STATE OF SOUTH CAROLINA

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

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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

RECORD ON APPEAL
VOLUME I OF VI – PAGES 1 - 428

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INDEX

Page

VOLUME I

ORDERS

Amended Final Order and Decision, dated February 26, 2010 1

Order on Motions for Reconsideration, dated February 26, 2010 32

Order Suspending Final Order and Decision, dated February 18, 2010 40

Final Order and Decision, dated January 22, 2010 41

Amended Order of Recusal, dated August 19, 2009 72

Consent Order for Consolidation, dated February 23, 2009 74

DHEC Board Denial Letter, dated January 14, 2009 79

PLEADINGS

KDP's Request for Final Review Conference, dated December 30, 2008 83

SCCCL s Request for Final Review Conference, dated December 31, 2008 88

KDP's Request for Contested Case Hearing, dated January 20, 2009 92

SCCCL's Request for Contested Case Hearing, dated January 29, 2009 107

KDP s Motion for Expedited Hearing, dated February 13, 2009 112

KDP's Prehearing Statement, dated May 29, 2009 125

SCCCL's Prehearing Statement, dated June 1, 2009 138

DHEC's Prehearing Statement, dated June 2, 2009 146

SCCCL's Amended Prehearing Statement, dated July 23, 2009 168

DHEC's Amended Prehearing Statement, dated August 5, 2009 177

KDP's Amended Prehearing Statement, dated August 7, 2009 181

SCCCL's Motion for Recusal, dated August 17, 2009 183

DHEC's Amended Motion for Continuance, dated August 21, 2009 185

DHEC's Amended Proposed Final Order and Decision, dated November, 2009 191 A

SCCCL's Motion to Reconsider, to Open the Record and Admit New Evidence and for Stay, dated February 2, 2010 220

DHEC's Motion to Reconsider, dated February 3, 2010 251

DHEC s Motion to Strike and Reply to Return of KDP to Motion to Stay, dated February 17, 2010 262

SCCCL's Notice of Appeal, dated March 26, 2010 265 A

DHEC's Notice of Appeal, dated March 29, 2010 265 C

TRANSCRIPTS

Administrative Hearing Transcript, dated August 24-29, 2009 266

Transcript Pages 1-8, Index 267

Transcript Pages 11-38, Arguments 274 A

Transcript Pages 65-70, Portion of Mr Whitfield-Cargile's Opening Statement 274 CC

Transcript Pages 73-136, Portion of Mr Long Testimony, Direct Examination by Mr Walker 274 II

Transcript Pages 143-148, Portion of Mr Long Testimony, Direct Examination by Mr Walker 313

Transcript Pages 158-219, Portion of Mr Long Testimony, Direct Examination by Mr Walker 319

Cross Examination by Mr Chandler 352

VOLUME II

Transcript Pages 220-271, Portion of Mr Long Testimony,
Cross Examination by Mr Whitfield-Cargile 377

Redirect Examination by Mr Walker 425

Recross Examination by Mr Whitfield-Cargile 427

Transcript Pages 275-376, Testimony of Mr Permar,
Direct Examination by Mr Howe 428 A

Cross Examination by Ms Armstrong 480

Cross Examination by Mr Whitfield-Cargile 494

Redirect Examination by Mr Howe 512

Recross Examination by Ms Armstrong 522

Recross Examination by Mr Whitfield-Cargile 522

Transcript Pages 377-439, Testimony of Mr DeWolff,
Direct Examination by Mr Walker 527

Cross Examination by Ms Armstrong 558

Cross Examination by Mr Whitfield-Cargile 566

Redirect Examination by Mr Walker 578

Recross Examination by Mr Whitfield-Cargile 580

Transcript Pages 440-493, Portion of Mr Bohannon Testimony,
Direct Examination by Mr Walker 585

Transcript Pages 496-578, Portion of Mr Bohannon Testimony
Direct Examination by Mr Walker 625 J

Proffered Direct Examination by Mr Walker 649

Continued Direct Examination by Mr Walker 650

Cross Examination by Ms Armstrong 651

Cross Examination by Mr Whitfield-Cargile 663

Redirect Examination by Mr Walker 686

Recross Examination by Ms Armstrong 694

Recross Examination by Mr Whitfield-Cargile 695

Transcript Pages 579-647, Portion of Dr Kana Testimony,
Direct Examination by Mr Walker 700

Cross Examination by Ms Armstrong 736

VOLUME III

Transcript Pages 649-815, Portion of Dr Kana Testimony
Cross Examination by Ms Armstrong 769

Cross Examination by Mr Whitfield-Cargile 852

Redirect Examination by Mr Walker 870

Recross Examination by Ms Armstrong 910

Recross Examination by Mr Whitfield-Cargile 913

Transcript Pages 816-898, Testimony of Mr Walton,
Direct Examination by Mr Walker 932

Cross Examination by Ms Armstrong 977

Cross Examination by Mr Whitfield-Cargile 996

Transcript Pages 899-954, Testimony of Dr Young,
Direct Examination by Ms Armstrong 1015

Cross Examination by Mr Howe 1054

Redirect Examination by Ms Armstrong 1068

Transcript Pages 955-996, Testimony of Dr Vanderwerker,

Direct Examination by Ms Armstrong 1071

Proffered Direct Examination by Ms Armstrong 1090

Continued Direct Examination by Ms Armstrong 1091

Cross Examination by Mr Whitfield-Cargile 1093

Cross Examination by Mr Walker 1094

Redirect Examination by Ms Armstrong 1100

Recross Examination by Mr Whitfield-Cargile 1101

Recross Examination by Mr Walker 1103

Redirect Examination by Ms Armstrong 1104

Recross Examination by Mr Whitfield-Cargile 1105

Transcript Pages 997-1017, Testimony of Mr Limehouse 1112

Direct Examination by Ms Armstrong 1113

Cross Examination by Mr Howe 1129

Cross Examination by Mr Whitfield-Cargile 1133

Transcript Pages 1018-1054, Testimony of Ms McAllister 1133

Direct Examination by Ms Armstrong 1134

Cross Examination by Mr Howe 1150

Redirect Examination by Ms Armstrong 1160

Recross Examination by Mr Howe 1164

Transcript Pages 1055-1075, Portion of Dr Dean Testimony, Direct Examination by Ms Armstrong 1171

Transcript Pages 1086-1114, Portion of Dr Dean Testimony, Direct Examination by Ms Armstrong 1182

Voir Dire Examination by Mr Howe 1206 D

Transcript Pages 1121-1135, Testimony of Mr O'Rourke,
Direct Examination by Ms Armstrong 1206 O

Cross Examination by Mr Walker 1213

Redirect Examination by Ms Armstrong 1215

Cross Examination by Mr Whitfield-Cargile 1217

Transcript Pages 1138-1159, Portion of Dr Dean
Continued Testimony 1221

Transcript Page 1171, Portion of Dr Dean Continued Testimony,
Continued Direct Examination by Ms Armstrong 1243

VOLUME IV

Transcript Pages 1192-1196, Portion of Mr Martin Testimony,
Direct Examination by Ms Armstrong 1243 A

Transcript Pages 1215-1267, Testimony of Mr Eiser,
Direct Examination by Mr Whitfield-Cargile 1244

Transcript Pages 1268-1322, Testimony of Dr Hughes,
Direct Examination by Mr Whitfield-Cargile 1296

Voir Dire Examination by Mr Walker 1300

Continued Direct Examination by Mr Whitfield-Cargile 1309

Cross Examination by Ms Armstrong 1333

Cross Examination by Mr Walker 1335

Redirect Examination by Mr Whitfield-Cargile 1349

Recross Examination by Mr Walker 1351

Transcript Pages 1323-1522, Continued Testimony of Mr Eiser,
Direct Examination by Mr Whitfield-Cargile 1352

Cross Examination by Ms Armstrong 1397

Cross Examination by Mr Walker 1426

Redirect Examination by Mr Whitfield-Cargile 1511

Recross Examination by Ms Armstrong 1531

Further Direct Examination by Mr Whitfield-Cargile 1550

Transcript Pages 1523-1557, Testimony of Mr Dorcas,
Direct Examination by Ms Armstrong 1551

Cross Examination by Mr Howe 1572

Redirect Examination by Ms Armstrong 1581

Transcript Pages 1558 1574, Continued Testimony of Mr Permar,
Direct Examination by Mr Walker 1587

Cross Examination by Mr Whitfield-Cargile 1595

Cross Examination by Ms Armstrong 1602

Transcript Pages 1575-1593, Continued Testimony of Mr Long,
Direct Examination by Mr Walker 1604

Cross Examination by Mr Chandler 1609

Cross Examination by Mr Whitfield-Cargile 1614

Transcript Pages 1595-1653, Closing Statements,
Mr Walker 1623

Mr Chandler 1638

Mr Whitfield-Cargile 1656

Mr Howe 1674

VOLUME V

Deposition of Jeffrey R Mollenhauer, dated September 1, 2009 1682

Examination by Ms Armstrong 1685

Examination by Mr Walker 1706

Examination by Mr Whitfield-Cargile 1731

Further Examination by Ms Armstrong 1741

Further Examination by Mr Walker 1745

Further Examination by Mr Whitfield-Cargile 1749

OTHER MATERIALS

SCCCL's Exhibit 1, Environmental Inventory of Kiawah Island, Geological & Coastal Processes Section 1751

SCCCL's Exhibit 2(a), Map, 1922 U S Coastal and Geodetic Survey (oversized) 1936

SCCCL's Exhibit 3(a), Photos, 1949 Aerial (oversized) 1937

SCCCL's Exhibit 8, Map, COBRA Unit M-08 (oversized) 1938

SCCCL's Exhibit 10(a-u), Photos, Ground and Aerial of the Riverbend, Spit and Inlet 1939

SCCCL's Exhibit 18(a-c), Photos, dated March 29, 2009 1960

DHEC's Exhibit 2, Technical Summary 1963

DHEC's Exhibit 4, Letters from Eiser 1970

DHEC's Exhibit 8, Comment Letters 1976 A

DHEC's Exhibit 20, Powerpoint, dated April, 2008 1977

DHEC's Exhibits 63 and 64, Emails between Long and Bohannon 1990

KDP s Exhibit 1, Image of location of Bulkhead, dated December 14, 2008 1995

KDP's Exhibit 2, Development Agreement, dated October 12, 2005 1996

KDP's Exhibit 4, Photos 2040

KDP's Exhibit 5, Photos 2064

KDP s Exhibit 6, Photos, Articulated Concrete Block 2090

KDP s Exhibit 10, Application and Cover Letters,
dated February 29, 2008 2095

KDP's Exhibit 11, Corps Nationwide Permit Verification Letter,
dated April 4, 2008 2123

KDP's Exhibit 14, Letter from Davis to Eiser, dated May 22, 2008 2141

KDP's Exhibit 15, Letter from McNulty to Eiser, dated May 30, 2008 2142

KDP's Exhibit 16, Fish and Wildlife Service Letter,
dated June 12, 2008 2143

KDP's Exhibit 17, Fish and Wildlife Service Letter,
dated June 16, 2008 2145

KDP's Exhibit 18, Letter from Pantlik to Eiser, dated June 24, 2008 2147

KDP s Exhibit 19, Letter from Folk to Pantlik, dated June 23, 2008 2150

KDP's Exhibit 20, Letter from Pantlik to Eiser, dated June 30, 2008 2152

KDP's Exhibit 21, Corps Nationwide Permit Verification Suspension Letter,
dated July 14, 2008 2153

KDP's Exhibit 22, Fish and Wildlife Service Letter,
dated August 14, 2008 - See KDP 23 2155

KDP s Exhibit 23, Fish and Wildlife Service Letter,
dated August 14, 2008 2156

VOLUME VI

KDP's Exhibit 24, Letter from Pantlik to Eiser,
dated September 2, 2008 2159

KDP's Exhibit 25, Oertel and Basco Reports and Resumes 2165

KDP's Exhibit 26, Impact Report, dated August 2008
- see KDP's Exhibit 25 2208

KDP's Exhibit 27, Sand Accumulation Report, dated August 2008 - see KDP's Exhibit 25 2209

KDP's Exhibit 28, Scour Potentials 2210

KDP's Exhibit 29, Letter from Bohannon to Eiser, dated September 2, 2008 2212

KDP's Exhibit 30, Letter from Kana to Wells, dated August 28, 2008 2216

KDP s Exhibit 31, Letter from Reed to Eiser, dated August 31, 2008 2219

KDP s Exhibit 32, Letter from McNulty to Eiser, dated September 2, 2008 2220

KDP s Exhibit 33, Letter from Long to Eiser, dated September 3, 2008 2221

KDP's Exhibit 34, Email from O'Rourke to Eiser, dated September 5, 2008 2223

KDP's Exhibit 35, Letter from Pantlik to Eiser, dated September 8, 2008 2224

KDP's Exhibit 37, Corps Nationwide Permit Verification Lift of Suspension Letter, dated September 9, 2008 2226

KDP's Exhibit 39, Letter from Pantlik to Eiser, dated September 18, 2008 2228

KDP's Exhibit 44, Critical Area Permit, dated December 18, 2008 2231

KDP's Exhibit 48, Maps (oversized) 2242

KDP's Exhibit 53, 2008 and 2009 Annual State of the Beaches Reports 2243

KDP's Exhibit 56, Overlay Map (oversized) 2254

KDP s Exhibit 57, Overlay Map (oversized) 2254

KDP's Exhibit 58 Conceptual Sketches 2255

KDP's Exhibit 69, Kana Resume 2257

KDP's Exhibit 70, DHEC Certified Mail Address List, dated January 14, 2009 2266

KDP's Exhibit 75, Photos 2270

KDP's Exhibit 77, Map Legend (oversized) 2277

KDP's Exhibit 78, Photos, Captain Sam's Spit and Boat Ramp, dated August 27, 2009 2278

CERTIFICATE OF COUNSEL 2380

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

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

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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

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[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 Park[3] 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 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 Kana[6] explained, in the

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[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

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Among other things Dr Kana is the principal architect of two successful manmade re locations of Captain Sam s Inlet in 1983 and 1996 The two re locations 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 (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 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 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 CCL s argument that KDP can still sell lots on Captain Sam s without the revetment," the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated 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 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 Bohannon[11] 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

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[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 Impacts[13]

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

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[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

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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 houses[15] 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

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[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

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[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 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 118 132-33 530 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 Nat l 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
>
> * * *
>
> (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
>
> * * *
>
> (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,
> >
> > * * *
> >
> > (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 for 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

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[19] The decision of the South Carolina Supreme Court in 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) 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 statues 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

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[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 Plan[22]

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]

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[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 I On, L L 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 polices 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

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[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

31 SCA

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners II Petitioners vs South Carolina Department of Health and Environmental Control Respondents	Docket No 09-ALJ-07-0029-CC **ORDER ON MOTIONS FOR RECONSIDERATION**
South Carolina Coastal Conservation League Petitioners vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners II Respondents	Docket No 09-ALJ-07-0039-CC

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 issue 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

Certified to be a true and correct copy of the original record on file with the South Carolina Administrative Law Court

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1 of 8 pgs

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 CCL 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, SCRCP as a basis for the request in its motion Rule 60(b)(2), SCRCP 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 SC 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

(2) 450

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 ' 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 Etiwan 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 it 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 ' Brown v Bi Lo, 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)

(3)540

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

CCL 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 CCL 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 Bi-Lo, 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 [2] See Kiriakides v United Artists Communications, Inc , 312 S C 271 275 440 S E 2d 364 366 (1994) (when construing a

[2] 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

④ 500

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

Consideration of CMP 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 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

(6) SD

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

CCL requests that the effectiveness ' of the Final Decision in this case be stayed until all appeal opportunities have been exhausted or concluded [3] In support of this motion CCL cited ALC Rule 29 (E), SCRP 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 supersedes 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 CCL 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

[3] In making this request I assume CCL presumes that their Motion for Reconsideration is denied

(7) SCD

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 hereof in the United States mail postage paid or in the In eregency Mail Service addressed to the party/ies) or heir a torney(s)
This 26th day of February, 2010
By: Judicial Law Clerk

8.SCD

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

A hearing was held in this matter on August 24 through August 28 2009, at the Administrative Law Court (ALC or Court) This Court issued a Final Order and Decision on January 22 2010 Thereafter Petitioners South Carolina Coastal Conservation League and Respondents South Carolina Department of Health and Environmental Control both filed a Motion for Reconsideration Therefore

IT IS HERFBY ORDFRFD that my Final Order and Decision is hereby suspended until a decision is made upon both Petitioner s and Respondent s Motions

AND IT IS SO ORDERED

Ralph King Anderson III
Chief Administrative Law Judge

February 18 2010
Columbia South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order upon 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 attorney(s) of their attorney(s)
This 18th day of February 2010
By Susan M Scott
Judicial Law Clerk

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FEB 18 2010
SC ADMIN LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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

APPEARANCES

Trenholm Walker & Gedney 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 (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

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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

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[1] The Court left the record open to receive the deposition testimony of Jeff Mollenhauer an expert witness for CCI 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 Park[3] 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 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 ' However as Dr Kana[6] explained in the

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[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

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Among other things Dr Kana is the principal architect of two successful manmade re locations of Captain Sam s Inlet in 1983 and 1996 The two re locations 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 (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 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 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 CCL s argument that KDP can still sell lots on Captain Sam s without the revetment ' the Court finds that the developable land on the peninsula would not likely be readily marketable if the bank was not stabilized and the erosion were allowed to continue unabated 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 is 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 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 Bohannon[11] 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

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[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 That delay is further exacerbated by the fact that there was no provision in the regulations allowing cancellation of a permit for failure to furnish this affidavit within thirty days 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

not be necessary and an ACB mat much shorter in width than forty feet may well suffice to 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 Impacts[13]

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

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[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 is to the **current** level of activity on the beach from

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

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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 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

not necessarily problematic The Department and CCL further aver that the people and their 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 houses[15] 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

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

habitat as occurred with the permitted project adjacent to the Ocean Course at the opposite end of Kiawah Island

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

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[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

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 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

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[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 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 118 132-33 530 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 Nat l 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
>
> * * *
>
> (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
>
> * * *
>
> (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 49-38-30 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
> >
> > * * *
> >
> > (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 for 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)[4] 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 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 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 statues 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 [19]

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[19] 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 70 and thus be guided by the following R 0 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

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 [20] 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

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

[20] 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

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 I 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(I) 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 Plan[21]

The Department and C C L 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)) [22]

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 polices enumerated in this section are to provide guidance on reaching and maintaining a balance between development and conservation of coastal resources Id

---

[21] 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 The Court recognizes based upon the record before it that these issues may soon be determined by the Supreme Court of South Carolina There is however no need for this Court to await that clarification upon that issue in this case because I do not find the proposed project is contrary to the Coastal Zone Management Plan even if it has the force and effect of law Nevertheless 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 if Supreme Court determines that the CZMP is enforceable See I On L L 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)

[22] 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

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 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

January 22 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 22nd day of January, 2010
By: Heidi M. Scott
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kiawah Development Partners II, Petitioner, vs South Carolina Department of Health and Environmental Control, Respondent	)	Docket No 09 ALJ-07-0029-CC Docket No 09-ALJ-07-0039-CC **AMENDED ORDER OF RECUSAL**
South Carolina Coastal Conservation League, Petitioner, v South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	)	**FILED** AUG 1 9 2009 SC ADMIN LAW COURT

The Court, during a motion hearing by telephone on August 17, 2009, discovered that Mr Leonard Long is the client of attorney Trenholm Walker evidently as a partner in Kiawah Development Partners, II

At the same time in the 1960's, Leonard Long and the undersigned were members of the same "Greek" social fraternity at the University of South Carolina [1] This fact was made known by the Court to counsel for all parties South Carolina Coastal Conservation League (SCCCL) would not waive the potential disqualification and has moved for disqualification

Under normal circumstances, mere social acquaintance would not alone be disqualifying However in the context of a social fraternity, the situation is different,

[1] At one point the undersigned was President of the fraternity

particularly from the standpoint of public perception Social fraternities, in the opinion of the Court, are viewed as secret, ritualistic and exclusive and known for engendering lifelong friendships Notwithstanding the fact that the undersigned has had no significant contact with Leonard Long since the 1960's, it is the opinion of the Court that the unique status of social fraternities requires his disqualification because "his impartiality might reasonably be questioned" [2]

THEREFORE, IT IS ORDERED that the undersigned, John D McLeod, be and he hereby is recused from hearing the captioned case

AND IT IS SO ORDERED

August 19, 2009
Columbia, SC

John D McLeod, Judge
S C Administrative Law Court

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 19 day of August, 2009

By Anthony R Goldman
Judicial Law Clerk

[2] This ruling is limited in scope and should not be viewed as opening a door for disqualification based on any other social contact or membership It is strictly limited to membership in Greek social fraternities

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II Petitioner vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT Respondent	DOCKET NO 09-ALJ-07-0029-CC **CONSENT ORDER OF CONSOLIDATION**
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE Petitioner, vs KIAWAH DEVELOPMENT PARTNERS and SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL Respondents	DOCKET NO 09-ALJ-07-0039-CC

FILED
FEB
SC ADMIN

These two contested case proceedings come before me upon request of, and consent by, the parties to their consolidation

These two proceedings arise from the same critical area permit issued by SCDHEC-OCRM and involve primarily the same factual and legal issues Consolidation of the two proceedings will make them more efficient avoid duplication and potentially inconsistent determinations and is in the interests of justice

By their signatures hereto counsel for all the parties consent to the consolidation

CONSENT ORDER OF CONSOLIDATION

IT IS THEREFORE, ORDERED that these two contested case proceedings are consolidated for all purposes

AND IT IS SO ORDERED

John D McLeod
Administrative Law Judge

Columbia, South Carolina
February 23rd 2009

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 23 day of February 2009
By Anthony R Gardner
Judicial Law Clerk

CONSENT ORDER OF CONSOLIDATION

WE CONSENT

By _____

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

WE CONSENT

By _____

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ATTORNEYS FOR SOUTH CAROLINA
COASTAL CONSERVATION LEAGUE

CONSENT ORDER OF CONSOLIDATION

WE CONSENT

By _____

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Chairman

Edwin H Cooper III
Vice Chairman

Steven G Kisner
Secretary

D H E C

PROMOTE PROTECT PROSPER

C Earl Hunter Commissioner

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Henry C Scott

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Promoting and protecting the health of the public and the environment

S.C. Board of Health and Environmental Control, Telephone (803) 898-3309 Fax (803) 898-3393

January 14, 2009

U S Mail - CERTIFIED – Return Receipt

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Via Interagency Mail Delivery
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1362 McMillan Avenue, Suite 400
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RE **Docket No 08-RFR-147** – *Request review of staff decision dated December 18 2008, to issue Permit No OCRM-08-117-E for the construction of an erosion control structure (revetment) at Beachwalker Park, Kiawah Island, with conditions that modify the application.*

The S C Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter

S C Code Section 44-1-60(F), 2006 Act No 387, Section 48, provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference "

A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website http://www.scalc.net. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550)

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum

Sincerely,

Lisa Lucas Longshore

Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy, parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20826

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ALAN FREEMAN (SC CT)
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DANIEL S COUPENEY JR
DENISE K PINE

EXHIBIT
tabbies
B

December 30, 2008

VIA FACSIMILE TRANSMITTAL 803-898-3393
and U S FIRST CLASS MAIL
Clerk of the Board
Board of Department of Health and Environmental Control
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

RE Written Request for Final Review
OCRM Permit OCRM-08-117-E
Project Kiawah River Bend Revetment
Applicant Kiawah Development Partners II, Inc

Dear Members of the Board

I and Gedney M Howe, III, represent Kiawah Development Partners II, Inc (' KDP"), the applicant for the above OCRM permit seeking to construct a revetment along the eroding bank of the Kiawah River On December 18, 2008, OCRM approved the permit with conditions that severely undermine the effectiveness of the revetment The conditions allow the construction of the revetment along the bank for only 270 feet, a distance that is but 10% of the requested distance The conditional permit completely fails to protect the remaining shoreline that continues to slough off into the Kiawah River

I am writing on behalf of the applicant to request final review of the permit by your board as provided in S C Code § 44-1-60(E) I have enclosed a copy of the permit as attachment No 1

THE PROJECT

The location of the proposed revetment is on the backside of Kiawah Island along the bank of the Kiawah River, a tidal river that connects to the Atlantic Ocean through Captain Sam's Inlet that separates Kiawah Island from Seabrook Island The river bank in question is on the "inland ' side of the southwestern peninsula of Kiawah Island that is known as Captain Sam's Spit This peninsula is about 1 3 miles in length and bounded on one side by the ocean and on the other by the Kiawah River The proposed revetment is along the bank in the bend of the river at the beginning of the peninsula

The purpose of the revetment is to stop continual erosion of high ground above the OCRM critical line on the riverbank for about a distance of 2783 feet (extending about 30% of the length of the Spit) I have enclosed a copy of color photographs of the location as attachment No 2 These show the extensive, rapid, destructive erosion in this area The bank in question is adjacent to a public park operated by the Charleston County Park and Recreation Commission ("PRC") known as Beachwalker Park The erosion has already damaged the PRC 's parking lot and riverside gazebo PRC's other park improvements will soon be severely damaged The park leases the land from a sister entity of KDP which owns the upland for the park as well as the upland along the river bank for the length of the proposed revetment

The proposed revetment is not a typical vertical bulkhead It would consist of a retaining wall working in combination with a sloped matt of articulated concrete block on the intertidal riverbank that would facilitate and foster the growth of marsh grass and other vegetation Enclosed are a copy of the permit application as attachment No 3 and a photo of a similarly constructed revetment OCRM permitted recently in Charleston County as attachment 4 The 2,783' length of the revetment was recommended by nationally recognized experts in shoreline dynamics and tidal flows who were retained by KDP to come up with the most environmentally and aesthetically appropriate solution for elimination of the erosion problem along the bank at the river's bend Short bulkheads adjacent to tidal waters such as the Kiawah River often transfer the erosion from the location of bulkhead to the land on either end The length proposed was specifically to *prevent* a shifting of the problem along the bank and thus accomplish a lasting solution

THE EMERGENCY

The significant continuing and rapid erosion presents an emergency KDP requests that the board conduct a conference to hear the appeal at its earliest convenience KDP daily suffers irreparable harm to its land from this incessant erosion and winter storms are on the near horizon

This erosion has been advancing unabated during the inordinate time the staff took to act on KDP's application KDP submitted its application on February 28, 2008 Three months after filing the staff improperly cancelled the application After the application was reinstated, no action was taken for more than 6 additional months Staff did not render its decision until nearly ten months after filing, despite the requirement of R 30 4(C) that staff decide applications for permits for minor development activity "within 30 days" after an application is complete *See*, S C Code § 48-39-10 (N) and S C Reg R 30-1(D)(34) ("Minor Development Activity - the construction, maintenance, repair or alteration of any erosion control structure, the construction of which does not involve dredging ")

THE APPEAL

The fundamental grounds for appeal are that (a) the proposed revetment complies with the controlling statures and regulations and (b) there are no significant negative impacts anywhere from the revetment, much less any significant negative impacts to the "critical areas" under OCRM s jurisdiction OCRM staff's ground for denying the permit for the majority of the revetment is its contention that potential residential development of a part of the highland of Captain Sam's Spit (*i e* , behind the state's beachfront setback line) as allowed under the Town's zoning ordinance would have a negative effect on rare and endangered species as well as the protected dune area This unsupported assertion is inaccurate and speculative

The applicant's grounds for challenging the staff's decision, in particular Special Condition No 1 limiting the length of the revetment to a small fraction of the requested distance, include, but are not limited to, the following

1 The application and proposed revetment comply with the statutes and regulations governing bulkheads and revetments
2 The proposed revetment will have no significant negative impacts, including no negative impacts at all in the critical area
3 The enormously reduced distance for the revetment approved by staff will, if built, possibly worsen and hasten erosion on either end of the 270' structure unless the remainder of the proposed revetment is constructed
4 The staff's decision was based on factors beyond its purview, *i e* , whether any development should be allowed on Captain Sam's Spit on the highland behind both the critical line and beachfront setback line This development authorization rests with the local municipality, not the Department
5 As the applicant does not have a development plan and no development plan was submitted to the staff The staff's determination of alleged negative effects is inaccurate, has no factual support, and is pure speculation
6 If and when the applicant commences development of the upland, the applicant will be required to comply with all applicable laws and regulations, including those of the Department governing stormwater and land disturbance This later event, if it should occur, is the appropriate stage in the permitting process for measuring any effects of the development of the upland with respect to stormwater runoff and land disturbance "Uses," however, such as low density, single family residential houses are outside the purview of the Department in acting on an application such as this one
7 Staff's determination appears to be based also on several incorrect assumptions and conclusions that include, but are not limited to, the following

a Staff provides in the much-reduced permit that the issuance of a permit for the requested distance will facilitate development in a "pristine dune area " This is an incorrect statement on two counts 1) the dunes are not being developed -- all land subject to any potential future development will occur behind the OCRM regulated beach/dune system, and 2) local zoning by the Town of Kiawah Island is the sole legal authority for any potential uses and development outside protected dunes and critical areas

b The staff implies in the conditional permit that it evaluated "overall plans and designs of a project" and was concerned about "the extent and significance of negative impacts on GAPCs " As stated earlier, there were no "overall plans and designs" in existence and *none were submitted requested nor required* Without them it is impossible to assess the cumulative foreseeable impacts, positive or negative, from the upland development, which is, in any event, well beyond the scope of this application

c The staff states in the reduced permit that "this area" is a barrier island This is misleading It is true that this revetment would extend partially along the side of a peninsula that is a tiny part of a barrier island over ten miles long and having 5,000 acres of upland, however, the particular land subject to the development is not a barrier island

d The staff states in the reduced permit that "this area" is a dune area. The revetment is not being built in, or anywhere near, a dune area It is being constructed on a river bank on the side of the peninsula away from the ocean Additionally, possible future development of a small part of the peninsula, well away from Captain Sam's Inlet, will not be in the dune area Using the OCRM definition, all development would occur outside of the "beach/dune system " *See*, definition in S C Code § 48-39-10 (J)(4) ("beach/dune system is the area from the mean high water mark to the setback line as determined in Section 48-39-280")

e The staff suggests that granting the permit to stop erosion of highland on the river "could affect the habitats for rare and endangered species " The staff refers to the habitat for piping plovers As the materials submitted by the applicant demonstrate, there will be no adverse impact on piping plover habitat Their habitat is the intertidal hard sand *beach* more than a half mile from the end of the proposed revetment

f The staff incorrectly considered the "project" to be the potential future development of the upland as allowed by the zoning authorities The "project" is instead the revetment area itself

g As there was no development plan of any kind before the staff, the staff incorrectly determined that possible undefined development unrelated to this revetment project, at some unknown future date, might damage areas of special resource significance

8 The staff's determination is not supported by the facts that were before it, is contrary to the controlling regulations, statutes, and law, and is arbitrary and capricious

9 The staff considered matters that were not properly before it including matters that the regulations prohibit the staff from considering in making the determination on the application for this minor project

10 The staff's determination deprives the applicant of its constitutional rights to substantive and procedural due process as well as equal protection The failure of the Department to base its decision on the controlling law and its failure to render a decision in a timely manner as required by its own regulations has destroyed and taken high land of the Applicant

In summary, the Department improperly cancelled the application, improperly delayed its decision, and improperly rendered a flawed decision granting a partial permit, all in violation of the applicable statutes and regulations

The applicant respectfully requests that the board reverse the staff's determination and grant the applicant the permit without Special Condition No 1 that limited the revetment to a "270' section located along the southwest portion of the parking lot in Beachwalker Park " Instead, the permit should be for the length requested without further delay and damage

We look forward to the opportunity to appear before the Board in this matter

Sincerely,

PRATT-THOMAS, WALKER, P A

G Trenholm Walker

GTW\yye
Enclosures
cc Elizabeth A Dieck, Esq
Carolyn R Boltin, Deputy Commissioner DHEC-OCRM
Tom O'Rourke, Director of PRC
Gedney M Howe, III, Esq
Leonard L Long, Jr
Ray Panthk
Townsend Clarkson
Charles P Darby, III
Mitchell Bohannon

STATE OF SOUTH CAROLINA

BEFORE THE BOARD
OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

South Carolina Coastal Conservation League,

Appellant,

vs

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

Respondents

RE Critical Area Permit No OCRM-08-117-E
Kiawah Development Partners II, Inc

REQUEST FOR FINAL REVIEW CONFERENCE

The South Carolina Coastal Conservation League hereby requests that the Board of Health and Environmental Control conduct a final review conference to review the DHEC staff's decision to issue Critical Area Permit and Coastal Zone Consistency Certification # OCRM-08-117-E to Kiawah Development Partners II, Inc to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina

The basis for this request is as follows

1 The South Carolina Coastal Conservation League ("League") is a non-profit membership corporation organized and existing under the laws of the State of South Carolina Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources that would be adversely affected by the erosion control structure proposed by the permit applicant Members of the League boat and otherwise recreate in the waters, wetlands

and beaches surrounding Kiawah Island, including the spit on which Kiawah Development Partners II, Inc , proposed to construct a bulkhead and revetment

2 On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area, which is along the southwest portion of the parking lot at Beachwalker Park

3 The indicated location of the proposed bulkhead and revetment is the site of a pristine, undeveloped spit at the tip of the Island This spit supports a thriving wildlife community, including the endangered Loggerhead sea turtle and the Diamondback terrapin

4 The Appellant is informed and believe that the staff's permit decision was made in violation of applicable statutes, regulations and rules contained in the S C Coastal Zone Management Act, S C Code Ann §48-39-10, *et seq* , OCRM Regulations 30-1, *et seq* , and the Coastal Management Program

5 The permit and certification violates the State policies of protecting sensitive and fragile areas from inappropriate development, of protecting resources of the coastal zone, and to protect the quality of the coastal environment S C Code Ann §48-39-30

6 The permit and certification is inconsistent with general considerations of the project's impact on the production of fish shrimp, oysters, crabs, clams, other marine life, wildlife or other natural resources, the extent to which the activity could cause erosion, the extent to which the development could affect the habitats for rare and endangered species, the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state, and the extent to which the project will affect the value and enjoyment of adjacent owners

S C Code Ann §48-39-150(A) and S C Code Ann Regs 30-11 B

7 The permit and certification violates the DHEC Regulation that bulkheads and revetments "will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion, sedimentation, or where public access unless upland is lost due to tidally induced erosion ' S C Code Ann Regs 30-12(C)(1)(c) There are no structures on this spit, thus there is nothing that will be protected by the bulkhead and revetment and, in fact, the proposed bulkhead and revetment could cause acceleration of the existing erosion patterns and have detrimental impacts on the spit and adjacent properties

8 The permit and certification violates the Coastal Management Program in that it fails to consider the extent of up or downdrift damage due to installation of the structures, it is not part of a comprehensive erosion control program to ensure that it does not cause adverse affects on adjoining property owners or accelerate erosion, and it fails to promote the use of natural features of the system, rather than artificial protections Coastal Management Program, IV-56 & 57

9 The Appellant is informed and believes that the impacts of the proposed bulkhead and revetment will cause significant degradation of the environment on the spit, reduce the value of surrounding property and have severe negative impacts on wildlife within the impact area, as well as have negative impacts on erosional patterns on Kiawah Island

10 As a direct and proximate result of these violations and the proposed by the applicant, the Appellant and its members will suffer injury in fact in that the natural resources and environment of this area will be degraded, resulting in material harm to their recreational, environmental and aesthetic interests

11 The Appellant reserves all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding

WHEREFORE, the Appellant requests that the Board conduct a final review proceeding and issue an order reversing the proposed decision to issue the permit and certification

Respectfully submitted,

Amy E Armstrong
James S Chandler, Jr
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address Post Office Box 1380
Pawleys Island, SC 29585
Office address 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Appellant S C Coastal Conservation League

Georgetown, South Carolina

December 31, 2008

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent, In Re OCRM 08-117-E	**NOTICE OF REQUEST FOR CONTESTED CASE HEARING** DATE January 20, 2009 DOCKET NO ___- ALJ -___- __ - ___

Notice is hereby given that the Petitioner Kiawah Development Partners, II, does hereby appeal and request a contested case hearing regarding the decision (OCRM 08-117-E) issued by the South Carolina Department of Health and Environmental Control ('DHEC") Office of Coastal Resource Management (OCRM") on Petitioner s application to construct a revetment

A copy of OCRM Permit 08-117-E, dated December 18, 2008, is attached as Exhibit A Petitioner timely filed a Written Request for Final Review to the South Carolina Board of Health and Environmental Control dated December 30, 2008, copy attached as Exhibit B The DHEC Board denied Petitioner's request on January 14, 2009, by letter, copy attached as Exhibit C

The grounds for Petitioner s appeal and request for contested case hearing are set forth in Exhibit B

The Petitioner seeks a determination by the Administrative Law Court reversing the final decision of the agency, ruling that the Permit should be granted without Special

Condition No 1 and allowing the construction of the revetment for the entire length requested

Respectfully Submitted

PRATT-THOMAS WALKER P A

BY 

G Trenholm Walker
Post Office Drawer 22247
Charleston, SC 29413-2247
Telephone 843-727-2208
Fax 843-727-2231
gtw@wiselaw com

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

ATTORNEYS FOR PETITIONER

January 20, 2009
Charleston SC

D H E C

PROMOTE PROTECT PROSPER

C Earl Hunter Commissioner

Promoting and protecting the health of the public and the environment

EXHIBIT tabbies' A

December 18, 2008

Mr Ray Pantlik
Kiawah Development Partners II, Inc
PO Box 12001
Charleston, SC 29422

SEE SPECIAL CONDITION(S)

Re OCRM 08 117-E
Kiawah Development Partners II, Inc

Dear Mr Pantlik

The SCDHEC Office of Ocean and Coastal Resource Management has reviewed your application to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina and has issued a permit for this work You should carefully read the description of the authorized project and the special conditions that have been placed on the permit, as these conditions may modify the permitted activity In addition, there are a series of general conditions that should be reviewed The original and one photocopy of the permit as issued, are enclosed After carefully reading the permit if you wish to accept the permit as issued, sign and date in the signature block entitled PERMITTEE' on the original version of the permit **and return it to this Department Keep the photocopy for your records**

PLEASE READ CAREFULLY You are required to sign and return the original version of your permit to this Department If this permit is not signed and returned within thirty (30) days of issuance, *OR* appealed within 15 days as described on the enclosed "Notice of Appeal Procedure", the Department reserves the right to cancel this permit. Please carefully review the enclosed "Notice of Appeal Procedure" for information and deadlines for appealing this permit.

We have also enclosed a "request for a construction placard" card You must send in this card before the time you wish to start construction At that time a construction placard will be sent to you to post at the construction site

PLEASE NOTE You are not authorized to commence work under the permit until we have received the original version of the entire permit signed and accepted by you, and a construction placard has been issued and posted at the construction site The receipt of this permit does not relieve you of the responsibility of acquiring any other federal or local permits that may be required

Sincerely,

William C Eiser

William C Eiser
Wetland Section Project Manager

cc Blair Williams Acting Wetland Section Manager
/enclosure

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office 1362 McMillan Avenue Suite 400 Charleston SC 29405
Phone 843 953 0200 Fax 843 953-0201 www scdhec gov

(1)

D H E C

PROMOTE PROTECT PROSPER

C Earl Hunter Commissioner

Promoting and protecting the health of the public and the environment

SEE SPECIAL CONDITION(S)

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No 387

1 This decision of the S C Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee licensee, or affected person

2 An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3 The request for final review should include the following
- a the grounds on which the Department's decision is challenged and the specific changes sought in the decision
- b a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
- c a copy of the Department's decision or action under review

4 In order to be timely a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent If the 15th day occurs on a weekend or State holiday the request is due to be received by the Clerk of the Board on the next working day The request for final review must be received by the Clerk of the Board by 5 00 p m on the date it is due

5 If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures

6 The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference The conference may be conducted by the Board its designee, or a committee of three members of the Board appointed by the chair

7 If a final review conference is not conducted within 60 days the Department decision becomes the final agency decision and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference

The above information is provided as a courtesy parties are responsible for complying with all applicable legal requirements

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Ocean and Coastal Resource Management
Charleston Office 1362 McMillan Avenue, Suite 400 Charleston SC 29405
Phone 843 953 0200 Fax 843 953 0201 www scdhec gov

(2)

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s)	**Kiawah Development Partners II, Inc**
Permit Number(s)	**OCRM-08-117-E**
Date of Issuance	**December 18, 2008**
Expiration Date	**December 18, 2013**
Location	**On and adjacent to the Kiawah River at Beachwalker Park, Kiawah Island, Charleston County, South Carolina**

SEE SPECIAL CONDITION(S)

This permit is issued under the provisions of S C Code Ann Section 48 39-10 *et seq* and 23A S C Code Ann Regs 30 1 through 30-18 (Supp 2007) Please carefully read the project description and the special conditions that appear on this permit/certification as they will affect the work that is allowed The general conditions are also a part of this permit/certification and should be read in their entirety The S C Contractor's Licensing Act of 1999, enacted as S C Code Ann Section 40-11-5 through 430 requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor s license for marine class construction, except for construction performed by a private landowner for strictly private purposes Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit This applies to permittee, future property owners, or permit assignees**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The permit has been issued with significant modifications from the original request to build a 2,783' erosion control structure Specifically a 270 section of bulkhead and articulated concrete block revetment has been approved for the northeastern end of the project area along the southwest portion of the parking lot in Beachwalker Park, but the remaining 2,513 of the proposed erosion control structure to the southwest of the park is not authorized

With the exception of the parking lot and associated infrastructure for Beachwalker Park there is currently no high-ground development in the general vicinity of the project area The applicant provided general information that indicated up to 50 residential homes on approximately 20 acres is planned and approved by the local government If issued as requested, the permit will prevent the shoreline movement in an area that historically has seen inlet formation and facilitate development in a pristine dune area that is currently undeveloped and adjacent to federally designated critical habitat for the piping plover a threatened species and as such is designated a Geographic Area of Particular Concern (GAPC) This area is also federally designated as a COBRA unit Regulation 30 11(C) requires that consideration must be given to the extent to which long range cumulative impacts of the project may result within the context of other possible development and the general character of the area the extent to which overall plans and designs of a project can be submitted together and evaluated as a whole and the extent and significance of negative

impacts on GAPCs, in this case the piping plover habitat and the Retreat Policy in its broadest sense Regulation 30 11(B) requires that consideration must be given to the extent to which the development could affect the habitats for rare and endangered species Section III(C)(3)(XII)(A) of the Coastal Management Program Document identifies barrier islands and dune areas outside of the critical area as areas of special resource significance that are unique and environmentally fragile, which would apply to this area Consequently the permit will be issued to authorize a 270 erosion control structure adjacent to Beachwalker Park parking lot and the remainder of the proposed structure will not be authorized The purpose of the proposed activity is for erosion control

SPECIAL CONDITIONS

1 Provided that a 270' section of the proposed erosion control structure located along the southwest portion of the parking lot in Beachwalker Park is approved but the remaining 2,513 of the proposed structure is not approved

2 Provided that an as-built survey of the erosion control structure must be submitted to the Department within 90 days of the expiration date of the final construction placard The survey must be performed by a registered land surveyor, must show all edges of the structure, and must list the starting and ending coordinates of the structure in the SC State Plane Coordinate System which can be obtained by survey-grade Global Positioning System equipment

3 Provided that in the event that archaeological or paleontological remains are found during the course of work the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr James Spirck at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976) Archaeological remains consist of any materials made or altered by man which remain from past historic or prehistoric times (ie older than 50 years) Examples include old pottery fragments metal, wood arrowheads, stone implements or tools, human burials historic docks, structures or non recent vessel remains Paleontological remains consist of old animal remains, original or fossilized, such as teeth tusks, bone, or entire skeletons

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5) BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF ANY DEVIATION FROM THESE CONDITIONS TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE

2 of 11

SEE SPECIAL CONDITION(S)

(4)

SEE SPECIAL CONDITION(S)

Permit Number OCRM-08-117-E

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit

(PERMITTEE(S)) (DATE)
Kiawah Development Partners II, Inc

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below

William C. Eiser 12/18/2008

(PROJECT MANAGER WETLAND SECTION) (DATE)
William C Eiser
Or his Designee
Other Authorized State Official

GENERAL CONDITIONS

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee

1 That the permittee in accepting this permit covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina its employees or representatives harmless from all claims of damage arising out of operations conducted pursuant to this permit

2 That if the activity authorized herein is not constructed or completed within five years of the date of issuance this permit shall automatically expire A request in writing for an extension of time shall be made not less than thirty days prior to the expiration date

3 That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish wildlife and water quality

4 That this permit does not relieve the permittee from the requirements of obtaining a permit from the U S Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws ordinances, and zoning regulations This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast

5 That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges, nor does it authorize the permittee to alienate, diminish infringe upon or otherwise restrict the property rights of any other person or the public nor shall this permit be interpreted as appropriating public properties for private use

6 That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit

7 That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM

8 That this permit may not be transferred to a third party without prior written notice to OCRM either by the transferee s written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply

9 That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee

10 That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work

11 That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto and shall be maintained in good condition Failure to build in accordance with the plans and drawings attached hereto or failure to maintain the structure in good condition, shall result in the revocation of this permit

12 That the authorization for activities or structures herein constitutes a revocable license OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public s health safety, or welfare or if any activity is inconsistent with the public trust doctrine Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation

13 That OCRM shall have the right to revoke, suspend or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health safety and welfare, and/or is violation of Section 48-39 150 (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant That the permittee upon receipt of OCRM s written intent to revoke suspend, or modify the permit has the right to a hearing Prior to revocation suspension or modification of this permit OCRM shall provide written notification of intent to revoke to the permittee and permittee can respond with a written explanation to OCRM (South Carolina Code Section 1 023 370 shall govern the procedure for revocation, suspension or modification herein described)

14 That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee, agent or representative of OCRM or the State of South Carolina

15 That all activities authorized herein shall if they involve a discharge or deposit into navigable waters or ocean waters be at all times consistent with all applicable water quality standards effluent limitations and standards of performance prohibitions, and pretreatment standards established pursuant to applicable federal state and local laws

16 That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others This permit authorizes no invasion of adjacent private property and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit

12/23/2008 10:35 9530260 OCRM CHARLESTON PAGE 08

000100

STATION ID 8667062
KIAWAH BRIDGE CHARLESTON COUNTY
83-00 EPOCH

MHHW	5 99 FEET
MHW	5 80 FEET
NAVD88	3 11 FEET
MTL	2 80 FEET
NGVD 29	2 13 FEET
MLW	0 00 FEET
MLLW	-0 17 FEET

SEE SPECIAL CONDITION(S)

5 of 11

4

5

6

BEACHWALKER PARK

MLW

NOTE
FOR PERMITTING ONLY
NOT FOR CONSTRUCTION

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER JAMES R DUCKER NO 25167 2 28 08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No C00285 CERTIFICATE OF AUTHORIZATION

APPROXIMATELY 2783 LINEAR FEET OF RIVER FRONTAGE PROPOSED TO BE IMPACTED

HOR SCALE 1"=400
0 200 400 800 1200

THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

EXISTING SITE CONDITIONS & SHEET INDEX

OCRM-08-117-E

KIAWAH RIVER BEND EROSION CONTROL

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

FEBRUARY 14 2008

SCALE 1 = 400

SHEET 3 OF 7

(7)

12/23/2008 10 35 9530260 OCRM CHARLESTON PAGE 09

101000

THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT
PARTNERS II INC
FEBRUARY 14 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1 100

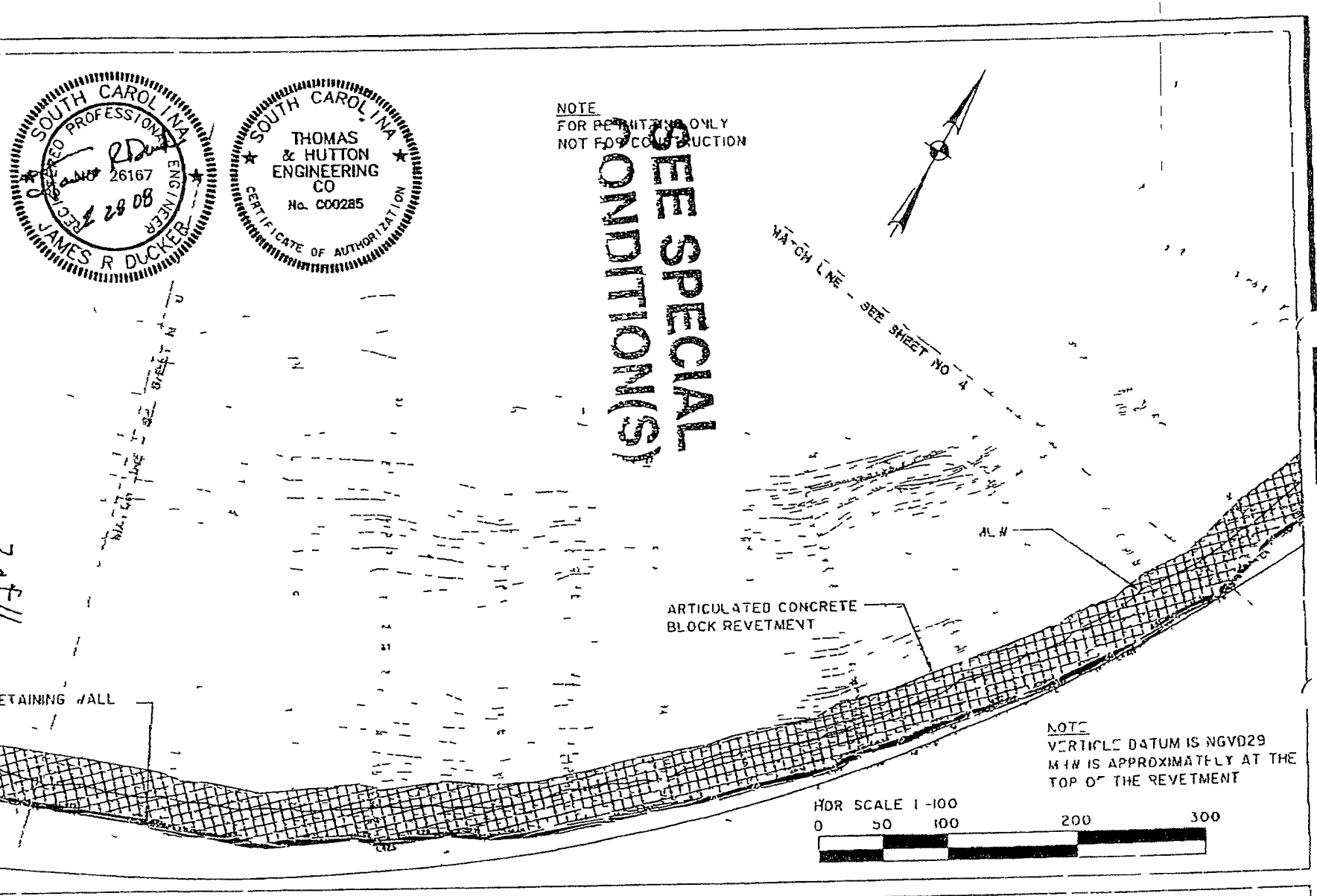
SHEET 4 OF 7

8

12/23/2008 10 35 9530250 OCRM CHARLESTON PAGE 10

000102

DWG\PLIMIT\0234900 SAS 000 07 1 F 1 27 PM 02 62



7 of 11

THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849 0200
SAVANNAH GA
MYRTLE BEACH SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

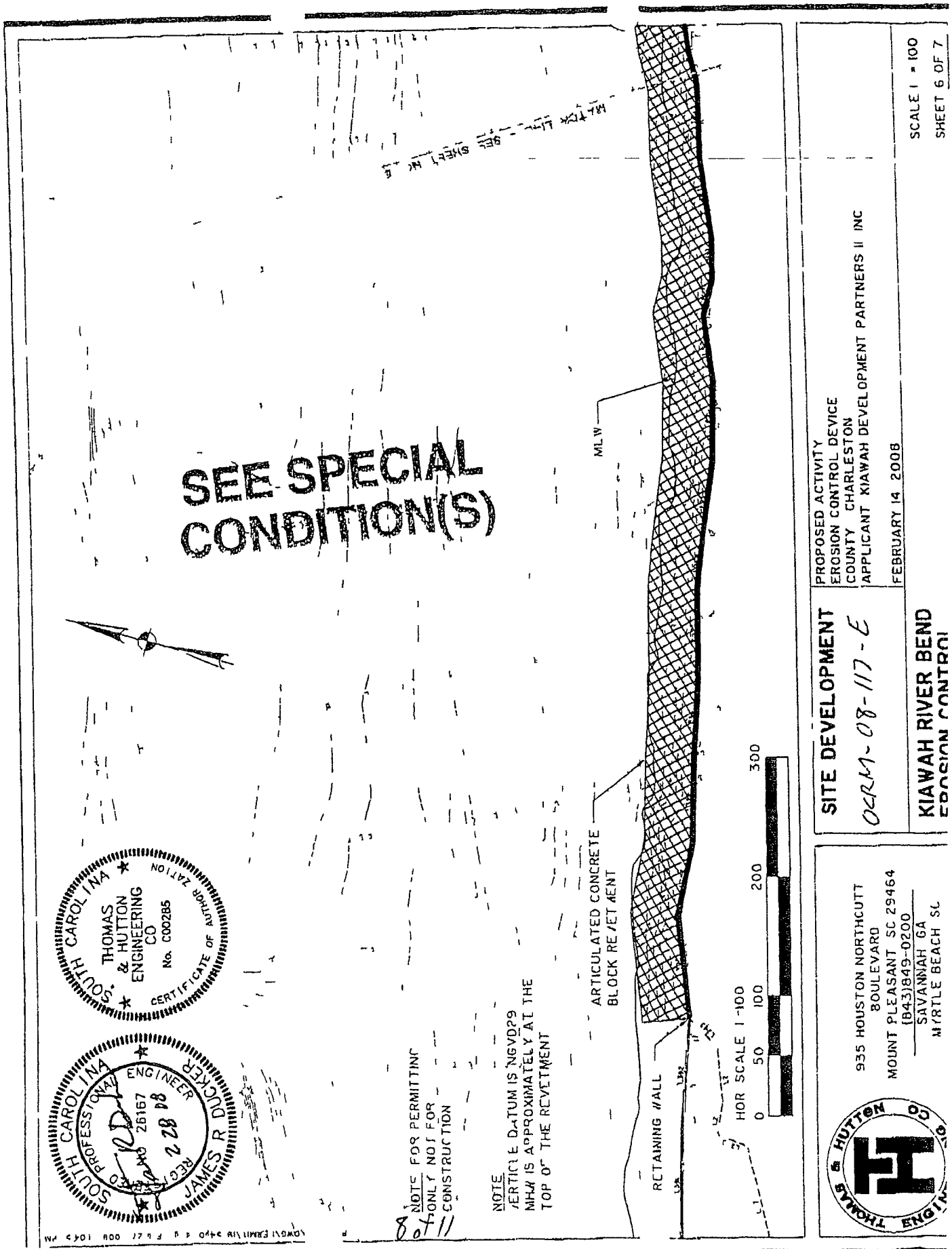
FEBRUARY 14 2008

KIAWAH RIVER BEND EROSION CONTROL

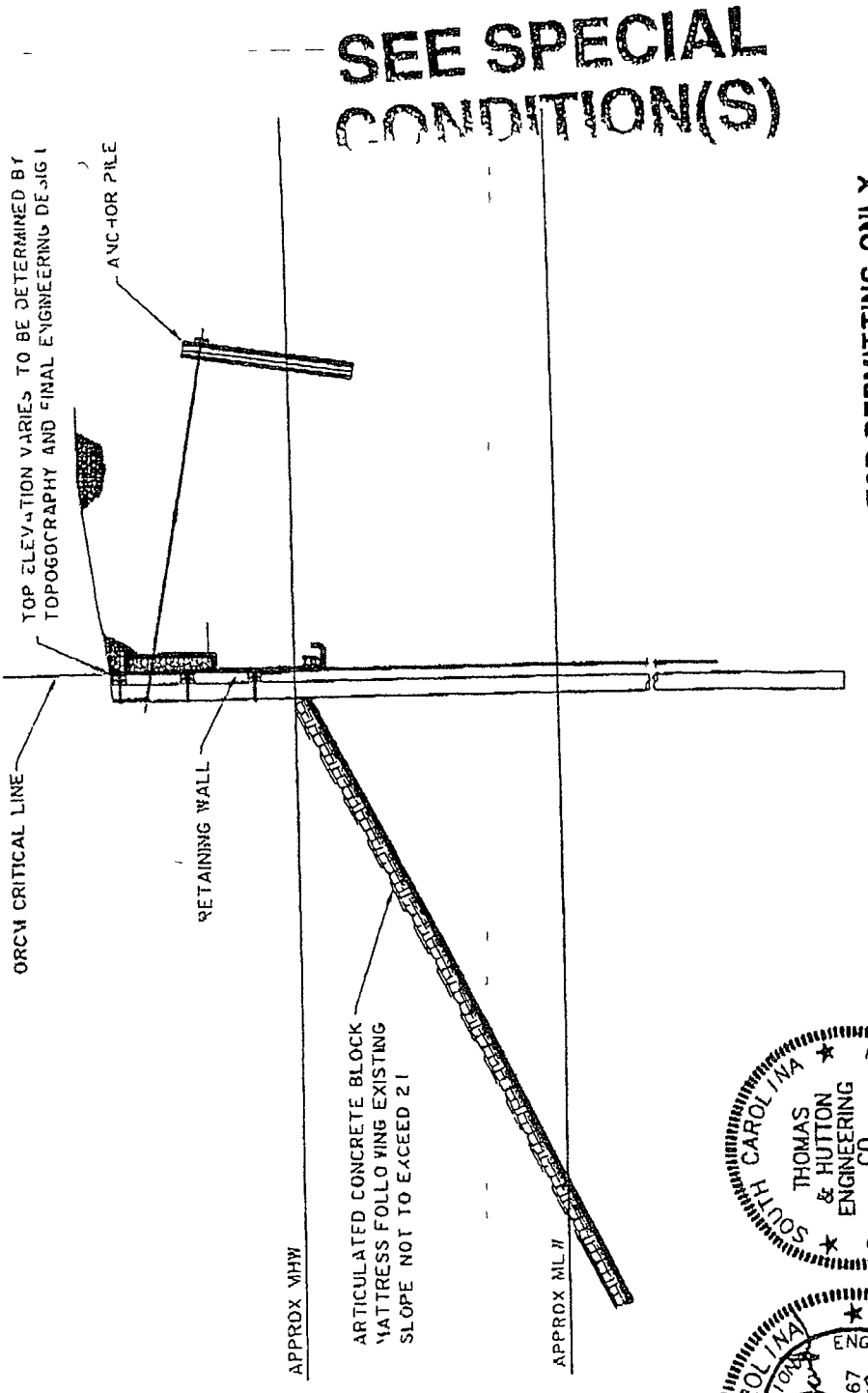
SCALE 1 = 100

SHEET 5 OF 7

9


SEE SPECIAL CONDITION(S)
MLW
ARTICULATED CONCRETE BLOCK REVETMENT
RETAINING WALL
HOR SCALE 1"=100'
0 50 100 200 300
NOTE
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8 of 11
SOUTH CAROLINA PROFESSIONAL ENGINEER JAMES R DUCKER 26167 2 28 08
SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No. C00285 CERTIFICATE OF AUTHORIZATION
THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC
SITE DEVELOPMENT
OCRM-08-117-E
PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC
FEBRUARY 14 2008
KIAWAH RIVER BEND
EROSION CONTROL
SCALE 1 = 100
SHEET 6 OF 7

10



SECTION DETAIL

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

FEBRUARY 14 2008

NOT TO SCALE

SHEET 7 OF 7

KIAWAH RIVER BEND
EROSION CONTROL

SOUTH CAROLINA PROFESSIONAL ENGINEER
JAMES R DUCKER
REGISTERED
NO 26167
12 08

THOMAS & HUTTON ENGINEERING CO
No C00285
CERTIFICATE OF AUTHORIZATION
SOUTH CAROLINA

930 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849 0200
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MYRTLE BEACH SC

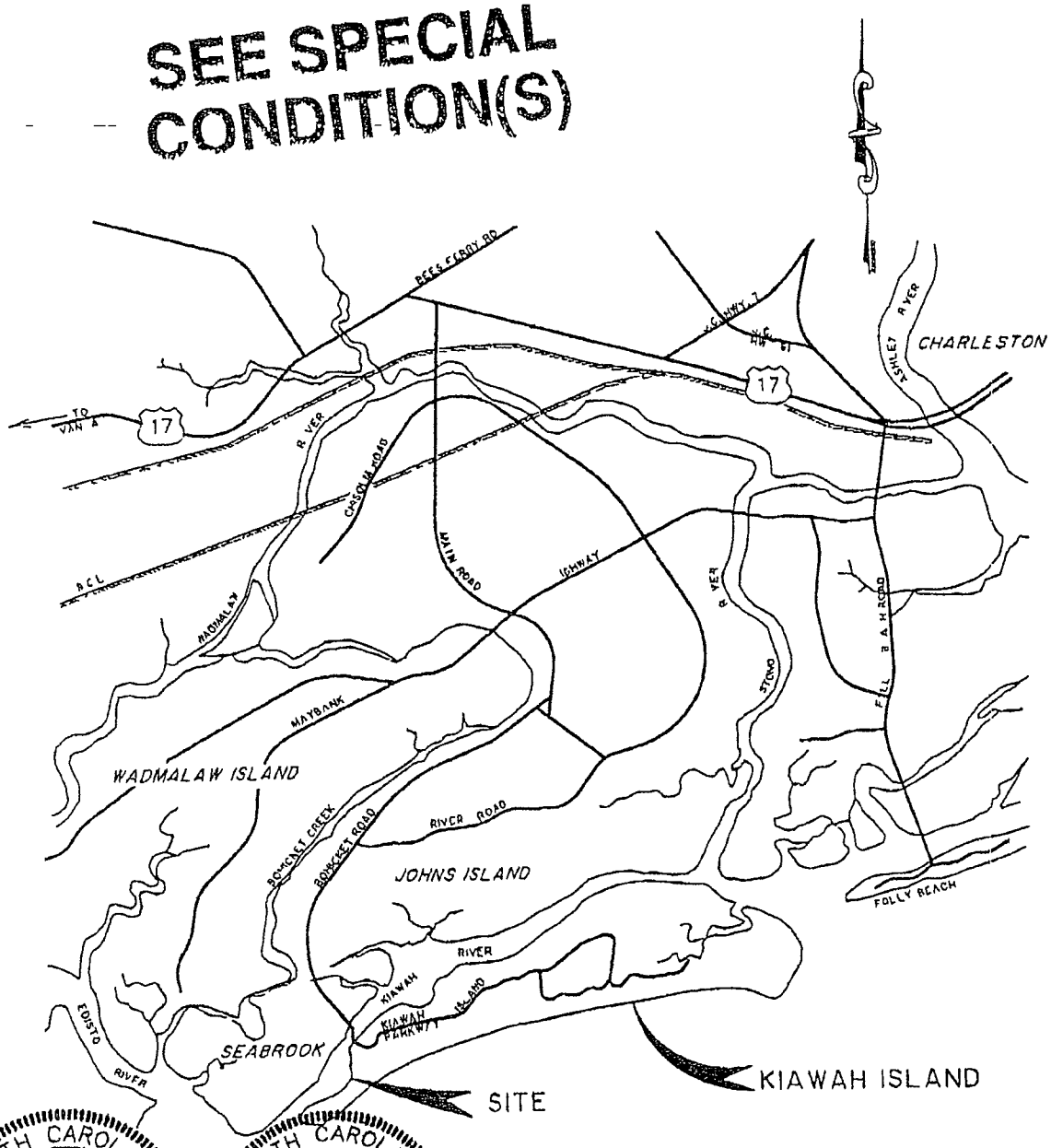
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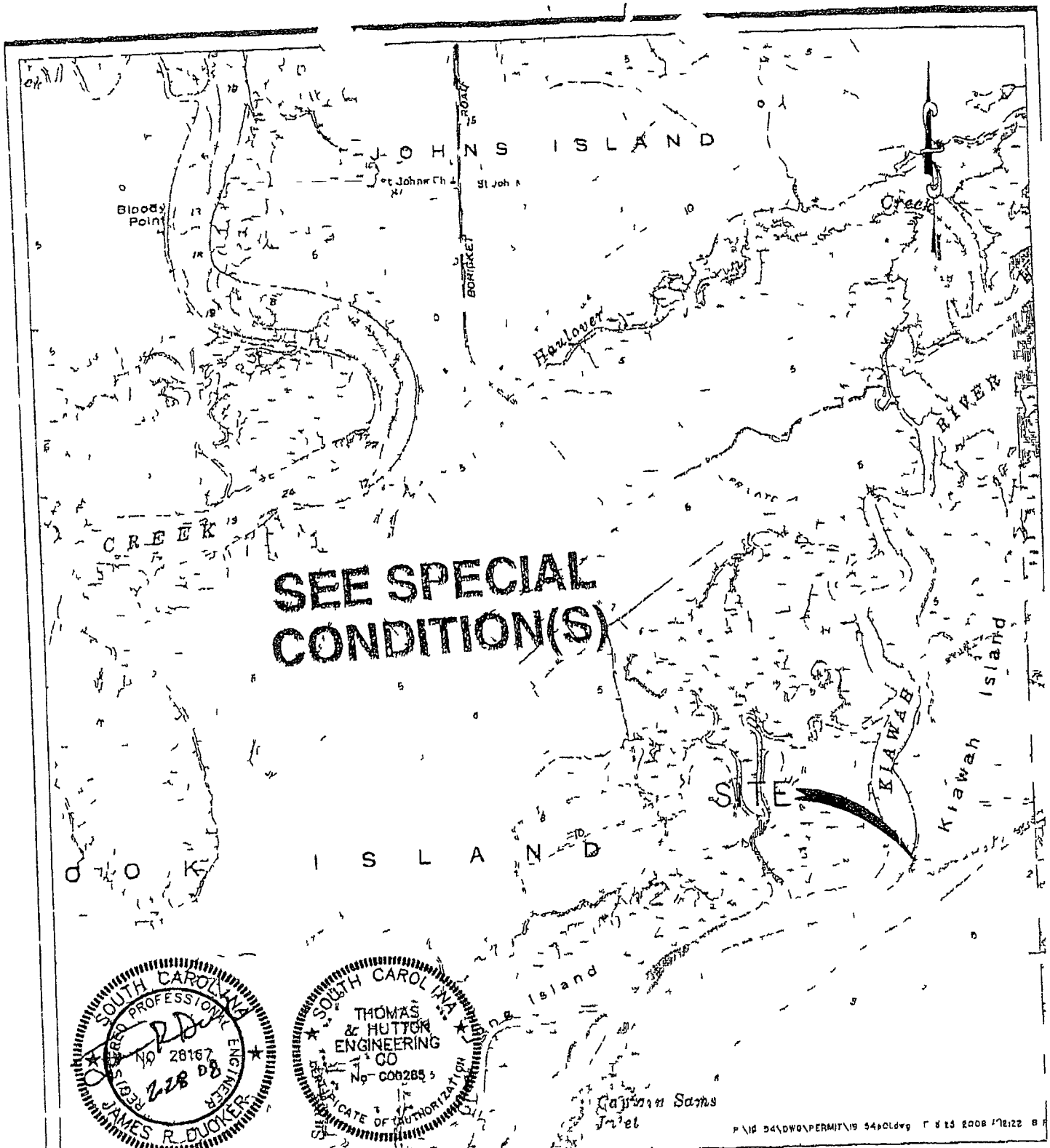
SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER NO 26167 JAMES R DUCKER 2 28 08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No C00285 CERTIFICATE OF AUTHORIZATION

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THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC
10 of 11

VICINITY MAP OCRM-08 117-E	PROPOSED ACTIVITY EROSION CONTROL DEVICE COUNTY CHARLESTON APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC FEBRUARY 14 2008
KIAWAH RIVER BEND EROSION CONTROL	NOT TO SCALE SHEET 2 OF 7



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No 28167 JAMES R DUCKER 2-28-08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No C00285 CERTIFICATE OF AUTHORIZATION

THOMAS & HUTTON ENGINEERING CO

935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

11 of 11

QUAD MAP

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC
FEBRUARY 14 2008

LAT 32° 35 12
LONG 80° 07 54"
SOURCE ROCKVILLE SC QUADRANGLE MAP
KIAWAH ISLAND, SC QUADRANGLE MAP

SCALE 1 = 2000

SHEET 1 OF 7

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents	Docket No 09-ALC-07-_____-CC **REQUEST FOR CONTESTED CASE HEARING**

TO THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS

The South Carolina Coastal Conservation League, pursuant to Administrative Law Court Rule 11, hereby requests a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control ("DHEC ") to issue Critical Area Permit and Coastal Zone Consistency Certification # OCRM-08-117-E to Kiawah Development Partners II, Inc to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina

The basis for this request is as follows

1 The South Carolina Coastal Conservation League ('League") is a non-profit membership corporation organized and existing under the laws of the State of South Carolina Members of the League live on Kiawah Island and use and enjoy the waters, wetlands, and other natural resources that would be adversely affected by the erosion control structure proposed by the permit applicant Members of the League boat and otherwise recreate in the waters, wetlands

FILED
JAN 29 2009
ADMINISTRATIVE LAW COURT

and beaches surrounding Kiawah Island, including the spit on which Kiawah Development Partners II, Inc , proposed to construct a bulkhead and revetment

2 On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area, which is along the southwest portion of the parking lot at Beachwalker Park, see attached Critical Area Permit, Exhibit A

3 On December 31, 2008, the S C Coastal Conservation League filed a request that the DHEC board conduct a final review conference in connection with the DHEC staff proposed decision A number of requests for DHEC board review were filed by other parties, including a request made by the Respondent Kiawah Development Partners, II, on December 31, 2008

4 During a DHEC Board meeting conducted on January 8, 2009, the Board decided not to conduct a final review conference and notified the League in writing of its decision on January 14, 2009, see attached letter from the DHEC Clerk, Exhibit B

5 The indicated location of the proposed bulkhead and revetment is the site of a pristine, undeveloped spit at the tip of the Island This spit supports a thriving wildlife community, including the endangered Loggerhead sea turtle and the Diamondback terrapin

6 The Petitioner is informed and believes that the staff's permit decision was made in violation of applicable statutes, regulations and rules contained in the S C Coastal Zone Management Act, S C Code Ann §48-39-10, *et seq* , OCRM Regulations 30-1, *et seq* , and the Coastal Management Program

7 The permit and certification violate the State policies of protecting sensitive and fragile areas from inappropriate development, of protecting resources of the coastal zone, and to

protect the quality of the coastal environment S C Code Ann §48-39-30

8 The permit and certification is inconsistent with general considerations of the project's impact on the production of fish, shrimp, oysters, crabs, clams, other marine life, wildlife or other natural resources, the extent to which the activity could cause erosion, the extent to which the development could affect the habitats for rare and endangered species, the extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state, and the extent to which the project will affect the value and enjoyment of adjacent owners S C Code Ann §48-39-150(A) and S C Code Ann Regs 30-11 B

9 The permit and certification violates the DHEC Regulation that bulkheads and revetments "will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion, sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion " S C Code Ann Regs 30-12(C)(1)(c) There are no structures on this spit, thus there is nothing that will be protected by the bulkhead and revetment and, in fact, the proposed bulkhead and revetment could cause acceleration of the existing erosion patterns and have detrimental impacts on the spit and adjacent properties

10 The permit and certification violates the Coastal Management Program in that it fails to consider the extent of up or downdrift damage due to installation of the structures, it is not part of a comprehensive erosion control program to ensure that it does not cause adverse affects on adjoining property owners or accelerate erosion, and it fails to promote the use of natural features of the system, rather than artificial protections Coastal Management Program, IV-56 & 57

11 The Petitioner is informed and believes that the impacts of the proposed bulkhead and revetment will cause significant degradation of the environment on the spit, reduce the value of surrounding property and have severe negative impacts on wildlife within the impact area, as well as have negative impacts on erosional patterns on Kiawah Island

12 As a direct and proximate result of these violations and the proposed by the applicant, the Petitioner and its members will suffer injury in fact in that the natural resources and environment of this area will be degraded, resulting in material harm to their recreational, environmental and aesthetic interests

13 The Petitioner reserves all rights under Section 44-1-60 and other applicable laws to present evidence and argument during the review proceeding

WHEREFORE, the Petitioner requests that the Administrative Law Court conduct a contested case hearing and issue an order reversing the proposed decision to issue the permit and certification

[signature block on following page]

Respectfully submitted,

Amy E Armstrong
James S Chandler, Jr
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Mailing address Post Office Box 1380
Pawleys Island, SC 29585
Office address 430 Highmarket Street
Georgetown, SC 29440
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FAX (843) 527-0540

Attorneys for the Petitioner S C Coastal Conservation League

Georgetown, South Carolina

January 27 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT Respondent, In Re OCRM 08-117-E	**PETITIONER'S MOTION FOR AN EXPEDITED HEARING** DOCKET NO 09-ALJ-07-0029-CC
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs KIAWAH DEVELOPMENT PARTNERS, II AND SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondents,	**RESPONDENT KIAWAH DEVELOPMENT PARTNERS, II'S MOTION FOR EXPEDITED HEARING** DOCKET NO 09-ALJ-07-0039-CC

PLEASE TAKE NOTICE that Kiawah Development Partners, II ("KDP) does hereby give notice and move for an expedited hearing in these two contested cases This motion is based on the record and the affidavit of Ray Pantlik P E filed simultaneously herewith

This matter involves an application by KDP to the South Carolina Department of Health and Environmental Control – Office of Ocean Coastal Resource Management

("OCRM") for a permit to construct a revetment to stop significant ongoing erosion of high land owned by the applicant The permit issued allows a revetment that is less than 10% of the length of the bank sought to be protected As more fully explained below, time is of the essence

THE TWO RELATED CASES

Petitioner's request for a contested case hearing (DOCKET NO 09-ALJ-07-0029-CC) was filed on January 21, 2009 On January 28, 2009, this case was assigned to the Honorable John D McLeod Administrative Law Judge

On January 27, 2009, the South Carolina Coastal Conservation League filed a request for contested case hearing (DOCKET NO 09-ALJ-07-0039-CC) on this same permit application KDP and OCRM have joined in SCCCL s request for consolidation

Pursuant to Rule 3(B) of the Rules of Procedure for the Administrative Law Court Petitioner requests Judge McLeod shorten the time to conduct a hearing on the appeals of the KDP and SCCCL

BACKGROUND AND BASIS FOR REQUEST

Good cause exists for an expedited hearing It has been almost a year since the KDP applied to OCRM for a permit to build the revetment Without a prompt hearing and adjudication of this matter, the applicant will suffer irreparable harm and the relief may be rendered moot

On February 29, 2008, KDP submitted its application to OCRM seeking permission to construct an erosion control device in the critical area on the bank of the Kiawah River on Kiawah Island immediately adjacent to its property OCRM did not render its decision on the permit application until December, 18, 2008 OCRM staff

limited the permit to approval of only a fraction of the revetment requested As evidenced by the Affidavit of Ray Pantlik, P E filed with this motion, this delay and the limitation in the permit are having a significant detrimental impact on the KDP s property

THE FAILURE OF OCRM TO ACT WITHIN THE STATUTORY TIMEFRAME

This permit application seeks a permit for what the controlling regulations define as a minor project S C Reg 30-1 (34) defines 'Minor Development Activity" as the construction, maintenance, repair or alteration of any private pier or erosion control structure the construction of which does not involve dredging " This permit seeks the construction of a private erosion control structure and does not involve dredging therefore qualifying as a Minor Development Activity

The controlling regulations provide OCRM shall act on a completed application for a minor project within 30 days S C Code Section 48-39-150, S C Reg 61-30 In this instance, rather than the allowed 30 days, OCRM took almost 10 months During this time KDP s property has continued to suffer extensive, unabated erosion

THE IRREPARABLE HARM

In an effort to minimize additional damage caused by erosion Petitioner requests this matter be heard on an expedited basis Further delays will cause irreparable harm and could possibly moot the permit request depending on the rate of erosion The pictures attached as Exhibit A to the Affidavit of Ray Panlik, P E show the significant damage to KDP's high land from the continuing erosion In furtherance of the interests of justice it is essential that the contested case hearing in these two cases involving the same issues and the same permit be conducted as soon as practicable

KDP further requests that the Court grant a hearing on the motion at the Court s earliest convenience

Respectfully Submitted

PRATT-THOMAS WALKER, P A

BY 

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Charleston, SC 29413-2247
Telephone 843-727-2208
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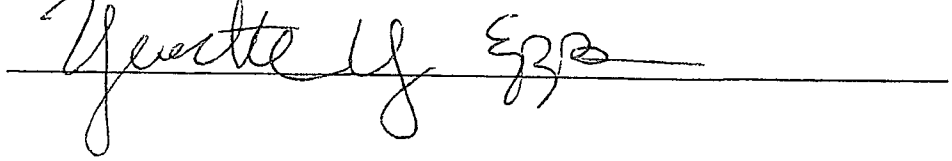
GEDNEY M HOWE, III, P A
Gedney M Howe, III
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Charleston, SC 29402
Telephone 843-722-8048
ghowe@gedneyhowe com

ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

February 13, 2009
Charleston, SC

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand, or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service on this 13th day of February, 2009 in Charleston, South Carolina



STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent, In Re OCRM 08-117-E	)	DOCKET NO 09-ALJ-07-0029-CC
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner vs KIAWAH DEVELOPMENT PARTNERS, II AND SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Respondents,	)	**AFFIDAVIT OF RAY PANTLIK, P E IN SUPPORT OF MOTION FOR EXPEDITED HEARING** DOCKET NO 09-ALJ-07-0039-CC

PERSONALLY appeared before me Ray Pantlik P E , who, being duly sworn, attests as follows

1 I am a resident of Charleston County, South Carolina, and have personal knowledge of the matters herein

2 I am the Director of Development for Kiawah Development Partners Inc and Kiawah Development Partners II, Inc (KDP) the applicant in this case

3 I am submitting this Affidavit in support of the Motion for an Expedited Hearing filed simultaneously with this Affidavit on behalf of KDP

4 On February 29, 2008, KDP, through its engineer Thomas & Hutton Engineering Company filed a minor activity permit application with the South Carolina Department Health & Environmental Control – Office of Ocean & Coastal Resource Management ('OCRM") The Permit sought OCRM's approval for the construction of a combination bulkhead/articulated concrete block revetment erosion control device along approximately 2,783 linear feet of bank on the Kiawah River

5 The location of the proposed revetment is on the backside of Kiawah Island along the bank of the Kiawah River, a tidal river that connects to the Atlantic Ocean through Captain Sam s Inlet that separates Kiawah Island from Seabrook Island The riverbank in question is on the 'inland" side of the southwestern peninsula of Kiawah Island known as Captain Sam's Spit This peninsula is approximately 1 3 miles in length and bounded on one side by the ocean and on the other side by the Kiawah River The proposed revetment is along the bank in the bend of the river at the beginning of the peninsula

6 The purpose of the revetment is to stop continual, serious erosion of high ground above the OCRM critical line on the riverbank for a distance of 2,783 ft The proposed revetment is adjacent to two separate parcels The first parcel is land Charleston County ("CC") leases from KDP and Kiawah Resort Associates, L P for use as a public beach access park CC holds a ninety-nine (99) year lease on the park site This public park has over 50,000 visitors annually and has 150 parking spaces and

other facilities The entire western edge of this parking area is in immediate danger of significant damage from erosion

7 The second parcel consists of approximately 130 acres of high land owned by KDP The zoning of the Town of Kiawah Island allows up to twenty acres of residential development for no more than fifty lots on certain limited areas of high land within this 130 acres

8 Erosion along the bank is both severe and rapid Evidence of the progress of the erosion is shown by the photographs I have attached hereto as Exhibit 1 The CC leased parcel has already lost portions of its fencing and a gazebo has been destroyed, other improvements are in danger of being undermined or destroyed altogether

9 In late 2006 Charleston County Parks and Recreation Commission ('CCPRC"), which operates the park on the CC leased parcel, filed an application with OCRM, P/N OCRM-06-396-B, to construct a 270 foot bulkhead with 150 cubic yards of backfill and 70 cubic yards of riprap to protect CCPRC s park and improvements KDP requested CCPR hold off on pursuing its permit to allow it to study the erosion problem and propose a one-time complete solution for the riverbank rather than a piecemeal one that might worsen erosion in various locations, including the adjacent high land of KDP

10 KDP hired experienced scientists specializing in beach morphology-geology and coastal hydrology to undertake an extensive series of studies of the erosion of the river bank and accretion of the beachfront of Captain Sam s peninsula as well as of the tidal flow and hydrology of the Kiawah River Based on this exhaustive analysis, these consultants devised an effective and environmentally sound plan that

they recommended to KDP that protects the high land from erosion and preserves the environmental and aesthetic integrity of the surroundings Their recommended solution is the revetment that KDP seeks permission to construct It was only after undertaking this extensive effort that we sought OCRM approval to implement what our experts told us was the best, most effective, and most environmentally sound option

11 As stated, Thomas & Hutton applied for a permit on our behalf on February 29, 2008 The purpose of the application was to seek a permit to prevent the significant, continuing, and rapid erosion of KDP's high land and the park s improvements

12 It is my understanding that this permit application is classified as a 'minor' project as defined by the applicable regulations As such, it is my understanding OCRM staff had to make a determination on our permit application within 30 days In this case, OCRM took almost 10 months to make its decision

13 Three months after filing the application, OCRM staff abruptly canceled the application based on its erroneous position the KDP had failed to properly provide a written affidavit attesting to the notice of newspaper publication of the permit application A couple of weeks later OCRM rescinded its cancelation and reinstated the permit application After the application was reinstated, no action was taken by OCRM for more than six additional months During this time we tried often to spur a determination from OCRM, without success, because the erosion was continuing unabated

14 Throughout the permit process KDP immediately responded to any questions or concerns of OCRM, third persons, or other governmental agencies KDP also provided reports and analyses from highly qualified experts (including

environmentalists, engineers, and coastal marine geologists) to address all questions and issues raised, and further proactively furnished information we thought would help in the process We have taken all reasonable steps to ensure that the proposed revetment will have no negative impact on the critical area wildlife, or habitat, while protecting our high land from being destroyed

15 After the permit application was reinstated, I made periodic inquiries with OCRM as to the status of a decision I was repeatedly told a decision would be made 'in a day or two or 'within the week' or 'by Friday ' Despite these assurances OCRM did not make its decision until December 18, 2008

16 Even though we demonstrated to OCRM that the proposed revetment was environmentally sound and sufficiently limited in scope, OCRM approved the construction of the revetment along the bank for only 270 feet, a distance of 10% percent of the requested revetment The conditional permit completely fails to protect the remaining high land of KDP that is continuously eroding

17 OCRM staff's stated reason for denying the permit for the remaining length of the revetment was their concern about undetermined possible effects on upland flora and fauna that might possibly happen from the hypothetical limited residential development of the peninsula as allowed by the zoning of the Town of Kiawah Island

18 Shortly after the limited permit was issued, KDP appealed to the Board of the Department of Health & Environmental Control seeking its review of the limited permit approval The Board decided not to conduct a conference on our request We immediately filed our appeal with the Administrative Law Court

19 It has been almost one year since this process began Most of this time has been spent waiting on OCRM to make a decision All the while, KDP as landowner is suffering significant damage as a result of the uncontrolled erosion of the bank of the Kiawah River Because of the urgent need for relief and the irreparable ongoing harm, KDP urges the court to grant an expedited hearing It is imperative that we seek all available remedies as soon as possible in an effort to control and manage the significant erosion concerns This case presents an emergency If the hearing is not held as soon as reasonable possible, the problem will be exacerbated, more high ground will erode and the protection we seek may become futile

Further your affiant sayeth not

Ray Pantlik, P E

SWORN TO before me this 13th day of February, 2009
Yvette G Epps (Seal)
Notary Public for South Carolina
My Commission Expires 3/14/2017

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Rules of Civil Procedure by electronic transmission or by hand delivery or by regular United States Mail postage prepaid properly addressed to the attorney(s) of record for such party(s)
on this 13th day of February 2009.
Charleston South Carolina
Yvette G. Epps

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS II, Petitioner, vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent, In Re OCRM 08-117-E SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner vs KIAWAH DEVELOPMENT PARTNERS, II AND SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL Respondents,	DOCKET NO 09-ALJ-07-0029-CC **AFFIDAVIT OF DOUG DEWOLFF IN SUPPORT OF MOTION FOR EXPEDITED HEARING** DOCKET NO 09-ALC-07-0039-CC

PERSONALLY appeared before me, Douglas L DeWolff who being duly sworn attests as follows

1 I am a resident of Charleston County South Carolina, and have personal knowledge of the matters herein

2 I am employed by Southeastern Surveying of Charleston, Inc (Southeastern") in the position of President

3 I am a licensed surveyor in South Carolina

4 Southeastern performs surveying throughout coastal South Carolina Southeastern has performed extensive surveying all over Kiawah Island for 29 years and has worked for Kiawah Development Partners Inc and Kiawah Development Partners II Inc the applicant in this case

5 At various times Southeastern has performed surveys of the perimeter of Captain Sam s Spit on Kiawah Island, including the bank of the Kiawah River in the where the proposed revetment would be located

6 The last survey of Southeastern performed in this area was in October 2008 I have compared this survey data with those obtained in 2002, 2005, and 2007 in the same location From these comparisons I was able to determine the high land on the bank lost through erosion and calculate the average rates of erosion of the bank where the revetment is proposed to be located

7 From September 2002 to October 2008 erosion of the bank resulted in the loss of 49,856 square feet of high land or approximately 1 14 acres, for a distance of 1800 linear feet The average width of the erosion incursion during this time was 27 7 feet and the average width of the erosion incursion on an annual basis was 4 6 feet a year

8 Recently the rate of erosion has increased dramatically From February 2008 to October 2008 this area lost 14,834 square feet to erosion along a portion of the bank with an average width of 14 7 feet at the rate of 10 feet erosion incursion per year

9 The area that had the greatest erosion during this period along the bank where the revetment would be located lost 39 feet over the last four years, or roughly an erosion intrusion averaging of 10 feet of high land per year

10 The data compiled by our surveyors establishes that the rate of erosion has increased over the last year and that a significant volume of upland is being lost to the erosion of the river bank

11 I prepared the attached compilation map based on actual field survey data that illustrates the changes in the location of the high land river bank over the last six years at various times It fairly and accurately depicts the loss of the high land along the bank where the revetment is proposed

12 Southeastern has performed surveys of many parcels in coastal South Carolina located on tidal rivers and creeks including those that are eroding The rate of erosion of the bank of the Kiawah River in this location is extreme in comparison to most if not all of them with which I am familiar

13 Once eroded the high land along the bank cannot be replaced It is lost Because the rate of erosion is not constant and has in fact accelerated in the last year, it is imperative if the high land is to be preserved that a revetment be constructed as soon as possible

Further your affiant sayeth not

Douglas L DeWolff

SWORN TO before me this 4 day of March 2009

(Seal)

Notary Public for South Carolina
My Commission Expires

LINDA B ODLE
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMM EXP 08 03 2014

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that true and correct copies of the pleading or paper to which this certificate is affixed was served upon the party(s) to this action in accord with the applicable Rules of Civil Procedure by electronic transmission or by hand delivery or by regular United States Mail postage prepaid properly addressed to the attorney(s) of record for such party(s) on this 4th day of March 2009 Charleston South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner, vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent	DOCKET NO 09-ALJ-07-0029-CC
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND KIAWAH DEVELOPMENT PARTNERS, II Respondents	**PRE-HEARING STATEMENT OF KIAWAH DEVELOPMENT PARTNERS, II**

In response to the Order of the Court filed April 30 2009, Kiawah Development Partners II (hereinafter "KDP') submits the following pre-hearing statement

1 **The nature of this proceeding**

This proceeding is an appeal of a final determination by the South Carolina Department of Health and Environmental Control - Office of Coastal and Resource Management (OCRM") on the application of KDP Kiawah s longtime developer, for a permit to construct a revetment on its property along the bank of the Kiawah River The purpose of the proposed revetment of 2,783 linear feet is to stabilize the severely eroding

high land owned by KDP The proposed revetment would be constructed of articulated concrete block ("ACB) that rests on the existing contours of the bank and a small part of the river bottom Unlike many typical materials used for revetments such as rip-rap or stone, ACB allows marsh grass to grow through it and provides potential habitat

OCRM granted the permit for a distance of 270 feet on the bank adjacent to the parking lot of Beachwalker Park a public park operated by Charleston County Park and Recreation Commission ('PRC") OCRM denied the permit for the remaining distance of the sharply eroding bank KDP sought review by the Board of DHEC pursuant to SC Code §44-1-60 (E) and (F) The Board declined to conduct a final review conference KDP then appealed to this Court, requesting a contested case hearing

2 **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations – be specific, not general**

S C Code §§44-1-60(F)(2) and S C Reg 30-6 confer subject matter jurisdiction on the ALC to determine this matter

Other applicable statutes and regulations include the project-specific regulation governing the issuance of permits for bulkheads and revetments in the critical area S C Reg 30-12(C), and the general guidelines applicable to all projects in the critical area, S C Reg 30-11

3 **The issues to be presented for determination, including any claims or defenses expected to be raised**

The overall issue for determination is whether the preponderance of the evidence supports OCRM's permit determination Stated another way the "ultimate" issue is whether the preponderance of the evidence establishes that OCRM s permit decision was contrary to the statutes and regulations governing the issuing of permits for revetments KDP intends to establish that neither the facts nor the law support OCRM's staff's permit decision

Some of the subsidiary issues to be presented for determination include but are not limited to, the following

a Whether the proposed revetment satisfies the project-specific criteria for revetments set forth in R 30-12(C), KDP will establish that it does

b Whether the proposed revetment most probably will have significant negative impacts on the critical area in light of other possible development in the vicinity, KDP will establish that there will be no such significant negative impacts

c Whether the proposed revetment will most probably have a significant adverse effect on occasional piping plovers (a threatened species) or their beach habitat more than a half mile away, KDP will establish that there will be no such significant adverse effects

4 **A brief summary of the facts to be presented at the hearing**

KDP will establish at the hearing that the facts do not support OCRM's determination and that a permit for the entire length of the proposed revetment should be granted

The Site, the Erosion Emergency, and the Proposed Revetment

On February 29 2008 KDP through its engineer, Thomas & Hutton Engineering Company filed the permit application with the OCRM for the proposed revetment The proposed revetment is considered a "minor activity' under the applicable regulations [1] The location of the proposed revetment is on the backside of Kiawah Island along the bank of the Kiawah River This tidal river connects to the Atlantic Ocean through Captain Sam's inlet that separates Kiawah Island from Seabrook Island *See,* aerial photo showing locations attached as Exhibit 1

The riverbank in question is on the "inland" side of the southwestern peninsula of Kiawah Island that is known as Captain Sam's Spit The peninsula is approximately 1 3 miles in length, bounded on one side by the ocean and on the other side by the Kiawah River Over the last sixty to seventy years the beach on the ocean side of Captain Sam s peninsula has been steadily accreting and growing

Recently the rate of erosion by the Kiawah River on KDP's land on the backside" has increased, advancing as much as fourteen feet inland

[1] S C Reg 30-1 (34) defines 'Minor Development Activity as 'the construction, maintenance repair or alteration of any private pier or erosion control structure, the construction of which does not involve dredging ' This private erosion control structure does not involve dredging and clearly fits the definition

during the last year in one location on the river's edge The revetment is to stop this continual, serious erosion which causes land and vegetation to slough off into the river

The proposed revetment is adjacent to two separately platted parcels The first parcel is a site leased to PRC for Beachwalker Park that attracts roughly 50,000 visitors annually to the beach along Captain Sam's The entire western edge of the park's parking area is in immediate danger of destruction from erosion

The second parcel consists of approximately 130 acres of high land owned by KDP comprising the remainder of the Captain Sam's peninsula The zoning of the Town of Kiawah Island allows conveyance of up to twenty acres for no more than fifty homesites within this high land of 130 acres

Well before submitting its application KDP hired experienced scientists specializing in beach morphology-geology and coastal hydrology to undertake an extensive series of studies of the erosion of the river bank and accretion of the beachfront of Captain Sam s peninsula as well as of the tidal flow and hydrology of the Kiawah River Based on this exhaustive analysis (including consideration of beach monitoring data collected by OCRM) these consultants devised an environmentally sensitive solution to the erosion that they recommended to KDP Their recommended solution is the revetment that KDP seeks permission to construct

The Unsubstantiated Basis for OCRM's Determination

OCRM finally issued its decision denying a permit for 90% of the revetment on December 18, 2008, almost ten months after the application was submitted and six months after the statutory deadline for a determination [2] A summary of the grounds for OCRM's staff's decision are recited in the permit decision KDP has taken the deposition of Mr Bill Eiser, the person with OCRM primarily responsible for its permit decision and learned in more detail the basis for the decision

Mr Eiser acknowledged that the proposed revetment fully satisfied all project-specific criteria of R 30-12(C) and further conceded that it was not denied on that basis Mr Eiser instead testified that the two main reasons for OCRM's denial of the permit for the full length of the proposed revetment were (1) OCRM's staff's belief that there possibly could be adverse impacts on piping plovers from the limited residential development well away from the beach that might occur sometime in the future, and (2) the view of OCRM's staff that the revetment will interfere with the natural erosion process that could conceivably one day contribute to the formation of a new inlet at the neck of Captain Sam s peninsula

As to piping plovers, Mr Eiser testified that he relied *entirely* on three comment letters sent by the Fish and Wildlife Service of the United States Department of the Interior ('Fish and Wildlife) KDP will prove that the Fish and Wildlife Service s conclusion in these letters was that *the*

[2] S C Code Section 48-39-150(c) and S C Reg R61-30 state that OCRM shall act on a completed application for a minor project within 30 days

revetment will have no significant adverse effects on piping plovers or their habitat – directly undermining OCRM s stated basis for its decision

Additionally, the facts to be presented by KDP will separately establish that the revetment will not adversely affect the few piping plovers spotted briefly during their winter migration and will not adversely affect their designated habitat located on tidal beach areas more than a half mile away from the closest point of the proposed riverside revetment

As for the OCRM staff's view that the revetment might interfere with the theoretical creation of a new inlet, KDP will show that no statute or regulation instructs that a revetment permit shall not be granted if it may prevent ongoing erosion that might someday lead to a new inlet The governing regulations or statutes do not contain any official policy to this effect Rather, this supposed "principle" is, at best, but personal opinion of some OCRM staff members

Obviously, the main purpose of any bulkhead or revetment is to prevent erosion of private or public lands a natural process If the governing statutes and regulations were meant to prohibit interference with the natural process of erosion they would never have provided for the construction of revetments in the first place

KDP intends to show that OCRM's unfounded concerns in fact arise from the personal opposition by some staff members to *any* residential development on Captain Sam's Spit even though (a) the Town of Kiawah Island has approved up to 50 single family dwellings by entering a

Development Agreement vesting this right in KDP, and (b) the State of South Carolina established the beachfront setback line in 1999 in a location that would allow KDP s possible future development As set forth in the terms of the Development Agreement entered in 2005 with the Town of Kiawah Island, this limited future development must be accomplished in an environmentally sensitive manner

Mr Eiser recognized too that there would probably be no adverse effects from the revetment itself The alleged possible future adverse effects he speculated about stemmed from the possible future residential development KDP will establish that its future residential development will, as with the entirety of Kiawah Island under its 20+ year stewardship, be undertaken in an environmentally sensitive manner and will have no negative impacts And more specifically there will be no negative impacts to the 'critical area' under OCRM's jurisdiction

KDP also will establish that OCRM is misinterpreting the operative language of Reg 30-11(C) (1) which provides that in its permitting decisions OCRM shall be guided by [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 (Emphasis added)

It is the long-range cumulative effects of the *project* that are to be considered The project in this case is the proposed revetment The 'other possible development" is the possible future residential

development as authorized by the zoning In its consideration of piping plovers, OCRM incorrectly considered the project to be the possible future residential development instead of just the revetment which will have no adverse long-range cumulative impacts as Mr Eiser acknowledged

KDP anticipates that OCRM may assert generally that the possible future development is contrary to the policies of the Coastal Zone Management Plan ("CZMP") Again, it must be emphasized that the project' being permitted is the revetment, not Kiawah Island generally, nor the future, limited residential development now allowed by state law, town ordinances, and the Development Agreement KDP intends to demonstrate that this potential future development, even if incorrectly considered by OCRM on non-critical area lands does not violate the policies of the CZMP The limited development there will include reasonable measures to diminish its impacts will not interfere in any manner with the primary dune system on the beach and will have no adverse effect on protected species (There are no endangered species in this area)

5 **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations**

KDP requests that the Court reverse the determination of OCRM staff OCRM s decision is not supported by the law or facts The proposed revetment complies with the project specific criteria set forth in R

30-12(C) There are no substantial, cumulative negative impacts from the revetment that command denial of the permit under R 30-11(C)

OCRM is required to make its determination on critical area permits in compliance with the governing regulations and law Triska v Dept of Health and Envtl Control, 292 S C 190 194 355 S E 2d 531, 533 (1987) The ALC has the authority to reverse a decision of OCRM denying a critical area permit where OCRM s decision was erroneous Risher v S C Dept Health and Envtl Control – Ocean and Coastal Resource Mgmt (S C Admin Law Judge Div Feb 26, 2009) Oak Lea Homeowners Assoc v S C Dept Health and Envtl Control – Ocean and Coastal Resource Mgmt (S C Admin Law Judge Div Feb 8, 1995)

6 **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion, (In the interest of judicial expediency, all motions should be submitted to the Court at least fifteen (15) days before the date of the scheduled hearing Returns should be submitted at least five (5) days before the scheduled hearing)**

At this time KDP does not anticipate raising any motions at the hearing other than the possibility of moving to exclude certain evidence as being inadmissible or irrelevant

7 **A list of proposed witnesses and exhibits**

The witnesses KDP may call include the following

Ray C Pantlik, P E
Kiawah Development Partners, Inc

PO Box 12001
Charleston, SC 29422

Leonard L Long, Jr
Kiawah Development Partners, Inc
Two North Adger's Wharf
Charleston SC 29401

Mark Permar
Permar, Inc
76 Wentworth Street, Suite 400
Charleston SC 29401

Tom O'Rourke
Executive Director
Charleston County PRC
861 Riverland Drive
Charleston SC 29412

George Oertel, Ph D
Hollow-Core Reef Enterprises, Inc
53 Huxley Place
Newport News VA 23606-2620

David R Basco, Ph D , P E
Beach Consultants, Inc
6144 Sylvan Street
Norfolk VA 23508

Mitchell Bohannon
Thomas & Hutton Engineering Co
935 Houston Northcutt Blvd
Mt Pleasant SC 29464

Charlie George
Thomas & Hutton Engineering Co
935 Houston Northcutt Blvd
Mt Pleasant SC 29464

Doug DeWolf
Southeastern Surveying, Inc
2093 Executive Hall Road
Charleston SC 29407

Timothy W Kana, PhD
Coastal Science & Engineering

PO Box 8056
Columbia, SC 29202-8056

William C Eiser
DHEC-OCRM
1362 McMillan Ave , Suite 400
Charleston SC 29405

Barbara Neale
Director of Regulatory Programs
DHEC
2600 Bull Street
Columbia, SC 29201

The Exhibits to be introduced by KDP include the following

1 The permitting file of OCRM,

2 Reports of expert witnesses,

3 Plats, maps, and diagrams of the area in question

4 Photographs of the area in question and an existing ACB revetment in another location

5 Excerpts from the Federal Registrar establishing piping plover habitats,

6 Demonstrative exhibits for trial (will be provided adverse parties ahead of time),

8 **A statement regarding the necessity for discovery, if any,**

Discovery is ongoing The parties have exchanged written discovery and are in the process of taking depositions

9 **Whether the party deems it necessary by the undersigned Judge to contact a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc ,**

Earlier this month, the Court conducted a telephone conference on scheduling Since then, the Court has issued an order setting the contested case hearing for the week of August 24 2009 No further scheduling order is needed

10 **The estimated time required for the hearing,**

KDP anticipates the hearing will last three to four days

11 **A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case**

The Court has set the hearing to commence on August 24, 2009

12 **An e-mail address that the Court can use for e-mail correspondence**

G Trenholm Walker gtw@wiselaw com

Gedney M Howe, III tlundsford@gedneyhowe com

KDP reserves the right to supplement this Pretrial Statement

PRATT-THOMAS WALKER P A

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS, II

COPY

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs SCDHEC Office of Ocean and Coastal Resource Management, Respondents	Docket No 09-ALC-07-0029-CC Docket No 09-ALJ-07-0039-CC **PREHEARING STATEMENT OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**
South Carolina Coastal Conservation League, Petitioner, vs Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents	FILED JUN 0 2 2009 SC ADMIN LAW COURT

The Petitioner, South Carolina Coastal Conservation League, submits the following as its Prehearing Statement in this matter

1 The nature of this proceeding

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control ("DHEC"), Office of Ocean and Coastal Resource Management, to issue a critical area permit and coastal zone consistency certification to Kiawah Development Partners, II, for the proposed construction of 270' of a bulkhead and revetment system along the banks of the Kiawah River near Captain Sam's Inlet in Charleston County, SC The South Carolina Coastal Conservation League appeals the issuance of the permit and Kiawah Development Partners, II, appeals the limitation of the permit to 270 feet of bulkhead and revetment instead of the applied-for permit of more than 2700 feet The appeals have been consolidated for hearing

2 **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations - specific, not general**

Subject matter jurisdiction (1) S C Administrative Procedures Act, S C Code Ann §§ 1-23-310, 1-23-370, 1-23-600, (2) the S C Coastal Zone Management Act, S C Code Ann § 48-39- 150, and (3) S C Code Ann § 44-1-60 2006 Act No 387

Other applicable statutes and regulations (1) the S C Coastal Zone Management Act, S C Code Ann § 48-39-10, *et seq* , and in particular §§ 48-39-10, 20, 30, 80, 120, 130, 150, 250, 260, (2) the Critical Area Regulations, S C Code Ann Reg 30-1, *et seq* , and in particular, R 30-11 A, B and C, (3) the South Carolina Coastal Management Program, and in particular the policies set forth on pages III-69 – III-71, III-73, IV-3, IV-16 & 17, IV-57

3 **The issues to be presented for determination, including any claims or defenses expected to be raised**

1 Will the project restrict or limit the public's use of State owned lands and waters in violation of the Public Trust Doctrine?

2 Will the project convert tidelands owned by the State in trust for all of its citizens to an area unusable by the public and in effect turn this State public trust property over to a private development?

3 Will the proposed project have adverse impacts on State owned lands and waters?

4 Will the project violate the State policies of protecting sensitive and fragile areas from inappropriate development, of protecting resources of the coastal zone, and of protecting the quality of the coastal environment, all in violation of S C Code Ann §48-39-30?

5 Will the proposed project result in a development that will place life and property at risk?

6 Does the proposed project violate the considerations and guidelines for critical area permits in the following respects

A Will the project affect the production of any marine life or wildlife, in particular diamondback terrapins, in the project area?

B Will the proposed project affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources?

C Will the development affect the habitats for rare and endangered species of wildlife?

D Will the proposed project affect the value and enjoyment of adjacent owners?

E Will there be long-range, cumulative affects of the project that may result within the context of other possible development and the general character of the area?

F Have overall plans and designs of the project been submitted together and evaluated as a whole to avoid piecemeal and fragmented evaluation?

G Will the project have negative impacts on Geographic Areas of Particular Concern (GAPC)?

7 Will the proposed violate the policies of the South Carolina Coastal Management Program in the following respects

A Would the proposed project alter the fragile and dynamic nature of Captain Sam's Spit?

B Is Captain Sam's Spit an unstable area, prone to erosion and other hazard risks?

C Will the project result in negative impacts on adjacent beaches, dunes, coastal waters and wetlands?

D Will the proposed project restrict or limit the continued public use of a recreational open area?

E Will the project result in damage to a Geographic Area of Particular Concern?

F Will the project alter or damage the natural functions of areas identified as critical habitat areas of the Federally endangered Piping Plover?

G Will the project violate the integrity of the Endangered Species Act?

H Will the proposed project interfere with existing public access to public trust tidelands?

I Will the proposed project impede public use of areas below the mean high water line?

8 Are there feasible alternatives to the proposed bulkhead and revetment system?

9 Is there a need for the proposed bulkhead and revetment system?

10 Did the agency properly deny the KDP application because it is inconsistent with the State policies specified in Sections 48-39-20 and 48-39-30 and the ten general considerations set forth in Section 48-39-150 of the Coastal Zone Management Act?

4 **A brief summary of the facts to be presented at the hearing**

Kiawah Development Partners II, Inc ("KDP") has applied for a permit to construct a 2,783' long articulated revetment and bulkhead in public trust tideland areas along the banks of the Kiawah River near Captain Sam's Inlet on Kiawah Island

KDP is proposing to construct a residential development consisting of 50 houses on the southern tip of Kiawah Island, an area known as Captain Sam's Spit In order to facilitate development of this area, KDP proposes to construct a revetment and bulkhead on state-owned public trust tidelands KDP asserts that this revetment and bulkhead is necessary to protect a road to the area it proposes to develop

Although KDP has announced plans to construct up to 50 houses on the property, KDP has not provided DHEC with specific development plans, nor has it submitted an application for a stormwater permit for the proposed residential development to DHEC/OCRM for review

The site of the proposed bulkhead and revetment is owned by the State of South Carolina and held in trust for the benefit of all of the people of the state, pursuant to the Public Trust Doctrine

The Spit also falls entirely within a federally-designated COBRA zone under the Coastal Barrier Resources Act, which prohibits federal flood insurance in these areas in an effort to deter development on unstable, dynamic barrier islands In 2008, Congressman Henry Brown made an unsuccessful attempt at removing Captain Sam's Spit from its COBRA designation

Captain Sam's Spit, the site of the proposed development, is pristine and undeveloped It supports a thriving wildlife community, including designated critical habitat for the federally endangered Piping Plover and the rare Diamondback terrapin Piping Plovers are a migratory bird species that use Captain Sam's Spit as resting and feeding grounds Human and animal activities that accompany development decrease the birds' ability to rest and feed The terrapin nests along the banks of the Kiawah River specifically in the area of the proposed bulkhead/revetment system The proposed structure would inhibit the terrapin from utilizing the banks for nesting activities

The Spit and Inlet are used for recreational purposes by the public, including members of the Coastal Conservation League League members and the public use the Kiawah River and

lands below the mean high water mark for boating, kayaking, fishing, viewing wildlife and other recreational activities

Public trust tidelands are owned by the state but pursuant to the public trust doctrine are held in trust by the State for the benefit of the citizens of the State Under the public trust doctrine, the State has a duty to protect this area for the benefit of all of the people of the State Accordingly, both the State and its citizens have significant property rights in this area The proposed bulkhead/revetment system would take over a half mile of public trust tidelands and convert it to private use to facilitate private development The hardened structure, in addition to having negative impacts upon wildlife, would limit or restrict use of this publicly-owned property

Both the SC Department of Natural Resources and the US Fish & Wildlife Service recommended denial of the permit because of pristine, undeveloped nature of the spit and potential damage that could result if it were developed

On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area The proposed bulkhead/revetment would be along the southwest portion of the parking lot at Beachwalker Park, the current public-access area at Kiawah Staff denied the remainder of the structure

The banks of the River in the area of the permitted structure on Beachwalker Park contain vegetation, which indicates that there is no current, active erosion occurring at the Park At best, the structure would protect ten parking spaces that could be moved to another location on the Park property and is therefore not necessary

5 **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations**

The Petitioner requests that the Court reverse the agency decision to issue a permit and certification to Kiawah Development Partners, II

The law which supports reversal is as follows

-the project would violate the Public Trust Doctrine, *McQueen v South Carolina Coastal Council*, 354 S C 142, 580 S E 2d 116 (2003) "[N]ot only does the State hold title to this land in jus privatum, it holds it in jus publicum, in trust for the benefit of all the citizens of this State" *Id* at 149, 119 *See also Sierra Club v Kiawah Resort Associates*, 318 S C 119, 456 S E 2d 397 (1995)

-the project as proposed would violate the State policies of protecting sensitive

and fragile areas from inappropriate development, of protecting resources of the coastal zone, and of protecting the quality of the coastal environment S C Code Ann §48-39-30

-the project would violate S C Code Ann Regs 30-12 B, which requires consideration of the impacts on production of marine life or wildlife or other natural resources, the impacts on existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational resources, the extent to which the project could affect habitats for rare and endangered species, and the extent to which the project could affect the value and enjoyment of adjacent owners

-the project as proposed would violate S C Code Ann Regs 30-12 C because it would have negative long-range and cumulative effects on marine life, wildlife habitat, and public use of a public trust tideland, particularly when considered within the context of other possible development and the general character of the area, because the KDP project and proposed development have not been presented in totality but instead this application has been submitted in a piecemeal manner, preventing comprehensive evaluation, and because it would have negative impacts on a Geographic Area of Particular Concern (GAPC)

-the project will result in negative impacts on adjacent beaches, dunes, coastal waters and wetlands, it will restrict or limit the continued public use of a recreational open area and interfere with public access to a public trust tideland area, it will damage a GAPC, it will alter or damage the natural functions of areas identified as critical habitat areas of the Federally endangered Piping Plover, and it will impede public use of areas below the mean high water line, which are inconsistent with Coastal Management Program policies at III-69 – III-71, III-73, IV-3, IV-16 – IV-17, and IV-57

- the project is inconsistent with the state policies set forth in the Coastal Zone Management Act, S C Code Ann § 48-39-30, § 48-39-80

6 A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion

No motions are expected at this time

7 A list of proposed witnesses and exhibits

Witnesses

Bill Eiser

Rob Young

Orrin Pilkey

Jeff Mollenhauer

Barbara Winslow

All witnesses listed by all other parties

Petitioner will supplement this list as additional witnesses are identified

Exhibits

All documents appearing in DHEC/OCRM files related to this critical area permit

Maps and photographs of the subject property and surrounding area

All exhibits listed by any other party

Petitioner will supplement this list as additional exhibits are identified

8 **A statement regarding the necessity for discovery, if any**

This is a relatively complex case that requires extensive discovery Two depositions have already been conducted, and four additional depositions have been noticed The Coastal Conservation League anticipates that additional depositions will be needed, and that it will likely engage additional expert witnesses who will need to review voluminous documents

9 **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc**

Petitioner does not believe it is necessary to conduct a scheduling conference or issue and order regarding motions and discovery at this time

10 **The estimated time required for the hearing**

Three to four days

11 **Any dates in the next ninety (90) days when you will not be available for a hearing**

The hearing date has been set for the week of August 24, 2009 All witnesses identified by the Coastal Conservation League as of this date are available to testify the week of August 24, 2009

Respectfully submitted,

Amy E Armstrong
James S Chandler, Jr
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
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FAX (843) 527-0540

Attorneys for the South Carolina Coastal Conservation League

Georgetown, South Carolina

June 1, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	DOCKET NO 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs South Carolina Department of Health and Environmental Control Respondent	**PREHEARING STATEMENT**

On behalf of the South Carolina Department of Health and Environmental Control (the Department), the following information is submitted

1 **Nature of the proceeding**
This contested case involves the Department's issuance of, and inclusion of special conditions on Critical Area Permit and Coastal Zone Consistency Certification # OCRM-08-117-E to Kiawah Development Partners II, Inc (KDP) to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina

2 **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations – be specific, not general**
S C Administrative Procedures Act, S C Code Ann § 1-23-310 *et seq* (Supp 2007)

Coastal Tidelands and Wetlands Act, S C Code Ann §§ 48-39-10 *et seq* (2008), Specifically S C Code Ann §§ 48-39-20(A-F), 48-49-30(D), 48-39-80(A), 48-39-80(B)(3),(4),(7), 48-39-130, 48-39-150(A)(5),(6),(7), 48-39-150(B), 48-39-210
23A S C Code Ann Regs 30-1 *et seq*
Specifically Regs 30-1(A)-(C), 30-4(A), (30-10)(A)-(B), 30-11(A)-(C), 30-12(C)

South Carolina Coastal Zone Management Program Document (CMP)
Chapter III C 3 XII A-B Activities in Areas of Special Resource Significance
A Dune Areas
B Dune Areas (Other than Critical Areas)
C Public Open Spaces
Chapter IV(A)(2)(a)(8) Threatened or Endangered Species
Chapter IV(C) Erosion Control Policy and (D) Beach and Shoreline Access

3 **The issues to be presented for determination, including any claims or defenses expected to be raised**

Whether the Department properly applied the provisions of the Coastal Tidelands and Wetlands Act, the Critical Area Regulations, and the Coastal Zone Management Program Document in reviewing KDPs' permit application and in issuing a permit with special conditions limiting the length of the authorized erosion control structure to 270'

The

4 **A brief summary of the facts to be presented at the hearing**

On February 29, 2008, the Department received a permit application to construct a 2783' erosion control structure consisting of a bulkhead with an articulated concrete block revetment placed along the toe of the bulkhead along the scarp line of the Kiawah River in the general vicinity of Beachwalker Park and Captain Sam's Spit on the Southwestern end of Kiawah Island, Charleston County, South Carolina A revised application was received on April 25, 2008 and the application was placed on Public Notice on May 16, 2008

The Department received comment letters from several entities and conducted a public hearing on the application U S Fish and Wildlife Service submitted three comment letters objecting to the permit Though conceding that the proposed revetment itself is not likely to affect the a federally listed species, FWS raised concerns about the federally listed piping plover, about impacts to the natural functionality of the Captain Sam's Inlet Complex, about potential negative impacts in a pristine and federally designated CBRA zone The South Carolina Department of Natural Resources also submitted comment objecting to the project, opining that the project is an unnecessary encroachment into sensitive intertidal habitats The Town of Seabrook Island and the Seabrook Island Property Owners Association initially submitted a comment letter objecting to the project because of concerns that the project may cause erosion on Seabrook Island, but both entities subsequently withdrew their objections Several other individuals also submitted comment letters and requested a public hearing, raising concerns about environmental impacts of the proposed project

On December 18, 2008, after conducting a thorough review of the project under the statute, regulations, and program document, the Department issued KDP a permit for the construction of a 270' bulkhead and articulated concrete block revetment on the northeastern end of the project area, along the southwest portion of the parking lot in Beachwalker Park Special Condition #1 of the permit provided that the remaining 2,513' of the proposed structure was not approved The Permit and the Technical Summary of Review (the Decision Document), which are attached hereto as Exhibit A and Exhibit B, contain a detailed explanation of the Department's decision

5 **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations**
The Department requests that the Court issue an order affirming the Department's decision to issue the permit with special conditions

6 **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion**
The Department does not plan to file a motion at this time, but reserves the right to do so

7 **A list of proposed witnesses and exhibits**
Witnesses Bill Eiser, Project Manager, OCRM
Exhibits The exhibits will consist of the contents of the DHEC file and aerial photographs, as well as any documents produced by the parties in the course of discovery

The Department also reserves the right to retain expert witnesses and will notify the parties immediately upon retaining an expert witness The Department also reserves the right to call as a witness any person or entity named as a witness by the other parties Finally, the Department reserves the right to call as a witness any person that submitted comment letters responsive to the Public Notice of this permit application

8 **A statement regarding the necessity for discovery**
Discovery will be necessary as provided in the ALC rules and the SCRCP

9 **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-hearing Scheduling Conference or Issue an order regarding motions, discovery, etc**
The Department does not feel at this time that a prehearing scheduling conference is necessary

10 **The estimated time required for the hearing**
A hearing should last approximately two-four days

11 **A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case**
The parties have tentatively agreed that they will be available, and a hearing on the merits has been noticed by the Court, for the week of August 24, 2009 Should that hearing be continued, Counsel for the Department is unavailable on the following dates 7/9-7/13, 9/17-9/20, 10/30

12 **E-mail address** whitficd@dhec sc gov

{Signature Page Follows}

Respectfully Submitted

Davis A Whitfield-Cargile
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South Carolina Department of Health and
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June 2, 2009

20826

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT

CRITICAL AREA PERMIT & COASTAL ZONE CONSISTENCY CERTIFICATION

Permittee(s)	**Kiawah Development Partners II, Inc**
Permit Number(s)	**OCRM-08-117-E**
Date of Issuance	**December 18, 2008**
Expiration Date	**December 18, 2013**
Location	**On and adjacent to the Kiawah River at Beachwalker Park, Kiawah Island, Charleston County, South Carolina**

SEE SPECIAL CONDITION(S)

This permit is issued under the provisions of S C Code Ann Section 48 39-10, *et seq*, and 23A S C Code Ann Regs 30-1 through 30-18 (Supp 2007) Please carefully read the project description and the special conditions that appear on this permit/certification as they will affect the work that is allowed The general conditions are also a part of this permit/certification and should be read in their entirety The S C Contractor's Licensing Act of 1999 enacted as S C Code Ann Section 40 11-5 through 430, requires that all construction with a total cost of $5 000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors **All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit This applies to permittee, future property owners, or permit assignees**

DESCRIPTION OF THE PROJECT, AS AUTHORIZED

The permit has been issued with significant modifications from the original request to build a 2,783' erosion control structure Specifically a 270' section of bulkhead and articulated concrete block revetment has been approved for the northeastern end of the project area, along the southwest portion of the parking lot in Beachwalker Park, but the remaining 2,513' of the proposed erosion control structure to the southwest of the park is not authorized

With the exception of the parking lot and associated infrastructure for Beachwalker Park there is currently no high-ground development in the general vicinity of the project area The applicant provided general information that indicated up to 50 residential homes on approximately 20 acres is planned and approved by the local government If issued as requested the permit will prevent the shoreline movement in an area that historically has seen inlet formation and facilitate development in a pristine dune area that is currently undeveloped and adjacent to federally designated critical habitat for the piping plover, a threatened species and as such is designated a Geographic Area of Particular Concern (GAPC) This area is also federally designated as a COBRA unit Regulation 30-11(C) requires that consideration must be given to the extent to which long-range cumulative impacts of the project may result within the context of other possible development and the general character of the area, the extent to which overall plans and designs of a project can be submitted together and evaluated as a whole, and the extent and significance of negative

Exhibit A

impacts on GAPCs, in this case the piping plover habitat and the Retreat Policy in its broadest sense Regulation 30-11(B) requires that consideration must be given to the extent to which the development could affect the habitats for rare and endangered species Section III(C)(3)(XII)(A) of the Coastal Management Program Document identifies barrier islands and dune areas outside of the critical area as areas of special resource significance that are unique and environmentally fragile, which would apply to this area Consequently, the permit will be issued to authorize a 270' erosion control structure adjacent to Beachwalker Park parking lot and the remainder of the proposed structure will not be authorized The purpose of the proposed activity is for erosion control

SPECIAL CONDITIONS

1 Provided that a 270 section of the proposed erosion control structure located along the southwest portion of the parking lot in Beachwalker Park is approved, but the remaining 2,513' of the proposed structure is not approved

2 Provided that an as built survey of the erosion control structure must be submitted to the Department within 90 days of the expiration date of the final construction placard The survey must be performed by a registered land surveyor, must show all edges of the structure, and must list the starting and ending coordinates of the structure in the SC State Plane Coordinate System, which can be obtained by survey grade Global Positioning System equipment

3 Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr James Spirek at 803 777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7 Title 54, Code of Laws of South Carolina, 1976) Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years) Examples include old pottery fragments, metal wood, arrowheads, stone implements or tools, human burials historic docks, structures or non-recent vessel remains Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks bone or entire skeletons

PERMITTEE S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND FIVE (5) BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE

THE PERMITTEE BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF ANY DEVIATION FROM THESE CONDITIONS, TERMS PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE

2 of 11

SEE SPECIAL CONDITION(S)

SEE SPECIAL CONDITION(S)

Permit Number **OCRM-08-117-E**

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit

(PERMITTEE(S)) (DATE)
Kiawah Development Partners II, Inc

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below

William C Eiser 12/18/2008

(PROJECT MANAGER, WETLAND SECTION) (DATE)
William C Eiser
Or his Designee
Other Authorized State Official

GENERAL CONDITIONS

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee

1 That the permittee in accepting this permit covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save OCRM and the State of South Carolina its employees or representatives harmless from all claims of damage arising out of operations conducted pursuant to this permit

2 That if the activity authorized herein is not constructed or completed within five years of the date of issuance this permit shall automatically expire A request in writing for an extension of time shall be made not less than thirty days prior to the expiration date

3 That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish wildlife and water quality

4 That this permit does not relieve the permittee from the requirements of obtaining a permit from the U S Army Corps of Engineers or any other applicable federal agency nor from the necessity of complying with all applicable local laws ordinances and zoning regulations This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast

5 That this permit does not convey expressly or impliedly, any property rights in real estate or material nor any exclusive privileges nor does it authorize the permittee to alienate diminish infringe upon or otherwise restrict the property rights of any other person or the public, nor shall this permit be interpreted as appropriating public properties for private use

6 That the permittee shall permit OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit

7 That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by OCRM

8 That this permit may not be transferred to a third party without prior written notice to OCRM either by the transferee s written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit and thereby agreeing to comply

9 That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee

10 That the permit construction placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work

11 That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition Failure to build in accordance with the plans and drawings attached hereto or failure to maintain the structure in good condition shall result in the revocation of this permit

12 That the authorization for activities or structures herein constitutes a revocable license OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by OCRM that such activity or structures violates the public s health safety or welfare or if any activity is inconsistent with the public trust doctrine Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing When the Permittee is notified that OCRM intends to revoke the permit Permittee agrees to immediately stop work pending resolution of the revocation

13 That OCRM shall have the right to revoke suspend or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health safety and welfare and/or is violation of Section 48 39 150 (2) adversely impacts public rights (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false incomplete or inaccurate or (4) that the activity is not in compliance with the drawings submitted by the applicant That the permittee upon receipt of OCRM s written intent to revoke suspend or modify the permit has the right to a hearing Prior to revocation suspension or modification of this permit OCRM shall provide written notification of intent to revoke to the permittee and permittee can respond with a written explanation to OCRM (South Carolina Code Section 1 023 370 shall govern the procedure for revocation suspension or modification herein described)

14 That any modification suspension or revocation of this permit shall not be the basis of any claim for damages against OCRM or the State of South Carolina or any employee agent or representative of OCRM or the State of South Carolina.

15 That all activities authorized herein shall if they involve a discharge or deposit into navigable waters or ocean waters be at all times consistent with all applicable water quality standards effluent limitations and standards of performance prohibitions and pretreatment standards established pursuant to applicable federal state and local laws

16 That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property of others This permit authorizes no invasion of adjacent private property and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit

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STATION ID 8667062
KIAWAH BRIDGE CHARLESTON COUNTY
83-00 EPOCH

MHHW	5 99 FEET
MHW	5 60 FEET
NAVD88	3 11 FEET
MTL	2 80 FEET
NGVD 29	2 13 FEET
MLW	0 00 FEET
MLLW	-0 17 FEET

SEE SPECIAL CONDITION(S)

4

5

6

BEACHWALKER PARK

MLW

NOTE
FOR PERMITTING ONLY
NOT FOR CONSTRUCTION

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
NO 26167
2 28 08
JAMES R DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO
No C00285
CERTIFICATE OF AUTHORIZATION

APPROXIMATELY 2783 LINEAR FEET OF RIVER FRONTAGE PROPOSED TO BE IMPACTED

HOR SCALE 1 =400
0 200 400 800 1200

THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

EXISTING SITE CONDITIONS & SHEET INDEX

OCRM-08-117-E

KIAWAH RIVER BEND EROSION CONTROL

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

FEBRUARY 14 2008

SCALE 1 = 400

SHEET 3 OF 7

11 of 5

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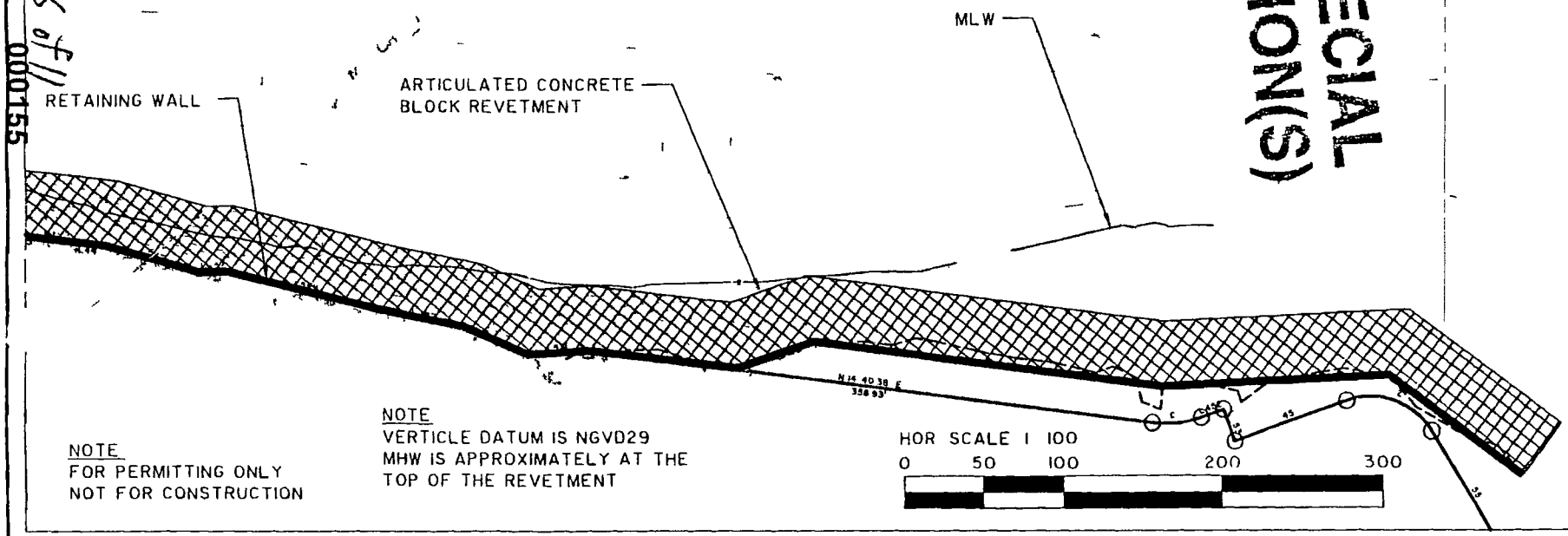
SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
NO 26167
2.28.08
JAMES R DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO
No. C00285
CERTIFICATE OF AUTHORIZATION

SEE SPECIAL CONDITION(S)

6 of 11

0001555



NOTE
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NOT FOR CONSTRUCTION

NOTE
VERTICLE DATUM IS NGVD29
MHW IS APPROXIMATELY AT THE
TOP OF THE REVETMENT

THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849 0200
SAVANNAH GA
MYRTLE BEACH SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT
PARTNERS II INC
FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1 = 100

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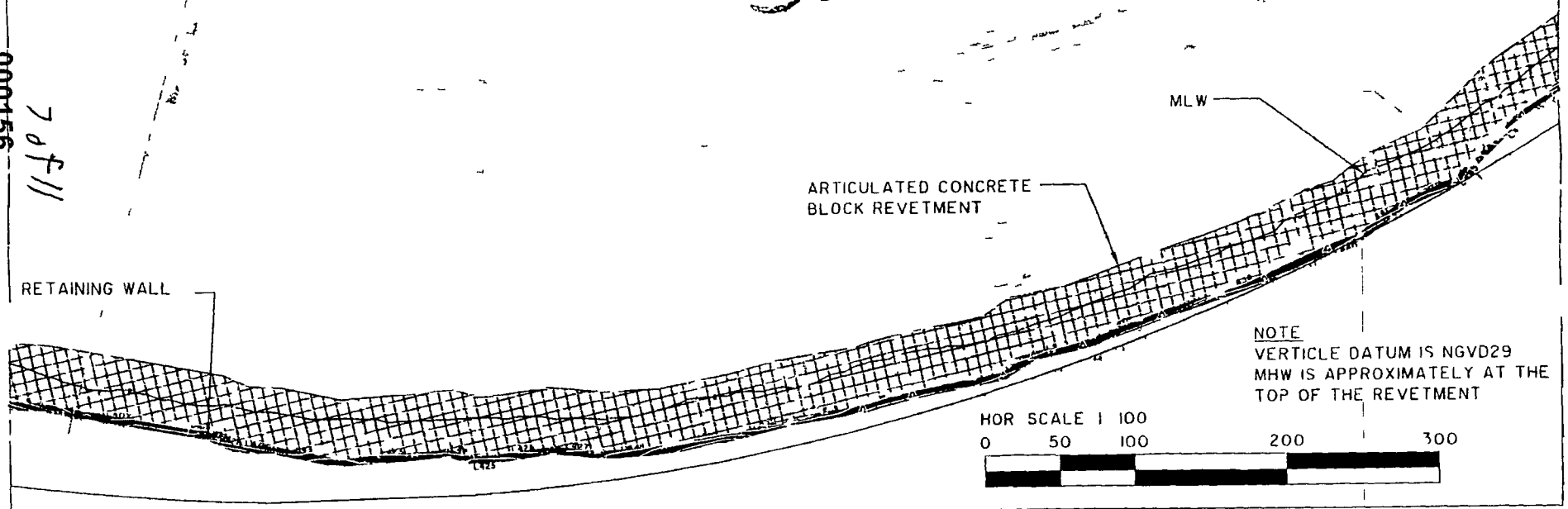
SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
26167
2 28 08
JAMES R DUCKER

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO
No C00285
CERTIFICATE OF AUTHORIZATION

NOTE
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SEE SPECIAL CONDITION(S)

MATCH LINE - SEE SHEET 10 &



NOTE
VERTICLE DATUM IS NGVD29
MHW IS APPROXIMATELY AT THE TOP OF THE REVETMENT

HOR SCALE 1 100
0 50 100 200 300

000156

7 of 11

THOMAS & HUTTON ENGINEERING CO
935 HOUSTON NORTHCUTT BOULEVARD
MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

SITE DEVELOPMENT

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

FEBRUARY 14 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1 = 100

SHEET 5 OF 7

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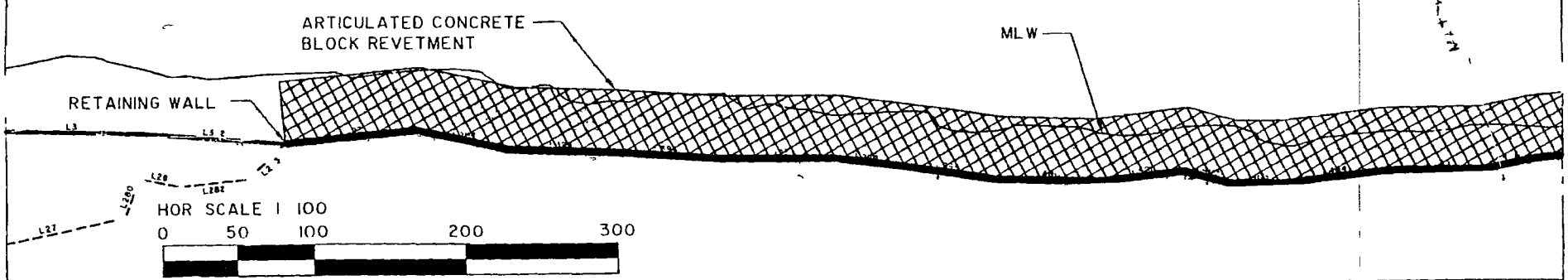
SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER
JAMES R DUCKER
NO 26167
2 28 08

SOUTH CAROLINA
THOMAS & HUTTON ENGINEERING CO
No. C00285
CERTIFICATE OF AUTHORIZATION

SEE SPECIAL CONDITION(S)

NOTE FOR PERMITTING ONLY NOT FOR CONSTRUCTION

NOTE
VERTICLE DATUM IS NGVD29
MHW IS APPROXIMATELY AT THE TOP OF THE REVETMENT



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MYRTLE BEACH SC

SITE DEVELOPMENT

OCRM-08-117-E

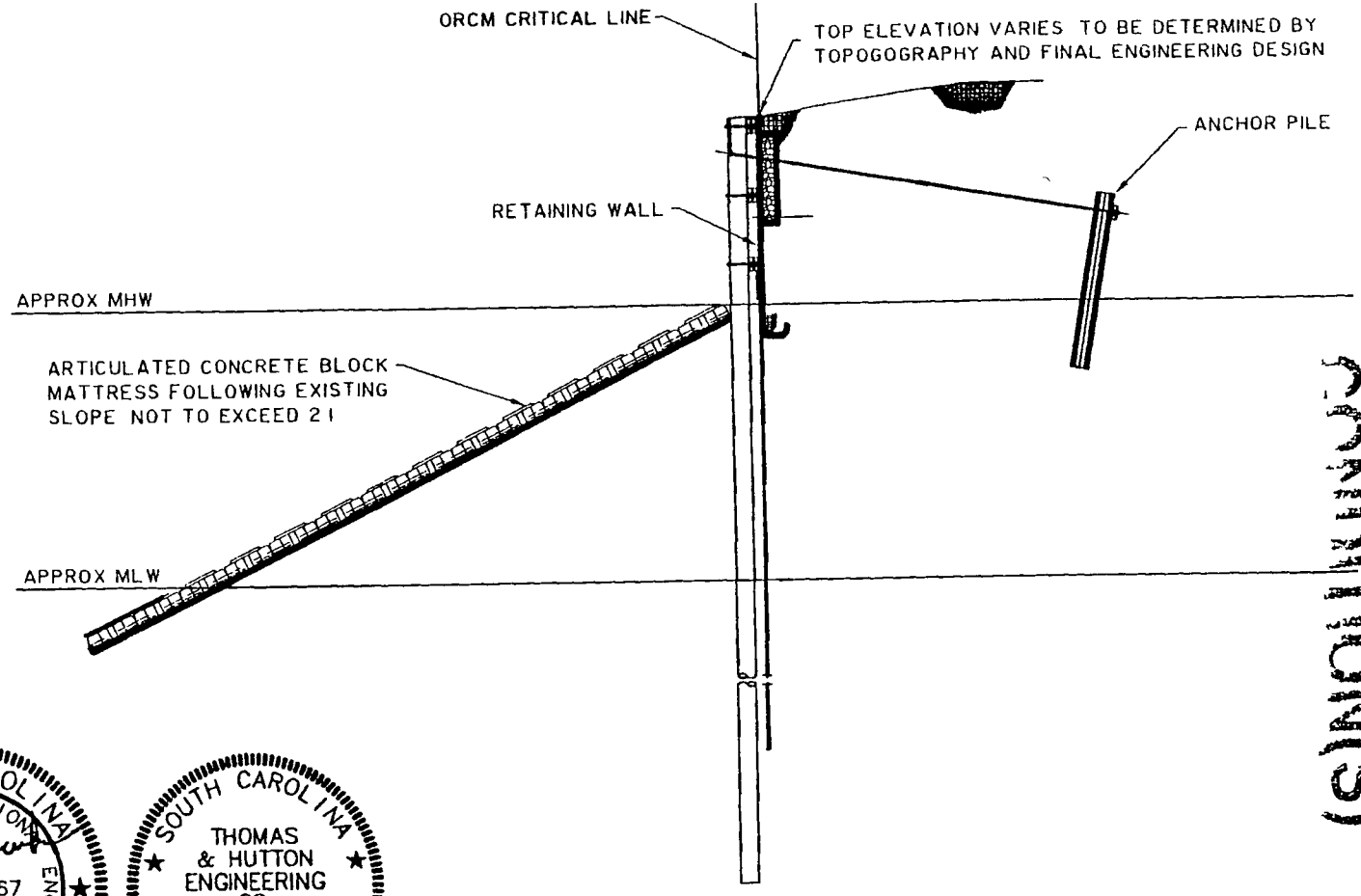
PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

FEBRUARY 14, 2008

KIAWAH RIVER BEND EROSION CONTROL

SCALE 1 = 100

SHEET 6 OF 7



SEE SPECIAL CONDITION(S)

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER JAMES R DUCKER NO 26167 2 28 08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No C00285 CERTIFICATE OF AUTHORIZATION

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9 of 11

0001358

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(843)849 0200
SAVANNAH GA
MYRTLE BEACH SC

SECTION DETAIL

OCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC

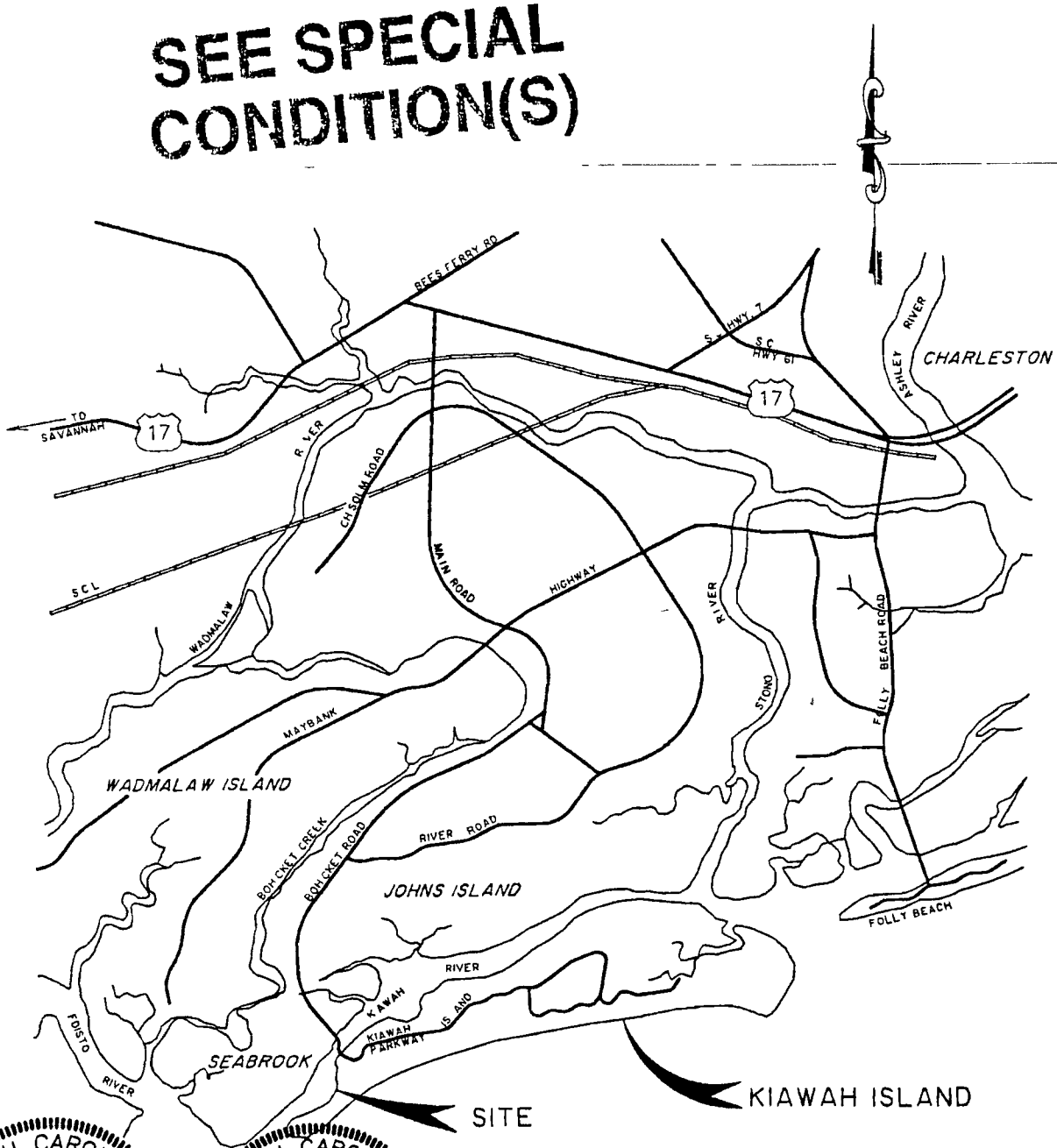
FEBRUARY 14 2008

KIAWAH RIVER BEND EROSION CONTROL

NOT TO SCALE

SHEET 7 OF 7

SEE SPECIAL CONDITION(S)



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER NO 26167 JAMES R DUCKER 2 28 08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No C00285 CERTIFICATE OF AUTHORIZATION

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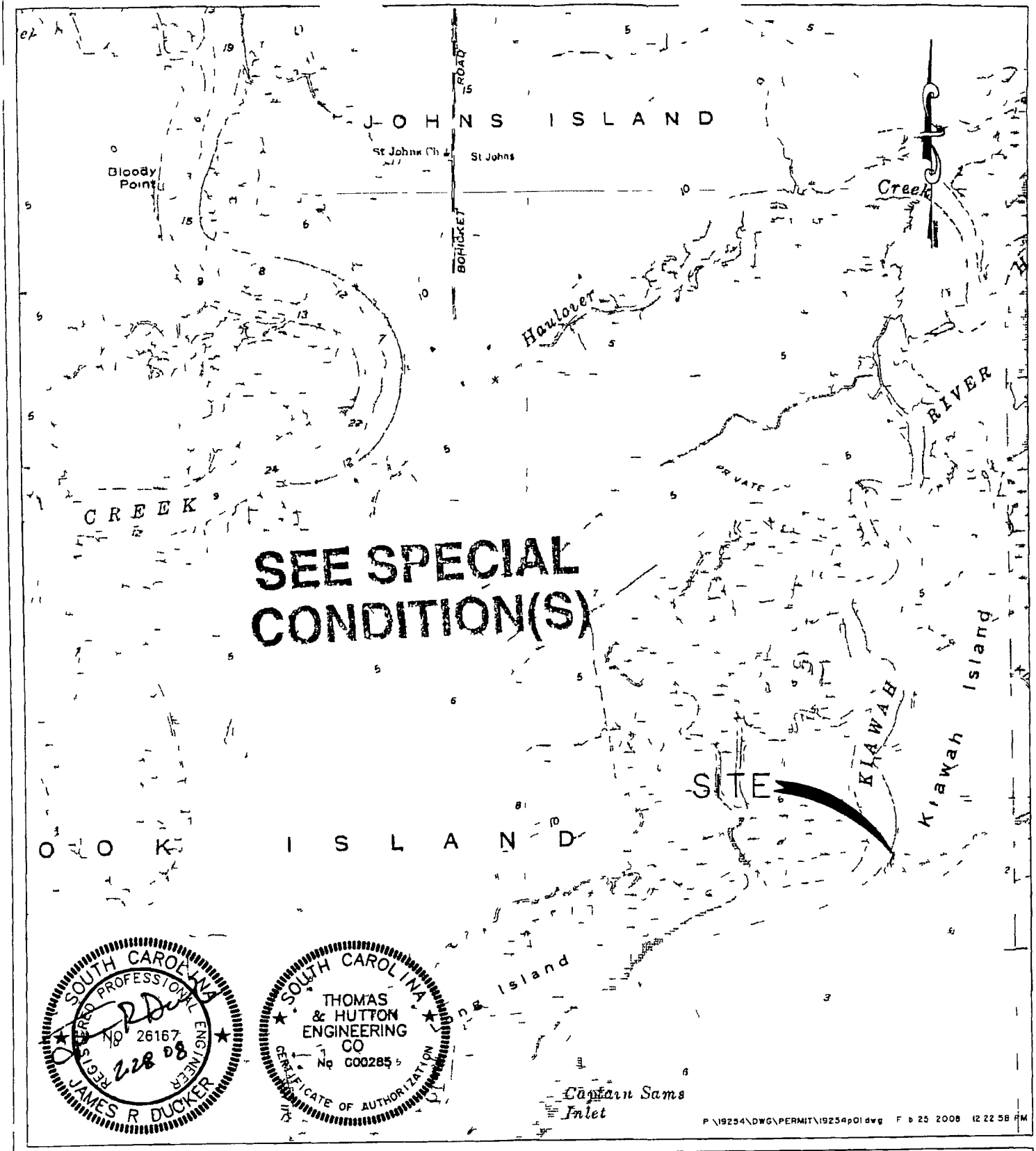
THOMAS & HUTTON ENGINEERING CO

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MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

10 of 11

VICINITY MAP OCRM-08-117-E	PROPOSED ACTIVITY EROSION CONTROL DEVICE COUNTY CHARLESTON APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC FEBRUARY 14 2008
KIAWAH RIVER BEND EROSION CONTROL	NOT TO SCALE SHEET 2 OF 7

000159



SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No 26167 JAMES R DUCKER 2 28 08

SOUTH CAROLINA THOMAS & HUTTON ENGINEERING CO No C00285 CERTIFICATE OF AUTHORIZATION

THOMAS & HUTTON ENGINEERING CO

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MOUNT PLEASANT SC 29464
(843)849-0200
SAVANNAH GA
MYRTLE BEACH SC

11 of 11

QUAD MAP

DCRM-08-117-E

PROPOSED ACTIVITY
EROSION CONTROL DEVICE
COUNTY CHARLESTON
APPLICANT KIAWAH DEVELOPMENT PARTNERS II INC
FEBRUARY 14 2008

LAT 32° 35' 12
LONG 80° 07 54
SOURCE ROCKVILLE SC QUADRANGLE MAP
KIAWAH ISLAND, SC QUADRANGLE MAP

SCALE 1 = 2000

SHEET 1 OF 7

000100

Regulatory Programs Division Decision Document
Impact Assessment for Bulkheads and Revetments
(Other than ocean front)
Office of Ocean and Coastal Resource Management - SCDHEC

TECHNICAL SUMMARY OF REVIEW

Permit Name Kiawah Development Partners II, Inc
Decision

Permit	
Permit with Conditions	X
Deny	

I Background Information Database ID# 63093

Permit Number OCRM-08-117-E

P/N Date 5/16/2008 Date Received 2/29/08, in revised form on 4/25/2008

Direct Critical Area

Other Agency Permits: Corps NW #13 issued 4/4/08; Corps NW #13 suspended 7/14/08; Corps NW #13 reinstated 9/9/08

Permit Type

County Charleston Water Body Kiawah River

Location Description Kiawah Island – Beachwalker Park and the spit to the southwest

II Project Description and Stated Purpose

Description A 2 783 erosion control structure consisting of a bulkhead with an articulated concrete block revetment placed along the toe of the bulkhead along the erosional scarp line of the Kiawah River in the general vicinity of the Charleston County PRC lot and where the proposed residential development would occur

Purpose Erosion control to protect Charleston County Park infrastructure and to protect future residential development In a letter dated June 26 2008 the applicant references a 2005 development agreement that specifies plans for up to 50 homes on 20 acres

III Summary of Public and Agency Comments (List by name, date & comment summary, if none, so indicate)

Federal Agencies USFWS 6/12/08 – concerns the project may adversely impact nearby piping plover habitat which is a threatened species making the habitat a GAPC Recommend denial
USFWS 6/16/08 – repeats these concerns asks Corp to rescind the NW #13
USFWS 8/14/08 – expressed continued concerns about impacts to the natural functionality of the Captains Sam s Inlet Complex and that the project is not necessary and may lead to negative impacts in a pristine and federally designated area COBRA zone but also concludes the project footprint is

Exhibit B

not likely to adversely affect federally protected species and/or designated critical habitat

State Agencies DNR 5/22/08 – project is an unnecessary encroachment into sensitive intertidal habitats no structures are threatened here recommends denial

Local Agencies Town of Seabrook Island 5/30/08 – States concerns expressed by Seabrook Island POA are valid and deserve further study (see below) A second letter dated 9/2/08 withdrew their objections

Public Comment (Include all names from Public Hearing) Samuel Reed Seabrook Island POA 5/28/08 – project may cause erosion on Seabrook Island property A second letter dated 8/31/08 states that a study has been performed and based on this new information they no longer object
Dinkelspiel, 8/19/08 – objects unacceptable environmental impacts
Vinson CCL 8/21/08 – objects unacceptable impacts to the habitat of threatened species
Blizard 10/20/08 – objects may impact diamondback terrapins
After the formal comment period had closed 24 letters were received asking that the public comment period be extended and a public hearing be held

Adjoining Property Owners (Include all names of those who commented) Tom O Rourke with the Charleston County PRC 9/5/08 – supports project

IV Environmental Assessment

A Describe the coastal resources (i e , vegetation habitat etc) which will be impacted

The riverbank is dominated by the forces of the river but also is affected by other processes in this barrier island system Barrier Islands are characterized as one of the most dynamic coastal ecosystems since they are constantly being reshaped by winds and waves The erosion control device would affect the ability of the inlet and the beach/dune system to migrate, as it has been known to do in the recent past The scope of the project calls for the hardening of approximately 2700 linear feet of shoreline on the backside of a barrier island Up to 50 homes are proposed on 20 acres located within Areas of Special Resource Significance as outlined in Chapter III C 3 XII A-B of the Coastal Zone Management Plan Program Document Barrier Islands, Dune Areas outside the critical area, and Public Open Spaces are three of the five identified Areas of Special Resource Significance These sensitive areas play an integral part in the coastal ecosystem The erosion control structure and the proposed development are likely to have long-range and cumulative effects on these areas and on the general character of the area As a part of the review and certification of permits, OCRM employs the additional resource policies for projects located in Areas of Special Resource Significance The applicable policies for the individual activity which is proposed, as well as the general guidelines for evaluation of all projects, are also considered by OCRM in permit and project reviews in these areas

The location of the proposed erosion control structure is along a bend in the Kiawah River on the backside of a spit feature on the southern end of Kiawah Island which is a barrier island located in Charleston County The riverbank exhibits typical features of a river bend with an escarpment with little to no vegetation including non-littoral vegetation The area where the proposed erosion control structure will be built at its narrowest point is approximately 500' This area is subject to periodic inundation by tidal and wave action The footprint of the erosion control structure is within two of the four types of the direct jurisdictional areas of SCDHEC-OCRM (1) coastal waters and (2) tidelands The footprint of the structure does not fall within

the beach/dune system or beaches types of direct jurisdiction of SCDHEC-OCRM However, the footprint of the project and where the proposed development will occur are located on a barrier island and/or within a dune area which are designated as Areas of Special Resource Significance The overall character of the shoreline is of a sandy sloping intertidal shoreline with typical beach vegetation such as sea oats and other beach grasses on the adjacent high ground

Describe erosional aspects of the property

The area along the parking lot for the county park shows evidence of active scarping along the river edge The degree of erosional scarping decreases with distance toward the southwest, away from the park

B Watershed and vicinity information (include watershed name & size classification any impaired waters listed within impaired parameter and shellfish status)

Kiawah River watershed, shellfish lease/permit # S194W, Kiawah River West

1) Vicinity information (include information on developments within watershed within 3 mile radius)

Most of the area in the vicinity is undeveloped pristine beach-type dune area located along the southwestern end of a barrier island with a well-developed recurved spit feature The backside of the barrier island is bounded by a tidal waterbody known as the Kiawah River The location of the proposed erosion control structure is adjacent to federally designated piping plover critical habitat The piping plover is a federally listed threatened species The area is also known to be important habitat for shorebird species including the nesting Wilson's plovers as described in the US Fish and Wildlife Service letter dated 6/12/08 As will be discussed later, critical habitat for threatened species are further designated as Geographic Areas of Particular Concern (GAPCs) under South Carolina's Coastal Tidelands and Wetlands Act

Additionally, the proposed project is located within the federally designated Captain Sam's Inlet Unit (SC-M08) of the Coastal Barrier Resource System (CBRS) The CBRS was established in the Coastal Barrier Resources Act (COBRA) of 1982, and is comprised of undeveloped coastal barriers along the Atlantic, Gulf and Great Lakes coasts Among other things, the purpose of COBRA is to help achieve the long-term conservation of fish wildlife and other natural resources associated with the coastal barriers by eliminating Federal spending on projects in designated areas

The land in the vicinity of the proposed project is notable in that it lacks human improvements with the exception of minor improvements associated with the County Park located at the northeast end of this site The general vicinity is otherwise in a completely natural and pristine state typical of a barrier island and dune area There is no development on the south side of the Kiawah River downstream of the proposed project

2) Existing system stressors (i e shellfish closures 303d)

None

C GAPC Review (List any GAPC s present on or adjacent to project site include agency comments attach GIS printout and outline treatment methods)
Adjacent to critical habitat for the threatened piping plover which is a GAPC The map provided by USFWS shows the exact boundary of the designated critical habitat Unit SC-10

D Name and approximate width of water body Kiawah River, approx 400 wide average

V Policy Assessment

A Regulatory History

1) Previous OCRM authorizations (Critical Area Permits land disturbance Federal cert)
A permit application was submitted by Charleston County Parks & Recreation Commission on 9/21/06 P/N OCRM-06-396-B requesting a permit to construct a 270 rock revetment to address erosion along the parking area for the Beachwalker Park The applicant s agent Ross Nelson with Tidewater Environmental Services requested the Department hold the permit application in abeyance by way of an e-mail dated 6/1/07 This permit request was withdrawn by the applicant on 10/13/08

2) Previous Enforcements (is project in compliance w/all previous permits etc) None

B Applicable Regulations and Policies

Statutory Provisions
48-39-10 et seq
48-39-20(A-F) 48 39-30(D) 48-39-80(A) (B)(3 4 7) 48-39-130
48-39-150(A)(5)(6)(7) 48-39 150(B) 48-39 210

Regulatory Provisions
R 30-1 et seq
R 30-1(A C) 30-4(A) 30 10(A-B) 30-11(A-C) 30 12(C)

Specific Project Standards
R30 12(C) sets out the standards for Bulkheads and Revetments in coastal waters and tidelands These criteria attempt to mitigate environmental losses that can be caused by these structures by adopting several standards The proposed project design conforms to the critical line is proposed to be built within 18 inches of the critical line and the area is not otherwise adequately protected by marshlands These specific regulatory provisions do not bar this project

South Carolina Coastal Zone Management Program Document
Chapter III C 3 XII A-B Activities in Areas of Special Resource Significance
A Barrier Islands - Policies
B Dune Areas (Other than Critical Areas)
D Public Open Spaces
Chapter IV(A)(2)(a)(8) Threatened or Endangered Species
Chapter IV(C) Erosion Control Policy and (D) Beach and Shoreline Access
D Beach and Shoreline Access

C Does the project contravene any coastal zone regulations? YES

X YES ☐ NO

Specific Project Standards

48 39-150(A)(6) Department staff find the permit as requested contravenes this provision of the statute This provision speaks to the extent to which the development could affect the habitats for rare and endangered species of wildlife

R30-12(C) sets out the standards for Bulkheads and Revetments in coastal waters and tidelands These criteria attempt to mitigate environmental losses that can be caused by these structures by adopting several standards The proposed project design plans show the erosion control structure being built at the OCRM critical line in an area that is not otherwise adequately protected by marshlands These specific regulatory provisions do not bar this project

Although the specific regulatory provisions for bulkheads and revetments do not bar this proposed activity when evaluating the overall project staff must take into consideration R 30-11 Guidelines for All Critical Areas Therefore staff must consider the long-range cumulative effects the project may have within the context of other possible development and the general character of the area The long-range effects on the general character of the area would be to prevent the normal shoreline migration and the cycle of creation and subsequent in-fill of a tidal inlet Furthermore in a letter dated June 26 2008,the applicant references a 2005 development agreement that specifies residential development KDP identifies that the plans call for up to 50 homes on 20 acres The long-range and cumulative impacts of the project must take into consideration the associated infrastructure roads water sewer etc and impacts of 50 homes with this development

The general character of the area is one of a pristine barrier island with a well developed recurved spit feature It has a sizable dune area Both of these features are classified as Areas of Special Resource Significance by South Carolina s Coastal Zone Management Plan Program document A recurved spit feature typically has a narrow area where inlets are cut and subsequently fill in Historical information indicates that inlets have formed in this area approximately 7 times in the past The proposed project footprint is located in critical areas of the coastal zone The erosion control structure will be located adjacent to a dune area These areas are known to be highly dynamic areas It is likely that the future development will have a significant impact on the general character of the area

R 30 11(C)(1-3) Further Guidelines

In this section of the regulation staff is directed 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 Staff must consider the overall plans for the project which calls for over 2700 of hardening of a shoreline on a spit feature on a barrier island and up to 50 homes on 20 acres The purpose of the erosion control structure is to prevent the normal shoreline movement and to protect the existing County Park as well as the proposed residential development There are likely to be additional impacts to fresh and saltwater wetlands associated with the residential development roads or other infrastructure These additional activities would result in further impacts to the general character of the barrier island and dune area

VI Modifications for bringing the project into compliance with regulations

A Modifications required to minimize impacts (list avoidance & minimization measures buffers size and/or use restrictions additional treatment measures deed restrictions and agency agreements)

Based on the value of public recreational and open space areas as stated in **Chapter III C 3 XII D Public Open Spaces** of the Coastal Zone Management Program staff is recommending the allowance of approximately 270 of the erosion control structure The erosion control structure in this location will protect and allow for the continued use of the public recreational facility at the County Park This continued use is supported by the values cited in the Public Open Space provisions of the Management plan The remainder of the requested erosion control structure is not authorized by this permit

As requested the permit will prevent the migration of the shoreline of this barrier island by not allowing inlet migration and/or inlet formation as has been the case in the recent past Also the permit as requested would facilitate development in a pristine dune area on a barrier island that is currently undeveloped and is adjacent to the critical habitat for the federally protected piping plover which is a Geographic Area of Particular Concern (GAPC)

B If Permit is denied explain contraventions of regulations and/or Coastal Zone Management Program

VII Field assessment by Bill Eiser 5/22/08, 11/21/08

(Name) (Date)

VIII Reviewed By

1 Project Manager Bill Eiser 12/18/08

(Signature) (Date)

IX Notes

Project site is adjacent to Congressionally designated Critical Habitat for the protected Piping Plover and located with COBRA Unit M 08

Beach Jurisdictional Line History

Although the footprint of the proposed erosion control structure is not located within the beach beach/dune system types of critical areas it is immediately adjacent to these jurisdictional areas and therefore the past history of these jurisdictional lines is provided below as related information

The original beach/dune jurisdictional baseline drawn along the oceanfront portion of this property in 1990 stopped in the general vicinity of Beachwalker Park such that all of the land to the southwest of the Park was considered to be seaward of the baseline When the beach/dune baseline was revised in 1999 as part of the state-wide line review process mandated to occur every 8-10 years the baseline was extended approximately 4 600 feet past the Park down the oceanfront shoreline toward the southwest This change was based on the fact that the methodology calls for the baseline to be drawn at the most-landward shoreline during the past 40 years unless other scientific data suggests otherwise In 1999 an older shoreline used in the 1990 review was not included as directed by Statute therefore allowing for the baseline movement This significant change in the position of the baseline is a direct result of the dynamic nature of this beach

The following letters were also received from the applicant or their agent

Mitchell Bohannon 9/2/08 – states that project will not harm Seabrook Island and is needed to prevent further erosion on the property Includes a comment letter on the project from Tim Kana and a report on sand accretion on the Kiawah Spit by George Oertel

Ray Pantlik 9/2/08 – attempts to document how project is in compliance with all applicable regulations Includes a report by Oertel and Basco on potential impacts from the project Reiterates the proposed development plans call for approximately 50 homes on 20 acres

Leonard Long 8/3/08 – provides project history and reasons why the permit should be issued

Ray Pantlik 9/8/08 – states that proposed revetment length is not excessive

Ray Pantlik 9/18/08 – states there will be no long-range cumulative adverse effects and no impacts to a GAPC from the proposed revetment
The letter suggests that the governmental decision whether development should occur on high ground rests within the providence of the local government Local governments play an important role in shaping the densities and extent of development within their jurisdiction However SCDHEC-OCRM with its broad statutory authority to ensure the State s Coastal Zone Management Plan is not contravened as laid out in law regulations and policies As a part of certifying that projects do not contravene the Plan takes into consideration direct indirect secondary and cumulative impacts from a proposed project Furthermore SCDHEC-OCRM has direct authority with respect to NPDES Construction General permits issued pursuant to the SC Pollution Control Act This permit and activities contemplated under its review must also be found consistent with our State s Coastal Zone Management plan Therefore SCDHEC-OCRM will have an active role in reviewing any proposed upland development activities on this site

Other relevant information
Spit has grown to about 150 acres (Post and Courier article)
CSE 1999 report – Over the last 60 years the shoreline of Kiawah Island has built seaward over 0 25 miles
Ortel August 2008 report - Channel migration at the river bend estimated to be about 8 9 ft/yr with ocean shoreline building faster than the channel is shifting The spit at its narrowest point is approximately 500 wide
KDP in 2005 agreed to build fewer than 50 homes on approximately 20 acres based on 2005 zoning

X **Attachments Required**
GIS Review (See Section IV C above) and site photographs

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

COPY

Kiawah Development Partners, II, Petitioner, vs SCDHEC Office of Ocean and Coastal Resource Management, Respondents	Docket No 09-ALC-07-0029-CC Docket No 09-ALJ-07-0039-CC **AMENDED PREHEARING STATEMENT OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE**
South Carolina Coastal Conservation League, Petitioner, vs Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents	**FILED** JUL 27 2009 **SC ADMIN LAW COURT**

The Petitioner, South Carolina Coastal Conservation League, submits the following as its Prehearing Statement in this matter

1 **The nature of this proceeding**

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control ("DHEC"), Office of Ocean and Coastal Resource Management, to issue a critical area permit and coastal zone consistency certification to Kiawah Development Partners, II, for the proposed construction of 270' of a bulkhead and revetment system along the banks of the Kiawah River near Captain Sam's Inlet in Charleston County, SC The South Carolina Coastal Conservation League appeals the issuance of the permit and Kiawah Development Partners, II, appeals the limitation of the permit to 270 feet of bulkhead and revetment instead of the applied-for permit of more than 2700 feet The appeals have been consolidated for hearing

2 **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations - specific, not general**

Subject matter jurisdiction (1) S C Administrative Procedures Act, S C Code Ann §§ 1-23-310, 1-23-370, 1-23-600, (2) the S C Coastal Zone Management Act, S C Code Ann § 48-39- 150, (3) S C Code Ann § 48-1-10, *et seq* , and (4) S C Code Ann § 44-1-60 2006 Act No 387

Other applicable statutes and regulations (1) the S C Coastal Zone Management Act, S C Code Ann § 48-39-10, *et seq* , and in particular §§ 48-39-10, 20, 30, 80, 120, 130, 150, 250, 260, (2) the Critical Area Regulations, S C Code Ann Reg 30-1, *et seq* , and in particular, R 30-11 A, B and C, (3) DHEC Regulations for 401 water quality certifications, SC Code Ann Regs § R 61-101, (4) the South Carolina Coastal Management Program, and in particular the policies set forth on pages III-69 – III-71, III-73, IV-3, IV-16 & 17, IV-57

3 **The issues to be presented for determination, including any claims or defenses expected to be raised**

1 Will the project restrict or limit the public's use of State owned lands and waters in violation of the Public Trust Doctrine?

2 Will the project convert tidelands owned by the State in trust for all of its citizens to an area unusable by the public and in effect turn this State public trust property over to a private development?

3 Will the proposed project have adverse impacts on State owned lands and waters?

4 Will the project violate the State policies of protecting sensitive and fragile areas from inappropriate development, of protecting resources of the coastal zone, of protecting the quality of the coastal environment, and of using critical areas in a manner that insures the maximum benefit to the people, but not necessarily a combination of uses that generates measurable maximum dollar benefits, all in violation of S C Code Ann §48-39-30?

5 Will the proposed project result in a development that will place life and property at risk?

6 Does the proposed project violate the considerations and guidelines for critical area permits in the following respects

A Will the project affect the production of any marine life or wildlife, in

particular diamondback terrapins, in the project area?

B Will the proposed project affect existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational coastal resources?

C Will the development affect the habitats for rare and endangered species of wildlife?

D Will the proposed project affect the value and enjoyment of adjacent owners?

E Will there be long-range, cumulative affects of the project that may result within the context of other possible development and the general character of the area?

F Have overall plans and designs of the project been submitted together and evaluated as a whole to avoid piecemeal and fragmented evaluation?

G Will the project have negative impacts on Geographic Areas of Particular Concern (GAPC)?

7 Will the project violate the State's policy of protecting and preserving the beach/dune system for the highest and best use which is protection of life and property by allowing the beach/dune system to act as a buffer from high tides, storm surge, hurricanes, and normal erosion and of preserving existing public access, in violation of S C Code Ann §48-39-260?

8 Will the project violate DHEC's water quality certification regulations, specifically

A Will the project adversely impacts waters containing State or Federally recognized rare, threatened or endangered species, which is prohibited by R 61-101(F)(5)(c)?

B Is there a lack of feasible alternatives to the proposed project, as required by R 61-101(F)(5)(b)?

9 Will the proposed violate the policies of the South Carolina Coastal Management Program in the following respects

A Would the proposed project alter the fragile and dynamic nature of Captain Sam's Spit?

B Is Captain Sam's Spit an unstable area, prone to erosion and other hazard risks?

C Will the project result in negative impacts on adjacent beaches, dunes, coastal waters and wetlands?

D Will the proposed project restrict or limit the continued public use of a recreational open area?

E Will the project result in damage to a Geographic Area of Particular Concern?

F Will the project alter or damage the natural functions of areas identified as critical habitat areas of the Federally endangered Piping Plover?

G Will the project violate the integrity of the Endangered Species Act?

H Will the proposed project interfere with existing public access to public trust tidelands?

I Will the proposed project impede public use of areas below the mean high water line?

10 Are there feasible alternatives to the proposed bulkhead and revetment system?

11 Is there a need for the proposed bulkhead and revetment system?

12 Did the agency properly deny the KDP application because it is inconsistent with the State policies specified in Sections 48-39-20 and 48-39-30 and the ten general considerations set forth in Section 48-39-150 of the Coastal Zone Management Act?

4 A brief summary of the facts to be presented at the hearing

Kiawah Development Partners II, Inc ("KDP") has applied for a permit to construct a 2,783' long articulated revetment and bulkhead in public trust tideland areas along the banks of the Kiawah River near Captain Sam's Inlet on Kiawah Island

KDP is proposing to construct a residential development consisting of 50 houses on the southern tip of Kiawah Island, an area known as Captain Sam's Spit In order to facilitate development of this area, KDP proposes to construct a revetment and bulkhead on state-owned public trust tidelands KDP asserts that this revetment and bulkhead is necessary to protect an access corridor for a road to the area it proposes to develop

Although KDP has announced plans to construct up to 50 houses on the property, KDP has not provided DHEC with specific development plans, nor has it submitted an application for a stormwater permit for the proposed residential development to DHEC/OCRM for review

The proposed bulkhead and revetment would be constructed along the banks of the Kiawah River in critical area tidelands below the Mean High Water mark These critical area tidelands are owned by the State of South Carolina and held in trust for the benefit of all of the

people of the state, pursuant to the Public Trust Doctrine

The Spit also falls entirely within a federally-designated COBRA zone under the Coastal Barrier Resources Act, which prohibits federal flood insurance in these areas in an effort to deter development on unstable, dynamic barrier islands In 2008, Congressman Henry Brown made an unsuccessful attempt at removing Captain Sam's Spit from its COBRA designation

Captain Sam's Spit, the site of the proposed development, is pristine and undeveloped It supports a thriving wildlife community, including designated critical habitat for the federally endangered Piping Plover and nesting grounds for the federally endangered Loggerhead Seaturtle and the rare Diamondback Terrapin Piping Plovers are a migratory bird species that use Captain Sam's Spit as resting and feeding grounds Human and animal activities that accompany development decrease the birds' ability to rest and feed Prominent scientists have been conducting research on the terrapins that inhabit the Kiawah River since 1983 and have documented population declines The terrapin nests in the dunes along the Kiawah River specifically in the area of the proposed bulkhead/revetment system The proposed structure would inhibit the terrapin from reaching the dunes and utilizing the dunes for nesting activities, potentially leading to further population declines

In 1974 a comprehensive, 16 month study of Kiawah Island and its resources was conducted by a group of prominent scientists That study, entitled Environmental Inventory of Kiawah Island, contains a section devoted to Geology and Coastal Processes In that section the scientists reviewed historical changes in Captain Sam's Inlet dating back to 1661 They found that the Captain Sam's Spit had been completely eroded and redeposited at least twice in the last 200 years They concluded that due to its instability and susceptible to erosion and storm damage it would be very unwise to develop Captain Sam's Spit

The Spit is located in an inlet erosion zone, which is the most dangerous place for development When severe storms or hurricanes hit coastal South Carolina, the portion of the barrier island that is within the inlet erosion zone, or within 300 meters of an inlet, is extremely vulnerable to flood damage because of its proximity to the inlet that carries storm waters Residential development on the Spit will inevitably be subject to severe storms and/or hurricanes that could cause significant damage to life and property When homes, vehicles, docks and other improvements are strewn about public trust waters, tidelands, and marshes, the developer would not be responsible for any losses or damage because the lots will have been sold to ill-informed purchasers Instead, the citizens of South Carolina will be financially responsible for the resulting clean up

Yet it is the very citizens of the State that will suffer a loss if the bulkhead/revetment is constructed The Spit and Inlet are used for recreational purposes by the public, including members of the Coastal Conservation League League members and the public use the Kiawah River and lands below the mean high water mark for boating, kayaking, fishing, viewing wildlife and other recreational activities

Public trust tidelands are owned by the state but pursuant to the public trust doctrine are held in trust by the State for the benefit of the citizens of the State Under the public trust doctrine, the State has a duty to protect this area for the benefit of all of the people of the State Accordingly, both the State and its citizens have significant property rights in this area The proposed bulkhead/revetment system would take over a half mile of public trust tidelands and convert it to private use to facilitate private development The hardened structure, in addition to having negative impacts upon wildlife, would limit or restrict use of this publicly-owned property

Both the SC Department of Natural Resources and the US Fish & Wildlife Service recommended denial of the permit because of pristine, undeveloped nature of the spit and potential damage that could result if it were developed

On December 18, 2008, the DHEC staff issued notice that it was authorizing the construction of 270' of bulkhead and articulated concrete block revetment along the northeastern end of the proposed project area The proposed bulkhead/revetment would be along the southwest portion of the parking lot at Beachwalker Park, the current public-access area at Kiawah Staff denied the remainder of the structure

The banks of the River in the area of the permitted structure on Beachwalker Park contain vegetation, which indicates that there is no current, active erosion occurring at the Park At best, the structure would protect ten parking spaces that could be moved to another location on the Park property and is therefore not necessary

5 **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations**

The Petitioner requests that the Court reverse the agency decision to issue a permit and certification to Kiawah Development Partners, II

The law which supports reversal is as follows

-the project would violate the Public Trust Doctrine, *McQueen v South Carolina Coastal Council*, 354 S C 142, 580 S E 2d 116 (2003) "[N]ot only does the State hold title to this land in jus privatum, it holds it in jus publicum, in trust for the benefit of all the citizens of this State *Id* at 149, 119 *See also Sierra Club v Kiawah Resort Associates*, 318 S C 119, 456 S E 2d 397 (1995)

-the project as proposed would violate the State policies of protecting sensitive and fragile areas from inappropriate development, of protecting resources of the coastal zone, of protecting the quality of the coastal environment, and of using critical areas in a manner that insures the maximum benefit to the people of South Carolina, but not necessarily a combination

of uses that generates measurable maximum dollar benefits S C Code Ann §48-39-30

-the project as proposed would violate the State's policy of protecting and preserving the beach/dune system for the highest and best use which is protection of life and property by allowing the beach/dune system to act as a buffer from high tides, storm surge, hurricanes, and normal erosion and of preserving existing public access S C Code Ann §48-39-260

-the project would violate S C Code Ann Regs 30-12 B, which requires consideration of the impacts on production of marine life or wildlife or other natural resources, the impacts on existing public access to tidal and submerged lands, navigable waters and beaches, or other recreational resources, the extent to which the project could affect habitats for rare and endangered species, and the extent to which the project could affect the value and enjoyment of adjacent owners

-the project as proposed would violate S C Code Ann Regs 30-12 C because it would have negative long-range and cumulative effects on marine life, wildlife habitat, and public use of a public trust tideland, particularly when considered within the context of other possible development and the general character of the area, because the KDP project and proposed development have not been presented in totality but instead this application has been submitted in a piecemeal manner, preventing comprehensive evaluation, and because it would have negative impacts on a Geographic Area of Particular Concern (GAPC)

-the project as proposed would violate S C Code Ann Regs 61-101(F)(5) because it will adversely impacts waters containing State or Federally recognized rare, threatened or endangered species, and because there are feasible alternatives to the proposed project

-the project will result in negative impacts on adjacent beaches, dunes, coastal waters and wetlands, it will restrict or limit the continued public use of a recreational open area and interfere with public access to a public trust tideland area, it will damage a GAPC, it will alter or damage the natural functions of areas identified as critical habitat areas of the Federally endangered Piping Plover, and it will impede public use of areas below the mean high water line, which are inconsistent with Coastal Management Program policies at III-69 – III-71, III-73, IV-3, IV-16 – IV-17, and IV-57

- the project is inconsistent with the state policies set forth in the Coastal Zone Management Act, S C Code Ann § 48-39-30, § 48-39-80, § 48-39-260

6 **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion**

No motions are expected at this time

7 **A list of proposed witnesses and exhibits**

Witnesses

Bill Eiser

Rob Young

Jeff Mollenhauer

John Mark Dean

Greg VanDerwerker

Sophia McAllister

Barbara Winslow

Sidi Limehouse

Heather Preston

Josh Martin

Michael Dorcas

All witnesses listed by all other parties

Petitioner will supplement this list as additional witnesses are identified

Exhibits

All documents appearing in DHEC/OCRM files related to this critical area permit

Maps and photographs of the subject property and surrounding area

Environmental Inventory of Kiawah Island

All exhibits listed by any other party

Petitioner will supplement this list as additional exhibits are identified

8 **A statement regarding the necessity for discovery, if any**

This is a relatively complex case that requires extensive discovery Seven depositions have been taken already and at least four more depositions are being scheduled

9 **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-Hearing Scheduling Conference or issue an order regarding motions, discovery, etc**

Petitioner does not believe it is necessary to conduct a scheduling conference or issue and order regarding motions and discovery at this time

10 **The estimated time required for the hearing**

Four to five days

11 **Any dates in the next ninety (90) days when you will not be available for a hearing**

The hearing date has been set for the week of August 24, 2009 All witnesses identified by the Coastal Conservation League as of this date are available to testify the week of August 24, 2009

Respectfully submitted,

Amy E Armstrong
James S Chandler, Jr
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Attorneys for the South Carolina Coastal Conservation League

Georgetown, South Carolina

July 23, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	DOCKET NO 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs South Carolina Department of Health and Environmental Control Respondent	**DEPARTMENT'S AMENDED PRE-HEARING STATEMENT**

On behalf of the South Carolina Department of Health and Environmental Control (the Department), the following information is submitted

1 **Nature of the proceeding**
This contested case involves the Department's issuance of, and inclusion of special conditions on Critical Area Permit and Coastal Zone Consistency Certification # OCRM-08-117-E to Kiawah Development Partners II, Inc (KDP) to construct an erosion control structure at Beachwalker Park, Kiawah Island, Charleston County, South Carolina

2 **The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations – be specific, not general**
S C Administrative Procedures Act S C Code Ann § 1-23-310 *et seq* (Supp 2007)

Coastal Tidelands and Wetlands Act, S C Code Ann §§ 48-39-10 *et seq* (2008), Specifically S C Code Ann §§ 48-39-20(A-F), 48-49-30(D), 48-39-80(A), 48-39-80(B)(3),(4),(7), 48-39-130 48-39-150(A)(5),(6),(7), 48-39-150(B), 48-39-210
23A S C Code Ann Regs 30-1 *et seq*
Specifically, Regs 30-1(A)-(C), 30-4(A), (30-10)(A)-(B), 30-11(A)-(C), 30-12(C)

South Carolina Coastal Zone Management Program Document (CMP)
Chapter III C 3 XII A-B Activities in Areas of Special Resource Significance
A Dune Areas
B Dune Areas (Other than Critical Areas)
C Public Open Spaces
Chapter IV(A)(2)(a)(8) Threatened or Endangered Species
Chapter IV(C) Erosion Control Policy and (D) Beach and Shoreline Access

3 **The issues to be presented for determination, including any claims or defenses expected to be raised**

Whether the Department properly applied the provisions of the Coastal Tidelands and Wetlands Act, the Critical Area Regulations, and the Coastal Zone Management Program Document in reviewing KDPs' permit application and in issuing a permit with special conditions limiting the length of the authorized erosion control structure to 270'

4 **A brief summary of the facts to be presented at the hearing**

On February 29, 2008, the Department received a permit application to construct a 2783' erosion control structure consisting of a bulkhead with an articulated concrete block revetment placed along the toe of the bulkhead along the scarp line of the Kiawah River in the general vicinity of Beachwalker Park and Captain Sam's Spit on the Southwestern end of Kiawah Island, Charleston County, South Carolina A revised application was received on April 25, 2008 and the application was placed on Public Notice on May 16, 2008

The Department received comment letters from several entities and conducted a public hearing on the application U S Fish and Wildlife Service submitted three comment letters objecting to the permit Though conceding that the proposed revetment itself is not likely to affect the a federally listed species, FWS raised concerns about the federally listed piping plover, about impacts to the natural functionality of the Captain Sam's Inlet Complex, about potential negative impacts in a pristine and federally designated CBRA zone The South Carolina Department of Natural Resources also submitted comment objecting to the project, opining that the project is an unnecessary encroachment into sensitive intertidal habitats The Town of Seabrook Island and the Seabrook Island Property Owners Association initially submitted a comment letter objecting to the project because of concerns that the project may cause erosion on Seabrook Island, but both entities subsequently withdrew their objections Several other individuals also submitted comment letters and requested a public hearing, raising concerns about environmental impacts of the proposed project

On December 18, 2008, after conducting a thorough review of the project under the statute, regulations, and program document, the Department issued KDP a permit for the construction of a 270' bulkhead and articulated concrete block revetment on the northeastern end of the project area, along the southwest portion of the parking lot in Beachwalker Park Special Condition #1 of the permit provided that the remaining 2,513' of the proposed structure was not approved The Permit and the Technical Summary of Review (the Decision Document), which are attached hereto as Exhibit A and Exhibit B, contain a detailed explanation of the Department's decision

5 **The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citations**

The Department requests that the Court issue an order affirming the Department's decision to issue the permit with special conditions

6 **A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion**
The Department does not plan to file a motion at this time, but reserves the right to do so

7 **A list of proposed witnesses and exhibits**
Witnesses Bill Eiser, Project Manager, OCRM
Barbara Neale
Melissa Bimbi
Exhibits The exhibits will consist of the contents of the DHEC file and aerial photographs, as well as any documents produced by the parties in the course of discovery

The Department also reserves the right to retain expert witnesses and will notify the parties immediately upon retaining an expert witness The Department also reserves the right to call as a witness any person or entity named as a witness by the other parties Finally, the Department reserves the right to call as a witness any person that submitted comment letters responsive to the Public Notice of this permit application

8 **A statement regarding the necessity for discovery**
Discovery will be necessary as provided in the ALC rules and the SCRCP

9 **Whether the party deems it necessary by the undersigned Judge to conduct a Pre-hearing Scheduling Conference or Issue an order regarding motions, discovery, etc**
The Department does not feel at this time that a prehearing scheduling conference is necessary

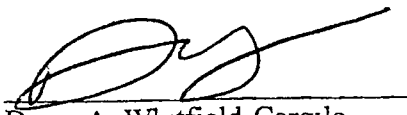
10 **The estimated time required for the hearing**
A hearing should last approximately three-five days

11 **A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case**
The parties have tentatively agreed that they will be available, and a hearing on the merits has been noticed by the Court, for the week of August 24, 2009 Should that hearing be continued, Counsel for the Department is unavailable on the following dates 7/9-7/13, 9/17-9/20, 10/30

12 **E-mail address** whitficd@dhec sc gov

{Signature Page Follows}

Respectfully Submitted



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August 5, 2009

20826

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

KIAWAH DEVELOPMENT PARTNERS, II, Petitioner vs SCDHEC OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Respondent	)	DOCKET NO 09-ALJ-07-0029-CC DOCKET NO 09-ALJ-07-0039-CC **FIRST AMENDED PRE-HEARING STATEMENT OF KIAWAH DEVELOPMENT PARTNERS, II**
SOUTH CAROLINA COASTAL CONSERVATION LEAGUE, Petitioner, vs SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND KIAWAH DEVELOPMENT PARTNERS, II Respondents	)	

Kiawah Development Partners, II (hereinafter KDP) hereby supplements its initial pre-hearing statement as follows

7 A list of proposed witnesses and exhibits

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ATTORNEYS FOR KIAWAH DEVELOPMENT PARTNERS II

August 7, 2009
Charleston, South Carolina

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand or by depositing a copy of same enclosed in a first class postpaid wrapper properly addressed to the attorney(s) of record for such other party(s) in a post office or official depository under the exclusive care and custody of the United States Postal Service on this 7th day of August 2009 in Charleston South Carolina

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs SCDHEC Office of Ocean and Coastal Resource Management, Respondents	Docket No 09-ALC-07-0029-CC Docket No 09-ALJ-07-0039-CC **MOTION FOR RECUSAL**
South Carolina Coastal Conservation League, Petitioner, vs Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents	

TO HONORABLE JOHN D MCLEOD AND ALL PARTIES AND THEIR ATTORNEYS

YOU WILL PLEASE TAKE NOTICE that the S C Coastal Conservation League hereby moves the Court, pursuant to ALC Rule 20, for an Order recusing the presiding Judge, John D McLeod, from hearing this contested case

The basis for this motion is that on a conference call conducted this morning of Monday, August 17, 2009, Judge McLeod informed the parties that he was a fraternity brother of Leonard Long, a partner in Kiawah Development Partners, II, at the University of South Carolina The Judge then stated that he would recuse himself, unless waived by the parties

Counsel for the League consulted with its client, who informed counsel that it was not willing to waive the conflict If the Judge felt obligated to disclose his relationship with a party to this action and then offer to recuse himself, that raises sufficient concern to the League about whether the Judge can be fair and unbiased The fact that now, despite the Court's offer to recuse, the Court has requested a motion for recusal, makes the League more concerned about the Judge hearing this contested case requested by a fraternity brother

The League respectfully asks the Court to stand by his statement that he would recuse himself, unless waived, and issue an Order of Recusal

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August 17, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	DOCKET NO 09-ALJ-07-0029-CC (consolidated cases)
Kiawah Development Partners, II Petitioners, vs South Carolina Department of Health and Environmental Control Respondent	**DEPARTMENT'S AMENDED MOTION FOR CONTINUANCE**

TO THE COURT AND ALL PARTIES

Please take notice that the Department hereby moves this court for an order continuing the hearing in this matter The basis for this request is as follows

WITNESSES AND DEPOSITIONS

1 On June 24, 2009, the Department served and filed a Touhy Request with the U S Fish & Wildlife Service (FWS) seeking to obtain the testimony of Melissa Bimbi The Department has only learned at the beginning of this week that the Solicitor's Office at the Department of Interior (DOI) intends to deny the request for testimony However, the Solicitor's Office indicated that Melissa Bimbi would prepare an affidavit setting forth the requested testimony Recognizing the

difficulties of admitting the affidavit into evidence without affording an opportunity for cross examination, Counsel for the Department has been in constant interaction with the Solicitor's Office at DOI seeking to arrange for Ms Bimbi to testify either at a deposition or in court In addition, the Department has served Melissa Bimbi with a subpoena to compel her testimony at the trial in this matter The Department understands that as a result of the issuance of a subpoena, DOI intends to file a motion to quash and withdraw the affidavit

2 On July 20, 2009, Counsel for the Department informed opposing Counsel that he was seeking to obtain the testimony of Melissa Bimbi On August 5, 2009, the Department served an amended prehearing statement and amended answers to interrogatories listing Melissa Bimbi as a possible expert witness On both occasions, Counsel informed opposing counsel that the Touhy request had not yet been granted, and that he would inform the parties immediately once that was done Counsel for Kiawah Development Partners, II ("KDP") and the South Carolina Coastal Conservation League ('League") informed counsel that were willing to accommodate a late-granting of the Touhy Request by the U S Fish & Wildlife Service

3 As set forth in Paragraph 1, at this point, FWS is not going to authorize Ms Bimbi to testify During the late afternoon on August 18, 2009, Counsel was given the name of Melissa Hughes, a professor at the College of Charleston, and he was informed that she is very familiar with piping plovers Ms Hughes has agreed to testify in this matter Counsel immediately amended his Answers to Interrogatories to reflect this Ms Hughes will be testifying as a substitute witness for Ms Bimbi and will testify to the same matters as Ms Bimbi would have However, Counsel has not had an opportunity to prepare his witness for trial and nor have other Counsel been afforded an opportunity to conduct her deposition

4 Pursuant to the Court's orders at the deposition this morning, the Counsel for the Department and the League have tentatively scheduled four depositions for Thursday, August 20, 2009 However, because Counsel for KDP has been in a deposition most of the day, the Parties have been unable confirm this schedule with him Thus, it is uncertain at this point whether each of the depositions will proceed as scheduled

Motion to Compel

4 The Department filed a Motion to Compel on August 18, 2009 As set forth in the Motion to Compel, the Department served discovery requests April 24, 2009 and only received a response on August 5, 2009 On July 29, 2009, KDP indicated it would prepare a privilege log for documents withheld from production pursuant to the Subpoena Duces Tecum served July 22, 2009 At the conference call on August 19, the Court ordered that Counsel for KDP produce a privilege log of the documents withheld As of 5 30 on August 19, the Department has not been provided with said log Counsel understands that Counsel for KDP has been tied up in a deposition for most of the day and the Department does not assert that KDP's failure to timely produce the log was intentional or for the purposes of causing delay Nonetheless, the log has not been produced and the Department has not been able to review the log and assess the applicability of any claim of protection or privilege Further, the Parties have scheduled four depositions for August 20, 2009 At this point, it is simply unrealistic to expect that the depositions will be conducted timely or that the Department will be given a fair opportunity to assess the privilege/protections claimed for withheld documents or to review the documents once produced, if at all

Motion to Expedite

5 During the conference call on August 19, 2009, Counsel for the Department understood part of Your Honor's basis for proceeding to trial on August 24 as wanting to honor Judge McLeod s granting of KDP's Motion to Expedite Having mulled over this statement, Counsel for the Department did not understand Judge McLeod to have granted the Motion to Expedite [1] Rather, at Judge McLeod's request, the parties collaborated to come up with a tentative trial date that all counsel agreed to work towards However, it seems abundantly clear that discovery has not been completed, and that it is unrealistic and unreasonable to expect that this matter will be ready for a hearing on August 24, 2009 Counsel for all parties have worked very diligently and generally accommodated each other to prepare this matter as expeditiously as possible Counsel will continue to do so However, if discovery is not complete, then it is unreasonable to proceed blindly towards trial next week

Recusal of Judge McLeod

6 Moreover Judge McLeod's recusal from this matter on Monday, August 18, 2009 further complicated the likelihood of this matter being heard next week Counsel for the Department had previously scheduled depositions for Tuesday, August 18, 2009 On Monday, August 17, 2009, during a conference call on the League's Motion to Exclude the witnesses being deposed, Judge McLeod recused himself from the hearing in this matter As a result, the parties were unable to obtain a ruling on the League s Motion to exclude the witnesses The attorneys conferred with each other and agreed that it was unlikely that this matter would proceed to a hearing as scheduled, and that it would be in the best interests of everyone to allow the new judge, once assigned, to rule on the League's Motion prior to conducting the depositions so that

[1] Rather Counsel recalls Judge McLeod saying something to the effect that KDP s waiting several months to request a hearing on the Motion indicated maybe the reasons given as a basis for the request weren t so severe after all

the League would be able to participate This decision was also driven by the fact that Counsel for the League indicated that she was not available on August 18, 2009

Exhibit List

7 During a conference call on August 11, 2009, Judge McLeod ordered that all parties provide opposing counsel with a proposed exhibit list in advance of trial Specifically, the judge ordered that they be made available by the end of that week so that the parties would have an opportunity to get objections to the Court by August 20th Counsel for the League provided her exhibit list on August 14th Counsel for the Department informed the parties that it would be Sunday August 16th before he could produce the list Counsel for the Department provided the list to all parties on Sunday August 16th Counsel for KDP indicated that his list would be forthcoming on Monday August 17th Today is Friday, August 21 The trial is scheduled to begin Monday August 24th Counsel for the League and the Department complied with Judge McLeod's Order and provided KDP with proposed exhibit lists The Department is severely prejudiced by KDP's failure to comply with the Court's Order Despite Judge McLeod's orders during the conference call on August 11th, the Department has not be given the notice and opportunity to review the documents and discern what objections, if any, it may have to KDP's documents, and to form the basis for those objections On the other hand, KDP has had the opportunity to review the Department's exhibits This tactical and strategic advantage that KDP has gained by its failure to comply with Judge McLeod's orders and the Department's compliance with Judge McLeod's Orders, to its detriment, severely prejudices the Department This is yet another basis for the Court to grant a continuance in this matter KDP is the party that has requested that this case be expedited KDP is the party that has neglected to comply with

discovery deadlines, has noticed late witnesses and has not complied with Judge McLeod's orders to provide all parties with a proposed exhibit list well in advance of trial

Continuance

8 The decision to grant a continuance is generally left to the trial judge and will not be disturbed absent a showing of abuse of discretion Counsel's understanding is that the primary reasons for moving forward with the trial as scheduled are (1) an attempt to honor Judge McLeod's granting KDP's Motion to Expedite and (2) the difficulties in rescheduling a hearing As discussed above, the Department was not of the understanding that the Motion had in fact been granted, but rather the parties agreed to prepare this matter as expeditiously as possible In fact, the Notice of Hearing does not indicate that the matter will not be continued, but rather it provides that a request for a continuance should be filed no later than 24 hours prior to the hearing Thus, Judge McLeod's Notice of Hearing did not foreclose the possibility of a continuance The Department realizes the difficulties of scheduling hearings but does not believe that this should be the basis for denying a continuance Here, where the discovery has not been completed, and depositions are still be conducted The privilege log has not been produced and counsel has not been afforded an opportunity to assess the applicability of the claimed privilege and won't be given an opportunity to assess the substance of any documents that may be produced should the Motion to Compel be granted This is a very large case involving many experts and the parties should be afforded an adequate time to complete discovery

9 While Counsel understands and appreciates the difficulties of scheduling a weeklong hearing the interests of justice are best served if the parties are given an adequate time to complete discovery and conduct depositions accordingly In making this motion, the Department is not asserting in any way that Counsel for KDP is intentionally withholding the privilege log or

otherwise impeding the ability of the parties to complete discovery The Department realizes the difficulties and time constraints involved with preparing multiple cases for trial [2] Nonetheless, the fact still remains that multiple depositions have not been conducted, that a privilege log has not been produced, and that discovery is simply not complete

10 This is not a case where the parties have sat on their laurels and are requesting a continuance on the basis that they are not prepared for trial Counsel for the Department has worked diligently to prepare this case for trial in the most expeditious manner possible Though any one of the above mentioned discovery delays caused by KDP may not be, in and of itself, enough to warrant a continuance, the totality of the circumstances in this case and the resulting prejudice to the Department warrant a continuance

WHEREFORE, the Department respectfully requests that this Court issue an Order continuing the hearing in this matter for at least 30-days

Respectfully Submitted,

Davis A Whitfield-Cargile
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Charleston, SC
August 21, 2009

[2] In fact Chief Counsel for OCRM is out on maternity leave and the undersigned has a very increased litigation schedule as a result For this reason Counsel for the Department especially appreciates Mr Walker s and Ms Armstrong s willingness to work with and accommodate the parties in preparing this case for a hearing

D H E C
PROMOTE PROTECT PROSPER

C Earl Hunter Commissioner

Promoting and protecting the health of the public and the environment

November 24, 2009

VIA US MAIL and EMAIL
The Honorable Ralph King Anderson III
South Carolina Administrative Law Court
Edgar A Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

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

Dear Judge Anderson

I enclose an amended proposed order that addresses in more detail the testimony referenced in your email to the parties on November 19, 2009 Specifically, I have made changes to Paragraphs 8 and 9 (including footnotes) in the Findings of Fact section, as well as Paragraph 11 (including footnotes) in the Conclusions of Law section Otherwise, the proposed order has not changed

I would also point out to the Court that after KDP acknowledged that there is not a need for the entire 2,783' structure, KDP was asked by the Court for specifics about where there actually is a need for the revetment KDP provided no specifics, but rather relied on Bohannon's vague, spur of the moment testimony KDP is the party that bears the burden of showing that the revetment complies with the Act and Regulations and is consistent with the CZMP Simply put, KDP did not provide the court with sufficient evidence to enable the Court to come up with a design between the 270' and the 2783' proposed by KDP that would satisfy the Act, the Regulations, and CZMP I would surmise that this is because, and the evidence supports that, there is not a need for a revetment beyond the 270' authorized by the Department Looking at the photographs in KDP Ex 78, which are calibrated with points on Ex 77, there is no visible evidence of significant erosion from points A-J, where the revetment is proposed to go Specifically, there is no distinction in the shoreline between points B-F (the point referenced in KDP's most recent communication to the Court) and points G-J, where the proposed revetment would end This is more fully and succinctly set forth in the attached order

I appreciate the Court providing the parties the opportunity to provide these comments for consideration

Sincerely,

Davis A Whitfield-Cargile
Staff Attorney

enclosure
cc Amy Armstrong, Esq
G Trenholm Walker, Esq
Gedney M Howe, III, Esq

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	DOCKET NO 09-ALJ-07-0029-CC (consolidated cases) **FINAL ORDER AND DECISION**
Kiawah Development Partners, II Petitioners, vs South Carolina Department of Health and Environmental Control Respondent	

Appearances

G Trenholm Walker and Gedney M Howe, III, for Kiawah Development Partners, II
Amy E Armstrong and James S Chandler, Jr , for S C Coastal Conservation League
Davis A Whitfield-Cargile for Department of Health and Environmental Control

STATEMENT OF THE CASE

This contested case is an administrative appeal of Permit Number 2008-1366-1IQ-P, which was issued by Respondent South Carolina Department of Health and Environmental Control (hereinafter "DHEC" or the "Department") to Petitioner/Respondent Kiawah Development Partners, II ("KDP") The permit authorized KDP 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 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 KDP and the South Carolina Coastal Conservation League (the "League") 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 The issue before the Court is whether the Department's decision is consistent 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 *et seq* (the Critical Area Regulations), and the Coastal Zone Management Program Document (CZMP)

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion,[1] I make the following findings of fact by a preponderance of the evidence

1 On February 29, 2008, KDP submitted a permit application seeking authorization from the Department to construct a 2,783' bulkhead and 2,783' by 40' articulated concrete block revetment ("bulkhead/revetment") on the shoreline of the Kiawah River adjacent to Beachwalker Park and Captain Sam's Spit on Kiawah Island in Charleston County, South Carolina

2 The proposed bulkhead/revetment, if constructed, would result in the alteration of Critical Area and as such cannot be constructed without a permit from the Department pursuant

[1] In these consolidated cases both KDP and the League bear the burden of persuasion on certain issues KDP, as the party challenging the Department s decision to deny authorization for 2513' of the requested bulkhead/revetment and the party seeking to alter critical area bears the burden of proving that the structure complies with, and the Department s decision to deny the same was contrary to, the Act, the Regulations and the CZMP The League, as the party challenging the Department s decision to authorize a 270 bulkhead/revetment at the Beachwalker park parking lot bears the burden of proving that the revetment violates, and the Department's decision to authorize the same is contrary to the Act, the Regulations and the CZMP

to S C Code Ann § 48-39-130 Of the four types of critical area (coastal waters, tidelands, beaches, and beach dune systems), this bulkhead/revetment would result in alterations to tidelands, coastal waters, and beach critical area It is undisputed that the revetment will alter tidelands and coastal waters critical area. The revetment is also in beaches critical area, as the area where the revetment will go is subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established (Tr pp 735 3, 1233) The revetment is proposed to go in the intertidal beach between mean high water and mean low water (Tr p 204, 218) Contrary to the testimony of Doug Dewolf, KDP's expert in surveying that claims to have expertise in setting critical area lines, the area where the proposed revetment will go is not beach dune systems A review of an aerial image of Kiawah Island reveals no other significant section of sandy beach along the Kiawah River According to the testimony of Leonard Long, most of the Kiawah River is abutted by marsh grass or oyster beds and pluff mud Tr pp 223 lines 9-24, 961-962, 986-87 Thus, the area where the revetment is proposed to go is unique in that it is the only significant portion of dry sandy beach along the Kaiwah River that is easily accessed by the public

3 The proposed revetment itself would encompass almost three acres worth of critical area, specifically sandy inter-tidal beach along the Kiawah River The proposed revetment will be constructed of 40-foot wide articulated concrete block mattress for a length of 2,783 feet of shore, which Bohannon calculated to be 111,320 square feet (Tr p 535 line 12-537 line 18) There are 42,250 square feet in one acre, so the revetment would turn 2 63 acres of critical area along the sandy shores of the Kiawah River into a 2 63 acre articulated concrete block mattress KDP Exhibit 6 shows photographs of the use of this material in other areas The photographs show concrete blocks placed in rows along the shoreline The voids in the block

arguably provide some area for vegetation to potentially grow, but due to the currents in this portion of the Kiawah River, it is unlikely that vegetation would grow here (Tr pp 544 lines 11-15, 545 lines 1-4, 1244-1345) The entire shoreline is currently sandy and lacks vegetation and I am not persuaded that vegetation would even grow in the voids between the blocks Moreover, I find that the concrete blocks would pose a safety hazard for someone attempting to utilize the shoreline of the River There is evidence in the photographs of significant gaps between the rows of block, which further evinces a safety risk to persons that would seek to utilize the shoreline should the revetment be constructed (KDP Ex 6) The revetment will be connected to a vertical bulkhead which would be driven into the ground and which would protrude above the revetment and aboveground for much of the length of the structure KDP acknowledged that the proposed revetment will be situated between Mean Low Water and Mean High Water on critical area owned by the State and held in trust for the People of South Carolina

4 All parties agreed that there has been some history of erosion along the shoreline of the Kiawah River near Beachwalker Park KDP, the League, and the Department submitted photographic evidence of the shoreline at the proposed revetment location The photographs show a wide intertidal beach that is sandy and gently sloped Notably, the intertidal beach is wide, sandy, and is not steep There is, however, evidence of an escarpment shoreward of the mean high water mark The escarpment is much steeper with a higher reveal in the vicinity of the parking lot, where there is visible evidence of portions of the upland vegetation and bluff sloughing off into the river This is especially evident in KDP Exhibit 5 However, beyond the parking lot, the reveal of the escarpment and the visible geo-indicators of erosion diminish significantly (Tr pp 905-916, Ex 77, 78) KDP Exhibit 78 is a book of photographs showing locations along the shoreline and the location of the photographs is readily discernable from Ex

77, which lists the points at which the photographs were taken Consistent with my finding that erosion has been most severe in the vicinity of the parking lot, the photographs taken between points A and B on Ex 77 show the most evidence of erosion, and these photographs were taken in the vicinity of the parking lot at Beachwalker Park, where the Department authorized a 270' structure This is also supported by the testimony of and maps prepared by Doug DeWolf DeWolf prepared an exhibit showing various locations of what he perceived to be the critical area line at different points in time[2] Exhibit 48 shows that between October 2008 and August 2009, the escarpment either remained in place or accreted riverward over most of the area where the bulkhead/revetment is proposed to go (Tr pp 438 line 5-439 line 11) Therefore I find that the erosion is most severe in the vicinity of the Beachwalker Park Parking lot, where the Department authorized a 270' bulkhead/revetment

5 I find that the proposed site of the revetment is utilized by the public for access to the Kiawah River Though Bill Eiser, the Department's project manager for this application, testified that he did not consider public access to be a significant factor when he made the permit decision, I find that based on the testimony of Mr Kana, Dr Vanderwerker, Mr Limehouse, Ms McAllister and Mr O'Rourke, that there is significant public use of the Kiawah River shoreline where the revetment is proposed to go The intertidal beach is used for fishing, bathing, launching and landing of kayaks and canoes, and general recreation by the public I find that a forty foot wide concrete block revetment similar to the one shown in KDP Exhibit 6 would severely restrict the ability of the public to utilize this intertidal beach

[2] None of the lines shown on the Exhibits Prepared by Dewolf were established pursuant to the required procedure set forth in § 48-39-210 for establishing critical area delineations, and as such they carry little probative weight Moreover despite claiming knowledge of the Critical Area, DeWolf was not able to accurately identify the types of critical area at issue However when considering the evidence submitted by KDP the documents show no erosion in the ten months preceding the date of the trial and actually show that the escarpment is accreting riverward

6 The installation of a 2783' bulkhead and revetment would directly impact the ability of the Diamondback Terrapin to nest and reproduce [3] Professor Michael Dorcas testified that the only known nesting grounds for the Diamondback Terrapin, which spends most of its time in the tidal marsh creeks along the backside of Kiawah Island, is in the dunes adjacent to the shoreline where the bulkhead/revetment is proposed to go (Tr pp 1534-1537) The evidence indicated that a terrapin would not be able to scale a vertical bulkhead and the drawings associated with the bulkhead/revetment clearly indicate that the bulkhead would stick up beyond the edge of the revetment [4] Though the terrapin is not a listed threatened or endangered species, it is a species of marine life and the Department is required to take into consideration the extent to which the project would affect the production of marine life The terrapin lays eggs above the Mean High Water Mark in the dunes along the Kiawah River As proposed, the 2,783' revetment would eliminate access to the only nesting sites known for the Kiawah population of the Diamondback Terrapin However, the 270' portion of the revetment authorized by OCRM is not eliminating a significant portion of nesting habitat for the diamondback terrapin The 270' section that was authorized is less suitable habitat for the terrapin because the area above the MHW at this location is paved parking lot and not sandy dunes that the terrapins need for nesting The fact that it is not a crime to possess up to two terrapins does not negate the Department's obligation to consider the potential impacts to this species I find based on the

[3] KDP sought to exclude evidence of the potential impacts of the project on Diamondback Terrapins KDP argued that § 50 5-2300 forecloses the consideration of impacts to terrapins That statute makes it a crime to take or possess diamond-backed terrapin for a commercial purpose but allows for a person to possess up to two diamond-backed terrapins for a non-commercial purpose without it being considered a crime I am not persuaded by KDP s argument The Act and Critical Area Regulations specifically require the Department to consider "the extent to which the completed activity would affect the production of fish, shrimp oysters, crabs, clams *or any marine life* or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply " The fact that it is not a crime to possess up to two terrapins does not negate the Department s obligation to consider the potential impacts to this species

[4] Bohannon testified that it would be possible to install the bulkhead so that it did not protrude above the revetment in some areas Bohannon was not clear on where or for what length this would be possible Furthermore I find that the ACB Revetment in and of itself poses an obstacle to the Terrapins accessing the nesting grounds on the spit

testimony of Professor Mike Dorcas that the western most 2513' of the proposed bulkhead and revetment is likely to adversely affect the reproduction capabilities of the Diamondback Terrapin

7 In addition, there is evidence that the revetment, in the context of possible residential development, could have significant negative impact on the Piping Plover, a federally listed threatened species that utilizes the spit while wintering during the period of late July and early August through late April and early May Of the three experts offered by the parties, Walton exhibited the least understanding of the plover and its habitat, as his cursory understanding of critical habitat to be mudflats between low and high tide is clearly inconsistent with the definition set forth in the Federal Register (Compare Tr p 862 lines 8-12 and 862 lines 16-18 with 50 CFR Part 17 at 36065 and Tr pp 883 line 2-885 line 11) He opined that because neither the revetment nor the possible houses would be physically situated on land that contains constituent elements of the critical habitat for the plover, then neither revetment nor the homes will adversely impact the plover However, I find that any residential development would bring additional people and their pets and scavengers to the beach in front of Captain Sam's Spit during the months that Beachwalker Park is closed Beachwalker Park is closed from October through April, save for weekends and some holidays In other words, the park is closed during a significant amount of time that the piping plover winters on Kiawah Island Walton, Hughes, and Mollenhauer all agreed that the plovers prefer foraging in uninhabited areas (Tr 875-76) They also all agreed that the plover has two goals when wintering to fatten up (eat) and rest in order to build up energy for the migration north to breed They also all agreed that the most energy demanding activity the plover can do is take flight and that an increase presence of humans would cause the plovers to take flight more frequently than they otherwise would

Though it is not certain that residential development will occur if the revetment were built, I find that it is probable that the revetment, in the context of possible residential development, would result in adverse impacts to the piping plover

8 I further find that KDP has not demonstrated a need for this revetment beyond the parking lot where the Department authorized 270 feet of bulkhead/revetment Tim Kana, KDP's expert in coastal systems and geomorphology, who has been working on Kiawah and Seabrook Islands for approximately thirty years, testified that he had not assessed whether there was a need for this structure and that he did not know if there is a need for the structure (Kana Testimony, Tr p 811) (Q "Is there a need for this revetment?" A "I did not [ ] I have not evaluated this site to say whether there is a need for the revetment") Rob Young testified that there is not a need for this structure The only testimony that even tended to indicate a need for the structure was from Mitchell Bohannon, who is an engineer who designs rather than assesses need for structures He testified that he was of the opinion that the structure would serve its intended purpose, which is to protect an access corridor between the setback line and the critical line While the revetment may in fact serve that purpose, I am not persuaded that the revetment is needed to serve that purpose Bohannon testified that he calculated the length of the proposed structure by looking at where there was a scarp line Tr p 543 line 21-544 line 10 (Q "You said you came up with the 2783 foot figure by looking at where there is a scarp line?" A "Yes, correct" Q "So if there's a scarp line, you want a 40' wide revetment?" A "Yes") Bohannan went on to concede that there is not presently a need for much of the proposed structure, and that if the permit was issued, he would be inclined to build only a portion of the proposed structure and take a "wait and see" approach with respect to the remainder (Tr p 556 line 3-557 line 21, 563 line 10-568 line 22) When asked for specifics of what portions of the proposed structure he

would build today, Bohannon was unable to offer any specific dimensions but rather vaguely described an area where he thought he might consider starting the bulkhead/revetment [5] (Tr p 566-567) This indicates to me that no study or assessment has been made and I am not persuaded by Bohannon's speculative and unsupported testimony [6] Moreover, the area where Bohannon indicated he would like to build a revetment is the same area where DeWolf indicated the erosional trend may be reversing, as there has either been no change or the escarpment has accreted at the narrowest location of the neck between October 2008 and August 2009 (Ex 48, Dewolf Testimony, pp 418 line 14-419 line 14, 421 line 5-423 line 8, 438 line 5-439 line 11)

9 Moreover, even should erosion continue, I am not persuaded that KDP would lose access to the western end of the spit without the revetment, as there are other alternatives that do not require the conversion of 2 63 acres of sandy shoreline to a concrete block mattress Leonard Long testified that the town of Kiawah has agreed to reduce the right-of-way requirements for an access corridor to the spit Moreover, the undisputed testimony was that spit is accreting sand on the ocean front at a pace much faster than the riverbend has been eroding As the spit continues to grow, I conclude that it is foreseeable that the setback line might move ocean-ward in the future [7] Moreover, Leonard Long and Mark Permar testified that it is possible that KDP will not

[5] Moreover, Bohannon conceded that he came up with this idea of taking a wait and see approach the morning of the trial and that he had not consulted with KDP about this possibility (Tr p 569 line 19-570 line 9) I am not persuaded by Bohannon's cursory approach to assessing need for the structure His testimony was essentially 'if there's an escarpment then there's a need for the revetment I do not find this persuasive Bohannon is an engineer who designs structures He lacks any expertise in geology, morphology geomorphology, hydrology, or hydronamics and I am therefore not persuaded by his efforts to identify a need for the structure (Tr p 570 line 16-p 571 line 8)

[6] KDP retained three experts seemingly qualified to assess the need for the revetment--Kana Oertel, and Basco But Kana did not assess whether there was a need for the structure and KDP did not offer the testimony of Oertel or Basco I find an adverse inference from KDP's failure to put Oertel and Basco on the stand 75A Am Jr 2d Trial, 1111, 30 S C Jur Ev 26 *Arnold v Yarborough* 281 S C 652 316 S E 2d 416 (Ct App 1984) *Nelson v Coleman Co* 249 S C 652 155 S E 2d 917 (1967), *McCowan v Sutherland*, 253 S C 9 168 S E 2d 573 (1969), *Duckworth v First National Bank*, 254 S C 563 176 S E 2d 297 (1970) *Davis v Sparks* 235 S C 326, 111 S E 2d 545 (1959) I find it very telling that with three experts available who seem to be qualified to assess the need for the structure KDP offered no such testimony

[7] The Department is required to review the baseline and setback line every eight to ten years S C Code Ann § 48-39-280(C)

develop any homesites on the spit (Tr pp 259 17-260 7, 332) In addition, the statute allows the Department to consider special permits seaward of the setback line [8] Finally, it is possible to build homes on the spit without a revetment (Tr pp 349 line 23-350 line 1, 355 lines 9-11, 1589 lines 9-12) Therefore, I find that KDP has not met its burden of persuading the Court that there is a need to convert almost three acres of wide, sandy, intertidal beach to an articulated concrete block mattress

10 I further find that if this structure was constructed, there is a significant possibility that additional erosion control devices might be needed in the future Mr Kana testified that the presence of the structure would result in deepening of the river bottom until the river reached equilibrium Mr Bohannon acknowledged that the experts retained by KDP, Dr Oertel and Dr Basco,[9] both recommended that the width of the ACB Mattress be extended to sixty feet and that training jetties be sought (Tr pp 530-532) Training Jetties are large structures that would be constructed in the river itself to direct flows away from the revetment According to DHEC Exhibit 20, a presentation prepared by Oertel and Basco, and Bohannon these structures would be needed to address toe scour at the base of the revetment Therefore I find that the revetment could cause additional impacts to critical area in the future The need for those structures will be avoided by not constructing the unnecessary 2513 feet of bulkhead/ revetment

11 I find that purpose of the proposed bulkhead/revetment would also be to facilitate possible residential development on Captain Sam's Spit, which is a fragile and dynamic area

[8] S C Code Ann § 48-39-290(D)

[9] Neither Basco nor Oertel testified at the hearing in this matter I find an adverse inference from their not testifying The failure to call an available witness who is in one party's control and has knowledge pertaining to a material issue may, if not satisfactorily explained, lead to an inference or presumption that the witnesses' testimony would have been adverse to the party 75A Am Jr 2d Trial, 1111 30 S C Jur Ev 26 *Arnold v Yarborough* 281 S C> 652, 316 S E 2d 416 (Ct App 1984), *Nelson v Coleman Co* 249 S C 652, 155 S E 2d 917 (1967), *McCowan v Sutherland* 253 S C 9, 168 S E 2d 573 (1969), *Duckworth v First National Bank*, 254 S C 563 176 S E 2d 297 (1970), *Davis v Sparks*, 235 S C 326 111 S E 2d 545 (1959)

The spit is a land formation that has formed since 1949 due to sand accumulation on the western end of Kiawah Island and the migration of Captain Sam's Inlet There is evidence that there was no spit in 1922 In addition, Kana acknowledged that the spit has been completely eroded and redeposited at least twice in the past 200 years (Tr p 633) Kana further acknowledged that the spit has breached at least four times over the last couple of centuries (Tr p 621) According to the testimony of Kana and Young, the spit has a long history of growth, extension, migration, and breach Permar acknowledged that the spit is unstable and dynamic Tr p 331 The area that Permar indicated would be the location of potential home sites is the same area as the channel cutting through the spit on the 1949 Aerial As I discuss further below, the area where any residential revetment would go also constitutes dune areas under the CZMP In addition, the Spit has been designated for inclusion in the Chaffee Coastal Barrier Resources System pursuant to the Coastal Barrier Resources Act The inclusion of the Spit in the Coastal Barrier Resources System further supports that the spit is unstable, sensitive, fragile, and inappropriate for human development [10] The testimony of Kana and Young indicated that any potential breach would be initiated by over wash on the ocean side, but that any breach would occur on the backside of the spit as a result of the water trying to find the quickest course to the ocean (Tr pp 661 line 9-663 line 16, 667 line 14- 670 line 9) Young testified that the proposed revetment would not be likely to offer any protection to any residents or infrastructure on the spit in the event of a storm strong enough to cause a breach This was not successfully disputed by KDP In § 48-39-250 and 260, the General Assembly made several findings about the ineffectiveness of and false

[10] See 16 U S C §§ 3501-3510 Though this federal act is certainly not dispositive of the issue the findings of the Congress that those lands designated serve as natural storm protective buffers and are generally unsuitable for development because they are vulnerable to hurricane and other storm damage and because natural shoreline recession and the movement of unstable sediments undermine manmade structures supports a finding that the spit is unsuitable for development The policies contained in the Coastal Barrier Resources Act are similar to the findings and policy set forth by the General Assembly in 48-39-20 and 48-39-30 in terms of utilizing the critical area for the maximum benefit of the people protecting the public health, safety, and welfare and protecting inappropriate areas from human development

sense of security provided by hard erosion control structures on the ocean front beach The proposed revetment would facilitate development on ocean front property Though 48-39-250 and 48-39-260 do not apply to the review of this permit application, I find 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 (Tr pp 189, 192 lines 5-13) I find that the policies regarding the false sense of security created by revetments on the ocean front is relevant in this situation and that the policies in 48-39-20 and 48-39-30 support the Department's decision not to authorize KDP to utilize almost three acres of critical area in order to create a false sense of protection to potential homebuyers on the spit I find that construction of the proposed revetment in critical area could result in the development of an area that is sensitive, fragile, and inappropriate for development

12 I find based on Long's testimony that KDP has not presented any evidence on the value or the benefit that KDP will receive from the Revetment Tr p 258, lines 5-12 Long acknowledged that it is possible that the Spit will not be developed, but that the revetment would make the residential development of the spit more viable, because people would not want to purchase a house on the spit if they drove by and saw an eroding shoreline Tr pp 189, 192, lines 5-13, 250 line 17-260 line 7 Prior to KDP entering into a new development agreement with the Town of Kiawah in 2005, the only authorized uses of the spit were for park and open space Tr p 248-249 Long acknowledged that it would be possible to build some houses on the spit without a revetment, but indicated that it would not be prudent from a marketability standpoint The spit is pristine and unfamiliar with human improvements Tr p 268 6-20 Currently the funds from the mortgage on the spit are being used to fund construction of a resort on St Kitts,

an island in the Caribbean Tr pp 1589 line 13-1592 line 8 I find that construction of the revetment would not be the best utilization of the critical area for the People of South Carolina

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I make the following conclusions of law

Jurisdiction and Standard of Proof

1 The Administrative Law Court has jurisdiction over this contested case 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 involves two requests for contested case hearings which were consolidated, KDP and the League both have burdens of proof KDP bears the burden of proving that the Department's decision to deny the western-most 2513' of bulkhead/revetment was inconsistent 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 Stated differently, KDP has the burden of proving that the 2783 bulkhead/revetment complies with the same See Leventis v S C Dept of Health and Envtl Control, 340 S C 118, 132-33, 530 S E 2d 643, 651 (Ct App 2001) The League, 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 Dept of Health & Envtl Control, 298 S C 373, 380 S E 2d 841(Ct App 1989) "The construction of a regulation by the agency charged with executing the regulation is entitled to the most respectful deference and should not be overruled without cogent reasons" Converse Power v DHEC, 350 S C 39, 48, 564 S E 2d 341, 346 (Ct

App 2002), Brown v Bi-Lo Inc 354 S C 436, 440, 581 S E 2d 836, 838 (2003)(Citing Brown v DHEC, 348 S C 507, 560 S E 2d 410 (2002) 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) (emphasis added)

Coastal Zone Management Act

2 In § 48-39-150 and Reg 30-11, the General Assembly sets forth considerations that must be taken into account when making permit decisions for all applications to alter critical area In making permitting decisions, "the Department shall base its decision on the individual merits of each application, the policies specified in Section 48-39-20 and 48-39-30, and be guided by the following considerations" S C Code Ann § 48-39-150, 23A S C Code Reg § 30-11(B) Thus, the Department is required to review the application for consistency with the policies in 48-39-20 and 48-39-30 and take into account ten listed considerations

Policies in 48-39-20 and 48-39-30

3 48-39-20(A) indicates a policy of the state to promote variety of natural, commercial, recreational and industrial resources for the present and future well-being of the state Subsections (B), (C), (D), and (E) of this statute encourage the Department to exercise its full authority over lands and waters in the coastal zone to protect the coastal zone and marine resources and wildlife, which are ecologically fragile and vulnerable to destruction by man's alterations, and to protect ecological, natural, geologic and scenic characteristics and industrial, economic and historic values in the coastal zone, which are being irretrievably lost or damaged by ill-planned development Subsection (F) speaks of an urgent need to protect and give high priority to the natural systems in the coastal zone while balancing economic interests

4 Section 48-39-30 begins with the General Assembly's declaration of the basic policy of the state "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and all the people of the state" S C Code Ann § 48-39-30(A) (emphasis added) Subsection (B) of this statute sets forth specific state policies in furtherance of that basic policy The first policy listed is "to promote the 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" S C Code Ann § 48-39-30(B)(1) (emphasis added) The second listed policy is "to protect, and where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations S C Code Ann § 48-39-30(B)(2) (emphasis added)[11] Finally, the General Assembly sets forth 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 that will generate maximum dollar benefits As such, use 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) (emphasis added)

5 Addressing these policies together, Bill Eiser indicated that Captain Sam's Spit is one of three pristine undeveloped spit features in the state As discussed in the findings of fact above, the spit is a dynamic, fragile spit of land that is a valuable resource to the people of South

[11] The third, fourth and fifth policies in subsection (B), which promote formulation of a comprehensive tidelands protection program and a comprehensive beach erosion and protection policy and encourage state agencies, counties and municipalities in the coastal zone through comprehensive programs to achieve wise use of coastal resources are not particularly illuminative here and are therefore not discussed in detail above

Carolina The proposed revetment site is a wide intertidal beach that is utilized frequently by members of the public for boating, walking, birding, fishing, and other recreational uses I find that the Department's decision to deny the western most 2513' of the bulkhead/revetment furthers the state's interest in maintaining a variety of resources for the present and future well-being of the state by promoting recreational use of Beachwalker Park and the intertidal beach along the Kiawah River I find that the decision to authorize 270' of bulkhead revetment along the park also furthers these policies by protecting the facilities and infrastructure that are being threatened by erosion Thus the Department's decision promotes protection of the natural resources on the spit and maintaining the spit and its shoreline in a natural condition while also protecting the existing infrastructure of the park and encouraging the recreational use of the area The shoreline of the Kiawah River is of maximum benefit to the people of South Carolina in its natural, unaltered state KDP presented no evidence of the economic benefit that would be afforded by conversion of almost three acres of sandy intertidal beach to an articulated concrete block revetment, other than offer that the revetment would make any residential development more marketable by giving a perception of protection to prospective homebuyers I conclude that the policies set forth in 48-39-20 and 48-39-30 support the Department's decision to authorize 270' of bulkhead/revetment at the park and deny the 2513' of bulkhead/revetment I further conclude that utilization of this critical area to facilitate construction of homesites on the fragile, dynamic, and unstable spit[12] and to facilitate a perception of protection for prospective home buyers is contrary to the policies in §§ 48-39-20 and 48-39-30

[12] KDP argued that by setting the baseline and setback line on the Spit in 1999, the Department condoned development of the spit I am not persuaded by this argument The Department is required to review the baseline and setback lines every ten years pursuant to a statutory formula Lands seaward of the setback line are generally prohibited from development However by setting the setback line, the Department does not determine whether property landward of the line is stable, fragile dynamic or otherwise appropriate for development See S C Code Ann § 48-39-280 The setting of the setback line does not supplant the Department's responsibility to review all permit applications for consistency with the Act, Regulations and CZMP

Ten General Considerations in 48-39-150 and Reg 30-11

6 In making decisions on all permit applications, the Department is required to consider

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to water,
(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water
(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 habitat for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone,
(7) The extent of economic benefits as compared with the benefits from preservation of the 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 landowners

S C Code Ann § 48-39-150(A)(1)-(10) (emphasis added), 23A S C Code Reg § 30-11(B)(1)-(10) (emphasis added) The Department must also be guided by

(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, and
(2) 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, and
(3) The extent and significance of negative impacts on Geographic Areas of Special Concern [ ]

23A S C Code Reg § 30-11(C) (emphasis added)

7 As discussed above, the western most 2513' of the proposed project would significantly impact the reproduction of the diamondback terrapin, a species of marine life, and therefore would contravene the third general consideration of § 48-39-150 However, the 270' structure that the Department authorized adjacent to the parking lot is not likely to impact the terrapin's access to preferred nesting sites, as the evidence indicated that the terrapins nest in the dunes adjacent to the Kiawah River further down the spit Thus, I conclude the third general consideration of § 48-39-150 supports denial of the 2513' section of the bulkhead/revetment at issue

8 In addition, as discussed in the findings of fact above, the revetment would significantly limit public access to the sandy inter-tidal beach along the Kiawah River Though Bill Eiser testified that he was not particularly concerned about the effect on public access when he issued his permit decision, the uncontroverted testimony at the hearing established that there is significant public use of the inter-tidal beach that KDP proposes to replace with three acres of articulated concrete block revetment The sandy shoreline along Captain Sam's Spit is a unique feature on the Kiawah River, most of which is surrounded primarily by marsh or oyster beds and plough mud Therefore, I conclude that the fifth general consideration of 48-39-150 supports the Department's determination

9 In the context of possible future residential development on the spit, the revetment has the potential to impact piping plovers Though it is impossible to assess the exact impact the revetment and any residential development will have on plovesrs, the Statute and Regulation require me to consider "the extent to which long range cumulative effects *may* result within the context of *possible* future development " Reg 30-11(C)(1) (emphasis added) KDP's witnesses testified that one of the purposes of the project is to facilitate possible residential development on

the spit The common testimony of Walton, Hughes, and Mullenhauer lead me to believe that residential development on the spit might increase the disturbance of the wintering piping plovers and have an adverse effect on the plovers It does not appear from the evidence that the 270' authorized by the Department would facilitate development of the spit or have an effect on plovers or their habitat Therefore, I conclude that the sixth general consideration of 48-39-150 and the requirement to consider potential long range cumulative effects of the project in the context of possible future development support the Department's decision to deny the western most 2513 feet of bulkhead/revetment

10 The benefits of preservation of the area in its unaltered state outweigh any economic benefit KDP might receive Long testified that KDP has not calculated what economic benefit it would receive from the bulkhead/revetment The only evidence in this regard were that the structure might make the spit more valuable and that it would make homesites more marketable by creating a perception of protection for prospective homebuyers No dollar amount was placed on this The findings and policy of the General Assembly in 48-39-20 and 48-39-30 speak to the value of preservation of the area in its unaltered state There was ample testimony about the public use of the sandy shoreline of the Kiawah River and the pristine nature of the area The proposed revetment would eliminate this public use of the shoreline and significantly alter the natural and pristine nature of the Kiawah River and the spit Therefore, I conclude that the seventh general consideration of 48-39-150 supports the Department's decision to deny the western most 2513 feet of the bulkhead/revetment

11 Finally, no evidence was submitted indicating that KDP has taken all feasible safeguards to *avoid* adverse environmental impacts of the project The only evidence offered was that marsh vegetation could grow between the voids of the concrete blocks However, this does

not address avoidance but rather is more of a form of mitigation Furthermore, as discussed in the findings of fact above, I am not convinced that Marsh will grow in the voids in the block in this high energy environment Moreover, KDP has not demonstrated that there is a need for this bulkhead/revetment beyond the 270' permitted by the Department If there is not a need for the bulkhead/revetment, then environmental impacts can be easily avoided by not authorizing the structure to be built As discussed in the findings of fact above, Bohannon readily agreed that such a large structure may not be needed and that he would propose not building the entire structure [13] When asked for specifics, he was unable to provide any but pointed generally to the area between the parking lot and the narrowest portion of the neck However, this is the same area where DeWolf indicated there has been no erosion since October 2008 and where there is actually evidence of accretion along the shoreline Looking at the photographs in KDP exhibit 78, which are calibrated with points on KDP Exhibit 77, I see no visible sign of significant erosion beyond the section where the Department authorized the erosion control structure Thus, I am not persuaded that there is a need for any erosion control structure beyond 270' DHEC authorized to protect the parking lot No evidence was presented that persuaded me that all feasible safeguards have been taken to avoid adverse environmental impacts Therefore, I conclude that the tenth general consideration of 48-39-150 supports the Department's decision

[13] KDP also suggested that I delete special condition #1 on the permit and replace it with language placing limitations on the size of what can be constructed based on what KDP's Engineer determines is appropriate down the road I find such a suggestion wholly inappropriate The General Assembly has given the Department sole authority to manage the resources in the critical areas of the coastal zone S C Code Ann § 48 39-210(A) This Order does not prohibit KDP from seeking additional erosion control devices in the future if the spit becomes developed and property actually become threatened by erosion However it would be wholly inappropriate for this Court to place the discretion to determine what alterations KDP may make to the critical area in the hands of KDP's engineer Only the Department has authority to authorize alterations to critical area S C Code Ann § 48-39-210(A)

Specific Project Standards for Bulkheads and Revetments

12 There are four specific project standards for bulkheads and revetments that are not located on the ocean front *See* Reg 30-12(C)

> (a) The structures must be designed to conform to the critical 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 property could be detrimentally affected by erosion, sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion, and
> (d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists

23A S C Code Reg 30-12(C)(1)(a)-(d) The Department indicated in its decision document that the specific project standards did not require denial of the project However, the League challenges whether the standards have been satisfied Furthermore, because I previously concluded that the revetment would adversely affect public access, it is clear that the project standards have not been satisfied unless no feasible alternative exists As I discussed in the findings above, there are alternatives to constructing the western most 2513' of the revetment As an initial matter, based on DeWolf's testimony regarding Exhibit 48, it appears that the erosion along much of the shoreline has plateaued and that some of the shoreline is actually accreting KDP has not persuaded me that there is even a need for the structure beyond the 270' authorized by the Department to protect the parking lot at Beachwalker Park Thus, no revetment, or the "no action alternative" is a viable alternative Moreover, even if erosion continues, KDP has other options that do not involve the conversion of almost three acres of publicly used intertidal beach to 2783' articulated concrete block mattress Therefore, I conclude that the fourth specific project standard for bulkheads and revetments supports the Department's decision

Coastal Zone Consistency

13 Finally, the Department is also required to review applications for consistency with the CZMP S C Code Ann § 48-39-80(B)(11), Brown v S C Dept of Health and Envtl Control, 348 S C 507, 516-517 (2002) (the Department has the authority to review all state and federal permits in the coastal zone for consistency with the CZMP)

14 As an initial matter, KDP 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 [14] I am not persuaded by this argument The General Assembly set forth a policy that the Coastal Council was to follow in creating the CZMP See S C Code Ann § 48-39-80 and S C Code Ann § 48-39-90 It is undisputed that the Coastal Council followed these procedures and that the CZMP was approved by Joint Resolution and signed into law by Governor Riley The process set forth in 48-39-30 is more rigorous than the process for promulgating regulations under the APA, in that the CZMA requires affirmative approval by the General Assembly and the Governor, whereas the APA only provides for a negative veto but does not require affirmative action There is nothing in the constitution that limits the tools available to the legislature in setting forth procedures for state agencies to follow in promulgating policies to be applied by the Agencies

15 The proposed revetment/bulkhead triggers several policies in the CZMP, including Policies for Activities in the following Areas of Special Resource Significance Barrie Islands, Dune Areas (other than Critical Areas), and Public Open Space (Chapter III of the CZMP), as well as the GAPC policies for Threatened or Endangered Species (Chapter IV(A)(2)(a)(8) of the CZMP), and the Erosion Control Policies and Beach and Shoreline Access Policies in Chapter IV(C) and (D)of the CZMP Because the bulkhead/revetment itself is in

[14] The Supreme Court heard oral arguments in this issue in another matter on October 21 2009

critical area, the CZMP indicates that the Rules and Regulations for permitting applicable to the proposed activity will apply, and sets forth additional policies that also apply In addition, because the Department is required to review for long range cumulative impacts in the context of other possible development, the potential impacts of the residential development which the revetment might facilitate also must be taken into account (See CZMP, Guideline #7 for Evaluation of All Projects in the introduction to Chapter III(C)(3) on p III-14)

16 I conclude that the proposed activity triggers the Policies for Activities in Areas of Special Resource Significance for Barrier Islands (Chapter III(C)(3)(XII)(A) of the CZMP) The policies for Barrier Islands require KDP demonstrate that any construction or development on the barrier islands will retain to the extent feasible the 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 No such demonstration has been made The lack of any development plans makes it difficult to assess the potential long range cumulative effects of the revetment in the context of possible future development Nonetheless, the Conceptual Sketch prepared by Permar indicates that any residential development would be in the vegetated area behind the visible dune ridges on the northwestern portion of the spit, which leads me to conclude that any future development could be inconsistent with the first policy for Barrier Islands The second policy requires project proposals for activities on barrier islands to demonstrate reasonable precautions to prevent or limit any direct negative impact on adjacent critical areas As discussed above in regards to the Critical Area Regulations, the proposed work will directly negatively impact tidelands, coastal waters, and beaches critical area The only evidence submitted by KDP to demonstrate that any future development would comply with this

requirement was the Development Agreement[15] and its history of environmentally sensitive development.[16] The third provision provides that new road or bridge projects involving expenditure of public funds to previously undeveloped barrier islands will not be approved unless an overwhelming public interest can be demonstrated. Arguably, requiring the use of public trust tidelands and coastal waters to facilitate an access corridor would fall within the purview of this policy and no such demonstration of overriding public interest has been demonstrated. Thus, I cannot conclude that the project is consistent with the policies for Barrier Islands.

17. This project also triggers the policies for Dune Areas (Other Than Critical Areas) (Chapter III(C)(3)(XII)(B) of the CZMP). These policies cover "dunes upland from or behind the primary dune. While not as crucial as the first dune adjacent to the Atlantic, the dune fields or landward ridges of unconsolidated sand are still valued as part of the overall storm protection and sand preserve system." Though the bulkhead /revetment itself is likely to have little effect on the dune areas, in the context of possible residential development of the spit, it will affect the dune areas on Captain Sam's. The policies require KDP to demonstrate reasonable precautions to prevent or limit any direct negative impacts on the adjacent critical areas. As discussed above, this has not been done. It requires special attention be given to prevent or mitigate negative impacts on adjacent property owners, specifically increased loss of protective dune formations on adjacent lots due to unnecessary destruction of or encroachment onto stable dunes. KDP has

[15] The Development Agreement is a contract between KDP and the Town of Kiawah, which has been previously amended and therefore I am persuaded by the Development Agreement. KDP testified that until 2005, the existing development agreement only authorized use of the spit for open space or park purposes. This was changed in 2005 and there is nothing to convince me that it cannot be changed again.

[16] KDP readily admitted that it has not previously applied for any structure near the size of this structure and that its previous ventures have been in areas that were not as dynamic and sensitive as Captain Sam s Spit. Therefore though I am impressed by KDP s history of environmentally sound development, I am not persuaded that all future endeavors by KDP will be of the same environmentally sensitive standards or that future development on the Spit will be consistent with the CZMP.

not demonstrated that any residential development would comply with this policy Finally, as I will address below, project proposals in ocean-front and sand dune areas must conform to the policies of Beach Erosion and Beach and Shoreline Access I cannot conclude that the project is consistent with the CZMP policies for Dune Areas

18 This project also triggers the policies for Public Open Space, which includes state and l*ocal (county or municipal) parks* or *other open space areas*, other than those designated as GAPCs (Chapter III(C)(3)(XII)(D) of the CZMP) (emphasis added) It cannot be disputed that the Beachwalker Park is public open space [17] The riverbend shoreline is also public open space It is undisputed that the proposed revetment will be visible from the park and will change the visual character of the area The policies require that project proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area (aesthetically or environmentally) will not be certified where other alternatives exist The bulkhead/revetment itself violates this policy, as it restricts access to the intertidal beach and would disrupt the character of the area from one that is pristine and unfamiliar with human improvements to one that is comprised of three acres of concrete block Therefore I conclude that project is inconsistent with the CZMP policies for open space areas

19 Because I found that the bulkhead/revetment, in the context of future residential development, has the potential to impact piping plovers, it triggers the policies for Geographic Areas of Particular Concern (GAPC), specifically, priority of uses for Threatened or Endangered Species (Chapter IV(A)(2)(a)(8) of the CZMP) The priority of uses for this GAPC include (1) uses which are compatible with all regulations and management programs to protect any designated habitat area under the Federal or State Endangered Species Act, (2) uses which

[17] Based on the evidence and testimony of Leonard Long and Mark Permar and Bill Eiser I find that the spit itself though privately owned meets the definition of open space area because it has been historically zoned for open space and park uses See definition of Open Space CZMP p III-73

maintain the natural functions of areas identified or designated as critical habitat areas of species listed on the State or Federal threatened or endangered species lists, and (3) non-structural, non-intensive uses which do not create irretrievable damage to any species listed as a threatened species As discussed, KDP has not established that any development of the spit would comply with these priorities Therefore I cannot conclude that the project is consistent with the priorities of uses for GAPCs

20 This project triggers the Erosion Control Policies contained in Chapter IV(C)(4) There are six specific policies listed which must be considered before any erosion control projects are approved, including

> 1 The type of materials employed, their useful life expectancy along with anticipated maintenance or replacement costs,
> 2 The economic justification of the proposed project in comparison with available erosion control alternatives including consideration of the anticipated damage and economic loss due to failure,
> [ ]

Chapter IV(C)(4)(b)(1)-(2), CZMP KDP did not submit evidence of the useful life expectancy of this project More importantly, as discussed above in connection with the policies in 48-39-20 and 48-39-30 and the seventh general consideration under 48-39-150 and Reg 30-11(B), KDP did no assessment of the economic benefit that the revetment would provide Therefore I cannot say that the revetment is consistent with these policies In addition, the specific considerations for seawalls, bulkheads, and revetments in Chapter IV(C)(4)(c)(1)-(8) also support the Department's decision Eight policies are listed, including (1) a requirement that such structures will only be considered as part of a comprehensive erosion control program, (2) a requirement that the structures not interfere with existing or planned public access unless no adequate access can be provided, (3) a requirement that the structure not impede public use of beaches below mean high water, and (6) a requirement that "except special circumstances such as critically

eroding shorelines that have a direct measurable effect on the economic well being of an applicant or are a threat to public safety," the Department "will promote the use of natural features of the dune and beach system rather than artificial protection" Based on previous findings and conclusions, I conclude that these policies support the Department's decision to only authorize 270' of revetment/bulkhead

21 Finally, the proposed bulkhead/revetment triggers the Beach and Shoreline Access Policies in Chapter IV(D)(3)(c) of the CZMP Several of these policies support the Department's decision to authorize only 270' of the requested erosion control structure at the Beachwalker Park Parking lot and to deny the remainder The first, second, third, and tenth policies listed promote protection of and, where feasible, expansion of public access and discourage activities that would negatively affect public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources The Eighth listed policy promotes provision of adequate parking space in upland areas, which the Department's decision facilitates

Allegations of Bias and Timeliness of Decision

22 KDP also argued that it was entitled to a revetment based on allegations of bias As an initial matter, bias is not a basis for which a person may be authorized to utilize critical area Alterations to the critical area may only be permitted if the applicant establishes that the proposed alteration complies with the Act and the Critical Area Regulations and that the proposed alteration is consistent with the CZMP S C Code Ann §§ 48-39-80, 48-39-130 Moreover, KDP did not establish any evidence of bias As discussed in the findings of fact and conclusions of law, the Department's decision finds support in the Act, Regulations, and CZMP and therefore cannot be said to be arbitrary and capricious KDP's own witnesses testified that

they were unaware of any application for a structure of this size and the Department explained that the application triggered several policies and required extensive review Finally, KDP points out that the time to process the application was much longer than envisioned in the Regulations There is no law which says that a permit will be issued if not acted upon within the time period envisioned in the regulations Rather, the remedy provided by law is a refund of the application fee, which was done here *See* Reg 61-30 Therefore, I conclude that the remainder of KPD's arguments lack merit as a matter of law

ORDER

Based on the foregoing, **IT IS THEREFORE ORDERED** that the permit is **AFFIRMED** as conditioned and issued by the Department

AND IT IS SO ORDERED

Ralph King Anderson III
Chief Administrative Law Judge

November ___, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Kiawah Development Partners, II, Petitioner, vs SCDHEC Office of Ocean and Coastal Resource Management, Respondents	Docket No 09-ALC-07-0029-CC **MOTION TO RECONSIDER, TO OPEN THE RECORD AND ADMIT NEW EVIDENCE AND FOR STAY**
South Carolina Coastal Conservation League, Petitioner, vs Kiawah Development Partners, II, and South Carolina Department of Health and Environmental Control, Respondents	

TO ADMINISTRATIVE LAW JUDGE RALPH KING ANDERSON, III, AND THE RESPONDENTS

PLEASE TAKE NOTICE that the Petitioner South Carolina Coastal Conservation League hereby moves the Court (1) pursuant to SCALC Rules 29 and 68, and SCRCP Rules 52, 59, and 60, for an order reconsidering the Order of January 22, 2010, rescinding said order and/or altering said order in favor of Petitioner as set forth herein,

(2) pursuant to S C Code Ann § 1-23-380, to open the record and admit new evidence

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that support its grounds for reconsideration, and

(3) pursuant to SCALC Rule 29 E , SCRCP Rule 65, SCACR Rule 225, and S C Code Ann § 1-23-380 and § 1-23-600, for an order staying the Order of January 22, 2010, pending resolution of this case on appeal

The grounds for this motion are as follows

Motion to Reconsider, Open the Record and Admit New Evidence

While this case was pending in the Administrative Law Court, Kiawah Development Partners, II, applied for a stormwater permit to construct a 340-foot long, interlocking, sheet pile wall system along the narrowest portion of Captain Sam's Spit (referred to as the "bite" or "neck" of the spit in the Order of January 22, 2010) The stated purpose of the project is to "protect KDP's land including a possible future road and possible utilities " *See* Exhibit A, Consistency Determination, dated October 27, 2009 The proposed sheetpile wall would thus "protect" the same area proposed to be protected by the bulkhead/revetment system in the case pending before this Court

DHEC was required to review the stormwater permit for the sheetpile project for consistency with the Coastal Management Program ('CMP"), just as it had with the bulkhead/revetment critical area permit, pursuant to the S C Coastal Zone Management Act which requires all state and federal permit to be certified as consistent with the Coastal Management Program S C Code Ann § 48-39-80 The Act's requirement for certification that a project is consistent with the Coastal Management Program, and the validity and applicability of the CMP to stormwater permits, was recently affirmed by the S C Supreme Court in *Spectre v DHEC et al* , ___ S C ___, Opinion No 26764 (February 1, 2010)

The CMP policies that apply in this case are the same as the policies that apply to the sheetpile stormwater project – the guidelines for all projects, policies applicable to Geographic Areas of Special Concern (GAPCs), and policies applicable to Areas of Special Resource Significance (barrier islands, dune areas)

On October 27, 2009, the DHEC staff issued the stormwater permit and coastal zone consistency certification *See* Exhibit A

On November 11, 2009, the S C Coastal Conservation League ("League") filed a Request for Final Review Conference with the DHEC Board pursuant to S C Code Ann § 44-1-60 The Board granted the League's request and conducted a final review conference on December 10, 2009 At the conclusion of the conference, the Board unanimously voted to overturn the staff decision to issue consistency determination The Board issued a formal agency opinion setting forth the agency's policy interpreting and applying the S C Coastal Zone Management Act and the CMP in its Final Agency Decision on January 7, 2010 *See* Exhibit B, Final Agency Decision, dated January 7, 2010

In reversing staff's decision, the Board did two things that are directly relevant to this case First, it affirmatively adopted the staff's decision in the case pending before this Court Second, as the agency given the authority to implement the CZMA, it utilized this authority to set department policy in applying the Coastal Zone Management Act and Coastal Management Program

This Court must give "deference to an administrative agency's interpretation of an applicable statute or its own regulation" *Brown v Bi-Lo Inc*, 354 S C 436, 440, 581 S E 2d 836, 838 (2003) (citing *Brown v DHEC*, 348 S C 507, 560 S E 2d 410 (2002)) "The

construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons " *Converse Power Corp v DHEC*, 350 S C 39, 48, 564 S E 2d 341, 346 (Ct App 2002)

In interpreting the CZMA in its Final Agency Decision, the Board concluded that the staff failed to adequately 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 " *See* Exhibit B, CMP, Policy I 7 at p III-14, *see also* S C Code Ann Regs 30-11(C)(1) The Board noted that "the primary purpose [of the project] is to protect land for an access corridor including a possible future road and utilities to facilitate a residential development on the Spit " *See* Exhibit B The Board said that the Department has an obligation under the CZMP to consider impacts flowing from that development in the consistency review And the Board concluded that "given the pristine nature of the Spit and the Kiawah River in the vicinity, the lack of human improvements, the use of the area around the Spit as a public park, and the fact that much of the Spit is a GAPC (habitat to threatened or endangered species) and an area of special resource significant (barrier island, dune areas, and public open space)," the consistency determination must be denied because of the long-range cumulative effects of the project on this area

The Board was clear that the agency's policy in reviewing projects under the standard of CMP policy I 7, which is identical to R 30-11(C)(1) is to consider impacts that would be a direct result from the proposed project on the nature and character of the area, whether those

impacts are within the critical areas or outside the critical area [1] The long-range, cumulative impacts of both the sheetpile wall and the bulkhead/revetment are the same stabilization of a migratory inlet/spit system, residential development that will increase human and pet activity within areas designated as critical habitat under the Endangered Species Act, and residential development that will take a pristine, undeveloped natural area and change its character to one of development including houses, people, pets, cars, road, utilities and other infrastructure The Board concluded that these long-range, cumulative impacts were inconsistent with CMP policy I 7, and therefore the consistency certification must be denied *See* CMP at III-14 And those conclusions are entitled to deference under *Brown v Bi-Lo Inc* , 354 S C 436, 440, 581 S E 2d 836, 838 (2003)

In addressing the policies of the Coastal Zone Management Act, the Board affirmed that the agency must give heightened protection to the sensitive and fragile areas in accordance with the Act's policy at S C Code Ann § 48-39-30(B)(1) Recognizing the Spit to be one of these sensitive and fragile areas, the Board affirmed the agency policy that these areas receive greater protection and thus more weight when balanced against social and economic growth in the coastal zone The Board concluded that the sensitive and fragile nature of the Spit, along with the fact that it is currently unimproved and completely undeveloped, requires the agency to use extra caution and protect this area from inappropriately-sited development

The Board also concluded that if the shoreline continues to erode, the sheetpile wall will

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[1]The League notes that the consideration of "possible future development" presumes development on highground, outside of the critical area, as other portions of the Act and regulations prohibit filling in critical areas for residential development S C Code Ann Regs 30-12 G (2)(a)

be in critical area and exposed If that occurs, the Board found that the wall would have significant impacts in critical areas by changing the shoreline "from one that is sandy and gently sloped and easily accessed by the public to one that is a vertical escarpment comprised of a sheet pile wall inaccessible by the public " Exhibit B, p 6 The Board ruled that the public's use of the shoreline of the Kiawah River below mean high water would be impeded and the character of the River and sensitive and fragile Spit would be disrupted, all in violation of the policies of the Coastal Management Program and the policies of the Coastal Zone Management Act CMP, Policy I 7 at p III-14 & S C Code Ann § 48-39-30(B)(1)

The staff's permitting decision in this case became the final agency action when the DHEC Board failed to conduct a final review conference Yet the Board took no affirmative action on the revetment/bulkhead project to set agency policy as it relates to evaluation of long-range, cumulative impacts in the context of possible future development or of protecting sensitive and fragile areas But in the sheetpile stormwater project, the Board did take affirmative action and issued a formal written agency opinion The League requests that this Court reconsider its Order in light of this formal written opinion from the governing body of the agency charged with implementing, applying and interpreting the Coastal Zone Management Act and Coastal Management Program, in accordance with *Brown v BiLo*

The League further requests that the agency's Consistency Determination, Exhibit A, in the sheetpile stormwater permit project, and the Final Agency Decision of the DHEC Board, Exhibit B, be admitted in support of this motion for reconsideration

Motion for Stay

The Petitioner moves this court to stay the effectiveness of its decision until all appeal

opportunities have been exhausted or concluded *See* S C Constitution, Art I §22, S C Code Ann §§ 1-23-380 & -600, Rule SCALC Rule 29 E, SCRCP Rule 65, SCACR Rule 225 This motion for stay is based in part on the arguments set forth above but is also made independent of the court's decision on the motion to alter or amend as more fully explained below There are both broad based and site specific reasons this stay is being sought

The DHEC Board affirmed agency policy that interprets the Coastal Zone Management Act and Coastal Management Program as requiring staff to evaluate projects in light of their long-range, cumulative impacts, and in particular residential development outside the critical area where permits are sought that would allow development of pristine, undeveloped, sensitive and fragile areas The policy requiring evaluation of long-range, cumulative impacts is applicable to "all projects" in the coastal zone CMP Policy I 7 at III-14 A departure from this agency policy casts into question all applications for state and federal permits throughout the coastal zone in that these projects are all required to be reviewed for consistency with the CMP, and specifically for consistency with the policy that requires an assessment of long-range, cumulative effects in the context of future development and the general character of the area

Never before has a structure of this length and width been permitted Tr 1367-68 And never before has almost 3 acres of public trust sandy shoreline been covered with a hard erosion control structure As Mr Limehouse testified, a group of citizens passionate about the Spit and the Kiawah River formed an organization called Friends of the Kiawah River for the sole purposes of protecting the recreational and natural resources values of the Captain Sam's Spit and Inlet from the proposed development, and in particular the sandy banks of the Kiawah River *See* http //www kiawahriver org/kr/home php Dr Greg VanDerwerker and Ms Sophia

McAllister both testified that they regularly use the sandy banks of the Kiawah River in the area of the proposed structure And the League has alleged serious potential damage to public access and recreational uses, as well as to marine life The public's use of, and interest in protecting, the almost 3 acres of public trust sandy beach would best be served by staying this decision until a reviewing court makes a final determination as to whether loss of these public trust resources comports with the CZMA, the critical area regulations and the CMP

In light of these allegations and the regulations and policies requiring consideration of impacts to marine life and the prohibition on eliminating public access, the League believes that, if the motion to reconsider is not granted, a stay of this case is appropriate

Based on the evidence at the hearing, the League understands that construction of the proposed revetment/bulkhead will not commence immediately due to the costs of the structure The evidence also indicates that the Spit is growing in size, and that KDP is experiencing an overall net gain in highground And finally the evidence shows that, if constructed, the structure would result in a loss of three acres of public trust sandy beach and public use of this area will be significantly damaged or eliminated For these reasons, the League does not believe that KDP will be unfairly prejudiced by the staying of this appeal and asserts that its members will be prejudiced if the structure is constructed and damage is done to marine life, as well as to their recreational uses

Kiawah Development Partners, II, does not consent to these motions DHEC consents to these motions

WHEREFORE, for these reasons, the Petitioner respectfully requests that the Court reconsider its Final Order and Decision of January 22, 2010, and issue an order rescinding said

order, and altering and amending its ruling by issuing an order consistent with the points made in this motion In addition, the Petitioner respectfully submits that the Court should issue an order staying the effect of its order pending the resolution of this case on appeal

Respectfully submitted,



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Attorneys for the Petitioner

Georgetown, South Carolina

February 2, 2010

D H E C

PROMOTE PROTECT PROSPER

C Earl Hunter Commissioner

Promoting and protecting the health of the public and the environment.

S C Coastal Zone Management Program (SCCZMP) Consistency Determination
NPDES General Permit for Stormwater Discharges from Large and Small Construction Activities, SCR100000 (2006 NPDES CGP)

Project Name Kiawah Island Sheet Pile Project

Consistency Determination (From Sections VII and XIII)

Project Consistent with _____ SCCZMP _____ 2006 NPDES CGP Requirements

Project Consistent with __X__ SCCZMP __X__ 2006 NPDES CGP Requirements
(After Revisions)

Project Inconsistent with _____ SCCZMP _____ 2006 NPDES CGP Requirements

I Background Information
File Number 10-09-04-03
Public Notice Start Date (10 calendar days) 4/17/09
Permit Type(s) 2006 NPDES CGP
Permit Agency(ies) DHEC-OCRM
Staff GIS Reviews 4/14/09 and 7/14/09
Staff Site Visits 4/22/09 and 6/25/09

II Brief Project Description and Purpose
The scope of this project includes installing a 340-foot long interlocking steel sheet pile wall system and temporary construction access for the sheet pile wall installation only The wall is prefabricated in 4 5-foot wide sections and will be driven approximately 35 feet below existing grade in an upland area The stated purpose of this project is to "protect KDP's land including a possible future road and possible utilities that might be installed at and below grade, respectively, on the south side of the sheet pile" according to Trenholm Walker, attorney for KDP, in a letter dated July 28, 2009 Total disturbance for this phase includes approximately 0 6 acres

III Brief Description of Site Stormwater Management, Sediment and Erosion Controls
Site access is proposed through an existing emergency beach access drive A double row of silt fence is proposed adjacent to the critical area with a minimum of a 10-foot offset landward from the critical line Rough grading and clearing are proposed for temporary crane access and track mats are specified to minimize impacts from site disturbance and compaction Use of light equipment is specified for rough grading Vegetation that has to be removed for access is specified to be removed by hand The site is to be restored to existing grades, slopes and vegetation to match pre-construction conditions as closely as possible The contractor is instructed to take photographs prior to, during and after construction The contractor is also instructed to inventory existing conditions so that they can be matched as closely as possible post construction The inventory is to at a minimum include detailed description of existing

Exhibit A

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grades, slope and existing site conditions, as well as size, species, quality and quantity of vegetative cover within the construction access route

IV Summary of Public and Agency Comments (List by name, date & comment summary, if none indicate as such)

Federal Agencies USFWS, 6/23/09- Expressed concerns that the project may adversely impact several special status species The federally-listed loggerhead sea turtle and the state-listed Wilson's plover inhabit Captain Sam's spit for part of their life cycle The proposed project is also located within the designated critical habitat unit SC-10 for federally-listed, non-breeding piping plovers The proposed project is not located within areas that contain the constituent elements necessary for feeding and sheltering of piping plover

The letter from USFWS also notes that the project area is also within the undeveloped Captain Sam's Inlet Unit (SC-M08) of the Coastal Barrier Resource System (CBRS) USFWS expressed concerns that the proposed project will interfere with the natural dynamics of the island and will likely result in less suitable habitat for the species that inhabit this area USFWS is also of the opinion that the proposed project will result in the stabilization of an area in order to facilitate and protect future development and infrastructure Recommends denial

State Agencies SC DNR, 7/22/09- The southern end of Kiawah Island is used for nesting by the federally threatened loggerhead sea turtle Federally endangered leatherback sea turtle has also been reported nesting at this location Threats to these species include loss or degradation of nesting habitat, disorientation of hatchlings resulting from beachfront lighting and excessive nest predation by native and non-native predators The beachfront areas along this portion of the island are designated as critical habitat for the federally threatened piping plovers Armament and stabilization can result in the degradation and/or elimination of important piping plover foraging habitat Disturbance from human activities disrupts feeding and other critical activities Opposed to project

Local Agencies Town of Kiawah, 6/10/09-Supports the project

Public Comment

Spoke at Public Hearing, held 6/10/09

1 William Wert- supports project
2 Robert Dhelen- pristine area needs protecting
3 Paul Roberts- declined to speak
4 Sarah Latshaw- erosion, sea-level rise, endangered species, OCRM mission contravened
5 Ike Smith- declined to speak
6 Harry Polychon- objects to project that will have negative effects
7 Peter Mugglestone- objects to project that will have negative effects
8 Alan Bernaford- supports project
9 Art Morgenstern- deny permit, to protect area
10 Kyra Westerberg- deny permit, to protect area
11 C Westerberg- deny permit, to protect area
12 Liza Johnson- declined to speak
13 Katie Zimmerman- deny permit
14 Angela Jones, Sierra Club & SC Native Plant Society- deny permit, to protect area
15 Rich Thomas- deny permit, to protect area

16 Sidi Limehouse- deny permit, to protect area
17 Blase Keegel- deny permit, to protect area
18 Carole King- deny permit, to protect area
19 Greg Vanderwerker- will create erosion and is in a COBRA zone
20 Nelson Fenimore- will submit comments in writing
21 Marilyn Blizard- Diamondback terrapin habitat should be protected
22 Amy Armstrong, SCELP/Coastal Conservation League- GAPC because of Piping Plovers, long-range cumulative impacts, requests denial
23 Patrick Rogers- this is issue about zoning not environmental regulation

Other comments received during the public notice period

Gerald Mcgee,4/11/2009, Objects to permit issuance
Tammy Mcgee, 4/13/2009, Objects to permit issuance
Anne B Lake 4/24/2009, Objects to permit issuance
Arthur s & Lynn E Morgenstern, 4/24/2009, Objects to permit issuance
Barbara Winslow, 4/24/2009, YES piping plover
Carol R Cutsinger, 4/24/2009, Objects to permit issuance
Clarke Langrall, Jr , 4/24/2009, Objects to permit issuance
David Colangelo, 4/24/2009, Objects to permit issuance
Glenn Dalhart, 4/24/2009, Objects to permit issuance
Jimi Craddock, 4/24/2009, Objects to permit issuance
John Dinklespiel, 4/24/2009, Objects to permit issuance
Konrad Mugglestone, 4/24/2009, Objects to permit issuance
Marilyn R Blizard, 4/24/2009, Diamondback Terrapin habitat should be protected
Mary M Langrall, 4/24/2009, Objects to permit issuance
McNair Law Firm/Sharon C Bramlett, 4/24/2009, Objects to permit issuance
Michael & Rebecca Niemiec, 4/24/2009, Objects to permit issuance
Peter Muggleston, 4/24/2009, Objects to permit issuance
Richard G Thomas, 4/24/2009, Objects to permit issuance
Sophia Mcallister 4/24/2009, Objects to permit issuance, additional comments followed 5/18/9
Greg A Vanderwerker, 4/25/2009, Objects to permit issuance
Gretchen Hayes, 4/25/2009, Objects to permit issuance
Kevin Shorr, 4/25/2009, Objects to permit issuance
Lisa R Marrone, 4/25/2009, Objects to permit issuance
Sarah Latshaw, 4/25/2009, erosion concerns, need to protect area, objects to permit issuance
Sidi Limehouse, 4/25/2009, Objects to permit issuance
Wendy Kulic, 4/25/2009, Objects to permit issuance
David Wm Owens PH D, 4/26/2009, Objects to permit issuance
Karen Davis, 4/26/2009, Objects to permit issuance
Barbara & Alan Nourie, 4/27/2009, Objects to permit issuance
Barbara Burgess, 4/27/2009, Objects to permit issuance
Bernadette Brogan, 4/27/2009, Objects to permit issuance
Bowman Jordan, 4/27/2009, Objects to permit issuance
Diane Fosnocht, 4/27/2009, Objects to permit issuance
Donald & Patricia Machlonete, 4/27/2009, Objects to permit issuance
Marcia C Lucas, 4/27/2009, Objects to permit issuance
Michael B & Claire B Gwyn, 4/27/2009, Objects to permit issuance
Nancy Williams, 4/27/2009, Objects to permit issuance
Paula Feldman PHd, 4/27/2009, Objects to permit issuance

Polly Savage, 4/27/2009, Objects to permit issuance
Robert F Chick, Jr , 4/27/2009, Objects to permit issuance
Scott & Cathy Westerberg, 4/27/2009, Objects to permit issuance
Sherry Hines, 4/27/2009, Objects to permit issuance
Stuart A Mckeever, 4/27/2009, Objects to permit issuance
Sarah Marie Mooney, 4/25/2009, Objects to permit issuance
Lynn Smith, 4/27/2009, Objects to permit issuance
Susan B Budnick, 4/27/2009, Objects to permit issuance
Arie & Wilma Dezanger, 4/28/2009, Objects to permit issuance
Lawrence & Terry Hall, 4/28/2009, Objects to permit issuance
Penelope Polychon, 4/28/2009, Objects to permit issuance
Rebecca J Hamler, 4/30/2009, Objects to permit issuance
Robert A Cheatham, 4/30/2009, Objects to permit issuance
SCELP/Coastal Conservation League, 5/1/2009, requests denial, cumulative effects

Other comments received outside the public notice period

Wendy Kulick, 6/23/2009, endangered species, deny permit
Peter Silveston, 6/25/2009, deny permit
Robert Smith, 6/25/2009, endangered species concern, deny permit
Shane Woolf & Jennifer Lahr, 6/25/2009, protect area
SC DNR, 6/24/2009, endangered species concern
Fish & Wildlife, 6/24/2009, endangered species concern
Sheila Larson, 6/23/2009, deny permit
Laura Anschel, 6/16/2009, deny permit
Chirstina Lanzieri, 6/14/2009, diamond back terrapin critical habitat
Dr Gary McGraw, 6/14/2009, diamond back terrapin critical habitat
Jimmy Jarrett, 6/14/2009, deny permit
Cheryl Jarrett, 6/14/2009, deny permit
David Colangelo, 6/12/2009, deny permit
David & Molly Jones, 6/11/2009, deny permit
Ike Smith, 6/11/2009, this is a zoning issue that the Town of Kiawah should deny, deny pemit
Lorna Hattler, 6/11/2009, deny permit
Dennis Maxwell, 6/11/2009, deny permit
Nancy & Judson Williams, 6/11/2009, deny permit
Diane Lehder, 6/9/2009, deny permit
Maureen and Yutaka Kobayashi, 6/8/2009, deny permit

V SCCZMP Consistency Determination Assessment

A Does the project impact any SCCZMP defined resources, including geographic areas of particular concern (GAPCs)? Describe

Scope of Project and Impact Assessment

The proposed project area is located on upland, dune area adjacent to Kiawah River on the neck of a spit feature which is part of a barrier island, outside of the direct DHEC-OCRM Critical Area Permitting jurisdiction The general character of the area is that of a spit feature on a barrier island that is currently undeveloped This area contains upland and dune areas The proposed sheet pile wall is located in the coastal zone and is therefore subject to the Department's indirect authority provided by the Coastal Zone Management Act, the South Carolina Coastal

Program Document (Program Document) and the associated excerpt entitled Policies and Procedures of the South Carolina Coastal Zone Management Program (Program Excerpt)

The stated purpose of this project is to "protect KDP's land including a possible future road and possible utilities that might be installed at and below grade, respectively, on the south side of the sheet pile" according to Trenholm Walker, attorney for KDP, in a letter dated July 28, 2009 The proposed construction activity included in the request for NPDES Construction General Permit coverage is limited to the installation of the proposed sheet pile wall and the temporary installation of construction access associated with the wall No further development plans are included in the application or construction drawings All disturbed areas are to be returned to pre-construction conditions upon project completion and the proposed sheet pile wall is below grade Based upon the information provided by the applicant and its consultants, no formal plan for development exists The applicant provided a development agreement in response to staff's request for a development plan of the Kiawah spit property This agreement, however, does not contain enough information for staff to make a coastal zone consistency determination on any future development The development agreement is not a plan for development and the applicant has indicated it is possible that no development will occur in this area While the absence of a development plan limits the ability of the Department to conduct an analysis of the consistency of any future development on the spit, the absence of a definitive plan for possible future development does not prevent the Department from conducting a limited coastal zone consistency review of the proposed sheet pile wall project. It is ideal to have the entire development presented from a coastal planning perspective, so that the Department can perform a comprehensive review However, in this case, the 340 foot sheet pile wall is proposed to be installed in an upland area below grade to protect a relatively small area of the entire spit feature that may become shoreline in the future Until erosion occurs such that the wall becomes exposed, the wall will have little to no effect on the critical area However, should the wall become exposed or should the wall come into the Department's critical area jurisdiction, it will be subject to additional review at that time and the Department may require its removal if it is determined to be inconsistent with the policies of the Coastal Zone Management Program (CZMP) or the Critical Area Regulations If adequate precautions are taken, the proposed sheet pile wall project in and of itself, without consideration for future development, does not violate the policies of the coastal zone management program

Certifying the proposed sheet pile wall project in no way gurantees the certification of any future development Any other proposed construction or development will require a separate permit and a separate coastal zone consistency determination Further, if erosion continues and the wall becomes located in the critical area it will trigger additional policies of the CZMP and the Critical Area Regulations, and the Department reserves the right and has the authority to evaluate the sheet pile wall for consistency with the CZMP and applicable provisions in the Coastal Tidelands and Wetlands Act as well as the Critical Area Regulations

Threatened and Engdangered Species

Since the project is located in close proximity to sensitive areas with respect to threatened and endangered species habitat adequate precautions must be taken to avoid impacts The impacts can be avoided with the inclusion of appropriate safeguards for this particular project Threatened and endangered species habitat are considered GAPCs (Chapter IV(A)(2)(a)(8)) The following information on species was found during the coastal zone consistency review and taken into consideration

1 Piping Plover (bird species), *Charadrius melodus* The designated Critical Habitat Unit SC-10 for the piping plover and the area of Unit SC-10 containing the constituent elements is depicted on an

aerial photo map, revised July 14, 2008 The map was produced by Melissa Bimbi with the USFWS and is attached with this decision document

The US FWS comment letter dated June 23, 2009 notes

- The sheet pile project has the potential to degrade the habitat of the piping plover by stabilizing the spit and preventing natural island and inlet migration
- Although the current version of the proposed project is located within the designated critical habitat boundary, it is not located within the constituent elements necessary for feeding and sheltering
- Man-made structures along the shoreline or manipulation of natural inlets upset the dynamic processes and result in habitat loss or degradation
- Seawall installations continue to constrict natural coastal processes thereby constricting existing foraging and roosting habitat and preventing the creation of new habitat

An email sent by US FWS on October 2, 2009 states

- The habitat used by this species occurs July through May 15 (migration and wintering)

A comment letter dated July 22, 2009 from SC DNR also notes

- The disturbance from human activities and pets will disrupt feeding and other critical activities of this species
- That armament and stabilization of the project area can also result in the degradation and/or elimination of important foraging habitat and these threats can potentially increase as a result of development in the area

At least one dozen public comments received also mention the above concerns of this species in regards to the proposed project and development

2 Loggerhead Sea Turtle (animal species), *Caretta caretta* This species is listed on SC DNR's web site labeled 'Threatened, & Endangered Species Inventory Species Found In Charleston County Data, Last Updated January 17th, 2006' The listing category under the heading "Legal Status" on the web site is Federally Threatened (FT)/State Threatened (ST)

The US FWS comment letter dated June 23, 2009 notes

- This is a federally-listed species which inhabits Captain Sam's spit for part of their life cycle
- In a clarification email on July 14, 2009 US FWS explains that this species primarily uses oceanfront beaches, but they do occasionally use inlet beaches
- In a clarification email on October 2, 2009, US FWS explains that the seasonal use of this habitat is May through August (nesting season) and July-October (hatching season)

A comment letter dated July 22, 2009 from SC DNR also notes

- That threats to this species include loss or degradation of nesting habitat from coastal development and beach armoring, disorientation of hatchlings resulting from beachfront lighting, and excessive nest predation by native an non-native predators
- Threats will increase as a result of development in the area
- In an email dated July 13, 2009, information was given that nests have had to be relocated because of the low profile of the beach

There were several public comments concerning this species

3 Wilson's Plover (bird species), *Charadrius wilsonia* This species is listed on SC DNR's web site labeled 'Threatened, & Endangered Species Inventory Species Found In Charleston County Data, Last Updated January 17th, 2006' The listing category is under the heading "Legal Status" on the web site is ST

The US FWS comment letter dated June 23, 2009 notes

- This species is a state-listed species which inhabits Captain Sam's spit
- The proposed project will facilitate the development of the spit, which will adversely affect the plovers, turtle and terrapin, either through direct habitat destruction or through degradation of the surrounding habitat

An email from US FWS on October 2, 2009 states

- The habitat for the Wilson's Plover is open sandy areas and base of dunes with sparse vegetation for nesting, same for roosting, intertidal and mudflats/marsh for foraging, and parents hide chicks in marsh grass and fledglings also use it for cover
- Seasonal use of this habitat used by the Wilson's Plover consists of April-August (nesting), also migrate through spring and fall

A comment letter dated July 22, 2009 from SC DNR also notes

- The Wilson's plover species is not federally listed, however it is considered a high conservation priority
- Undisturbed beaches for resting and feeding are essential for their survival and successful migration

An e-mail dated October 5, 2009 from SCDNR clarifies

- Wilson's Plover is state listed as threatened

An email from SC DNR on October 14, 2009 states

- Wilson's Plover has been documented to nest on the southern spit of Kiawah SCDNR indicates they do not consider the number of Wilson's plover documented on the southern end of Kiawah insignificant
- Impacts to protected species (shorebirds and sea turtles) resulting from bulkhead construction only can best be avoided and minimized by restricting all construction activities to a time period of October 1 - February 28 No monitor would be necessary during this time frame

There were several public comments concerning this species

4 Leatherback Turtle (animal species), *Dermochelys coriacea*

The comment letter dated July 22, 2009 from SC DNR notes

- This is a federally endangered species
- Threats to this species include loss or degradation of nesting habitat from coastal development and beach armoring, disorientation of hatchlings resulting from beachfront lighting, and excessive nest predation by native an non-native predators
- These threats will increase as a result of development in the area
- The southern end of Kiawah Island is a reported nesting location for the Leatherback Turtle

This species is not mentioned in the US FWS comment letter dated June 23, 2009 but clarification is added in an October 2, 2009 email stating

- That the seasonal use of this habitat is May through August (nesting season) and July-October (hatching season)
- The species is endangered

There were several public comments concerning this species

5 Diamondback Terrapin (animal species), *Malaclemys terrapin*

The US FWS comment letter dated June 23, 2009 notes

- This species is mentioned as a species which inhabits Captain Sam's spit for part of their life cycle, but is not state listed

The comment letter dated July 22, 2009 from SC DNR does not mention this species There were several public comments concerning this species This species is not federally or state threatened or endangered and is therefore not a GAPC

6 American oystercatcher (bird species), *Haematopus palliates*, Red Knot (bird species), *Calidris canutus* (bird species), and Marbled Godwit (bird species), *Limosa fedoa*

The comment letter dated July 22, 2009 from SC DNR notes

- Notes that these species are not federally listed but are considered a high conservation priority
- Undisturbed beaches for resting and feeding are essential for their survival and successful migration

There was no public comment concerning any of these species These species are not federally or state threatened or endangered and are therefore not a GAPC

7 Waterbird Colony (bird species), aka Colonial Nesting Bird, no scientific name provided, was not found in the location of the proposed sheet pile wall project but was found on the ocean-side beach, which is part of the remaining parcel area, during the GIS review performed by OCRM staff on April 14, 2009 In the SC DNR and US FWS comment letters, there is no mention of this species

There was no public comment concerning this species This species is not federally or state threatened or endangered and is therefore not a GAPC

8 Least Tern (bird species), *Sterna antillarum*, was originally found elsewhere on the parcel and not at the sheet pile wall project location during the GIS review performed by OCRM staff on April 14, 2009 In the SC DNR and US FWS comment letters, there is no mention of this species

There was no public comment concerning this species

An email from SC DNR on July 13, 2009 indicates

- Least Tern nests have not been found on the southern end of Kiawah for years

Since nests have not been found for years as per SCDNR, this species is not a concern for this project

9 Eastern Woodrat (animal species), *Neotoma Floridana*, was originally found on the larger parcel and the sheet pile project location, during the GIS review performed by OCRM staff on April 14, 2009 In the SC DNR and US FWS comment letters, there is no mention of this species

There was no public comment concerning this species This species is not federally or state threatened or endangered and is therefore not a GAPC

10 Beach Morning-Glory (plant species), *Ipomoea stolonifers*, was originally found on the larger parcel, and not at the location of the proposed sheet pile wall during the GIS review performed by OCRM staff on April 14, 2009 In the SC DNR and US FWS comment letters, there is no mention of this species

There was no public comment concerning this species This species is not federally or state threatened or endangered and is therefore not a GAPC

Section 48-39-80(B)(4) of the Coastal Zone Management Act calls for the inventory and designation of areas of critical state concern within the coastal zone In summary, only four of the previously mentioned species are designated as GAPCs by the Department according to the policies for GAPCs contained in the Program Document and Program Excerpt since these policies are limited to the classifications of Threatened and Endangered Species Habitat The four species habitats that are designated GAPCs for this project are the leatherback and loggerhead turtles along with the piping and Wilson's plover The remainder of the species do not trigger the policies related to GAPCs in the CZMP

Safeguards for Shorebirds

When considering the proposed sheet pile wall only and no further development, based on concurrence provided in an e-mail dated October 20, 2009, US FWS recommended that construction should be avoided during migration for the piping plover which would cover other shore birds as well The migration periods are August September and March-April US FWS further

recommended that construction not occur from March 1 through September 30 to avoid creating confusion on when construction can actually occur

Safeguards for Turtles

When considering the proposed sheet pile wall only and no further development, as it relates to the federally listed turtles, USFWS recommended the following condition Coordinate with SCDNR and the Town of Kiawah Island during turtle nesting season prior to and during construction to ensure no nests are within the construction limits Also, vibration from heavy equipment should be taken into consideration when relocating nests so that the vibration does not negatively impact nests even when they are located outside of the project limits USFWS also indicated that not allowing construction from March 1 through September 30 would afford more protection for the turtles

In an e-mail dated October 14, 2009, SCDNR indicated that "impacts to protected species (shorebirds and sea turtles) resulting from bulkhead construction only can best be avoided and minimized by restricting all construction activities to a time period of October 1 through February 28 No monitor would be necessary during this time frame

Areas of Special Resource Significance/Special Management Areas

This project is on a barrier island in dune areas outside of the Department's direct critical area permitting jurisdiction These areas are identified as areas of special resource significance in Chapter III, Section XII of the Program Document and Program Excerpt, specifically in Sections XII A for Barrier Islands and XII B for Dune Areas (other than critical areas) No direct impact will occur to critical area from the installation of the sheet pile wall because it is being installed in an upland area below grade outside of the critical area If erosion occurs and the wall becomes exposed, such that it is exposed in critical area, additional policies and regulations will be triggered and the project will be reviewed for consistency with the CZMP and compliance with the critical area regultions at that time Until erosion occurs such that the wall becomes exposed, the wall will have little to no effect on the critical area Currently, the project as proposed, does not contravene the policies of the CZMP for Areas of Special Resource Significance because the wall is not situated in critical area or directly impacting critical area However, if the wall becomes critical area and/or begins having a direct impact on critical area the Department reserves the right to reassess the sheet pile wall according to the above referenced policies that cover direct impacts to critical areas and the Critical Area Permitting Regulations The Department also reserves the right to require the removal of the structure if necessary according to its statutory and regulatory authorities

Further, if erosion occurs and the wall becomes exposed as stated in the above paragraph such that it is exposed in critical area and/or having a direct impact on critical area, this scenario would also require a review of the project based upon the policies that cover Beach and Shoreline Access as a Special Management Area in Chapter IV of the Program Document and Program Excerpt Currently the policies of the CZMP regarding Beach and Shoreline Access as a Special Management Area are not contravened because the wall is not having an adverse effect on critical area but the policies could be contravened if the wall begins to have an adverse effect on critical area The Department reserves the right to reassess the sheet pile wall according to the policies regarding Beach and Shoreline Access as a Special Management Area and require the removal of the structure if necessary according to its statutory and regulatory authorities should the wall begin to have an adverse effect on critical area

The construction drawings for the proposed project show that precautions are being taken during construction with the use of best management practices These best management practices are

identified in Section III of this document These best management practices are specified to prevent direct impacts to the critical area from construction activities and to prevent sediment laden runoff from discharging into the adjacent Kiawah River Post construction, the site is being returned to pre-construction conditions for both topography and vegetation

B - What is(are) the purpose(s) of the impact(s), if any, to coastal resources and how are the impact(s) being addressed?
Impacts can be avoided from this project Refer to Section V A for information on project scope and further justification Potential impacts from this project are to threatened and endangered species and associated habitats within the general area of the project site during construction activities, as well as Dune Areas Subject to the conditions in the following two paragraphs and considering the proposed sheet pile wall project only, the project can be considered consistent with the CZMP

Based upon the information compiled in Section V A, these potential impacts can be avoided by limiting construction to a time period of October 1 to February 28 Considering the habitat for Wilson's plover is open sandy areas and the base of dunes with sparse vegetation per USFWS and this is characteristic of the project site, the Wilson's plover's nesting season is from April 1 to August 31 per SCDNR, and periods of migration for the piping plover and other shore birds include the months of March, April, August and September, a condition of no construction from March 1 through September 30 is appropriate for the sheet pile wall project Further coordination with SCDNR and USFWS would be necessary should construction need to occur outside of this window

Further potential impacts can be avoided by coordinating with SCDNR and the Town of Kiawah Island during turtle nesting season, which runs from May through August, and hatching season, which runs from July through October, prior to and during construction to ensure no nests are within the construction limits or in close vicinity Also, vibration from heavy equipment should be taken into consideration when relocating nests so that the vibration does not negatively impact nests even when they are located outside of the project limits These safeguards were proposed by USFWS and SCDNR during discussions which considered the sheet pile wall project, as proposed, and no further development Considering hatchlings may become disoriented by lighting as specified in SCDNR's comment letter dated July 22, 2009, any construction that needs to occur after daylight hours needs to be coordinated and approved by the Town of Kiawah and SCDNR during turtle hatching season to avoid disorienting the hatchlings Most of this coordination is only necessary should construction have to occur during the restricted time period of March 1 through September 30 as specified above for the shorebirds However, construction is allowed during the month of October which is the last month of turtle hatching season

No permanent impacts will occur to the barrier island or dune areas outside of the direct critical area permitting jurisdiction because the site is being returned to pre-construction conditions upon construction completion However, if the wall becomes critical area and begins having a direct impact on critical area the Department reserves the right to reassess the sheet pile wall according to the Critical Area Permitting regulations, the policies for Areas of Special Resource Significance and the policies covering Beach and Shoreline Access at that time See Section V A The Department also reserves the right to require the removal of the structure if it is determined that the structure becomes inconsistent with the CZMP or that it contravenes the statutes and regulations governing alterations to the critical area

C Is the project consistent with SCCZMP policies related to stormwater, sediment/erosion control, and wetland impacts? Explain

Yes, the project is consistent based upon the stormwater management and sediment/erosion control plan submitted by the applicant The proposed sheet pile wall project will not create any new impervious area as the whole structure will be below existing grade post installation and the proposed construction access is temporary and pervious Temporary sediment and erosion controls are proposed for the project to prevent sediment from discharging offsite during construction See Section III No wetland impacts are proposed as part of this project

D Is a dock master plan required? If so, why?

A dock master plan is not required for this project because the project scope is limited to the proposed installation of the sheet pile wall and temporary construction access for the project

E Is a critical area permit required?

No, there are no proposed impacts to critical area at this time However, if the sheet pile wall becomes exposed, the Department retains the right to review for compliance with the Critical Area Permitting Regulations at that time

F Does the project contravene any coastal zone management policy? ___ Yes ___ No__ X_ No, with revisions
(If No or No, with revisions, skip to Section VII, if Yes, complete Section VI)

VI For Projects Inconsistent with the SCCZMP (deny)

A The project is inconsistent with the following policies

B Specific reasons(s) project is inconsistent

C Modifications necessary for bringing the project into consistency

VII Staff SCCZMP Consistency Determination

_____ Project is consistent
__X_ Project is consistent with revisions
_____ Project is inconsistent (deny)

VIII Staff SCCZMP Consistency Recommendation by

Name Greg Wahl Date 10/27/09

Section Manager Shannon Hicks Date 10/27/09

IX Approved By

Stormwater Project Manager Greg Wahl Date 10/27/09

Section Manager Shannon Hicks Date 10/27/09

X Notes

XI Stormwater Management, Sediment and Erosion Control Assessment

A Does the project meet the technical requirements of S C Stormwater Management and Sediment Reduction Regulations (26 S C Code Ann Regs 72-300, et seq (Supp 2007))? Explain

Yes The engineering consultant provided documentation, including construction drawings, pre-construction and proposed post-construction conditions, soils information, construction sequence and site stabilization information to show how the site is being returned back to existing conditions post construction This eliminates the need for post-construction water quality calculations and detention calculations for the proposed installation of the sheet pile wall and associated temporary construction access per R 72-300(B)(1) No new impervious surfaces are included as part of the proposed project and the proposed sheet pile wall is being driven below existing grade The proposed construction drawings identify adequate best management practices and construction notes to control sediment and erosion during construction See Section III The site will be stabilized post-construction back to pre-construction conditions

B Is the project consistent with the requirements of the 2006 NPDES CGP and Regulation 61-9? Explain

Yes, by providing and installing best management practices prior to and during construction to control sediment and erosion The proposed site is going to be stabilized back to pre-construction conditions once construction is complete See Section III

C Is the project inconsistent with the requirements of the 2006 NPDES CGP and Regulation 61-9?
___ Yes ____ No_X__ No, with revisions
(If No or No with revisions, skip to Section XIII, if Yes, complete Section XII)

XII For Projects Inconsistent with the requirements of the 2006 NPDES CGP and Regulation 61-9

A The project is inconsistent with the following technical requirements from the S C Stormwater Management and Sediment Reduction Regulation(s) (26 S C Code Ann Regs 72-300 et seq (Supp 2007)) and/or the following permit requirements of the 2006 NPDES CGP

B Specific reasons(s) the project is inconsistent with the technical requirements from the S C Stormwater Management and Sediment Reduction Regulation(s) (26 S C Code Ann Regs 72-300, et seq (Supp 2007)) and/or the following permit requirements of the 2006 NPDES CGP and Regulation 61-9

C Modifications necessary for making the project consistent with the requirements of the 2006 NPDES CGP and Regulation 61-9

XIII Staff Recommendation for 2006 NPDES CGP Coverage

_____ Project is consistent with the requirements of the 2006 NPDES CGP and Regulation 61-9
_X__Project is consistent with the requirements of the 2006 NPDES CGP and Regulation 61-9 with revisions
_____Project is inconsistent with the requirements of the 2006 NPDES CGP and Regulation 61-9 (deny)

XIV Staff Recommended Decision for 2006 NPDES CGP Coverage by

Name Greg Wahl Date 10/27/09

Section Manager Shannon Hicks Date 10/27/09

XV Approved By

Stormwater Project Manager Greg Wahl Date 10/27/09

Section Manager Shannon Hicks Date 10/27/09

XVI Notes

SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL

FINAL AGENCY DECISION

In Re Staff Decision dated October 27, 2009, to issue OCRM Permit No 10-09-04-03 to Kiawah Development Partners II, Inc., for the construction of a steel sheet pile wall system

Board Docket Number 09-RFR-94

Appearances *Amy E. Armstrong, Esq for South Carolina Coastal Conservation League*
G Trenholm Walker, Esq , for Kiawah Development Partners, II, Inc
Sidi Limehouse, for Friends of the Kiawah River
Sara Bazemore Esq , for South Carolina Department of Health and Environmental Control

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BACKGROUND

This matter comes before the Board of Health and Environmental Control for final review pursuant to S C Code Ann § 44-1-60 on requests filed by Friends of the Kiawah River and the South Carolina Coastal Conservation League (the "League") to review a decision made by Department staff on October 27, 2009, issuing Permit No 10-09-04-03 The staff decision authorized the construction of a steel sheet pile wall system near Beachwalker Park on Captain Sam's Spit, adjacent to the Kiawah River, Kiawah Island, Charleston County, South Carolina. The staff decision was made in response to Kiawah Development Partners, II, Inc 's ("KDP") request to the Department dated April 4, 2009 The staff decision authorized KDP to install a 340-foot long, interlocking, steel sheet pile wall system and temporary construction access for the sheet pile wall installation only to be driven approximately 35 feet below existing grade in an upland area.

Requestor Friends of the Kiawah River timely filed a request for final review on November 10, 2009 Requestor South Carolina Coastal Conservation League timely filed a

Exhibit B

request for final review on November 13, 2009 The Board conducted a final review conference on December 10, 2009 For the reasons set forth below, the Board has determined that the Staff's decision to issue the permit should be reversed and the permit denied

In its request for review and at the review conference, Requestor Friends of the Kiawah River raised several arguments in support of its challenge to the staff's decision, including the following a) the piling is to be placed in a location in the beach sand where water will simply flow around the end of the piling and cause a breach at one, if not both ends of the structure, b) KDP's project is requested with the aim of reinforcing the sand and to allow a road to be built, which Requestor sees as "blatant attempt to find a loophole around the [Department's decision on Permit No OCRM-08-117-E]", and c) that the project does not comply with the Coastal Zone Management Act and the Coastal Zone Management Program (CZMP)

In its request for review and at the review conference, Requestor South Carolina Coastal Conservation League raised several arguments in support of its challenge to the staff's decision, including the following a) members of the League who use and enjoy the waters, critical areas, and other natural resources on Kiawah Island would be adversely affected by the sheet pile structure proposed, b) the proposed work is situated in a Geographic Area of Particular Concern (GAPC), c) the project does not comply with the Coastal Zone Management Act and the Coastal Zone Management Program (CZMP), d) the staff's issuance of this permit and certification is inconsistent with its decision on critical area Permit No OCRM-08-117-E, dated December 18, 2008, and e) the League believes that the impacts of the proposed structure will cause significant degradation of the environment on Captain Sam's Spit, reduce the value of surrounding property and have severe negative impacts on wildlife within the impact area, as well as have negative impacts on erosion patterns on Kiawah Island.

DISCUSSION

Having reviewed the administrative record and heard from the parties in this matter, the Board concludes that the staff decision should be overturned. Department staff reviewed the permit and certification requests under the applicable statutory provisions, but staff did not adequately consider the potential cumulative effects of the wall in the context of possible future development and the general character of the area. The resource policies of the CZMP require that in review and certification of permit applications in the coastal zone, the Department be guided by "[t]he possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area." CZMP, Guidelines for Evaluation of All Projects, Policy I (7) at p III-14

KDP argues that the Department must consider only the impact of the immediate area of land disturbance for the sheet pile project and should not consider the long-range cumulative effects of the project when reviewed in the context of possible future development and the general character of the area because KDP does not have development plans, and any future permitting actions for construction will receive applicable review at that time The staff also took the position that it need not assess the potential effects of this wall in the context of the future residential development, because, in their view, construction of the sheet pile wall will not facilitate residential development. The Board does not agree It is clear from the record, including the permit application, representations contained in correspondence from KDP, and statements to the Board by representatives of KDP that the primary purpose of the sheet pile wall is to protect land for an access corridor including a possible future road and utilities to facilitate a residential development on the Spit of up to fifty homes. The fact that KDP has not formalized its development plans does not negate the Department's obligation under the CZMP to consider

the possible long-range cumulative effects of the project, reviewed in the context of possible future development and the general character of the area. Furthermore, the Board is not persuaded that the 2005 Development Agreement between KDP and the Town of Kiawah provides a sufficient basis to assure that possible future development will not have a significant impact on the general character of the area or other adverse effects on the resources on the Spit. In addition, the Board finds that the Development Agreement does not assure that possible future development will be consistent with applicable policies for Geographic Areas of Particular Concern and the applicable policies for Areas of Special Resource Significance

Moreover, staff's decision in regard to cumulative effects is inconsistent with the Department's decision on Permit # OCRM-2008-1366-1IQ-P, which involved a request for an erosion control structure for the purpose of protecting an access corridor for future residential development on the Spit. In that decision, the Department found that that proposed activity, when reviewed in the context of possible future residential development and the general character of the area, was likely to have adverse cumulative effects. Neither KDP nor the staff has persuaded the Board that this sheet pile wall, when reviewed in the context of the same possible residential development and the general character of the area, would not have adverse cumulative effects Given the pristine nature of the Spit and the Kiawah River in the vicinity, the lack of human improvements, the use of the area around the Spit as a public park, and the fact that much of the Spit is a GAPC (habitat to threatened or endangered species) and an area of special resource significance (barrier island, dune areas, and public open space), the Board denies the consistency determination based on 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.

The Coastal Zone Management Act, S C Code Ann § 48-39-10, *et seq* and the CZMP give the Department the authority to review all projects in the Coastal Zone Activities in the Critical Areas require a direct permit from the Department, permit applications for activities in the coastal zone that are outside the critical areas are reviewed by the Department for consistency with the CZMP The CZMP and the Act afford heightened protection to the Spit. The policies in 48-39-20 and 48-39-30 require the Department 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. " S C Code Ann. § 48-39-30(B)(1) (emphasis added.) As discussed above, the Spit is an Area of Special Resource Significance and is a Geographic Area of Particular Concern under the CZMP Given the exposure of Captain Sam's Spit to dynamic forces on three sides and the history of the Spit and its susceptibility to washover and breach as well as the pristine nature of the Spit, the Board determines that this is a sensitive and fragile area of the coastal zone that must receive heightened protection under the CZMP

The Department is also required to review the activity for consistency with the following policies in the CZMP General Guidelines for Evaluation of All Projects (p III-14 and III-15), Policies for Activities in Barrier Islands (p III-69 through III-71), the Policies for Activities in Dune Areas (p III-71 and III-72), Policies for Public Open Spaces (p III-73) and the Policies for Erosion Control Programs (p IV-51 through IV-59) These policies require the Department to consider the potential impacts to critical areas and discourage such activities that would have a negative effect on critical areas Staff determined that these policies are not violated because the area where the sheet pile wall is proposed to go is not in a critical area. Staff also imposed

conditions on the certification requiring that KDP provide notice to the Department if the wall becomes exposed or becomes critical area and requiring that the Department then conduct additional reviews to determine consistency with the above referenced policies and the Department's Critical Area Regulations

The Board disagrees with staff's decision to postpone review of this project for consistency with these policies until erosion causes the proposed wall to be located in a critical area. It is undisputed that the purpose of the wall is to protect an access corridor for a roadway and utilities to facilitate residential development on the Spit. The premise behind this project assumes that the Kiawah River will erode to the point where the sheet pile wall is proposed to go If erosion reaches the point where the sheet pile wall is proposed to go, the sheet pile wall will be in a critical area. The shoreline of the Kiawah River consists of coastal waters and tidelands critical area, and arguably beach critical area, as the shoreline of the Kiawah River is a dry sandy beach subject to periodic tidal and wave action such that no nonlittoral vegetation is present. The Board finds that if installed, the construction of the sheet pile wall will have significant impacts on the critical areas of the coastal zone If the Kiawah River erodes to the point that the sheet pile wall is exposed, the sheet pile wall will significantly impact the shoreline, changing it from one that is sandy and gently sloped and easily accessed by the public to one that is a vertical escarpment comprised of a sheet pile wall inaccessible by the public If erosion reaches the sheet pile wall, the wall would impede public use of the shoreline of the Kiawah River below Mean High Water and disrupt the environmental and aesthetic character of the pristine Kiawah River, the adjacent public park, and the environmentally sensitive and fragile Captain Sam's Spit. The policies in the CZMP provide that "except under special circumstances, such as critically eroding shorelines that have a direct measurable effect on the economic well-

being of an applicant or are a threat to public safety, the Council will promote the use of natural features of the dune and beach system rather than artificial protection." CZMP at IV-57, provision IV(C)(4)(c)(7) These exceptions are not present here

Furthermore, the Board disagrees with the staff's reliance on language in the Consistency Determination that should the sheet pile wall become exposed or come within the Department's critical area jurisdiction, it will be subject to additional review and the Department may require its removal if it is determined to be inconsistent with policies of the CZMP or Critical Area Regulations The Board is mindful of the extreme difficulty in implementing removal of the wall if the residential development this structure is designed to facilitate and protect has already been constructed.

The Board finds that the issues raised by Requestors have merit and justify reversal of the staff decision. The Board concludes that the proposed activity is inconsistent with the above-cited policies in the CZMP and that this permit and certification were improperly issued. Accordingly, the Board overturns the Department's decision to issue Permit No 10-09-04-03

Paul C Aughtry, III
Chairman
Board of Health and Environmental Control
For the Board

January 7, 2010

Notice of Right to Request Contested Case Hearing Before Administrative Law Court

S C Code §44-1-60(F)(2) provides that within 30 days after the receipt of the Board's written final agency decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website http //www scalc net. If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the following address

Lisa L Longshore
Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy, parties before the ALC are responsible for complying with all applicable requirements of the Court.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	DOCKET NO 09-ALJ-07-0029-CC (consolidated cases) **MOTION TO RECONSIDER**
Kiawah Development Partners, II Petitioners, vs South Carolina Department of Health and Environmental Control Respondent	

TO THE COURT AND ALL PARTIES

PLEASE TAKE NOTICE that the Respondent, South Carolina Department of Health and Environmental Control, hereby moves this Court, pursuant to Rules 29 and 68, SCALC, and Rules 52, 59, and 60, SCRCP, for an Order reconsidering the Order of January 22, 2010, rescinding said Order and/or altering said Order in favor of the Department, as set forth herein "It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also a vehicle to seek 'reconsideration' of issues and arguments A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule " Elam v S C Dept of Transportation, 361 S C 9, 602 S E 2d 772 (S C 2004) The Order should be amended or withdrawn because certain material factual findings are unsupported by the evidence in the record, the Order contains errors of law,

and the Court either overlooked or misinterpreted the Department's Arguments, and the Opinion contains material that is not necessary to the Court's order which could be used against the parties in subsequent litigation

(1) THE DEPARTMENT RESPECTFULLY REQUESTS THAT THE COURT DELETE FOOTNOTE 10

In Footnote 10 of the Order, the Court makes "recognizes that there is credible evidence that the Department has been uncooperative during the permitting process of this case [ ]" The Court goes on to elaborate on its view of the evidence and the law in this regard The Department respectfully requests that the Court remove this footnote The footnote is not necessary to the Court's ruling in this matter Moreover, Kiawah Development Partners, II (KDP) has filed a civil action in Charleston County alleging a taking based on the Department's action on the permit application which is the subject of this Contested Case The language of the Court in Footnote 10 and its analysis of the evidence in this matter, and the Court's comments on the law governing the processing of permit applications, could have implications in the takings suit The Department understood from comments made by the Court that the allegations of bias and undue delay would not factor into the Court's decision on the merits given the Court s *de novo* review and the Department respectfully submits that it would be appropriate to delete the footnote to afford the parties a full opportunity to address KDP's allegations in this regard in the event the civil action is taken to trial

In further support of this request, or in the alternative, the Department points out that it does have the regulatory authority to cancel a permit application Contrary to the Court's statement that "that delay is further exacerbated by the fact that there was no provision in the regulations allowing cancellation of a permit for failure to furnish this affidavit within thirty days," the Department does have the regulatory authority to cancel a permit application that is

incomplete Pursuant to Reg 30-2(B) and S C Code Ann § 48-39-140(B), an application is not complete, and will ordinarily not be considered, unless the affidavit of publication is received In addition, Reg 61-30 authorizes the Department to cancel permit applications where the applicant does not comply with a request for additional information within the time prescribed See Reg 61-30(H) Finally, the Department refunded the application fee as required by Reg 61-30 when the application was not acted on in the timeframe prescribed

Regardless, none of these issues are necessary to the Court's Order and the Department represents that the interests of justice supports removing the footnote to enable the issues raised by KDP on this point to be more fully developed and litigated in the context of the civil action, if necessary

2 STANDARD OF REVIEW

The Department respectfully requests that the Court amend the Final Order and decision to properly cite the correct standard of review and reconsider its findings of fact and conclusion of law in light thereof "The construction of a regulation by the agency charged with executing the regulation is entitled to the most respectful reference and should not be overruled without cogent reasons" Converse Power v DHEC, 350 S C 39, 48, 564 S E 2d 341, 346 (Ct App 2002), Brown v Bi-Lo, Inc , 354 S C 436, 440, 582 S E 2d 836, 838 (2003) The Department submits that this theory is equally applicable in the context of applying the policies contained in the CZMP The Court's Order fails to give proper deference to the Department's interpretation of its regulations and the CZMP

3 SCOPE OF REVIEW

Although the Court conducts a *de novo* hearing, the contested case is still a review of the Department's permit decision The application submitted to the Department was for a 2783'

bulkhead and a 2783' by 40' revetment The Court properly found that the structure applied for by KDP was not necessary Nevertheless, the Court went on to authorize a structure that it designed based on the testimony of Mitchell Bohannon KDP did not apply for the structure that the Court has authorized There was no evidence submitted showing plans for any less of a structure that were submitted to the Department, or the Court for that matter [1] The off the cuff testimony of Mitchell Bohannon relied on by the Court in redesigning the proposed structure was not submitted to nor considered by the Department and does not meet the requirements of 48-39-140(B) and Reg 30-2(B) Moreover, the question before the Court was whether the Department's denial of the 2783' bulkhead and 2783' by 40' revetment was consistent with the Regulations, Statute, and CMP KDP and KDP's agents acknowledged and conceded at the hearing that the structure is not necessary, and therefore the Court should reconsider its Order and amend the Order in favor of the Department and affirm the Department's decision

4 AUTHORITY OF THE DEPARTMENT TO CONSIDER CUMULATIVE IMPACTS AND IMPACTS OUTSIDE OF THE CRITICAL AREAS

The Court concludes that 'the pertinent inquiry is the cumulative impacts of the project within the critical area, not the cumulative impacts of the future development on the high ground outside the critical area" Order p 22 This argument was clearly rejected by the Supreme Court's recent decision in Spectre v DHEC, _____ S C _____, Op No 26764 (Feb 1, 2010) The Court affirmed the Department's authority under the CZMA to review all state and federal permits in the coastal zone for consistency with the State Coastal Management Program (CMP) The Court affirmed that the policies in the CMP apply to all lands and waters in the coastal zone, and it directly rejected the argument that the Department's review is limited to critical areas To avoid the need for appeal, the Department respectfully requests that the Court reconsider its findings and conclusions in light of the Spectre decision and amend the Order in

[1] Plans were submitted to the Department by PRC for a 270 structure at Beachwalker Park

the favor of the Department, giving proper deference to the Department's interpretation of the CMP, the Regulations, and the Statute, and to the Department's specialized knowledge in skill in managing the resources of the coastal zone, and affirm the Department's decision

5 **ALTERNATIVES**

The Court found as a factual matter that there are no alternatives to the proposed bulkhead and revetment This finding overlooks repeated admissions by KDP and its agents and the Court erred in finding otherwise KDP's 30(b)(6) designee, Leonard Long, acknowledged that it would be possible to develop homesites on the spit without a revetment Tr p 268 6-20 Moreover, Leonard Long and Mark Permar testified that homesites may never be developed on the spit, supporting the conclusion that a no action alternative is viable, as the purpose of the revetment is to protect a potential access and utility corridor for potential homesites Finally, there is no absolute prohibition on installing an access and utility corridor seaward of the setback line KDP's representatives acknowledged the provisions in § 48-39-290 for special permits The undisputed testimony from all of the witnesses testifying on the issue—Kana, Young, and DeWolf, agreed that the spit is very wide at the neck and that there are several hundred feet between the setback line and the primary sand dune on the ocean front These facts are clear from the exhibits showing the location of the setback line Thus, it is undisputed that it would be possible for KDP, if it decides to proceed with development of homesites, to apply for a special permit to install the access and utility corridor seaward of the setback line Such an alternative would have much less impact on the critical areas Thus, the Department respectfully requests that the Court reconsider its ruling and amend the order in favor of the Department and affirm the Departments decision

6 **FOOTNOTE 21**

The Court held that "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 if the Supreme Court determines that that the CZMP is enforceable " Order, p 28 The provisions of 48-39-280 and 48-39-290 make no findings about the suitability of property landward of the setback line for development Rather, the Act makes property between the setback and baseline subject to the provisions of 48-39-290(B) and property seaward of the baseline subject to the provisions of 48-39-290(A) The Act neither explicitly nor implicitly, overrules nor takes precedence over the Department's authority to review and certify all state and federal permits in the coastal zone for consistency with the CZMP Simply put, the Act takes no position whatsoever on the suitability of property landward of the setback line for development The Department respectfully requests that the Court delete this footnote and reconsider the findings and conclusions of law affected by the statements and conclusions therein

7 CMP POLICIES

It is clear from Spectre that the CMP policies apply to the review of this activity and that the Department is required to consider the policies in the CMP in reviewing this project The General Guidelines for Evaluation of All Projects require the Department to 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, p III-14 (Policy I-7) As set forth in the Department's Proposed Order, this activity triggers the following additional policies in the CMP Policies for Activities in the following Areas of Special Resource Significance Barrier Islands, Dune Areas (other than critical areas), and Public Open Space (all in Ch III of the CMP), Policies for the following Geographic Areas of Particular Concern Threatened or

Endangered Species (CH IV(A)(2)(a)(8) of the CMP) Erosion Control Policies (Ch IV(C) of the CMP), and Beach and Shoreline Access Policies (Ch IV(D) of the CMP)

- Barrier Islands The policies applicable to Barrier Islands require KDP to demonstrate that any construction or development on the barrier islands will retain to the extent feasible the 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 The undisputed testimony was that these policies apply and that Kiawah Island is a barrier island, and that the spit is a pristine, natural feature not familiar with human development The policies for barrier islands also require there to be a demonstration of reasonable precautions to prevent or limit any direct negative impact on adjacent critical areas

KDP offered no evidence from which the Department or the Court could find that the possible future development would conform to these policies in the CMP The only evidence offered was the development agreement, KDP's history of environmentally sensitive development, and the conceptual sketches [2] The applicant's history of environmentally sensitive development does not obviate or circumvent the requirement in the CMP that the applicant provide assurances that the policies therein will not be contravened The development agreement contained nothing which could possibly provide the required assurance regarding existing dune ridges drainage patterns, and natural vegetation and impacts to critical areas and other policies in the CMP Rather, the development agreement speaks towards limited number of lots (50) and other measures designed to limit impacts to the environment—none of which speak to the requirements for the policies for Barrier Islands (or to the policies for Dune Areas or to the

[2] The recent decision by the Board addresses the insufficiency of these documents to provide the required assurance The League has filed a Motion to Reopen the Record for the purpose of admitting the Board s decision into evidence The Board s decision came out after the hearing in this matter and the Department joins in the League s Motion to re open the record for the purpose of admitting the Board Decision

Policies for Public Open Space—or any policies in the CMP, for that matter) Moreover, the conceptual study prepared by Permar showed that the homesites would be within the dune fields and in the area where the fledgling maritime forest is beginning to grow It is clear from the aerial photography and the conceptual sketches that the homesites are slated to go in close proximity to the critical area tidelands and marsh on the western end of the spit Finally, at the hearing, KDP and its agent acknowledged that they have no present plans for development (though the stated purpose of the revetment is to support an access corridor for development), and did not know what development, if any, they would put on the spit Therefore there is no way that they could have provided the necessary information that would allow an evaluation of the cumulative impacts on these issues Moreover, a ruling on that basis would essentially delegate OCRM's statutory responsible to a private developer As such, that constitutes an error of law

Policies for Dune Areas It is clear when viewed in the context of the possible future development, the revetment is likely to have severe impacts to the dune areas on the spit The testimony of Kana and Young unequivocally establishes that the entire spit is a dune area, and that any development will have impacts to the dune areas, as will the utility and access corridor that the revetment is designed to facilitate As explained in more detail in the Barrier Island section above, without plans, there is no way to say that KDP established the required assurance that there will not be a loss of protective dune formations or unnecessary destruction or encroachment on to stable dunes

Public Open Space It is undisputed that much of the spit and the Kiawah River shoreline is public open space The policies provide that proposals which would restrict or limit the continued use of a recreational open area or disrupt the character of such a natural area

(aesthetically or environmentally) will not be certified where other alternatives exist CMP, p III-73 It is undisputed that this structure will impact the public use of the Kiawah River shoreline by bathers, fishermen, swimmers, boaters, kayakers, and other persons utilizing the Kiawah River Shoreline It is also undisputed that conversion of the sandy shoreline into a 2 6 acre field of concrete blocks turned on their side with holes facing up will alter aesthetic and environmental character of the Park and the Shoreline Thus, the Court should reconsider its order and amend the decision in the favor of the Department and affirm the Department's decision

Erosion Control Policies These policies are addressed in more detail on p 26 of the Department's proposed order, and the Court only acknowledged these arguments in passing in a footnote Contrary to the Court's conclusion that the Department lacks the authority to deny a permit for a bulkhead or a revetment that retards the process of shoreline change, the Erosion Control Policies require the Department to "promote the use of the natural features of the dune and beach system rather than artificial protection" IV-57 The only exception to this is "under special circumstances such as critically eroding shorelines that have a direct measurable effect on the economic well being of an applicant or are a threat to the public safety " Exhibit 48, DeWolf's analysis of the shoreline, the only evidence submitted by KDP showing the purported erosion rates and shoreline movements, shows that the shoreline was either stable or accretional for most of the length of the area of the proposed revetment Moreover, there was no evidence of a direct measurable effect on the economic well being, only conjecture that a revetment would make potential homesites on the spit (if they are ever developed) more marketable The general considerations n the erosion control program require the Department to consider, among other things, "the economic justification of the proposed project in comparison with available erosion

control alternatives including consideration of the anticipated damage and economic loss due to failure " Once again, there was no evidence from KDP on this other than the conjecture that a potential development of homesites would be more marketable - This is not sufficient under the Erosion Control Policies in the CMP Finally, "the structures shall not impede public use of beaches below the mean high water line " CMP, p IV-57 It is undisputed that this concrete block revetment would be unsafe to walk on, and that it would impede public uses of the beaches below mean high tide Therefore, the Department respectfully requests that the Court reconsider its Order and amend the Order in the favor of the Department and affirm the Department's decision

Beach and Shoreline Access Policies Likewise, the Beach and Shoreline Access Policies discourage structures that would negatively affect public access to tidal and submerged lands, navigable waters, and beaches or other recreational coastal resources

8 POLICIES IN 48-39-20 and 48-39-30

The Court did not address the Department's arguments that the inclusion of the Spit in the Coastal Barrier Resources Act further supports the Department's conclusion that the spit is a fragile and sensitive area that should be protected from inappropriate development, and that given this, it is inappropriate to allow KDP to utilize the critical areas of the coastal zone—state owned submerged tidal lands—to facilitate development on a fragile spit of land that is subject to dynamic wave action on three sides The mere fact that KDP is applying for this gargantuan structure and claiming that lots on the spit would not be marketable without the revetment underscores and highlights just how fragile, sensitive, and inappropriate for development this spit is In addition, the Court should not overlook the undisputed history of the spit and its 40-80 year cycle of growth, elongation, migration, and breach—the same history that Kana

acknowledges and has incorporated into every report he has published and which underscores and forms the basis of all of the reports decreeing this spit unstable Kana only questioned soundness of his published theories when testifying in this case [3] Moreover the common testimony of Eiser, Young, and Kana was that the spit is a unique feature, very new in geologic time, that is subject to dynamic wave action on three sides, and that is pristine in nature with no human improvements The Court erred in failing to give deference to the Department's interpretation of the CMP, the Statute and Regulations and its technical expertise in assessing the best use of the critical areas where this structure is proposed to go

Therefore, the Department respectfully requests that the Court reconsider its opinion and issue an Amended Final Order and Decision affirming the Department's decision in this matter

Respectfully Submitted,

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[3] On page 9 of the Order the Court acknowledges KDP s expert s analysis which shows that there has been no erosion in the last 10 12 months but bases its finding of a need for the structure on the long term history of shoreline erosion on the riverbend If the Court is looking at the long term history of the spit to establish a need for the structure despite the accretional and stable trend over the last year then it should also look to the long term history of the spit rather base its finding that the spit is stable on the most recent thirty years—a very short amount of time in geologic history especially given the 40 80 year cycle incorporated by Kana in his published works This is especially true given as Kana and Young agreed we are still in the middle of a 40 80 year cycle

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs South Carolina Department of Health and Environmental Control and Kiawah Development Partners, II, Respondents	DOCKET NO 09-ALJ-07-0029-CC (consolidated cases) **MOTION TO STRIKE and REPLY TO RETURN OF KDP TO MOTION TO STAY**
Kiawah Development Partners, II Petitioners, vs South Carolina Department of Health and Environmental Control Respondent	

TO THE COURT AND ALL CONCERNED PARTIES

PLEASE TAKE NOTICE that Respondent South Carolina Department of Health and Environmental Control (DHEC or Department), hereby moves this Court, pursuant to Rule 12(f), SCRCP, to strike the Affidavit of Doug Dewolf and the accompanying plat (Exhibit A) included in Petitioner's Return of Motion to Stay The grounds for this motion are as follows

Once again, Kiawah Development Partners, II (KDP) is relying on misrepresentations of fact to the Court to further its arguments As KDP and Mr DeWolf acknowledged during the hearing in August, a critical line is a legal monument, and the only method for establishing and delineating critical lines is set forth in S C Code Ann § 48-39-210 The statute requires that such delineations be validated by the Department Specifically, S C Code Ann § 48-39-210(B) provides that a critical area delineation for coastal waters or tidelands is valid only if the line is depicted on a survey done by a professional surveyor and the line is reviewed and approved by

the Department KDP's Ex 48 was the subject of much contention during the hearing, and the Court required KDP to redact portions of the exhibit, though the Exhibit purporting to show critical lines at various points in time was admitted over continuing objection from the Department In support of its Return to the Coastal Conservation League's (the "League") Motion to Stay, KDP submitted an affidavit and plat prepared by Mr Dewolf purporting to show a critical line in August 2009 and in November 2009 Neither of these lines has been validated by the Department In fact, the only valid critical line that exists for the Spit was prepared in 2006, yet KDP has never utilized the only valid line in support of its arguments to the Court [1] The evidence that KDP is attempting to admit is not a valid delineation of critical lines

The exhibit purporting to show the location of Mean High Water and the Critical Line is essentially a study by a purported expert, and there has been no opportunity to cross examine the witness, nor an opportunity to challenge the validity of the data he includes in the Exhibit It is not at all discernable from the face of the Affidavit and/or the attached exhibit how Mr Dewolf calculated the figures he alludes to in the Affidavit Even looking at the data on the Exhibit, it is clear that there are portions of the Kiawah River shoreline where the purported November 2009 line is more riverward than the purported August 2009 line—evidence of accretion Dewolf's cursory and inaccurate summation of the data in the Exhibit does not establish a long term trend especially given the 12 month snapshot that was introduced into evidence that showed no erosion but rather evidence of accretion over the 12 months prior to the hearing

Furthermore, the affidavit and accompanying plat are irrelevant and immaterial to the Motion to Stay The fact that KDP owns property that is subject to dynamic wave action on three sides does not outweigh the public interest in staying the Court's decision pending

[1]The Court should draw an adverse inference from KDP s continued effort to misrepresent critical lines to the Court and its calculated decision not to include the only valid critical line in its arguments to the Court

resolution of the motions to reconsider and any appeal to the appellate courts of this State The physical impact on the environment—converting nearly three acres of sandy intertidal beach along the Kiawah River, a beach which the undisputed substantial evidence in the record established to be frequently utilized by the public—is severe Should the ALC's decision be reversed by a higher court, the damage to the environment—and the cost to KDP—would have been done all for naught Moreover, as the record in the hearing established, a three month window during the fall is not indicative of an annual rate of erosion or a long term trend The Department respectfully submits that the standards for imposition of a temporary injunction are different from the standard for considering a motion to stay the effect of a final order of this Court KDP proposes a paradoxical standard in which the Court must concede that there is a significant likelihood of success on appeal before this Honorable Court can stay its Final Order and Decision pending an appeal While the Department would respectfully submit that there is a significant likelihood of success should it appeal an adverse final decision in this case, the Rules do not require this Court to make a determination to that effect, and nor should they The paradoxical standard propounded by KDP is simply not the standard for issuance of a stay Rule 29(E) allows the ALC to stay the effect of a final order that is subject to judicial review "upon appropriate terms "

Allowing KDP to proceed with the construction of a bulkhead and revetment during an appeal of this Court's Order would result in irreparable adverse impacts to the critical areas of the coastal zone, and, presumably to the League and its members who would lose access to and enjoyment of that intertidal beach Moreover, the public interest is served by staying the effect of this Order pending judicial review The public clearly has an interest in maintaining access to the intertidal beach along the Kiawah River during the spring and summer and in protecting the

critical areas of the coastal zone from unnecessary alteration, utilization, and destruction The lack of any definitive plans of development, and the existence of alternatives to the proposed structure, demonstrate that the alleged injury to KDP does not outweigh the injury to the public interest should KDP be allowed to proceed while an appeal is pending [2]

For the reasons above, the Department respectfully requests that the Affidavit of Doug Dewolf and the accompanying plat (Exhibit A) be stricken from the record Further, the Department respectfully requests that the Court grant the Motion to Stay and stay the effect of the Final Order and Decision in this matter pending resolution of the Motions to Reconsider and any appeal

Respectfully Submitted,

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[2] Moreover when KDP purchased this property it was fully aware of the dynamic nature of the spit The barrier spit is a depositional feature that has changed drastically in recent geologic time The undisputed evidence in the record supports this This was the main justification for restricting use of the spit to park and open space when it was initially purchased and in the 1995 Development Agreement This history significantly undermines KDP s allegations of material harm

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Case No 09-ALC-07-0029-CC
Case No 09-ALJ-07-0039-CC

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

vs

South Carolina Coastal Conservation League — Appellant

NOTICE OF APPEAL

The South Carolina Coastal Conservation League hereby appeals from the Final Order and Decision of the Honorable Ralph King Anderson, III, Administrative Law Judge, dated February 26, 2010, and from the Order on Motions for Reconsideration of the Honorable Ralph King Anderson, III, dated February 26, 2010

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Docket No 09-ALJ-07-0029-CC

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

vs

South Carolina Coastal Conservation League — Appellants

NOTICE OF APPEAL

The South Carolina Department of Health and Environmental Control (the "Department" or the "Appellant") hereby appeals the decision of the Honorable Ralph King Anderson, IIII dated January 22, 2010, captioned "Final Order and Decision " Appellant received a copy of the decision on January 24, 2010

The Department also hereby appeals the decisions of the Honorable Ralph King Anderson, III dated February 26, 2010, captioned "Order on Motions for Reconsideration" and "Amended Final Order and Decision " Appellant received a copy of these decisions on March 1, 2010

[SIGNATURE ON FOLLOWING PAGE]

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

Date: August 24, 2009

CREEL COURT REPORTING, INC
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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No- 09-ALJ-07-0029-CC

Kiawah Development Partners, II,

Petitioner,

v

SCDHEC Office of Ocean and Coastal Resource Management,

Respondent

South Carolina Coastal Conservation League,

Petitioner,

v

SCDHEC Office of Ocean and Coastal Resource Management and Kiawah Development Partners, II,

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
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INDEX

		PAGE
OPENING STATEMENTS		
MR WALKER		38
MR CHANDLER		54
MR WHITFIELD-CARGILE		66
MR LONG		
MR WALKER	DIRECT	73
MR CHANDLER	CROSS	195
MR WHITFIELD-CARGILE	CROSS	220
MR WALKER	REDIRECT	268
MR WHITFIELD-CARGILE	RECROSS	270
MR PERMAR		
MR HOWE	DIRECT	276
MS ARMSTRONG	CROSS	327
MR WHITFIELD-CARGILE	CROSS	341
MR HOWE	REDIRECT	359
MS ARMSTRONG	RECROSS	372
MR WHITFIELD-CARGILE	RECROSS	372

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MR	DEWOLFF			
MR	WALKER		DIRECT	377
MS	ARMSTRONG		CROSS	413
MR	WHITFIELD-CARGILE		CROSS	421
MR	WALKER		REDIRECT	433
MR	WHITFIELD-CARGILE		RECROSS	435
MR	BOHANNON			
MR	WALKER		DIRECT	440
MR	WALKER		PROFFERED DIRECT	524
MR	WALKER		DIRECT (Continued)	525
MS	ARMSTRONG		CROSS	526
MR	WHITFIELD-CARGILE		CROSS	538
MR	WALKER		REDIRECT	561
MS	ARMSTRONG		RECROSS	569
MR	WHITFIELD-CARGILE		RECROSS	570
DR	KANA			
MR	WALKER		DIRECT	579
MS	ARMSTRONG		CROSS	615
MR	WHITFIELD-CARGILE		CROSS	732
MR	WALKER		REDIRECT	750
MS	ARMSTRONG		RECROSS	794
MR	WHITFIELD-CARGILE		RECROSS	797
MR	WALTON			
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MR	WHITFIELD-CARGILE		CROSS	880
DR	YOUNG			
MS	ARMSTRONG		DIRECT	899
MR	HOWE		CROSS	938
MS	ARMSTRONG		REDIRECT	952
MR	WHITFIELD-CARGILE		CROSS	953
DR	VANDERWERKER			
MS	ARMSTRONG		DIRECT	955
MS	ARMSTRONG		PROFFERED DIRECT	974
MS	ARMSTRONG		DIRECT (Continued)	976
MR	WHITFIELD-CARGILE		CROSS	977
MR	WALKER		CROSS	978
MS	ARMSTRONG		REDIRECT	984
MR	WHITFIELD-CARGILE		RECROSS	985
MR	WALKER		RECROSS	987
MS	ARMSTRONG		REDIRECT	989
MR	WHITFIELD-CARGILE		RECROSS	990

MR	LIMEHOUSE			
MS	ARMSTRONG	DIRECT		997
MR	HOWE	CROSS		1013
MR	WHITFIELD-CARGILE	CROSS		1017
MS	MCALLISTER			
MS	ARMSTRONG	DIRECT		1018
MR	HOWE	CROSS		1035
MS	ARMSTRONG	REDIRECT		1044
MR	HOWE	RECROSS		1048
DR	DEAN			
MS	ARMSTRONG	DIRECT		1055
MR	HOWE	VOIR DIRE		1104
MS	ARMSTRONG	DIRECT (Continued)		1114
MR	O'ROURKE			
MS	ARMSTRONG	DIRECT		1122
MR	WALKER	CROSS		1128
MS	ARMSTRONG	REDIRECT		1130
MR	WHITFIELD-CARGILE	CROSS		1132
DR	DEAN			
MS	ARMSTRONG	DIRECT (Continued)		1136
MR	HOWE	VOIR DIRE		1167
MS	ARMSTRONG	PROFFERED DIRECT		1169
MS	ARMSTRONG	DIRECT (Continued)		1171
MR	MARTIN			
MS	ARMSTRONG	DIRECT		1173
MR	WHITFIELD-CARGILE	CROSS		1200
MR	WALKER	CROSS		1202
MR	WHITFIELD-CARGILE	RECROSS		1206
MR	EISER			
MR	WHITFIELD-CARGILE	DIRECT		1215
DR	HUGHES			
MR	WHITFIELD-CARGILE	DIRECT		1268
MR	WALKER	VOIR DIRE		1272
MR	WHITFIELD-CARGILE	DIRECT(cont)		1281
MS	ARMSTRONG	CROSS		1304
MR	WALKER	CROSS		1306
MR	WHITFIELD-CARGILE	REDIRECT		1320
MR	WALKER	RECROSS		1322
MR	EISER			
MR	WHITFIELD-CARGILE	Direct(cont)		1323

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MS	ARMSTRONG	CROSS EXAMINATION	1369
MR	WALKER	CROSS-EXAMINATION	1397
MR	WHITFIELD-CARGILE	REDIRECT	1482
MS	ARMSTRONG	RECROSS	1502
MR	WHITFIELD-CARGILE	FURTHER REDIRECT	1521
DR	DORCAS		
MS	ARMSTRONG	DIRECT	1523
MR	HOWE	CROSS	1544
MS	ARMSTRONG	REDIRECT	1552
MR	PERMAR		
MR	WALKER	DIRECT	1558
MR	WHITFIELD-CARGILE	CROSS	1566
MS	ARMSTRONG	CROSS	1573
MR	LONG		
MR	WALKER	DIRECT	1575
MR	CHANDLER	CROSS	1581
MR	WHITFIELD-CARGILE	CROSS	1585

CLOSING STATEMENTS

MR	WALKER	1595
MR	CHANDLER	1611
MR	WHITFIELD-CARGILE	1628

REPLY

MR	HOWE	1646

Certificate 1657

EXHIBITS

KDP's Exhibit Number One (Map KDP0001)	562
KDP's Exhibit Number Two (2005 Development Agreement)	96
KDP's Exhibit Number Four (Aerial photos)	87
KDP's Exhibit Number Five (Photos Aug 2009)	107
KDP's Exhibit Number Six (Photos ACB mat)	114
KDP's Exhibit Number Ten (Ltr dtd 2/29/08 from Rogers to Joyner)	118
KDP's Exhibit Number Eleven as proffer (04/04/08 Army Corps ltr to Rogers)	497
KDP's Exhibit Number Eleven (04/04/08 Army Corps ltr to Rogers)	1481

KDP's Exhibit Number Fourteen 1481
(05/22/08 Ltr from Davis @ DNR to Eiser @ OCRM)
KDP's Exhibit Number Fifteen--- 1481
(05/30/08 Ltr from McNulty @ Town of Seabrook to Eiser @ OCRM)
KDP's Exhibit Number Sixteen as proffer 497
(06/12/08 Fish & Wildlife Ltr to Eiser)
KDP's Exhibit Number Sixteen 1481
(06/12/08 Fish & Wildlife Ltr to Eiser)
KDP's Exhibit Number Seventeen as proffer 497
(06/16/08 Fish & Wildlife Ltr to Jordan @ Army Corps)
KDP's Exhibit Number Seventeen 1481
(06/16/08 Fish & Wildlife Ltr to Jordan @ Army Corps)
KDP's Exhibit Number Eighteen 134
(06/24/08 Pantlik to Eiser ltr)
KDP's Exhibit Number Nineteen 143
(06/23/08 Folk ltr to Pantlik)
KDP's Exhibit Number Twenty 1481
(06/30/08 Pantlik ltr to Eiser)
KDP's Exhibit Number Twenty-one 147
(07/14/08 Army Corps ltr to Long)
KDP's Exhibit Number Twenty-two as proffer 497
(08/14/08 Fish & Wildlife ltr to Jordan @ Army Corps)
KDP's Exhibit Number Twenty-three as proffer 497
(08/14/08 Fish & Wildlife ltr to Jordan @ Army Corps)
KDP's Exhibit Number Twenty-four 1481
(09/02/08 Pantilk ltr to Eiser)
KDP's Exhibit Number Twenty-five 1481
(June 2008 Oertel/Basco report)
KDP's Exhibit Number Twenty-six 1481
(August 2008 Oretel/Basco report)
KDP's Exhibit Number Twenty-seven 1481
(August 2008 Oretel sand accumulation report)
KDP's Exhibit Number Twenty-eight 517
(Scour protocol)
KDP's Exhibit Number Twenty-nine 517
(09/02/08 Bohannon ltr to Eiser)
KDP's Exhibit Number Thirty 1481
(08/28/08 Kana ltr to Well @ Seabrook Island POA)
KDP's Exhibit Number Thirty-one 1481
(08/31/08 Seabrook Island POA ltr to Eiser @ OCRM)
KDP's Exhibit Number Thirty-two 1481
(09/02/08 McNulty @ Town of Seabrook ltr to Eiser)
KDP's Exhibit Number Thirty-three 165
(09/03/08 Long ltr to Eiser @ OCRM)

KDP's Exhibit Number Thirty-four 1481
(09/05/08 O'Rourke @ Charleston Cty PRC email to Eiser @ OCRM)
KDP's Exhibit Number Thirty-five 1481
(09/08/08 Pantlik ltr to Eiser @ OCRM)
KDP's Exhibit Number Thirty-seven 158
(09/09/08 Eiser ltr to Long)
KDP's Exhibit Number Thirty-nine 182
(09/18/08 Pantlik ltr to Eiser @ OCRM)
KDP's Exhibit Number Forty-four 184
(12/18/08 Permit)
KDP's Exhibit Number Forty-eight 402
(Plats and surveys of Southeastern Surveying)
KDP's Exhibit Number Fifty-three 1512
(2008 and 2009 OCRM State of the Beaches report)
KDP's Exhibit Number Fifty-five 316
(Aerial photos of development other than Kiawah)
KDP's Exhibit Number Fifty-six as proffered 371
(Aerial photo with overlay of unstable regions as depicted on page G-63 of Environmental Inventory)
KDP's Exhibit Number Fifty-seven as proferred 371
(Map of existing development of Kiawah Island with overlay of unstable regions as depicted on page G-63 of Environmental Inventory)
KDP's Exhibit Number Fifty-eight 325
(Mark Permar's draft conceptual renderings)
KDP's Exhibit Number Sixty-nine 581
(CV of Tim Kana)
KDP's Exhibit Number Seventy 194
(DHEC ltr 12/30/08)
KDP's Exhibit Number Seventy-five-A through G 471
(Pictures)
KDP's Exhibit Number Seventy-six-A through F 524
(Pictures) (proferred)
KDP's Exhibit Number Seventy-seven 1566
(Map)
KDP's Exhibit Number Seventy-eight 1566
(Photos)
CCL's Exhibit Number One 334
(Environmental Inventory of Kiawah Island)
CCL's Exhibit Number Two-A 676
(US Coastal & Geodetic Survey Map)
CCL's Exhibit Number Three-A 626
(1949 Aerial photograph)
CCL's Exhibit Number Eight 1372
(COBRA, Unit M-08 map)
CCL's Exhibit Number Ten 914
(Ground and aerial photos of riverbend spit and inlet)

CCL's Exhibit Number Twelve 1128
(E-mail from O'Rourke to Long 7/11/08)
CCL's Exhibit Number Thirteen 1128
(Charleston Cty PRC map of Beachwalker Park alternate location)
CCL's Exhibit Number Eighteen 972
(Ground photos from 3/29/09)
CCL's Exhibit Number Twenty-nine 1391
(Stormwater permit)
CCL's Exhibit Number Thirty as proferred 732
(Proceedings of South Carolina's Migrating Beaches 1983)
CCL's Exhibit Number Thirty-four proferred 732
(Final report dtd April 1981)
CCL's Exhibit Number Thirty-five proferred 732
(Abstract by Kana, KDP-T&H1616)
CCL's Exhibit Number Thirty-six proferred 732
(Shoreline stability along Block 16 June 1982)
CCL's Exhibit Number Thirty-seven proferred 732
(Relocation of Captain Sam's Inlet Sept 1995)
CCL's Exhibit Number Thirty-eight proferred 732
(Updated Final report Sept 1999)
DHEC's Exhibit Number One 1259
(Permit)
DHEC's Exhibit Number Two 1260
(Technical Summary of Review)
DHEC's Exhibit Number Four 276
(Ltrs from Eiser to File or Applicant)
DHEC's Exhibit Number Eight 1483
(Individual comment ltrs re effects on wildlife)
DHEC's Exhibit Number Twenty 276
(Riverbend Protection Advise Based on Field & Model Studies)
DHEC's Exhibit Number Sixty-three 542
(Email ltr dtd 1/15/09 George/Long)
DHEC's Exhibit Number Sixty-four 540
(Ltr dtd 9/29/08 Walker/Long/Pantlik/Bohannon)
DHEC's Exhibit Number Seventy-six 1248
(Department File)
DHEC's Exhibit Number Seventy-seven 1555
(Dr Hughes reference list)
DHEC's Exhibit Number Seventy-eight 1557
(Photo-plover sighting)
DHEC's Exhibit Number Seventy-nine 1556
(Ltr from Dept of Interior)

(The original exhibits were retained by Judge Anderson)

All right Apparently, we have motions to deal with before we proceed?

MR WALKER That is correct, Your Honor

THE COURT Proceed

MR WALKER Thank you very much Your Honor, I'm Trenholm Walker today on behalf of Kiawah Development Partners With me is Gedney Howe, to my left, who is also representing Kiawah Development Partners

The first and I think the only motion before we commence the opening statements is our motion in limine We filed a motion in limine in order to reduce what we see to be the taking of unnecessary and irrelevant evidence

As you know from reviewing our motion, we have asserted essentially three areas where proof should not be allowed and these three areas we suggest should not have proof come in because of the clear wording of statutes and the scope of review

The first ground, Your Honor, deals with proof of alleged cumulative impacts, long-range cumulative impacts You know from everything that you've seen and heard in this matter, that this is an application for a permit to

construct essentially a 2700-foot combination revetment or bulkhead on the bank of the Kiawah River on the southwest end of Kiawah Island known as Captain Sam's

The permit was put in in February, late February of '08 The decision was rendered in mid December of '08 The decision that was rendered was to grant the permit with conditions Essentially, though, the permit was denied What was allowed was 270 feet, which we understand to be 270 feet in front of the Charleston County Park and Recreation Commission park known as Beachwalker Park The rest of it was denied And the reason the permit was sought was that the Kiawah River in the bend location adjacent to Captain Sam's is eroding the high ground owned by Kiawah Development Partners, II We'll refer to them as KDP

We contend that the applicable regulations limit the scope of cumulative impacts to those resulting from the revetment as opposed to --

(Construction noise interruption)

(Off the record)

MR WALKER As we stated in our notice of motion

and motion in limine, where we expound on the reasons, the statute and regulation in question -- the regulation essentially mimics the statute -- states that the consideration for the Agency -- and it's just one consideration -- is 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

The clear, unambiguous, plain meaning is that we look at the effects of the project The project in this case is the revetment

What has occurred is that the Agency considered the alleged effects of a hypothetical development on the spit The local zoning allows and a development agreement vests the right in KDP to develop up to 50 homesites on Captain Sam's

The analysis that was conducted by OCRM focused on what it perceived to be the effects of the development as opposed to the effects of the revetment And, in fact, as you will hear when we go over the deposition of the chief permitting officer, he acknowledged that if we

were just looking at the effects of the revetment, the permit would have been granted So we base that on the clear wording of the statute and we also have at hand --

THE COURT When you say "trying to limit it to the project," the problem I have with that theory is that it wouldn't -- to analyze the project, the project has to result in a cumulative impact by some means other than -- or in analyzing once the project is there, what's going to be the cumulative impact You know, and the only way to exclude that is to say that the evidence has no probative value, whether or not, you know, some of the evidence may have none in this area Some of it may touch upon some potential "if you build this, then there's a potentiality that this is going to occur " If they can present evidence that if "A" occurs, therefore "B" will follow, then under the principals of logic, to me, that would have probative value And then I would analyze the significance of the A to B to determine whether or not it's probative enough to change my mind So with that said, what's your response?

MR WALKER I think your logic is flawless, if it

is what results from the revetment

THE COURT Okay

MR WALKER I agree completely, because it's the effect of the revetment in the context of foreseeable development It's not the effects of foreseeable development

For instance, if we had a dock application --

THE COURT All right So tell me where you think their -- because if mine's flawless and you're still making the motion --

MR WALKER I'll give an example

THE COURT -- you must point something out that they're missing, so

MR WALKER I'll bring it from the abstract to the concrete

THE COURT Okay

MR WALKER All right?

THE COURT Well, abstract is fine with me I don't care either way

MR WALKER In this instance, there's a suggestion that if there are houses on Captain Sam's, the people in those houses will go out and scare the piping plovers, a threatened species Well, it's not the revetment That's not an effect of the revetment That is houses --

people in houses That's the development And the statute clearly says, it's the effects from the project in light of the later development, because those would happen regardless whether the project existed or not, right? Because they would have the development and the effects So the issue is, the effects of the revetment This --

THE COURT Well, are they not arguing that the revetment is necessary to allow the development of houses?

MR WALKER We're going to show that it is an essential aspect of the development of Captain Sam's, but that development will have its own permitting process at a time when the development plan is fully realized and we know what's going to go there Right now, we don't know exactly what's going to go there Then there will be another foray through the permitting process and everybody who wants to oppose it can then oppose it and can oppose the effects of that development What's before this court is the effects of the revetment The Court of Appeals this June decided a challenge to a dock case and it actually, I

believe, is the latest interpretation of the regulation, which is 30-11(C)(1)

THE COURT The latest one is the one they did today

MR WALKER Was there one today?

THE COURT Yeah But that's okay You're close

MR WALKER I'm ancient history I'm scared to say anything more at this point

THE COURT Oh, no, that's fine

MR WALKER Let me just tell you what went on in this decision

THE COURT The one today pretty well emphasizes that the staff doesn't carry today as far as the interpretation of the regulations It's the --

MR WALKER The board?

THE COURT -- the board Which I think the Court of Appeals established that a long time ago, but the Supreme Court now has come down on that

MR WALKER The Supreme Court is finally on board and I'd hope they'd be on board if we ever make it in this case And the one I'm talking about is a Court of Appeals case, Rutledge, a Charleston lawyer, challenges neighbor's dock

permit

THE COURT Oh, that's the one they reversed I'm just kidding

MR WALKER I'm so riddled with bullets right now, Your Honor I'm just like the guy in search of the Holy Grail

Anyway, may I hand up this case?

THE COURT Yeah

MR WALKER And in it, when the Court came to -- I'm sorry

THE COURT That's okay

MR WALKER When the Court came to look at the cumulative effects -- and again it referred to the boat lift and the effect of the boat lift, which was what was being permitted, in light of the other development

The second ground, Your Honor, is, OCRM was very definite on the reasons for its determination in this case It's not an instance where we have no concurrent or contemporaneous record of the reasons for their decision OCRM policy now requires that the Department issue written rationale for its permit decision in something that's called a Technical Summary of Review, or something like

that So we know what those reasons are
They're clearly stated We have taken the
deposition of the two primary persons involved
in that decision They both say that decision
contains all the reasons
What's happening now is the Agency has decided
to look for other reasons We know that Your
Honor's review is de novo As we argue in our
brief, we maintain that the de novo standard
here means that the parties can put in whatever
evidence they want on the rationale and the
reasons that were before OCRM Then Your Honor
can make his findings as to whether the
decision of the Agency is substantiated or not
substantiated based on the preponderance of the
evidence
This is not a time for the Department to go
grab reasons left and right that were never
considered and say, "Well, we didn't deny it on
this basis, but here's another reason that we
might have could have denied it "
It's a little bit like an insurance bad-faith
case, that the question of whether they acted
properly is based on what they did and what the
rationale is, not what they can go out and gin

up later on Otherwise, we would have nothing really to appeal All we would have is a permit and then it would be just a free-for-all and the review by the DHEC board of the permitting decision based on the record would be meaningless because at the end of the day, new reasons could be brought up

THE COURT All right Let me just start down that path on two things I'm going to ask you about The first one is, under the CON act -- and I'm going to bring this back to this case You're probably wondering where I'm going

MR WALKER I know

THE COURT Okay All right Have I already discussed this with y'all?

MR WALKER We saw -- I think -- you haven't

THE COURT Okay Well, let me refresh your memory if you've read it somewhere before Under the CON act, they have the provision where if you don't raise the issue before the staff, then you're limited -- well, you're limited to only the issues raised before the staff You can't come into the Administrative Law Court and raise new issues That being said -- so there's a specific reg or

statute -- I think it's a statute -- that narrows --

MR WALKER That's correct

THE COURT -- the scope in those instances So in that sense, under the rules of statutory construction, you've got a specific instance Then I would take from that, since this is a general rather than a specific, that since they have not chosen to make this an instance, as in CON, then it would logically extend that here there would be wide -- not parameters -- wide latitude I was looking for another word that begins with a "P" and I can't think of what it is right now That's what it's like being raised by my dad There's all these words in the back of your head and sometimes you can't pull them out

But can you respond to that?

MR WALKER Yes, sir In looking at the issue, we came across the regulations or statute that would -- that you were talking about And I agree completely on the rule of construction I don't think that that eliminates, though, that there needs to be some fixed point that we're talking about I don't think that a de

novo --
THE COURT Well, they're going to argue that there's a fixed point and it is today at the de novo hearing, so we've got to decide where the fixed point is
MR WALKER And I would go back -- and I don't have the section number in front of me There is now, as you know, an appeal of the final decision or the staff decision to the DHEC board
THE COURT Uh-huh (affirmatively responds)
MR WALKER They can either have a conference or pass on it
THE COURT Yeah
MR WALKER That statute clearly specifies that when it's going up, that it's going up based on that decision and that record, not new things And we think that that limitation and scope would carry forward
We understand that the limitation and scope would not restrict the proof, but we do think that there has to be integrity of the decision and that's what was intended in the portion of that statute dealing with the appeal of the staff decision to the DHEC board

THE COURT So where does the limitation, under your interpretation, happen? Staff level? DHEC level? Obviously not ALC, but --

MR WALKER That's right I agree that there's no express restriction --

THE COURT No, no Where does it happen? Where does the limitation happen?

MR WALKER I think that it happens the whole way up

THE COURT At the staff level, once they made their final decision --

MR WALKER I think the staff can consider just anything, really

THE COURT Yeah

MR WALKER And then once they make their decision, they have a written determination Then the applicant, or whoever the aggrieved party is, can try to seek review by the DHEC board Plainly, that's based on the reasons by statute that were stated by staff

And I think that even though there is no similar mirroring provision in the statute for appeals to the ALJ, but that continuity is certainly implied, otherwise, there would be no need to appeal to the DHEC board and limit it

because why would you be limited before the DHEC board but could go willy-nilly before the Administrative Law Court?

THE COURT Well, then, under that theory, if you have the applicant and OCRM dealing with the issue and there's a party like Coastal Conservation League, who later establishes proper standing, but they have grounds that were different than that which the staff considered, then under your theory, I could not consider any of those proposed grounds because they were not part of the decision-making process at the staff level

MR WALKER That's right, because they had input before They could have raised those grounds to staff They were on notice and they had the opportunity to raise those grounds before the decision was made

THE COURT Okay So it would be required that they raise it to the staff and I'd analyze it from that standpoint of whether or not the staff considered it

MR WALKER I think that's what it would be, because they were noticed parties of the process the whole way They can't sit back and

let staff make a decision, get two bites at the apple, maybe staff decides for them If they don't, then they raise new reasons on appeal

THE COURT Intriguing

MR WALKER I'll move to the next one

This is I think equally as intriguing and that deals with whether or not the alleged impacts on diamondback terrapins, even if there were impacts, can constitute a basis for denying the permit

As we stated in our brief, SC Code Section 50-5-2300 specifically allows citizens of South Carolina -- I don't even know if it's limited to citizens of South Carolina -- to take or possess diamondback terrapins, but you can't do it for a commericial purpose and you can't have more than two a day

Now, we don't think that the revetment does anything more than put a hard structure on the terrain that's already there, so the terrain is basically the same But that aside, how can the impact to a species that's not protected in any way constitute a basis for denying the permit?

It was not something that was considered by

OCRM This is one of those after-the-fact reasons that we're going to hear about and we're going to chase rabbits through the courtroom I think all week if this is allowed

THE COURT Or diamondback terrapins

MR WALKER Or diamondback -- chase them It's like saying, "You can't do it because they're bobcats or they're white-tailed deer or they're raccoons " I mean, if they aren't a protected species, then it cannot constitute a basis for -- it's not a consideration And that's our final grounds limited to this one --

THE COURT Okay

MR WALKER -- specific issue, Your Honor

THE COURT So they're not endangered

MR WALKER Not endangered, not threatened, not protected

THE COURT Are they on any list?

MR WALKER They're on no federal list and the State says you can harvest them

THE COURT Okay All right Who's going next?

MS ARMSTRONG It doesn't matter to me, either

THE COURT Ms Armstrong?

MS ARMSTRONG I'll go ahead and start, Your Honor Amy Armstrong representing the Coastal

Conservation League I guess I'll start with addressing the first issue about limiting the scope of this review to not allow any evidence showing the long-range cumulative impacts And I guess, first of all, I'll just point to Regulation 30-11(C)(1) and that regulation specifically requires the Department to consider the extent to which the long-range cumulative effects of the project may result within the context of other possible development

To hear now KDP coming in and talking about the possible future development of 50 houses is something that's speculative is a little surprising because -- I've got to look for a date on this, but they, back in May, filed a $100 million taking suit against the State of South Carolina and in it, they allege that by not allowing the development of the spit that they owe a hundred million dollars for what this property's worth once developed because the State's not allowing the revetment So they've directly tied their taking case to the State not permitting a revetment to allow them to develop it

The conceptual plans that KDP has produced through discovery show 48 houses on the spit During a 30(b)(6) deposition of KDP, Leonard Long, who is a partner of KDP, specifically said that this revetment is needed to allow the development of the spit So, I mean, there's your "A" Once you have "A" occurs, once that revetment is built, then "B" can occur, the spit can be developed

I think, you know, the project isn't defined anywhere in the act or in the regulations in a way that would limit the Agency's review just to that structure They have to consider the long-range cumulative effects, and those include the future development that's going to be facilitated by this structure and all the impacts that flow from that development

I want to address, I guess, this Court's scope of review in items two and three in Mr Walker's motion in limine What he's asking you to do is limit the scope of your review And Your Honor has -- I would point you to the case of Marlboro Park Hospital versus DHEC I believe Your Honor's quite familiar with that case

THE COURT I know about it
MS ARMSTRONG You've cited it in a case that -- two cases that Mr Chandler and I have had before you, the Wedgefield case, and also the DOT Highway 601 bridges case
THE COURT Did I cite that against y'all?
MS ARMSTRONG You did cite that against us, Your Honor, but I agree that it is the proper standard of review, which is a de novo review This Court reviews -- has a trial-type hearing, makes findings of fact, conclusions of law, and has the ability to and is really required to determine whether the permit as issued compiles with or violates the applicable regulatory statutory standards
And so the evidence that Mr Walker's seeking to exclude is evidence that the League is going to present, specifically relating to whether the permit as issued meets or does not meet the applicable statutory and regulatory standards We're not opening the door of evidence that doesn't directly pertain to the requirements that the Agency has to look at in making permitting decisions
THE COURT All right

MS ARMSTRONG And I guess I just --
THE COURT Let's get to the diamondback terrapins
MS ARMSTRONG The diamondback terrapins The diamondback terrapins are on the state list of concerned -- concerned list of species So it's not an endangered or threatened species Permits are currently allowed under the state law There hasn't been one issued in quite sometime But why it relates to this case --
THE COURT I need to know -- because I understand the endangered species --
MS ARMSTRONG Right
THE COURT -- comes in Where under the regs --
MS ARMSTRONG It's actually --
THE COURT -- or the law --
MS ARMSTRONG It's in the regs It's also in the statute It's in 48-39-150
THE COURT Hold on one second Let me get there
MS ARMSTRONG Okay
THE COURT All right I'm there Which one?
MS ARMSTRONG So if you turn -- look at Section (A)(3), the Department has to be guided by the extent to which the applicant's completed project would effect the production of fish, shrimp, oysters, crabs or clams or any marine

life or wildlife or natural resources in a particular area

And the diamondback terrapin is a species of marine life The testimony that the League intends to present is that this structure, the actual revetment itself, is going to negatively impact the production of marine life, specifically the diamondback terrapin

THE COURT All right Mr Whitfield-Cargile?

MR WHITFIELD-CARGILE Yes, Your Honor

THE COURT If you could just stay on number three for me

MR WHITFIELD-CARGILE The terrapins?

THE COURT Yep

MR WHITFIELD-CARGILE Well, the terrapin issue is really an issue that the League is raising I do think it's relevant to whether or not the ultimate -- three and two are kind of tied together, I guess

The comments were raised regarding impacts to terrapins and to the Department That was cited in the Department's decision document The decision document cited to the ten general considerations as one of the bases for its decision, so I do think it's relevant

THE COURT Okay Anything else on that issue?
MR WHITFIELD-CARGILE No, Your Honor
THE COURT All right If I could hear you on the terrapins, if you wish to If you don't
MR WALKER I think the statute says it all, Your Honor
THE COURT Says it all?
MR WALKER I mean, in terms of the --
THE COURT Tell me where the statute is -- I mean, they've got the extent in which the completed project would affect production of fish And they're going to argue that the completed project is going to affect the production of diamondback terrapins Then I'm going to be -- that's what I'm going to be considering as far as relevancy
So where in -- it says "or other resources in a particular area including, but not limited to, water and oxygen supply " So, I mean, how it's going to affect it, I do not know yet, but it said "including but not limited to " So, I'm at the motion in limine stage, is where I'm trying to hear your argument
MR WALKER My response is, the statute allows a person to possess two How can we punish a

revetment when a person can go out and grab two off the bank?
I don't see where -- if that's the case, where an impact to a terrapin -- and we don't think there will be -- can constitute a basis for the consideration against the issuance of the permit
THE COURT Well, let's say that their project was going to kill off all diamondback terrapins in the area, would it be relevant then under this statute?
MR WALKER I think as long we didn't kill off more than two at a time in a day
THE COURT Okay Well, I've got enough
MR WALKER Thank you
THE COURT As far as long-range cumulative impacts, at the motion in limine stage, I'm not going to deny that, although, that doesn't mean I'm not going to rule some of the evidence, if not all -- but it all depends, I guess -- irrelevant based on the probative value of it when it's received and so I'm not granting the motion in limine in that regard
Regarding the de novo review, I didn't even know about it, but the example of, if they

hadn't raised the diamondback terrapins at the OCRM level, I just think it's something that -- "they" being Coastal Conservation League -- could have brought up under the theory of de novo review

Now, I do see the point -- now, I haven't decided this one way or the other, but I see the point about, you've got DHEC in the process and the board exists for a reason and Act 387 was passed after the CON act, which I refer to And there's a provision in there that my father cited in the decision that sets -- provision in the 387 that sets forth that 387 was intended to make uniformity in the appellate process But I just don't think at this stage of the game, the way I read it -- and, boy, the Supreme Court's reversed me in the past, although, they -- the Court of Appeals has reversed me and they reinstated me, so it goes different ways on that But if I'm wrong, I'd be glad to be corrected on that particular issue, because I -- it doesn't have ultimate clarity, as far as I'm concerned

And then the diamondback terrapins, that's going to be one that I'm going to call it as I

see it, just like I did on one, so --
unfortunately, I deny all your grounds Thank you very much
All right Anything else before we proceed?
MR WALKER Your Honor, I would like to provide Ms Armstrong and Mr Whitfield-Cargile a copy of our exhibit notebooks I was in the process of doing it when we started
THE COURT All right If I need to step out, I'll do that
MR WALKER No, that's --
THE COURT Okay
MR WALKER And we aren't asking to introduce them right now
THE COURT Okay Well, apparently, before you proceed, either Mr Whitfield-Cargile's seat has become uncomfortable or he was fixing to tell me something, I think, or make a motion Is that
MR WHITFIELD-CARGILE No, Your Honor My seat's very comfortable At this time, I would reraise my motions for continuance and amended motion for continuance --
THE COURT All right
MR WHITFIELD-CARGILE -- the same

THE COURT I think at a later stage in the game, I might want to go through and give my reasons for denying the motions for continuance which remain, especially after further analysis of this case But, with that said, at this point in time, if y'all could remind me maybe of that I've got a whole list of reasons But I'm going to deny your motion

MR WHITFIELD-CARGILE Thank you, Your Honor

THE COURT Anything else?

MS ARMSTRONG No, Your Honor

THE COURT Okay Who's going to -- with the way that we've got this thing captioned, who goes -- how are we going to do this, y'all?

MS ARMSTRONG We had discussed early on --

THE COURT That's always better

MS ARMSTRONG -- that -- it is It is And since had KDP filed its request for contested case hearing before the League had, that KDP would go first

THE COURT Okay Well, with that said, I'll just state for the record, KDP will be going first, but I'm certainly cognizant that Coastal Conservation League is a Petitioner, as far as their portion of the case, so I guess this is

going to be a case where KDP will have the burden for its case, Coastal Conservation League will have the burden for its case, and the Department will be the Respondent throughout, and then KDP will not have the burden, I guess, for the Coastal Conservation League -- let's see Seems like more than one party has the burden Am I right on that? Mr Chandler, you're standing there

MR CHANDLER I think so I just came over here to get my briefcase

THE COURT Oh, okay

MR CHANDLER I don't mean to cross in front of you, but I didn't want to walk in front of you while you were speaking

THE COURT All right

MS ARMSTRONG That makes sense, Your Honor Yes, I agree

THE COURT Okay

MR WALKER I agree, Your Honor We have the burden on our grounds for appeal

THE COURT Okay You're not going to argue --

MR WHITFIELD-CARGILE I agree with that, Your Honor

THE COURT That would be a big mistake for you to

argue that one Okay Thank you very much
(Off the record)
THE COURT I'll hear opening
OPENING STATEMENT BY MR WALKER
MR WALKER Thank you, Your Honor And I'm not going to go through the introductions again The only new person that I'll introduce is Leonard Long, who's sitting on the back row Leonard Long is going to be our first witness He's been involved with the development of Kiawah Island since 1988 when they bought Kiawah from the Kuwaiti investment company You will hear that his company, which is related to KDP, Kiawah Resort Associates and Kiawah Development Partners, have been developing Kiawah in a manner that is highly responsive to nature -- they've won several awards -- and that the development that is being proposed later -- not just proposed, but approved and zoned for Captain Sam's, is a further continuation of what they've been doing in the past
This, as you know, is an appeal of a final decision that granted a permit with conditions My client applied for the bulkhead/revetment

THE COURT This revetment's going to be on the beach?

MR CHANDLER Well, there's lots of beaches There's an ocean beach There's also a beach on the back side of this It is a sandy beach

THE COURT I understand this is on the back side

MR CHANDLER Yes, sir

THE COURT But it's going to be on the --

MR CHANDLER It's going to be within the boundaries of the public trust area, below the mean high tide, stretching down probably below low tide

THE COURT Okay I'm just trying to figure out where it's going to be

MR CHANDLER Okay Now, what all this amounts to is that KDP wants the State to become a party to the development of unstable land KDP, as part of its project of developing some unstable land, they want the State to come in as sort of partner and put the public's property into this and give them a half mile of public property to facilitate their private development, to give comfort to the poor souls that are going to come in here and buy this land They're going to give them a false sense

of security
Because even KDP and even its engineers knows that the kind of storms that reshape these kind of spits are not going to be prevented by this wall or anything else The State's going to be left with pieces of houses and it's going to be just like it was when I was a little kid, when Hurricane Hazel came to Pawley's Island and for years and years, when we went swimming at the south end, we had to watch out for glass, tile, and all of this crap that got washed into the beach when there was a hurricane from all of those houses
The decision that DHEC made to deny 90 percent of this permit was correct The only thing that they didn't do right was to give them ten percent

THE COURT All right

OPENING STATEMENT BY MR WHITFIELD-CARGILE

MR WHITFIELD-CARGILE Your Honor, Davis Whitfield-Cargile, and I represent the Department And later in the week you will hear from some DHEC employee, Bill Eiser, who was project manager on this permit
The issue in this case is going to be -- well,

KDP, you heard from Mr Walker, has applied to use 2,783 feet of tidelands critical area to facilitate road access for some development on the spit -- for some future residential development on the spit

The issue in this case isn't whether or not they can develop the upland, but whether or not they can use 2,783 feet of tidelands critical area to facilitate that development on a very unstable piece of land Their own experts, you will hear, agree that it's not a stable piece of property

Currently, the shoreline is sandy It's used by the public, but it is subject to erosion in some places The Department recognized that and recognized that in certain instances the regulations and the statute authorizes the Department to issue a permit for someone to build a revetment and a bulkhead to protect their upland property

Here, there's evidence that, you know, upland property from the Beachwalker Park was sloughing off into the river and that erosion was threatening infrastructure There's a parking lot up there and some other facilities

up there
So the Department issued a permit for that 270 feet, however, contrary to what Mr Walker indicated in his opening statement, the Department doesn't have blanket authorization to just say you can put up an erosion control structure anywhere if there's erosion They have to apply the statutes and the regulations and the policies in 48-39-20 and 48-39-30 and the ten general considerations and the guidance in Reg 30-11 and that's what they did here, Your Honor
I don't want to be too duplicative of what Mr Chandler said, but you'll see that the evidence is that if you start right there at Beachwalker Park and look down to the left, to the southwest along the shoreline where this revetment is proposed to go, a half mile of shoreline where this revetment is supposed to go, right there at the park there is sharp escarpments, tall escarpments, and there is severe erosion there But the further away from the park you go, towards the neck and down on alongside the spit, the severity of the erosion diminishes greatly And by the end --

about halfway down that shoreline, there's very little to no evidence of erosion
The Department's required to consider the considerations for -- I don't want to get into too much of what's going to come out more in closing argument and the law itself But the Department's required to protect the citizens of the State from inappropriate development in fragile and sensitive areas
Their own experts acknowledge that this is a very dynamic area The fact that they say that they can't construct houses on here, on this property, without a half-mile long revetment in and of itself shows the fragileness and sensitive nature of this land
The Department is required under 30-11 to look at the cumulative effects of the project in the context of future development
Mr Long -- as Mr Chandler indicated in his opening, Mr Long said that without a revetment it's going to be difficult to market any residential development The purpose of this revetment, it's undisputed, is to facilitate future development on the spit itself And so in the context of that future development, this

revetment is likely to have significant cumulative impacts And then you have to take a look at the general character of the area, which the Court -- which their own experts, their witnesses, Mr Long himself, their 30(b)(6) designee, said this is a very pristine area, it's unfamiliar with human development And the evidence will show that the Department properly took into account the potential impacts of the structure, the general character of the area, the cumulative impacts in the context of -- it's not just possible future development Their own experts, their own 30(b)(6) designee say the purpose of this is to facilitate future development It's not just possible, but it's likely to occur And the evidence will show that the Department properly took that into account and determined that the best thing to do -- the best use of this tidelands critical area, in conjunction -- according to the policies set forth in the act, is to leave the critical area in its unaltered state beyond the park where there's actually threats to human (sic) development and it's not the best use of the property

reasons they issued 270 feet, the evidence is going to show, was to promote public access to the beach But they're asking to put the concrete block revetment -- so you're going to have stacked concrete blocks with the holes coming up, on that 2,783 feet of shoreline, which is currently dry, sandy beach -- well, it's a sandy beach that's used by the public So, for those reasons and other reasons that will come out in evidence, Your Honor, we're going to ask that you affirm the Department's decision

THE COURT All right Mr Walker?

MR WALKER Thank you Our first witness is Leonard Long

(The witness was duly sworn by the court reporter)

THE COURT Hopefully your testimony will not live up to your last name

THE WITNESS I hope not That would be sweet

LEONARD LONG, having been duly sworn, testifies and examines as follows

MR LONG - DIRECT EXAMINATION BY MR WALKER

Q Leonard, what is your current occupation?

A I am executive vice president of KRA, which is

Kiawah Resort Associates, that owns most of the land at Kiawah and our companion entity is KDP II, among others, that owns this land at Kiawah

Q Have you always been in real estate development?

A No

Q Did you have a prior life?

A I had one and I enjoyed it I was a lawyer for many years and I passed the bar in '69 and practiced law, real estate law mainly, mostly appellate work, if I could get it, that's what I enjoyed, and representing governmental entities Did that for probably 15 years and slowly got into developing historic houses downtown, really restoring them and renovating them and then finally --

Q Downtown Charleston?

A Downtown Charleston And then subdivisions and ultimately we had the chance of a lifetime to buy Kiawah in '88 and to everybody's surprise, the person who had it under contract let the contract expire without closing, so we fortunately were able to get in and meet with the Kuwaitis who owned the island at the time

and acquired the property

Q Let's back up a few years so that the Judge understands the development of Kiawah Island When was the island begun to be developed in truth? When did that occur?

A There were a few houses there when I first started fishing on Kiawah in 1970 that were built under the permission of Mr Royal, Robert Royal from Aiken, South Carolina, who at that time owned the entire island And he sold the property -- his heirs actually sold the property for about $17 million in 1973 or '4 to the Kuwait Investment Company Kuwait Investment Company hired Sea Pines Company at the time, which was doing well in Hilton Head and other places, to be their developer And they, among other things, developed a plan to treat the island in certain ways and not treat it in certain ways And the sales began in about '75 or '6 from the Kuwait companies Ironically, it's one of those curious twists, I was the county attorney at the time and negotiated with Sea Pines Company the PDD that was alluded to, at least by Jimmy

THE COURT PDD or PUD?

THE WITNESS They called it in Charleston Planned Development District Most people called it a PUD

THE COURT Okay Same thing as PUD?

THE WITNESS PUD, uh-huh (affirmatively responds) Yes, sir It was the second one ever in Charleston County

Q When the opportunity came along in 1988, approximately how much of Kiawah Island had been developed, roughly?

A Trenholm, in '88, we closed in June, and the Kuwaitis probably had built -- they were mostly in the condominium sales, some homesites, some other smaller units, but mostly condos I guess they probably had fifteen, 1800 units sold and they had a couple of golf courses built and opened One golf course built but never opened until we got there and a couple of tennis centers And that was about it They had a 150-room inn They had a water and sewer company and that was about their development limit at the time

Q Were there still large undeveloped pieces of the island?

A Yes, there were and --

Q Would you -- go ahead
A There were a couple thousand acres left of -- or more probably of developable highland Kiawah's ten miles long, as you alluded to It's about a mile wide, maybe a little bit longer and wider in places and it's got about 10,000 acres, of which about maybe 5500 are developable highland Probably at least that -- at least half of that was available, I suppose, if I could correct my earlier statement, when we got there in '88
Q What was the game plan? When the opportunity came along and you closed, what was generally the business plan moving forward? What were you going to do?
THE WITNESS Well, Your Honor, our game plan was basically to do simple things you might not say We tried not to mess up what we knew, just as citizens of Charleston, was a great place We'd seen it developed well for a number of years by the Kuwaitis They'd won a lot of nice awards and they understandably were kind of the "big elephant" that used to be called in the market place They set price up and down the East Coast They are the standard

for marketing They had done a lot of things really well and we didn't want to injure that So we decided right away that what we would try to do is not do certain things We didn't do, for example, what they'd gotten permitted from the Coastal Council, which was an inland harbor development, because we thought it would pollute the river and we'd catch some grief And so we deleted the third village There were to other villages at Kiawah that I can mention later, but that was part of the plan that the Kuwaitis had come to honor and develop as they were moving along in the seventies and eighties But what we wanted to do, Trenholm, was we wanted to not build things We'd rather have somebody else reputable who really knows how to build houses and condominiums and the like So we have never built product to sell We sell homesites We try to create neighborhoods that are attractive, environmentally correct, work the infrastructure is top of the line in every way

Q How do you -- or do you maintain some esthetic control, even if you allow the building?

A We do We control -- and get a little grief as you can imagine, but I think most people have come around to understand that it's been very, very positive to have the Architectural Review Board, which controls architecture, but also controls landscaping

THE WITNESS And Kiawah, which was a tree farm, Your Honor, for about a hundred years, is extra dense It looks unlike any barrier island -- I live on Sullivan's Island and it has no relation to Sullivan's Island or any of the other barrier islands in South Carolina This island of Kiawah is massively dense And we wanted to keep it that way We wanted to have that natural privacy We wanted to have that increased sense of forested area right in the middle of the Atlantic Ocean There's only one way on and one way off Kiawah and you start at the western end and you go -- you know, the Kuwaitis are marching east and we picked up where they stopped, about mid island We, therefore, are very, very strict on architecture And probably 15 years ago, we started doing some things that were fairly innovative in our field

Q What about with respect to trees?
A 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 There's a lot of other things, though, Trenholm, that we try to do We try not to -- we try to eschew the development of typical grass yards and instead focus on native grasses, xeriscaping 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
Q And what, in particular, Leonard, are you talking about when you talk about setbacks? What is it that distinguishes the ocean setbacks at Kiawah?
A Well, I think everybody in the world probably knows that setbacks are the most important thing on an island, a barrier island The

primary dunes and the secondary and tertiary and other dunes that can be developed and strengthened and enlarged and widened and made taller over time by sand and vegetation are the key, so it has a strength function and then it has a visual function

If you look down a beach in South Carolina, you'll see on most beaches there's houses And we want you to be able to look down Kiawah's beach and see the trees

Q **Leonard, I'd like you to --**

THE COURT What are -- excuse me, what are the setbacks on Kiawah versus other locations?

THE WITNESS The Kiawah setback, Your Honor, is basically that we might let you in the dunes put a piece of a pool, for example, or a tiny piece of a house, but basically you're in the forest The forest that is Kiawah's sort of visual icon and you can't get proud of or forward of, seaward of that forest line to any measurable degree We'll have some evidence that can show you pictures of how that's worked out

Q **And I was going to ask you if you'd go to tab number four in Exhibit Number One -- in book**

number one Is that book number one?
A Yes, it is
Q Would you got to tab four and there's a series of pictures and if you go about five pictures in, there's a photograph that's Bates marked --
MR WALKER May I approach, Your Honor?
Q -- 853 Do you see that Mr Long?
A I do
Q Is that illustrative of what you were talking about?
A It's somewhat, although, because from the air you don't get the impact of the trees The trees actually -- if you were standing on the beach and walking on the beach, they would block most of the houses From up top, you can see the houses You can see they're behind the trees, however, and that's been the point There's usually four, five, or six rows from the beach, the high watermark, to the house
Q At this point, how much of the beach has been developed at Kiawah? Starting at the east end -- if you start near the Stono Inlet and come to the west end where we're talking about Captain Sam's, has the entire beach been developed, beachfront?

A Probably 90 percent has been developed with houses The Ocean Course was two and a half miles along the Atlantic and instead of putting houses there, we put the golf course there

Q And which end is the Ocean Course?

A East end

Q Has it received awards, as well?

A It has It's won a lot of awards for not only its integrity as a golf course and playability and degree of difficulty, but also for its environmental approach

Q All right And what happened there in 1991?

A The Ryder Cup

Q All right Now, let's move along to Captain Sam's -- but before I do that, has your group received any type of recognition for the environmental sensitivity with which you've approached development on Kiawah?

A We have We've won some nice accolades Well, since we're ticking them off, the only one that really appeals to us the most because it was from a group of our peers, called The Urban Land Institute, which began about 1936 -- it has 15,000 members internationally -- and bestowed us the excellence award, which I think

they've only given to one or two other developers in America for stewardship and also for doing things that actually meet the market demands at the same time

Q Now, what I'd like to do now is start to turn our attention to Captain Sam's Spit The first picture that we have in this is section four, would you turn to that?

A The first picture in section four?

Q In Exhibit Four that has the number 338 at the bottom

A Yes

Q Ignore the lettering, but -- or the numbers What is that that we're looking at?

A That's the spit that we've been referring to as Captain Sam's Spit at the western end, extreme western end of Kiawah, where you can see the river running behind it, the ocean on the front, and Seabrook Island to the left

Q Is the Kiawah River evident in this photograph?

A It is It's the last part of it where it meets the Atlantic Ocean, goes behind the spit and finally wraps around the spit and comes out into the Atlantic

Q When was the first time that you set foot on

the spit?

A About 1970 I used to fish for bass in the spring and fall before there were any houses on Kiawah

THE COURT If I could stop you You're showing me an exhibit It's fine with me It helps me understand the testimony, but it's not been admitted into evidence

MR WALKER Well, I'll go over that with him, then, Your Honor

THE COURT Well, if y'all don't have an objection to him doing that, that's fine

MR WALKER Do you have any objections to the photographs that are --

MR CHANDLER We don't have any objections to these photographs, Your Honor

MR WALKER Your Honor, we would move the photographs that are in Exhibit Four into evidence

THE COURT Are they numbered?

MR WALKER They're all numbered with separate Bates numbers We haven't numbered them separately, but I will count them out

THE COURT Give me the number, blank through blank

MR WALKER Okay 338 --

THE COURT Through?
MR WALKER -- 848 --
THE COURT No, I just need all the way to the end
MR WALKER All right There's some omissions
THE COURT Oh, okay
MR WALKER So it's 338, then 848 through 869 and 1104
MS ARMSTRONG Trenholm, you've got through 870 in your exhibit list
MR WALKER All right We'll take out 1104 for now If you haven't seen it, I'll get it to you
MS ARMSTRONG No, I don't have a problem with --
MR WALKER Do you have any problem with 1104?
MS ARMSTRONG I don't think we have a problem with 1104 I was just saying that there is an 870 in there and you stopped --
THE COURT You stopped at 869 What she's saying --
MS ARMSTRONG Right
MR WALKER Oh, it went to 870, I'm sorry
THE COURT She's giving you the option of getting another one, so
MR WALKER Well, we would ask to move in 870, too, and that was an error in our listing of the

exhibits

THE COURT All right Any objection to those exhibits?

MR CHANDLER No objection

MR WHITFIELD-CARGILE No objection, Your Honor

THE COURT They're admitted

(KDP's Exhibit Number Four was admitted into evidence)

Q Leonard, what have you observed over the years has occurred at Captain Sam's in terms of its size and what it's doing?

A Well, in the 40 years I've been familiar with it, it's lengthened many hundreds of feet to the west toward Seabrook and it's grown -- the dunes -- I can remember going back in the dunes and the maritime forest was really just some shrubs and now it's starting to burgeon, starting to grow It's lengthened So the width -- as I understand it, Trenholm, the width is now 1400 feet and it's probably half that 40 years ago

Q Are you talking -- at which point, the widest part?

A At the widest part of the wishbone part, you might say, of the spit

Q Have dune ridges built --
A Yes
Q -- on --
A There are now six or seven rows of dunes at the last third, let's say, of the spit going west And there's probably four or five, at least, even down to the spit neck
Q Are those illustrated here?
A They are
MR WALKER Your Honor, just to show you an example And I'm showing the Court --
THE COURT If you can just ask him about 849
Q Is 849 a good illustration of what you were just talking about, Leonard?
A It is
Q And how about 869, from the other end?
A Yes That's taking it from the inlet looking back east, all the way along Kiawah Island, and it shows the tremendous number of dunes that have grown up
Q There's been some discussion about the migration of Captain Sam's Inlet toward Seabrook Has there been any alteration of that inlet over the years, Leonard?
A Yes

Q Would you tell His Honor about that?

THE WITNESS Well, Your Honor, starting in the eighties and again in the mid nineties, Seabrook, which is the island next door, has an erosional beach unlike Kiawah, at least in major part, and they literally run out of sand every dozen or so years And they approached Kiawah and the owners of Kiawah at the time before we got there in the eighties and then when we were there in the nineties and asked could they experiment under the direction of Dr Tim Kana, a coastal geologist and will be one of our witnesses, and literally create with equipment and other ways a new channel through the end, the far western end, of the highland of Captain Sam's and allow the water to rush in there where there was then highland and wash the sand that's been moved, and the highland between that channel, let it wash on down after a tide cycle or two to nourish the beach at Seabrook next door, move across the inlet onto Seabrook's beach It's worked well The beach here at Captain Sam's has blossomed, come right back, and vegetated and the dunes have come right back

Q To your naked eye, has the relocation of the inlet those two times to cut the spit, has that in any way had an adverse effect as far as you can see on the sand accumulation on Captain Sam's?

A No, it hasn't and that's because of the massive amount of sand that moves down Kiawah's Beach I think we are -- this beach at Kiawah is the most accretional beach on the East Coast of America and has been for many, many decades

Q What happened in 1999? Was there a change with regard to the regulatory designation of Captain Sam's?

A Yes

THE WITNESS Until OCRM decided to change its setback line, the setback line, Your Honor, would come down Kiawah's beach moving from the east to west and stop, essentially, at the neck and just cut right over to the river So there wasn't a setback line for the last mile or so

Q And I don't know if this can be seen Where did the setback line go? Where did it --

A It just cut right through the neck and just ended (indicating) There wasn't any setback line for the entire drumstick we call Captain

Sam's Spit There was no authorization, therefore, by the State to develop behind or landward of the setback line

Q Can you point out, also -- and I apologize for the scale -- where the county park parking lot is on this Exhibit Four, 338?

A Yeah The county park is really about two or three acres and it's just a parking lot, a little changing area and a little tiny snack bar and a walkway through the dunes to the beach It's a 99-year lease from now KRA It has about 60, 65 years to run, and that's the entire width and breadth and length of the park and its activities It serves about 50,000 visitors a year

Q Is the white area on this photograph that is evidenced -- that is evident here, is that the location of the county park parking lot?

A Yes

Q All right Did your company lobby or argue for or take any affirmative steps to change the setback line in 1999?

A No, we did not

Q Who made that decision?

A The State of South Carolina and OCRM was the

effectuating agency
Q What did you understand the significance to be of moving the setback line for almost -- or placing it on Captain Sam's for almost the entire length of the spit?
A Well, the obvious one, which if you look up the definition of "setback line" and what you can do seaward and landward, it allows you to develop landward of that line And it allowed that land to be developed And why? Because it's just like the rest of Kiawah It's accretional It's stable In fact, the State reports describe it as stable It's one of the most stable areas of Kiawah, not just on the East Coast
Q Well, there's a lot of talk about instability Do you understand that if something is accretional that technically it might be considered unstable and dynamic?
A Well, certainly if something is moving, it's -- whether it's from erosion or accretion, it's dynamic It's changing That doesn't mean it's unstable In this situation, the accretion far surpasses the erosion over many decades I think the accretion level --

MR CHANDLER Your Honor, this witness has not been qualified to give expert testimony about erosion and accretion I think I let this go on too far I object

MR WALKER I'll rephrase the question

THE COURT Okay

Q From your own visual observations, have you been able to observe any changes with respect to sand accumulation or sand diminishment on Captain Sam's?

A I have And it's been significant It's been significant up and down Kiawah

Q In 2005, did the Town of Kiawah Island enter a development agreement with your company?

A They did We entered a development agreement and changed the earlier 1994 development agreement that had been the only other one we ever had

THE WITNESS In '94, Your Honor, had replaced the PDD ordinance that applied The reason that went away is the PDD for Kiawah was a Charleston County ordinance allowing development in a certain way, like a PUD, and then the town came into existence the same year we bought the rest of Kiawah in '88, and

obviously the town has to pass its own zoning And they did and then we entered a development agreement a few years after the town came into formal existence with the town in, I think, '94

MR WALKER We have made a copy of the development agreement in 2005 as an exhibit that's marked as Exhibit Number Two It doesn't have all the exhibits to the development agreement It does have the graphic exhibit of the development agreement 16-2 that deals with Captain Sam's We offer that into evidence

THE COURT Where I can be clear before y'all present is, you said the town passed its own zoning in '94?

THE WITNESS It passed its own zoning when they became into existence in '88

THE COURT Okay

THE WITNESS And then in '94, we entered --

THE COURT Yeah Okay You said y'all entered into a development agreement and he just referred to 2005

THE WITNESS Right What I was trying to give you was the continuum We started with a PDD with the county, then the town came in and they just

had a regular zoning ordinance, then we entered into a development agreement under and pursuant to the zoning ordinance in '94 Then in 2005, we entered our second development agreement --

THE COURT Okay

THE WITNESS -- because the first one was about to expire

THE COURT I just want to be -- so the record will be clear, because you're talking about '94 and now we're going into --

THE WITNESS I know It's a little crazy

THE COURT All right Any objection?

MR CHANDLER No objection

THE COURT Mr Whitfield-Cargile?

MR WHITFIELD-CARGILE I would object on relevance, Your Honor I don't see how this is relevant to whether or not they can utilize the critical area for a revetment

MR WALKER Your Honor, the development agreement goes to the rights that are held by my client that are somewhat at issue and implicated in this case This development agreement also talks about the nature of the development that can occur there

THE COURT All right The objection is overruled

(KDP's Exhibit Number Two was admitted into evidence)

Q Are there particular provisions in the development agreement that deal with Captain Sam's, Leonard?

A Yes, there are

Q And I'm going to direct you to page 21 of Exhibit Two

A Tab two?

Q Yes, sir

A Trenholm, what page? Because I started --

Q I'm sorry, it's KDP71, 21 of the development agreement but KDP71

A Got it

Q All right Is that one of the provisions that deal specifically with Captain Sam's?

A It is It's probably the main provision

Q Without reading it, could you explain to Judge Anderson what that involves?

A Yes

THE WITNESS Your Honor, basically, the town council wanted to be assured that on this site, which if you measure all the highland that we own --

MR CHANDLER Your Honor, I want to object He's

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

MR WHITFIELD-CARGILE Same objection

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

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

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

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

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

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

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

Q What's his name?

A Mark Permar

Q All right

A It says that the structures to be sensitively arranged

THE WITNESS 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

Q **Does the agreement address docks?**

A **It does 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**

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

A Yes, it is It's -- you might want to put a Bates number on there, but, yes, that's the exhibit that shows the property

Q And the area in green is what area?

A That's the area above the setback line on the ocean side and above the critical line on the river side

THE WITNESS And the critical line is denominated, I'm sure Your Honor knows, by vegetation The setback line is, in this case, 20 feet from the baseline and the baseline is determined by that formula that was alluded to by somebody earlier, that looks back at 40 years of the highest high tide line in the last 40 years and then they derive a formula for where the baseline can go

Q Since we have the diagram in front of us, would you tell us the area that we're talking about that's really the area at issue, the revetment?

A The area is -- yeah For the revetment?

Q Yes For the river bend

THE COURT If you could step up here for that --

MR WALKER Yeah

THE COURT -- so I can be clear

THE WITNESS (Witness compiles)

(Off the record)

THE WITNESS The revetment, Your Honor, is -- starts at the park property, which is over here (indicating) It's delineated right there This is the park property As you can see, it stops well before it gets to the beach because we just give them the right to walk to the beach from the parking lot

They noticed erosion starting here along the river where I'm pointing, maybe even a little bit north of there And erosion continued to exacerbate along here until you get opposite this creek right here on Seabrook (indicating) This is all Seabrook over here (indicating) And it stops -- the revetment would stop about right there (indicating)

Everything in green, which is labeled about 31 4 acres, is the size in 2005 of the land between the critical and setback lines, within which we can sell 20 acres

Now, if you take all this land here, Your Honor, that we own, it's about 150 acres

Q **Now, where is the access corridor? Where is your concern about the access corridor that people have alluded to?**

A The access corridor is -- now, we would come out at our property, which is right next to the park property, and we'd have to get through the neck here and the neck would be -- the corridor would be about right where I'm pointing right here (indicating) I think we have a better exhibit

Q We do

THE WITNESS But basically, Your Honor, it's the distance between the critical line and the setback line

In those days, that is in 2005 and '6, the distance between those two lines was about 90 feet You need about 50 feet to do an ideal road, certainly 40 feet, for the utilities, landscaping, driving surfaces, et cetera

So we knew we had 90, but we knew that that critical line on the river side was moving significantly such that we now find, as of today, that the distance is 66 feet

Q And what is -- under the development agreement, Mr Long, the area that's white, Leonard, the remainder of the land is --

A The remainder of the land is the land above the mean high tide line

Q On the other side of the setback line, correct?
A Yes
Q On the seaward side? And under the development agreement, what is the future of that land? Is it protected?
A It can't be developed at all It's -- and so is the other 11 4 here (indicating) Actually, it's a little bit more than that now because of accretion
THE COURT 11 4?
THE WITNESS 11 4 acres The 31 4 I showed you a minute ago -- I said we only could sell 20 of it, so the other 11 4 from the 31 4 is -- can't be developed, either, under the development agreement
THE COURT Now, where I can back up so my notes will be good, you said the access corridor is now 66 feet, it was 90 feet when?
THE WITNESS In 2006
THE COURT All right
Q I'd like to back up, too, to go back to the development agreement At the time of the entry of the development agreement, did your entity have to give up anything, so to speak, in order to accomplish the development

agreement's development rights with respect to Captain Sam's?

A **Yes The way this began was, the town under the '94 development agreement had allowed us to have roughly where Parcel 13 is on this exhibit map that we've been looking at**

THE WITNESS It's about a 19-, 20-acre tract, Your Honor, on which we had, I think, the only zoned hotel site on the East Coast And the town, for reasons I don't know, to begin negotiations asked that we give up that right to have a hotel and related condominiums and other things you might have near a hotel, commercial And we said, "Well, let us think about that " And we came back and asked could we develop a limited portion -- 20 of 150 acres today is what it would amount to -- of Captain Sam's Spit for no more than 50 homesites And they agreed

We had obviously not had the right in the '94 agreement to ask for any development down there because the State had yet to say that the setback line extended to Captain Sam's When they did that, it was a new day

Q **You earlier mentioned the adjoining parcel,**

which is Beachwalker Park What months is that open?

A It's open from, just roughly, Memorial Day to Labor Day, except for special events And because it's relevant, I know this from personal observation that they allow dogs on leashes to come to the park It's never been a problem, but the leashes don't stay on very much, but it's okay, too, because it hasn't been a problem

Q Now, I'm going to ask you about your own observations Have you been to the Kiawah River side of Captain Sam's in order to observe what's happening on the shoreline there?

A I have I haven't been there in a couple of months, but we'll have some pictures of it as recently as yesterday and the day before

THE WITNESS It's escarpment, Your Honor In other words, it's a vertical piece of highland that's being chopped by the wave action daily, such that it is somewhere between three and four feet high, up to 10 or 12 feet high, almost 90 degrees straight up

The highland that was forested land and vegetated land is now sloughing off and falling

into the river Trees, shrubs, grasses

Q I'm going to ask you to turn to Exhibit Five, which is a series of pictures Would you please do that, Leonard?

A Yes

Q What do those photographs behind tab five constituting Exhibit Five illustrate?

A These pictures -- you might want to show Your Honor These pictures are -- this first picture, for example, is taken from the PRC property looking west

MR WALKER And before we get to that, do y'all have any objection to entering the pictures that are marked as Exhibit Five?

MR WHITFIELD-CARGILE One minute, Trenholm

MR WALKER Sure

MR CHANDLER Do you know when these pictures were taken?

MR WALKER They were taken in November of last year, I believe

THE WITNESS That's right

MR CHANDLER No objection

MR WHITFIELD-CARGILE One moment, Your Honor, please (Perusing) No objection

THE COURT They're admitted

MR WALKER Thank you

THE COURT Or Exhibit Five, I guess I should say

MR WALKER Exhibit Five and those would be pages --

THE COURT So they're all Exhibit Five?

MR WALKER Yes, sir

THE COURT Then I'll just say Exhibit Five is admitted

MR WALKER It would be KDP -- the Bates numbers are 563 through 587

THE COURT All right

(KDP's Exhibit Number Five was admitted into evidence)

Q You were just referring to the first photograph, Leonard?

A Yes That photograph, as well as many of the others, show the pine trees and the other shrubs and vegetation that's falling into the river

Q And you mentioned the vantage from which the picture was taken Where do you think this was taken?

A I believe it was taken at the -- you know, from a seaward point of the parking lot of PRC looking west

Q All right And then what about the next picture, which is marked 564?

A Trenholm, that's looking at the sand fencing of PRC that replaced their regular fence that they had up there You can see pieces of the regular fence to the right of the picture And I think basically that fence keeps moving to prevent people from falling down the escarpment

Q Do the rest of the pictures here in this exhibit illustrate various places along the riverbank?

A They do They are representative of about a year ago If anything, it's a good deal worse

Q At some time around 2006, did Charleston County PRC do anything with respect to the riverbank that we're taking a look at here that's eroding?

A Yes, they did They hired some engineers that we were unfamiliar with it to come up with a plan and actually submitted the plan to the Corps of Engineers and to OCRM to put in a certain type of revetment to stop the erosion in front of the park

And we asked them -- once we found out, we

asked them if they would be kind enough to stop that and let us come up with a singular solution for both their problem and ours and engage the engineers that had been the only engineers, really, for Kiawah for the last 40 years, Thomas & Hutton, to have one type of erosion control structure, so that a lot of things would happen that would be beneficial One would be, if they just put up their revetment, the erosion would be exacerbated at the extreme ends of their revetment

Q Did you consult with Thomas & Hutton about this singular solution, as you described it?

A We did

Q Did they have any recommendations or suggestions as to other people who might be involved?

A Yes, they did They recommended two gentlemen, two eminent scientists that were at Old Dominion College Drs David Basco and George Oertel

Q Are they with us today?

A They are They are in the second row there, the two gentlemen in the second row

Q All right

A They helped us come up with a design for a revetment

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

What we wanted to have was a revetment that was a good deal more expensive, as it happens, but also a good deal better looking, more functional, would provide habitat for a number of species, and least interfere with the environment

I was interested in the comments that Mr Chandler said, because we could have a vertical revetment and we would save millions It wouldn't serve the purposes that this one will serve and we can get into those, if you want

Q What was your decision based on the

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recommendations of Thomas & Hutton with respect to the type of material that you would put on the slope portion of the shore, the revetment portion?

A On the slope portion of the shore, starting from the vertical bulkhead (indicating), angling down to hug the shoreline as it might move a little bit as it reaches the water, maybe a little bit beyond It's called an ACB, articulated concrete block And each block has holes in it, as we know, except these are a good deal larger holes
In the holes you would grow Spartina and other grasses through We could show you how that looks in reality, because they are not brand new, but they're not as often done because of the price
But what they do is they create a shoreline with maturity, in a couple of years, looks like grass, like marsh grass It provides habitat Besides stopping the erosion, it provides an attractive look And that's -- that was their recommendation amongst others We could have just put rocks, which is a typical revetment in South Carolina's Lowcountry You know, big

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

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

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

Q Would you please to turn to Exhibit Six?

THE COURT If you could just stop for a second

MR WALKER Yes, sir

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

THE WITNESS Yes, sir And other grasses

THE COURT And other grasses?

THE WITNESS Yes, sir

THE COURT Did I miss anything?

THE WITNESS - No, you didn't-

THE COURT Go ahead

Q Would you please turn to Exhibit Six?

A Got it

Q What does Exhibit Six contain? What are the photos in Exhibit Six illustrate?

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

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

MR CHANDLER No objection

THE COURT Mr Whitfield-Cargile?

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

MR WALKER I do too, thank you

MR WHITFIELD-CARGILE There's four

MR WALKER We'll take off five, and those will be KDP124 through 126, KDP342 and KDP380

THE COURT But by and large, it's still Petitioner's Six?

MR WALKER They're all behind, yeah, Petitioner's Six

THE COURT All right That's easier for me It's admitted

(KDP's Exhibit Number Six was admitted into evidence)

Q **And you were talking about the incipient growth of grasses Is that illustrated in these photographs?**

A **It is Better illustrated in some than others**

Q **Well, which would you like me to turn to?**

A **Well, for example, in 125, you can see how it works after a short period of time And we'll have others that I think Mr Permar took as recently as yesterday or the day before, where you don't even see the concrete block**

Q **All right And if you go to 342 near the end --**

A Yeah

Q -- --- does that illustrate anything with respect to habitat?

A Yeah You can see that the oysters are propagating and the sand has come to fill some of the block The oysters attach themselves to the stacks and so forth of the concrete

Q In the times that you visited the sandy shore of the riverbank on the Kiawah River at Captain Sam's, have you seen any oysters in the sand?

A (No response)

Q Do they propagate in the sand alone?

A No, not usually

Q Based on the decision to move ahead with a combined bulkhead/revetment, did you authorize anything to be done on your behalf?

A Yes We asked Thomas & Hutton to prepare drawings and the permit application to the Corps, the OCRM That was done It was filed in February '08

Q All right I'm going to ask you whether or not you remember signing written authorizations to Thomas & Hutton to act on your behalf Did you?

A Probably did

Q And I'll turn your attention to Exhibits Eight and Nine

A (Witness complies) Yes, you're right I did

Q Who are the two entities you were representing in your authorization of Thomas & Hutton?

A Kiawah Resort Associates, LP, and KDP II, Inc

MR WALKER These two letters are part of the permit file We'd offer them into evidence, too Is there any objection?

MR CHANDLER We don't see how they're relevant to anything, Your Honor, so we would object on the grounds of just relevance We've got enough stuff in this case without just putting in random letters

THE COURT Mr Walker?

MR WALKER Well, we're saying that Thomas & Hutton was authorized on our behalf and you'll hear from Mitchell Bohannon of Thomas & Hutton

THE COURT Well, do y'all dispute that Thomas & Hutton --

MR CHANDLER We'll stipulate that they hired Thomas & Hutton

THE COURT All right I think I'll sustain that objection to that stipulation

Q Did you receive a copy of the permit

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application that was submitted by Thomas & Hutton to OCRM and the Army Corps?

A I did, but -- yes, I did

Q Would you please turn to Exhibit Ten?

A (Witness complies) Yes

Q What is Exhibit Ten?

A What is it?

Q Yes

A It's a letter from Thomas & Hutton to DHEC in late February -- February 29, 2008 And it says he's enclosing the administrative fee and he's including the application form, the project drawings, the letter naming Thomas & Hutton as the agent, affidavit of ownership and control, the affidavit of publication will be submitted at a later date, Mr Joyner was advised

Q If you go two pages in, is there another letter?

A Yes And that's essentially the same thing to Ms Tina Hadden at the Corps of Engineers

Q And behind those letters, is there a permit application, a copy of it?

A Yes, there is

MR WALKER We offer Exhibit Ten into evidence Is

there any objection?
MR CHANDLER Your Honor, that's the permit application and transmittal letter We don't object to that I will note it also includes one of the letters we just excluded, so -- but it was part of the package that was submitted to the agency, so
THE COURT Okay Mr Whitfield-Cargile?
MR WHITFIELD-CARGILE No objection, Your Honor
THE COURT This was Ten -- is admitted
MR WALKER Thank you, Your Honor
(KDP's Exhibit Ten was admitted into evidence)
Q Aside from weighing in on the type of material that would be used in the revetment, did you make any determination as to the specific location, height or any of that type of stuff with regard to what was submitted?
A No, although it was our understanding from submitting -- I had our people calculate three or 400 permits over the last 22 years to OCRM -- that what the practice is, is you submit your drawings and if they want to refine them or you do with their concurrence, you do that at a later date
For example, the vertical piece, it's shown in

the drawings that we just admitted into evidence as being a certain height, whereas, we all know, or they know certainly at OCRM, that it will be curved to the lay of the land The land is not a flat piece of highland that's cut by the river It rolls

MR WHITFIELD-CARGILE Your Honor, I'm going to object He's saying what the Department knows

THE WITNESS I'll rephrase that

MR WHITFIELD-CARGILE Strike that

THE WITNESS It's not what the Department knows It's what has always been the practice I've overseen permitting there and done permitting there before I was with KDP for 30 years through every permit administrator and that's exactly what happens You submit an application and then you get with the permit administrator and you make sure that it fits his idea of what it should be and your idea and as you can make improvements and jointly agree on them, they're usually always satisfactory

Q Mr Long, I would like you to turn in Exhibit Number Ten to what is marked as 27, KDP-T&H27, that's cut off part way

A I'm sorry, it's marked as

Q Keep going It's 27 It's the illustration you were referring to It would be page seven of seven of the drawings

A Okay Yes Got it

Q All right A minute ago you were referring to the drawing that was submitted to the Agency

MR CHANDLER Trenholm, can you give me just a minute on this The page 27 that we have is part of a letter

THE WITNESS Page seven of seven on the drawings

MR WALKER There it is

MR CHANDLER All right Thirty-seven

MR WALKER Thank you

Q All right Does this show what you were talking about?

A It does

Q Does this concept illustration show where the articulated concrete block would go?

A In concept, it does, although, I think everybody understands that the beaches are not perfect straight lines like that The point of the thing is that it is to hug the shore as it might undulate down to low water and below

Q Is the vertical member what you understood to be the bulkhead?

A It is
Q And is it anchored in the ground?
A It's anchored back into the highland
Q At some point, did a question arise as to whether -- during the permitting process as to whether the width of the mat was wide enough, the ACB extending from the bulkhead?
A It did
Q Can you tell us about that?
A Yes Drs Oertel and Basco had studied the river for a number of reasons and what was going on, whether it had any impact on the inlet, the erosion would have any impact on the inlet, much less the -- excuse me, the revetment, whether that would have any impact on the inlet, on Seabrook, on other things, and in the course of that, they also studied the revetment solution that had already been submitted to OCRM and the Corps And they suggested that it may be that in certain hot spots, as they called them, particularly in the bend of the river or the elbow in the river where the erosion was occurring and the revetment would be placed, that the revetment might need to be lengthened in places because

they felt like the --

Q When you say "lengthened," extend the width of the mat?

A Extend it down farther in places --

THE COURT What phrase are you using? "Width of the "

MR WALKER Of the articulated concrete block mat I should --

THE COURT "Mat"?

MR WALKER Right The articulated concrete block The width of the articulated concrete block section

THE WITNESS It's connected, Your Honor, by sort of a matting, you might say, at the bottom And it --

THE COURT Hence the term "mat"?

THE WITNESS Yes, sir

THE COURT All right

THE WITNESS And the concern that they had was that it might need to be adjusted in those places We had a meeting with them, Thomas & Hutton, and decided to take the recommendation of Thomas & Hutton

MR WHITFIELD-CARGILE Your Honor, I'm going to object to what he's -- he's saying what Oertel

and Basco and all these other people said

That's all hearsay

THE COURT There used to be an exception before the advent of the new rules about if a witness is present and available for cross-examination, but I don't think that's survived State V Cauldwell, but --

MR WALKER I was offering it as background, not for the truth of the matter discussed, but for the reasons why he did what he did

THE COURT All right It's not offered for the truth of the matter, it's only offered as background Any objection in that regard?

MR WHITFIELD-CARGILE I think he can explain why he did what he did without getting --

MR WALKER We'll do that, Your Honor

MR WHITFIELD-CARGILE -- into all of this hearsay

THE COURT Go ahead

Q Let's just get to what you did

A We decided that the best course of conduct at the time, which was like April or May of '08, several months after the permit had been submitted, and in anticipation that there was a 30-day window already exceeded by OCRM to make the decision under the statute and

regulation, that we would have a decision any day — And so we decided to take the advice of Thomas & Hutton, our engineers for 30 years, and build exactly what they designed And if there were some monitoring, as we would always do, and if it turned out that we needed to slightly lengthen in places the matting material, that we would come back and do what was appropriate under the regulations and with OCRM, and lengthen it if it was not retarding all of our erosional occurrences on that shoreline

Q Were you kept abreast of what was going on on the permitting side, Mr Long?

A Pretty well, and I was somewhat active Our development director, Ray Pantlik, our engineer on staff for the last 20 years we've been in business was directly responsible and I more or less oversee Ray, but I'm not an engineer, obviously, and I certainly don't know it as well as he might

Q Did you get a decision relatively quickly out of the Army Corps of Engineers for its piece of the approval?

A We did They decided in April, which was very

welcome, that we were entitled to the permit They issued a nationwide permit——They found that there were no adverse impacts from the revetment

Q Would you please turn to Exhibit Eleven?

MR WHITFIELD-CARGILE Your Honor, I'm going to object to that last statement, the Corps found there's no adverse impacts from the revetment, that's hearsay, too

MR WALKER Your Honor, the letter --

MR CHANDLER It's also not responsive to the question

THE COURT All right We've got two objections, nonresponsive and hearsay Any response?

MR WALKER My response is that this letter is part of the OCRM records It was received by OCRM and under the exception to the hearsay rule for --

THE COURT Is that in evidence yet?

MR WALKER I'm about to introduce it

THE COURT Well, introduce it

MR WALKER Your Honor, at this time we would introduce Exhibit Number Eleven, which is a copy of the Army Corps of Engineers' letter dated April 4, 2008, with the determination of

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approval under the nationwide permit
THE COURT All right Any -- he's offering it into evidence Any response?
MR CHANDLER Your Honor, we don't think this has anything to do with the OCRM approval and we would object to it as being irrelevant
THE COURT Irrelevant as why? I mean, it is as way of background and understanding the case
MR CHANDLER Well, I mean, I don't see how it adds to the case Just because some other agency approved it under some other standards OCRM's got its own standards
THE COURT All right
MR WHITFIELD-CARGILE I would agree with that, Your Honor
THE COURT I'm going to sustain that objection
MR WALKER May I be heard on that?
THE COURT Yeah, go ahead
MR WALKER It was copied to OCRM Curtis Joyner received it There is reference in the OCRM file to what the Corps was doing Their determination included what the Corps was doing and they took that into account
THE COURT Well --
MR WALKER Go ahead, I'm sorry

THE COURT No, that's a good point and I was going to ask them to respond to it Are you finished with it, because I didn't mean to cut you off?

MR WALKER No, if you're -- if that's enough, I'll stop

THE COURT Okay

MR CHANDLER Well, at this point, the foundation is only coming from statements from Mr Walker, not from anything else

THE COURT All right Here's going to be my ruling, then, I'm going to allow him to testify to this subject to it being linked up, because I think -- well, let me go back to the Rules of Evidence

Mr Walker, do you intend to offer a witness who's going to substantiate what he just said and seek to introduce it at that time or not?

MR WALKER I do have a witness who can say it was considered by OCRM, yes

THE COURT Do you intend to do that?

MR WALKER Yes

THE COURT All right He intends to do that It sounds to me like his foundation -- the foundation has been laid to at least introduce it into evidence, therefore, I'm going to --

MR WHITFIELD-CARGILE May I briefly respond to that? I think that the only --

THE COURT Briefly

MR WHITFIELD-CARGILE I think that the only witnesses that can address what OCRM did are OCRM employees

THE COURT Well

MR WHITFIELD-CARGILE And I'm not aware of any subpoena for any OCRM employee

THE COURT Well, see, the way it works, Mr Whitfield-Cargile, is not whether you're aware of what The Rules of Evidence set forth that if an attorney establishes -- submits to the Court that the attorney intends to link the evidence up, that the Rules of Evidence allows the evidence to come in subject to the failure of the attorney to link the evidence up and, therein, your motion to strike will be sustained All right?

MR WHITFIELD-CARGILE Thank you, Your Honor

THE COURT So with that said, that's my ruling

Q Leonard?

A Yes, sir

Q When you became apprised of this letter, which is Exhibit Number Eleven, what was your

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reaction?

A Obviously, we were pleased because particularly paragraph three of the letter

Q But what did you understand to be the import of the letter with respect to the nationwide permit?

A That they were granting the permit that they had taken into account as they say in the letter the cumulative -- any cumulative adverse environmental effects and they found none

Q All right As the process went on with OCRM, did you receive copies of various comment letters that were submitted by South Carolina Department of Natural Resources and others?

A Yes, I did There were several

Q Did you do any anything on your side as the applicant to respond to those letters?

A Yes, we did We sent OCRM and the Corps the reports of Drs Oertel and Basco, as well as Dr Tim Kana, we sent them supportive letters from the Town of Kiawah and the Town of Seabrook and others and tried to be responsive And every time they suggested something in their letters to us from OCRM, we tried to respond But from beginning to end, in the

entire nine months, despite asking them repeatedly to let us know if they need anything else, to call us or write us if they need anything else, they never did

Q Did you write letters yourself?

A I did

Q Did Ray Pantlik, who works for you, write letters?

A He did As development director, he wrote and so did Thomas & Hutton write, asking do they need any other information

Q Did the letters that Mr Pantlik wrote, were they approved by you before they were sent?

A They were

Q Let's go to Exhibit Number Eighteen, please

A (Witness complies)

Q Do you recognize that as a letter that was sent by Mr Pantlik to Bill Eiser at OCRM?

A Yes, I do And I've got a copy of it and approved it in toto

Q Was this letter in response to comments that had been presented by resource agencies and others?

A It was

Q Now, I want you to go to the last page of this

letter, which is --

- MR - WALKER -- First- of all, Your Honor, we'd move for the admission of this letter, June 24, 2008, from Ray Pantlik to OCRM, reviewed and approved by Mr Long

MR CHANDLER Your Honor, I object to this I mean, the fact that they wrote a letter -- it's got a lot of statements in this letter that try to parrot things that came from their experts and they've got the experts here that they're going to put on the witness stand, they can say all of these things, but it's just not proper to just put it in from a self-serving letter that they wrote sometime It's all hearsay

THE COURT Mr Walker?

MR WALKER This is -- the Agency's supposed to make a decision based on comments, take the comments into consideration The applicant is entitled to comment, too It's not just the public

There were specific questions that were raised We answered those questions We will show that despite our answers, that the Agency acted contrary to the information that was provided to them Whether they acted reasonably,

arbitrarily and capriciously depends on what they had before them And we're contending, -- among other things, that it was capricious based on what they had before them

Also, this letter --

THE COURT Well, you've got a right to do everything you just said The issue, though, is whether you can do it via a letter

MR WALKER Well, we -- well, the letter --

THE COURT If you're offering the letter for the truth -- I mean, if you're only offering the letter to show that they made comments and they -- you know, whatever import there may be of that, that's one thing But if you're offering the letter for any other purpose, or for the truth of anything within the letter, if it contains hearsay, then Mr Chandler's correct

MR WALKER We're offering it for notice of what's in there, we're offering it for inquiry, notice, that they didn't act on it once they had it, we're offering it, as well, to show our cooperation, and we're offering it to show that we continually told the Agency that we are willing to sit down and provide any information

that they needed and answer any questions
---In their depositions, they're saying, "We were
in the dark They didn't provide us any agency
(sic)," and this goes to that point
THE COURT All right Mr Chandler, in that
regard, he's not offering anything for the
truth, he's offering it for -- I don't know if
I could go all the way through it -- notice,
inquiry, cooperation --
MR WALKER Notice --
THE COURT Huh?
MR WALKER That's right
MR CHANDLER He's basically offering it to show
that they wrote a letter And in that case, if
it's that limited, then I don't have a problem
with it
THE COURT Okay Mr Whitfield-Cargile?
MR WHITFIELD-CARGILE I don't have a problem with
it coming in to say that the comment letter was
sent to the Department But for the truth of
the matter asserted, if it's setting forth
expert opinions --
THE COURT Well, we've already dealt with that
MR WHITFIELD-CARGILE Yeah
THE COURT All right It's admitted for the

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limited purposes of what you have offered it for

MR WALKER Thank you, Your Honor

THE COURT What's the number?

MR WALKER It's Eighteen

THE COURT Okay

(KDP's Exhibit Number Eighteen was admitted into evidence)

(Off the record)

THE COURT Petitioner's Eleven, was that referenced?

MR WALKER Petitioner's Eleven, we skipped Eleven

THE COURT Okay

MR WALKER We're jumping around This is from an exhibit list They're not in consecutive order

THE COURT Go ahead You don't have to go in consecutive order

THE WITNESS Trenholm, you asked me earlier what we sent in and we sent in those reports I mentioned from the doctors and Thomas & Hutton We also sent a report responsive to one of the comments from somebody else, from Dr Travis Folk about the plovers And one of the

comments you asked me about, also, was some suggested that there was no need, there was no erosion, and we responded to that, too

Q Would you go to the next to the last paragraph?

A Yes

Q Would you -- did you approve that?

A I did

Q And tell us -- why don't you go ahead and read it to the Court, since it deals with the notice issue

A Yeah It just says that "We stand ready to meet with OCRM staff, the Town of Seabrook Island, South Carolina DNR, and any other persons having questions or concerns This shoreline protection is desperately needed, has no significant foreseeable adverse impacts If there are questions that I have overlooked, please let me know so that I might do so "

Q To the best of your knowledge, did anybody with OCRM get back in touch with Ray Pantlik or you?

A Never did, not even an e-mail or a call

Q Is Exhibit Nineteen the letter from Travis Folk that was enclosed in Ray Pantlik's letter that was just admitted?

A It is That's the report about the plovers,

et cetera

MR WALKER Your Honor, we'd offer this, too

MR CHANDLER Again, this is -- letter is hearsay I mean, it's a letter that was written to Ray Pantlik and the fact that he passed it on to OCRM doesn't make it evidence in this case

MR WALKER They are the ones who are saying there are adverse impacts on piping plovers We provided a letter that said there was no adverse effect We're entitled to show that they ignore everything that we give them It's replete with what we put them -- they were on notice and they pay no attention to what we give them, in order to show they're biased

THE COURT Okay Well, you can offer it to show bias What I was going to make clear is -- I see it from that perspective I mean, I've got to decide the case today, so it's not whether they were -- whether OCRM properly made their decision as it relates to today But if you're offering it show bias in their decision-making process, I will -- subject to your response, I'll consider that

MR WALKER We would offer it for that, as well as to show that they had contrary information in

THE COURT All right And that's what this was all referencing

(KDP's Exhibit Number Nineteen was admitted into evidence)

MR WALKER Mr Long -

THE COURT How much longer are you going to be?

MR WALKER Thirty minutes

THE COURT Okay We're going to take a break

(Off the record from 3 44 to 3 55 p m)

THE COURT How late did y'all plan to go today?

MR WALKER I was going to leave it up to Your Honor

THE COURT My law clerk wants to leave around 5 45 and that kind of makes me want to leave around 5 45, too

MR WALKER That's a good reason

THE COURT I can go on without her, if need be, but what's your position?

MR CHANDLER We would certainly like as much time this evening as we can get, so 5 45 works for us

THE COURT Okay

MR WHITFIELD-CARGILE 5 45 sounds good to me, Your Honor

THE COURT All right We'll do it around then

All right Proceed

MR -WALKER -- Thank you

Q Mr Long, or Leonard, did the permit application include the frontage of the county park side on the Kiawah River?

A It did

Q What was your intent with respect to PRC's application? Did you intend to take care of their bank?

A What we agreed to do, informally really, just a conversation with the PRC was we would -- if they would forego and actually withdraw the permit application that they had made, which we didn't really know anything about until they made it, and let us come up with one solution, that we would pay for the one solution that would be submitted to serve the park erosion problem, as well We would pay for the plans and submittal and anything else to do with the application, not the actual revetment

Q There, of course, has been plenty of discussion about the potential houses that could be built on the spit

A Yeah

Q What do you envision with regard to the

structures that would be there?

A That they would be modest sizes, like we've -- done in many subdivisions at Kiawah on parcels much smaller, much smaller than this That they would -- for example, we sort of pioneered low square footage caps, like 3500 to 4500 size homes so people don't have McMansions moving in next to them in most of our best subdivisions, limiting the square footage of an outbuilding to maybe a thousand or 1500 feet, depending on the size of the main building So I would say that the houses on the spit would be studied and appropriately capped to be cottages, you might say, on the ocean We're not in the business of allowing people to injure a neighborhood's ambiance with tall or too big or ugly structures It just ruins everybody else's appeal for a place and so why do it We didn't

Q I want to go back to comment letters, since this was an ongoing process When you learned of a comment letter that raised a particular concern, how would you respond?

A We tried to, as proper as possible, to have a report prepared if it was a technical,

engineering or coastal engineering or whatever, plovers -- we tried to prepare a report with a recognized scientist and have it submitted to OCRM and the Corps

Q For instance, was there any concern expressed by the Town of Seabrook Island or the Seabrook Island POA about the effects of the revetment?

A Yes They put in the hopper, you might say, at the Corps and OCRM early on in the application period, early '08, a letter of concern And they were concerned about whether or not the revetment, if implemented and permitted and constructed, would injure their beachfront, retarding any sand that might otherwise drift down and so forth And their engineer and our engineer submitted reports on that

Q Can you think of any major concern where you did not attempt to address it in that fashion, that if you couldn't address it, getting a qualified consultant to do so?

A Every concern letter that came in we -- from anybody, that had -- was a new issue, that had substance in our view of any material degree, we tried to respond to

Q I'm going to ask you to turn to Exhibit

Twenty-one Are you familiar with Exhibit Twenty-one?

A I recollect it

Q Did you receive it?

A I did

MR WALKER Your Honor --

A It withdraws a nationwide permit that had been earlier granted by the Corps and it was dated July 14th, I believe, 2008

MR WALKER Exhibit Twenty-one is a letter to Leonard Long from Richard Jordan, III, of the Corps We offer it into evidence

MR CHANDLER No objection We've already let the other Corps letter in, the one revoking it, we might as well

THE COURT It was for a limited purpose, but I guess for along the same path

Mr Whitfield-Cargile?

MR WHITFIELD-CARGILE No objection, Your Honor

THE COURT It's admitted

MR WALKER Thank you

(KDP's Exhibit Number Twenty-one was admitted into evidence)

Q What did you learn the Army Corps had done in this letter? By virtue of this letter, what

did you learn had happened?

A Well, that letter speaks for itself, but it says that they received some information from U S Fish & Wildlife, that the undertaking that we were proposing, quote, "may impact a threatened species, mainly the piping plover," that the critical habitat of that species might also be destroyed or adversely modified and as a result, they were going to suspend the permit date they had issued until they could gather more information, basically

Q Did the permit stay suspended?

A No, it didn't It was reissued in August or September by the Corps of Engineers

Q May I direct your attention to Exhibit Thirty-seven

A (Witness complies)

Q That's another letter to you from Jordan at the Army Corps It looks like it was dated September 9, received by OCRM on September 10 Did you receive this letter?

A Yes You said Thirty-seven, right?

Q Yes

A All right

MR WALKER We'd offer this letter from the Army

MR WALKER All right

MR WHITFIELD-CARGILE Your Honor, I'd like to lodge an additional objection as to relevance as to -- if he's offering it to prove -- to show what happened with the nationwide permit, none of that is relevant That's an entirely different process The validity of the Corps' --

THE COURT You know what? The problem with that is the ship's done sailed, because a while ago, you didn't object to it coming in for those purposes and this is just a further document relating to the initial offering for which you never made an objection to on notice, inquiry and the like

So you've -- once you've gone down that path and allowed evidence in that regard, this further explains the evidence down the path

So I overrule that objection

As for the ultimate purposes, I'm not making a ruling at this point in time

MR WALKER All right

(KDP's Exhibit Number Thirty-seven was admitted into evidence)

Q Mr Long, in early September, did you yourself

write a letter to Bill Eiser at OCRM?

A I did

Q Explaining certain things to him to make sure he understood what you were intending?

A I did

Q This is Exhibit Thirty-three Would you turn to Exhibit Thirty-three?

A (Witness complies) I got it

Q Is that a copy of the letter that you sent to Bill Eiser dated September 3?

A It is

Q And what do you cover in this letter? What are the subjects?

A I was clarifying the information that -- and confirming the information that we believed to that point in time we had provided Mr Eiser responsive, as I said earlier, to some comments from agencies and individuals, reaffirming that the erosion was getting worse, had been going on for years, that the dirt was falling into the river, along with the trees and bushes We were very concerned We couldn't understand, as I told Mr Eiser, the delays and delays and delays

He told me on a phone call and he said in a

number of pieces of correspondence that the decision would be like Friday or Monday Sometimes he'd say Monday Never happened That went on almost six or eight, ten times starting in July -- June

Q Did you also comment in the paragraph at the bottom of the first page about the revetment itself, the type of revetment?

A I did And I mentioned that, as he knew, I believe, that they were of the type used at Kiawah, that they had been successful, that it was a comprehensive solution to allow marsh grass to grow through it and to provide habitat, additional habitat Got no response

MR WALKER Your Honor, we would offer Mr Long's letter of September 3, 2008, into evidence to Bill Eiser, project manager at OCRM

MR CHANDLER Your Honor, we would object, except as to -- I mean, consistent with the earlier rulings about using it for notice purposes

THE COURT All right Mr Whitfield-Cargile?

MR WHITFIELD-CARGILE I would object to the extent it gives expert opinion I don't think Mr Long as has been qualified as an expert, but, otherwise -- and I haven't had a chance to

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see what portions of it would give an expert opinion

THE COURT I think that's kind of like inversely saying what Mr Chandler just said

MR WHITFIELD-CARGILE It could be, Your Honor

MR CHANDLER I think it's consistent I was kind of using some shorthand since we've been through this drill before

THE COURT Yeah Okay Any response?

MR WALKER I would also add that their whole position is there are adverse cumulative impacts OCRM's further position is that we didn't tell them what we were doing, "Well, you didn't tell us what you were going to do out there," and this goes to both We're saying there are no adverse effects, because the fact we're creating habitats --

THE COURT Is that the position that you're taking, Mr Whitfield-Cargile, that you were not informed? That since the Department was not informed, that's why this permit should be denied?

MR WHITFIELD-CARGILE No, Your Honor The Department was informed that there were plans to develop the upland property for up to 50

residential units We weren't given any development plans There was no -- we weren't given any basis to provide any kind of comprehensive review, Your Honor, but there was information as to what future development would be

THE COURT Is that a position you're taking here as to why the permit should be denied?

MR WHITFIELD-CARGILE The lack of -- it -- yeah, throughout the whole application process, their attempts to piecemeal the project and limit the comprehensive review the Department could do so that they could say, "Well, you don't have a basis for saying that there's going to be cumulative impacts " Yeah, that's relevant

THE COURT Mr Chandler, it seems like he's worked your objection out of here by his response, if you will You've successfully made it relevant

MR WHITFIELD-CARGILE I don't think that this letter has any probative value in that regard, though, Your Honor

MR CHANDLER Yeah I mean, I don't see anything in this letter that provides that kind of information I think we're talking about

different topic

THE COURT Okay

MR CHANDLER There are statements made in here by this witness that are hearsay or beyond his expertise But, I mean, it's one thing -- I mean, KRA has -- KDP has gone back and forth On one hand they say, "You cannot look at the impacts of the development " On the other hand they say, "If you don't give us this revetment, you're taking our property because we plan to build some development out there "

They say -- even though they say they're going to build some development out there, they say, "We don't have a development plan, so you can't look at that, take it into account " It's sort of been a push-pull kind of thing

"We're going to take -- we're going to use that argument when it suits us and when it doesn't suit us, we're going to take that argument back and tell you you can't look at it "

And so the fact that they said, "In general, we're going to plan to build up to 50 houses out there, and that's why we've got to have this thing," OCRM did the best they could with limited information If they had come in

showing where the roads are going to go, where the houses are going to go so a full assessment could have been made, then it wouldn't have been piecemeal application

THE COURT Okay Can you respond to what -- because I don't have the letter in front of me -- what the letter references, the subjects to which you think are admissible?

MR WALKER Mr Long is saying about the revetment -- it's the bottom of page one -- "The current plan is the most innovative and comprehensive revetment we've designed Innovative because of the way it allows marsh grass to grow through and partially screen the structural members while also providing much additional habitat "

So he is saying that it's not going to have an adverse effect It's going to enhance habitat and he comes back at the end of the letter, as well, and says, "Those moves, as well as the far-reaching master plan, which we're working on with a number of experts and scientists, will enhance, restore, and enlarge the amount of habitat available for a variety of birds and animals on Captain Sam's "

He doesn't have to be an expert to say that he's creating habitat

And that goes to the cumulative impacts that they constantly are arguing

MR WHITFIELD-CARGILE Your Honor, I would disagree that he doesn't have to be an expert to say that he's creating habitat

THE COURT I'm going to let the exhibit in for notice and inquiry in that area

What exhibit number was that?

MR WALKER I'm sorry, this was Exhibit Thirty-three

THE COURT Oh, okay

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

Q Leonard, I don't believe you had finished commenting on this letter

A Right

THE WITNESS Your Honor, we said several things in the letter that go to the plan

A plan, by the way, that was being thought about by our team

We have 500 employees at Kiawah

We have a lot of them devoted to development planning, still

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being obviously attended to in a big way
But in this letter, what we said was, all but
30 acres will one day be placed under a no
development, quote, end quote, conservation
easement with the Kiawah Conservancy, and then
granted subject to that easement to the
community association as pure greenspace
These moves, as well as the far-reaching master
plan, which we're working on with a number of
experts and scientists will enhance, restore,
and enlarge the amount of habitat available for
a variety of birds and animals
Now, at no time ever did we have any idea --
this goes to the motion in limine, maybe --
that we were supposed to come forward and give
them a master plan in connection with a
revetment

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

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

They just didn't answer it

Q Was there a -- did you, in fact, have a lot layout or anything to that effect for what you might be doing at Captain Sam's?

A We had a like almost preschematic thing that Mark, our land planner -- and before we came to Kiawah had been Kiawah's land planner for many years, Mark Permar -- that we had used in connection with the development agreement in 2005 That might have been enhanced, improved, you might say

We could have -- we probably could have taken two or three weeks, a month, month and a half max, and given them, I am sure, all the information they -- to their heart's content And they -- you know, we had no idea that you had to plan 150 acres to get a revetment It's never been the case for any revetment permit we've ever asked for or any permit

Q Even though you did not have a diagram to show the location of lots, would you have been able to respond to particular questions dealing with the qualitative aspects or particular development techniques that would have been used?

A Absolutely Because, as I alluded to earlier, Captain Sam's --

MR WHITFIELD-CARGILE Object, Your Honor This is all speculation He said they don't have a plan

THE WITNESS Qualitative aspects, I can respond to, Your Honor We have a game plan at Kiawah of how we develop extra sensitive areas on water, which is -- Kiawah, Your Honor, has almost 70 miles of perimeter water frontage It also has a number of islands that are only reachable by causeways and bridges

THE COURT All right Rephrase the question

Q Mr Long, would you please tell us about the qualitative aspects of the development that will occur on Captain Sam's when it does?

A Yes It will be -- as envisioned by the development agreement, it will be of limited numbers, with special provisions, such as the use of pervious materials for roadways, driveways It will be sensitively done It will be within the forest canopy, generally, as we've done on the other nine miles of Kiawah We will observe every regulation, as we've always done

We have gotten something like almost 500 permits in 22 years and never had a violation, never had a fine or a work stoppage from OCRM or the Corps or anybody else We'd be in compliance with the law We are adamant -- if somebody violates the law on our team, they're probably done That will not happen It has never happened

And so careful stewardship, observing the law that OCRM -- if we have any wetlands -- there aren't any to my eye, but if there are some wetlands, we will get the permits for it or apply for it If we have to get the docks, we'll get those

Every -- the road requires a permit because of the potential for runoff We know that That's one of the reasons why we haven't applied for it yet We'll get that permit, just like all the other roads that go through little tiny areas of marsh to get to islands now It will be qualitatively, I am sure, just as well done as anything we've ever done and as I said, we've complied such that we've never had a violation

Q You have mentioned certain areas where there's

causeways and small fingers Have you had any problems with OCRM dealing with buffers or any other type of permit violations on those sensitive areas?

A Never In fact, what we've generally done -- I haven't checked it in the last year or two, but when I was day to day on oversight of development, which was most of this time, we would take the OCRM setbacks from, say, the critical line on creeks and go farther for setbacks It's self-imposed setbacks, just to make sure they wouldn't come out and say that we did something wrong

Q Do you have a lot layout plan now?

A We have a -- no, but we have a schematic that, as I said earlier, might be called a "preschematic" that Mr Permar has done We've exhibited that to the other side in this case

Q Who prepared that?

A Mark Permar It was based on the habitats that are on the spit of land and a lot of other considerations, such as what's the most sensitive, what's the least He's an architect and a land planner for 40 years

Q If there is a development of limited

residential single-family on Captain Sam's, will there be public utility?

A It will be private utilities There'll be water and sewer and, you know, media and other lines to serve, underground, as required by the code over there at Kiawah and --

Q Will there be wells?

A There will be no wells, no septic tanks

Q Will there be septic tanks?

A No, no We've never had a subdivision ever with a septic tank or a well

Q Will you allow -- do you control the ARB?

A We do We're appointed --

Q Will the ARB allow random cutting of vegetation?

A No We fine people on a regular basis when we learn of it And I think the island's property owners are to be applauded because they are with us We don't get all the -- maybe not even most of the plaudits for that The island's property owners have bought into the concept that man is existing with nature at Kiawah in a very unusual, maybe unique for our coast, manner

Q Do you, as a developer, based on what you know

in your experience, just doing what you do day to day, do you foresee adverse impacts from what you're going to do at Captain Sam's?

A I don't 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

Q What is the primary season they spend there?

A Well, there's a couple of holidays in which they are there Christmas and the Fourth of July, otherwise, they'll just pick a couple of weeks here and there that they're allowed off from their, you know, employment, et cetera Usually about six or seven weeks is what the average homeowner or 89 percent of our homeowners being second homeowners will spend at Kiawah

Q Is there a difference between the island

population in the middle of summer and the middle of winter?

A Definitely Being that it's a second home community, they're there much more during the summer, not all at the same time, but pieces of the summer

Particularly, we're gone unusually and not -- we didn't envision this, but our average age of our buyers has gone down to in the high 40's rather than the mid 50's When we started out, we thought it'd be just the reverse So we have people with children much more often now than ten, 15 years ago

Q Let me ask you about the use of the beach Do the people on the island use the beach?

A They do

Q Have you had -- do you ever go down to the beach yourself to see what's going on?

A Oh, of course, and --

Q Have you been down to the area around Captain Sam's Spit where the county park has its walkover to the beach?

A I've been plenty of times

Q All right Is there anything on that beach that prohibits persons coming from the east or

the north going down to Captain Sam's peninsula?

A No People ride their bikes, they walk, they jog, they fish, they go up and down the entire length of the beach They don't like it when the wind's blowing one direction, maybe it's tough to get home or whatever, but up and down one of the prettiest beaches there is

Q Are there bike rentals on Kiawah?

A There are There's four or five different companies including the resort, but -- the Kiawah Island resort, which is a separate entity that owns the hotel and the public golf

Q Are the bicyclists, if they have the appropriate bike, allowed on the beach?

A Absolutely And we have generally estimated about 5,000 to 6,000 people per day are at the beach during the summer months

Q Based on what you have observed as far as populations and the island in general and seasonal shifts, do you anticipate that they're going to be a lot of people on the beach from these 50 houses?

A First of all, we sell homesites, we don't build houses And our average build-out, from sell

of the homesite to building, is usually three to four years before people actually build.

THE WITNESS We don't release much property per year, Your Honor It might be surprising to some people, but we only release about 20 to 30 homesites a year and usually at different price points and different locations

I can't see, even if we say -- decided this was a 40-lot subdivision on Captain Sam's, releasing more than six or eight at the most per year That would be very unusual to release more than six or eight in any one locale It would be very atypical of our 20-year record of releasing property

So if you consider that and you consider the time it takes to finally build houses, to build 40 houses would probably take 20 to 30 years Even if you had them all today, two and half people were there six weeks a year -- per house, six weeks a year is not much of an impact, compared to, say, the 50,000 visitors right next door at the park or five or 6,000 visitors up and down the beach from the existing 4500 property owners That's how many property owners there are I think there's

3500 dwellings of one type or another condos, houses, villas

Q Back in 1975, when you mentioned this PDD was adopted, was there a projection in it of when build-out would occur?

A Man, I'm sorry, I can't remember

Q I'll move on, I'm sorry

A Can't remember

Q Let's go to Captain Sam's, again

A Well, I'll tell you what The cap was 7500 in the PDD There only could be 7500 sales of some type of housing We've gotten that lowered to where the max is going to end up being about 4500, I think Mark can tell you better

Q Is --

A Excuse me, it's going to be about 5,000 -- yeah, about 500 left at Kiawah at the most Probably closer to 350 at the end of the day

Q How much of Captain Sam's peninsula, that over mile-long peninsula, is public land and how much is private land?

A Well, all the land below the mean high watermark in South Carolina is public Nobody at Kiawah, like any island, interferes with

somebody if they go above the mean high water line, but that's the line where the State owns below and they entrust it to the town and to agencies such as OCRM to monitor the land below mean high

Q The interior that we've seen in these magnificent shots of Captain Sam's, who owns the interior of Captain Sam's, the dune ridges and everything to the critical line?

A KDP II

Q Has that ever in any way been dedicated to the public?

A Never has It's never been part of the park and nobody could possibly think otherwise That doesn't mean that there isn't the occasional person who goes up there We haven't stopped people from going on inland properties, forested properties or Captain Sam's in innocent ways They've set no fires that we know of and other things, so -- but it's our land and everybody knows it

Q Leonard, I'm looking at one of the comment letters and it raises another question Did KDP believe that it was asking for a revetment of excessive length?

A No It was asking for a revetment to cover -- approximately coterminous with the erosion

Q Based on --

A Could I just qualify that, slightly? It might go "X" feet, a few feet past the erosion, because we were informed if you don't that it could -- if you stop short of the erosion, that it will just continue on down the edge of the river

Q Leonard, did you, in conjunction with Ray Pantlik, put together some additional letters to OCRM that specifically responded to particular regulations --

A Yes

Q -- such as cumulative impacts?

A We did

Q Would you please turn to Exhibit Thirty-nine?

A (Witness complies)

Q And while you're looking at that, let me ask you, did you authorize the delivery to OCRM of the reports that had been done by Drs Oertel and Basco?

A I did

Q Why did you authorize that?

A Well, because Dr Oertel, in particular, had

addressed the issues raised to OCRM by people who were commenting, such as, the Town of Seabrook was concerned about the sand moving down the river and onto their beach and there was a concern about whether the inlet would be impacted by the revetment The plover had arisen and there was concern about that and so we wanted to address it in various ways

Q Did you think that information was important in assessing the effects?

A I did I mean, it was interesting and useful and actually reassuring to us to know that we weren't going to be impacting Seabrook We try to cooperate in many different ways with Seabrook

THE WITNESS The plover -- there's 3300 feet, Your Honor, from the end of the revetment to where the plovers come to Kiawah most

Q Are you referring to the inlet by "banks," the inlet?

A They're down at the end of Captain Sam's by and large Not that there isn't the occasional plover that wanders the beach at the park, for example, or other places But the main sightings on the -- all the data we have -- and

the town monitors it -- is that the revetment is 3300 feet away from where the plovers conDougate at the beach

THE WITNESS They stay on the hard sand, Your Honor --

MR WHITFIELD-CARGILE Your Honor, I'm going to object --

MR WALKER That's fine We got it

MR WHITFIELD-CARGILE -- to that testimony as far as potential impacts on plovers This witness hasn't been noticed as an expert and

THE COURT He's not testifying as an expert, he's testifying as facts I'll overrule objection

Q Now, going back to the letter of September 18 that's marked as Exhibit Thirty-nine that was written by Ray Pantlik to Bill Eiser, did you review that before it went out?

A Yes, I did

Q In your estimation, did it fairly and adequately address your position with respect to whether there were adverse cumulative effects?

A Well, we hoped it did As I said, there was no -- unlike almost every other permit, there was no back and forth There was no effort by

OCRM to have a dialogue, to be collaborative, to be polite, even They just never acknowledged anything And I don't understand it to this day

Q Well, on the second page of this letter, which is Bates 204, there's a portion of the letter that responds to Regulation 30-11(C)(2) about whether a plan can be submitted together and evaluated as a whole rather than submitted piecemeal

A Right

Q Did you consider that your revetment application was a piecemeal application?

A No We certainly tried to show the entire revetment and we did And we didn't piecemeal anything And if they had thought we had, they could have said so, but they never did

Q To your knowledge, did anybody with OCRM during this permitting process get back to you to say, "It's submitted piecemeal and we need something else to make it whole"?

A No As I have said several times, they never got back to us to say anything, other than they -- they did tell us a couple of times, "Well, we'll get the decision next week Next

Monday looks like a pretty good day Maybe Tuesday "

MR WALKER Your Honor, we would offer Exhibit Thirty-nine into evidence, which is Mr Pantlik's letter of September 18

MR CHANDLER Your Honor, again, same objection we had to these other letters If it's offered simply for notice, you know, same deal as before

MR WHITFIELD-CARGILE Yeah I would object, same grounds, and it's replete with expert opinions, the guy that -- opinions of guy that wasn't noticed as an expert So I don't think it's admissible on those grounds, either

MR WALKER Again, Your Honor, for the reasons we stated earlier --

THE COURT You're offering it for notice, inquiry and --

MR WALKER Notice, inquiry We gave them information We gave them expert reports

THE COURT It's admitted

MR WALKER They said get back to us and we just don't hear anything

THE COURT It's admitted for those purposes

(KDP's Exhibit Number Thirty-nine was admitted into

evidence)

--Q --What ultimately was the decision of OCRM, Leonard?

A To deny all but 270 feet of the permit, the 270 being, as we understand it, in front of the park land that we own, but which is leased for another 65 years or so to Charleston County, which by an informal agreement allows Charleston County PRC to operate the park for it PRC is a separate legal governmental entity

Q Would you turn to --

A Under that lease, which I reviewed for many years as county attorney, there is no provision that allows it to be moved

Q Would you please to go to Exhibit Forty-four?

A (Witness complies)

Q Do you have that in front of you?

A I do

Q Is this a copy of the permit decision that was provided to Kiawah Development Partners from OCRM dated December 18?

A It is We got it in the mail three or four days after the 18th and learned about the decision, this decision, on the website that

somebody called our attention to
So, again, they didn't call us or write us or,
I mean, e-mail us or anything They put it in
the mail And we found out from somebody at
the League, actually called us, were kind
enough to tell us that we'd been turned down

MR WALKER We would move Exhibit Forty-four, a copy of the conditional permit, into evidence

MR WHITFIELD-CARGILE No objection, Your Honor

MR CHANDLER No objection

THE COURT It's admitted

(KDP's Exhibit Number Forty-four was admitted into evidence)

THE COURT Been a while since we've had a clean one like that

MR WALKER And don't it feel good

Q Leonard, if you would go down to the description of the project as authorized Do you see that in the middle of the page?

A Yes

Q And if you go down to the second paragraph, about halfway through, the Department says, "If issued as requested, the permit will prevent the shoreline movement in an area that historically has seen inlet formation and

facilitate development in a pristine dune area that is currently undeveloped "

Is the area where the development is planned, which is landward of the setback line, a dune area?

A No Well, excuse me --

MR WHITFIELD-CARGILE I'm going to object to that question if he's calling for a legal conclusion of whether or not that meets the definition of dune area under the regulation or under the program document I realize Mr Long is a lawyer, but I still --

Q Well, based on your observation, is the area where the development would go landward of that setback line, which is a considerable distance from the ocean, is it a dune area based on your walking it?

A Well, landward of the setback line is a dune area But we 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 the beach, a little tiny piece of a house, and usually they require vegetation to cover even those things

So we -- here, I know the plan is, and we've shown it, that it will stay in the forested area, almost entirely -- not entirely, but almost entirely

Q Does the permit and the description of the reasons state why OCRM is concerned about -- or explain why OCRM is disapproving development in an area that is behind its setback line that it, itself, set?

A I'm sorry

Q Does it --

A I need you to repeat that I have -- Jimmy and I go back a long way, but I have a problem I can't hear two things at once and he was just whispering, but it's still -- I only can hear you or him, but I can't -- so I apologize

Q Let me start again

MR CHANDLER Sorry

Q Who established the setback line in 1999 that made the land landward of the setback line developable?

A OCRM

Q In this permit decision, it says that the Agency -- one of the reasons it denied it was it would allow development in what it describes

as a "pristine dune area" Is that the same dune area that's behind the setback line they established?

A Right That's the -- that's the area seaward of the setback line that they said in '99 we could build on

Q You said "seaward " Did you mean "landward"?

A I mean landward of '99 -- landward of the setback line in '99 they said was authorized for building

MR WHITFIELD-CARGILE Your Honor, I'm going to object to this constant legal conclusion that the setback line changed in 1999 was the State saying you can build on that I don't think he's qualified -- I don't think that -- that's a decision for the Court to decide And the constant characterization of that is -- I don't think it's admissible, Your Honor

THE COURT Well, the problem you just said is the constant characterization of that Hasn't he already testified to that point already? If he's already testified to that point already and now you're getting around to objecting to it, isn't that --

MR WHITFIELD-CARGILE I don't know that the scope

of the testimony was the same They said that -- earlier they said that's what they understood it to be But what he understands it to be is entirely different from what it is And now they're testifying -- he's testifying and Trenholm's testifying -- Mr Walker is testifying in his questioning that this change of the setback line is the State's authorization of development

That's just an inaccurate legal conclusion and I don't think that by not objecting when he said earlier what he understood it to be that I've waived my objection to them testifying as to what it is

THE COURT Mr Walker, any response?

MR WALKER I think we've gone into it enough I'll move on I think it's clear

THE COURT Okay All right

Q Why has KDP appealed the determination, the final decision to deny the revetment except for the 270 feet?

A Because the erosion is continuing and because it's so persistent Apparently, it's been going on for decades and it's been exacerbated in the last decade and particularly in the last

few years It's not going to stop It's not like some process that we can-sort-of-depend on is going to come to a halt

MR WHITFIELD-CARGILE I'm going to object to that and ask that that be stricken He's rendering opinions as to whether or not that erosion is going to stop

Q Based on your personal observation, have you seen anything to indicate the erosion is going to stop?

A No And if you have erosion on the back of -- or front, depending on how you look at it, homesites, your burden of selling that homesite is almost impossible People would think you were a shyster, I'm sure, if you were trying to sell something to them and they wouldn't be stupid enough to buy it from you if they were worried about that erosion which is so dramatic, ten, 12-feet-tall escarpments

MR WHITFIELD-CARGILE Your Honor, I'm going to object to this line of testimony I don't think he's been qualified as an expert in marketing

Q Not going into opinions, what has been your experience based on 20 years about customers

and how they react to different property?

A I've been in charge of marketing for KDP and KRA for 22 years and before that for other entities that did subdivisions of two or 300 homesites in Charleston County that I was a partner in

And marketing is my first love It was the big draw that I really get up in the morning for When I got through practicing law, it was what I really, really liked to do, more than anything I oversee legal, but I'm really involved hands on with marketing and some development activities

So all the media buys, all the -- almost everything that's ever been written about the island in our media and advertising I do Either I do it personally or I edit it

We have an in-house marketing team We didn't want to go to an agency We have about 15 people, generally, now we have 20, and I'm the partner/liaison for that in-house marketing team, as well as the outside agency that places our national media ads

THE COURT In-house marketing team for Kiawah?

THE WITNESS Yes, sir

THE COURT Do you wish to have him qualified as an expert? Apparently, Mr Whitfield-Cargile has an objection if he's not

MR WALKER Well, I would like to -- I have not -- all I want him to say is, based on all his experience doing what he's doing does he think it's marketable

THE COURT Oh, okay

MR WHITFIELD-CARGILE Your Honor, he's rendering an opinion as to the marketability of this -- of a property without a revetment and --

THE COURT Based on his observations?

MR WHITFIELD-CARGILE I'm going to continue to object, Your Honor

THE COURT All right I overrule that

THE WITNESS Can I answer?

MR WALKER Yes

THE WITNESS Your Honor, what I would say is pretty simple and I'm sure it's fairly common sense to everybody I've never seen, first of all -- and I'm familiar with practically every barrier island in this state -- I've never seen a successful subdivision, you might say, oceanfront property, creek side, riverside

property, with significant, continuing decade's long erosion occurring where somebody actually tried to sell and market that property I don't think it's ever happened, but if it has, fine I know it can't happen at Kiawah where we sell high-end buyers who are sophisticated, mostly from the Northeast They're not fools They're very smart They kick every tire And if they have to drive onto Captain Sam's and look down that river and see that escarpment, it's obvious what they're going to think about the property, that it's going to keep moving towards the ocean, just like it's done

Q Has KDP or KRA or one of your affiliated companies or your affiliated companies in the past applied for revetment permits or bulkhead permits from OCRM?

A Yes

Q Have any of them been denied?

A No

Q Did you anticipate that you were going to be denied?

A Not in the slightest It was so obviously occurring and dramatic

Q Is there a mortgage on any part of this

property?

A Yes, there is There's a $50 million mortgage that we took out a couple years ago to the Bank of America, which has been our lead bank for all these years And that shows the level of interest and maybe level of value we placed in -- and the bank placed in the property

Q When the decision came out, what did you do? Was it -- did you authorize an appeal?

A I certainly did

Q That would have been to the DHEC board?

A Yes

Q Did the DHEC board conduct a conference on your appeal?

A They didn't

MR WALKER Your Honor, we have as Exhibit Seventy a copy of the DHEC letter advising that it was not going to conduct a review conference We would offer that in the record It may already be part of the administrative record, I'm not sure, but I wanted to make sure it's in

THE COURT Any objection?

MR CHANDLER It should already be part of the record I understand it has to be attached to the request for contested case hearing, so it's

already going to be part of the hearing record
THE COURT -- Just because it's in our file doesn't -- mean it's in the record
MR CHANDLER Well, I mean, I don't have any objection to it coming in --
MR WHITFIELD-CARGILE No objection
MR CHANDLER -- but it is part of the pleadings, in effect
THE COURT Yeah I think we've got a rule about getting the Department's exhibit in -- or Department's record into evidence Just because it's in the file doesn't mean it's in there So I offer that for your edification All right It's admitted
MR WALKER Thanks
(KDP's Exhibit Number Seventy was admitted into evidence)
MR WALKER Excuse me, Your Honor, just one second
(Off the record)
MR WALKER Your Honor, that's all I have at this time
THE COURT All right
MR CHANDLER Your Honor, could we just take another little short break? I need a personal couple of minutes

THE COURT I will allow you those personal minutes

(Off the record from 5 00 to 5 06 p m)

THE COURT Mr Chandler?

MR CHANDLER Thank you, Your Honor

MR LONG - CROSS-EXAMINATION BY MR CHANDLER

Q Mr Long, were you still practicing law when the Coastal Zone -- when the Coastal Zone Management Act was amended by the enactment of what's known as the Beachfront Management Act?

A What year was that?

Q I believe 1988 and then again in 1989

A I was starting in January of '88 We signed the contract to buy Kiawah and it was impossible to represent clients and still have time to do the due diligence and locate the financing, so I basically was out of the law business

Q Okay You were in the development business at that time As a developer at that time, did you follow the process of implementing the Beachfront Management Act with the drawing of baselines and setback lines on the beach?

A I didn't follow the process of it I think I knew at the time generally what was about to happen as far as the baseline and setback line

I remember they had the regular zones for most of the beach and then the inlet-erosion zones, as I recollect Maybe I don't have the name exactly right

Q Okay Well, I think that certainly "inlet erosion zone" seems to be a correct term Do you know whether this spit, the southern or western edge of Kiawah, was in an inlet erosion zone?

A Well, it's an inlet, so I guess it was, but, again, I don't know if it was I wasn't an expert on the act at the beginning or really now

Q Okay And are you familiar with the portion of the act that sets a setback line or the baseline in an inlet erosion zone on the most landward point of erosion over the last 40 years?

A It's been explained to me by Trenholm that that's the way it is set Every ten years they look back for 40 years for the most landward high tide line, I believe, isn't it? It wasn't erosion They look back at the high tide line, the most landward one

Q Okay And so if at the time they initially

drew these lines it had been less than 40 years from the last breach of this spit, they would have used the historical data from that breach in setting that setback line, wouldn't they?

A I wouldn't know

Q Okay Do you know whether there was a breach of this area in 1949?

A I know that Miles Hayes says there was and others have said that And, you know, a breach, you might want to define it I'm not trying to be semantically difficult, but water from a storm, and no one can apparently document what the storm was or what year it was, '48 or '49, did come over the beach, as it does other beaches from time to time in a serious storm I don't know anything more than that

Q Okay Now -- but -- well, let me just move on A while ago you were talking about the park and I believe your words were something like it was just impossible for anybody to think otherwise than that the spit was always private property and not part of the Beachwalker Park Do you remember saying that?

A I do

Q Okay Would it surprise you that in -- Tim Kana in 1981, when he submitted a report to what was then the South Carolina Coastal Council, called this whole thing Beachwalker Park?

A I guess it would You know, he'd be wrong, but I guess

Q Okay So one of your expert witnesses in this case thought it was Beachwalker Park back at least in 1981

A If that's what he thought 30 years ago, Jimmy, that's what he thought I don't know what document you're referring to

Q Okay And do you know whether Mr Oertel or Basco had referred to one of the benefits of this thing as protecting this area because it's Beachwalker Park?

A I don't really recollect that, but, sure, it would be a benefit to stop the erosion at a public park that serves 50,000 people a year

Q And have you ever heard of Dr Beach?

A I have I saw that -- a newspaper article a while back about somebody that called himself "Dr Beach "

Q Okay And we're not talking about Dana Beach

We're talking about somebody who lives outside of South Carolina and rates the top-ten-beaches in the world, isn't that right?

A Apparently he sets himself up as being sufficiently knowledgeable to do that

Q Okay And he listed Beachwalker Park as one of these top public beaches And have you seen the photograph he uses on his website?

A No

Q All right Would you be surprised that the photograph is of this entire spit?

A I wouldn't be I mean, I guess the rest of the beach is just as good in Dr Beach's opinion

Q Okay But it's not really impossible for somebody to think that, is it?

A No, that was probably an exaggeration Excuse me

Q Okay All right Now, how many lots did you say that KDP or KRA have in inventory, not counting what might be planned for this spit?

A I don't think I said they have an inventory I think that we, at the most, might have 350 homesites left to sell from various locales around Kiawah, but Mark Permar is really the better expert at that We don't -- generally,

if we -- we generally lower the densities as we go along and so what we look at one day is 500, sometimes it's 400

Q Okay And I think did you say that y'all turn loose or put up for sell somewhere around 20 lots a year?

A We do Some years it's been ten or 12, other years it's been 28 or 30

Q Okay Now, when Seabrook Island came in and applied for a permit to cut through this spit to move the inlet north, were you involved in that at all, personally?

A No

Q Okay Have you ever gone back and looked at any of the documents relating to the permits for that activity?

A To the permits for it?

Q Yes, sir

A I don't think so, but I may have I don't remember seeing the permit documents

Q Okay

A You're talking about in '95?

Q Well, they did it in '95, they also did it in the early '80's, didn't they?

A Yeah I think it was '83 or '84, but I

didn't --

Q Okay They originally applied for it in '81, so the permit's got an '81 date, but it might have been '83 or '84 before they actually did the project?

A Right We came along in '88 and I don't -- I'm sure I didn't see either one, but -- I might have just glanced at it, but I don't remember

Q Okay And at that point, they came along and when they did that, they cut a new channel, a new inlet, that came across this spit, didn't it?

A Came across the very tip of what was then the western end of Captain Sam's 14 years ago

Q Okay And the argument that Seabrook made in that case was that, "All we're doing is recreating what's going to happen naturally, anyhow This inlet's going to move back in some storm " Isn't that the justification they offered?

A No, I don't think they said any such thing But, again, I don't know what they said because, as I told you a minute ago, I wasn't familiar with that

Q Okay Now, what dates are -- I think you said

Beachwalker Park is open for Memorial Day, which would be around the end of May, right?

A Yeah, I believe so, in early June

Q Through Labor Day?

A Yeah, absent special events

Q Okay Do you have any knowledge of whether or not that is the season during which piping plovers are at Kiawah?

A I'm not an expert, but what I've picked up is that they have been sighted according to the town's reports starting in July, but that they go all the way until a little bit into the following year They do that every year

Q Okay

A They might be more prevalent in other months I don't know

Q All right Fair enough Now, did I understand you correctly to say that the decision was made that although there have been some recommendations about changing the design of the revetment, the decision is that we'll leave the permitting design as is and we'll come back later and make some adjustments if it doesn't work in some places?

A Well, that decision was taken in the spring

when we expected to have that Monday decision, that Tuesday decision, and it was because we had confidence in Thomas & Hutton, because we felt like at time, at least, that we were going to get a permit, that we would work out any details of, say, the bulkhead part, meld it to the ground level and other things, as well as the hot spots we might have -- as we learned in April or May from the report of Dr Oertel -- might have some places that we would want to lengthen it farther down into the creek and if we could get permission to do that after observing it and monitoring it for a few years and seeing if maybe it was needed, we'd do it with a new permit, if we had to, or informally if we didn't

Q Okay Now, the area where this spit is at its narrowest point and the area from there to the southern or western end of where you want to build the revetment and maybe a few hundred feet -- would it be that east or north of the narrowest point in that -- would you agree with me that that's a pretty sandy beach along in there?

A No Kiawah is all sandy soils, I mean, front

to back, east to west, but it's not a beach in any normal sense of "beach "

Q Okay Is it sand? Is the surface there -- when the tide is out, can you pull up and walk on sand?

A Well, yes I mean, you don't walk on anything but sand at Kiawah Island It's all there is But the beach, quote, end quote, which is not a beach in my estimation, is like ten feet between the high and low tide

Q Okay But as it exists right now, somebody who's got a little John boat or they've got a canoe or a kayak, they can go out there at low tide and they can pull up and they don't have to worry about damaging their vessel by coming up there They're going to come up to a soft surface, aren't they?

A They are

Q And their kids can jump out and run around barefooted out there, can't they?

A I suppose they could

Q Okay These pictures that were put into evidence as part of Exhibit Number Six, can you imagine any kids running around barefooted on these rocks?

A Well, the rocks to the left, Jimmy, are not the number 0124 are not the articulated concrete block They're the ones to the right side of that paragraph and they're in 0125

Q Okay And when you go over to 0125 and you see those rocks, can you imagine any kids or me or you or anybody running around on that barefooted?

A Jimmy, I don't think people would run around on it, but the point is to grow -- as we can show you in other pictures that will come in evidence, I hope, as recently as yesterday, how this marsh grass completely takes over where you can't even see -- these are a very new revetment -- where you can't even see the blocks And it'd be like pulling up your boat into marsh rather than onto what you characterized as a beach or sand

Q Okay So it's going to change the nature of any public use to that area

A It's going to change the nature, but it will hopefully improve it both in appearance and habitat and it will stop the severe erosion which is allowing upland, which is just as valuable as lowland, to fall into the river

every day
Q Okay Now -- I mean, if it ends up looking like the picture that is part of that Exhibit Six, that is KDP0342, and it grows a bunch of oyster beds, you're certainly not going to be able to get out and run around on that one barefooted, either, are you?
A Well, you couldn't go in any oyster beds in South Carolina and, you know, run around, that'd be the answer If they happen to grow on the articulated block down near low tide, which is the only place they're going to grow, no, you wouldn't But there's thousands of other beds in South Carolina you wouldn't run around on It's just -- I mean, that's where oysters like to grow So it's helping the oysters but it might not help the kid who wants to run around barefoot everywhere
Q Right And around Kiawah, you've got a lot of creeks with a lot of oysters
A We do
Q In fact, I think we were in a legal proceeding once in which our experts said they were the nicest oysters he's ever found in the State of South Carolina

A I think he might have said that, but I don't recollect

Q Okay

A You'd know better than me

Q And those are all good things if that's what you want is oysters Do you know how many miles of shoreline around that area are lined with oysters or Spartina marsh?

A I don't

Q Do you know many miles of the shoreline there provides a sandy beach, however narrow, that would allow people to get out and actually walk around just for the heck of it, not with boots to go pick oysters?

A I wouldn't know

Q All right It wouldn't be much, would it?

A I wouldn't ever call that beach In all my years of being around creeks and rivers, I've never called that land "beach "

Q Okay Well, we may have a difference here Now, are you aware of the provision in the Coastal Zone Management Act that provides for special permits to construct houses seaward of the setback line and, perhaps, even seaward of the baseline?

A I'm really not That's nothing that we've ever done or asked to do ----------

Q Okay So when you talked about not having a right to do any development out there prior to 1999, you weren't thinking about the process of applying for a special permit

A Well, no As I understood it, the setback line didn't cover any of the -- and the baseline didn't cover any of the spit until 1999

Q Okay Now, has KRA or KDP put an irrigation line down to the spit?

A No

Q Okay There's not a PVC pipe running down there?

A There was a thought to plant some pine trees on our highland

Q Uh-huh (affirmatively responds)

A And I think a storm came along or something and we sort of abandon it and got involved in other things So we were thinking about drilling a well, but we never did

Q Okay So if there's still some PVC pipe running out there across some of the dunes, that's been abandoned?

A I don't believe it's in the dunes It might

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be, but -- I last saw it along the forested area

MR CHANDLER Okay Beg the Court's indulgence for a moment

Q Now, Mr Long, when KRA entered into the agreement to buy this -- to buy basically up all of Kiawah that hadn't been already sold off to people as condominiums or lots, were you aware of the mid seventies Environmental Inventory that had been prepared by the Kuwaiti company?

A Was I aware of it in '88?

Q Yes

A Yes

Q Okay And you were aware of the fact that certain areas were designated in that report as unstable areas and there were recommendations that houses should not be built in those areas?

A I was

Q Okay And one of those areas was down where the Ocean Course was built and were talking about that those would be good areas to build things like golf courses so we didn't have residences down there that would be threatened Do you remember that?

A I do, but I also remember that the so-called -- unstable areas have grown so much that our highest-end subdivisions and most expensive homes were built all along the beach in what Miles Hayes described then almost 40 years ago as unstable

Q Okay Have you had to go in and do any renourishment at the Ocean Course?

A We didn't have to We don't own the Ocean Course, but the owner of the resort that owns the Ocean Course applied for and was given a permit by OCRM to renourish a length of dunes in front of the Ocean Course

Q Okay

A It worked And then the problem was the bar at the Eastern end of the island had not broken off And when it finally broke off, it let a lot of sand come down the beach and that cured it

Q But at least at one point the 18th hole at the Ocean Course was threatened enough that the owner came in and got a permit to do renourishment

A He did

Q Okay As part of your marketing analysis for

a development of the spit, have you taken a look at what kind of prices you would put on those lots?

A No

Q Okay You filed a takings claim against the State of South Carolina in the Court of Common Pleas?

A We did

Q Okay And in that case, you're asking for judgment in the amount of $100 million?

A Minimum of 100 million

Q How did you arrive at that figure?

A Trenholm said we had to name a number under some rule and we guesstimated that if we maxed at 50 homesites, which certainly is not a decision -- as I said, we almost always go lower density than allowed -- in fact, always, I'd say

The homesites on the ocean and the homesites on the river we guesstimated to average around three million, maybe more, maybe less given this crazy economy, and we just grabbed a number and then went below that for the purposes of the lawsuit But an MAI appraisal, et cetera, would have to get a number that made

some sense from the market, which has been volatile, to say the least

Q Okay Well, 50 lots at $3 million is going to be $150 million Are you figuring about $50 million in development costs?

A No, I really wasn't I just arbitrarily lowered it with Trenholm's advice to a number that's at a minimum of a hundred and we'd figure out -- if we had to go to trial, we'd get it formally appraised by a couple of appraisers and go through the exercise of development costs, land cost, planning cost, everything else, provision of utilities and whatnot

Q Okay Now, has KDP or KRA engaged the services of a geologist or other expert to go back and determine whether or not the pattern of buildup, extension and then breach, that's happened over the last 350 years, have you had anybody go back and look and say that something has changed and that's not going to happen again?

A Tim Kana will be our expert on that We feel like he's the leading expert in this part of the county and we've engaged him recently to

be -- to testify to that exact point
Q Okay And so he's going to say-that-he doesn't think that's going to happen again
A He sees nothing cyclical, nothing regular, nothing that portends the suggestion you just made or that Miles made 40 years ago You know, the spit is enormously bigger Even the decision by OCRM said the whole island has grown out a quarter of the mile into the Atlantic Ocean from where it was in 1974
Q Okay I mean, but are you aware of fact that Dr Kana in his own reports for the 1981 permit and for 1991 permit went through and said that that cycle has been demonstrated to come in 40- to 80-year cycles for the last 300 years?
A I wouldn't be aware of that I'm sure if he said that you'll be anxious to use that But I don't think he said that
Q Okay Now, as a marketing matter, you're worried that people are going to get out there on that narrow point and they, in turn, are going to be worried
A It's 1400 feet wide and it's almost 500 feet at its narrowest, so it's not terribly narrow We've developed spits of land and islands of

land that are 150 to 300 feet wide over and over and over with great success, bordering on all sides by water

Q Okay But it's got a pinch point that you said is something less than a hundred feet

A About four or five hundred feet Four or five hundred feet

Q Four or five hundred feet at the narrowest point?

A Between the high tide line and the high tide line The problem in this case, which you know as well I do, is that the corridor to get there in which to put a legal road at Kiawah Island is narrowing because the setback line on the ocean is practically static irrespective of the enormous accretion on the beach And the critical line on the river is moving towards the ocean And the difference between those two lines is 66 feet It was 90 feet just two years ago, three years ago, so it's dropped by a third

And OCRM knows perfectly well that what they're doing is they're delaying us until that narrows and it becomes impossible to get legal access to this land, even though it's much wider

than --
MR WHITFIELD-CARGILE I'd ask that that last statement about what OCRM knows be stricken That's pure speculation, Your Honor
THE COURT I'll sustain that objection
Q Now, you talked about the setback line being practically static But --
A It is
Q -- it's moved tremendously in the time since you've purchased this property, hadn't it?
A Well, there's only been a setback line in '99 You're talking about generally for Kiawah or the spit?
Q The spit
A Well, it's only -- the first one was 1999
Q Okay Well, there was before but it just cut it off back there at the spit, didn't it?
A Well, there wasn't one It just went across the spit to the river
Q Exactly
A So there wasn't one
Q Because that was the farthest point of erosion in the last 40 years
A I can't tell you what the State considered, but you might

Q Okay But you just said that customers are going to worry about this narrow area

A They're going to worry about the -- no, I didn't I said they're going to worry about the 2700 feet of erosion, that absent a bulkhead/revetment type structure is going to continue and I think it would injure your ability to sell tremendously

Q Okay Now, if those customers saw the reports that Dr Kana and others put together in years past, they might worry about something else, wouldn't they?

A I wouldn't know what reports you're referring to And I just know what he testified to last Friday and what we talked to him about in our office and it's 100 percent reassuring and I'd like them to see what his current data is today, not 30 years ago in some report you're referring to

Q Okay All right Well, we'll have those other reports But, basically, your feeling is you want to build this revetment to give your potential customers some reassurance

A I want to build a revetment to stop the erosion of our highland, which is so unnecessary, to

see good land being wasted every day and allowed to just slough off into the river And, secondly, we'd like to develop the property and you can't do that particularly unless you can retard obvious and lengthy and persistent erosion And, third, you have to understand that we have to get there We can't get there legally unless the line -- the distance between the critical line and the setback line is sufficient to put a road and utilities

Q Okay You can put your utilities within the road right-of-way, aren't you?

A Yes

Q And a road right-of-way is typically 50 feet

A Yes

Q So you've got at least 50 feet to go in there and build a road and have the right-of-way to put the utilities in

A Today, if we had a permit, you'd better believe we'd be out there putting that road in and utilities

Q Okay And the beach side is building up, isn't it?

A It is

Q And so setback lines and baselines are adjusted every five years or so, aren't they?

A Every ten years

Q Every ten years So that's going to be adjusted outward, too, isn't it?

A Yeah, it will In ten more years, it might move, like it did this time, like three feet

Q Okay Well, it's going to -- we're going to bring these people in and we're going to give them a sense of security Now, where is it you want to build this structure? Do you want to build it on your property?

A The revetment?

Q Yes, sir

A I want to build it in what's called the "critical area," as you know

Q And the critical area is owned by who?

A The State of South Carolina, the same area that has been allowed by the General Assembly to be available for docks and revetments and bulkheads and dozens of other uses

Q Okay And it's an area that is considered to be part of the public trust

A It is

Q And the State holds title in trust for the

people

A It does

Q Okay And

MR CHANDLER That's all I got

THE COURT I don't ımagıne you're goıng to get through ın ten mınutes

MR WHITFIELD-CARGILE Your Honor, I thınk you know that I won't, as much as I'd love to

THE COURT Okay Well, then, let's just break for the day Is ıt too early to get back at 9 00?

MR CHANDLER Let's do ıt

MS ARMSTRONG 9 00 ıs fıne wıth us

MR WALKER That's fıne

THE COURT He was just shakıng hıs head I saıd, "Is ıt too early to get back at 9 00?"

MR WALKER No

THE COURT I dıdn't see -- I saw theır --

MR WALKER Oh, I'm sorry, I was ın the mode of agreeıng, but I was dısagreeıng

THE COURT Oh, okay

MR WALKER I agree that we can get back by 9 00

THE COURT Okay All rıght Is that okay?

MS ARMSTRONG That's fıne, Your Honor

MR WHITFIELD-CARGILE No problem, Your Honor

THE COURT Okay See you at 9 00

MR WALKER Thank you, Your Honor

(The proceedings adjourned at 5 37 p m —and reconvened Tuesday, August 25, 2009, at 9 00 a m as follows)

THE COURT All right Mr Long, you're still under oath

THE WITNESS Yes, sir

MR LONG - CROSS-EXAMINATION BY MR WHITFIELD-CARGILE

Q Mr Long, you testified yesterday that you've never had a permit denied -- or a revetment denied Do you recall that?

A I do I don't believe we have

Q Have you ever applied for a revetment that was 2,783 feet long?

A Never

Q Have you ever applied for a revetment greater than 2,000 feet?

A No

Q Have you ever applied for one greater than 1500 feet?

A I think that the longest one was probably seven or 800 feet

Q Seven or 800 feet?

A I can't remember

Q And this one's over three times that?
A I think that's the math, yes
Q Do you have the exhibit notebook?
A I don't
Q Here you go
A All right
Q Thanks Can we look at Exhibit Four?
A (Witness complies) Okay
Q And if you look at Bates stamped 869 of that --
A (Witness complies)
Q -- you can see sand -- this was taken -- where was this taken?
A I'm getting to the page, just a second
Q Sure
A This was taken at Captain Sam's from the air, probably from a helicopter, at the far western end
Q This is the far western end of the spit?
A Yeah
Q And if you look down there, you can see sand, a sandy beach along that, or a sandy riverbank along the river all the way from the end of the spit, is that right?
A Are you talking about 0869?
Q 0869 If you look along that riverbank where

the revetment would go, you can see the white sand -- you can see the sand all the way from here, can't you? All the way from the end of the spit?

A I can see a line that's probably about a thirty-second or a sixty-fourth of an inch, maybe, in width that probably is sand

Q And it's distinct from the characteristics that you can see on the opposite bank where it is marsh?

A Yes

Q Okay

A But I wouldn't call it a "beach" I'd call it a "shoreline "

Q And this large aerial -- not large aerial, but this aerial of the entire island --

A Right

Q -- if you look on that, you can't -- how many -- well, look at the end of the spit You can see the sand from the sky, right?

A I can see the end of the spit Is that what you're asking me?

Q Look at where the neck is where the revetment is going to go

A Right

Q You can see the sandy shore from the sky, right, of the river?

A I can't really

Q Okay Do you have -- you're wearing glasses Are those your good glasses?

A You know what, they're good glasses but they're not good eyes I'm a little old, but I don't think I really see a sandy shore, but --

Q Okay Do you see a lighter shore than all the other shores along the Kiawah River?

A Slightly, yes

Q This shore is unique in that there's no marsh along it, right?

A Well, there's no marsh until you get to the last 2,000 feet

Q Well, right where the revetment is going to go, there's no marsh

A No, there's no marsh today

Q Okay But most of the Kiawah River has marsh on either side of it Would you agree with that?

A It has marsh, although there is a, you know, dark soil, pluff muddy oyster banks in places, piece of dirt between the marsh and the water

Q Do people walk on dark, sandy pluff mud with

oyster beds on them?

A Only if you're collecting oysters or you're just looking for shells

Q Let's flip to Exhibit Five These are the pictures, if I recall yesterday, you said show the severity of the erosion, right?

A Right

Q Do you know where the first page of this was taken, 563?

A It appears, as I said yesterday, to be taken from somewhere along the parking lot because of the fence on the left is the sand fence of the parking lot

Q Okay So that's right there at the parking lot?

A It's somewhere in the parking lot

Q 564, the next page, that's also the parking lot, right?

A I believe so Well, I don't know, but it's certainly PRC's property

Q Well, it's got that sand fence on it, right?

A Yes

Q And that's indicative of -- the only place we know that to be is at the parking lot, right?

A Yes

Q The same fence?
A Yes
Q Okay
A Although, I think it's actually proud or forward of the parking lot, as well
Q And if you look just past the parking lot, the sand fence, it's marsh, right?
A Yes
Q And that marsh line is the end of -- just above the end of the parking lot, right?
A Yes
Q Okay So we can use that as a landmark point of reference as we look through these photos, right?
A Okay
Q So 564 is at the parking lot 565
A Yes
Q Same sand fence?
A Yes
Q Parking lot?
A Well, the same fence
Q That's it And near the parking lot, correct?
A Yes
Q Do you know where 566 was taken?
A It was probably taken a little bit farther

west

Q Well, if you look down, you can see the bend in the neck farther on up, right?

A Right So I'm thinking it's a little farther west than the previous ones

Q Okay Do you know -- that tree that's fallen down, is that right there near the parking lot?

A Well

Q You've been to the site

A I have, but I don't recall if it's by the parking lot or a little bit little forward of the parking lot, but it's certainly near it

Q Okay 567, parking lot, right?

A I believe so

Q That's the top end of the sandy shoreline where it goes to marsh

A Probably

Q That's that point of reference we talked about, right?

A Yes

Q Okay 568

A Right

Q You can see the bend in the neck down in the distance if you look to the west, right?

A You can, yes

Q So that indicates we're right there near the parking lot, right?

A We're probably leaving the parking lot

Q Okay 569

A Right

Q You can still see that same sand fence and that same point of reference That's right there at the parking lot, isn't it?

A Right

Q 570, that's right there -- same picture, right there at the parking lot, right?

A I believe so

Q Okay 571, do you know where that is?

A Can't say I do

Q There's no point of reference, is there?

A I don't see one

Q Okay 572, no point of reference

A No It's somewhere when it straightens out, but I don't -- you know, around the bend to the west, but I don't know where on the curve it is

Q Well, if you look down towards the west in that picture, you can see it's starting to -- you still can't really see a bend, can you?

A Not totally It looks like it's curving to the

right

Q This is probably right there at the parking lot, isn't it?

A I really don't think so, but it might be

Q 573, we don't have a point of reference

A No

Q You can't even see erosion in that, can we?

A (No response)

Q It's just a picture of a tree

A It just looks like a tree that's fallen

Q 574, you can see that same point of reference where the marsh ends in the front of the parking lot, right?

A Right

Q This is right there near the parking lot, isn't it?

A It probably is, Davis, yes

Q Okay 575, don't know where it is No point of reference

A Not sure where it is

Q 576, you can see that same point of reference we were talking about This might be -- this is right near the parking lot, too, right?

A This looks to be as you look -- this looks to be coming on around the bend, probably past the

parking lot

Q Okay A little bit farther to the west of the parking lot?

A Yes

Q Okay In the immediate foreground, you don't have the same sharp scarp line as you do getting a little past towards the parking lot, do you?

A Well, I can't see everything to the right, but the scarp just down the creek there is very steep

Q Just down the creek there in front of the parking lot?

A Yes

Q Okay 577, that's the same picture we were just looking at, isn't it?

A It seems to be slightly different but it's generally the same

Q Well, it doesn't show that same -- in the immediate foreground, which is beyond the parking lot, it doesn't show that same scarp that's directly in front of the parking lot, does it?

A It's essentially the same picture

Q Okay 578, no point of reference Don't know

where it was taken

A -- I don't

Q 579, no point of reference

A It's certainly along the river, if that's what you're questioning, but 579 is, again, part of the escarpment that's caused -- but I don't know exactly where

Q Don't know where on that shoreline it's taken

A Not exactly

Q No point of reference 580, no point of reference

A Is that a question? I mean, are you testifying?

Q You don't know where 580 was taken, do you?

A Not exactly, but it's certainly along the river where the erosion is occurring

Q But we don't know where on that river it was taken

A Exactly, no, I don't

Q Okay 581, we're back to that same point of reference right there in front of the parking lot, right?

A Back at the end again, yes

Q Okay 582 --

A Yes

Q -- that's in front of the parking lot You can see that sand fence and the gate, right?

A Exactly It's somewhere near the parking lot

Q 583, parking lot, right?

A Yes

Q 584, parking lot, right?

A Seems to be, yes

Q 585 --

A Yes

Q -- parking lot

A Well -- or perhaps past it I'm not sure

Q Okay 586, parking lot

A Right

Q 587, parking lot

A Right

THE COURT Are we getting close to the end on this?

MR WHITFIELD-CARGILE We're done with all these, Your Honor

THE COURT Okay

Q So all these photos in Exhibit Five which show the severe erosion are right there at the parking lot

A No, they're not right there I think I said some of them were past the parking lot and some are on the bend, beginning to go around the

bend

Q All the ones that have a point of-reference on them are taken at the parking lot, correct?

A Well, all the ones that have a fence, if that's what you're talking about as the point of reference, yes, but --

Q Well, let me ask you --

A They're obviously connected up going around the bend from the PRC property

Q Well, show me which one that is beyond the end of the parking lot

A (No response)

Q We just walked through every single one of them and the only ones that had a point of reference you said are at the parking lot, right?

A You asked me did I know exactly where it was and I don't, but I can tell you they're all taken along the edge of the escarpment leading along PRC's property and then -- which we own, but it's leased -- and then past that going west around the curve And I didn't know exactly where they were or exactly where the line was between the leased property and ours, but I knew they were along the river edge

Q Okay The Department issued a permit, correct?

A They did
Q And we authorized a revetment in front of the parking lot
A You did
Q Where you have pictures to show that there is severe erosion
A Yes
Q Okay Let's look at Exhibit Six for a minute Flip to page 125, second page of this
A (Witness complies)
Q You see the first row of blocks on the river separating from the ones prior to that?
A The first row blocks closest to the water?
Q Yes
A Yes
Q So there's a big -- a wide crack in between one row of concrete blocks and the next ones, right?
A I'm not sure there is Where are you talking -- oh, you mean between the first row that's linearly along the river and between that and another row?
Q Yes, yes
A Yes, there is
Q Okay And you can see that same thing in page

380, correct?

A Yes

Q Okay Do you think that's hazardous if somebody's going to try to walk on that?

A That's not ours and that's somewhere else on Daniel Island or somewhere

Q I realize that But I'm asking you do you think it's hazardous for somebody to walk on that You think they might twist their ankle?

A I guess they could maybe if they weren't real careful

Q Well, if there's marsh growing up all through that, they wouldn't even be able to see that big crack, will they?

A Well, if they were laid like this, yes, they probably would not be able to see the crack

Q You said, "If they're laid like this, you're not going to be able to see the crack "

A Right

Q On yours -- how differently are yours going to be laid?

A That's not something I know about All I know, Davis, is we try to use best practices and --

Q Do you know who built this one?

A I don't know who built this one

Q Do you know who gave you these photos?
A Thomas & Hutton Engineers, I believe----------
Q And those are the folks that's going to build yours?
A They are designing ours, but I don't know that they designed this one
Q Let's talk about your design for a minute You said in your letter, which is Exhibit Number --
MR WHITFIELD-CARGILE Beg the Court's indulgence for just a moment
Q -- Thirty-three, I believe Let me look to see if that's right
A Exhibit Thirty-three?
Q Yeah In Exhibit Thirty-three you stated that, in the second paragraph, KDP took over the expenses so that one comprehensive solution and one type of engineering approach to prevent them from being stopped So you're advertising this to the Department as a comprehensive erosion control structure, right?
A I was telling the Department the reason why we asked PRC to withdraw its permit application from another engineering firm, and they did, and they allowed us to put in one solution and, of course, your client decided to piecemeal the

result by only issuing the permit for the PRC

Q And Exhibit Eighteen -- let me make sure -- give me a second

MR WHITFIELD-CARGILE Bear with me just a moment, please

Q Turn to Exhibit Thirty-nine

A (Witness complies) Can I read this for a second?

Q Sure

A (Reading)

MR WHITFIELD-CARGILE Your Honor, while he's reading that, I'm going to have the court reporter mark this, if that's okay

(Off the record)

THE WITNESS I saw this again What's your question?

Q Okay In Exhibit Thirty-nine, which is a letter from Ray Pantlik to the Department, you testified about this yesterday, and this is where he attempts to persuade the Department that y'all aren't piecemealing your approach, right?

A He suggested that we're in compliance with the regulations that counsels against piecemeal

approaches to things like revetments

Q Yet on the second page of that, -- that's marked 204, with a big, bold line where he says, "(C)(2), where applicable, the extent to which the overall plan, design of the project can be submitted to together " He quotes the regulation and then he attempts to address why this is not piecemealing, correct?

A Yes

Q Okay Right next to you is Exhibit Twenty?

A Right next to me is Exhibit Twenty?

Q On the ledge there, sir

A (Witness complies) All right

Q This is a document entitled -- on the front page it's "Riverbank Protection Advice Based on Field and Model Studies," right?

A Yes

Q And if you flip to page six of that, he's got design modifications that they're recommending This is your own expert, right, who prepared this?

A It's one of our experts

Q Oertel and Basco?

A Dr Oertel

Q Okay It's by Oertel and Basco on the front

page, is it not?

A Yeah I think this part had to do with Dr Oertel, but go forward

Q And they recommend increasing the width of the mattress from 40 to 60 feet and to install training jetties, the first two bullets under PowerPoint slide number three, right?

A Right

Q But you haven't --

A I suggested that yesterday that they did and that was April, it was barely three months after our application, and we considered their recommendations for the increase in the mattress at the hot spots and the training jetties and rejected the latter and said as to the former we would take the advice of Thomas & Hutton, which are more the mechanics, you might say, of revetments because they do them for a living and that was to monitor the situation for a few years and decide if the hot spots needed to be shortened, lengthened, widened or whatever They're -- it's just like anything else You have to make slight modifications and adjustments We didn't want to do the training jetties, nor did Thomas &

Hutton advise us to

Q Your experts advised you to ——

A One of our experts did We have several people that we employ

Q Well, that exhibit, Exhibit Twenty, if you look on the front page is prepared by Oertel and Basco, right?

A It was

Q Okay You said that -- yesterday, you said you didn't want to apply for the training jetties, will increase the size, because you expected the permit any day or decision any day

A We did There was a 30-day window We were already three months into it and we expected to hear any day We wanted to go ahead and hopefully get the permit, meet with OCRM, discuss any modifications before going to final working drawings, biddable drawings, which is the typical approach of OCRM for all these years that we've been dealing with them, and then move forward and build it And if we needed to enlarge the width of the mattress, then or later, we would do it If we had to get a permit or go through that extra step to simply enlarge a piece of the mat at a hot spot

later on we would, if they would allow us to do it without that step, we would

Q Mr Long, your permit wasn't complete until -- your application wasn't complete until late May, was it?

A The application was complete in our view Your people take the view that every little tiny bit of paperwork has to be in the file before they will consider it and they were extra strict this time for reasons that have been atypical

Q Well, the Department notified you in May or in June -- let me see here

MR WHITFIELD-CARGILE Beg the Court's indulgence for just a moment, Your Honor

Q May 23rd they requested additional information from you, correct?

A Can you show me the exhibit?

Q Absolutely

(Off the record)

MR WHITFIELD-CARGILE Mark this Exhibit Four, please

THE WITNESS Is it in --

MR WHITFIELD-CARGILE It's not in your folder

Q Mr Long, if you'd flip to the -- one, two, three -- fifth page of this

A (Witness complies)
Q On May 23rd, your ---
A I'm sorry, the fifth page in?
Q Yes It's a letter dated May 23rd
A Okay
Q That's not it Go one more Go one more
A Patrick Rogers?
Q Yeah, go to the next one, unless I stapled those out of order Here we go
A To Thomas & Hutton?
Q Yeah, May 23rd
A Yes
Q Thomas & Hutton was your agent, that's stipulated to
A Yes
Q Bill Eiser notified you that your permit was -- application was incomplete May 23rd
A (Reading) I don't see where he said it was incomplete, Davis, but I --
Q He's requesting information, isn't he?
A You're talking about he requested a copy of the affidavit of publication, maybe?
Q Yeah
A Yes
Q And then, if you go back one page --

A The matter had been published -- there had been public notice by you, your client -- The matter had been published in the newspaper and the engineers got this letter that said please submit basically the proof of the newspaper publication, which everybody knew had occurred, and then he canceled the whole application because we were 60 days late or something --

Q So June --

A -- giving the affidavit of publication

Q On June 25th, you were notified that the application was canceled, right?

A We were Well, I don't know the date it was, honestly

Q If you go to the page before, it's the one we were just looking at --

THE COURT Where I can be clear, you were setting forth your explanation of the application being canceled?

THE WITNESS Yes, sir

THE COURT Were you expressing that that was unwarranted?

THE WITNESS Yes, sir, it was It was ultimately reversed by the counsel for DHEC when she saw what the staff had done

THE COURT Okay So it was -- explain that to me so I can understand

THE WITNESS What happened was, you apply and then you have a public notice placed by OCRM, apparently And we have to publish -- or our engineers have to publish in the newspaper the notice that we've applied for a certain type of permit and where it is and whatnot And that was done

And the young man apparently at Thomas & Hutton in charge of following up and sending the publication affidavit from the newspaper did not send it until six days after Mr Eiser said it had to be due, even though that's not a regulation that required it to be done or the application would be thrown out And, yet, he did cancel the whole application and we had to go down --

THE COURT Who is "he"?

THE WITNESS Bill Eiser, who is the -- he is the project director for OCRM --

THE COURT Okay

THE WITNESS -- canceled it entirely and so we were back to square one in his view We pointed out to the general counsel for OCRM and his

assistant that that was not correct, that neither should not have been canceled, the -- whole application should not have been canceled, as Mr Eiser had done or attempted to do, and it was totally reinstated

THE COURT Okay

Q And if you look at the fifth page -- and I was wrong earlier when I said the fifth page was the May 23rd letter, that was the seventh page The fifth page of Exhibit Four, dated July 17th, and that's notifying that the permit has been reactivated

A Yes

Q And that's well after this period in the spring when you said you were expecting a decision any day or the next week, right?

A We expected it in the spring that we would have gotten an answer We thought 30 days meant 30 days and we were wrong It meant nine months

Q That's not what I'm asking I'm saying, in July it was reactivated, well after the spring when you said you were expecting a decision any day

A That was well after the spring when I said that, yes

Q Okay And after this period you said you're presenting a comprehensive solution, right?
A We presented a comprehensive solution initially when we filed for the permit for the entire 2700 feet
Q Well, let's talk about that How did you come up with 2,783 feet?
A I didn't, but the engineers measured, along with surveying people and the soils people, everything they could, in their view, need to measure to measure the erosion and the cause of the erosion and whatnot and came up with a solution they thought would solve the problem I am so unleft-brained If you ask me any of those scientific questions, I'll have no chance at it
Q Okay
A But we have some people here who can do it
Q Well, in November 2007, your expert, Dr Oertel, recommended 1,000 feet of riverbank protection
MR WALKER Your Honor, Mr Whitfield-Cargile appears to be reading from an exhibit Could we ask him to present it to the witness?
MR WHITFIELD-CARGILE I'm not reading from the

exhibit
MR WALKER Because it isn't something that was -- prepared by the witness, it was prepared by somebody else, and he appears to be referring to a document
THE COURT I don't think the rules require -- is there a Rule of Evidence that requires that if he asks a question he must show the document to the witness first?
MR WALKER I think he's asking -- I think what his question was --
MR WHITFIELD-CARGILE I'll rephrase the question, Your Honor
MR WALKER All right
THE COURT I mean, I would say, as far as expert witnesses, you're going to have plenty of opportunity, I assume down the road, to cross-examine them
MR WHITFIELD-CARGILE I'm not going to assume anything, with all respect, Your Honor I'm not sure who he's going to call
THE COURT Well
Q Mr Long, do you recall in November 2007 being advised by your expert to develop -- that y'all would develop a conceptual plan for a thousand

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feet of riverbank protection?

A I don't

Q Okay Do you recall in February Mr Walker authorizing Patrick and George Oertel -- Patrick Rogers and George Oertel to design a structure for 2100 linear feet of riverbank protection?

A Is that a question?

Q Yeah Do you recall that?

A Honestly, I don't I'll tell you the way it works is that Trenholm, because he's had legal implications dealing with an Agency, and the engineers and surveyors and other experts that we called in on coastal processes, they and our director of development, who's an engineer, Ray Pantlik, would meet and they -- they were studying it right along for a great number of months before we filed in February of '08 and I was not at most of those meetings I tried to only come to the decision meetings, you might say, you know, whether to file for a permit on a certain basis or not, whether to ask for training jetties or not

Q So it was all just strategic decisions not to apply for a comprehensive solution?

A I don't follow you, Davis

Q Let's talk about the -- you said that the 2005 development agreement sets forth the standards and shows that y'all do any development in an environmentally sensitive manner yesterday Do you recall that?

A It suggests in certain language that the subdivision known as Captain Sam's, where they allowed up to 50 homesites on 20 acres, that it would be done in an environmentally sensitive manner

Q Okay And that was what the evidence you submitted indicating that y'all would -- that any development would be in an environmentally sensitive manner, is that right?

A That's right

Q Okay Let's talk about the 1994 development agreement What uses did it authorize?

A Well, it authorized mostly residential, some commercial, some mixed use

Q Let me back up What uses did it authorize on Captain Sam's Spit?

A Two uses were authorized there Of course, at that time there was no -- there was no setback line established by the State, so you couldn't

build residentially

Q What two uses were authorized?

A On the western roughly half of Captain Sam's, we asked for and the town agreed to give us the right to convey that to the community association as greenspace one day, and on the eastern half that we could sell it for park purposes to, for example, Charleston County PRC or other park entities or

Q So your 1994 development agreement limited it to park space and greenspace?

A For the most part I think Mark Permar is the best answer of that '94 agreement, but that's pretty close

Q Okay And that was in 1994?

A Yes

Q Okay And 11 years later, you got a new development agreement --

A (Nods head affirmatively)

Q -- allowing residential development?

A We did

Q Okay But you want us to rely on the current residential -- or the current development agreement as your environmental standards and what's going to bind you to that

A Well, that's the only one that applies

Q Okay So we know development agreements can change, right?

A We do

Q Okay We talked about the setback lines You're aware -- or are you aware that the Department's required to revise the setbacks lines every ten years?

A I am so aware, yes

Q And are you aware that there's a specific formula that they're required to use?

A I know that there is a formula depending on where you are on the beachfront

Q And do you agree that the existence of setback lines themselves don't authorize construction?

A What they authorize is construction subject to the local zoning

Q The setback line is just a line in the sand that shows where the landward-most point of the shoreline over the last 40 years, right?

MR WALKER Objection That's an incorrect statement of law

A No, that's not correct

THE COURT Well, also, he's asking for a legal conclusion, I think

MR WHITFIELD-CARGILE Okay I'll move on then, Your Honor

Q But yesterday you made a big deal out of the fact that no one at Kiawah requested that those lines be changed Do you remember that?

A I said nobody with KDP did

Q That nobody with KDP did And you kind of made a big deal out of that, that OCRM just offered that to you But the statute requires --

A I didn't know I was making a big deal out of it, but I certainly thought it was relevant, but go ahead

Q But the statute requires them to do that and requires them to follow a formula, right?

A Well, they didn't do it in any years before that when they were changing the lines All of a sudden they had a setback line for a mile and a third of property that had never had one, so that was a little different

Q Let's look at the development agreement for a minute Is one of the reasons -- what you said yesterday that -- let me back up You said yesterday that the road and any utilities would be private?

A Yes, they would

Q Okay But in the development agreement on page --

MS ARMSTRONG Two

Q -- Exhibit Two

A Could you refresh my memory on what exhibit number that was?

Q Exhibit Two

A All right What page?

Q Page 22 It's Bates stamped 072

A Okay

Q The third paragraph on that page envisions that the roadway and utilities will be transferred to the Kiawah Island Community Association, right?

A Can I just read it for a second? (Reading) You are talking about the third paragraph on 0072?

Q Yeah

A It talks about the conveyance of the property and the assurance to the community association about the right-of-way

Q Uh-huh (affirmatively responds)

A And what's your question? I'm sorry

Q Before those -- before that roadway and the right-of-way can be transferred to the

community association, you've got to get a certification from a licensed civil engineer with 20 years experience in South Carolina coastal development that it won't be unreasonably subject to tidal erosion from the Kiawah River, right?

A Right

Q So the purpose of this revetment is to help facilitate getting that certification, right?

A Among other things

Q Okay So that y'all won't have to be -- so that KDP won't have to be responsible for the roadway

A No, I don't know that we'd be responsible or not, but we'd transfer roads and infrastructure as we build them out in each subdivision and we'd transfer them to the community association, which then maintains them And we've never -- we've never agreed to do what this says, but we were willing to do it here because there was concern about the river erosion that everybody could see And so we said that we would make sure we got this assurance from an engineer to the community association and if there were a problem, I

wouldn't say that we would -- we weren't getting indemnified or anything like that -- We may still have some liability if something happened, as might the engineer, I suppose

Q But the plan is that KDP is not going to maintain any roadway out there

A We don't maintain roads We put in the capital to build the roads, water, sewer and other utilities --

Q Okay

A -- and we warrant them or get warrantees from the contracting companies and pass those along

Q You said yesterday that y'all are going to -- under the development agreement, you're required to only develop 20 out of the 150 acres of upland?

A Right

Q But there's only 31 acres of upland that's developable, according to your testimony yesterday, right?

A Well, today, there's actually about 35 acres that could be developed that's between the setback line and the critical line and otherwise available for development

Q So in 2005, y'all amended the development

agreement because more acreage came in behind the setback line, is that right?

MR WALKER Object to the form of the question That's an inaccurate statement of both the facts and there's no evidence to that effect

Q You said the reason --

THE COURT He can ask the question

MR WALKER It assumes facts that are not only not in evidence but they're wrong

THE COURT Well, he didn't say "you said" or the "evidence said " He's asking the question I overrule that

THE WITNESS Could you rephrase -- could you just repeat the question, I'm sorry?

Q Well, you said that -- you testified that --

THE COURT Well --

MR WHITFIELD-CARGILE I'm asking the question

THE COURT -- now you're telling him "you testified" --

MR WHITFIELD-CARGILE Well, I'm asking him --

THE COURT Okay You're moving

THE WITNESS Want her to read it?

MR WHITFIELD-CARGILE No, I'll rephrase it

Q In 2005, y'all changed the development agreement based in part because more land came in behind the setback line, right?
A There had been accretion, but mainly the change was that there had been authorization by reason of there being a setback line
Q Because the setback line previously ended right there at the neck of the spit at Beachwalker Park
A It did
Q And then when they revised in 1999, it extended farther down the spit --
A All the way --
Q -- because it got rid of the 1949 shoreline
A It went all the way to the end of the spit
Q Okay And so you got some -- you got land behind the setback line, so you amended the development agreement
A Well, it wasn't quite like that, but, yes, it occurred that we ended up getting an amendment to the development agreement in exchange for other things that we gave up to the town
Q And the beach is accreting on the front, right?
A It is
Q So, in ten years, it's likely that the setback

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line can move seaward, and you could gain additional acreage, right?

A We may gain a few feet This time, despite the accretion from '99 to 2009 and despite all the years of steady accretion, the setback line moved like three feet

Q Has the Department actually finalized the decision on that?

A No

Q Okay

A But they've told us, you know, informally, unofficially it's going to be about, I don't know, three feet, maybe three and a half

Q But you don't know that

A (Shakes head negatively)

Q Okay Every ten years they're going to revise that setback line

A They do

Q And if it keeps accreting, you could gain additional acreage behind the setback line, right?

A If we still have a development agreement and KDP is still around and they move it more than a few feet like it is this time, you know, yeah, everything will be lined up perfect

Q So are you going to amend the development agreement then, too?

A The develop agreement will be over, unless we get it extended

Q Okay Have you calculated the economic benefit of the revetment?

A No

Q So we don't know what the economic benefit of the revetment is?

A I haven't calculated it

Q Okay Have you had anybody calculate it?

A No

Q Okay You said you had a $50 million mortgage on the property?

A Yes

Q When did you get that mortgage?

A In '06 or '07

Q '06 or '07? Is there an agreement with the bank about what the money can be used for, the $50 million?

A I don't remember if the -- there was a loan agreement and I didn't handle the loan transaction, as I think you know from our deposition, but we used it, in fact, for our investments in St Kitts in the Carribean

Q Okay So the mortgage on this property is funding development in St Kitts

A Yes

Q Okay Is the bank asking you to get this revetment?

A No The bank's had no comments on the revetment

Q If that note gets foreclosed on -- well, if that property get foreclosed on, is the bank going to have the same environmental sensitivity as KDP?

A I don't know

Q Okay And as far as economic return from the revetment itself -- you were at Mark Permar's deposition, right?

A No, I wasn't

Q Were you not? Okay Well, I'm going to represent to you that he testified that they really don't know if any houses will ever be built out there

A He doesn't know if any houses are going to be built out there?

Q Right And I'm paraphrasing

A Okay

Q Do you know if any houses are going to be built

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out there?

-- A -- On Captain Sam's?

Q Yes

A If we get the revetment and can stabilize that erosional shoreline, I'd hope the market would be such that we could introduce some homesites We -- other people build the houses

Q Okay The denial of the 2,513 feet of revetment itself isn't prohibiting you from developing the spit, though, is it?

A Yes, it is

Q There's a law that says you can't develop that spit without a revetment on it?

A No, there's not a law There's common sense There's market place interaction There's reticence of buyers who look at 2700 feet or 2400 feet of eroding shoreline for 20 to 40, 50 years and say that'd probably be a good place for me to buy a homesite

Q So your marketing folks are telling you you have to have a revetment out there?

A I believe it and our president of our real estate company believes it and all of our marketing people we've consulted -- it's almost self-evident and probably is self-evident

Q You don't think that revetment's going to stop a breach during a major storm, do you?

A I wouldn't know if it could stop a breach

Q We talked about this being a "top ten beach" according to Dr Beach?

A Yeah

Q And you weren't familiar with the photo that he has on the website --

A No, I wasn't

Q -- showing the whole spit? Do you think this would still be a "top ten beach" if there's a 2700-foot revetment right there at that parking lot? That whole shoreline --

A He was referring to the beach, not the river

Q Well, you get to Beachwalker Park by going through the parking lot, right?

A You do

Q And if you look out there and there's 2700 feet of concrete block sitting on that shore, do you think that's still a "top ten beach"?

A Well, that's not a beach The shoreline is not the beach And I don't think you're going to look out and see that If you'll see the pictures that will be introduced, then you will see that it becomes impossible to see the

concrete after a couple of years

Q Well, the exhibits you've shown us in Exhibit Six looks like blocks to me Do you not agree with that?

A Those were done in other places When you see what's at Kiawah, as we'll introduce with other witnesses, you'll see what I mean

Q Look forward to that You said that y'all have a history of reducing the total number of developable lots on the island, right?

A We do

Q Up until 2005, there were zero lots on the spit, right?

A Exactly

Q You didn't reduce that, did you?

A We haven't done anything about those lots The authorization there is up to 50 and we're still at the authorization level We haven't ever topped out, say, 30 or 35, which would be a reduction, obviously, from 50

Q But it would be an increase from zero that was pre 2005, right?

A Pre 2005? I'm sorry, yes, you're right

Q Okay You bought it in 1988?

A Yes

Q And up until 2005 you had no expectation to develop out there, right?

A We didn't

Q Your zoning limited you and your development agreement limited you

A And the State of South Carolina

Q Are you familiar with any areas in South Carolina that are developed without road access?

A Yes

Q Okay You applied for a stormwater permit from the Department, right?

A We did

Q And that's pending for 340-foot sheet pile wall?

A Yes

Q And that's 340 feet that's going to be on the neck of the spit, run parallel to the shore?

A On the upland, no, on the critical area

Q Okay And you only applied for 340 feet, is that right?

A That's right

Q Okay You testified yesterday about dog leash laws and you said that they don't keep dogs on their leashes, right?

A That's been my observation

Q It's been your observation that dog law leashes are generally ineffective, right?

A Well, I think most people let their dogs run loose a bit when they get on the beach --

Q Uh-huh (affirmatively responds)

A -- but maybe some people don't

Q But most people let them run loose

A I would think so

Q You said you had a fellow named Folk submit a letter to the Department to give them notice there wouldn't be any adverse impacts to plovers, or something like Do you remember that yesterday?

A I do

MR WHITFIELD-CARGILE Beg the Court's indulgence for just a moment

THE COURT If you can keep moving, Mr Whitfield-Cargile, it would be appreciated

MR WHITFIELD-CARGILE Yes, Your Honor Can I beg your indulgence for one moment?

Q Do you remember learning that -- well, you haven't retained Dr Folk to testify here, have you?

A I don't believe so

Q You learned that he's not an expert on plovers, didn't you?

A I didn't learn anything but maybe Trenholm worked with him

Q Y'all didn't even consider him an expert, though, did you?

A I did I didn't -- I'm surprised to say he -- to suggest he isn't I thought he was

Q Are you aware of any study comparable to the 1974 Environmental Inventory that takes a cumulative look at and assesses the undeveloped lands on Kiawah Island?

A There was only one time when Kiawah was utterly barren of development and that was in '73 when the study was actually conducted and that's the only one done

Q Okay There's no other in-depth look at Kiawah Island, right?

A Not in terms of what you just asked There's been plenty of studies of the spit and the erosion and we've submitted those to the Department, and plovers and other things, but those studies were piecemeal -- or I should say pinpointed to not Kiawah Island, like you said, but the "spit"

Q But they weren't in-depth studies like the Environmental Inventory was

A I would say they're far more in-depth than the rather cursory treatment that Miles Hayes and his students gave the spit in 1973

Q You hired two what you called "academics"

A Well, they --

Q The question is you hired two academics

A They've been teaching for 35 -- 25 and 35 years, respectively, at Old Dominion They're not in business to design and operate and monitor things like revetments

Q You said yesterday you would gladly show the Department some development plans if they had asked for it

A Be happy to supply them whatever information they wanted Obviously, this is an essential permit We would -- we offered many times to give them any other information they wanted

Q But you don't have any development plans, do you?

A We could have lived with whatever we could put together, as I said, in six or eight weeks of intense study and be willing to live with it had the Department made clear that they wanted

to have a development plan for the entire spit
Q -- Well, it's August --
A And our understanding
MR WALKER Objection, Your Honor He's interrupting Mr Long before he finishes his explanation
MR WHITFIELD-CARGILE I apologize
A Our understanding, Davis, was that the project was the revetment Your director and your executive project director -- your project director and his superior both said in their depositions that the project is the revetment And with that in mind, we studied the revetment and tried to give information on the revetment
Q You said yesterday you would gladly show them details of this development
A Would be happy to Had they even, you know, like subliminally even told us they wanted to know about the development that was occurring landward of the revetment project
Q But you don't have any plans, do you?
A We could have developed -- we certainly have a lot of staff members We have several engineers, architects, land planners, people that we can engage We would have had whatever

the Department wanted had they asked

Q It's August 2009, right? -- - ———————— —- —

A It is

Q Still no plans

A We have not put together the plans We've -- the time to put those together and submit is over

Q Didn't you testify at your deposition that the spit's pristine?

A It's pristine in the sense, as I told you then, that there are no manmade structures or impediments or changes to the lay of the land that I know of

Q So would you call it "pristine and unfamiliar with human development, human improvements"?

A Unfamiliar with what now?

Q Unfamiliar with human improvements, the spit itself?

A The spit has no human improvements on it that I know of

MR WHITFIELD-CARGILE Okay I don't have any further questions

THE COURT Redirect

MR LONG - REDIRECT EXAMINATION BY MR WALKER

Q Mr Long, you were asked about developing

Captain Sam's basically as an island without road access Is the Town -- is Captain Sam's within the municipal limits of the town?

A It is

Q What is the town?

A The Town of Kiawah Island, South Carolina

Q Does the town have a subdivision ordinance?

A It does

Q Does it have a road code?

A Yes

Q Based on your working knowledge of the governing ordinances, would it be possible to have a subdivision on Captain Sam's if it was separated by a body of water without a road?

A I don't think so You'd have to have a bridge and, obviously, if we can't even get a road and a revetment, we're never going to get a bridge permit

Q Is that because those ordinances require that there be access for emergency vehicles --

A Yes

Q -- in subdivided areas?

A It does

MR WALKER That's all I have, Your Honor

THE COURT On those questions alone

MR CHANDLER Nothing

MR LONG---RECROSS-EXAMINATION BY MR - WHITFIELD-CARGILE

Q Mr Long, you testified yesterday that the Kiawah requires a 50-foot road access -- road right-of-way, rather

A The road code specifies a 50-foot minimum in almost all places

Q But you testified or Mark Permar testified that y'all have got an agreement where you don't have to have a 50-foot right-of-way, is that right?

A We can lessen the right-of-way It's not optimal for a lot of reasons that I'll be happy to tell you

Q What can you lessen it to?

A I think the pavement can go down to 16 or 18 feet and the right-of-way -- I don't recall, but the right-of-way would include utilities, landscaping, signage, safety measures, places where you can, you know, get off the road just a bit if there's somebody approaching in the wrong lane

Q You don't need a big wide highway going out to up to 50 houses

A No We wouldn't want to have that

MR WHITFIELD-CARGILE Okay No further questions

THE COURT You may step down

(Witness excused)

MR WALKER Your Honor, before we call the next witness, I would like to get back to the Court about the exchanges we had yesterday over certain exhibits, including letters from the Army Corps of Engineers --

THE COURT Yeah

MR WALKER -- that were informing all the --

THE COURT Well, I just sent my law clerk out to get a -- I've got a two-volume set on McCormick

MR WALKER All right

THE COURT And apparently she can't find it because she's not back yet

MR WALKER Well, why don't I just wait Why don't we do this, Your Honor --

THE COURT There you go

MR WALKER I don't want to jump the gun, but I do want to come back to this issue about those exhibits And if you're ready to go, we can talk about them now or we can talk about them after the next witness, whatever's your

whatever you want to do
THE COURT Well, you can introduce the evidence and I'll just do the same thing If you introduce the testimony --
MR WALKER All right
THE COURT -- we'll introduce it subject to that determination
MR WALKER Thank you, Your Honor
THE COURT We did that in a recent case Were y'all in that case?
MR CHANDLER I think so, Your Honor
THE COURT Okay I think you were the one doing that, weren't you?
MR CHANDLER Yes, sir I was handling that witness
THE COURT All right With that said --
MS ARMSTRONG Your Honor, may we take a five-minute break? Is that all right?
THE COURT All right
(Off the record from 10 03 to 10 15 a m)
MR HOWE Call Mark Permar
MR WHITFIELD-CARGILE Your Honor, before we continue with him, I've neglected to admit Exhibit Twenty, my Exhibit Twenty, and at this time I would do that