the Kiawah River or above the dune line on Captain Sam's. As explained by Mr. Walton, those areas are not critical habitat for piping plovers. Furthermore, the Court takes judicial notice of 50 C.F.R. pt. 17, "Final Determination of Critical Habitat for Wintering Piping Plovers, Final Rule," propounded by the United States Fish and Wildlife Service establishing the boundaries of critical habitat for wintering piping plovers. The text description of S.C. Unit-10 which controls over the associated illustration specifies that the critical area of habitat includes the beach along Seabrook Island and extends 0.1 mile north of Captain Sam's Inlet. S.C. Unit-10 does **not** extend above the building setback line on Captain Sam's. Federal Register, Vol. 66, No. 132 at pp. 36042 (Col. 3), 36045 (Col. 3), and 36069 (Col. 2).

Nevertheless, the Department and CCL argue that the adverse effect to the piping plover emanates not from the proposed project itself, but from the future residential development that would occur as a result of the project. However, as noted above, the designated habitat does not extend into the limited developable acreage under the Development Agreement. The potential residential development will not occur in critical plover habitat nor will it occur in close proximity. The Department and CCL assert that the proposed project will nonetheless adversely affect the piping plover because the structure will facilitate residential development and with that residential development a greater number of people and animals will use the beach. That use is not necessarily problematic. The Department and CCL further aver that the people and their

the beach if up to fifty houses, about 1% of the island's residential dwellings, were ultimately constructed on Captain Sam's.

The gist of their opinions was that any increase at all in use of the beach might be detrimental, yet they provided no credible factual support for this theory. In fact, the studies on disturbance of piping plovers Dr. Hughes and Mollenhauer referred to dealt with breeding and nesting piping plovers, not wintering piping plovers.

animals will disturb the piping plovers on the beach in front of their homes and that the disturbance will be so significant that it will adversely affect the birds' health upon returning to their nesting grounds

I find the evidence supporting the Department's and CCL's contention conjectural. Neither Dr. Hughes nor Mollenhauer advocated that recreational activity on the beach should be prohibited. Instead, they both advocated that beachgoers use 'reasonable' behavior as the best way to avoid or reduce any possible disturbance of these birds. There was no proof that any persons on the beach from the up-to-50 houses¹⁵ would engage in unreasonable behavior that would increase any theorized frequency or intensity of disturbance of these wintering piping plovers on Kiawah Island. Additionally, Kiawah is primarily a second home community in which eighty percent of the home owners spend an average of only 6 to 7 weeks at their home per year. That time is primarily during the summer months.

In fact, the mere existence of the piping plovers on Captain Sam's Spit is questionable. In 2007, only one piping plover was seen at Captain Sam's though fourteen were seen on the east end of Kiawah Island. In 2008, eleven birds were seen on Kiawah Island and no birds were seen at Captain Sam's. Furthermore, the evidence did not establish that wintering piping plovers shy away from the beach in front of the miles of developed areas on the Kiawah Island beachfront where there may be suitable mudflats or beaches, nor that Kiawah Island's beachgoers have ever been harmful to them. Wintering piping plovers have been documented on the beach for the entire length of Kiawah Island where over 4,150 properties have been sold. Beachwalker Park has more than 50,000 visitors annually, and the Sanctuary Hotel is situated on the front beach. S C Unit-10 also includes the fully developed beachfront on Seabrook Island.

The Court also notes that OCRM issued a permit in 2006 to the Town of Kiawah Island to scrape and alter sizeable stretches of ocean beach and tidal flats adjacent to The Ocean Course Golf Course that were located within designated habitat for wintering piping plovers that is identified as S C Unit-9. Even though that project directly altered the critical habitat, OCRM permitted the activity under a mitigation plan approved by the United States Fish & Wildlife Service. Here, neither the project nor the potential residential development will alter critical habitat as occurred with the permitted project adjacent to the Ocean Course at the opposite end of Kiawah Island.

¹⁵ The development upon Captain Sam's will be limited to no more than fifty homes.

Therefore, I find that that neither the proposed bulkhead/revetment nor potential future residential development will have a material or adverse effect on the wintering piping plovers or their critical habitat

Diamond-back Terrapins

CCL argues that the proposed bulkhead/revetment will have an adverse impact on diamond-back terrapins. These particular terrapins have not been listed as an endangered or threatened species in South Carolina. Furthermore, even if these terrapins were a protected species, whether denying this permit would protect the species in the area of Captain Sam's is dubious. Mr. Limehouse testified that diamond-back terrapins used to be in the river by the hundreds, now they are rarely seen.¹⁶ The accuracy of the nesting data relied upon by Dr. Dorcas is also questionable. The data was gathered more than 15 years ago before the sharp decline in the terrapin population in the several tidal creeks monitored behind Kiawah Island. Additionally, CCL's expert, Michael Dorcas, Ph.D., indicated that untended or forgotten crab traps, mostly commercial, are the primary cause of premature mortality of terrapins. Neither the bulkhead or revetment will have any bearing on the number of crab traps that are in the river now and may be placed there in the future, nor on the tendency of some to ignore the traps they have set in rivers and creeks.

It is even more unclear whether the nesting occurs in the area where significant erosional escarpment has taken place. CCL's expert, Michael Dorcas, testified that the vertical bulkhead 'could' affect terrapins that were seeking to nest in the upland area on Captain Sam's. He did not testify that the proposed structure, to a reasonable degree of certainty, most probably **would** have a significant negative effect on terrapins. Moreover, the **vertical** bulkhead portion of the proposed structure is intended to stabilize the existing **vertical** escarpments created by erosion. The bulkhead follows the contours of those elevations. The bulkhead should not increase the vertical face that might confront nesting terrapins beyond current vertical escarpment conditions resulting from erosion.

The evidence also did not demonstrate that the terrapins will sustain any significant adverse effects from the revetment (or the potential residential development, if that were a proper

¹⁶ Though that fact lessened the need to take steps to protect these animals who are not considered endangered, I was especially struck by the sincerity of the testimony of Mr. Limehouse regarding the terrapins and the need to preserve Captain Sam's.

consideration) For instance, though CCL's expert testified that the terrapins display fidelity to previous nesting areas he acknowledged that it is unknown whether a terrapin that is unable to nest at a particular location will seek another location To the extent that terrapins seek possible upland nesting sites on Captain Sam's peninsula they will still have access for the more than 3 000 feet of the peninsula's river shoreline between the western end of the proposed revetment area and Captain Sam's Inlet ¹⁷

Public Use of the Riverbank at Low Tide

The erosion of the river shoreline has contributed to the creation of a sloping sandy river bank adjacent to Captain Sam's Kayakers and other boaters occasionally pull up on this bank Much of this bank in the river's bend would be covered with the ACB mat and subsequently by marsh grass which is intended to grow up through its holes However the use of the bank by the public is limited ¹⁸ As explained by the Department's project manager on KDP's permit application, there is "some public use" of the riverbank at low tide, but it is not "heavily used by the public" Accordingly though "there might be some minimal adverse effect on public access that impact is "not strong enough to bar the permit from being issued"

The Court therefore finds that construction of the revetment will not unreasonably eliminate public access and use 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 Furthermore if a boater or kayaker does not desire to land on the ACB mat (regardless of whether it is exposed concrete or covered by sand spartina, or other vegetation) then the remaining riverbank shoreline in the immediate and general vicinity will remain available Moreover, Captain Sam's Inlet and Seabrook Island on the opposite side have sandy shorelines offering varied landing sites for river boating and kayaking enthusiasts

¹⁷ That is not to mention the many dozens of miles of Kiawah's other marsh shorelines and Seabrook shorelines

¹⁸ CCL entered into evidence pictures of a party of kayakers on the bank of the area of the proposed revetment However that evidence appears contrived The persons depicted in the photographs were attending a planned event to raise funds to pay for CCL's legal expenses to contest the granting of this permit CCL also presented testimony by other individuals that used the river bank area on a limited basis Though that use is a consideration in limiting the permit as explained above it does not establish a basis to deny the permit Notably Ms McAllister who now lives upon Kiawah Island which was once pristine now wishes that a permit which would allow others to live upon the island be denied because it will interfere with her enjoying a pristine area of the island

Development upon Captain Sam's

The large scale development of Kiawah Island as a resort residential community began in the mid-1970s. KDP and its related companies have been the master developer of Kiawah Island since June 1988, and Kiawah Island became an incorporated municipality the same year. The zoning ordinances of the Town of Kiawah Island (the 'Town') and a development agreement entered by the Town in 2005 (Development Agreement) provide for the development of no more than 50 home sites on Captain Sam's peninsula on the thirty-one or more highland acres that lie between the critical line on the river side and the OCRM set back line on the ocean side. The Development Agreement provides that KDP can convey a maximum of twenty of these acres as home sites to purchasers or about 14% of the total highland of the peninsula. The Development Agreement requires that the remainder of Captain Sam's peninsula be preserved in a natural state, with limited exceptions (*e.g.* the entry road which may be pervious material and a few boardwalks) in perpetuity through encumbrance by a conservation easement to the Kiawah Island Natural Habitat Conservancy.

The Development Agreement also requires that this green space be conveyed to the Kiawah Island Community Association. KDP and its related entities have a history over the last twenty years of developing projects on Kiawah Island responsibly and in an environmentally sensitive manner with due regard for the natural setting. KDP and its related development entities have obtained approximately 500 permits from OCRM during this time and accomplished all of the permitted work in accordance with these permits without violation or citation. In fact, these KDP entities have responsibly developed small islands and narrow peninsulas in marshlands and along tidal creeks on and adjacent to Kiawah Island.

Furthermore, the planned future development of detached single family dwellings on Captain Sam's will occur behind the State's setback line, be served by appropriate utilities, be separated by four to seven rows of established high dunes well back from the beach, be placed primarily within the trees and other evolving vegetation on the northern side of Captain Sam's, be implemented in an environmentally sensitive manner by an experienced developer that has historically abided by its permits, and the development is both limited and accommodating to the natural features of Captain Sam's peninsula.

Mark Permar, the island's principal land planner for 25 or more years, plainly explained the many mitigating measures that will likely be employed by KDP to tailor the residential

development to the site such as limiting the elevation of houses to no more than one and a half stories limiting lawns using natural landscaping schemes utilizing shared driveways minimizing the number of beach access paths and boardwalks and having no more than two docks along more than a mile of river edge and marsh shoreline It is worth noting here that about 86% of the 150 acres of highland on Captain Sam's will be preserved as 'green space' under the strict Development Agreement terms and a conservation easement to be granted to the Kiawah Island Natural Habitat Conservancy This undevelopable acreage will be owned by the Kiawah Island Community Association, and will remain in its natural state Only a maximum of twenty acres will be available for sale as home sites

CONCLUSIONS OF LAW

Based upon the above Findings of Fact I conclude the following as a matter of law

General Findings

The proposed bulkhead/revetment is located in a critical area pursuant to S.C. Code Ann. § 48-39-10 (Supp. 2008). S.C. Code Ann. § 48-39-130(C) (Supp. 2008) requires a person or entity to obtain a permit for any alteration of the "critical area" of the coastal zone. The Administrative Law Court has contested case jurisdiction over those issues pursuant to S.C. Code Ann. § 1-23-600(A) (Supp. 2008) and S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008). Because this case involves two requests for contested case hearings which were consolidated, KDP and the CCL both have the burden of proof. KDP bears the burden of proving that the 2783 foot bulkhead/revetment complies with the Coastal Wetlands and Tidelands Act, S.C. Code Ann. §§ 48-39-10 *et seq.*, the regulations promulgated thereunder 23A S.C. Code Reg. §§ 30-1 through 30-18, and the CZMP. See Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2001). CCL, as the party challenging the Department's decision to authorize 270' of revetment, has the burden of proving that the Department's decision was contrary to the Act, Regulations and CZMP and that the bulkhead/revetment should have been denied. Id. The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. Natl. Health Corp. v. S.C. Dep't of Health & Envtl. Control, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). In addition, the Court "shall give consideration to the provisions of § 1-23-330 with regards to the Department's specialized knowledge." S.C. Code Ann. § 44-1-60(F)(2) (Supp. 2008).

Where an expert's testimony is based upon facts sufficient to form the basis for an opinion the trier of fact determines its probative weight Berkeley Elec Coop v S C Pub Serv Comm'n, 304 S C 15, 20, 402 S E 2d 674 (1991) A trier of fact is not compelled to accept an expert's testimony, but may give it the weight and credibility he determines it deserves Florence County Dep't of Social Servs v Ward 310 S C 69 425 S E 2d 61 (Ct App 1992) The trier of fact may also accept the testimony of one expert over another S C Cable Television Ass'n v S Bell Tel & Tel Co 308 S C 216, 417 S E 2d 586 (1992)

General Considerations of Section 48-39-150

S C Code Ann Section 48-39-150 sets forth the general considerations to be taken into account for every critical area permit application See also S C Code Ann Regs 30-11 (Supp 2008) The pertinent considerations set forth in S C Code Ann § 150 (A) for this application are

In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations

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(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply

(4) The extent to which the activity could cause erosion shoaling of channels or creation of stagnant water

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners

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 Specifically as to diamond backed terrapins, the Court additionally concludes they are not a protected species and that the law allows individuals to possess up to two terrapins at a time provided they are not possessed for commercial purposes See S C Code Ann § 50-5-2300 (Supp. 2008) In fact with respect to habitat concerns the ACB mat likely will instead provide additional habitat for oysters and perhaps other marine life associated with marsh grass habitat that may spring through the mat's multiple holes The ACB mat will thus have a limited effect on public access to tidelands because it covers a sandy river shore However, that impairment is not substantial

Furthermore, the project will clearly reduce and likely stop erosion rather than precipitate any erosion The elimination of that erosion will further provide an economic benefit to KDP In fact, the benefit from protection of its upland through stabilization of the riverbank is considerable when compared with the benefit of leaving the riverbank in its unaltered state and allowing the erosion to continue unabated into the forested highland and dune areas along the river This erosion has no positive benefit for anyone and clearly is a detriment to the landowner Likewise, the proposed revetment will not have an adverse effect on the value and enjoyment of adjacent owners KDP is the only adjoining highland owner (including owning the land used for Beachwalker Park at the eastern end of the Spit) The Court cannot agree with the suggestions made by CCL that the public is the adjoining owner as a result of its "right of access" across KDP land to the beach from the Beachwalker Park leased area KDP is the fee simple owner of the park parcel and seaward therefrom to the MHW line No evidence was offered refuting this Additionally O'Rourke testified that Charleston County PRC, which operates the park fully supports the entire revetment permit

The proposed project, through its mat over the sloping surface of the bank and its bulkhead against the vertical scarps, also provides reasonable safeguards against adverse environmental impacts These and other types of revetments have been historically approved by the Department, including on Kiawah Island for these same protective purposes Accordingly the revetment will not have adverse environmental impacts

As set forth above, Section 48-39-150 also instructs the Department to be guided by the policy statements in S C Code Ann §§ 48-39-20 and 48-39-30 in assessing the potential impacts

of projects in critical areas See also S C Code Ann Regs 30-11 (Supp 2008) The pertinent portions of Section 48-39-20 are as follows

The General Assembly finds that

(A) The coastal zone is rich in a variety of natural commercial recreational and industrial resources of immediate and potential value to the present and future well-being of the State

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(D) The coastal zone and the fish, shellfish other living marine resources and wildlife therein may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations

(E) Important ecological, cultural, natural geological and scenic characteristics industrial economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate

The pertinent portions of Section 48-39-30 provide as follows

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State

(B) Specific state policies to be followed in the implementation of this chapter are

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone,

(2) To protect and where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations

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(5) To encourage and assist state agencies counties municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological cultural and historic values as well as to the needs for economic and social development and resources conservation

* * *

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

These policy statements require a balancing of economic-development benefits and environmental preservation. Even though the focus of the inquiry is on the effects of the project, neither the bulkhead/revetment nor the potential limited residential development will result in any significant harm to the public resources or marine or other plant or animal life, nor significantly impair public access to critical areas. As previously found, the potential residential development is not ill-planned and will be implemented in a low density, environmentally sensitive manner. It will also be subject to local, state, and possibly federal permitting requirements. Neither the proposed bulkhead/revetment nor the potential limited residential development transgresses the policies set forth in these two statutes.

Additionally, the Court notes that these policies refer to the role of local municipalities. Here, the Town of Kiawah Island has implemented measures to safeguard the environment in the restrictions it imposed on the potential residential development. These safeguards include the legal preservation through a conservation easement of almost all but twenty acres of the peninsula in a natural state in perpetuity. This salient requirement is certainly in furtherance of the policies in favor of protecting coastal resources. The twenty acres also appear to be not only behind several rows of high dunes but also more than 3,000 feet from the inlet.

KDP thus established that there are no significant negative impacts from either the bulkhead/revetment or the potential future residential development under S.C. Code Ann. Section 48-39-150 (A) and S.C. Code Ann. Regs. 30-11 (B). Further, neither the project nor the potential residential development are in violation of the relevant policies set forth in Sections 48-39-20 and 48-39-30.

Regulation 30-11(C)

S.C. Code Ann. Regs. 30-11(C) sets forth additional guidelines to be considered when making permitting decisions regarding activities in the critical areas.

30-11(C)(1)

The first of the guidelines in Regulation 30-11 (C)(1) requires consideration of ' [t]he extent to which long-range, cumulative effects of the project may result within the context of

other possible development and the general character of the area S C Code Ann Regs 30-11(C)(1) (Supp 2008) It is this provision which constitutes the underlying objection to this permit by CCL and in particular the Department They argue that the bulkhead/revetment will allow homes to be built upon Captain Sam's which will change the character of the **upland** area However the controlling statutes and regulations for critical area permits do not require a determination of whether high land outside the Department's critical area jurisdiction is 'suitable' for residential development Instead the pertinent inquiry is the cumulative impacts of the project **within** the critical area, not the cumulative impacts of future development on the high ground **outside** the critical area In other words, the area for which the Department has regulatory authority is the critical area not the high ground **outside** the critical area¹⁹ Construing this provision otherwise would lead to a substantial expansion of the Department's authority to regulate the development of entire communities Conceivably the Department could deny critical area permits near towns or cities simply because it believes the permits would facilitate upland sprawl and general over-development In fact the Department's project manager testified that he denied the revetment at all locations on Captain Sam's Spit other than adjacent to Beachwalker Park, because he believed potential residential development would destroy the pristine nature of Captain Sam's Thus, the Department avers that it has the authority through coastal permitting to deny upland development even against the Town's approval of that development through its zoning process If the General Assembly had intended to authorize such a considerable expansion of the Department's authority it is inconceivable that it would have done so with such general language See Captain's Quarters Motor Inn, Inc v S C Coastal

¹⁹ The decision of the South Carolina Supreme Court in Spectre v S C Dep't of Health and Environmental Control Op No 26764 (S C Sup Ct filed Feb 11 2010)(Shearouse Adv Sh No 5 at 35) does not alter this conclusion In Spectre the Supreme Court held that the Coastal Zone Management Plan (CZMP) had the force and effect of law its reach extended beyond the critical areas in the eight coastal counties and it could be applied to isolated freshwater wetlands that were not subject to the jurisdiction of the Army Corps of Engineers Spectre did not involve a critical area permit instead the applicant was seeking a permit to fill isolated freshwater wetlands for a commercial development This type of activity was expressly addressed – and discouraged – in the CZMP which specifically provides that upland wetlands play an important role in the ecosystem and prohibits most commercial construction requiring fill of freshwater wetlands Accordingly the adverse effects in Spectre arose from the immediate impact of the project itself not from some later development which might have arisen if the permit had been granted In this case to the contrary the Department denied the permit for the revetment based not upon immediate adverse impacts on the critical area but upon the assumption that the construction of the revetment would lead to the residential development of the upland portion of Captain Sam's Spit Nowhere in Spectre did the Supreme Court rule that the CZMP authorizes the Department to deny critical area permits because of the effects of later foreseeable development on upland Moreover as is further discussed herein I find that the proposed development is consistent with the CZMP

Council 306 S C 48 413 S E 2d 13 (1991) (administrative agencies are possessed of only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged) 3 Sutherland Statutory Construction § 65.2 (6th ed.) (statutes authorizing administrative agencies to exercise powers tending to interfere with established or traditional property rights are strictly interpreted)

Furthermore, the regulations or statutes granting the Department authorization to use its permitting power do not govern ‘highland uses’. The authority to determine appropriate land uses has, over the history of our State’s law, been relegated to the municipalities and counties having planning and zoning jurisdiction and expertise to best determine such planning matters. See e.g., Bear Enterprises v. County of Greenville, 319 S C 137 459 S E 2d 883 (Ct. App. 1995), Rushing v. City of Greenville 265 S C 285 217 S E 2d 797 (1975). Thus, the governmental consideration of whether residential uses are appropriate above the critical line and landward of the setback line for Captain Sam’s is a zoning matter within the province of the Town of Kiawah Island. To the contrary, the Department’s actions in this case appear to be colored by its mistaken belief that it may simultaneously, trump local zoning and development agreements and decree that privately owned upland property remain permanently undeveloped and in a natural state without any suggestion of fair compensation to the owner. See e.g., S C Code Section 48-39-30(c) (“In the implementation of the chapter, no government agency shall issue any order so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.”). However, nowhere do the governing statutes and regulations prohibit lawful zoned real estate development on highland parts of barrier islands above OCRM critical lines and landward of OCRM ocean setback lines in the coastal zone. Instead, they caution against “ill planned development.” S C Code Ann. § 44-39-20(E) (“E. Important ecological, cultural, natural, geological, and scenic characteristics, industrial, economic, and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.”).

Likewise, the focus is on whether the proposed structure satisfies the applicable South Carolina regulations and statutes governing the permitting of bulkheads and revetments in critical areas. None of these controlling regulations and statutes establish “stability of the

adjacent highland as a consideration in acting on a critical area permit to construct a bulkhead or revetment or a river bank

No regulation or statute prohibits construction of a bulkhead or revetment that retards the process of shoreline change, another argument made by OCRM and CCL in opposition to this permit. Every bulkhead or revetment by its very nature must “interfere with the natural process of erosion” to do its intended job. If the General Assembly had sought to create an exception for the permitting of revetments and bulkheads where the structure might interfere with the erosion in certain instances, the legislature could have so specified. It did not. Instead, the General Assembly specifically recognized the fundamental need to protect upland from destruction from the natural process of erosion on tidal rivers. Indeed, it authorized the Department to issue permits for the construction of bulkheads and revetments in locations other than the front beach.

(F) The department, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, **the protection of public and private property from beach and shore destruction** and the continued use of tidelands, submerged lands and waters for public purposes.

S.C. Code Ann. § 48-39-120 (E) (emphasis added). See also, S.C. Code Ann. Regs. 30-12 (C)(1)(c) (“Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected **unless upland is being lost due to tidally induced erosion**”)(emphasis added).

Additionally, in this instance, the potential residential development will not have deleterious impacts even if the Court were to consider the effects of the potential residential development. OCRM and CCL do not challenge KDP’s history of environmentally sensitive development methods, permit adherence record, or any of the specific strategies, methods, and approaches that KDP will use in its limited residential development of Captain Sam’s. Rather, they urge that **any** residential development at all, regardless of safeguards and protections, on the now-undeveloped Captain Sam’s highland peninsula along the ocean and river is **per se** ill-planned. The Court concludes that the numerous measures and safeguards KDP intends to utilize in its development of Captain Sam’s demonstrate that this limited residential use would be

sensitively planned responsive to the natural features of the peninsula attentive to its flora and fauna and without significant negative effects on the critical area. Even though consideration of the effects of the upland is beyond the purview of the regulation, the Court concludes that there was no evidence adduced that the residential development would have any material adverse environmental effects on the upland. The development team also has a twenty-two year unblemished track record for compliance with all OCRM permits.²⁰

30-11 (C)(2)

The second guideline of Regulation 30-11 (C) provides that

Where applicable, the extent to which the overall plans and designs of a **project** can be submitted together and evaluated as a whole, rather than submitted piecemeal and in a fragmented fashion which limits comprehensive evaluation

S.C. Code Ann. Regs. 30-11 (C)(2) (emphasis added). The Department and CCL contend that this application was piecemeal because (i) the revetment plan submitted by KDP did not include the final construction drawings, and (ii) KDP did not submit plans for the future residential development on Captain Sam's. However, KDP submitted sufficient design plans for the proposed revetment. KDP submitted the application for the project, i.e. the revetment, as a whole.²¹ The evidence reflected that it is customary practice with a project of this nature for the Department to base its permitting decision on conceptual renderings, such as those supplied with this application, rather than requiring the applicant to incur the substantial expense of full blown construction and bid drawings. If the permit is granted, the customary and practical course is that the applicant then submits construction drawings for conformance and final approval, seeking to work out any details then. Likewise, the failure to request training jetties cannot be considered an omission in the application, as suggested by counsel for CCL and OCRM, as KDP has no intent to pursue them at this time. Obviously, it would be unreasonable to require that a permit request provide an alternative design element for every contingency that may arise.

²⁰ It also bears pointing out that this regulation specifies that OCRM must **in part** base its decisions regarding permit applications on the policies specified in Sections 48-39-20 and 48-39-30 and thus be guided by the following: R. 30-11 (C) (emphasis added). This regulation does not state that the sole consideration or even the primary consideration is extent to which long range cumulative effects of the project may result within the context of other possible development and the general character of the area.

²¹ In fact, in an effort to assure that the project was submitted as a whole, KDP requested that Charleston County PRC withdraw an earlier application it had filed with OCRM to construct solely a bulkhead of 270 feet in front of Beachwalker Park. This allowed KDP, utilizing Thomas and Hutton and other experts, to develop a single engineering solution.

Additionally, if the Department had truly believed the application to be incomplete, presumably it would have so informed KDP at the time of submission of the application. It did not do so. To the contrary, throughout the application process, KDP repeatedly offered to provide any additional information that the Department desired for purposes of its determination. The Department never requested any further information from KDP. Indeed, it never responded to the several offers of more data by KDP as to either the design of the revetment or the possible future residential use on the upland on Captain Sam's Spit.

Moreover, as to the failure to submit a specific residential plan, the "project" under consideration is the bulkhead/revetment, not the future residential use of the upland. The applicant testified to valid reasons for not having a specific development plan for this moderate sized "neighborhood." Detailed plans fixing the precise locations and number of homesites and the exact location of the infrastructure improvements were not necessary to gauge the cumulative effects of the bulkhead/revetment.

I therefore conclude that the permit application does not violate Regulation 30-11 (C).

Regulation 30-12 (C)

S.C. Code Ann. Regs. 30-12 (C) (Supp. 1999) sets forth standards for the construction of bulkheads and revetments erosion control structures. It provides that for bulkheads and revetments which are not ocean front:

(1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:

(a) Structures must be designed to conform to the critical area line (upland boundary) to the maximum extent feasible and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard,

(b) Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis,

(c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion or sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion.

(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.

S.C. Code Ann. Regs. 30-12(C)

Here although public access to the riverbank at low tide may be affected on a very limited basis Regulation 30-12 (C) specifically allows some adverse effect where upland is being lost due to tidally induced erosion Clearly KDP's upland is being lost due to tidally induced erosion, and there is no feasible alternative that will stabilize this eroding riverbank Additionally although the ACB mat degrades the public uses of the shoreline where the mat is approved it does not eliminate all public access Nevertheless there are other sandy landing spots at low tide in the immediate vicinity in general and specifically as a result of the reduction in the mat as ordered below

The Court further concludes that despite the arguments of the Department and CCL that the design of the revetment is insufficient and that the revetment may fail the design is adequate to stabilize the bank under normal conditions its intended purpose Its intended purpose is not to prevent a breach of the peninsula in the event the catastrophic hurricane In sum the Court concludes that the proposed revetment meets all the specific criteria for bulkheads and revetments set forth in S C Code Ann Regs 30-12 (C)

Public Trust Doctrine

CCL argues further that this bulkhead/revetment should be denied for violating the public trust doctrine The premise of CCL's argument is that the public has the right to use public trust lands and waters for recreational purposes, including fishing, bathing, swimming and other recreational uses Specifically the public has a right to pull up kayaks and boats on the sandy banks of the Kiawah River and to swim fish and crab on the banks of the river in the location of the proposed revetment Accordingly, if the revetment/bulkhead structure were constructed as requested these public rights would be eliminated in violation of the public trust doctrine

Clearly the above laws set forth the parameters of when coastal public trust land may be used for private purposes In Sierra Club v Kiawah Resort Associates 318 S C 119, 456 S E 2d 397 (1995), the Supreme Court expounded on the public trust doctrine in implementing these laws and outlined the test for determining whether a particular project violated it The Court held that

The legislation creating the Coastal Council [now OCRM] and defining its duties, while not explicit implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways See S C Code Ann § 48-39-10, et seq

The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining

Illinois Central R. Co. v. Illinois, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1042 (1892). Clearly, under the South Carolina Coastal Management Act, the State through the Coastal Council maintains control over the public trust lands. See e.g., Caminiti v. Boyle, 107 Wash.2d 662, 732 P.2d 989 (1987). Coastal Council's Regulations specifically state that "[n]o permit shall convey, nor be interpreted to convey, a property right in the land or water in which the permitted activity is located." 24A S.C. Code Ann. Regs. R. 30-4(E). Since no interest in the land or water within the public trust is conveyed by the permit, the relevant inquiry is whether the docks **substantially impair** the public interest in the public trust lands and waters. As there was testimony that the docks would not substantially impair marine life, water quality, or public access to the area, we hold that the permits at issue do not violate the public trust doctrine. We affirm.

Sierra Club, 456 S.E.2d at 402 (emphasis added). Here, the bulkhead/revetment will not substantially impair the recreational activities of boaters, kayakers, and others, nor will it substantially impair or unreasonably restrict their use of the public trust tidelands including a portion of the southerly bank of the Kiawah River.

Coastal Zone Management Plan²²

The Department and CCL contend that the proposed bulkhead/revetment will violate the several policies in the CZMP, including the policies for

- Activities in Areas of Special Resource Significance for Barrier Islands (Chapter III(C)(3)(XII)(A)),
- Dune Areas (Other Than Critical Areas) (Chapter III(C)(3)(XII)(B))
- Public Open Space (Chapter III(C)(3)(XII)(D)),
- Geographic Areas of Particular Concern (Chapter IV(A)(2)(a)(8))²³

²² KDP also argues that the policies in the CZMP cannot be imposed as binding norms by the Department and that the Department lacks the authority to deny a project based on policies contained in the CZMP. This issue was recently determined by the Supreme Court of South Carolina in the case of Spectre v. S.C. Dep't of Health and Envtl. Control, Op. No. 26764 (S.C. Sup. Ct. filed Feb. 1, 2010) (Shearouse Adv. Sh. No. 5 at 35), in which the Court held that the CZMP has the force and effect of law. Nonetheless, I do not find the proposed project is contrary to the Coastal Zone Management Plan. Moreover, I do recognize that the General Assembly adopted the Beachfront Management Act, S.C. Code Ann. §§ 48-39-250 *et seq.* (BMA) well after the Department compiled the CZMP. The provisions of the BMA, including in particular those establishing the baseline, setback line, and the standards for construction in relation to them, take precedence as legislation over any provisions of the CZMP that may conflict therewith, even though the CZMP is enforceable. See 1 On, L.I.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (generally, the most recent legislation will take precedence over earlier enactments).

Chapter III (C) of the CZMP discusses Residential Development in the coastal zone. It provides that "[o]f primary concern is adequate treatment and disposal of domestic sewerage from residences , and that [u]ncontrolled development patterns can also degrade water quality and impact marine and aquatic species CZMP p III-16. The policies enumerated in this section are to provide guidance on reaching and maintaining a balance between development and conservation of coastal resources. Id

The CZMP classifies barrier islands as an area of special significance. The policies for development of those islands include the following:

- 1) Construction and development on barrier islands shall retain to the extent feasible existing dune ridges, drainage patterns and natural vegetation in landscaping and construction plans in order to maintain the value of the island as a storm buffer. Intensive or high-density development may not be suitable on some barrier islands which are less stable or more prone to erosion or other hazard risks; these factors must be taken into consideration when alternative development plans are formulated,
- 2) Because of their proximity to and strong ecological relationship with the critical areas of the coastal zone, project proposals for barrier islands must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas (beaches, primary dunes, coastal waters and wetlands)
- 3) New road or bridge projects involving the expenditure of public funds to provide access to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated; for example, provision of access to a public recreation area or other facility. Preference will be given to ferry access in those instances where public funds cannot be expended for road access.
- 4) The extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural "carrying capacity" of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.
- 5) The Coastal Council encourages and supports State, local and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary

²³ The Department also argued that this project triggered the CZMP Erosion Control Policies contained in Chapter IV(C)(4) and the Beach and Shoreline Access Policies in Chapter IV(D)(3)(c). Neither KPD nor CCL addressed these issues in their Proposed Orders. Nevertheless, as to the Erosion Control Policies, the project is to be made of more than acceptable materials. Moreover, the evidence clearly established the economic justification for the project that will have only limited effect upon the public use of the area. The discussion above regarding the public use of the shoreline reflects that the Beach and Shoreline Access policies will not be violated.

motivation for these efforts and where appropriate barrier islands should be maintained for recreational use based on the capacity of individual areas to accommodate human activity

CZMP Chapter III (C)(3)(XII)(A) p 70-71 The CZMP also treats dune areas which fall landward of the beach zones as areas of “special resource significance” The enumerated policies in the CZMP regarding these areas include the following

Because of their proximity to and strong physical and ecological relationship with the beach and primary sand dune critical areas of the coastal zone project proposals in the secondary sand dunes must demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas

CZMP Chapter III (B) p 71-72 Concerning open spaces the CZMP seeks to restrict projects which would “limit the continued use of a recreational open area or disrupt the character of such a natural area” unless other alternatives exist CZMP Chapter III (D) p 73 On the other hand the CZMP seeks to “increase the amounts and distribution of public open space and recreational areas in the coastal zone” Id Finally, the CZMP sets forth that areas in which endangered and threatened species inhabit are Geographic Areas of Particular Concern

The development techniques and safeguards KDP intends to implement are consonant with the policies in the CZMP More specifically, I find that the low-density development described by Long and Permar that would be employed in the residential development of Captain Sam’s, entail reasonable precautions No evidence was offered to alter this important point The many rows of dunes seaward of the setback line would remain essentially intact on a permanent basis to enjoy for their beauty and protection, thereby preserving the strong natural protections deemed desirable by the policies in the CZMP Accordingly, the proposed limited, residential development several rows of dunes behind the primary dune will not violate the policies of CZMP Chapter III (C)(3)(XII)(A)

Furthermore, the CZMP contains no policies that would prohibit the potential residential development of Captain Sam’s and the potential residential development is consistent with its terms The policies dealing with barrier islands and the dunes system specifically contemplate residential development on barrier islands These policies do not prohibit residential development that occurs landward of the primary dune if reasonable precautions are taken The potential residential development on private property will also not impair public open space at Beachwalker Park or along the beach Finally, the developable area of Captain Sam’s peninsula

is well **outside** Unit 10's boundaries of designated critical habitat for wintering piping plovers. It is thus not a Geographic Area of Particular Concern under the CZMP.

Therefore, I find that neither the bulkhead/revetment nor the possible future residential development is contrary to the policies of the CZMP.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the permit issued by the Department is approved except that the terms and conditions in the permit limiting the bulkhead and revetment to 270 feet in Special Condition No. 1 are deleted and the following shall be substituted for Special Condition No. 1:

1. Provided:

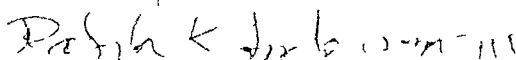
(i) that care is used in the installation of the requested erosion control structure near its eastern end adjacent to Beachwalker Park, to avoid covering marsh grass, where practical, unless necessary to prevent significant highland erosion,

(ii) that, for the portion of the proposed erosion control structure to be located west of survey point "F" on Petitioner KDP's Exhibit 77, a bulkhead shall not be used where the vertical face of the escarpment is less than 24 inches,

(iii) that for this same western section of the proposed erosion control structure, the ACB mat shall be no greater than eight (8) feet in width, and,

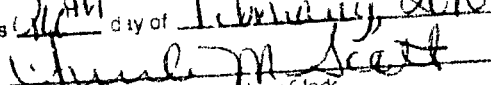
(iv) that KDP shall submit final construction plans to the Department consistent with the permit requested as modified and approved by Order of the Administrative Law Court before commencing initial construction of the erosion control structure, and, after initial construction, prior to commencing construction of any necessary extensions of the ACB mat (or bulkhead to the extent herein authorized but not originally constructed) authorized by this permit.

AND IT IS SO ORDERED.



Ralph King Anderson III
Chief Administrative Law Judge

February 26, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 26th day of February, 2010
By 

Judicial Law Clerk

EXHIBIT B

**CCL Exhibit 10-U admitted into
evidence at the ALC hearing August
24-28, 2009**

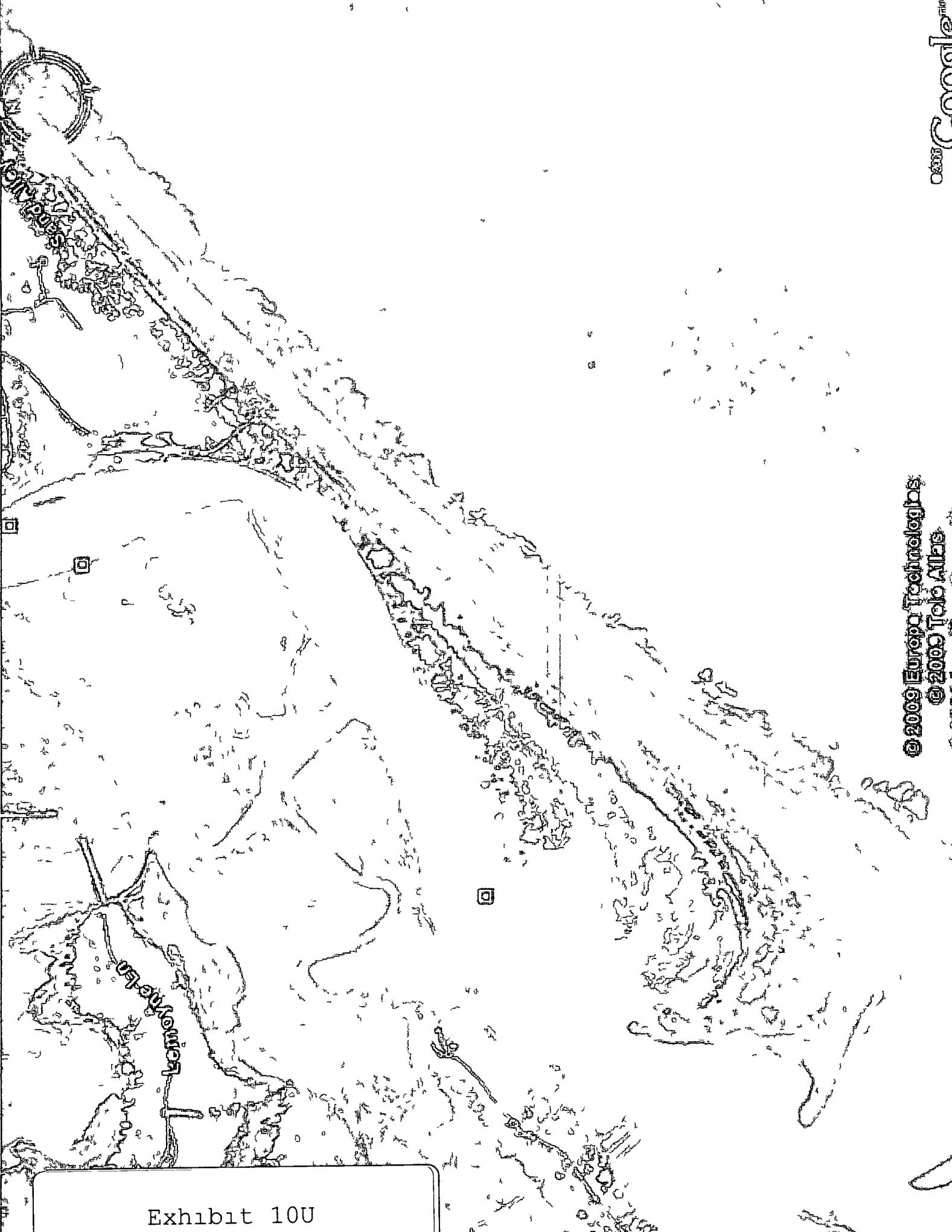
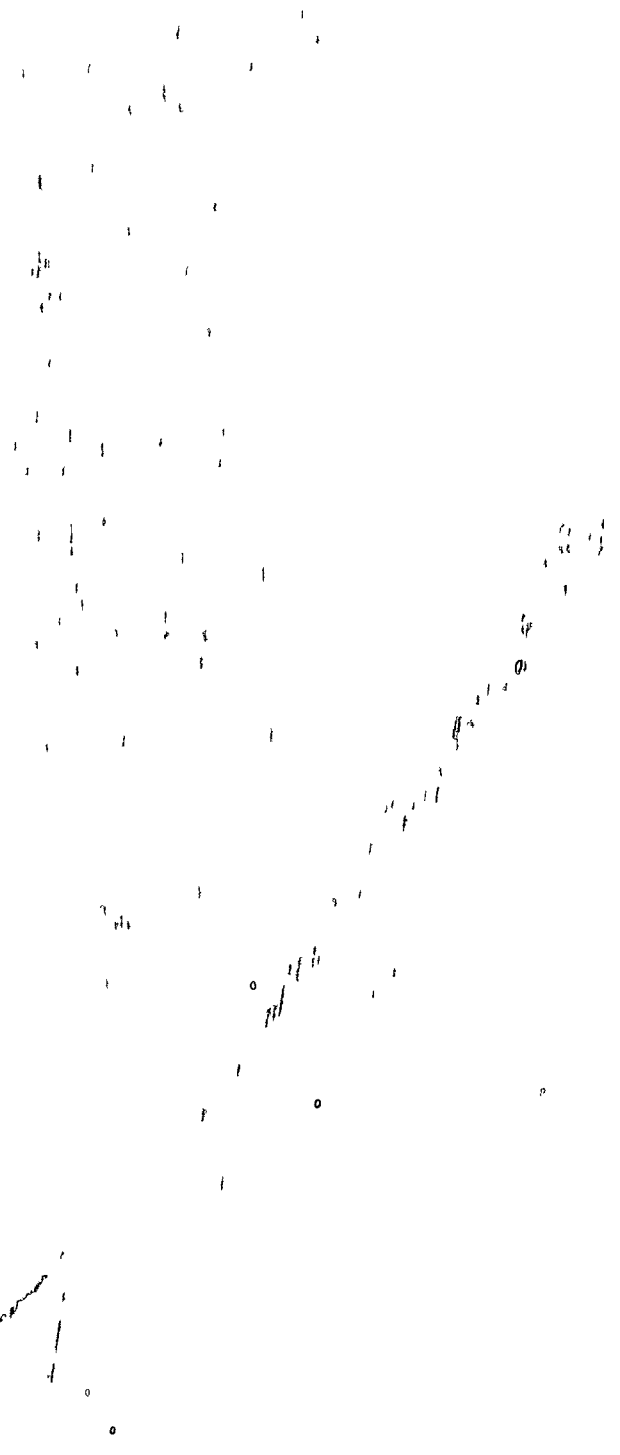
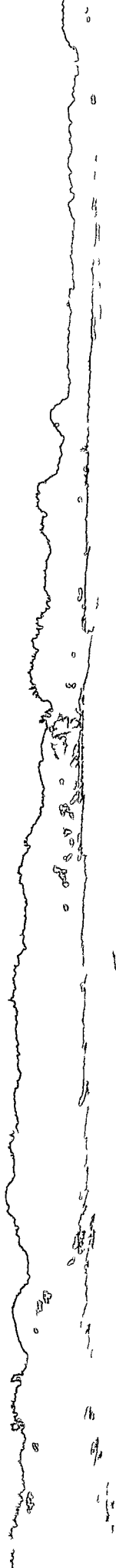


Exhibit 10U

EXHIBIT C

**CCL Exhibit 10Q and excerpts from
KDP Exhibit 78 admitted into
evidence at the ALC hearing August
24-28, 2009**





capt sam's 8 27 09

_DSC0542

kdp



capt sam's 8 27 09

_DSC0546

kdp



capt sam's 8 27 09

_DSC0549

kdp

EXHIBIT D

**Excerpts from hearing transcript
before the Administrative Law Court,
dated August 24-28, 2009**

Testimony of Greg VanDerwerker

1 (Witness excused)

2 THE COURT Let's just take a short break, if that's

3 okay

4 MS ARMSTRONG Okay All right

5 (Off the record from 5 41 to 5 51 p m)

6 MS ARMSTRONG Okay Your Honor, Coastal

7 Conservation League calls Dr Greg VanDerwerker

8 to the witness stand

9 DR GREG VANDERWERKER, having been duly sworn,

10 testifies and examines as follows

11 DR VANDERWERKER - DIRECT EXAMINATION BY MS

12 ARMSTRONG

13 Q Dr VanDerwerker, well, first, let's start

14 with -- we've had a few other doctors up here,

15 but you're not quite the same kind of doctor

16 What kind of doctor are you?

17 A Retired doctor

18 Q Okay Of what? What did you practice?

19 A Doctor of Medicine My specialty is pathology

20 Q Okay And you're retired now How long have

21 you been retired?

22 A Four years now

23 Q Okay And where do you currently live?

24 A On Kiawah Island

25 Q Okay What's your address on Kiawah?

1 A 510 Ruddy Turnstone

2 Q And how long have you owned property down on
3 Ruddy Turnstone?

4 A We bought property in -- right at the beginning
5 of '94, January '94, and used it as
6 vacation/holiday property until retirement and
7 then we've been there full time since

8 Q Okay Now, are you a member of the South
9 Carolina Coastal Conservation League?

10 A I am

11 Q About how long have you been a member of the
12 League for?

13 A I'd say 11 or 12 years

14 Q All right And you and I had talked earlier,
15 you told that me you were originally a mountain
16 guy, but now you've sort of turned into loving
17 the beach and the coast Can you tell me what
18 you love about it and Kiawah Island?

19 A The setting We had been -- make a short story
20 long, I have two daughters and a wife and they
21 dictate what happens in the house and,
22 therefore, we went to the beach on weekly -- I
23 mean, annual retreats, rather than to the
24 mountains And we went to a number of beaches
25 over the years, Fripp, Pawley's, North

1 Litchfield for a number of years, Seabrook
2 once, and I was happy to get back to the
3 upstate

4 Then one year, I guess must have been 1990 or
5 '91, we went to the Kiawah at the
6 recommendation of a colleague at the hospital
7 and I just fell in love with it It's totally
8 different from the rest of the coast The
9 maritime forest, I guess, is really what
10 attracted me and then -- because I'm not one to
11 sit on the beach and read under the sun, having
12 seen so many skin cancers being removed from
13 people I tend -- am not patient enough to
14 sit I like to be active, so I'm a kayaker and
15 so I take off to the marshes and rivers and the
16 oceanfront, playing in the waves, too

17 Q So in what areas do you kayak on around Kiawah
18 Island?

19 A Anywhere there's water, which is Kiawah River
20 Yesterday, I was out to Bird Key I put in at
21 Rhett's Bluff and went out to Bird Key at the
22 other -- inlet at the other end I was on --
23 I was in Kiawah River toward Captain Sam's past
24 two Sundays, actually, as they were
25 particularly nice days Black River, couple

1 weeks ago, Edisto, Ashepoo, Combahee Last
2 weekend was particularly good because of
3 Hurricane Bill, so I spent Friday, Saturday --
4 well, Saturday morning I couldn't get out
5 because the waves were too strong, but on
6 Saturday afternoon the waves were good for
7 ocean kayaking, so I was out oceanfront most of
8 the weekend

9 Q So you spend a good bit of your time -- your
10 recreational time kayaking?

11 A All I have is recreational time now

12 Q Kayaking is something that you do regularly?

13 A Yes

14 Q Okay And you said that you've been kayaking
15 at Captain Sam's Inlet Have you been there
16 frequently?

17 A It varies, depending on what's going on in life
18 and other obligations, vacations or the kids
19 and -- I would say I'm out there a couple of
20 times a month, at least I know this month
21 I've been out there the last two Sundays

22 Q And when you're out there on your kayak -- do
23 you know -- have you seen the permit
24 application for the proposed bulkhead/revetment
25 system and drawings of it?

1 A Can you show it to me? I have seen a small
2 image of something that's purported to be a
3 schematic of it If I show --

4 A What I was referring to is an engineering
5 schematic

6 Q I guess what I'm wondering is if you have an
7 understanding of where the revetment structure
8 would start and where it would end

9 A Where it's supposed to be located?

10 Q Can you identify that, just so Court knows that
11 you've identified that area

12 A Yeah The parking lot for the park,
13 Beachwalker Park, is right here (indicating)

14 Q Okay

15 A As you can see, there's a small tidal inlet,
16 marsh inlet (indicating) and the --

17 MS ARMSTRONG Can you see that, Your Honor, or
18 would you like the witness --

19 THE COURT Yeah, I can see

20 A There's a little tidal inlet here (indicating)
21 This is healthy marsh all along here and,
22 actually, it seems to be healthy the first
23 third of the park And then beginning around
24 here, there's a big scarp on the wall and then
25 there's beach down here And my understanding

1 is it's the half mile from here to somewhere
2 around here (indicating)

3 Q So it would end right about where the creek
4 comes out on the opposite side?

5 A I guess

6 Q Is that where you were indicating?

7 A I mean, I haven't --

8 Q Okay

9 A -- seen it marked There's survey sticks all
10 over this I don't know what it indicates, but
11 it should be from here to a half mile, which I
12 guess would be probably about here, I guess
13 (indicating)

14 Q All right So you're familiar with the area
15 along the Kiawah River where the structure is
16 being proposed?

17 A Yes

18 Q How would you describe what that area looks
19 like?

20 A It looks like a really nice beach. It's tidal,
21 of course, and during low tide the waters go up
22 and narrows the beach almost to right up to the
23 vegetation line, particularly high tides And
24 then at low tide, it's a wide, gorgeous sandy
25 beach.

1 I have a convenient ruler with me, because my
2 kayak is 18 feet long, so -- and I know I can
3 pull my kayak up on that and there's still room
4 at the end, so it's got to be 20 feet wide

5 Q And you said you pull -- have you pulled your
6 kayak up before on the banks of --

7 A Okay Yeah, every time I go out there That's
8 the best of the part of the trip is to be on
9 that beach area

10 Q What do you enjoy about being on that beach
11 area?

12 A Well, solitude Occasionally, there will be
13 fishing boats coming up or down and other
14 kayakers, but there's not the constant turmoil
15 that you have on the beachfront with children
16 and families and people flying kites and that
17 sort of thing There's a nice view of the
18 marsh that's on the other side

19 In the wintertime, it's generally in the
20 wave -- the nonwindy side You can sit on the
21 beach and the wind kind of goes over you when
22 it's cold So it's unique There's nothing
23 like it on the rest of the Kiawah River
24 If you get down toward Bird Key at the west
25 end, along the -- of course, the river's a lot

1 wider There's patches of shell beaches, but
2 really no nice strand of sand It's unique

3 Q And so you said every time you go out there you
4 pull your kayak up onto the beach And what
5 else do you do when you're in that area? Do
6 you go swimming or what other activities?

7 A Swim I eat It's where -- that's my favorite
8 lunch spot or snack spot

9 Q So you stop and you bring a picnic there or --

10 A Oh, yeah, absolutely

11 Q Okay Do you see other people, members of the
12 public that are using that sandy beach area
13 along the river where the proposed structure
14 will be?

15 A Absolutely Other people pull up their kayaks,
16 fly fishing skiffs will pull up there Right
17 where the end of the parking lot is
18 (indicating) the bluff is not as steep and
19 oftentimes -- I guess they come from the
20 parking lot I don't know where they come
21 from, but there's no other way to get there
22 There will be youngsters fishing the river, so
23 I guess they are up at the park and then walk
24 down where it's flattened out and they use the
25 river for fishing I personally am not patient

1 enough to fish, so I go to Crosby's to do my
2 fishing

3 Q And they're doing that along the bank where --

4 A Oh, yeah, because the rest of it's marsh You
5 can't stand there

6 Q And we're talking about the area that's between
7 the mean high watermark and the mean low
8 watermark?

9 A Right

10 Q And how do you view that area in terms of a
11 public resource?

12 A Well, my understanding it is a public resource
13 and, like all public resources, I enjoy using
14 them And, obviously, other people do, too
15 They're -- public resources are important for
16 me and for the public for quality of life

17 Q And how would this revetment -- you understand
18 it's going to be 40 feet wide, extending --

19 A Right

20 Q -- the whole width of the shoreline

21 A And then some

22 Q How would that affect your ability to use the
23 beach and the river area?

24 A Well, basically, it would make it unusable for
25 a number of reasons I can go into, if you --

1 Q If you would please explain those reasons

2 A Number one, again, the schematic I've seen of
3 the engineering, where the revetment -- there's
4 a statement on it that says -- about the slope,
5 that it will not be greater than two to one,
6 which means, therefore, it can be two to one
7 If it's not greater than, it's at least that or
8 less And two-to-one slope, which is a rise to
9 run, calculates to about a 63 degree angle
10 And if this is -- here's the water and here's
11 a 90-degree angle and 45 (indicating) -- so 63
12 is about halfway between and you can't come in
13 from the water and have access to a -- at that
14 angle It's just not possible It's not
15 really practical for even a kayak and it would
16 be impossible for a motorboat
17 Second, the schematic I saw states that it's
18 articulated concrete, would be the material,
19 and -- I'm sorry?

20 Q I was going to hand you a diagram that's --

21 A That looks like it, yeah

22 Q It's sheet seven of seven of the permit
23 application that's in evidence

24 MR CHANDLER Kiawah Exhibit Forty-four

25 Q Kiawah Exhibit Forty-four

1 A Right This is it That's what I'm talking
2 about Not to exceed two-to-one slope, which
3 is a 63-point-something angle that somewhere
4 It's -- you can't access something at that
5 angle

6 And then, as it says here, it's articulated
7 concrete block The difference between
8 recreating on concrete block versus fine sand
9 beach is just a world different It'd be like
10 partying on a parking lot, which I don't get
11 much pleasure from Occasionally, a tailgate
12 party, I guess, in a parking lot is fun, but
13 that's not where I would want to be when I'm
14 out kayaking

15 Additionally, concrete materials, if you've
16 been to boat landings, boat ramps that the
17 county has around or riprap or other large
18 pieces of rock, stone, concrete, whatever, that
19 are in water a long time, algae grows on them
20 And if you've been on boat ramps, the very top
21 part is fine If you get down where the water
22 is coming and going, it's all full of algae, so
23 it's slippery and nothing you want to lay out
24 and be on.

25 Q I'm going to show you, while you're talking

1 about that structure, I'm going to hand to you
2 what's been marked as CCL Exhibits Nine-A, B
3 and C I believe they're in the packet that I
4 provided to you I think they might actually
5 be introduced -- might have been introduced by
6 KDP I'm not sure I believe you've seen them
7 before But just for sake of convenience, I'm
8 going to go ahead and hand you those and ask
9 you --

10 MR WHITFIELD-CARGILE I think those are in as KDP

11 Six, Amy

12 Q KDP Six If the structure looked something
13 like that, how would that affect your use?

14 A It's unusable for my purposes and any kind of
15 boating purposes

16 Q Would you be able to pull a boat up onto that?

17 A I mean, you could conceivably pull a boat up on
18 that, but you would tear it up I mean, you
19 don't pull your boat up on a ramp You bring
20 your trailer down into the water and put your
21 boat on that It's too destructive to the
22 boat

23 Q Is it something that you think would be safe to
24 walk on?

25 A If it's got a lot of algae on it, no, it would

1 be slippery, you know, mud and algae It would
2 not be safe to walk on The angle, you know,
3 the higher -- the greater the angle, the
4 greater the opportunity of a fall, so -- but
5 could I walk up that? Yes, I could, probably,
6 but I would choose not to

7 Q For safety reasons and because it just wouldn't
8 be an enjoyable place to go?

9 A Correct Also, the aesthetics of it I mean,
10 the best part of that trip from -- I usually
11 put in at the bridge, the Kiawah River bridge
12 There's a paved pull-off specifically for
13 people to put boats in, small boats, not
14 powerboats Fish locals use it to pull off
15 there and then fish the river around the
16 bridge For the trip from the bridge down to
17 the inlet, the best part is that beach
18 And that is, in my view, particularly ugly and
19 unaesthetic I don't know what it's made of,
20 but there's a not dissimilar type of revetment
21 at Bass Creek on Kiawah Island where Ocean
22 Course goes out to the -- Ocean Course goes out
23 at the end And then Ocean Course Drive goes
24 out there Bass Creek actually comes under it,
25 tunnels, there's a pipe or something But

1 there's been a lot of erosion over the years
2 there I don't know why But there's a
3 similar type of structure on the bank there and
4 it's frankly god-awful ugly It's a real
5 eyesore and it's covered with black silty algae
6 stuff

7 As you can see, the only vegetation is right up
8 here (indicating), because it's got to be above
9 the average high watermark or it's just going
10 to be too much salt, so none of this will ever
11 get vegetated

12 Q So that the area is below the mean high water,
13 is that what you're talking about?

14 A. I don't think so I'm not an expert, but
15 seeing a lot of shorelines from the boat, you
16 don't see vegetation where the tidal flux is
17 And, also, from the wildlife point of view,
18 there are a lot of shorebirds that sit along
19 there and doing what shorebirds do, fishing and
20 eating And I don't believe that they're going
21 to find this attractive, so, for what it's
22 worth, I think it would eliminate the habitat
23 for them

24 Q And is viewing shorebirds while you're out
25 paddling on the river something you enjoy

1 doing?

2 A That, and a lot of dolphin in there and there's
3 bait strand feeding along there, where the
4 dolphin corral the fish and push them up onto
5 the beach and they often leap up and it's easy
6 pickings because there's all these fish there
7 They're not -- I've never heard of dolphin
8 strand feeding on a revetment

9 Q I'm going to hand you what I have marked as CCL
10 Eighteen-A, B, and C

11 MS ARMSTRONG They're just images that I have
12 e-mailed you coming from the kiawahriver org
13 website

14 Q Hold them up sort of --

15 A Sure

16 Q -- so that the Judge can see them, also
17 Did you take a kayak trip out with a group of
18 people --

19 A Sure did

20 Q -- recently?

21 A Yeah

22 Q When was that?

23 A It wasn't recent Well, "recent" is relative

24 Q We've been talking geologic terms

25 A Yeah, real recent in geologic terms It was

1 the end of March Sunday, March 29th of this
 2 year, I think I didn't take these
 3 photographs, but I was -- I'm not sure
 4 Q Was that what it looked like that day --
 5 A Yeah
 6 Q -- that y'all were out there?
 7 A In fact, I think my boat is right there
 8 (indicating)
 9 Q One of the red boats?
 10 A No, no, the white underneath and yellow on top
 11 Q Okay
 12 A Yeah, I was there
 13 Q Okay And so that where those boats are pulled
 14 up -- about how long are those kayaks?
 15 A Well, mine's 18 feet Most of these are
 16 probably 16 feet and there's a large amount of
 17 beach up here I'd say it's got to be 20 feet
 18 or more of beachfront
 19 Q And that's Eighteen-A Could you flip to the
 20 next one --
 21 A Sure
 22 Q -- Eighteen-B And what's that a picture of?
 23 A Some of the folks that were on the trip I
 24 recognize two of them, one who's in this room
 25 Q And what about --

Testimony of Sophia McAllister

1 because I can't get in that close to either the
2 hammock islands or to some of the other areas

3 Q What kind of things do you enjoy doing when
4 you're out on the Kiawah River in that area of
5 Captain Sam's?

6 A Well, contemplating my naval, I guess That's
7 part of it But I love to see the changes I
8 love to see the wildlife Occasionally, I see
9 other people But most often, I see the
10 dolphins, I see the -- all of the waterfowl who
11 live there I see eagles. We've had in the
12 past eagles nesting on one of the hammock
13 islands out there and I've watched them court,
14 and I've watched them build a nest, and I've
15 watched them rear their babies and watched the
16 babies, or baby, fledge

17 Q. Do you do that from the boat?

18 A Oh, yes Well, most of the time, you can't see
19 them unless you're in a boat.

20 Q Do you ever use the banks of the Kiawah River?

21 A Always, uh-huh (affirmatively responds)

22 Q What do you use the banks for?

23 A Well, to swim when it's really hot In fact,
24 just two weeks ago one of my grandchildren was
25 visiting with me and it was just the two of us

1 And she's only seven, but last year she started
2 kayaking I have a small child-sized kayak
3 that she was proficient enough in to go out on
4 her own So two weeks ago, she was ready to
5 kayak and we went up to the bend in the river
6 And it was her first time, so we decided to go
7 onshore and rest

8 And when we got to the shore, this pod of
9 dolphins showed up and started strand feeding
10 right in the same spot I swear it was in the
11 same spot that I first was there with my son 30
12 years previous And she was just so amazed
13 It's something a grandparent couldn't resist
14 Anyway, we got out and the dolphin went on
15 Then we went swimming and, lo and behold, we're
16 about ten feet out in the water and a dolphin
17 comes between us, just surfacing and swimming
18 on And she's -- it was the first thing she
19 told her class when she got to school This
20 was just this week, in fact So these are
21 wonderful times that I would hate to not be
22 able to have and give to my children and
23 grandchildren

24 Q So when you say "the bend in the river," you're
25 talking about the area where the proposed

1 revetment would be?

2 A I suppose

3 Q You suppose or are you sure that that's where
4 it is?

5 A Well, if my understanding is correct, that the
6 revetment is proposed for that bend in the
7 river, then, yes, that's

8 Q And that day that you and your granddaughter
9 saw the dolphins strand feeding, did you pull
10 your boats up --

11 A Yes

12 Q -- onto the bank in that area?

13 A Oh, yes Well, we pulled them up and got out
14 of the kayaks and sat in the sand It was high
15 tide, so there wasn't a whole lot of sand to
16 sit in, but .

17 Q Even at high tide, there was some sandy beach
18 for you to --

19 A Yes

20 Q -- pull up on and enjoy?

21 A Yes There usually is at that spot

22 Q And is that something that you look forward to
23 sharing -- how many grandchildren do you have?

24 A I have four

25 Q Is that experience something you're looking

1 forward to sharing with your --

2 A Absolutely

3 Q -- other grandchildren?

4 A Yeah

5 Q I want to have you look at -- I think right

6 behind you there's two sets of photographs I

7 want -- can I talk about one of them with you?

8 One of them is marked Eighteen-A, I believe,

9 CCL Eighteen-A

10 A Eighteen-A, uh-huh (affirmatively responds)

11 Q Have you -- does that site look familiar to

12 you?

13 A Oh, yes This is when the Friends of the

14 Kiawah River met and kayaked up to the -- we

15 started at Mango Point, which is in the

16 opposite direction from Inlet Cove, and we

17 kayaked up to the bend in the river So if

18 that's the spot, yes, that's --

19 Q Could you show the Judge, just face it so the

20 Judge can --

21 THE COURT I've seen that picture

22 MS ARMSTRONG Okay, good

23 THE WITNESS Okay

24 MS ARMSTRONG I just wanted to make sure

25 A Yes, March It was in March that we did this

1 Q Okay All right Thanks

2 MS ARMSTRONG There's another set of pictures I
3 think they're -- these are the one's that are
4 marked -- can I look at those for just a
5 second? These are marked as CCL Nine-A, but
6 they are copies of the same exhibit that was
7 admitted as KDP Six Just for convenience, I'm
8 going to refer to them, if the parties are okay
9 with that?

10 THE COURT I assume by silence that means "yes "

11 Q Ms McAllister, just looking at those images,
12 what do you see in those?

13 A Well, I see some hard surfaces and with some
14 plugs, hair plugs, but they're sweet grass, or
15 Spartina

16 Q Is that a river bank? Is that what it appears
17 to be?

18 A That's what it looks like, yes

19 Q Does it -- are they concrete, sort of
20 concrete-looking structures?

21 A Oh, yes Here -- yes, they look like those
22 concrete blocks with holes in them Or do all
23 concrete blocks have -- yes, here -- yeah,
24 these are concrete blocks and some trees staked
25 up and some plugs

1 Q Now, if that kind of structure -- if that's
2 what the revetment looked like on the banks of
3 the Kiawah River, how would that affect your
4 ability to use the banks of the Kiawah River?

5 A Well, I wouldn't be able to, would I? I
6 couldn't pull my kayaks up The dolphins
7 couldn't strand feed here My granddaughter
8 couldn't get out and walk around the bend down
9 to the -- on the banks of the Kiawah River
10 here

11 Q And how about esthetically, how would that
12 effect your enjoyment of paddling on the river?

13 A Well, I wouldn't like it I would be very
14 disappointed in the place that's been really
15 dear to me for 30 years

16 Q And how long have you been paddling in -- on
17 the Kiawah River along the Captain Sam's Spit
18 area?

19 A Oh, that, for 20 years

20 Q And have you observed any changes -- what kind
21 of changes have you observed over the course of
22 the past 20 years?

23 A It's hard to be specific with something like
24 this As I'm sure everyone really knows by
25 this time, that no change happens overnight

1 school starts again, there are a lot fewer
2 people on the island, isn't that true?

3 A That's true.

4 Q All right And would you say it dropped 80 to
5 90 percent?

6 A Again, I can't speak to that

7 Q Don't know?

8 A I don't know

9 Q We can call it a large drop in population?

10 A I would think, yes

11 Q Okay

12 A There are not as many renters is what

13 Q Okay And you described -- and these were your
14 words -- when you go to that inlet, you said
15 occasionally you see other people, is that
16 correct?

17 A That's right

18 MR HOWE That's all I got

19 MS McALLISTER - REDIRECT EXAMINATION BY MS

20 ARMSTRONG

21 Q Ms McAllister --

22 THE COURT Hold on one moment

23 MS ARMSTRONG Oh, I'm sorry, Your Honor

24 THE COURT All right

25 Q Ms McAllister, from your dock at Inlet Cove,

1 can you see Captain Sam's Spit?

2 A Yes

3 Q So it's how close from your dock down to the

4 bend in the river, approximately?

5 A I'm not all that good, but I would say that

6 maybe a quarter of a mile, could be a third of

7 a mile

8 Q And how far is Bird Key from your dock --

9 A Oh

10 Q -- from where you put your boat in?

11 A That would be -- I've used a GPS I want to

12 say 11 miles It might be -- that might have

13 been another trip, but I would say

14 Q So is it more convenient for you go to

15 southwest?

16 A Oh, I only go that far if I have someone else

17 to paddle with, and planning

18 Q Okay And why do you prefer going to Captain

19 Sam's Spit?

20 A Oh, because I can go there really quickly I

21 don't have to make tide charts and I can just

22 say, okay, I want to go out for 30 minutes, 45

23 minutes, an hour, and I can get in my kayak and

24 go It doesn't matter whether it's high tide

25 or low tide and I can go by myself, which I

Testimony of Sidi Limehouse

1 MR LIMEHOUSE I'd like to still be here tomorrow

2 SIDI LIMEHOUSE, having been duly sworn, examines and

3 testifies as follows

4 MR LIMEHOUSE - DIRECT EXAMINATION BY MS ARMSTRONG

5 Q Mr Limehouse, where do you live?

6 A I live on Johns Island, South Carolina

7 Q Okay And you have an accent You don't sound

8 like a lot of people that are living down in

9 that area these days Where did you grow up?

10 A I grew up right there A lot of the -- most of

11 the people there now talk like Yankees

12 Q And where is Johns Island in relation to Kiawah

13 Island?

14 A Kiawah Island is the ocean part of Johns

15 Island Johns Island is behind Kiawah, more or

16 less That's Kiawah and Seabrook Behind that

17 is the bigger island, which is a barrier

18 island, but it's not on the ocean It's behind

19 the ocean.

20 Q So Johns Island is separated from Kiawah Island

21 by a body of water?

22 A Yes, ma'am

23 Q Okay And what body of water is that?

24 A Kiawah River

25 Q Okay

collection for some of their research studies?

A Yeah, uh-huh (affirmatively responds)

Q And did you notice decreasing populations of the terrapins in the years that you assisted with the study?

A No, because I -- I didn't really assist in the study I just assisted in the physical catching of the terrapins And so we would catch 25 or 30 and I didn't know, you know, if any were missing or whatever I didn't do that part of it

Q What are your concerns about the impacts that will occur if the revetment as proposed is constructed along the banks of the spit?

A Sticking with the terrapins, okay, that is one place that they have left to nest Everything -- every other place they have is all developed, so my thought is that -- and I may not be correct in this -- is the decline is because of development, because of people Whatever adverse effect different things have, all of them -- all human activity affects everything and it affects those terrapins apparently in a very negative way

Q And how would the revetment have an impact on

1 some of the things that you talked about? You
2 said that you step out, you like to take people
3 so they can get their feet on the sand and
4 experience what the spit's about How would
5 the revetment affect that, those feelings that
6 people get?

7 A Well, it would just eliminate it altogether
8 It would just -- you could go there I mean,
9 the doctor has testified about the revetment
10 and it has a sign on it that says you can't get
11 on it Well, if you can't get on it for --
12 physically you can't get on it, unless you want
13 to break your neck You know, you can't walk
14 on something like that Can't pull a boat up
15 on it, unless you're going to mess up your boat
16 or kayak I mean, it's just -- it wouldn't
17 work

18 I mean, it would just destroy that whole beach,
19 is what it would do, and that's the only beach
20 like that on Kiawah, the only one

21 MS ARMSTRONG Give me just a minute, Your Honor

22 Q Mr Limehouse, have you described to the Court
23 all of the concerns that you have about the
24 impacts? Is there anything else that you'd
25 like to add about your concerns about this

1 revetment and its impacts on the spit and the
2 values that you've talked about today?

3 A Well, my main concern is -- are the terrapins
4 My other concerns are the dolphins, feeding
5 dolphins

6 My third concern is the fact that -- and this,
7 in human terms, is my biggest concern -- is the
8 fact that that area, which is a half a mile
9 long and however wide it is, will be denied the
10 general public The general public will not
11 have a use -- you know, couldn't use it because
12 you couldn't -- just couldn't use it I mean,
13 it's just not -- it would just be lost to them,
14 okay?

15 And then that's the only place I mean, that's
16 the only place on Kiawah, only place in that
17 whole section of the river that you can do
18 that, except if you go way up on the other end
19 of Kiawah, which ten or 11 miles up there, and
20 go to Bear Island, where you can pull your boat
21 up

22 MS ARMSTRONG I don't have any other questions of
23 this witness, Your Honor

24 MR WHITFIELD-CARGILE Nothing, Your Honor

25 THE COURT Mr Howe

Testimony of Bill Eiser

1 Q Do you have the regulations in front of you?

2 A Yes

3 Q Do you have a copy of the statute with you?

4 A Yes

5 Q Okay Can you turn in your statute to

6 48-39-150?

7 A All right

8 Q And section (A) (5) requires you to consider the

9 extent to which the development could effect

10 existing public access to tidal and submerged

11 lands, navigable waters and beaches or other

12 recreational coastal resources How did this

13 particular statute play into your decision?

14 A Well, it basically directs me to do what it

15 says right here, which is to consider how much

16 public access there is in the area where the

17 revetment is proposed to be constructed, based

18 on my observations or based on any other

19 information that I might become aware of

20 Q Okay And how did this element factor into

21 your decision?

22 A Well, at the time that I've done my site

23 visits, the four site visits specifically for

24 this project review, I have seen people walking

25 along that section, I've seen kayaks pulled up,

1 I've seen people either fishing or crabbing, I
2 can't remember which So I think that there
3 definitely is some public access and use in
4 that area I can't really, you know, quantify
5 how many people a day or a month go back there,
6 but I think it's certainly true that if this
7 articulated concrete block structure were
8 built, that it would effectively remove the
9 public's ability to use that half-mile-long
10 shoreline

11 Q Okay Before we -- actually, I want to start
12 with the specific project standards I recall
13 in your deposition and in your decision
14 document you said that you determined that the
15 specific project standards found in regulation
16 30-12(C) do not bar this project, do you recall
17 that?

18 A Yeah, the 30-12(C) is the specific regulation
19 that talks about bulkheads

20 Q Okay

21 A And I didn't feel that that regulation gave me
22 the guidance that would require me to out and
23 out deny this permit application

24 Q Why?

25 A Well, maybe we can go through the different