

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Docket No 09-ALJ-07 00029-CC

Kiawah Development Partners, II,

Respondent,

v

South Carolina Department of Health and Environmental Control,

Appellant

Docket No 09-ALJ-07-00039-CC

South Carolina Coastal Conservation League,

Appellant,

v

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

Of Whom

South Carolina Department of Health and Environmental Control is,

Appellant,

and Kiawah Development Partners, II, is,

Respondent

RECORD ON APPEAL
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1 WILLIAM EISER, having been duly sworn, examines and

-- 2- testifies as follows --

3 MR EISER - DIRECT EXAMINATION BY MR

4 WHITFIELD-CARGILE

5 Q Mr Eiser, what's your full name?

6 A It's William Eiser The last name is spelled
7 is E-I-S-E-R

8 Q And where do you live?

9 A Summerville, South Carolina

10 Q Where are you employed?

11 A DHEC Office of Ocean and Coastal Resource
12 Management

13 Q What's your title?

14 A I'm a project manager in the regulatory
15 division

16 Q How long have you been with DHEC?

17 A Almost 20 years

18 Q Almost 20 years And what type of work -- what
19 does your job with DHEC involve?

20 A As a project manager, I review critical area
21 permits and freshwater wetland certification
22 projects on Kiawah Island and Seabrook Island
23 I am also primarily responsible for the
24 periodic revision of our beachfront
25 jurisdictional lines, the baseline and setback

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1 line

2 Q Okay Are you the staff oceanographer?

3 A Yes

4 Q Okay What's your educational background?

5 A I've got a Bachelor's and Master's degree in
6 marine science from the University of South
7 Carolina, Bachelor's in '82 and Master's in
8 '84

9 Q Okay What did you do when you graduated --
10 when you got your Master's, rather?

11 A For the first five years out of graduate
12 school, I worked for Coastal Science and
13 Engineering, here in Columbia And then in
14 1989 I went to work for the agency that used to
15 be known as the South Carolina Coastal Council

16 Q Okay And you described some of the work
17 you've done with the Coastal Council Can you
18 kind of give me a little bit more detail about
19 what you do there?

20 A Sure I am primarily responsible for
21 periodically revising the position of our
22 beachfront jurisdictional lines, the baseline
23 and setback line I manage our beach erosion
24 monitoring program where we actually contract
25 to have beach cross-section surveys collected

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1 annually at about 400 beach monitoring stations
2 along the coast We use that information to —
3 write our annual State of the Beaches report
4 and we also rely on it when we periodically
5 update the baseline and setback line positions
6 And then I also serve as project manager,
7 reviewing critical area permits and freshwater
8 wetland certification projects that come in

9 Q Okay You said that you're primarily
10 responsible for setting the setback lines?

11 A The beachfront baseline and setback line, yeah

12 Q Okay What does that entail?

13 A Well, the lines are mandated to be drawn and
14 updated by the Beachfront Management Act, the
15 legislation that was first passed back in 1988
16 What we look at as we're updating these line
17 positions is how the beaches have changed in
18 the past ten years since those lines were last
19 established, to revise what new data or
20 information has become available There's a
21 fairly complex process spelled out in the
22 statute for how we actually revise those lines
23 or how they're supposed to be established
24 Q Okay What kind of data do you look at when
25 you set the lines?

1 A We look at data that shows the current
2 condition of the beach, how much sand is on the
3 beach from those beach survey profiles
4 We also look at what they call LIDAR data
5 LIDAR is an acronym, sort of like radar It
6 stands for light detection and ranging, but
7 it's basically a way that you can do a
8 topographic survey of the dune field from an
9 airplane They fly along the coast and they
10 can actually produce a topographic map of the
11 dune field as they're flying
12 We look at that type of data We look at
13 historical shoreline position data that
14 typically comes from aerial photographs or any
15 sorts of charts or surveys that we can obtain
16 Q Okay You said you have a Master's What's
17 your Master's degree in, again?
18 A In marine science
19 Q Marine science Do you have an emphasis?
20 A Physical oceanography Marine science and
21 oceanography are basically the same thing, so
22 within oceanography the four general areas of
23 specialization are physical, geographical,
24 biological and chemical And my specialization
25 was in physical oceanography

1 Q Okay Did you do any kind of thesis work?

2 A Yes, I did

3 Q What's your thesis in?

4 A My thesis topic was the flow of water, both
5 over the flooded marsh surface and through
6 marsh creeks and channels in North Inlet

7 Q Where is North Inlet?

8 A Just north of the Georgetown here in South
9 Carolina That's where the Baruch field lab is
10 located

11 Q Okay I thought I'd heard someone mention the
12 North Inlet earlier What's your Bachelor's
13 degree in, again?

14 A It's also marine science

15 Q Okay Did you have a specific emphasis?

16 A No

17 Q Okay Have you taken classes in geology?

18 A Yes

19 Q Have you taken classes in geomorphology?

20 A Yes

21 MR WHITFIELD-CARGILE Okay Your Honor, at this
22 time I would move for the admission -- or to
23 have Mr Eiser qualified as an expert in
24 coastal processes and coastal zone management

25 MR WALKER Your Honor, Mr Eiser was never listed

1 as an expert witness, I don't think
2 - MR WHITFIELD-CARGILE Your Honor, on my responses
3 to interrogatories, I listed Department staff
4 to review the application as experts
5 MR WALKER Did you?
6 MR WHITFIELD-CARGILE Yes
7 MR WALKER If that's correct, then I stand
8 corrected I'll have to take a look
9 The other basis is, again, we're back to
10 coastal zone management I think he's a
11 permitting official I don't know what coastal
12 zone management is I don't know if it's a
13 recognized field
14 / MR WHITFIELD-CARGILE I can do more foundation,
15 ~ Your Honor
16 THE COURT I'd like to get more clarity about what
17 it really is
18 MR WHITFIELD-CARGILE Okay
19 THE COURT I mean, I heard what he got his Master's
20 ~ in
21 MR WHITFIELD-CARGILE Okay
22 Q Mr Eiser, have you been qualified as an expert
23 in court before?
24 A Yes
25 Q What were you qualified as?

1 A Coastal processes and coastal zone management

2 Q What's coastal processes? - - -

3 A Coastal processes, as Dr Dean fairly well
4 described, has to do with the forces that shape
5 our coastline As a physical oceanographer, I
6 tend to focus on physical processes, waves,
7 winds, tides and currents, but there are other
8 forces, you know, geological, underlying
9 geological forces and biological forces, as
10 well

11 Q Okay What's coastal zone management?

12 A Coastal zone management, in a very practical
13 sense, is the implementation of the South
14 Carolina Beachfront Management Act, which I've
15 been doing for almost 20 years now It has to
16 do with our permitting and regulatory authority
17 along the coastline and has to do with the
18 underlying policies that the State adopted
19 about 20 years ago, as far as what is the value
20 of our coastal resources and how do we balance
21 the competing demands on those resources

22 MR WHITFIELD-CARGILE Okay Your Honor, at this
23 time I would move for the admission -- or,
24 again, move for the qualification of Mr Eiser
25 as an expert in coastal processes and coastal

1 zone management

2 I'd also point out that this Court can take

3 judicial notice of Department staff's

4 specialized knowledge and technical competence

5 pursuant to 1-23-330(D)

6 THE COURT Or maybe 320

7 MR WALKER We would -- we, acknowledge, stipulate

8 that he's an expert for purposes of acting on

9 permits and doing what he does on a day-to-day

10 basis Where we would have a problem is if we

11 get into a number of hypotheticals

12 If he's going to ask the witness about what he

13 did in this instance, what he typically does

14 and that type of thing, in other words, his

15 professional expertise as applied to his job,

16 I think he's qualified to do that

17 I don't think he's qualified just to start

18 rendering opinions on hypothetical questions

19 and what I'll do is, if we get far afield, I'll

20 stand up and object and we can address it then

21 MR WHITFIELD-CARGILE Your Honor, I don't

22 anticipate getting into hypotheticals with Mr

23 Eiser

24 THE COURT Well, I'll qualify him in the area of

25 coastal processes as described, and it fits

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001251

1 within his education, the forces that shape our
2 coastline, so- -
3 Do you have a position?

4 MS ARMSTRONG We don't have any objection I
5 mean, this Court certainly has qualified
6 witnesses, this particular agency staff in
7 areas like coastal zone management, water
8 quality certification, different programs that
9 fall under the Department's jurisdiction, so we
10 think it's appropriate to have him as an expert
11 in a field such as coastal zone management

12 THE COURT Well, I'll also qualify him as coastal
13 zone management, but just note that doesn't
14 mean you can testify to what the laws are or
15 the meanings of the law So I'm not sure where
16 you're going on that expertise, but he's got
17 experience applying the laws

18 MR WHITFIELD-CARGILE Your Honor, I agree that
19 ultimately you decide what the laws are, but I
20 think that he can testify as to the
21 Department's interpretation of the law

22 THE COURT He doesn't need to be qualified as an
23 expert to testify to that That's his job

24 MR WHITFIELD-CARGILE Okay Thank you, Your
25 Honor

1 What's your role -- ruling? He's admitted --

2 THE COURT What's my role or ruling? - - - - -

3 MR WHITFIELD-CARGILE I know what your role is,

4 Your Honor

5 Your ruling was that he was admitted or

6 qualified as an expert in coastal processes and

7 coastal zone management, is that right?

8 THE COURT Yes

9 MR WHITFIELD-CARGILE Okay Thank you, Your

10 Honor

11 THE COURT Coastal zone management, with a little

12 question mark behind it

13 MR WHITFIELD-CARGILE I understand

14 Q Mr Eiser, how did you become familiar with --

15 or are you familiar with Captain Sam's Spit?

16 A Yes

17 Q How did you become familiar with Captain Sam's

18 Spit?

19 A While I was still in graduate school a fellow

20 graduate student named Jim Mason actually did

21 his Master's thesis on the immediate response

22 to Captain Sam's Inlet from the first inlet

23 relocation project that was done in 1983 And

24 I actually assisted him with the collection of

25 field work for his thesis, which basically

1 means that we spent a lot of time at Captain
2 Sam's Inlet doing beach surveys We went out
3 in a small boat and did a lot of hydrographic
4 surveys and current measurements, that sort of
5 thing That work became Jim Mason's Master's
6 thesis and they published a technical report
7 Sea Grant published a technical report based on
8 that

9 Q Okay

10 A And that was probably my first experience at
11 Captain Sam's Inlet In 1984, when I went to
12 work for Coastal Science and Engineering, that
13 company was actively involved in beach
14 monitoring and shoreline assessment projects
15 for both Kiawah Island and Seabrook Island on
16 either side of the inlet, so I spent a
17 considerable amount of time during those five
18 years at both islands and at the inlet

19 Q CSE, is that -- Coastal Science and
20 Engineering, is that Tim Kana's company?

21 A That's correct

22 Q Okay When did you work there?

23 A From 1984 through 1989

24 Q What type of work did you do on Captain Sam's
25 Inlet?

1 A We did data collection work, actually doing
2 beach surveys, looking at historical aerial
3 photographs so that we could write shoreline
4 assessment reports that looked at both
5 year-to-year changes in the beach and also
6 looked at, from a historical perspective, at
7 what the shoreline had done previously

8 Q Were you involved in the writing of any reports
9 when you worked at CSE?

10 A Yes

11 Q Okay Do you recall the testimony yesterday
12 and some this morning about Miles Hayes' report
13 in the Environmental Inventory of Kiawah
14 Island?

15 A Yes, I've heard about that, yeah

16 Q Are you familiar with the diagram -- I believe
17 there's a copy of it that's proffered as
18 Coastal Conservation League's Exhibit
19 Thirty-nine

20 A I have seen varieties of this diagram I'm
21 most familiar with the one that appeared in the
22 Mason report from 1985 and 1986, which, in
23 turn, was taken from another report prepared by
24 Jerry Sexton, I believe But they all
25 essentially show the same thing, that the inlet

1 has been located in numerous positions going
2 back to the 1600's

3 Q Okay

4 MR WHITFIELD-CARGILE And, Your Honor, at this
5 time I would move for the admission of

6 Q Let me back up Is Coastal Conservation
7 League's Exhibit Thirty-nine an accurate
8 reflection of that diagram?

9 A Yes

10 MR WHITFIELD-CARGILE Okay At this time I would
11 move for the admission of Exhibit Thirty-nine,
12 Your Honor

13 MR WALKER May I take a look at it?

14 THE COURT Yes It's right now an offer of proof

15 MS ARMSTRONG Can I see that? Okay All right

16 MR WALKER One moment, Your Honor

17 Your Honor, this is hearsay And even if it's
18 relied on, he can -- he hasn't said he relied
19 on it We would object to it
20 Plus, in his deposition, the witness said the
21 only thing he consulted with respect to the
22 history of Captain Sam's before issuing his
23 decision was a diagram in a different book
24 But this is hearsay It's a piece of paper
25 from a book that they want to put into

1 evidence

2 THE COURT Mr Whitfield-Cargile?

3 MR WHITFIELD-CARGILE I can lay more foundation

4 for whether or not he's relied on it, Your

5 Honor

6 I beg the Court's indulgence I'm consulting

7 with myself

8 I'll withdraw that at this time, Your

9 Honor

10 THE COURT All right

11 MR WHITFIELD-CARGILE That's already been

12 proffered

13 Q Okay You said you did some work on Captain

14 Sam's Spit in the eighties when you worked with

15 Tim Kana's company

16 A That's correct

17 Q What else have you done with Captain Sam's

18 Spit?

19 A Well, in my time with the Coastal Council, now

20 OCRM, we have implemented a beach monitoring

21 program where we actually survey the beach at

22 almost 400 monitoring stations statewide, so I

23 was involved with the initial siting or

24 location of those beach monitoring stations and

25 I have reviewed the beach profile data that has

1 been collected at those stations for about 20
2 years now
3 Kiawah Island, the south spit of Kiawah Island
4 is included in that overall program
5 Q Okay How did you become familiar with Captain
6 Sam's Spit in the context of this litigation?
7 A I was assigned to be the project manager on the
8 KDP permit application
9 Q Okay And I believe that's KDP's Exhibit
10 Number --
11 MR WHITFIELD-CARGILE I don't have that list up
12 there
13 Trenholm, can you help me out?
14 MR WALKER Yes I think the application is Ten
15 MR WHITFIELD-CARGILE Okay
16 Your Honor, I see that my expert, Ms Hughes,
17 is here Before we get too --
18 THE COURT If he could finish up -- how much longer
19 will his direct be?
20 MR WHITFIELD-CARGILE I'll probably have about an
21 hour, maybe an hour and a half of direct with
22 Mr Eiser
23 THE COURT Well, I would prefer to go ahead and
24 finish it up, but
25 MR WHITFIELD-CARGILE Well, we can do that, Your

1 Honor I'm happy to continue with Mr Eiser,
2 Your Honor I want to make sure that we're
3 through with Ms Hughes tonight, if that's at
4 all possible

5 THE COURT Well, we're going to go to 6 00

6 MR WHITFIELD-CARGILE 6 00

7 THE COURT I'm looking at that time frame

8 MR WHITFIELD-CARGILE Three o'clock, four o'clock

9 THE COURT And I wanted us to get through your
10 direct --

11 MR WHITFIELD-CARGILE Okay

12 THE COURT -- so I'll have a clean breaking point

13 MR WHITFIELD-CARGILE Okay That's fine, Your
14 Honor

15 Q Exhibit Ten in one of those two big binders in
16 front of you, Mr Eiser

17 A (Witness complies) All right

18 Q Okay What did the -- that's the application
19 that you reviewed?

20 A Yes

21 Q Okay What exactly did KDP apply for?

22 A KDP applied for a critical area permit to build
23 a 2,783-foot-long articulated concrete block
24 revetment

25 Q Okay Is the revetment proposed to go in

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1 critical area?

2 A Yes

3 Q What kind of critical area?

4 A Well, it probably is going in more than one
5 type of critical area I can tell you for sure
6 that it's not going in beach dune critical
7 area, because the beach dune critical area is
8 marked off in the area between our setback line
9 and the mean high water on true beachfront
10 property, which this is not, based on where our
11 baseline and setback lines are drawn

12 Q Did you hear Mr DeWolff characterize this
13 critical area as beach dune system critical
14 area?

15 A Yes

16 Q Okay And that's not accurate?

17 A Of the four possibilities, that's the one it's
18 definitely not

19 Q Okay What are the four types of critical
20 area?

21 A Coastal waters, tidelands and beaches

22 Q Okay And what type of critical area is the
23 area where this revetment is supposed to go?

24 A The part of the revetment that's going below
25 the mean high water line is in coastal water

1 critical area The distinction or transition
2 from tidelands to beaches can be fairly --
3 indistinct I think you could argue that the
4 portion of the structure that's going up closer
5 towards Beachwalker Park might be characterized
6 as tidelands and the section that's closer down
7 towards Captain Sam's Inlet might be
8 characterized as a beach

9 Q Okay What's a "tideland"?

10 A If I could read from the definition, the
11 statute, I can tell you exactly, but basically
12 it refers to salt marsh, mud flats, sand flats,
13 that sort of thing

14 Q Okay Do you have your copy of the regulations
15 up there with you?

16 A Yes, I do

17 Q What about this property makes that area
18 tidelands?

19 A Well, the definition says that coastal wetlands
20 includes marshes, mud flats and shallows It
21 means those areas periodically inundated by
22 saline waters, whether or not the saline waters
23 reach the area naturally or through artificial
24 water courses So this area is a shallow area
25 that's periodically inundated by tidal waters

1 There is some overlap between the definition of
2 tidelands and the definition of beaches

3 Q Okay What are "beaches"?

4 A Okay The definition of beaches in here, I'm
5 just going to read it straight from --
6 actually, I'm going to read it from the
7 statute, because I've got it open to that page
8 "'Beaches' means those lands subject to
9 periodic inundation by tidal" --

10 THE COURT Don't go too fast

11 A -- "by tidal and wave action so that no
12 nonlittoral vegetation is established "

13 Q Okay And is this length of the shore where
14 this revetment's proposed to go, is that
15 subject to periodic --

16 A Inundation

17 Q -- inundation by tidal and wave action?

18 A Yes

19 Q Okay Is no nonlittoral vegetation --

20 A Correct

21 Q -- established?

22 A Yes

23 Q Okay That's a double negative Okay Let's
24 talk about the characteristics of the site
25 Have you been to the site?

1 A Yes

2 Q How many times have you been to the site?

3 A Directly related to my review of this permit,

4 I've been there four times

5 Q Okay When did you first go to the site?

6 A Probably in May of 2008

7 Q Okay What did you do when you went there?

8 A That was my initial site visit as we were

9 beginning to process the permit application

10 The purpose of my visit was to observe the

11 general character of the area where the

12 revetment would be constructed and then the

13 general character of the Captain Sam's Spit

14 property itself

15 Q Okay What's the general character of the area

16 where the revetment's going to go?

17 A Portions of the area where the revetment will

18 be located were obviously eroding, to me,

19 particularly the area adjacent to Beachwalker

20 Park, the parking lot there

21 Q Okay

22 A I think there's a significant erosion problem

23 that's jeopardizing the park infrastructure

24 It appeared to me that the erosion continued on

25 down the river, heading towards Captain Sam's

1 Inlet, and the severity of the erosion
2 decreased as you got further down, so that by
3 the time you were to the area where the
4 revetment would stop, the erosion appeared to
5 be minimal to almost none

6 Q Okay And between the area where the
7 revetment's going to stop and going back
8 towards the bend in the spit -- if we can look
9 at KDP Exhibit Forty-eight, it kind of shows
10 the spit, shows a couple of different versions
11 of the spit But as you go back east towards
12 the park, you said -- well, you said as you
13 leave the park and go west, it decreases?

14 A Yeah, the erosion I think is worst in the park
15 It continues to be fairly bad until you get to
16 the narrowest point on the neck and then the
17 severity of the erosion decreases the farther
18 you go towards the southwest, towards the inlet
19 and ocean

20 Q Okay Does it decrease significantly?

21 A Yes, to the point where the revetment is
22 proposed to terminate at the southwest end, the
23 erosion seemed to be very negligible

24 Q Okay What else did you observe at the area
25 where the revetment is proposed to go, the

1 actual location of the revetment?

2 A The actual location of the revetment is a sandy
3 area I wasn't sure when I first viewed the
4 application if it would be more of a muddy
5 environment, but it's definitely a sandy
6 environment on the outside curve of the river
7 there It seemed to be a completely pristine
8 or area that's unaltered by any manmade
9 activities

10 Q Okay When you say that, are you talking about
11 the area where the revetment is going to go?

12 A Yeah I mean, outside of the park, obviously
13 But once you get beyond the park boundary, it's
14 a very pristine, undisturbed environment

15 Q Is the bank along the river really steep or is
16 it --

17 A Well, if you go at high tide, so that the water
18 is right up to the bank, yes, that part of the
19 bank is very steep If you go at low tide,
20 then that intertidal section, between the high
21 water line and the low water line, has some
22 slope to it, but it's not an extremely steep
23 slope

24 Q Okay Did you walk on that bank?

25 A Yes

1 Q Okay Did you walk the entire length of it?

2 A Yes

3 Q Okay Let's talk about the character of the

4 upland portion of the property You said you

5 assessed that, too?

6 A Yes

7 Q Okay Describe that for me

8 A I would describe it as a pristine, undeveloped

9 barrier island spit

10 Q Okay What does that mean?

11 A It means that, first of all, Kiawah is a

12 barrier island That neck at the southwest end

13 of Kiawah, that peninsula is what I would refer

14 to as a spit, Captain Sam's Spit, and there's

15 absolutely no evidence of any manmade

16 alterations to the southwest of the county

17 park,

18 Q What's a spit?

19 A A spit is just sort of a layman's term, I guess

20 you might say, for a sandy projection at the

21 end of an island

22 Q Okay Do you know the history of that spit?

23 A To some degree, yes

24 Q In doing your work, your coastal -- your

25 revision of the setback lines, you said you

1 review historic shoreline data?

2 A That's correct

3 Q Okay Can you kind of walk me through your

4 understanding of the history of that spit?

5 A Sure Well, if I could just back up one step

6 Q Sure

7 A The area to the southwest of the county park is

8 classified as an unstabilized inlet zone The

9 "inlet zone part" means that that beach is

10 close enough to Captain Sam's Inlet that the

11 inlet processes dominate the shoreline The

12 "unstabilized" part means that there are no

13 seawalls or revetments or jetties or groins

14 that keep the shoreline trapped or pinned in

15 one location

16 So for unstabilized inlet zones, the Beachfront

17 Management Act says that the baseline should be

18 drawn at the most landward shoreline position

19 during the past 40 years That's in the

20 statute

21 Q Okay Before we talk about the setback line,

22 where do you get those terms, "unstabilized

23 inlet zone"?

24 A That's out of the Beachfront Management Act, as

25 well It mandates that the entire shoreline of

1 South Carolina be classified as either a
2 standard zone or an inlet zone And inlet
3 zones are further subclassified as stabilized
4 or unstabilized

5 Q Okay What's this one?

6 A This is an unstabilized inlet zone

7 Q Okay Go back and tell me about the setback
8 lines

9 A So because that's the way the shoreline is
10 classified, the statute says that the baseline
11 should be drawn at the most landward shoreline
12 position during the past 40 years, which means
13 in 1988 we had to look at historical aerial
14 photographs that went back 40 years

15 And I believe it was at that time that I became
16 aware of the 1949 photo, which is the exhibit
17 here in the room And during 1988 and '89, and
18 then certainly during the line revisions in
19 1999, I was reviewing all those photographs to
20 see how the shoreline had changed in that area
21 over the past 40 years

22 Q Have you looked at how the shoreline has
23 changed beyond the last 40 years?

24 A I have not reviewed any photographs that go
25 back prior to '49 I'm not sure there are any

1 People weren't really taking aerial photos much
2 before 1949

3 But I have looked at the Hayes report and the
4 Mason report and also that "Living with the
5 South Carolina Shoreline" book by Bush and
6 Pilkey, that indicate different positions of
7 the shoreline and the inlets going back to the
8 1600's

9 Q Have you looked at data that wasn't just in
10 those reports?

11 A I have looked at aerial photographs between
12 1949 and the present that may not have been
13 documented in all those reports

14 Q Okay Have you looked at other shoreline data?

15 A I've looked at the aerial photograph data
16 That's as far as shoreline positional data
17 during the past 40 years, nothing besides that
18 whole suite of aerial photos

19 Q Okay What's the significance of the 1949
20 breach in terms of the setback line?

21 A Well, the original setback line was drawn
22 coming down toward the southwest to terminate
23 at the county park, because the area to the
24 southwest of the county park was not stable
25 high ground on that 1949 photo

1 Q When was the first time a setback line was
2 drawn for Kiawah Island?
3 A All initial lines were drawn in 1988
4 Q And in 1988 you had to go back 40 years?
5 A Yeah
6 Q Okay So the 1988 line would have included the
7 1949?
8 A Yeah, that 1949 photo fell within that 40 year
9 window in 1988
10 Q Okay And can you explain to me why the
11 setback line did not continue on down the spit?
12 A Because once you get beyond the location of the
13 present day county park, there is no high
14 ground property where you could say there was
15 a shoreline
16 Q Okay Can you come show the Judge what you
17 mean by that?
18 A Sure And let me also tell you that for the
19 purposes of drawing the baseline in these
20 unstabilized inlet zones where we're looking at
21 historical aerial photographs, we're using the
22 line of vegetation as the reference feature, as
23 the thing on the picture that we're picking out
24 and saying this is what we're going to use for
25 drawing baselines

1 Q Okay

2 A So as I'm reviewing this photograph --

3 THE COURT If I could stop y'all

4 MR WHITFIELD-CARGILE Sure

5 THE COURT If this is not something that was taken
6 into consideration of where we are now, why --
7 am I just hearing this for historical purposes?

8 MR WHITFIELD-CARGILE Well, you're hearing it for
9 historical purposes, Your Honor There's also
10 part of -- what I understand KDP's -- part of
11 KDP's case is that -- argument is that all of
12 a sudden there's a setback line that goes
13 beyond the spit in 1999 and that makes the
14 property stable I want to develop a record as
15 to why there's a setback line there now

16 THE COURT But the statute speaks for itself,
17 though, as to where the setback line is Go
18 ahead

19 THE WITNESS Would you like me to indicate on the
20 photo?

21 MR WHITFIELD-CARGILE Okay Yes, please
22 Quickly

23 THE WITNESS Okay Your Honor, if we were --

24 Q Don't speak too quickly

25 A If we were trying to pick out a shoreline

1 feature off this photo for purposes of drawing
2 the baseline, we would follow this line of
3 fairly stable vegetation down to here and then
4 we would wrap it around the corner and that's
5 where the baseline was first drawn
6 (indicating)

7 Q Okay I want to talk about how the ACB
8 mattress would change the site conditions at
9 the site of the revetment itself

10 A Okay Well, the -- I mean, the purported
11 reason for the permit application was to
12 stabilize that shoreline and prevent further
13 erosion How it would change that area, first
14 of all, it would be a rather significant
15 manmade influence in an area that previously
16 has not had any sort of development impacts or
17 manmade impacts to it So it would certainly
18 change the character of that section of
19 shoreline and I think you could also say would
20 change the overall character of Captain Sam's
21 Spit
22 It would also change that area from its present
23 recreational and what they call "living marine
24 resources" uses, and that refers to any sort of
25 organism besides people that might use that

1 shoreline

2 Q When you say "living marine resources" -- you --
3 said what they call "living marine
4 resources" --

5 A It's any living creature besides man, usually
6 gets categorized as a living marine resource
7 So that could be, you know, shorebirds,
8 turtles, fish, crabs, things like that

9 Q Okay How else would it change the actual site
10 conditions where the revetment's going go?

11 A Well, I mean, you would be putting this
12 concrete armor along the shoreline It would
13 no longer be a sandy bluff that sort of dropped
14 off vertically down to about where mean high
15 water was and then a more gently sloping sandy
16 beach beyond that It would be a linearly
17 sloped concrete wall, for lack of a better
18 term

19 Q Based on your knowledge of coastal processes,
20 would you expect vegetation to grow in the
21 blocks themselves?

22 A In this particular location, no I've seen
23 areas, and there were some photos introduced
24 where this type of structure has been
25 constructed in a low energy environment, no

1 wave action, no strong currents, and in those
2 types of environments, you can trap sediment,
3 you know, sand and silt and mud, in the pores
4 of the mattress and you can get vegetation to
5 grow there But this is such a high energy
6 environment with relatively large wave action
7 and strong currents, I think any sediment or
8 vegetation would just be swept off of that
9 structure

10 Q Okay Let's talk about the processing of the
11 application Can you tell me how you processed
12 this application, what you did to process it?

13 A Sure When an application comes in, once it's
14 complete in the sense that the drawings meet
15 our requirements and the application has been
16 signed, and that sort of thing, and they pay
17 their administrative fee, we put out what we
18 call a "public notice" that gets distributed to
19 adjoining property owners, local governments,
20 other natural resource agencies, and they have
21 the opportunity to comment back to OCRM about
22 the proposal

23 Q Okay When did you say you received the
24 application?

25 A Well, let me get that notebook back open again

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1 Can you tell me which tab that was? Was it
2 Ten? --- --
3 Q Yes, it was
4 A Okay The cover letter from Patrick Rogers is
5 dated February 29, 2008
6 Q Okay When did you put it on public notice?
7 A Well, I'd have to dig a little deeper in the
8 file and actually find our public notice I'm
9 thinking that it may have been sometime in May
10 Q Can you look at Exhibit Tab Thirteen?
11 A Yes, that is the public notice It's dated May
12 16, 2008
13 Q Okay Is that an accurate reflection of the
14 public notice?
15 A Well, what I have is just one page without the
16 drawings, but it's the text portion of the
17 public notice
18 Q Okay What would have been attached to that?
19 A These drawings that we got from Thomas &
20 Hutton
21 Q So the drawings that are attached to Exhibit
22 Thirteen?
23 A Yeah, my tab --
24 Q Exhibit Ten, rather
25 A -- my tab Thirteen doesn't have any drawings in

1 with it

2 Q The drawings that were attached with Exhibit
3 Ten, would those have been attached to Exhibit
4 Thirteen?

5 A The drawings that we got in in February may or
6 may not have been the ones that went on public
7 notice If we felt that they were deficient in
8 some way, we may have asked for revisions I
9 don't know that we did I'm just saying that
10 without the drawings attached to the public
11 notice, I can't say "yes" for sure

12 MR WHITFIELD-CARGILE Beg the Court's indulgence
13 for just a moment, Your Honor

14 Q If I give you the permit file --

15 A Yeah, I think we could probably find that out
16 from the permit file I can tell you that the
17 drawings that came in with the application are
18 dated February 14th, so if the drawings that we
19 went out on public notice are also dated
20 February 14th, then, yes, they're same Or you
21 can look at the permit itself, if those
22 drawings are still dated February 14th, then
23 that would be the indication

24 Q Okay I'm going to hand you what's been marked
25 as Exhibit Seventy-six Is that the public

1 notice?

2 A Yes

3 Q Okay Is that an accurate reflection of the

4 public notice?

5 A Yes

6 MR WHITFIELD-CARGILE Okay Your Honor, I would

7 move for the admission of Exhibit Seventy-six

8 into evidence

9 MR WALKER No objection from KDP

10 MS ARMSTRONG No, objection, Your Honor

11 THE COURT It's admitted

12 (DHEC's Exhibit Number Seventy-six was admitted into

13 evidence)

14 Q Okay When was the permit administratively

15 complete?

16 A If we could just back up a step, the drawing --

17 Q Sure

18 A -- is dated February 14th, so apparently there

19 were no changes to the drawing from the time

20 that they were submitted and the time we put

21 out the public notice

22 Q Okay When was the application

23 administratively complete?

24 A The application would have been

25 administratively complete when we received the

1 affidavit of publication, which basically is
2 proof that they ran the required newspaper ad -
3 When the application was first submitted to us,
4 it did not include that and I don't believe we
5 got that until sometime in July

6 Q Okay I'm going to show you --

7 MR WHITFIELD-CARGILE Does anybody have a problem
8 with him using the permit file?

9 MR WALKER Not at all

10 MS ARMSTRONG I don't

11 MR WHITFIELD-CARGILE Okay

12 Q Can you tell me, by looking at the permit file,
13 when the application was administratively
14 complete?

15 A This file has really gone through the wringer,
16 so it's not where it normally would be It may
17 take me a while just to find it

18 Q Okay Well, let's back up I don't want to --

19 A Okay

20 Q -- take the Court's time Was there ever a
21 time you canceled the permit?

22 A Yes

23 Q Why?

24 A We canceled it because we had sent the
25 applicant a letter saying, "You have 30 days to

1 get your affidavit of publication to us," and
2 they did not do that within that 30-day time
3 period, so we initially canceled their
4 application

5 Q Is Department's Exhibit Four up there with you?
6 In Department's Exhibit Four --

7 A Yeah

8 Q -- let me show you a letter dated May 23rd Is
9 that where you requested that an affidavit --

10 A Yes

11 Q -- of publication be filed?

12 A Yes

13 Q And did you receive one in response to that
14 letter?

15 A Not within the 30 days that was specified in
16 the letter

17 Q Okay Is that why you canceled the permit?

18 A Yes

19 Q Okay What happened after that with this
20 permit?

21 A We became aware of the fact that there's a fee
22 regulation that applies to OCRM, but does not
23 appear in our OCRM regulation package, that
24 gives applicants 180 days to provide any
25 additional information that's required to

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1 complete their file

2 Q Okay How did that come into play with this
3 permit?

4 A Well, basically, when I became aware of that
5 180-day time period, we reinstated the original
6 permit application

7 Q Why?

8 A Because we felt that we didn't have the
9 authority to cancel it within 30 days, that the
10 fee regulation required us to give them 180
11 days to provide that additional information

12 Q Okay Did you subsequently receive the
13 affidavit of --

14 A Yes

15 Q -- affidavit of publication?

16 A Yes, we did

17 Q When did you receive that?

18 A Well, that's what we were looking for a little
19 while ago I believe it was sometime in July
20 I actually have to flip all the way through the
21 file here to find it

22 MR WHITFIELD-CARGILE Okay Your Honor, I'm
23 sorry, I thought that I had put that in my
24 exhibit list, but apparently I did not
25 Begging the Court's indulgence for just one

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1 moment

2 - A Somewhere in the file there's a page that's

3 called "Administrative Summary of Review" --

4 Q Okay

5 A -- that would list the date that we received

6 that newspaper ad But because this file has

7 been taken apart and copied, that page is not

8 where it normally would be

9 MR WALKER Davis, it's our Exhibit Forty-six

10 Q Okay Can you look in that folder and look at

11 your exhibit -- KDP's Exhibit Forty-six?

12 A (Witness complies)

13 Q The tab there

14 A Yeah, this book goes through Exhibit

15 Forty-five

16 Q Okay

17 A Is that book a continuation?

18 Q Yes

19 A All right Okay

20 Q When was that affidavit --

21 A It was received June 26th

22 Q Okay And what did you do after that time

23 line? What happened with the processing of the

24 permit?

25 A Well, at that point there was no additional

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1 information that we were actively seeking from
2 KDP We were also involved in some discussions
3 with US Army Corps of Engineers over how they
4 were processing the federal permit for this
5 activity

6 Q Okay

7 A So most of July, I would say, was taken up in
8 those types of discussions There's a bit of
9 history on that, too

10 Q How did that impact Corps' processing of the
11 nationwide application

12 A Well, the US Fish & Wildlife Service had asked
13 Corps of Engineers to process the federal
14 permit as an individual permit, not a
15 nationwide permit, so that the Fish & Wildlife
16 Service could give it adequate review And,
17 typically, if the Corps of Engineers is going
18 to process a permit, they put out a joint
19 public notice that also solicits the public to
20 send comments to OCRM, as well as to the Corps
21 of Engineers

22 So, basically, I wanted to see how the Corps
23 was actually going to ultimately handle the
24 federal permit before I felt like we had that
25 issue completely resolved

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1 Q Okay Can you turn in Volume I of that exhibit
2 to KDP Exhibit Eighteen

3 A (Witness complies)

4 MS ARMSTRONG Your Honor, I'm going to have to
5 object and ask that that last answer be
6 stricken I don't know how -- we argued about
7 Corps -- the relevancy of the Army Corps of
8 Engineers' determination and Fish & Wildlife
9 Service and I just ask that that be stricken
10 I don't think it's relevant to the Department's
11 permitting decision

12 THE COURT One of the things in the deposition of
13 Mr -- Eisner?

14 THE WITNESS Elser There's no N in it, Elser

15 THE COURT That was one of the designated areas I
16 believe I've already -- that was in there, so
17 it's in the record now

18 MS ARMSTRONG Okay

19 THE COURT So this would be kind of redundant

20 MS ARMSTRONG All right

21 THE COURT Does that change your --

22 MS ARMSTRONG Well, if it's already in there, I --
23 you know, I let Mr Chandler handle the
24 designation I haven't read all of it I was
25 at the deposition I don't recall discussing

1 that, but it was a while ago that that
2 deposition -- -
3 THE COURT Okay
4 MS ARMSTRONG -- was taken, so I'm going to -- I'm
5 taking your word for it
6 THE COURT I went back when I read it, to make sure
7 I should be reading it, and, as a matter of
8 fact, it was on lines one through eight on page
9 35, maybe
10 MR WHITFIELD-CARGILE I'm impressed, Your Honor
11 MS ARMSTRONG I am, too
12 THE COURT So -- well
13 Q Okay
14 A So, anyway, if the Corps of Engineers was going
15 to put out an individual permit, it seemed
16 obvious that the US Fish & Wildlife Service was
17 going to provide additional comments in
18 response to that individual permit public
19 notice And I was interested in knowing what
20 those additional comments from Fish & Wildlife
21 might be before I made my final decision on the
22 OCRM permit
23 Q Okay Do you know if a nationwide permit has
24 been certified for consistency with the coastal
25 zone permitting document in critical areas?

1 A I mean, in a generic sense, OCRM did certify
2 the Corps of Engineers to issue nationwide --
3 this particular one is a nationwide 13 permit
4 There's a whole series of nationwide permits
5 But our certification also said that -- excuse
6 me -- in the critical area, that OCRM would
7 process their own critical area permit
8 application and permit, potentially, and that
9 our issuance of the critical area permit would
10 essentially be our certification of the work
11 Q Okay Can you turn in that notebook to Exhibit
12 Eighteen?
13 A (Witness complies) Yes
14 Q Okay That's a letter from Ray Pantlik at KDP
15 to you?
16 A Yes
17 Q Is that something you considered in your
18 processing of this application?
19 A Yes
20 Q Okay Can you turn to Exhibit Twenty-one?
21 A Yes
22 Q Sorry Exhibit Twenty-nine
23 A (Witness complies) Yes
24 Q Is that a letter from Mitchell Bohannon at
25 Thomas & Hutton, dated September 2nd, '08 --

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1 A Yes

2 Q -- to you? Is that something you considered in

3 your processing of the application?

4 A Yes

5 Q Okay Did that letter attach Exhibit Thirty?

6 Well, did you see Exhibit Thirty? Is that

7 something that you considered in your

8 processing of the application?

9 A If it was in the file, then, yes

10 Q Okay Exhibit Thirty-three?

11 A Yes

12 Q That's a letter from Leonard Long of KDP to

13 Bill Eiser?

14 A Yes

15 Q Okay And that's dated September 3rd, 2008?

16 A Correct

17 Q Would you have considered that?

18 A Yes

19 Q Okay And Exhibit Thirty-nine, it's a letter

20 dated September 18th from Ray Pantlik at KDP

21 A Yes

22 Q Okay And did you consider that in your

23 decision -- in rendering your decision?

24 A Yes

25 Q Okay What was the ultimate decision?

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1 A The action that OCRM took was to issue a permit
2 for approximately ten percent of what KDP had
3 asked for We issued a permit for a
4 270-foot-long section of revetment at
5 Beachwalker county park and disapproved the
6 balance of the wall

7 Q Okay I'm going to show you what's been marked
8 as Exhibit One, the Department's Exhibit One
9 Do you recognize that document?

10 A Yes

11 Q What's that?

12 A That is the critical area permit that OCRM
13 issued

14 MR WHITFIELD-CARGILE Trenholm, do you need a
15 copy?

16 MR WALKER We have one

17 Q Is that a fair and accurate representation of
18 the permit?

19 A Yes

20 MR WHITFIELD-CARGILE Your Honor, at this time, I
21 would move for the admission of Exhibit One,
22 the Department's Exhibit One

23 THE COURT OCRM?

24 MR WHITFIELD-CARGILE Pardon me?

25 THE COURT Is it OCRM One?

1 MR WHITFIELD-CARGILE I think we're labeling them

2 DHEC Exhibit One, is that right?

3 THE WITNESS This one, the sticker says DHEC One,

4 yes

5 MR WHITFIELD-CARGILE Yes

6 THE COURT Any objection?

7 MS ARMSTRONG No objection, Your Honor

8 MR WALKER No objection

9 MR WHITFIELD-CARGILE Okay

10 THE COURT It's admitted

11 (DHEC's Exhibit Number One was admitted into

12 evidence)

13 Q Under the description of the project as

14 authorized, can you publish -- actually, the

15 Judge can read that

16 Exhibit Two, if you would look over that

17 railing there, there's a stack of folders

18 Here, I'll get it for you

19 Do you recognize Exhibit Two? That's a

20 Technical Summary of Review?

21 A Yes

22 Q And what is that?

23 A Well, it's captioned "Technical Summary of

24 Review " I would probably informally refer to

25 this as our decision document

1 Q Okay Is that an accurate representation of
2 the Technical Summary of Review?
3 A Yes
4 MR WHITFIELD-CARGILE I would move for the
5 admission of DHEC Two, Your Honor
6 MS ARMSTRONG No objection, Your Honor
7 MR WALKER No objection
8 MR WHITFIELD-CARGILE Okay
9 THE COURT It's admitted
10 (DHEC's Exhibit Number Two was admitted into
11 evidence)
12 Q You said you authorized 270 feet at Beachwalker
13 Park, correct?
14 A Correct
15 Q You denied the remaining 2,413 feet?
16 A 2,513 feet were disapproved, yes
17 Q Okay Can you tell me why you issued a permit
18 for the 270 feet that you issued?
19 A Well, the actual number, the 270, is what
20 Charleston County PRC had asked for in their
21 2006 permit when they were trying to just
22 protect the Beachwalker Park infrastructure
23 Q Tell me about -- what's this 2006 PRC
24 application?
25 A Okay This was something that was discussed

1 earlier today, that PRC, Charleston County
2 Parks and Recreational Commission, had applied
3 to OCRM for a permit to build -- I think it was
4 a revetment, but some sort of an erosion
5 protection structure of 270 feet in length just
6 behind the park where the Kiawah River was
7 causing erosion into the park parking lot

8 Q Okay

9 A And PRC eventually abandoned that request
10 because KDP came in with a permit application
11 that included the park property, as well as
12 some remaining property

13 Q Okay And why did you say you issued the 270
14 feet?

15 A Well, I mean, the number that we came up with,
16 the 270, is what Charleston County PRC had
17 asked for But the reason that we issued that
18 length of wall or that portion of wall is
19 because there was obviously an erosion problem
20 where existing park infrastructure was being
21 threatened We didn't feel that allowing that
22 section of shoreline to be armored would change
23 the general character of that area It already
24 had a fairly large parking lot and a changing
25 room and places -- buildings like that in the

1 area, and that there would not be any
2 cumulative effects that could accrue from
3 allowing that portion of the wall to be built
4 Q Okay And can you tell me in a general sense
5 why you denied the remainder of the project?
6 A That may be a fairly long answer
7 Q Well, I want to walk through the regulations
8 that you cited and why you determined that they
9 weighed against issuing the permit, but I
10 want -- can you generally explain to the Court
11 why you --
12 A Certainly We looked at the impacts of --
13 THE COURT Hold on one moment Go ahead
14 A We looked at the impacts of the wall itself and
15 how it would impact the area where the wall
16 would be constructed and how it might change
17 the general character of the overall area And
18 then we also looked at how the overall
19 development of Captain Sam's Spit might have
20 adverse impacts on the overall character and
21 uses and value of the spit property, as well
22 Q Okay What did you understand the purpose of
23 the revetment to be?
24 A To stop the erosion along the Kiawah River
25 shoreline of that property

1 Q Were there any other purposes that you
2 understood to be associated with the revetment?

3 A To try to stabilize that section of the river,
4 which I guess is the same as stopping the
5 erosion

6 Q Why did they want to stop the erosion, do you
7 know?

8 A I can go back and reread the application, but
9 I think they were concerned that they were
10 losing high ground property and that they may
11 have felt that stabilizing that section of
12 shoreline would facilitate development of the
13 Beachwalker Park spit

14 Q Did you understand that there were plans to
15 construct residential houses on the spit?

16 A I don't know that they mentioned that in their
17 initial permit application, but the information
18 that was provided to us by Ray Pantlik or Mitch
19 Bohannon, or possibly both of them, prior to us
20 making our final decision, confirmed that they
21 did have plans to develop that property

22 Q Okay Can you turn to -- I believe it's KDP
23 Exhibit Twenty

24 MR WHITFIELD-CARGILE Let me get my notebook
25 That's not it Hold on, that's not the one I

1 want you to turn to
2 Q KDP Exhibit Eighteen
3 A All right
4 Q In that letter, does Mr -- on the second page
5 of that letter, does Mr Pantlik indicate that
6 there are plans to pursue residential
7 development on that spit?
8 A Well, it talks about the fact that the property
9 was rezoned in 2005 to allow residential
10 development, yes
11 Q Okay Did you receive another letter
12 indicating that there could be houses put on
13 the spit?
14 A Yes
15 Q Okay Was that in Exhibit --
16 MR WHITFIELD-CARGILE Begging the Court's
17 indulgence one moment, Your Honor
18 A I'm looking at Exhibit Twenty-four
19 Q Okay What does Exhibit Twenty-four tell you?
20 A Exhibit Twenty-four is the letter from Ray
21 Pantlik, dated September 2nd, and at the bottom
22 of the letter it says "within these 20 acres up
23 to 50 single family homesites, at most, may be
24 sold "
25 Q Okay And that's a September 2nd, 2008 letter?

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1 A Yes

2 Q So did you understand the purpose of the
3 revetment would be to facilitate that
4 development?

5 A At that point, yes

6 Q Okay I want to walk through the statutes that
7 you cited in your decision document and how
8 they came into play in your decision

9 A All right

10 Q Can we look at --

11 MR WHITFIELD-CARGILE And, Your Honor, I would
12 note that it's four o'clock and cognizant of
13 the time we have and my --

14 THE COURT You don't think you're going to make it
15 through direct in time for --

16 MR WHITFIELD-CARGILE I don't know that we can
17 make it through the direct in time to do a
18 direct and cross-examination of Ms Hughes,
19 because I recognize that I'm painstakingly slow
20 and boring

21 THE COURT All right No comment in that area, but
22 are you at a good breaking point?

23 MR WHITFIELD-CARGILE I think we probably are

24 THE COURT All right

25 MR WHITFIELD-CARGILE Would that be okay with the

1 Court?
2 THE COURT Well, maybe if we put the bird expert -
3 up, you can get more of your case and get it
4 down the path, with time, so
5 MR WHITFIELD-CARGILE Hopefully I'm trying, Your
6 Honor
7 THE COURT Okay Well, then, let's just --
8 MS ARMSTRONG That's high expectations for an
9 hour
10 THE COURT I'm just trying to compromise with
11 myself, since I did not meet one of my goals
12 Mr Elser, if you'll step down
13 (Witness excused)
14 MR WHITFIELD-CARGILE Can I have five minutes,
15 Your Honor?
16 MS ARMSTRONG I would join in that I would join
17 in that
18 THE COURT Okay
19 MS ARMSTRONG I'd love to have a quick rest and
20 break
21 THE COURT I'll give Ms Armstrong five minutes
22 MR WHITFIELD-CARGILE Thank you, Your Honor
23 (Off the record from 4 00 to 4 09 p m)
24 MR WHITFIELD-CARGILE Your Honor, Department calls
25 Dr Melissa Hughes

1 THE COURT Can we go ahead?

2 MS ARMSTRONG Yes, Your Honor, we can go ahead

3 THE COURT Before we go further, I listened to the

4 testimony of Mr Eiser and he didn't give any

5 reason for denying the permit as a result of

6 the birds and, matter of fact, I thought he

7 said that y'all waited on the --

8 MR WHITFIELD-CARGILE Your Honor, we're --

9 THE COURT -- waited on the permit from the Corps

10 The Corps found that that was not a problem

11 and -- so I'm trying to figure out how that

12 is -- from your perspective, how that's an

13 issue or is it --

14 MR WHITFIELD-CARGILE Your Honor, we haven't

15 finished the testimony of Mr Eiser

16 THE COURT Okay I know that That's why I'm

17 asking

18 MR WHITFIELD-CARGILE I'll tell you, it's coming

19 THE COURT Okay All right

20 MR WHITFIELD-CARGILE Is that good enough?

21 THE COURT Yes, sir

22 MR WHITFIELD-CARGILE Thank you, Your Honor

23 DR MELISSA HUGES, having been duly sworn, examines

24 and testifies as follows

25 DR HUGHES - DIRECT EXAMINATION BY MR

1 WHITFIELD-CARGILE

2 Q Dr Hughes, can you please state your name for, -
3 the record

4 A Melissa Hughes

5 Q And where do you live?

6 A Charleston, South Carolina

7 Q Where are you currently employed?

8 A College of Charleston, Department of Biology

9 Q Okay And what's your title there?

10 A Associate professor

11 Q How long have you been there?

12 A Since 2001

13 Q Okay Let's talk about your educational
14 background for a minute Where did you do your
15 undergraduate work?

16 A Bucknell University

17 Q And what did you get a degree in?

18 A Biology

19 Q When?

20 A 1988

21 Q Okay What did you do after that?

22 A I went directly that fall to Duke University
23 and started a Ph D program

24 Q What did you get your Ph D in?

25 A Zoology

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1 Q Okay Did you have any particular emphasis?

2 A Animal behavior

3 Q Okay And when did you get your Ph D ?

4 A 1994

5 Q What did you do after that?

6 A In 1994, I took a teaching position at Duke and
7 switched the lab I was working in and stayed
8 for an additional two years at Duke, working on
9 a songbird project

10 After that I received an Alexander von Humboldt
11 fellowship, that's kind of like a German
12 version of a Fulbright, and I went over to
13 Berlin for a year to work on nightingales And
14 following that, I returned to another position
15 at Princeton University for three years and
16 then I came to the College of Charleston

17 Q Okay Are you an ornithologist?

18 A Yes

19 Q Okay Are you a tenured professor at College
20 of Charleston?

21 A Yes

22 Q What classes do you teach?

23 A Animal behavior and ornithology Both of those
24 are taught primarily to seniors or upper level
25 laboratory courses for undergraduates I do

1 occasionally teach them at a grad/undergrad
2 level Graduate students can be incorporated
3 into those classes in additional work

4 Q Okay

5 A I also teach introductory biology

6 Q Slow down just a little bit when you're
7 talking

8 A Sorry

9 Q It's going to help the court reporter

10 A I get that from my students

11 Q Okay Do you teach courses in coastal
12 ornithology?

13 A I don't teach a particular course in coastal
14 ornithology, but the coastal birds are a big
15 part of the environment that we have in
16 Charleston, and so the coast becomes a large
17 part of that class, for sure

18 Q Okay What work have you -- when did you first
19 become familiar with piping plovers?

20 A My academic interest in piping plovers began
21 when I moved to Charleston, because I knew I
22 was going to have to be teaching ornithology
23 and perhaps advising graduate students And so
24 with all of the shorebirds and seabirds and
25 waders that make up most of our birds in the

1 Charleston area, most of our obvious, easily
2 observed birds in the Charleston area, I took
3 an interest in learning as much as I could
4 about their behavior and ecology so that I
5 could be a good teacher

6 Q Have you reviewed any literature on piping
7 plovers in connection with this litigation?

8 A I have

9 MR WHITFIELD-CARGILE Okay I'm going to have you
10 mark this, Madam Court Reporter as Exhibit
11 Seventy-seven, I think

12 (Off the record)

13 Q And is Exhibit One a list of the literature
14 that you reviewed in connection with piping
15 plovers?

16 A It is

17 MR WHITFIELD-CARGILE Okay Your Honor, at this
18 time, I would move for the admission of
19 Dr Hughes as an expert in piping plovers in
20 ornithology

21 THE COURT Any objection?

22 MR WALKER May I examine as to her qualifications?

23 THE COURT Yes

24 DR HUGHES - VOIR DIRE EXAMINATION BY MR WALKER

25 Q Is it Dr Hughes?

1 A Correct

2 Q My name is Trenholm Walker, good afternoon,

3 representing KDP When were you first

4 contacted about this particular case?

5 A This particular case? Last week

6 Q What day last week?

7 A I don't remember Monday or Tuesday or

8 Wednesday, early in the week

9 Q When did you compile this list of references on

10 piping plovers?

11 A When did I compile it? Some of these --

12 many -- I don't want to put a quantified number

13 on it -- some of these references I knew about

14 previously from other work I had done with

15 classes or graduate students and so I already

16 had a small bibliography of shorebird stuff

17 that I -- that some of these were gleaned from

18 When I was contacted last week, I did some

19 additional searches This final list congealed

20 by late in the week, into the weekend

21 Q Have you ever worked on any particular projects

22 involving piping plovers, such as banding

23 piping plovers? Have you ever --

24 A No

25 Q -- worked on any projects?

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1 A I have not
2 Q Have you ever acted as a consultant in
3 rendering opinions on designations of habitat
4 or classifying habitat for piping plovers?
5 A I have not
6 Q Have you -- maybe we hit this Have you ever
7 done any fieldwork involving -- formal
8 fieldwork on piping plovers?
9 A I have not
10 Q Have you ever published on piping plovers?
11 A Nope
12 Q With respect to this case, did you obtain data
13 as to the presence of piping plovers on Kiawah
14 Island?
15 A No
16 Q So, as you sit here today, you have not
17 reviewed the publicly available data on the
18 presence of plovers on the -- the census data
19 for the presence of plovers on Kiawah Island
20 A I'm sorry, was that your previous question? I
21 must have misunderstood I thought you were
22 asking if I had personally done the census
23 Q No, no, have you reviewed --
24 A I've reviewed publicly available data on the
25 presence of plovers

1 Q What census data have you reviewed for piping
2 plovers on Kiawah Island?

3 A I've reviewed the data from the South Carolina
4 Shorebird Report I've reviewed reports from
5 Carolina Birds and I've reviewed reports from
6 the Cape Romain Bird Observatory

7 Q Have you been in touch with the Town of Kiawah
8 Island to obtain --

9 THE COURT Wait a second

10 Can you give me that list one more time so I
11 can --

12 THE WITNESS South Carolina Shorebird Report, Cape
13 Romain Bird Observatory And what else did I
14 say? Oh, the Carolina birds list

15 THE COURT Go ahead

16 Q Have you obtained the available data from the
17 town of Kiawah Island from their town
18 biologist, Jim Jordan, who has been collecting
19 data on piping plovers over the last four years
20 every two weeks?

21 A I was unaware that that was -- I'm sorry to
22 step on you I was unaware that that was
23 happening until more recently and, since I had
24 already found data from a number of different
25 sources demonstrating that they were present,

1 which was really my only concern at that point,
2 I didn't feel the need for additional --
3 confirmation that they were present

4 Q If I understand your testimony, then, it's not
5 the distribution on Kiawah Island you're
6 concerned with, it's the fact that wintering
7 piping plovers are present

8 A Wintering piping plovers are present in the
9 inlet area Beyond that, I was not
10 particularly concerned with more detail about
11 where they were present

12 Q When you talk about the inlet area, are you
13 talking about the inlet on the west end or the
14 east end?

15 A I'm talking about the inlet at the end of
16 Captain Sam's Spit on the Kiawah side

17 Q Have you done any research to investigate the
18 number of people who use the beach at Kiawah
19 Island?

20 A No, I have not

21 Q As we sit here today, do you have any idea of
22 the number of people who use the beach at any
23 time of the year on Kiawah Island?

24 A Nope

25 Q Is any part of the opinions that you are here

1 to render today, does any part deal with the
2 disturbance --
3 A Absolutely
4 Q -- by humans on the beach?
5 A Absolutely
6 Q So without having any information as to the use
7 of the beach, you do not know the degree of
8 that disturbance, do you?
9 A I'm not interested in the precise amount of
10 disturbance I'm interested in the likelihood
11 of increase in disturbance
12 Q All right So without knowing how many people
13 are on the beach, you can have no idea of how
14 many -- the incremental increase as a result of
15 the possibility of 50 houses, can you?
16 A I think that you don't need to know the
17 starting number to know that when you add to
18 it, the number goes up
19 Q I'm not asking you if the number goes up I'm
20 asking you what --
21 A And I'm saying what I'm concerned about is that
22 the number goes up
23 Q I'm asking you, do you have any basis for
24 telling us --
25 MR WHITFIELD-CARGILE Your Honor, I'm not offering

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1 her as an expert in census -- human census
2 calculations or the psychology of people or
3 what people do

4 THE COURT You're offering her as an expert in
5 piping plovers He's asking about the issues
6 related to this case to determine whether she
7 can be qualified as an expert to testify in
8 this case, is she not?

9 MR WHITFIELD-CARGILE I think that he's asking her
10 about what people do

11 THE COURT I overrule your objection Proceed

12 Q Today, as you sit there, you do not know what
13 the number of people is or a relative
14 approximation, reasonable approximately based
15 on data of beach use on Kiawah Island, do you?

16 A Nope

17 Q And you don't know whether or not that use
18 fluctuates depending on the season, do you?

19 A Well, unless people are walking farther in the
20 winter than they do in the summer, again, that
21 number must go down, since the park is closed
22 for a chunk of time and closed during the week,
23 but not weekends, another chunk of the time

24 Q We're talking about wintering piping plovers,
25 correct?

1 A Correct

2 Q You do not know, as you sit there, what the use
3 of the beach is during the months that
4 wintering piping plovers are present on Kiawah
5 Island, do you?

6 A I've not gone out and counted the people, no

7 Q And since you don't know the number of people,
8 nor the percentage that those people represent
9 in proportion to the people on the island at
10 that time, you certainly can't tell us what
11 percentage would be represented by the persons
12 who might go on the beach from these potential
13 50 houses, can you?

14 A And I have no intention to do so

15 Q It's not possible to give an opinion with any
16 certainty as to the incremental increase in
17 alleged disturbance without knowing what the
18 disturbance is to start with, correct?

19 A If I have reason to believe that this
20 disturbance will go up, I can tell -- I'm here
21 to testify about the effect on the plovers If
22 there's other evidence that other people can
23 testify to about how the disturbance isn't
24 going to change, that's a separate issue I'm
25 here to testify about the plovers

1 Q Aren't you here -- I thought you were here to
2 testify to the change in the disturbance,
3 allegedly, as a result of some day having 50
4 houses there

5 A I'm here to tell you what will happen to the
6 plovers if the disturbance goes up If there's
7 other data that I'm not aware of that can
8 assure the world that the disturbance is not
9 going to increase, I can't speak to that I'm
10 here to testify about what will happen to the
11 plovers if the disturbance goes up

12 MR WALKER Your Honor, we would move that she not
13 be qualified to render an opinion in this case,
14 first, because she doesn't have sufficient
15 background and data and information to render
16 an opinion with reasonable certainty The
17 upshot of her whole opinion is going to be that
18 somebody from these houses might walk on the
19 beach and that causes disturbance, but she
20 doesn't have a starting point to go by She
21 has no information at all She's just simply
22 saying that disturbance is bad And since she
23 doesn't have a starting point, she can't say
24 how these potential people would contribute
25 We think it's speculative We don't think

1 she's qualified

2 THE COURT Any objection?

3 MS ARMSTRONG There's no objection that -- the

4 issues that Mr Walker's raised go to the

5 weight of the testimony, but not to whether

6 she's qualified as an expert witness I mean,

7 that goes to whether she's got training, skill,

8 experience and would assist Your Honor in the

9 finding of fact in this matter and her

10 opinions --

11 THE COURT That's going to be my ruling, then

12 MS ARMSTRONG I'm sorry, Your Honor

13 THE COURT That's okay

14 MR WHITFIELD-CARGILE She made my argument, Your

15 Honor

16 THE COURT Well, as Ms Armstrong was explaining,

17 I overrule your objection because it goes to

18 the weight of her testimony and we're going to

19 have to ultimately determine how her testimony

20 fits within the relevancy of this case

21 MR WALKER I understand

22 THE COURT With that said, let's proceed

23 MR WHITFIELD-CARGILE Thank you, Your Honor

24 DR HUGHES - DIRECT EXAMINATION (Continued) BY

25 MR WHITFIELD-CARGILE

1 Q Let's talk about the plovers for a minute

2 What's a piping plover?

3 A Sorry, piping plover is a shorebird, a
4 migratory shorebird, that winters here in South
5 Carolina

6 Q Okay What's the status of the plover?

7 A The plover has three what appear to be
8 genetically distinct breeding populations One
9 is listed as endangered, the other two are
10 threatened, I believe Two of those
11 populations are known to winter here in South
12 Carolina

13 Q Which two populations --

14 THE COURT What did you say, the last part?

15 THE WITNESS Two of those populations are known to
16 winter here in South Carolina

17 Q Okay And we hear about piping -- or, sorry,
18 breeding plovers and wintering plovers Can
19 you explain that that distinction is?

20 A Well, wintering plovers are overwintering here
21 in South Carolina They're migratory and so
22 they breed in the far North, taking advantage
23 of a bloom in resources that occurs in the
24 North in the summertime, in the longer daylight
25 that occurs in the North in the summertime

1 They're only on the breeding grounds for a
2 relatively short period of time, two, three
3 four months, depending on the population, and
4 then they migrate back down to the wintering
5 grounds where they spend the winter We would
6 be an example of a wintering ground, then

7 Q Okay How many times have you been to Kiawah
8 Island?

9 A Since moving to Charleston in 2001, I've been
10 there seven or eight times

11 Q Okay Have you been to the spit -- how many
12 times have you been to the spit?

13 A The seven or eight times, that's where I go if
14 I go out there

15 Q Okay How do you know that piping plovers use
16 the beach on the spit in front of Kiawah?

17 A Oh, they've been counted in the South Carolina
18 shorebird survey There were regular surveys
19 from 2006 to 2008 through the late summer into
20 the early spring months This was the study
21 done in a collaboration, I believe, between the
22 Audubon Society and SCDNR There might have
23 been another agency involved
24 There were also surveys done on the Sullivan's
25 Island side and when the surveyors got to the

1 tip, they would train their spotting scopes
2 across the way and see if they could see
3 plovers on the mud flats in between or over on
4 the Kiawah side, and there were reports that
5 came from those surveys, as well

6 As I said, I also have reports from the Cape
7 Romain Bird Observatory and the Carolina birds

8 Q Okay What is the significance of the status
9 of the bird being listed as threatened or
10 endangered?

11 A What's the significance?

12 Q Yes

13 A It means the population is in decline, the
14 numbers are in the decline, and things need to
15 be done to rectify that

16 Q Okay And what elements are important to
17 rectifying that?

18 A I think -- well, in the case of the piping
19 plovers, as part of the original recovery -- or
20 the revised recovery plan of 1996, they did
21 what's called a population viability analysis
22 A population viability analysis is a
23 statistical means of essentially trying to
24 assess what are the most sensitive phases of
25 this animal's life cycle You take all of the

1 data you got from the field, real field data,
2 on how long do they live, how big is the
3 population, what percentage breeds, how many
4 young do they have, how well do the young
5 survive

6 You take all that demographic data, incorporate
7 variation in that demographic data, throw in
8 some chance events, some stochasticity, and
9 then you can be -- stochasticity chance
10 events, random events

11 And in the process then you can begin to model
12 what happens if this variable increases or
13 decreases, what happens if this variable
14 increases or decreases Think of it as a kind
15 of sensitivity analysis How -- what will
16 happen to the population if we increase the
17 number of -- the proportion of individuals who
18 successfully breed, what will happen to the
19 population if we increase the number of
20 individuals who survive migration, what happens
21 if we decrease these variables And what you
22 get out of it is a measure, like I said, of
23 sensitivity What are the variables where
24 small changes in the variable have a big impact
25 on the likelihood of a population going

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1 extinct, hence the name population viability
2 analysis

3 Q And what are the variables that have the small
4 change in which can impact the likelihood of a
5 species going extinct?

6 A Well, the only one relevant to us here in the
7 wintering population is adult survival, or
8 overwintering survival, turned out to have
9 quite a large impact on population viability
10 In the additional analysis that they did, using
11 the data they had at that time for these
12 demographic variables, how long the birds live,
13 how many babies they have, that kind of thing,
14 they found that there was -- given the numbers
15 that they had, if they started with 2,000
16 breeding pairs, they would have, I believe, a
17 four percent chance of extinction in a hundred
18 years

19 But if they decrease adult survival by just
20 five percent and juvenile survival by ten
21 percent, for both of these, that's essentially
22 overwintering survival, so with these small
23 changes in overwintering survival they found
24 that the likelihood of extinction jumped
25 eightfold, jumped to 32 percent

1 So that would be an example of an output from
2 a population viability analysis that kind of
3 raises your eyebrows You said, okay, this
4 adult survival turns out to be pretty critical
5 to the recovery of the species Small changes
6 in adult survival are going to have a big
7 impact on whether the population is growing or
8 shrinking

9 Q Okay Before we can get to what can cause
10 small changes in adult survival, what do
11 wintering plovers do in South Carolina?

12 A The life of a wintering plover is similar in
13 many ways to the life of any wintering
14 shorebird They return to the wintering
15 grounds hungry and needing to refuel after
16 their southward flight
17 What they need to do next is put on weight in
18 the form of fat so that they can survive any
19 overwintering events that come along, but, more
20 importantly, it's essentially putting on fuel
21 for the migration north

22 Q How do they get fuel?

23 A Eating and resting That's what they do
24 But I just want to emphasize, this putting on
25 of fat is not inconsequential This is 20 to

1 40 percent of their body weight in fat gets put
2 on over the winter months And there's- ----
3 certainly evidence to suggest in shorebirds
4 that not putting on sufficient fat leads to
5 higher mortality risk overwintering They
6 essentially die on migration It's like an
7 airplane that takes off without enough fuel, it
8 doesn't make it to the destination

9 Q Okay How do they allot their time when
10 they're on --

11 A So on the wintering grounds -- and this data is
12 specific to piping plovers This was in a
13 study done on a Georgia coastal island What
14 do they do? They need to gain weight What do
15 you do when you need to gain weight? They
16 spend their time predominantly eating, 76
17 percent of the daylight hours are spent
18 foraging in this population Most of the
19 remaining time was spent resting
20 And so what you need to do, not surprisingly,
21 if you need to put on a lot of fat, is you need
22 to eat most of the time and you need to rest as
23 much as possible Otherwise, less than five
24 percent of the time in these birds' daily time
25 budgets was spent on anything else, including

1 running, flying, being vigilant, interacting
2 with each other, aggressive interactions

3 Q You said less than five percent of the time?

4 A Less than five percent of the time was spent on
5 those other activities

6 Q Okay Can you tell me about the critical
7 habitat of the plover?

8 A Well, the critical habitat of the plover is
9 really -- it's a habitat mosaic And, again,
10 think about if what you need to do is feed all
11 day long, essentially, except when you're going
12 to rest, you need to have ample foraging
13 habitat available to you and in a dynamic
14 environment, an intertidal environment --

15 THE COURT Can you slow down?

16 THE WITNESS Sorry

17 A In an intertidal environment, these are birds
18 that feed in the intertidal zone

19 THE COURT I don't think that worked

20 THE WITNESS Sorry I get excited about birds

21 A So given that they're feeding in a zone that's
22 essentially changing throughout the day,
23 because the tide is moving, having a variety of
24 habitats that are exposed at different times,
25 that are exposed for different amounts of times

1 that provide different foraging opportunities
2 becomes critical So when you look at -- when
3 I say this habitat mosaic, the critical
4 habitats for piping plovers tend to include an
5 assemblage of habitats, mud flats, sandy mud
6 flats, algal mats turn out to be really
7 important, these mud flats with a thin layer of
8 algae on top Coastal lagoons are important in
9 some populations They like to have some front
10 beach They prefer to do their resting up in
11 the wrack on front beaches Their foraging
12 they're doing more around in the inlet areas
13 often or even up in the salt marshes in some
14 cases This assortment of habitats in close
15 proximity to each other, so you're not wasting
16 a lot of energy getting from point to point,
17 but you have all the foraging opportunities you
18 need and the resting opportunities that you
19 need to shelter with minimal cost, moving
20 between them So these are most typically
21 found at the accreting ends of barrier islands
22 Close proximity to inlets seems to be really
23 important Yeah

24 Q Have you been -- you said you've been to
25 Captain Sam's Spit a few times?

- 1 A Yes
- 2 Q And do you know if Captain Sam's Spit contains
- 3 constituent elements of critical habitat?
- 4 A Certainly appears to
- 5 Q Why?
- 6 A It's got a nice wide front beach, but then,
- 7 more importantly perhaps for the foraging
- 8 aspect, it's got beautiful mud and sand flats
- 9 that wrap around into the inlet area for ample
- 10 foraging. It's got some tidal marshes that
- 11 they can go up into. It's got a little bit of
- 12 dune. Occasionally, they will move back behind
- 13 the front dune for shelter and, on really high
- 14 tides, they've been known to forage on insects,
- 15 although that's a little rare. Usually,
- 16 they're more of an intertidal forager.
- 17 Q Okay. Do you know if plovers -- what portions
- 18 of Kiawah Island plovers are most densely or
- 19 most commonly found?
- 20 A Across the whole island, I do not. I've been
- 21 focusing on getting what information I could
- 22 for down at the south end.
- 23 Q Okay. What are the main threats to plovers?
- 24 A To wintering plovers, the primary threat is
- 25 chronic human disturbance.

1 Q Okay Can you elaborate on that for me? What
2 do you mean by that?

3 A Think of it as a leaky faucet, one little drip
4 doesn't amount to much, but if you don't
5 address it, your water bill is going to be a
6 lot higher than you really want to pay
7 Chronic human disturbance means really small
8 individual disturbances, tiny individual
9 disturbances happening repeatedly over the
10 course of multiple days, multiple months,
11 across the wintering period
12 Chronic human disturbance is not limited to the
13 humans themselves Humans bring with them an
14 assortment of other effects There's indirect
15 effects from human exposure That can be pets,
16 dogs and cats, and it can be other animals that
17 tend to follow wherever humans go, rats,
18 raccoons, foxes and so forth

19 Q Okay How do those other -- well, what about
20 humans and human disturbance, how is that --
21 what is human disturbance, I guess?

22 A "Human disturbance" can be something as simple
23 as walking by And, again, one person walking
24 by one plover is not going to cause them to
25 start dropping dead out of the sky But the

1 issue is that leaky faucet, that drip and drop
2 Remember that they're supposed to be spending
3 three-quarters of their time eating and most of
4 the remainder of the time resting Every time
5 they run away from something, they're expending
6 energy Those short flights that they take to
7 escape, are some of the most metabolically
8 expensive things that they can do, that short
9 little hop, that acceleration You use more gas
10 when you accelerate your car, right, than you
11 do cruising So that short hop is the most
12 expensive thing they can do And they weren't
13 foraging, they've stopped foraging, and so they
14 have spent energy That's a little fraction of
15 fat they didn't put on
16 So they fly over there into a new place and
17 they start to feed and, if that's all that ever
18 happens to them, they're fine, but if they get
19 chased from the other place, that's another
20 drip in the faucet The drips start to add up

21 Q Okay

22 A That's the chronic part

23 Q You said that humans themselves can cause birds
24 to fly What about a human causes a bird to
25 fly or to move?

1 A Walking by
2 Q Why will they move if a human walks by?
3 A As far as they know, we're a predator
4 Q Okay What about the -- you said that humans
5 can bring with them other effects, such as
6 other animals What about those --
7 A Few things are more fun in life than walking a
8 dog on a beach, so humans often have dogs on
9 beaches Dogs are known to disturb shorebirds
10 at greater distances and for longer times than
11 just having a person present
12 Humans also have cats and even pet cats that
13 are well fed like to hunt There have been
14 scattered accounts of pet cats being able to
15 prey on piping plovers, but -- adult piping
16 plovers, but, more importantly, I think, in
17 terms of the chronic effects of disturbance,
18 even if the cats are usually unsuccessful at
19 predating them, the plover has to get away from
20 the cat, it has to fly away Again, it's one
21 more drip from the faucet and one more source
22 of disturbance
23 Q Okay Do other mammals cause threats to
24 plovers?
25 A For the -- in terms of things that might be

1 associated with humans, again, racoons,
2 possums, foxes, these are all species that are
3 known -- rats, Norway rats, these are species
4 that are known to live in higher abundance
5 around human habitation We leave trash out
6 Even if we try to be clean, there's additional
7 trash that's left around, it's additional food
8 for them They are attracted to human
9 habitation

10 Q How do these animals affect the plover?

11 A Again, it's one more thing the plover has to
12 run away from These are unlikely to be direct
13 predators of adult plovers, I don't think A
14 fox could potentially take an adult plover,
15 although I'm not sure I've ever seen a
16 reference to that Raccoons, unlikely
17 Possums, unlikely That doesn't mean they're
18 not going to try And the plover, again, is
19 going to have to fly away, expending energy
20 It's another drip from the faucet

21 Q Okay Are you aware of any studies that track
22 evidence of increased human disturbance in
23 piping plovers?

24 A They are numerous studies, dating back to the
25 mid nineties, demonstrating that even small

1 increases, adding one person to the number of
2 people within 100 meters of shorebirds
3 decreases the amount of time they spend
4 foraging There's certainly numerous studies
5 on wintering shorebirds, in general
6 To the best of my knowledge, there are no
7 studies -- I was unable to find any studies on
8 wintering piping plovers There are similar
9 data on breeding piping plover Again, the
10 more people you have even close by, sunbathing,
11 if there's more people within a radius around
12 the plover, they just have -- they have to look
13 up more frequently, they have to look around
14 more frequently They actually -- these are
15 studies that actually measure foraging rate,
16 the number of swallows the birds are taking
17 They're taking in less food

18 Q Okay And is the mere presence of birds in
19 areas with human disturbance and human
20 development, is that a sign of a healthy bird?

21 A Well, you have no idea when you look at a bird
22 if it's healthy or not You can't see under
23 those feathers how much fat it's put on
24 The birds are attracted to -- they're
25 incredibly site faithful They're very site

1 faithful in the wintering grounds and so if a
2 development goes in some place and two years
3 later there are still plovers around, well,
4 those could be the same birds

5 In addition, the birds are going to be
6 attracted to where the foraging opportunities
7 are, where the food is And so they're going
8 to come to where the food is, but if they're
9 unable to eat as quickly or if they have to --
10 if they can't eat in uninterrupted bouts, even
11 though the food's there, they're not going to
12 be able to eat as much of it

13 Q What do they eat?

14 A Mostly -- their favorite food, apparently, are
15 polychete worms that live in the intertidal
16 These are -- it's a kind of worm that lives in
17 the intertidal But they'll eat other small
18 invertebrates, mostly aquatic, living in the
19 sand

20 Q You said that they have high site fidelity
21 What's the range of a plover when it's
22 wintering?

23 A Wintering plover ranges can be several
24 kilometers, as many as ten or 12 kilometers in
25 diameter They will cover a fairly wide range

1 This is thought to be related to that idea I
2 said earlier about needing a mosaic of
3 habitats

4 Q Well, let me ask you this If they have a wide
5 range, why can't they just fly to another area
6 if a dog or a person walks up?

7 A Well, that's, in fact, exactly what they do,
8 but now they've expended energy, instead of
9 eating, and if they're disturbed on the place
10 where they flew, then they fly back and -- it's
11 the chronic nature Again, it's not the single
12 disturbance that's the problem, it's the
13 chronic nature of the disturbance

14 Q Well, are you familiar with Deveau Banks?

15 A Yes

16 Q Is that developed?

17 A No, it is not

18 Q Why can't all the plovers just go to Deveau
19 Banks?

20 A I don't know if there's ample habitat there for
21 them Deveau Bank may not have right set of
22 constituent habitats I've only been at
23 Deveau by kayak and only on one side I don't
24 know if it has the extensive mud flats and sand
25 flats and other things that are necessary for

1 them to feed at the lower tidal cycles

2 Q Is it likely that all the plovers would just go

3 to Deveaux Banks?

4 A The thing is the plovers -- it's not accurate

5 to think of Deveaux Bank as being a separate

6 locale To the plovers, it might not be The

7 plovers, there are banded plovers that have

8 been sighted on Deveaux and over on Kiawah

9 What is much more likely to be going on is that

10 these are birds -- this is part of, as far as

11 they're concerned, the mosaic habitat They

12 use Deveaux when Deveaux has what they need

13 They use Kiawah or Seabrook when those places

14 have what they need

15 Q Are you aware of whether or not Beachwalker

16 Park is open -- or do you know when Beachwalker

17 Park is open?

18 A I believe it's closed for, I believe, four

19 months in the winter, is that correct? And

20 then there's -- there's a total of seven months

21 with reduced openness There's three or four

22 months when it's closed and then the remaining

23 three or four months, it's only open on

24 weekends There's a total of seven -- yeah, I

25 believe seven months when it has a very reduced

1 access

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

5 A Yeah, I believe so, yes

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

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

19 Q Okay

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

1 whether either or those are likely to occur

2 Q Okay Well, what about any potential
3 development on the spit, have you formed an
4 opinion as to whether any residential
5 development on that spit could affect the
6 plovers?

7 A If residential development adds to the number
8 of people on the beach, then certainly it will
9 impact the plovers

10 Q How?

11 A By adding one or two more people walking by, it
12 will reduce the amount of foraging time for the
13 plovers

14 Q Okay And why is -- well, if there were up to
15 50 houses on the spit, how could that affect
16 the plovers?

17 A As has been pointed out, I have no way of
18 saying how many people are going to be using
19 those 50 houses I can only assume that
20 somebody will be using those houses If
21 somebody is using those houses and if they
22 choose to go out on the beach, then the
23 additional presence of people will certainly
24 impact the plovers by reducing foraging time
25 In addition, if those people produce any form

1 of garbage that attracts raccoons or foxes or
2 if they bring cats or dogs, those would be
3 additional sources of chronic disturbance

4 Q What about gulls, do gulls affect plovers?

5 A Gulls are sort of an interesting case Gulls
6 are certainly also attracted by people, as
7 anyone who's been to a garbage dump knows And
8 gulls, as it turns out, are virtually
9 impossible to disturb Again, if you've been
10 to a beach, you know this They recover very
11 quickly, they'll fly away, but immediately come
12 back They're almost impervious to human
13 disturbance Gulls and shorebirds, including
14 plovers, will often -- they have overlapping
15 habitat preferences for where they want to be
16 on beaches during some times of the tidal
17 cycle Gulls can be very aggressive and so if
18 there's an aggressive -- they're much bigger in
19 body size than the plover is, so it's been
20 proposed -- and this was a recently study by
21 Joanna Burger -- but it's been proposed that
22 there can be interference, competition, that
23 is --

24 THE COURT You have a recent study by who?

25 THE WITNESS Oh, Joanna Burger, up in New Jersey

1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

001330

1 Actually, the study, I believe, was in
2 -- Delaware

3 THE COURT I'm just trying to slow you down to help
4 my court reporter out

5 THE WITNESS I'm so sorry

6 A The idea is this If you've got shorebirds and
7 gulls foraging together on the beach and
8 there's some kind of disturbance, both are
9 going to leave The gulls are going to come
10 back first and the gulls are going to deter --
11 make it even longer for the shorebirds to come
12 back because the gulls tend to have more --
13 they're more raucous, they have more aggressive
14 interactions, and the shorebirds are going to
15 want to keep a wider berth from that

16 Q Okay And why is it -- why does it matter if
17 there's a small increase -- if a few people
18 disturb more birds?

19 A I'll come back to my leaky faucet analogy,
20 it's -- a few more people disturb a few more
21 birds, the -- what happens if you eat less and
22 exercise more, you'll put on less fat If more
23 people are disturbing the birds -- and, again,
24 one disturbance isn't the issue, it's the
25 chronic nature It's the birds not spending

1 less than five percent of their time running or
2 walking or doing anything else, the birds not
3 spending three-quarters of their time eating
4 and 19 percent of their time resting It's the
5 chronic nature of the disturbance

6 But what happens if you, over the course of a
7 winter, exercise more and eat less, you put on
8 less fat We know, from studies in other
9 species of shorebirds, that if they don't put
10 on enough fat, mortality risk on migration
11 increases and now we're back to the
12 overwintering mortality question, this idea
13 that adult mortality, it could be very critical
14 in the recovery of the species

15 Q Okay How is it critical in the recovery of
16 the species?

17 A It goes back to the population viability
18 analysis The simplest way to understand it is
19 if nobody survives migration back North, it
20 doesn't matter if you have breeding ground or
21 not If the number of individuals returning to
22 breed is declining, you're not going to have
23 enough individuals to breed

24 MR WHITFIELD-CARGILE Okay I have no further
25 questions, Your Honor

1 THE COURT Ms Armstrong?
2 DR HUGHES - CROSS-EXAMINATION BY MS ARMSTRONG
3 Q I just have one question Dr Hughes, you said
4 that you had looked at census data and that it
5 indicated that there were plovers using Captain
6 Sam's Spit, is that right?
7 A Uh-huh (affirmatively responds)
8 Q Okay
9 A Yes
10 Q And you identified three different populations
11 of the piping plover, is that right?
12 A Breeding populations
13 Q Breeding populations
14 A There are three different breeding populations
15 of the piping plovers
16 Q And what are the wintering populations that
17 have been seen in South Carolina?
18 A The majority of birds -- actually, the majority
19 of band returns -- the three breeding
20 populations are morphologically
21 indistinguishable You can't look at a bird
22 and say, "Oh, that's a Great Lake bird So our
23 information about where the birds go -- they're
24 doing genetic studies now, which will be much
25 more helpful, although, you do have to catch

1 the bird -- but the information we have comes
2 from banding studies, band birds on the
3 breeding ground and then, hopefully, see them
4 again, see where they end up
5 In the -- from the band return data that I've
6 seen, we have a number of birds from the Great
7 Lake population and we also have some birds
8 from the Atlantic population I think I saw
9 maybe one band return in all of South Carolina
10 for a Great Plains population, but that would
11 be an outlier The Great Plains birds tend to
12 go down to the Gulf The Great Lakes birds go
13 to the Gulf and to the Atlantic coast The
14 Atlantic coast breeding population probably
15 mostly passes by us Some of them stay with us
16 and others go further on south down to the
17 Caribbean

18 Q And what's the species designation for the
19 Great Lakes population?

20 A The Great Lakes population is the endangered
21 population

22 Q Is that federally endangered or state
23 endangered?

24 A Federally

25 Q And what about the Atlantic population?

1 A I believe they're listed as threatened

2 Q And is that on the federal? --

3 A I believe so

4 MS ARMSTRONG I don't have other questions for
5 this witness

6 THE COURT Mr Walker?

7 DR HUGHES - CROSS-EXAMINATION BY MR WALKER

8 Q Dr Hughes, did you do your thesis or your
9 dissertation on shrimp?

10 A I did

11 Q Was there one on shrimp communication?

12 A One what?

13 Q I saw your CV and I --

14 A Uh-huh (affirmatively responds)

15 Q -- saw you had published something on shrimp
16 communication or --

17 A I published three papers on shrimp
18 communication

19 Q All right Was one of those your dissertation
20 or your Master's thesis?

21 A All three of them came out of my dissertation
22 I did not do a Master's

23 Q All right You mentioned the 1996 population
24 viability analysis Since that analysis came
25 out, the population has been tracked, the adult

1 population of wintering piping plovers,

2 - correct?

3 A I assume so

4 Q And isn't it true that the population has
5 proven to be gaining ground and has exceeded
6 the target numbers?

7 A I don't know if that's true or not I know
8 that there were increases and then more
9 recently I believe some decreases, but I
10 haven't looked at those data in a long time
11 I did not look at those data in the last two
12 weeks, to be honest That's stuff that I've
13 done my class and I did not do it for this

14 Q All right When you talked about disturbance,
15 you did acknowledge that the studies that have
16 been on -- done on disturbance have been done
17 on breeding piping plovers, correct?

18 A The studies that have been done on piping
19 plovers have been done on breeding piping
20 plovers Numerous other studies have been done
21 on other shorebirds However, there's reason
22 to think in --

23 Q Dr Hughes, my question was the studies that
24 you referred to on disturbance of piping
25 plovers were for breeding piping plovers,

1 correct?

2 A Correct

3 Q All right And according to the "Birds of
4 North America" -- which you'd consider
5 authoritative, wouldn't you?

6 A It was one of my sources, yes

7 Q Disturbance factors for wintering birds are
8 poorly known Isn't that what that referential
9 text says?

10 A I believe that referential text was written in
11 the early nineties I'd have to look Yes, in
12 1992 the disturbance effects were poorly known
13 We've learned a lot since then

14 Q The United States Fish & Wildlife Service is
15 charged with designating -- or its designated
16 critical habitat for wintering piping plovers,
17 correct?

18 A Yes

19 Q Do you consider that they have the piping
20 plovers best interests at heart?

21 A The critical habitat definition --

22 Q I wasn't asking you about the critical habitat
23 definition I'll change my question Would
24 you agree that the United States Fish &
25 Wildlife Service has expertise on staff on

1 wintering piping plovers?

2 A Absolutely

3 Q Would you agree that those would be the persons
4 who would be involved in writing up the
5 publications of the United States Fish &
6 Wildlife Service, presumably dealing with
7 wintering piping plovers?

8 A I would agree that those would be some of the
9 people involved, but not all of them

10 Q Are you familiar with the United States Fish &
11 Wildlife Service Q and A that's available on
12 the Internet dealing with wintering piping
13 plovers?

14 A Yeah, the FAQ sheet or I'm not sure --

15 Q It's the Q and A Let me see --

16 A I'm not sure if I've seen that particular
17 one --

18 Q It's called "Piping Plover Critical Habitat
19 Questions and Answers "

20 A I don't believe I've seen that

21 Q All right Were you aware under the question
22 that was asked, "What impact will critical
23 habitat designation have on beach use," did you
24 read that available information before coming
25 to court today to testify? Did you read the

1 answer to the question of, "What impact will
2 critical habitat designation have on beach
3 use?"

4 A I'm not an expert on beach use I didn't think
5 I'd be asked to testify to that

6 THE COURT You're not an expert on what?

7 THE WITNESS Beach use

8 THE COURT Beach use

9 Q And I'll ask you if you agree or disagree with
10 what the US Fish & Wildlife Service has to say
11 "While piping plovers are frequently known to
12 return to the same wintering beach each year,
13 they are not necessarily tied to specific sites
14 on that beach as they are when nesting or
15 rearing young, therefore, human disturbance is
16 less of an issue in wintering areas For this
17 reason, we don't anticipate any additional
18 restrictions on recreational beach use in the
19 wintering areas as a result of the critical
20 habitat designation "

21 A The critical habitat designation was, I
22 believe, in 2001 I don't know when that
23 statement was written I certainly do disagree
24 with it and the more recent literature would
25 agree with me, I believe

1 Q Well, the United States Fish & Wildlife Service
2 has said that it doesn't think recreational - - -
3 beach use has an adverse effect on wintering
4 piping plovers Can we agree on that?

5 MR WHITFIELD-CARGILE Objection, Your Honor,
6 that's not what that statement says, at least
7 not the way I recall him reading it

8 MR WALKER I will rephrase that

9 Q The United States Fish & Wildlife Service does
10 not think that recreational beach use
11 constitutes such a risk that it's going to
12 suggest curbing any recreational beach use in
13 wintering piping plover critical habitats,
14 correct?

15 MR WHITFIELD-CARGILE Your Honor --

16 A I haven't read the statement, so I can't say
17 whether it's correct or not

18 THE COURT Wait a second

19 MR WHITFIELD-CARGILE It sounds to me like Mr
20 Walker's testifying --

21 THE COURT Well, he's asking --

22 MR WHITFIELD-CARGILE -- and he's also --

23 THE COURT He can ask leading questions He's on
24 cross-examination

25 MR WHITFIELD-CARGILE I agree, Your Honor But

1 that's also hearsay If he's not letting us
2 put in this Fish & Wildlife map, he's sitting
3 there reading from the Fish & Wildlife website,
4 so that's hearsay and I ask that be stricken

5 THE COURT Any response?

6 MR WALKER It was recognized as authoritative I
7 was asking her whether she agreed or disagreed
8 with the Fish & Wildlife Service

9 THE COURT Well, look, she testified that US Fish
10 & Wildlife has expertise on wintering piping
11 plovers So I don't know if she -- she didn't
12 specifically say that that text is
13 authoritative

14 / THE WITNESS Am I allowed to say anything?

15 THE COURT No, not right now

16 But she did testify that they have expertise in
17 that area

18 MS ARMSTRONG Right, Your Honor Just for the
19 record, I do object and I think that that
20 goes -- I think saying that -- I think it's
21 going a little bit too far saying that that is
22 authoritative, this document right here
23 That's a different thing than the Fish &
24 Wildlife Service having expertise and this
25 document being authoritative I think, you

1 know, if he asks her about that, she can give
2 an answer

3 MR WALKER Well, she disagreed with it I'll move
4 to the next one

5 THE COURT Okay

6 MR WALKER She said she doesn't agree with it

7 A Neither did the Fish & Wildlife when they were
8 writing the 2003 Great Lakes Recovery Plan,
9 which specifically does mention

10 Q Well, they still had it on their website on
11 March 25th, 2009, didn't they?

12 A Maybe they don't pay their web designer enough

13 Q And the Federal Register for designating
14 critical habitat for wintering piping
15 plovers -- have you read the Federal Register?

16 A I'm a biologist, no, I have not

17 Q But with respect to piping plovers, since you
18 were coming down here today, did you look at
19 the Federal Register designation of critical
20 habitat for wintering piping plovers?

21 A I came down here today to testify about the
22 biology of wintering piping plovers No, I did
23 not read a government -- the register, or
24 whatever that is

25 Q Did you look at the midwinter censuses for

1 plovers on the coast of South Carolina for
2 1997, 1998, and 1999, by Dodd, Spinks and
3 Wilkinson?

4 A No, I don't believe I did I'm not sure I'm
5 aware of that document

6 Q That might have been helpful to know what those
7 censuses had to say about the presence of
8 piping plovers on Kiawah Island, wouldn't it?

9 A Again, that's some time ago and I'm -- I'm a
10 scientist, we're trained to use the most recent
11 data

12 Q Do you have any reason to doubt what was said
13 in this, that for beaches where observers
14 recorded both piping plovers and humans, the
15 median number of people and dogs was five and
16 zero, respectively, in 1998 and 21 and two,
17 respectively, in 1999?

18 A Are you asking if I think they were lying? No,
19 I have absolutely no reason to think they were
20 lying

21 Q That's not a whole lot of people on the beach,
22 is it?

23 A I don't know what "a whole lot" entails I do
24 know that studies that have looked at wider
25 ranges of habitat use have found that you find

1 reduced numbers of plovers the closer you get
2 to large urban areas But a single study where
3 you look at a couple of beaches, it's a small
4 sample size and, again, it's some time ago
5 I've not seen that document I can't speak to
6 the methodology, how the numbers were obtained,
7 anything like that

8 Q So would it surprise you that in one of those
9 years during the three-day survey zero
10 wintering piping plovers were found on the west
11 end and the next year there was only one found
12 on the west end --

13 A Why would that surprise me?

14 Q -- while the same year 18 were found on the
15 east end?

16 A As I said earlier in my testimony, the birds
17 are going to go primarily where the food is
18 That would lead me to believe there was more
19 food available on the other end or that that's
20 historically, as they are site faithful, a
21 place that they have returned to Again, not
22 knowing anything about the site, it's hard for
23 me to be surprised by some numbers

24 THE COURT So where I can be clear, it would not
25 surprise you that only one was found one year

1 on the east end and no piping plovers the next
2 year?

3 THE WITNESS I don't know why that would be
4 surprising There's noise in ecological
5 data --

6 THE COURT If you could just answer the question,
7 so I can --

8 THE WITNESS No

9 MR WALKER And that was on the west end, Your
10 Honor, where Captain Sam's --

11 THE COURT Oh, I had it backwards?

12 MR WALKER Yes, sir, the east end is Stono Inlet

13 THE COURT I'll ask the question again, with the
14 west end, that's where Captain Sam's Spit is,
15 would that not surprise you that --

16 THE WITNESS It's a number You say it was a
17 three-day survey Yeah, that doesn't surprise
18 me Maybe on these three days they were over
19 on the Seabrook side, or something like that
20 It's hard to know -- you can't prove an absence
21 and so I -- that's a little hard, a couple of
22 numbers, I can't draw a conclusion from that,
23 especially from a study that old

24 Q Wouldn't it also be, since you mentioned they
25 might be on Seabrook, that their range in

1 getting food when they're wintering is, I think
2 you said, up to ten kilometers?

3 A I believe 12 is cited in some sources, but
4 yeah

5 Q So it would be common for the bird to feed
6 within that radius, correct?

7 A Correct

8 Q So it's to be expected that the bird would get
9 up and fly around within that radius, correct,
10 so it can --

11 A Yes

12 Q -- go to the next feeding area?

13 A Absolutely

14 Q The feeding area that you said, as I understand
15 it, would be most attractive to the plovers at
16 Captain Sam's Inlet would be the mud flats that
17 have algae on top?

18 A That's one of the places they've been
19 frequently observed there Also, the sandy
20 flats and around onto the front beach,
21 especially at low tide when there's little
22 lagoon areas

23 Q Although your primary concern is disturbance,
24 I take it's from animals more than humans, or
25 is it --

1 A The sum total

2 Q -- the sum total? You have not given us a
3 tipping point In other words, you haven't
4 told us where there's going to be an adverse
5 effect You're just saying anybody out there
6 is an adverse effect, correct?

7 A I don't think anyone knows the tipping point

8 Q But based on that, you're saying as long as
9 there's anybody in the area, that's an adverse
10 effect, correct?

11 A I'm not saying that as long as there's anyone
12 in the area, the birds will die I'm saying
13 that chronic exposure, as long as there is
14 chronic exposure to there being humans or other
15 kinds of disturbances, then there will be an
16 effect

17 Q And since -- I think you just said we don't
18 know where the tipping point is, right?

19 A We don't

20 Q And since we don't know where the tipping point
21 is, we can't say whether another person on the
22 beach will have an adverse effect, can't we?

23 A That is what we call an empirical question We
24 won't know until we've tipped

25 Q Are you aware that the entire Seabrook front

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1 beach is within critical habitat of SC Unit 10?

2 A I didn't realize it ran all the way down I
3 knew it ran down some way on Seabrook

4 Q Deveau Bank is a critical unit

5 A Uh-huh (affirmatively responds)

6 Q Seabrook, up to a tenth mile --

7 A Up to --

8 Q -- one-tenth of a mile, Captain Sam's Would
9 you be in favor of preventing people from going
10 on the beach at Seabrook Island during the
11 winter? Is that what you think is the best
12 thing for the plovers?

13 A I think the best thing for the plovers is to
14 minimize disturbance I would love to have
15 people just walk around them and it would all
16 be cool

17 Q So if the people on Captain Sam's walked around
18 them, we would be cool, right?

19 A Well, if they also didn't have any pets or
20 garbage That's another added situation But
21 certainly, no, I wouldn't ask them to not go
22 out on the beach I would ask them to be
23 responsible users of the beach

24 MR WALKER Thank you, Your Honor

25 THE COURT If you're going to redirect, let me know

1 so I can -- I've got to write a little bit
2 more - - - - -

3 MR WHITFIELD-CARGILE I do have a few questions,
4 Your Honor

5 THE COURT Okay Hold on for a second

6 MR WHITFIELD-CARGILE Sure Thank you, Your
7 Honor

8 THE COURT All right Proceed

9 DR HUGHES - REDIRECT EXAMINATION BY MR
10 WHITFIELD-CARGILE

11 Q Dr Hughes, is there a difference between
12 flying from one beach to another and
13 disturbance -- flying when birds are disturbed?

14 A Presumably, when they get up on their own and
15 fly from one beach to another, they're doing it
16 because they have run out of food or the
17 habitat that they're at here -- it's their
18 choice, basically is the difference, and it
19 doesn't -- they're not being interrupted from
20 a place where they were finding food and then
21 having to go find another place to find food
22 The energetics of the takeoff, I don't think
23 there'd be much difference in that

24 MR WHITFIELD-CARGILE Can you mark this as
25 Seventy-eight?

1 (Off the record)

- 2 - Q Dr Hughes, I'm going to show you what's
3 been marked as Exhibit Seventy-eight
4 Mr Walker asked you if you'd seen
5 piping plover data collected by Kiawah
6 Island

7 A Uh-huh (affirmatively responds)^

8 Q Have you seen this document before?

9 A I don't think so

10 Q Okay I'm going to represent to you -- can
11 you tell by looking at that document what it
12 shows?

13 A I'm assuming -- well, I think what it's showing
14 is that those yellow dots are, I'm thinking,
15 piping plovers sightings?

16 Q Okay And why do you say that?

17 A Well, that's the title, "Piping Plover Sighting
18 Data "

19 Q And does it say who it's provided from?

20 A Town of Kiawah Island

21 Q Looking at that data, can you tell if
22 there's -- where the sightings are most
23 frequent?

24 A They seem to be most frequent at either end of
25 the island

1 Q Okay And would either end of the island
2 include Captain Sam's Spit?

3 A There seems to be a little cluster of them down
4 there and then another cluster at the other
5 end

6 Q Okay

7 MR WHITFIELD-CARGILE I don't have any further
8 questions, Your Honor

9 MS ARMSTRONG Nothing, Your Honor

10 MR WALKER May I take a look at the exhibit?

11 THE COURT Yeah

12 DR HUGHES - RECROSS-EXAMINATION BY MR WALKER

13 Q If those dots are piping plovers, they also
14 appear with some frequency between the two ends
15 of the island, do they not?

16 A Yes

17 Q Including appearing in front of the Sanctuary
18 Hotel, correct?

19 A Piping plovers occur around people If the
20 habitat is good for them to forage there,
21 that's where they'll go It doesn't mean it's
22 good for them to be there

23 Q But it seems like if we can trust piping
24 plovers to know what's good for them, it's
25 okay -- they've decided it's okay to be in the

1 settled part of the beach, haven't they?

2 A They have very small brains and they are site
3 faithful, and so if it was a good year for them
4 last year, maybe they got lucky

5 MR WALKER That's all I have

6 THE COURT You may step down

7 (Witness excused)

8 MR WHITFIELD-CARGILE Your Honor, the Department
9 will recall Mr Eiser

10 THE COURT Go ahead

11 MR EISER - DIRECT EXAMINATION (Continued) BY

12 MR WHITFIELD-CARGILE

13 Q Mr Eiser, when we took a break in your
14 testimony, we were about to talk about specific
15 reasons that you did not authorize the
16 remaining 2,513 feet of the proposed revetment

17 THE COURT If you could just stop just for a
18 moment

19 MR WHITFIELD-CARGILE Yes, Your Honor

20 THE COURT Today, Mr Walker, if you could go get
21 the security

22 MR WALKER My pleasure

23 (Off the record)

24 THE COURT All right Go ahead and proceed

25 MR WHITFIELD-CARGILE Thank you, Your Honor

1 Q Do you have the regulations in front of you?

2 A Yes -

3 Q Do you have a copy of the statute with you?

4 A Yes

5 Q Okay Can you turn in your statute to
6 48-39-150?

7 A All right

8 Q And section (A) (5) requires you to consider the
9 extent to which the development could effect
10 existing public access to tidal and submerged
11 lands, navigable waters and beaches or other
12 recreational coastal resources How did this
13 particular statute play into your decision?

14 A Well, it basically directs me to do what it
15 says right here, which is to consider how much
16 public access there is in the area where the
17 revetment is proposed to be constructed, based
18 on my observations or based on any other
19 information that I might become aware of

20 Q Okay And how did this element factor into
21 your decision?

22 A Well, at the time that I've done my site
23 visits, the four site visits specifically for
24 this project review, I have seen people walking
25 along that section, I've seen kayaks pulled up,

1 I've seen people either fishing or crabbing, I
2 can't remember which So I think that there
3 definitely is some public access and use in
4 that area I can't really, you know, quantify
5 how many people a day or a month go back there,
6 but I think it's certainly true that if this
7 articulated concrete block structure were
8 built, that it would effectively remove the
9 public's ability to use that half-mile-long
10 shoreline

11 Q Okay Before we -- actually, I want to start
12 with the specific project standards I recall
13 in your deposition and in your decision
14 document you said that you determined that the
15 specific project standards found in regulation
16 30-12(C) do not bar this project, do you recall
17 that?

18 A Yeah, the 30-12(C) is the specific regulation
19 that talks about bulkheads

20 Q Okay

21 A And I didn't feel that that regulation gave me
22 the guidance that would require me to out and
23 out deny this permit application

24 Q Why?

25 A Well, maybe we can go through the different

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

3 Q Okay

4 A It's a fairly short regulation It's titled
5 "Bulkheads and Revetments (Other Than
6 Oceanfront) " It says, first of all, "A,
7 Structures must be designed to conform to the
8 critical area line to the maximum extent
9 feasible " They had proposed to build it
10 within 18 inches of the critical line at the
11 upper end, while the bottom of it is going to
12 go 40 feet out into the river It talks about
13 "constructed so that reflective wave energy
14 does not destroy stable marine bottoms or
15 constitute a safety hazard "

16 Q When you issued the permit, did you have any
17 reason to think that that first project
18 standard was contravened?

19 A The critical area line part, no The second
20 part, I think I had some questions, but not to
21 the level that I felt it was being contravened,
22 no

23 Q Okay What about the second number, B?

24 A That's the one that actually says within 18
25 inches of the existing escarpment or, if that's

1 not feasible, wherever Department staff feels
2 it's appropriate

3 Q Okay

4 A So there's no contravention there

5 Q Okay What about the third one?

6 A The third one says that, "Bulkheads and
7 revetments should be prohibited in areas where
8 marshlands are adequately serving as an erosion
9 buffer," which is not the case here There is
10 no marshland that's serving as a buffer
11 Then it goes on to say "where adjacent property
12 could be detrimentally affected by erosion,
13 sedimentation," which I don't think is really
14 an issue, "or where public access is adversely
15 affected, unless upland is being lost due to
16 tidally-influenced erosion "

17 Q Okay

18 A So I think that public access could potentially
19 be adversely affected, but then it goes on to
20 say "unless upland is being lost due to
21 tidally-induced erosion," and I think they are
22 experiencing upland loss due to
23 tidally-influenced erosion

24 Q Okay What about the last one?

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

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

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

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

12 Q Okay What did you conclude?

13 A What did I conclude?

14 Q Yeah

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

18 Q Based on the specific project standards?

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

23 Q Okay Is that still your opinion?

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

1 that area than I had observed when I've been
2 - out there I still, though -- I'm not
3 convinced that that level of public access, you
4 know, rises to the level where you'd have to
5 say that the entire structure should be
6 prohibited just for that one reason

7 Q Okay

8 A But that -- I think that's open to
9 interpretation

10 Q Okay Let's talk about -- let's go back to
11 48-39-150(A)(5) That also deals with public
12 access, doesn't it?

13 A Yeah, let me get caught up with you Statute
14 48-39-150(A)(5) Okay This is what we
15 generally refer to as the ten general
16 considerations These are factors that we are
17 to consider in every critical area permit
18 decision that we make
19 It's -- (5) says, "The extent to which the
20 development could affect existing public access
21 to tidal and submerged lands, navigable waters
22 and beaches or other recreational coastal
23 resources "

24 Q Okay

25 A I think when you talk about the development

1 here, I think you could argue that they're
2 either talking about the actual permitted - - -
3 structure or the development that might
4 accumulate as a result of that structure being
5 permitted If you just narrowly look at the
6 structure itself, then, again, I think you
7 could argue that, yes, there is going to be
8 some effect on existing public access to the
9 submerged lands and tidal lands If you look
10 at the --

11 Q Okay What about navigable waters?

12 A If it's going to go 40 feet out into the river,
13 then to some degree it's going to change
14 navigation, but the river's wide enough I think
15 people in boats and kayaks can probably get
16 past it

17 Q What about beaches?

18 A Well, that's another issue, because if you say
19 beaches or other recreational coastal
20 resources, then you could be talking about the
21 entire Kiawah Spit property And the fact that
22 it says "development," I think can allow me to
23 look at the potential impacts from development
24 of that overall area that could result from
25 issuance of the critical area permit

1 THE COURT What specific provision are you looking
2 at right now?
3 THE WITNESS I am --
4 MR WHITFIELD-CARGILE 48-39-150(A)(5), Your Honor
5 THE COURT Oh, one second
6 THE WITNESS 150(A)(5)?
7 MR WHITFIELD-CARGILE (A)(5), I apologize
8 THE COURT Let me get there Okay
9 A So the question then becomes, could the overall
10 development of Captain Sam's Spit affect
11 existing public access to beaches or other
12 recreational coastal resources, which could
13 include the entire spit? And I think, you
14 know, potentially the answer to that could be
15 "yes "
16 Q Okay What about number seven?
17 A Number seven says, "The extent of the economic
18 benefits as compared with the benefits from
19 preservation of an in its unaltered state "
20 Q Okay Do you have any information as to the
21 extent of the economic benefits of the project?
22 A Of the development project?
23 Q Of the revetment
24 A Oh, the economic benefit of the revetment
25 itself, no

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

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

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

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

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

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

22 Q Okay

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

25 Q Is Beachwalker Park in that?

1 A I don't know if it was in the most recent one,
2 - it may have been But it was in one of the
3 ones that he's put out very recently, yeah
4 Q Okay What about number eight?
5 A Number eight says, "The extent of any adverse
6 environmental impact which cannot be avoided by
7 reasonable safeguards "
8 Q How does that come into play here?
9 A The environmental impact could certainly
10 include impacts to the piping plovers and, you
11 know, we've received information from US Fish
12 & Wildlife Service that indicated that they are
13 concerned that the development of that spit
14 could certainly have adverse impacts on piping
15 plovers
16 Q Are you aware of any potential environmental
17 impacts of the revetment itself?
18 A The revetment itself, I think could have some
19 additional environmental impacts You know,
20 we've heard information that if not the piping
21 plovers, then at least some other bird species
22 may be nesting along those erosional bluffs
23 I've got information in the file, though I
24 don't know how reliable it is, that the
25 terrapins, the turtles -- not the big

1 oceangoing turtles, but another species of
2 turtles -- may use that area as habitat

3 Q Okay What about the ninth consideration?

4 A "The extent to which all feasible safeguards
5 are taken to avoid adverse environmental impact
6 resulting from a project " And, again, if you
7 talk about the project as being some potential
8 overall development in the area, it's really
9 difficult to say what feasible safeguards are
10 being taken, because the development plans are
11 relatively nebulous at this point

12 Q Do you know of any feasible safeguards that are
13 being taken in connection with the actual
14 revetment itself?

15 A No

16 Q Okay What about the tenth consideration?

17 A "The extent to which the proposed use could
18 affect the value and enjoyment of adjacent
19 owners "

20 Q Okay

21 A Well, you know, the adjacent park property is
22 actually leased from KDP, so I don't know that
23 you can really count Charleston County Parks
24 and Recreation Commission as the adjacent
25 owners But if you kind of expand that to mean

1 people who use the property adjacent to the KDP
2 property, then I think yes, there will be an
3 effect to the value and enjoyment of those
4 users

5 Q Okay

6 THE COURT Wait a second, where I can be clear,
7 because I've heard many an OCRM case

8 THE WITNESS Uh-huh (affirmatively responds)

9 THE COURT You're now taking the position that
10 adjacent owners are who?

11 THE WITNESS Well, I mean, the beaches are owned by
12 the State of South Carolina --

13 THE COURT Okay

14 THE WITNESS -- and they're used by the citizens of
15 the State of South Carolina We don't
16 generally, you know, think of the State as the
17 adjacent owner, but all property below mean
18 high water is owned by the State

19 THE COURT So the position now, at least for you --

20 THE WITNESS Uh-huh (affirmatively responds)

21 THE COURT -- in interpreting this statute, that
22 the adjacent owners can be who? Explain that
23 to me

24 THE WITNESS I think the adjacent owners are
25 normally considered to be the people that own

1 the property next door

2 THE COURT - I recognize that I know how y'all have

3 interpreted it in the past

4 THE WITNESS Right, right, and I don't think I'm

5 really --

6 THE COURT How are you interpreting it now?

7 THE WITNESS I don't think I'm really trying to

8 interpret number ten as being anything other

9 than that

10 THE COURT Okay Fine

11 THE WITNESS I mean, I think you could expand upon

12 that, but that was not part of my

13 decision-making process in this

14 THE COURT Okay

15 Q Let's talk about your decision-making process

16 How did you weigh these ten general

17 considerations? Did those weigh for issuing

18 the permit or against issuing the permit?

19 A I think that several of these indicated that

20 the permit should be -- I keep wanting to say

21 "denied," but we didn't deny it -- but it

22 should be severely restricted in the way that

23 we did

24 Q So how did you restrict it, again?

25 A By only approving 270 feet out of the requested

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1 2,783 feet

2 Q And how do these factors weigh for issuing the
3 270 feet, but weigh against issuing the
4 remainder?

5 A Well, it has to do with the fact that the
6 section where we approved the wall to be built
7 is an existing park where existing
8 infrastructure is quite obviously threatened
9 and there would not be any additional
10 development in the park that could have a
11 cumulative adverse impact

12 Q Okay Are there any differences -- explain the
13 difference between the -- I guess you said
14 earlier that the spit is undeveloped

15 A Yes

16 Q And the part where you issued the permit you
17 said has infrastructure

18 A Yeah

19 Q Are there any other differences between the
20 park property and the spit property?

21 A Not that I can think of, no I mean,
22 there's -- you know, part of the KDP property
23 is a county park and there's park
24 infrastructure that's on that section That is
25 where people come out onto the beach when they

1 go to the beach and then they can either stay
2 put or go left or go right

3 Q Okay Well, let's look at the spit for a
4 second I'm just going to use Exhibit
5 Forty-eight as a -- what was the demonstrated
6 need for an erosion control structure in the
7 area where you saw

8 A All right Well, if we're talking about the
9 riverine shoreline, the Kiawah River shoreline
10 there, then the erosion in the county park
11 section is, by far, the worst, I would say
12 That's where the erosion is most dramatic and
13 most extreme

14 Q Okay

15 A And the degree of erosion decreases as you go
16 down towards Captain Sam's Inlet

17 Q What's the need -- why isn't there a need for
18 an erosion control structure on the spit
19 itself? Is there a -- well, let's go back to
20 48 -- or to 30-12(C) and it talks about losing
21 upland property Do you consider that there is
22 property being lost on the spit itself?

23 A Yes

24 Q Okay Is there also property being gained on
25 the spit?

1 A Yes

2 Q Okay Can you describe the difference for me?

3 A Sure Well, as has been discussed, this is a
4 very dynamic area I wouldn't expect any
5 shoreline here to stay put They're constantly
6 going to be changing That's just the nature
7 of these types of areas So they are
8 experiencing some erosion along that Kiawah
9 River shoreline, but they're also experiencing
10 accretion on the Atlantic Ocean shoreline and
11 the spit, as a whole, is moving farther down
12 towards Seabrook Island So it's building out
13 on the ocean side, it's extending further down
14 into Captain Sam's Inlet towards Seabrook
15 Island, and then it's also experiencing some
16 erosion on the Kiawah River shoreline right
17 there along that bank

18 Q Is the spit itself gaining land --

19 A Yes

20 Q -- overall?

21 A Yes

22 Q Have you ever issued a revetment in the past
23 for a piece of property that's gaining land?

24 A Well, I mean, typically people apply for
25 revetments because they have an erosion problem

1 and, as a result, they're experiencing a net
2 loss of property In this case, even with the
3 erosion, they're experiencing a net gain of
4 property

5 Q Okay Let's go to 48-39-30 and -- are you
6 required to consider 48-39-30 in acting on
7 permits?

8 A Yeah, this is -- 48-39-20 is a declaration of
9 findings and 48-39-30 is a declaration of State
10 policy regarding the coastal zone

11 Q Okay How did you apply the policies set forth
12 in 48-39-30?

13 A I certainly considered these policies in making
14 our decision

15 Q Okay And how did they factor into the
16 decision?

17 A Well, some of these --

18 Q Let's talk about (B)(1)

19 A Okay, (B)(1), and it's fairly short, let me
20 just read it "To promote economic and social
21 improvement of the citizens of this State and
22 to encourage development of coastal resources
23 in order to achieve such improvement with due
24 consideration for the environment and within
25 the framework of a coastal planning program

1 that is designed to protect the sensitive and
2 fragile areas from inappropriate development
3 and provide adequate environmental safeguards
4 with respect to the construction of facilities
5 in the critical areas of the coastal zone "

6 Q Does the Department read that statute to
7 promote development on all coastal properties?

8 A Not on all coastal properties, no

9 Q Okay Do you consider the spit a fragile and
10 sensitive area?

11 A Yes

12 Q Do you consider that issuing a critical area
13 permit for the revetment would facilitate
14 construction on that spit?

15 A Yes

16 Q Okay Let's look at 48-39-030(D), and that's
17 to provide -- "the critical areas shall be used
18 to provide the combination of uses which will
19 insure the maximum benefit to the people, but
20 not necessarily a combination of uses which
21 will generate maximum dollar benefits As
22 such, the use of a critical area for one or a
23 combination of like uses to the exclusion of
24 some or all other uses shall be consistent with
25 the purposes of this chapter "

4 Q How?

12 We're supposed to ensure the maximum benefit to
13 the people And I think the maximum benefit to
14 the people is to try to preserve the Kiawah
15 Spit in as unaltered a state as we can

19 **A** **No**

22 A No

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1 A On the beach side there is a baseline and
2 40-year setback line

3 Q Okay You heard testimony about a need to
4 protect an access corridor Do you recall
5 that?

6 A Yes

7 Q Okay Would denying this permit -- the
8 Department in denying the permit would result
9 in a loss of an access corridor?

10 A I don't think it would, no

11 Q Why?

12 A Well, I mean, there is an existing access
13 corridor that's out of the Agency's critical
14 area jurisdiction and it may not be as wide as
15 they would like it to be, but it's obviously an
16 access corridor and it's out of the Agency's
17 critical area jurisdiction

18 Q Is there an absolute prohibition on any
19 construction seaward of the setback line?

20 A No

21 Q Would it be possible for -- if that access
22 corridor continued to erode, would it be
23 possible for someone to apply for a permit to
24 construct a road beyond the setback line?

25 A I think that's an interesting question First

1 of all, the setback line is updated every eight
2 to ten years, so it may not always stay in its
3 current location It may move seaward as a
4 result of continuing accretion on the beach
5 there I think the statute mandates us to do
6 that

7 And then, secondly, there's no prohibition in
8 the statute or the regs that I'm aware of that
9 would prohibit them from building some sort of
10 an access road in our beach dune jurisdiction

11 Q Is there a special permitting process, that
12 you're aware of?

13 A Yes

14 Q Okay

15 A And just to finish that thought, I mean, we
16 have issued permits for houses to be built
17 seaward of our baseline I don't think that an
18 access road would have any greater impact than
19 private individual houses would

20 Q Okay Are you saying that the Department --
21 that any developers could definitely get an
22 access road there or are you just saying they
23 could apply for one?

24 A They could apply for a permit And I can't
25 think of any regulation that would

1 explicitly -- any, you know, critical area
2 special permit regulation that would explicitly
3 prohibit us from issuing that permit
4 Q Okay Let's talk about, would you consider --
5 did the Department consider whether or not this
6 revetment would facilitate some false sense of
7 security for potential buyers of residential
8 houses on that spit?

9 MR WALKER Objection, Your Honor (It's totally
10 leading and argumentative, because it was
11 something some witness -- or that they've been
12 arguing and now --

13 THE COURT Well, I'll sustain the objection

14 MR WHITFIELD-CARGILE Okay

15 Q Can you explain to me how the Department's
16 obligation to protect sensitive and fragile
17 areas from inappropriate development under
18 48-39-30(B)(1) factored into your decision?

19 A Say that citation again, 48?

20 Q 39-30(B)(1), the one we were just looking at a
21 moment ago

22 A Okay, the same one

23 Q We moved on to another regulation, but can you
24 explain to me how that factored into your
25 decision?

1 A Well, as I've said, this is a pristine,
2 undeveloped section of beachfront that we feel
3 should deserve our highest level of protection
4 because of that It's an extremely valuable
5 resource to the State of South Carolina for
6 natural resource and aesthetic and public
7 recreational uses, as well?

8 Q Is that the spit itself?

9 A Yeah, that's the spit and then, to a lesser
10 degree, the shoreline where the revetment would
11 be constructed

12 Q But do you consider the shoreline itself an
13 important resource to the State?

14 A Yes

15 Q Okay So how did this 48-39-30(B)(1) come into
16 play?

17 A We felt that that particular regulation
18 indicated that we should not facilitate
19 development of the Kiawah Spit by issuing the
20 permit for that half-mile-long revetment

21 Q Okay

22 A You know, that that would be facilitating
23 development in a sensitive and fragile area

24 Q Okay Why -- or how?

25 A I think our concern was that if the revetment

1 were built, that might give prospective buyers
2 that were unfamiliar with the history of this
3 area the sense that this was now a safe place
4 to buy a lot or build a house

5 Q When you say history of the area, what do you
6 mean?

7 A That 1949 shoreline that shows that virtually
8 all those proposed housing sites were under
9 water

10 Q Are you aware of any other data indicating that
11 there has been breaches in the spit?

12 A Yes

13 Q Like what?

14 A Well, I was aware of the Mason report that
15 identified historical inlet positions I was
16 also aware of the Bush and Pilkey book that
17 indicated different historical inlet positions
18 going back hundreds of years

19 Q You said the Mason report?

20 A Yes

21 Q I'm going to hand you -- is this the Mason
22 report?

23 A Yes

24 Q What in that report indicates historic inlet
25 positions?

1 A Well, there's a figure in this report that's
2 actually very similar to the figure that was in
3 that Kiawah report that Dr Dean was discussing
4 earlier today, that just indicates that Captain
5 Sam's Inlet has been located in a lot of
6 different locations in this area, going back
7 hundreds of years

8 Q Okay Let's get back to the statutes Are you
9 aware of the prohibition -- well, under
10 48-39-250 and 260, are you aware of the
11 prohibition on hard erosion control structures
12 on the beach?

13 A Yes

14 Q Are any of the policies in that section
15 relevant here?

16 A Well, 48-39-250 is captioned "Legislative
17 Findings Regarding the Coastal Beach Dune
18 System " That's not where they're proposing to
19 build this revetment It's not in the beach
20 dune system

21 48-39-260 talks about the policies and
22 stewardship responsibilities of the State of
23 South Carolina And it goes on to list several
24 of these, but, again, this is in the section of
25 the statute that was adopted in what's commonly

1 referred to as the Beachfront Management Act,
2 so I didn't feel that the prohibition on new -
3 erosion control structures in the beach dune
4 critical area was really applicable to this
5 revetment

6 Q Okay So the reason -- you didn't deny this
7 based on some perceived prohibition on
8 revetments, right?

9 A That's correct

10 Q Okay

11 A Yeah I mean, we do have a prohibition on any
12 kind of erosion control structure in our beach
13 dune critical area, but this revetment is not
14 proposed to be located in our beach dune
15 critical area

16 Q Okay Is this property subject to any
17 heightened protection under the Coastal Zone
18 Management Program document?

19 A Yes

20 Q How so?

21 A Under the Coastal Zone Management Program
22 document, this area is classified as a
23 geographic area of particular concern, or GAPC

24 Q Why?

25 A Because it is habitat for endangered or

1 threatened species

2 Q - Okay And when you say "this area," are you
3 referring --

4 A I'm talking about Captain Sam's Spit, not
5 necessarily the location where the revetment is
6 proposed to go, but the spit property itself

7 Q Okay Well, how is that relevant in your
8 determination?

9 A It's relevant because, under the program
10 document, these GAPC's are supposed to be given
11 the highest level of protection

12 Q Well, if the critical habitat is on the spit
13 itself, how does that factor into your
14 evaluation?

15 A It factors in because of comment letters that
16 we receive from US Fish & Wildlife Service
17 expressing concerns about this project

18 Q Is there a regulation that requires you to look
19 at the impacts of this revetment in the scope
20 of Captain Sam's Spit?

21 A Yeah, I mean, one of the ten general
22 considerations is the adverse cumulative
23 effects that could result from issuance of a
24 particular critical area permit

25 Q Okay Let's look at 30-11 for a minute

1 Actually, before we do that, is there any other
2 reasons that this area is afforded heightened
3 protection under the Coastal Zone Management
4 Program document?

5 A Sure If we're going back to the program
6 document --

7 Q Sorry to keep you on your toes

8 MR WALKER Your Honor, objection The program
9 document is not law I don't want to waive our
10 objection that it's not a legal consideration
11 in this analysis

12 THE COURT All right

13 MR WALKER So I object on that basis and would
14 like to have a continuing objection, if Your
15 Honor allows the testimony

16 THE COURT I will allow you a continuing objection

17 MR WALKER Thank you, Your Honor

18 MS ARMSTRONG Your Honor, while we --

19 THE COURT Although I would like to hear --
20 apparently, there's one case out there on that
21 that I haven't read yet Somebody referenced
22 it, that it's not law, but -- so I'm going to
23 ask y'all to brief that issue

24 MR WALKER All right

25 MS ARMSTRONG All right, Your Honor

1 I did have one quick concern I saw signs that
2 say the elevator is out from 6 00 to 8 00
3 Those are posted all over the place It's 5 39
4 and I'm going to need a few minutes to pack up
5 my stuff before the six o'clock cutoff that you
6 and I --

7 THE COURT I'm going to shut off at 6 00 and give
8 you a best chance to -- I have made
9 arrangements for it to be shut down at 6 30
10 now

11 (Off the record)

12 Q Okay You were talking about what other --

13 A Sure In the program document, in addition to
14 this area being a GAPC because of the
15 threatened or endangered species habitat
16 issues, there are other areas that are
17 identified as areas of special resource
18 significance They include barrier islands,
19 dune areas outside the critical areas and
20 public open spaces

21 Q And how does this property satisfy -- how is
22 this property a barrier island?

23 A In this document there's a table that lists all
24 the barrier islands in the state of South
25 Carolina, and Kiawah Island is listed

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1 Q Okay And is the spit a part of that barrier
2 island? - - -

3 A Yes

4 Q How is the spit unique, if it is at all?

5 A Unique on Kiawah Island or unique within the
6 state of South Carolina?

7 Q Let me withdraw the question

8 Would this property constitute dune areas?

9 A Yeah

10 Q How?

11 A Well, again, when I say "the property," I'm
12 talking about the Kiawah Spit

13 Q Okay

14 A I'm not talking about the area where the
15 revetment is proposed to be built

16 Q Okay

17 A But the Kiawah Spit is nothing but dunes that
18 have developed over the past 60 careers

19 Q How does the program document define dune
20 areas?

21 A If can read from it

22 Q You may

23 A It says -- well, let me find the definition,
24 excuse me Well, I know it's here someplace
25 You have to give me a minute, I'm sorry

1 Q Well, do you know how this property -- what
2 about this property makes it dune areas? - -

3 A Well, if I can paraphrase what's in here, it
4 basically is talking about these areas of
5 special resource significance being dunes that
6 are not critical area dunes, which typically
7 just means the primary -- I mean, not primary
8 dunes which are in our critical area It's
9 talking about the secondary dunes that are not
10 in our critical area jurisdiction They're
11 landward of the primary dune, but they are
12 still considered to be of special resource
13 significance

14 Q And how does it require you to protect those?

15 A There are actually policies that we're supposed
16 to apply for dune areas

17 Q Okay

18 A Just as there are policies for barrier islands
19 and policies for public open spaces

20 Q Okay What part of those policies come into
21 play here?

22 A Well, if we go back to the barrier islands
23 policies --

24 Q Well, I want to talk about dune areas

25 A Okay All right The policies for dune areas

1 say that because of their proximity to and
2 strong physical and ecological relationship
3 with the beach and primary sand dune critical
4 areas of the coastal zone, project proposals in
5 secondary sand dunes must demonstrate
6 reasonable precautions to prevent or limit any
7 direct negative impacts on the adjacent
8 critical areas

9 Q Okay And what about public open spaces?

10 A Public open spaces is the third type of area of
11 special resource significance that I think
12 would apply to this area

13 Q Why?

14 A Because it is an open space that is used by the
15 public and historically been used by the
16 public For many years it was actually zoned
17 as a conservation area I frankly don't think
18 that a lot of people that go to Charleston
19 County park, Beachwalker Park, realize that
20 it's not a county park all the way down to the
21 inlet

22 Q Is Beachwalker Park itself public open space?

23 A Yeah, Beachwalker Park is clearly a public open
24 space

25 Q What policies regarding public open spaces come

1 into play here?

2 A Number one, project proposals which would -

3 restrict or limit the continued use of a

4 recreational open area or disrupt the character

5 of such a natural area, aesthetically or

6 environmentally, will not be certified where

7 other alternatives exist

8 Q Okay How did you determine that the revetment

9 could implicate that policy?

10 A Well, first of all, I think that clearly

11 Beachwalker Park is a public open space It's

12 owned by Charleston County And I think that

13 any potential development of the spit could

14 adversely affect what they describe as the

15 aesthetic or natural character of the park

16 itself It will no longer be adjacent to a

17 pristine beach environment

18 But even the KDP property itself, which is an

19 open space used by the public, would certainly

20 have its aesthetic or environmental

21 characteristics changed if it's developed But

22 even just the revetment itself, building a

23 half-mile-long, 40-foot-wide concrete wall

24 that's going to take up about two and a half

25 acres of critical area, is certainly going to

1 change the aesthetic and environmental
2 character of that area

3 Q Is that looking at it from Beachwalker Park or
4 from the spit itself?

5 A Even from the Beachwalker Park area, because,
6 you know, the park is going to be immediately
7 adjacent to that pristine undeveloped
8 section -- and I can make a distinction on the
9 back side of the property where you've got that
10 park parking lot and the changing rooms and
11 snack shack and whatnot, a distinction between
12 having that section armored, where there's
13 already a lot of existing infrastructure, for
14 270 feet, versus continuing that revetment
15 another roughly half a mile down into that
16 pristine undeveloped property

17 Q Okay You mentioned 30-11(C)(1) in your
18 decision document How did that come into play
19 in your decision?

20 A 30-11(C)(1)?

21 Q Yes And I'll represent to you that this is
22 the regulation that requires consideration of
23 long-range --

24 A Right

25 Q -- cumulative impacts of the project

1 A It says basically that we are --

2 Q Why don't you publish -- why don't you read
3 that sentence

4 A Okay

5 THE COURT Did you say (C)(1) or (B)(1)?

6 MR WHITFIELD-CARGILE (C)(1), Your Honor,
7 30-11(C)(1)

8 THE COURT Okay I'm there

9 A (C) starts out, "In fulfilling of its
10 responsibility under Section 48-39-150, the
11 Department must in part base its decisions
12 regarding permit applications on the policies
13 specified in Section 48-39-20 and 30 and must
14 be guided by the following One, the extent to
15 which long-range, cumulative effects of the
16 project may result within the context of other
17 possible development and the general character
18 of the area "

19 Q Okay What did you consider to be the
20 possible long-range, cumulative effects of the
21 project?

22 A The construction of 50 houses on the Kiawah
23 Spit

24 Q Okay Anything else?

25 A The infrastructure and human activity that

1 would go along with that

2 Q Okay And what are the effects, what exactly
3 about those -- what are the exact long-range,
4 cumulative effects?

5 A Well, I mean, the consideration is whether or
6 not issuance of the entire length of the
7 bulkhead that was requested would facilitate
8 that cumulative impacts And I think we
9 concluded that, yes, it would

10 And then looking at number one, it says we're
11 supposed to judge or consider what those
12 long-range, cumulative effects might be when
13 we're making that permit decision And the
14 long-range, cumulative effects would be that
15 the development that's being considered would
16 completely change the character of that area,
17 it would completely change the natural and
18 public value, use and enjoyment

19 Q What else? What are the other cumulative
20 effects of the project?

21 A Well, I mean, specifically, US Fish & Wildlife
22 was concerned that it would have an effect on
23 the piping plover population that's there

24 Q How so?

25 A Well, I mean, they just sent us a comment

1 letter saying that, you know, this is piping
2 plover habitat and they recommended the permit
3 be denied

4 Q Isn't there a letter in the file that says that
5 the revetment is not likely to adversely to
6 affect piping plovers species?

7 A Yeah, the revetment structure itself, yeah, but
8 here we're looking at the cumulative impacts
9 from development of the area that might be
10 facilitated by that revetment construction

11 Q Okay What other potential effects were you
12 looking at?

13 A I think that's about it for that

14 Q Okay How does 30-11(C)(2) come into play?

15 A (C)(2) says, "Where applicable the extent to
16 which the overall plans and designs of a
17 project can be submitted together and evaluated
18 as a whole, rather than submitted piecemeal and
19 in a fragmented fashion, which limits
20 comprehensive evaluation "

21 This is definitely applicable because the
22 developers are going to need other permits from
23 OCRM to actually go forward with their
24 development plans They haven't -- well, at
25 the time that they applied for this permit and

1 we made the decision, they didn't have any
2 other pending permits with us, although they
3 now have a land disturbance permit pending with
4 us

5 Q What's a land disturbance permit?

6 A The land disturbance permitting section of my
7 office is involved with issuing permits or
8 doing consistency reviews for projects that
9 will literally disturb land and they're --

10 Q What's the specific -- do you know what the
11 specific project is?

12 A Yeah, I mean, the specific application that I'm
13 talking about is building a construction access
14 road and then building a relatively short
15 sheet-pile bulkhead or wall just landward of
16 the critical line, the erosion scarp line, on
17 the Kiawah River shoreline

18 Q Okay How else does that regulation come into
19 play?

20 A Well, I mean, just to finish that thought, I
21 think there are going to be additional permits
22 that they will need to put in, you know, roads
23 for development, water and sewer lines,
24 potentially There was some mention of a
25 community dock that OCRM would obviously have

1 to permit And the whole purpose of this
2 regulation is to say that instead of evaluating
3 these piecemeal, the developer should, you
4 know, come in with an overall development plan
5 and then we can decide what permits will be
6 necessary They can apply for those permits
7 and we can review them comprehensively

8 Q Are you aware of any other possible erosion
9 control permits that might be needed?

10 A Well, you know, as we said, it's a very
11 dynamic, unstable shoreline and, you know,
12 they've identified a half mile of shoreline
13 that's eroding right now You know, where the
14 shoreline's going to be eroding five or ten
15 years from now is anybody's guess

16 Q Okay Have you heard -- well, let me back up
17 Do you know what the effects of any potential
18 residential development would be?

19 A On piping plovers or just in general?

20 Q In general

21 A Okay In general, you know, development would
22 completely change the --

23 MR WALKER Objection, Your Honor This is totally
24 speculative He doesn't know what
25 development's going to go out there How can

1 he testify to the effect?

2 THE COURT Any response? - - -

3 MR WHITFIELD-CARGILE Well, he's heard testimony
4 here today --

5 THE COURT Lay the ground

6 Q Okay Well, first, let's back up Have you
7 seen any plans for any potential development?

8 A The only thing that I've seen is that sketch
9 that Mark Premar showed during his testimony

10 Q Okay Well, let's back up to before this
11 project Have you seen any plans for
12 construction out there?

13 A No I had done a site visit with Mark Premar
14 where he had sort of waved his hands and said,
15 "We think this area might be appropriate for
16 house construction "

17 Q Okay So can you actually assess definitely
18 what the potential impacts might be?

19 A No

20 Q Do the regulations require you to?

21 A No

22 Q What do the regulations require you to look at?

23 A Well, I mean, the regulations, as we just
24 talked about, require me to discuss the effect
25 of the project within the context of their

1 possible development and the general character
2 of the area
3 Q Does it also require you to consider the extent
4 to which cumulative effects may result?
5 A Yes
6 Q What does that imply to you?
7 A That I can use a certain amount of judgment and
8 discretion in determining what I think those
9 effects could possibly be
10 Q Okay Well, you've heard some testimony about
11 what the potential -- how the potential
12 development might be done, might be designed
13 Do you have any conclusions as to what
14 long-range, cumulative effects of the project
15 as it was described by Mr Permar --
16 A Well, I mean --
17 Q -- might come into play here?
18 A -- obviously there's the concern expressed by
19 US Fish & Wildlife about the threatened species
20 habitat, but, you know, besides that, as I
21 mentioned, this is one of the last remaining
22 large tracts of oceanfront property that's not
23 developed that the public has good access to
24 I think it has a tremendous value to the
25 citizens of the state from an aesthetic and

1 recreational viewpoint and I think that even
2 limited development- of that property is going
3 to completely change the character of it
4 I also think that the revetment that they've
5 applied for, which we definitely know what the
6 specifications are, will also change the
7 character of the area

8 Q How?

9 A Because it will no longer be a natural,
10 pristine environment where the island, the land
11 can respond to the natural forces that you
12 expect to see in an unstabilized inlet area

13 Q Okay How does 48-39-120(F) come into play?

14 THE COURT Are you getting close?

15 MR WHITFIELD-CARGILE I am getting close, Your
16 Honor

17 THE COURT Okay

18 A 120 talks about development of beach erosion
19 control policy, issuance of permits for erosion
20 control structures, removal of structures and
21 limitation of property development

22 Q Let's look at Subsection F

23 A All right F says, "The Department for and on
24 behalf of the state may issue permits not
25 otherwise provided by state law for erosion and

1 water discharge structures in or upon the
2 tideland submerged lands and waters of this
3 state below the mean high watermark as it may
4 deem most advantageous to the state for the
5 purpose of promoting the public health, safety
6 and welfare, the protection of public or
7 private property from beach and shore
8 destruction and the continued use of tideland
9 submerged lands and waters for public
10 purposes "

11 Q Would the revetment allow the continued use of
12 tideland submerged lands and waters for public
13 purposes?

14 A I think it would significantly impact that
15 ability

16 MR WHITFIELD-CARGILE Okay If I could have just
17 a moment, Your Honor
18 Your Honor, I don't think I have any more
19 questions at this time

20 THE COURT All right

21 MR WHITFIELD-CARGILE Actually, I do

22 THE COURT Go ahead

23 Q You mentioned that the fee regulations set
24 forth --

25 Did we discuss this? Did the Department refund

1 the applicant's -- KDP's application fee?

2 A Yes, we did

3 Q Why?

4 A Because we did not act on their permit

5 application within the time period specified in

6 the fee regulation

7 Q Are you aware of any other remedies provided in

8 the regulations or in the statute?

9 A No, it doesn't say that the permit is

10 automatically issued It just says that the

11 application fee must be refunded

12 Q Did you intentionally delay issuance of the

13 permit for any reason?

14 A Not in order to hold anybody up It was going

15 through a very careful review and scrutiny

16 within my office before the final decision was

17 issued

18 Q Have you ever reviewed a permit for -- this

19 large? For 2,800 feet of shoreline?

20 A For a revetment this length, no

21 Q What's the largest revetment application that

22 you've reviewed?

23 A I've done a few that are probably a couple

24 hundred feet long I can't think of ever

25 having done one that was more than, say, 250,

1 maybe 300 feet, and that was on a private
2 residential lot, I mean, a fairly big private
3 residential lot

4 Q Are you aware of other larger revetments that
5 have been issued by the Department?

6 A Not in recent memory, no I mean, I know that
7 there are some fairly large revetments, you
8 know, along the coast, but I can't think that
9 we've done any that I'm aware of in the past
10 several years, no

11 MR WHITFIELD-CARGILE Okay No other questions,
12 Your Honor

13 THE COURT All right We'll start back tomorrow at
14 9 00 Anything else before we go?

15 MR WALKER Nothing from KDP, Your Honor
16 (Proceedings adjourned at 6 00 p m and reconvened
17 Friday, August 28, 2009, at 9 00 a m as follows)

18 THE COURT Ms Armstrong

19 MS ARMSTRONG Thank you, Your Honor

20 MR EISER - CROSS-EXAMINATION BY MS ARMSTRONG

21 Q Mr Eiser, we were talking about what documents
22 you reviewed yesterday in your analysis You
23 reviewed historic data related to shoreline
24 changes at Kiawah on Captain Sam's Spit, isn't
25 that right?

1 A Well, I'm aware of the historical inlet
2 - -- positions and shoreline position I didn't
3 specifically refer to that as part of my
4 decision-making process, but it was, you know,
5 knowledge that I relied on
6 Q Okay Could you -- right behind you there's a
7 document It's got "Environmental Inventory"
8 on the top of it It's Exhibit One
9 A Yes
10 Q Would you look at page G-59 and G-61 with me
11 A (Witness complies) All right
12 Q You've seen those images before, haven't you,
13 Mr Eiser?
14 A Yes
15 Q And when you talk about data that you are aware
16 of that factored into your decision-making,
17 those images were part of that decision,
18 weren't they?
19 A These and others just like them As we
20 mentioned, there's the Pilkey book that has a
21 similar figure There's the Mason technical
22 report that has a similar figure
23 Q Okay So you've seen renderings of those same
24 shoreline change images in other places
25 discussing the spit, right?

1 A Yes

2 Q And those all were factors in your
3 considerations that you took when you were
4 making the permitting decision, isn't that
5 right?

6 A Yes

7 Q And, also, when you reviewed this project, you
8 knew that Captain Sam's Spit was in a CBRA
9 zone, isn't that right?

10 A I was aware of that, yes

11 Q Okay - And what is a CBRA zone?

12 A CBRA is an acronym for the federal Coastal
13 Barrier Resources Act It's basically federal
14 legislation and federal program that designates
15 certain barrier islands where federal funds
16 cannot be expended

17 Q So CBRA means that this designated barrier
18 island can't receive federal insurance, is that
19 right, flood insurance?

20 A I think that is part of the prohibition on
21 federal funding, yeah

22 Q And the fact that this is a CBRA zone factored
23 into your decision, isn't that right?

24 A It spoke to the general character of the area
25 There's no specific statute or regulation at

1 the state level that mentions CBRA zones or
-2 CBRA units, but it simply reinforced the idea
3 that this is a rather pristine barrier island
4 environment

5 Q I'm going to hand you what's marked as CCL
6 Exhibit Number Eight Open that up and take a
7 look at it

8 A (Witness complies) All right

9 Q If you can kind of direct it towards the Judge
10 and point to him where Captain Sam's Spit is

11 A Captain Sam's Spit is this area right here
12 (indicating)

13 Q Okay And there's a hatched-in area overlaying
14 Captain Sam's Spit, is that accurate?

15 A That's correct

16 Q Okay What does that area indicate?

17 A Well, I'm looking for a legend or a description
18 on this map where they would actually tell me
19 what that shaded area is

20 Q What does it say at the top of the map?

21 A At the top it just says "Coastal Barrier
22 Resources System, Captain Sam's Inlet, Unit
23 M08, Charleston County, South Carolina "

24 Q Okay There's a dark line with a hatched-in
25 area designating a specific area on that map,

1 isn't that right?

2 A That's correct Everything that's contained
3 within that dark line is the unit M08 and they
4 use different types of shading within that area
5 and the legend tells me what those different
6 shading types mean, but everything that's
7 within that solid line is within that unit

8 MS ARMSTRONG Your Honor, I'd like to move Exhibit
9 Number Eight into evidence

10 MR WALKER No objection

11 MR WHITFIELD-CARGILE No objection, Your Honor

12 THE COURT It's admitted

13 (CCL'S Exhibit Number Eight was admitted into
14 evidence)

15 Q You've been out to the site before, isn't that
16 right, Mr Eiser?

17 A Yes

18 Q And you viewed the park area where 270 feet --
19 is where you -- you permitted a bulkhead for
20 270 feet in front of the park, is that right?

21 A Yes

22 Q Okay And you've been to the park and seen the
23 site?

24 A Yes

25 Q Okay I want you to take a look at these

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1 images and when you go through each one --
2 actually, if you could come up and at least - -
3 show the Judge what you're talking about when
4 we go through each image
5 You're looking at Exhibit Ten-A, is that right?

6 A Correct

7 Q And that's right in front of the park area,
8 isn't it ?

9 A That's within the park boundaries, yes I
10 think this is sort of towards the northeast end
11 of the park area

12 THE COURT So I can be clear, are these the images
13 I've already seen through the geologist?

14 MS ARMSTRONG Yes

15 THE COURT Okay

16 Q And that's critical area marsh or marshlands
17 shown in that image, isn't that right?

18 A Yes

19 Q Flip to the next one Exhibit Ten-B, that's
20 also in front of the park, isn't that right?

21 A Yes

22 Q There's also some marsh vegetation along there,
23 is that right?

24 A Yes

25 Q Does that look like healthy marsh vegetation to

1 you?

2 **A - Yes -**

3 THE COURT That's shot from the top of the hill,
4 right?

5 THE WITNESS I don't know exactly where in the park
6 these pictures were taken As I said, I
7 believe these are sort of towards the northeast
8 end of the park, I guess you'd say

9 THE COURT What I'm trying to figure out is I see
10 vegetation on top, but it's not shot from the
11 river side ?

12 THE WITNESS Oh, I see what you're saying, like
13 where were you standing when these pictures
14 were taken?

15 THE COURT Yes

16 THE WITNESS I don't know if these were taken at
17 the top of the bluff or were more likely sort
18 of further down at ground level

19 **Q\ But you're on the land side of the river**
20 **looking down towards the river, is that right?**

21 **A Yes**

22 **Q And what is that Ten-C CCL image, what is that**
23 **a picture of?**

24 **A That's the park area**

25 **Q Okay And can you see down towards the river**

1 what is in that area? If you could kind of
2 angle it towards the Judge so he can--

3 A Sure Well, on this side here, you can see
4 there's a fringe of marsh grass It's
5 difficult to see what might be beyond that edge
6 right there There might be a small fringe of
7 marsh grass or it might just drop straight down
8 to the river

9 Q Okay So there is marsh grass right in front
10 of the park right now?

11 A In this area (indicating), yes

12 Q Could you flip to Ten-D, please Is that
13 another image taken from the bluff above on the
14 park?

15 A Yes

16 Q And what does that image show?

17 A It shows a fringe of marsh grass right in
18 through here

19 Q And that's healthy-looking marsh grass, isn't
20 that right?

21 A Yes

22 Q And I see some cars off on the right side of
23 that image Are those cars parked in the
24 parking lot of the park?

25 A Yes

- 1 Q And there's some marsh grass right in front of
2 the park in that area, is that right?
3 A Yeah, this a fringe of marsh grass right here,
4 yes
5 Q I think that might be right here
6 A Yes, we're back to A
7 Q Have a seat So that marsh grass that's
8 healthy and right in front of the park, right
9 now that's acting as adequate protection from
10 erosion, isn't it?
11 A I don't know that it's adequate protection from
12 erosion, no You can have a fringe of marsh
13 grass at the base of an actively eroding bluff,
14 depending on what the rate of erosion is
15 Q You didn't see any indication that that marsh
16 grass is eroding, did you?
17 A No
18 Q It otherwise looks like it's healthy and it's
19 performing the function it's supposed to
20 perform, isn't that right?
21 A Yes
22 Q Were you in the courtroom when Mr O'Rourke
23 from Charleston County Parks and Recreation
24 testified?
25 A Yes

1 Q And so you're aware that there have been
2 negotiations and plans to move the park, isn't
3 that true?

4 A Yes

5 Q Now, the permit that you issued for 270 feet in
6 front of the park, you issued that because it
7 would protect a public park facility, isn't
8 that right?

9 A Yes

10 Q And if the area, the 270-foot area where you
11 issued the permit wasn't a park, that would
12 have affected your decision, wouldn't it?

13 A Yes

14 Q If it wasn't a public park that was to be
15 protected, the Agency probably would have
16 denied the whole permit, wouldn't it?

17 A I think if that was property that KDP intended
18 to potentially develop as part of their overall
19 development of the spit, then, yes, I would
20 agree with your question

21 Q How many times have you been to the site,
22 Mr Eiser?

23 A Related to this permit and the appeal of the
24 permit, four times within, say, the past 15
25 months

1 Q Okay And when you've made those site visits,
2 you've seen people recreating on the banks of
3 the Kiawah River between mean high water and
4 mean low water in the area of the proposed
5 revetment, haven't you?

6 A Yes

7 Q And those people are fishing and crabbing and
8 swimming and pulling up their boats along the
9 banks, isn't that true?

10 A I don't think I've seen anybody swimming, but
11 kayaking and either fishing or crabbing, yes

12 Q Okay So there isn't a question but that this
13 area is used as a public access, isn't that
14 right?

15 A I would agree it's used by the public, yes,
16 recreationally

17 Q And if a 40-foot wide by almost half a mile
18 long structure of concrete blocks are placed
19 along the banks of the river, that would
20 eliminate the public access that's currently
21 there, isn't that right?

22 A I think it would, yes I think with great
23 difficulty the public could get on that
24 articulated concrete block wall I don't know
25 that it would be a prudent thing to do

1 Q And we're talking about the revetment itself
2 The revetment-wouldn't make an unstable spit
3 transform into a stable, safe place, would it?

4 A No

5 Q And the revetment, in fact, would give a false
6 sense of security to future purchasers,
7 wouldn't it?

8 MR WALKER Objection

9 THE COURT Go ahead

10 MR WALKER She is asking this witness what a
11 purchaser would think and she's also just spun
12 it completely about a subjective impression of
13 a purchaser --

14 THE COURT Also, you haven't laid the foundation
15 that he's qualified to make that statement

16 Q By constructing a revetment --

17 MR WHITFIELD-CARGILE Your Honor, I think that his
18 qualification as an expert in coastal zone
19 processes or coastal processes and coastal zone
20 management yesterday would qualify him to make
21 that

22 THE COURT Well, you may think that, but I don't,
23 because the question calls for him to
24 understand the implications of a revetment and
25 I haven't seen any foundation laid for his

1 expertise in that area I've heard foundation
2 laid to qualify him under the definition that
3 you came up with, I think, on coastal
4 processes That, in no way, included
5 engineering of revetments and the implications
6 thereof

7 MR WHITFIELD-CARGILE Your Honor, I don't think
8 that she asked him -- the question, as I heard
9 it, wasn't an engineering question, Your Honor

10 THE COURT I gathered what the import of that was
11 So I stick with my ruling and overrule your
12 objection

13 Q So this revetment would not make it a stable
14 place, would it?

15 MR WALKER Object to the form -- I mean, object --
16 not just to the form I object to the
17 question She's asking him an engineering
18 question which has to do with the stability of
19 the structure and he's not been qualified as an
20 engineer, nor has there been a foundation laid
21 for him to respond to questions dealing with
22 the integrity of the structure

23 MS ARMSTRONG Well, I'm not talking about
24 engineering I'm talking about he's a -- he
25 testified that he's has got experience in

1 geology and physical geology That's his --
2 that was part of his expertise
3 We're talking about coastal processes, whether
4 you can -- man can build, construct some sort
5 of a structure in a coastal environment and
6 whether that would do any good to protect
7 against natural forces

8 THE COURT I agree with almost everything you said,
9 except for the fact that I don't believe I've
10 heard anything from him regarding learning,
11 training, skill, experience involving the
12 application of the coastal processes upon
13 revetments --

14 MS ARMSTRONG Okay

15 THE COURT -- and his understanding of that

16 MS ARMSTRONG All right Let me back up a little
17 bit, then, Your Honor

18 Q Mr Eiser, how long have you been working with
19 the Agency?

20 A Almost 20 years

21 Q Okay And what was your initial role with the
22 Agency when you started?

23 A When I first started in 1989, I was involved
24 with our planning and certification authority
25 where we at the time were reviewing wastewater

1 and stormwater permits and that sort of thing
2 I was also involved with the revision of the
3 beach baseline and setback line
4 And then in 1992, I officially became staff
5 oceanographer for the Agency and became much
6 more involved in permitting issues for
7 beachfront But for 20 years I've been
8 involved with the establishment of beachfront
9 baseline and setback lines and the
10 categorization of certain areas as either inlet
11 zones, stabilized and unstabilized, or standard
12 zones

13 Q Okay And so you've been the person within the
14 Agency that's dealt with coastal processes,
15 inlet erosion zones and setting beach lines and
16 other activities related to permitting in the
17 coastal zone?

18 A Yes

19 Q And specifically on beaches and inlet areas, is
20 that right?

21 A Yes

22 Q Okay Your Agency has permitted revetments
23 many times, is that right?

24 A Yes

25 Q Okay Have you had opportunity to go out and

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1 inspect or see how those structures held up
2 after storm events?

3 A I haven't done any specific, you know, storm
4 event inspections I'm certainly aware of what
5 happened to many of the beachfront erosion
6 control revetments and bulkheads after
7 Hurricane Hugo and a few other storm events
8 that we've had in the 20 years since then

9 Q So you've seen how structures have held up
10 after a major storm event?

11 A Yes

12 Q And would you consider a storm event part of --
13 what happens after a storm part of a coastal
14 process?

15 A Yes

16 Q And what has happened to some of those bulkhead
17 and revetment structures after storm events?

18 MR WALKER Objection, relevance He said the only
19 ones he's seen have been beachfront revetments
20 and bulkheads We aren't on the beachfront
21 There's no relevance

22 THE COURT Any response?

23 MS ARMSTRONG It's still -- I mean, it's still an
24 erosion control structure, it's still a
25 structure on a beach area It's in a coastal

1 area that has been impacted by storms We've
2 been talking about how this specific
3 structure -- I mean, there's already been
4 testimony about how this would react in a storm
5 situation

6 THE COURT I think -- I haven't heard evidence that
7 beachfront revetments and these type revetments
8 involve the same processes I think we all
9 have common knowledge that the beach is
10 significantly different than the tidal areas,
11 so I still sustain the objection at this point

12 MS ARMSTRONG May I have just a minute

13 THE COURT I would add, also, for the record, that
14 just because somebody's observed something
15 doesn't mean that they have skill, education,
16 training, and experience to the point of giving
17 an expert opinion Because, again, if
18 observation was the test, then we could have
19 almost anybody come into this courtroom and
20 say, "I've observed revetments over a period of
21 time and here's what I think " I think the
22 rules require a little bit more than that

23 MR WHITFIELD-CARGILE Your Honor, if I may
24 interject, I mean, Mr Elser's been staff
25 oceanographer at DHEC for 20 years and Section

1 1-23-330 -- well, 44-160 says that the ALC
2 shall --
3 THE COURT I'm familiar with that section
4 MR WHITFIELD-CARGILE -- shall give or -- shall
5 apply the 1-23-330 --
6 THE COURT Give weight to their technical
7 experience
8 MR WHITFIELD-CARGILE Right
9 THE COURT And --
10 MR WHITFIELD-CARGILE And I think that's the --
11 the Legislature has found that and the
12 Court can take notice of the fact that
13 DHEC employees, especially specifically
14 oceanographers, do have specialized
15 technical skill and experience and knowledge
16 and --
17 THE COURT I'm finding that from the record that's
18 before me at this point in time, that though
19 you may assert that oceanographers have that
20 training, there's nothing before me to
21 establish that and I sustain the objection
22 MR WHITFIELD-CARGILE And, Your Honor, I'd also
23 like to add, you stated a minute ago that
24 it's --
25 THE COURT All right I'm going to let you have a

1 little bit more, but I've sustained the
2 objection
3 MR WHITFIELD-CARGILE Okay
4 THE COURT Go ahead
5 MR WHITFIELD-CARGILE Well, Trenholm's objection
6 is that this isn't a beachfront revetment
7 It's on a tidal inlet 500 feet from the
8 beachfront And then you stated in your ruling
9 that it's common knowledge that beachfronts and
10 inlets 500 foot (sic) away from the beachfront
11 are different environments, and I don't think
12 there's anything in the record to that
13 effect --
14 THE COURT You don't think it's --
15 MR WHITFIELD-CARGILE -- and I'm not sure --
16 THE COURT Mr Whitfield-Cargile, if I could ask
17 you, you don't think that a lay person could,
18 based on their observation, could see that a
19 beach is different than an inlet?
20 MR WHITFIELD-CARGILE I think they can see a beach
21 is different from an inlet, but I don't think
22 they can --
23 THE COURT Okay
24 MR WHITFIELD-CARGILE -- see that the processes
25 are different and that would --

1 THE COURT No, I said I don't have any evidence at
2 this point in time that the processes are
3 distinct regarding revetments I didn't make
4 a ruling regarding my determination of that
5 I said the evidence hasn't established that

6 MR WHITFIELD-CARGILE That they aren't distinct or
7 that they are distinct?

8 THE COURT That they are distinct There's no
9 evidence in the record at this point Anything
10 else?

11 MR WHITFIELD-CARGILE I don't think --

12 THE COURT I don't care for you to keep arguing
13 with me on the same point If you want to
14 raise another one

15 MR WHITFIELD-CARGILE Thank you, Your Honor

16 THE COURT All right

17 Q Mr Elser, I'm going to hand you what's been
18 marked as CCL Exhibit Number Twenty-one (sic)
19 Can you tell me what that document is?

20 A It is a permit application that was submitted
21 to OCRM and at the top it's captioned "Notice
22 of Intent -- NOI -- "for Stormwater Discharges
23 from Large and Small Construction Activities,
24 NPDES General Permit SCR100000 "

25 Q And who is the applicant?

1 A The project/site name is "Kiawah River Bend

-2 ----- Revetment " The project owner/operator is

3 Kiawah Development Partners II, Inc

4 Q That's a stormwater permit application, isn't
5 it?

6 A Yes

7 Q In that application they're requesting to build
8 a sheet-pile wall or a retaining wall behind
9 the critical area line Isn't that what
10 they're asking for?

11 A Yes

12 Q Does that indicate to you that there are
13 alternatives other than the structure that
14 Kiawah is requesting today?

15 A Yes

16 MS ARMSTRONG Your Honor, I'd like to move
17 CCL Exhibit Twenty-nine into evidence

18 MR WALKER Is it Twenty-nine or Twenty-one?

19 MS ARMSTRONG I think it's Twenty-nine

20 THE WITNESS It's Twenty-nine

21 MR WALKER Objection on the basis of relevance,
22 Your Honor That's a separate permit
23 application that was necessitated because OCRM
24 denied the revetment It's not relevant to
25 this proceeding It's a totally separate

1 application It's later than the denial in
2 this case It's not pertinent to the issues
3 before the Court

4 MS ARMSTRONG Your Honor, it's very relevant
5 because under the regulations, 30-12(C)(1)(D)
6 requires the Agency to deny a permit -- it says
7 that bulkheads will be prohibited where they
8 are adversely affecting public access unless
9 there are no feasible alternatives This
10 permit application goes directly to show that
11 there are feasible alternatives and that's how
12 it's relevant

13 THE COURT So you're offering it on the feasible
14 alternatives ground, not another ground

15 MS ARMSTRONG Yes

16 THE COURT Any response to that?

17 MR WALKER It is not a feasible alternative It
18 was meant as an emergency Band-aid in the event
19 we had to litigate this thing -- we've had to
20 litigate it continuously They denied the
21 permit, separate proceeding And it was not
22 something that was ever considered --

23 THE COURT This is not a stormwater permit to
24 assist in the development of the area This is
25 a stormwater permit dealing with the erosion,

1 is that --

-- 2 MR WALKER Correct, it's in the event that there's--
3 some mammoth storm event during the pendency of
4 this proceeding where we don't have a
5 revetment It's not meant to replace the
6 revetment

7 THE COURT All right

8 MR WHITFIELD-CARGILE Your Honor, I have a problem
9 with Mr Walker testifying I mean, there's a
10 difference between objecting and setting forth
11 arguments and testifying, and that's what he's
12 doing right now

13 MR WALKER The other thing I would add is it just
14 opens up a whole other proceeding that we have
15 to try a case on the stormwater permit
16 application, because there's plenty that we
17 could say about it and why we did it and the
18 pros and cons of it and what's going on in that
19 proceeding, that's going to require a mini
20 trial of that in reply It's unnecessary,
21 irrelevant to the question of whether the
22 revetment permit should have been granted

23 THE COURT Well, I certainly have no desire to make
24 this go any longer than it's going to go,
25 but -- and I am, at this point in time, from my

1 analysis, the probative value is not that much,
2 but -it's enough for me to overrule your
3 objection With that said, it's entered
4 (CCL's Exhibit Number Twenty-nine was admitted into
5 evidence)

6 Q Mr Eiser, in your studies in marine science
7 and through your years of experience with
8 Coastal Council and OCRM, have you acquired
9 special knowledge relating to various marine
10 habitats and the use of these habitats by
11 marine organisms?

12 A I have some knowledge, yes I'm not a marine
13 biologist, but I'm familiar with that, yes

14 Q And you are familiar with the marine habitat in
15 the site of the proposed revetment, is that
16 right?

17 A Yes

18 Q How would you describe that area in terms of
19 marine biology, the marine habitats?

20 A Well, I mean, the upper portion is an eroding
21 sandy bank And then once you get below the
22 mean high water line, you're into a sandy
23 benthic environment and you would typically
24 expect to see benthic organisms that live in
25 the sand, such as polychete worms There are

1 probably other marine organisms that would live
2 in the water column itself, not in the ---
3 sediment

4 Q So right now that area is providing some
5 habitat for marine organisms?

6 MR WALKER Objection, misstates his testimony He
7 said that the organisms would not be in the
8 sediment They'd be in the water, as I
9 understood it

10 THE COURT Well

11 MR WALKER Maybe I misunderstood If I did, I
12 apologize

13 Q Are there marine organisms living in area
14 between the mean high watermark and down into
15 the river?

16 A In the sediment, yes, as well as in the water
17 column

18 Q Okay And what are the animals that are living
19 in the sediments?

20 A Typically you would expect polychete worms and
21 other types of small benthic organisms

22 Q And do those organisms provide -- are they part
23 of the food chain?

24 A Yes

25 Q What other kind of animals would feed on those

1 organisms, benthic organisms?

2 A — Well, I heard testimony that piping plovers
3 like to eat them I'm not saying that piping
4 plovers live back there, but I think typically
5 shorebirds will feed on those types of
6 organisms

7 Q This type of habitat, is it different than
8 pluff mud, oyster reefs and marsh habitats?

9 A Yeah, it's much more sandy than pluff mud would
10 be, yeah

11 Q So is it providing different habitats for
12 various kinds of marine organisms that wouldn't
13 be provided for by marsh and oyster and pluff
14 mud habitats?

15 A I'm not enough of a marine biologist to be able
16 to give you a definitive answer to that, but I
17 would say that different habitats or different
18 substrates do support different types of marine
19 organisms, yes

20 Q And what role does the area that would be
21 covered by the proposed revetment, what role
22 does that play in the coastal ecosystem?

23 A In general, it's a part of the coastal
24 ecosystem It provides to the overall, you
25 know, functioning of that coastal ecosystem

1 Q Okay Other than the areas that would be
2 covered by this proposed revetment, do you know
3 of any other area that provides similar marine
4 habitats anywhere close to this site?

5 A I think if you continue on down towards Captain
6 Sam's Inlet along the back side of the Kiawah
7 Spit, that you encounter very similar
8 environments

9 Q That's only the smaller areas that are not
10 going to be covered by the proposed revetment?

11 A Well, what I'm talking about is if you get
12 beyond the 2783-foot boundary and once you get
13 to 2,784 feet, from there on out the
14 environment is very similar to the area that
15 would be covered by the revetment

16 Q We actually get into some salt marsh areas, if
17 you keep going, though, don't you?

18 A If you go considerably farther down closer
19 towards Captain Sam's Inlet itself, you do
20 begin to again encounter some Spartina salt
21 marsh, yes

22 Q And what would happen to that marine habitat
23 and the organisms that are living in it in the
24 sandy area if there's a revetment constructed
25 on top of it?

1 A Well, the revetment would significantly impact
- -- 2 -- that environment and I would expect to see some -- -- --
3 significant adverse impacts on the organisms
4 that live there

5 MR WALKER Objection, Your Honor, and ask that it
6 be stricken He's ventured into a biological
7 opinion about the effects on organisms
8 downstream from the revetment, without a
9 sufficient showing that --

10 THE COURT I sustain it at this point in time,
11 because he just testified earlier that he's not
12 a marine biologist and he couldn't testify
13 regarding that, and now he's testifying
14 regarding what appears to be marine biology
15 So at this point in time, I sustain the
16 objection

17 Q Mr Eiser, what was your Master's degree in?

18 A Marine science, which is not marine biology
19 There is a distinction

20 THE COURT Oh, I sustain the objection and strike
21 the answer

22 MS ARMSTRONG Right I understand

23 Q I want to ask you about a couple of issues that
24 might arise if this revetment structure is
25 constructed Your Agency has actually

1 permitted inlet relocations on Seabrook on two
2 separate occasions,--isn't that right?

3 A Yes

4 Q And at the time that those permits were issued,
5 there wasn't any development on the spit or any
6 plans to develop the spit, was there?

7 A Correct

8 Q And those inlet relocations were in 1983 and
9 1995, is that about right?

10 A Yes

11 Q Now, if the spit's developed and there are 48
12 or 50 houses out there, would that development
13 have to be taken into account if and when
14 Seabrook proposes another inlet relocation?

15 A Yes

16 Q And, based on your experience as a permit
17 administrator, would you expect that the owners
18 of homes on the spit to be concerned about
19 plans to move and relocate the inlet in
20 relation to their homes?

21 A Yes

22 Q And would you expect the owners to express
23 concerns in comment letters to your Agency?

24 A Yes

25 Q And would your Agency have to take those

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1 comment letters and concerns into account when
2 making a permitting decision on a future inlet
3 relocation permit?

4 A Yes

5 MS ARMSTRONG I don't have any other questions,
6 Your Honor

7 THE COURT Mr Walker?

8 MR WALKER Thank you

9 MR EISER - CROSS-EXAMINATION BY MR WALKER

10 Q Mr Eiser, under OCRM policy, you're required
11 to prepare a written decision, are you not,
12 within the file, explaining the reasons for the
13 Agency's determination?

14 A Yes

15 Q That's what's already been entered in evidence
16 as the Technical Summary of Review, I believe?

17 A Yes, that's DHEC Exhibit Two

18 Q That Technical Summary of Review was prepared
19 primarily by whom?

20 A Initially, by myself, with some rather heavy
21 editing by other OCRM staff people

22 Q Those other OCRM staff people would have been
23 above you?

24 A Yes

25 Q And that would be Ms Neale, who's sitting back

1 in the second row?

2 A Yes, one of those people would be her

3 Q Was it also reviewed by OCRM legal counsel?

4 A I believe it was, yes

5 Q Was there a concerted effort by your staff and

6 OCRM, in general, to make sure that every "I"

7 was dotted and "T" was crossed?

8 A Yes

9 Q Did that effort include making sure that every

10 reason for denial and every consideration that

11 was taken into account was expressed within the

12 technical summary review?

13 A Yes

14 Q It was to be an inclusive document, wasn't it?

15 A Yes

16 Q It was to be a document that we could go to

17 that encapsulated everything, right?

18 A Yes

19 Q You had many months to review that, did you

20 not?

21 A Yes

22 Q If there was anything you wanted to add to it,

23 you could have done it at the time, right?

24 A Yes

25 Q And if there was a reason that you took into

1 account for denial, it would be in that

2 Technical Summary of Review, correct? -

3 A Again, it's not truly a denial of the permit,

4 but for disallowing a certain portion, yes

5 Q Good clarification Every reason for the

6 action that you take on the permit --

7 A Yes

8 Q -- more accurately stated The documents that

9 were produced by OCRM indicated that you had a

10 draft initial permit decision on August 28,

11 2008 And I'm referring to the Department's

12 Exhibit Number Four that's been admitted into

13 evidence, and I'll refresh your recollection

14 with that It's one of the pages in that

15 exhibit

16 A Yes

17 Q So August 28th, was it?

18 A Yes

19 Q You had the draft decision The final decision

20 didn't come out until more than -- well, it's

21 about three and a half months later, right,

22 December 18th?

23 A December 18th, yes

24 Q My understanding is that the draft decision

25 that you had was largely intact, but it hadn't

1 been reviewed by the other folks at OCRM,
2 correct?
3 A Yes
4 Q And that draft decision no longer exists, does
5 it?
6 A Correct
7 Q It's gone
8 A Yes
9 Q It's destroyed, correct?
10 A Yes
11 Q All right It took you -- even though during
12 this time you knew that KDP -- or didn't you
13 know that KDP considered action on this permit
14 to be an urgent matter?
15 A I know that they were concerned that they were
16 experiencing erosion and had been for many
17 years I think they would have liked an answer
18 sooner, rather than later, but I didn't
19 consider this to be an emergency permit
20 application
21 Q Even though you didn't consider it to be an
22 emergency application, didn't you start
23 receiving calls and letters in, say, August, as
24 the file indicates, asking when a decision was
25 going to be made?

- 1 A Yes
- 2 Q You knew -- my point is, you knew that KDP was
- 3 eager to get a response, correct?
- 4 A Yes
- 5 Q And to wordsmith this thing should have only
- 6 taken a week or two, right?
- 7 A You would think so, but obviously it didn't
- 8 Q And, in fact, your regulations -- do you follow
- 9 the standard operating procedure for these
- 10 decisions?
- 11 A Yes
- 12 Q And this was a minor activity under the
- 13 regulations, since it was for a bulkhead
- 14 without dredging, correct?
- 15 A That's correct
- 16 Q Minor activities require a decision within 30
- 17 days after close of the notice period, correct?
- 18 A That's correct
- 19 Q And the notice period closed sometime in June?
- 20 A It's 30 days after the file is complete, which
- 21 would include the notice period, as well as us
- 22 receiving the affidavit of publication, so --
- 23 Q So the latest, since you got your affidavit of
- 24 publication on June 26th, would be July 26th
- 25 A Correct

1 Q All right And it still took four and a half
2 months after that, correct?

3 A Yes

4 Q And that was after you had canceled it and it
5 had been reinstated, correct?

6 A Yes

7 THE COURT It still took four and a half months
8 after what date?

9 MR WALKER June 26th, when they received the
10 affidavit of publication, which he said would
11 have been the last act typically filed

12 Q Is that correct?

13 A Yeah And then there would be -- the 30 days
14 would begin at that point So I think that
15 we'd say the file was technically complete on
16 July 26th

17 Q Well --

18 A I sorry, that the 30-day time period would have
19 run out then

20 Q Let's turn to the Technical Summary of Review,
21 which you have in front of you from yesterday,
22 do you not?

23 A Yes

24 Q All right To start with, after deliberating
25 on this permit for over nine months, you came

1 to the determination, as you testified
2 yesterday, that this application satisfied the
3 project specific criteria of Regulation
4 30-12(C), correct?

5 A That there was nothing in 30-12(C) that would
6 explicitly require me to deny the entire
7 permit, yes

8 Q And you said that within the Technical Summary
9 of Review, did you not?

10 A Yes

11 Q You stated that these specific regulatory
12 provisions, meaning 30-12(C), do not bar this
13 project, correct? And that would be at the top
14 of page four You'll see the carryover
15 Actually, page five, Mr Eiser

16 A Yes, that's correct

17 Q All right The reason that this project was
18 ultimately denied, in a nutshell, was the
19 Agency's perception of negative long-range
20 cumulative effects, is that correct --

21 A Yes

22 Q -- fair to say? And isn't it true, as you were
23 saying yesterday, that you did consider, of
24 course, the long-range cumulative effects of
25 the revetment, but you also considered, in

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

4 A Yes

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

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

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

16 A All right

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

21 THE COURT Mr Chandler, talk a little quieter

22 Go ahead

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

1 MS ARMSTRONG Objection, Your Honor He's asking
2 him to speculate on something It's not a
3 decision that's before the Court I mean,
4 that -- the Agency had to go -- he testified
5 already they went through an extensive review
6 process He's asking him to speculate on
7 something that just -- he can't --

8 THE COURT I'll overrule that I think he can ask
9 him about his decision-making process and the
10 things he considered I mean, you are right,
11 it is getting close to speculation, but it's
12 not asking just gross speculation It's asking
13 his decision-making process in this case and
14 how he reached it And I think that's
15 certainly pertinent, so I overrule that

16 A I think under those circumstances, it would
17 have been more likely that we would have issued
18 the permit for the entire revetment I can't
19 guarantee that we would have
20 We would still have been forced to look at how
21 construction of the revetment itself would
22 change the general character of Captain Sam's
23 Spit, but I think that if we knew that it was
24 impossible for houses to be built on Captain
25 Sam's Spit, it would have been more likely that

1 we would have issued the permit for the entire
2 revetment

3 Q That's because at the time you were having this
4 under consideration -- I'm not saying, by any
5 means, that you didn't consider the effects of
6 the revetment, but the foremost considerations
7 were analyzing in your view that the revetment
8 would facilitate development and you were
9 looking at the effects of that development

10 A Yes

11 Q When we talk about the development, the
12 information that you had that you rendered the
13 decision on was a statement in a letter that
14 the development agreement and the zoning would
15 allow up to 50 residential single-family
16 houses, right?

17 A Yes

18 Q Okay And that was it, right?

19 A Yes

20 Q The applicant offered, both through Ray Pantlik
21 and Mitchell Bohannon, to provide any
22 additional information that you wanted more
23 than once, correct?

24 A Yes

25 Q Even without that offer, if you had wanted

1 additional information you would have asked
2 them, as a person handling permits for all -- -
3 these many years, correct?

4 A Yes

5 Q In this case, you did not ask for any
6 additional information about the potential
7 residential development, correct?

8 A Correct

9 Q In this case, you did not ask them as to the
10 methods that they might use to accomplish that
11 residential development, did you?

12 A That's correct

13 Q In this case, you did not ask them to put
14 together a proposed footprint or lot layout
15 that you could consider, correct?

16 A Yes

17 Q In this case, you did not ask them if they were
18 going to use public utilities, such as water
19 and sewer, so that there would be no wells or
20 septic tanks in the spit, correct?

21 A Yes

22 Q In a nutshell, without going through this in an
23 exhaustive fashion, you didn't ask for anything
24 dealing with the development, correct?

25 A That is correct

1 Q All right But you would agree that if there
2 were ten houses, instead of 50, there would be
3 fewer impacts, correct?

4 A Yes

5 Q Presumably

6 A Yes

7 Q And you would agree that if they were no lawns,
8 that there would be fewer impacts than if there
9 were lawns that were sprinkled with fertilizer
10 and water and all that stuff, right?

11 A Yes

12 Q So there are many things about the methods of
13 development that influence the effects and
14 impacts of that development, correct?

15 A Yes

16 Q And, in this case, it wasn't so much the method
17 of development, what I understand you to say
18 yesterday was it came down to the fact that
19 there were going to be residential units on
20 Captain Sam's, correct?

21 A Basically, the question was, is there any way
22 that you can put in a road and infrastructure
23 and 50 houses and not have an adverse impact on
24 the existing character of that area

25 Q Right, right, and that's a good point It was

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

5 A That's correct, yes

6 THE COURT Just pause Okay, go ahead

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

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

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

19 A Yes

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

24 A Yes

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

1 only, in terms of footprint, of the parking lot
2 and the boardwalk and the associated
3 facilities

4 A Yes

5 Q The county doesn't own the high ground of the
6 spit, does it?

7 A That's my understanding, that that's all owned
8 by KDP

9 Q They can look at it -- and were you talking
10 about visual access, then, that they have
11 visual access to the spit even though it --

12 A I meant visual and physical access, that you
13 can walk down the beach and enjoy the spit from
14 very close proximity to the property

15 Q I need to clarify my question I didn't mean
16 to direct my question to walking on the beach
17 I meant that land, let's say, that's seaward of
18 the primary dune, that they only had visual
19 access to, it's private property, correct?

20 A Land that's seaward of the primary dune --

21 Q Yeah, I misstated, landward --

22 A You meant landward --

23 Q -- of the primary dune Thank you

24 A I can't tell you that the general public
25 doesn't walk behind those dunes and roam around

1 and just see what it looks like

2 Q But that was not parkland

3 A That's not parkland, no

4 Q All right Turning to the revetment, you were
5 provided a number of reports by consultants who
6 were engaged by KDP, were you not?

7 A Yes

8 Q We had George Oertel who -- and Dave Basco who
9 provided reports on the morphogeological
10 issues

11 A Yes

12 Q We had -- and those reports included their
13 determination that the revetment would
14 impact --

15 MR WHITFIELD-CARGILE Object, Your Honor, that's
16 hearsay

17 MR WALKER I'm asking this is what he took into
18 account I'll back up

19 THE COURT No I'll stick with what my ruling has
20 always been in the past for you and everyone
21 else and that is that you cannot -- if you're
22 asking him about his decision-making process
23 and you're not offering it for the truth of the
24 matter asserted, you can ask

25 MR WALKER All right

1 Q From the taking of your deposition, I
2 understand that you looked at everything that
3 went into the file, the comment letters, the
4 expert reports, everything, before making a
5 final decision

6 A Yes

7 Q The materials that were in your file, in
8 addition to the letters that we've talked about
9 already, included the reports of Drs Oertel
10 and Basco, correct?

11 A Yes

12 Q Those reports included their determinations
13 that the revetment would not have an adverse
14 effect on the accretion of sand along the
15 beach, correct?

16 MS ARMSTRONG Objection, Your Honor I mean, he's
17 putting in evidence about what the reports are
18 Those reports are not in evidence He's trying
19 to get them in the back door

20 THE COURT Well, I'll say that as far as your
21 objection's concerned, I overrule it, but I
22 will not admit the answer or the question,
23 because the question is what's got the
24 evidence The question is put it in and the
25 answer confirms it, but that -- not for the

1 truth of the matter asserted, but, again, as to
2 the information he had in developing his
3 decision-making process, because he's allowed
4 to go into bias and all the other potential
5 problems that may exist in someone's
6 decision-making process and --

7 MR WHITFIELD-CARGILE I would just -- Your Honor,
8 I'd just like to lodge a continuing objection
9 , and I would ask for a continuing, I guess,
10 limitation on the scope, so I don't have to
11 stand up and have that limitation every time,
12 and that it's hearsay

13 THE COURT Yeah Well, my ruling is that that
14 limitation is going to exist throughout his
15 questioning --

16 MR WHITFIELD-CARGILE Very good

17 THE COURT -- in regard to this issue Anything he
18 asks that has a hearsay component concerning
19 his decision-making process can only be offered
20 to develop his decision-making process and
21 nothing more

22 MR WHITFIELD-CARGILE Sure Okay Thank you,
23 Your Honor

24 MS ARMSTRONG I'm not sure -- I just want to
25 understand this, Your Honor Then why -- isn't

1 it sufficient to evidence that he's already
2 said that he's aware of the reports, he read
3 the reports, he took them into
4 consideration? I mean, why does the actual --
5 what the contents of the report need to
6 come in? I mean, the hearsay part doesn't
7 need to come in to show notice of inquiry
8 that he had the reports, he reviewed them
9 Either he considered them or he didn't consider
10 them

11 THE COURT All right I'll allow Mr Walker to
12 respond to that

13 Q **The reports of Drs Basco and Oertel that you**
14 **took into consideration included --**

15 THE COURT I'll allow you to respond to her
16 objection

17 MR WALKER Oh I'm entitled to show that the
18 information in the reports, since he took them
19 into account, were things he considered and
20 that the information in them contradicted what
21 he said in his determination, to show both our
22 argument that they were basically ignored, with
23 no other information to the contrary in the
24 file, to show bias and to show that there is
25 something else going on here other than an

1 objective evaluation of what was in the file

2 MS ARMSTRONG He's-trying to get the content of
3 the reports in

4 THE COURT Well, again --

5 MS ARMSTRONG I mean, he had two witnesses here
6 that could have authenticated, talked about the
7 reports and what they said They didn't put
8 those witnesses up And now they're trying to
9 back-door in the content I just -- I think
10 it's very prejudicial and it's hearsay and we
11 have no way to cross-examine any of that
12 information I mean, we don't know what
13 Mr Elser, when he was reviewing it, whether
14 he --

15 THE COURT Well, you have the opportunity to
16 recross him regarding this issue I overrule
17 your objection, with the limitation that I set
18 forth earlier I'm not going to get into
19 judicial estoppel, but I know -- I've taken
20 this approach in many a case And I'll just
21 leave it at that Go ahead

22 Q I think you have an idea of what my question is
23 going to be

24 A I'm not sure I do

25 Q Let me rephrase it The reports of Drs Oertel

1 and Basco you had in your file at the time you
2 made your determination included their
3 conclusions that the revetment would not have
4 an adverse effect on sand accumulation on the
5 beach, correct?

6 A We might want to be more specific about what we
7 mean by "sand accumulation on the beach "
8 Are --

9 Q The accretion, the continuation of accretion of
10 the beach at Captain Sam's Spit

11 A And "the beach" meaning the Atlantic shoreline?

12 Q The ocean beach --

13 A Yes

14 Q -- the beach as we typically know it

15 A Okay Thank you Yes

16 Q Those same reports also came to the conclusion,
17 which you considered, that the revetment would
18 not alter the hydrology of Captain Sam's Inlet

19 A Correct

20 Q The same reports and materials, substantiated
21 by Tim Kana's letter that we talked about, also
22 indicated that the revetment would not have a
23 material adverse effect on the sand supply of
24 Seabrook Island

25 A Correct

1 Q Among other things Your file did not contain
- 2 any reports to contradict those, did it, your
3 permitting file?

4 A No

5 Q In the Technical Summary of Review, there are
6 many -- or a few references to your
7 determination or Ms Neale's determination that
8 the revetment would inhibit the natural process
9 of inlet migration, is that true?

10 A Yes

11 Q Now, yesterday, I did not hear you to say that
12 that was one of your primary reasons Was it
13 or was it not one of your primary reasons that
14 you were of the opinion at the time you made
15 your determination that this revetment would
16 inhibit the natural process of inlet formation?

17 A I would not say that was a primary reason for
18 our final decision

19 Q It was, however, stated several times in the
20 Technical Summary of Review, correct?

21 A Yes, which I think was speaking more to how it
22 might alter the general character of the area

23 Q When I took your deposition, you indicated that
24 what you relied on for that was a one-page
25 diagram from Orrin Pilkey's 1984 book that

1 Dr Dean referred to yesterday, correct?

2 A Yes I mean, as I said, I'm aware of the

3 pattern of movement of the Captain Sam's Inlet

4 over the past 300 years and I've had that

5 knowledge for 25 years

6 Q So are you tossing that reason away today or

7 are you just saying it's not as significant --

8 or it was not significant?

9 A I'm saying it's not significant

10 Q There's no question that the statutes and

11 regulations allow bulkheads on places other

12 than in the beach dune system, correct?

13 A Correct

14 Q There is no policy that you know of embodied in

15 any statute or regulation that prohibits a

16 revetment if it retards natural inlet

17 migration? And when I say "revetment," a

18 revetment not on the beachfront

19 A Correct

20 Q In fact, as we know, with respect to the

21 natural formation of inlets, OCRM has issued

22 two permits that specifically artificially

23 created a relocation of Captain Sam's Inlet,

24 correct?

25 A Yes

1 Q One of the reasons for doing that --

2 THE COURT Say that again I didn't quite get
3 that

4 Q The OCRM and, prior to, the Coastal
5 Council have issued in combination two permits
6 to allow a manmade relocation of Captain Sam's
7 Inlet

8 THE COURT Oh

9 Q Is that correct?

10 A Yes

11 Q So when the Agency did that, it was allowing
12 the inlet to be relocated in a way that was not
13 through a natural process, correct?

14 A Yes

15 Q If the Agency believed at that time that there
16 was a reasonable chance that the spit might
17 breach at the neck and, therefore, through
18 natural process relocate the inlet, there would
19 have been no need to issue those permits for
20 manmade relocation, correct?

21 MR WHITFIELD-CARGILE Object, Your Honor, that's
22 speculation

23 MR WALKER I'm asking him as a permitting
24 official

25 MR WHITFIELD-CARGILE It's still speculation, Your

1 Honor He's speculating back to 1983
2 MR WALKER Well, I'll withdraw the question
3 THE COURT Yeah, I helped you while ago, now I hurt
4 you and I just -- I don't know if he has the
5 expertise to offer opinion, because you can
6 speculate an opinion if you have an expertise,
7 so
8 MR WALKER Suffice it --
9 MR WHITFIELD-CARGILE Well, Your Honor, I think he
10 has expertise
11 THE COURT Well, then, if you think he has
12 expertise --
13 MR WHITFIELD-CARGILE But that's your ruling
14 THE COURT -- but that's your objection
15 Q There's a notebook in front of you, Mr Eiser,
16 of our exhibits to your immediate left, and
17 that's a number two notebook
18 A Correct
19 Q If you turn to Exhibit Fifty-two
20 A All right
21 Q Does that appear to be a copy of the
22 first page of the permit issued in 1996
23 to Seabrook Island Property Owners
24 Association to allow the relocation of Captain
25 Sam's Inlet?

- 1 A Yes
- 2 Q All right I'm not sure it's the complete -
- 3 application because the -- excuse me, the
- 4 complete permit, but it's the copy we had
- 5 A Yeah, it looks like there were some
- 6 photocopying problems, but the first page makes
- 7 it obvious that it is that permit
- 8 Q Right You would agree that Captain Sam's Spit
- 9 has been steadily building since 1949?
- 10 A Yes
- 11 Q As part of the Beachfront Management Act, was
- 12 OCRM required to establish monuments along the
- 13 beach to measure changes in the shoreline?
- 14 A Yes
- 15 Q Has OCRM done that?
- 16 A Yes
- 17 Q Has that included monuments on the beach on
- 18 Captain Sam's Spit and the rest of Kiawah
- 19 Island?
- 20 A Yes
- 21 Q Does OCRM also prepare a report on an annual
- 22 basis known as the State of the Beaches report
- 23 in which it discusses what's going on?
- 24 A Yes
- 25 Q Would you turn to tab 53

1 A (Witness complies) All right

2 Q - I have excerpts under tab 53 for the 2008 and
3 2009 "State of the Beaches" report,
4 specifically dealing with the west end of
5 Kiawah Island Did you review these before
6 they were put into the public domain?

7 A Yes

8 Q Did you consider them to be accurate, to the
9 best of your knowledge?

10 A Yes

11 Q Now, if we go to the page numbered KDP1109, we
12 have the beginning of the discussion of Kiawah
13 Island in the 2008 report, correct?

14 A Yes

15 Q Would you please publish to the Court what your
16 Agency had to say about Kiawah Island, reading
17 the first two sentences in this report?

18 A "Kiawah Island is a ten-mile-long barrier
19 island located between Seabrook Island and
20 Captain Sam's Inlet to the west and Stono Inlet
21 and Folly Beach to the east Kiawah is one of
22 the most stable barrier islands in the state,
23 although the eastern and western ends of the
24 island are more dynamic, due to their proximity
25 to inlets "

1 Q Turning to page KDP1135, and that's the 2009
2 report, that contains the same narrative, does
3 it not --

4 A Yes

5 Q -- on that page? This 2009 report was released
6 in -- when, July of this year, August?

7 A It was either July or August, I believe, yes

8 Q All right Well, let's go to KDP1136, which is
9 page 27 of the 2009 report

10 A (Witness complies)

11 Q That is where the discussion appears on the
12 beach at the western end of Kiawah, correct?

13 A Yes

14 Q In that discussion you list or you describe
15 what's going on with the beach on the west end

16 A Yes

17 Q Would you please publish for us what OCRM had
18 to say about the west end of Kiawah Island in
19 its 2009 report, reading the text on this page,
20 KDP1136?

21 A It says, "Eighteen beach monitoring stations on
22 Kiawah Island were most recently surveyed in
23 June 2004, May and June 2005, March 2007, and
24 March 2008 Stations 2615 through 2645 are
25 located at the western end of Kiawah where land

1 use consists of undeveloped property and a
2 --beach park, single-family homes and some
3 multifamily structures This is usually one of
4 the most stable sections of Kiawah Island For
5 all stations here, the primary dune was stable
6 and the beach profile seaward of the dune
7 showed either no change or minor accretion
8 Some of the 2007 profiles document the
9 formation of a small dune 20 feet seaward of
10 the 2005 shoreline and the 2008 data continues
11 to indicate an increase of sand in the
12 shoreface "

13 Q And the next page includes at the top a beach
14 profile diagram comparing various years for
15 station 2625, correct?

16 A Yes

17 Q The 2625 is a station that is located very
18 close to the spit, about at the neck?

19 A Yes

20 Q And you can -- isn't that correct?

21 A Well, if you can give me one minute, I can
22 probably confirm that

23 Q You can turn two pages back and it will show
24 you station locations

25 A (Reading) If you can give me a minute to

1 check another map, I would --

2 Q All right

3 A -- like to take the opportunity to do that

4 Yes, that's correct Station 2625 is located
5 right at Beachwalker Park

6 Q From what we know from that is that there's
7 another dune that has started formation over
8 the last two or three years, correct?

9 A Yes

10 Q That's a good thing, is it not?

11 A I think it is, yes

12 Q Your graph at the top of KDP1137 shows the
13 accretion on a year-by-year basis in this slice
14 over the last five or six years, something like
15 that

16 A Yes

17 Q And it shows at this location that there is a
18 dune 150 feet seaward of your monument that's
19 15 feet in elevation, correct?

20 A Yes

21 Q That's a good size dune, isn't it?

22 A Yes, it is

23 Q Very healthy

24 A Yes

25 Q There's been much to-do in this case about what

1 went on in the 1600's, 1800's, early 1900's
2 Under the Beachfront Management Act, you
3 understand that the retreat policy is based on
4 40 years, correct?

5 A The baseline in unstabilized inlet zones looks
6 at a 40-year window In other words, we use
7 shorelines during the past 40 years to draw the
8 baseline position Our erosion rate
9 calculations can use a longer time period, but
10 the statute does talk about a 40-year policy of
11 retreat, which may have been a longer answer
12 than you wanted

13 Q Oh, you got exactly where I wanted to go

14 A Okay

15 Q The statute states that a 40-year policy of
16 retreat from the shoreline is established,
17 correct?

18 A Yes

19 Q The General Assembly, then, has said for
20 purposes of these calculations, we're looking
21 at 40-year retreat?

22 A Yes

23 Q Not 50 years, 40 years, correct?

24 A Yes

25 Q Over the last 40 years, has Captain Sam's

1 Inlet -- excuse me -- Captain Sam's Spit has
2 done nothing but accrete, correct?
3 A With some minor erosion incidents, probably
4 related to storms, yes The long-term trend is
5 certainly accretional
6 Q Did you hear part of Dr Kana's testimony?
7 A I heard most of it I'm not sure I caught the
8 very beginning of it
9 Q Well, is your understanding that the inlet
10 relocations that periodically move the inlet
11 back east would have the effect of continuing
12 over the long term to assist in the
13 accumulation of sand on Captain Sam's because
14 of the ebb-tidal delta?
15 A Yes
16 Q You are the person currently with the Agency,
17 I think, based on your testimony, who's
18 involved in doing the assessments every ten
19 years for the delineation of the new baseline?
20 A Yes
21 Q Is that correct?
22 A Yes
23 Q You're the person who also takes into account
24 the erosion rates for purposes of determining
25 the setback line, correct?

1 A Yes

2 Q 2009 was a -- or is the year for the redrawing
3 of the baseline on Kiawah Island, is it not?

4 A Yes

5 Q This year, when you took a look at it, you
6 determined that the baseline would not shift on
7 Captain Sam's Spit, correct?

8 A I'd have to go back and look at the maps, but
9 my recollection is that we might even have
10 proposed to move the baseline a little farther
11 toward Seabrook Island, although I'm not
12 positive about that I know it wasn't going to
13 be a more landward position, certainly

14 Q It was not in a more landward position, but the
15 baseline did not move seaward under your
16 recommendation at the neck, did it?

17 A At the neck, no I don't think we're proposing
18 a seaward movement at the neck, no

19 Q You also said something yesterday about KDP
20 could apply for some type of exception to allow
21 construction of a road seaward of the setback
22 line Did I hear you to say that?

23 A Yes

24 Q If, in fact, OCRM -- if that road were to go to
25 a potential residential development, all the

1 concerns that you've expressed about the
2 negative impacts of that residential
3 development would still apply, right?

4 A Yes

5 Q So there'd be no reason for you to approve that
6 permit if you held to your position that
7 development was not only a material adverse
8 impact, but so significant that permits to
9 facilitate it shouldn't be granted

10 MS ARMSTRONG Objection, Your Honor This is --
11 we don't have a -- we're opening the door
12 again I mean, Mr Walker objected on the
13 stormwater permit We're talking about an
14 entirely new project, a permit for an
15 application seaward of the setback line or
16 seaward of the baseline There isn't any such
17 project It is definitely speculative
18 There's nothing on the table to evaluate

19 THE COURT Well, it was asked --

20 MS ARMSTRONG It's speculative

21 THE COURT It was asked by someone I'm not
22 sure

23 MR WALKER Mr Whitfield-Cargile asked him
24 specifically about could they go get it, so
25 there's no need to worry about the access

1 corridor, on and on, that they can get an
2 exception

3 THE COURT That came into evidence and this is
4 responsive to that, is it not?

5 MS ARMSTRONG About whether they could actually
6 get a permit, though, that requires the Agency
7 to review some sort of application that they
8 don't even have before them I mean, I think
9 Mr Whitfield-Cargile asked could the Agency
10 entertain such an application and, certainly,
11 that could come in, but what the decision would
12 be on that application --

13 THE COURT Well, I think the question went a little
14 beyond that I overrule the objection

15 MR WHITFIELD-CARGILE I would join in the
16 objection, Your Honor, on the same basis I
17 think whether or not they can entertain it is
18 entirely different than what their decision
19 would be on the permit

20 THE COURT Well, you opened the door, though, by
21 asking that, because the way that you presented
22 the evidence was that that was another option
23 and that they could exercise that option rather
24 than do the revetment Is that not the way you
25 presented the evidence?

1 MR WHITFIELD-CARGILE Yes, Your Honor, I presented
2 -- -- that evidence as something that they could --
3 I mean, the evidence we've seen is that they
4 don't know if they're ever going to develop
5 that spit, so there's no reason to stabilize
6 that bank today They can wait and when they
7 do decide if they're going to actually develop
8 it, then they can in apply for something -- and
9 if that land's eroded beyond the setback line,
10 they can still apply for something else

11 THE COURT Well, thank you

12 MR WHITFIELD-CARGILE I don't think that that
13 opens the door to speculating as to how the
14 Department would rule on that There's a
15 difference between saying can they apply for
16 something and speculating as to what the
17 Department would do on it Rules of
18 Evidence --

19 THE COURT Well, I think it would be unfair to be
20 able to bring the issue up and not allow him to
21 explore whether that is, a legitimate
22 potentiality You present it as a possibility
23 and then you don't want him to explore whether
24 it is a legitimate possibility

25 MR WHITFIELD-CARGILE Well, I think presenting

1 what different feasible alternatives are and
2 then -- is distinct from speculating as to what
3 could happen down the road

4 THE COURT I overrule the objection Go ahead

5 A I think I might be able to answer your question
6 without you restating it I think we would
7 have the same concerns about that critical area
8 permit, that beachfront permit, changing the
9 overall character of the area However, let me
10 also say that in this instance, our permit
11 decision has not denied you use of the
12 property If we were to deny an access road
13 permit, then potentially we would have denied
14 you reasonable use of your property, which
15 raises other concerns

16 The general permit regulation, if I could read
17 it to you, there's a sentence or two here that
18 might be helpful It says, "The Department
19 shall consider applications for special
20 permits Special permits are to be issued only
21 in situations where without such a permit the
22 property owner would have no reasonable use of
23 his property or when an overriding public
24 benefit can be demonstrated "

25 So I think there's another test that we would

1 apply on that beachfront permit that hasn't
2 been applied in this revetment permit

3 Q And the consideration that you mentioned is
4 whether or not the property owner is being
5 denied reasonable access to his property?

6 A Or reasonable use of his property or access,
7 both, yes

8 Q Reasonable use or access

9 A Yes

10 Q In this instance, wouldn't the simplest thing
11 be to protect the access corridor which would
12 assure access to the property so we don't even
13 reach a special exception to construction --

14 A You're --

15 Q -- seaward of the setback line?

16 A You're asking me --

17 Q Isn't that much easier?

18 A You're asking me to cross the bridge we haven't
19 come to yet I'm just making a decision on the
20 application that's in front of me now If you
21 choose to apply for a permit in our beachfront
22 jurisdiction, we'll process that

23 Q I'll rephrase the question If the revetment
24 is constructed and if that revetment stabilizes
25 the bank so that there's sufficient width

1 between the narrowest point of the critical
2 line on the river and the setback line to allow
3 a road right of way, that would eliminate the
4 necessity of seeking an exception to
5 construction seaward of the setback line for a
6 road, correct?

7 A Yes

8 Q Jumping back for one moment to the
9 establishment of the baseline, what is the
10 shortest distance that the baseline can be
11 landward of this -- excuse me -- the setback
12 line can be landward of the baseline?

13 A Twenty feet

14 Q If a beach is accreting, building, does the
15 setback line still need to be landward of the
16 baseline?

17 A By 20 feet, yes

18 Q And that's what's going on at Captain Sam's,
19 correct?

20 A Yes

21 Q Because we have a 40-year history of accretion,
22 correct?

23 A You have a long-term history of accretion,
24 yeah

25 Q There is a statement in the Technical Summary

1 of Review that the revetment would retard or
2 inhibit the migration of the dune field system -
3 Do you remember that?
4 A I think so If you're actually reading it and
5 could tell me what page it's on, that might be
6 helpful
7 Q All right This may take me a second
8 A I'll look, too
9 Q Well, let me do this Rather than us look
10 for -- rather than put us to the task of a race
11 through this to see if we can find it, would
12 you agree the revetment is not going to retard
13 the accretion of the dune field system --
14 A Yes
15 Q -- on Captain Sam's?
16 A Yes
17 Q The last page of your Technical Summary of
18 Review -- or somewhere in your Technical
19 Summary of Review you mention the potential
20 for -- oh, I see it It's on the page that's
21 Bates stamped 28, if you could turn to that
22 Do you see that?
23 A Are we still looking at my Technical Summary of
24 Review?
25 Q All right Technical Summary of Review It

1 would appear at page --

2 MR - WHITFIELD-CARGILE What exhibit is that?

3 THE WITNESS It's DHEC Two

4 MR WALKER DHEC Two and KDP Forty-seven

5 Q If you go to page five, under R30-11(C)(1-3)

6 "Further Guidelines," do you see that?

7 A Yes

8 Q About halfway down Near the end of that

9 paragraph, you say, "There are likely to be

10 additional impacts to fresh and saltwater

11 wetlands associated with the residential

12 development, roads or other infrastructure "

13 Correct?_

14 A Yes

15 Q Mr Elser, I think you have seen that the

16 development envelope for Captain Sam's is

17 approximately, on that one exhibit to the

18 development agreement which you had in your

19 file, 31 acres, bounded by the setback line on

20 one side and the critical line on the other

21 A Yes

22 Q You're familiar with that? Isn't it true that

23 there are no isolated freshwater wetlands

24 within that 31 acres?

25 A I don't know that to be a fact, no

1 Q You have no knowledge, though, of any isolated
2 freshwater wetlands? - - - - -

3 A Correct

4 Q And you have no knowledge of any saltwater
5 wetlands within that delineation, other than
6 that there are marsh intrusions through the
7 fingers of land

8 A Well, I think that "other than" sort of negates
9 the first part of your statement

10 Q Well, what I'm getting at is, by definition,
11 since the project has to -- can't occur inside
12 the critical area, there are no saltwater
13 wetlands within that developable area, as drawn
14 right now, correct?

15 A Again, I don't know that for sure I don't
16 know where you might have to put bridges in or
17 what freshwater or saltwater or wetlands you'd
18 have to cross to access the property

19 Q Well, rather than debate that with you, if, in
20 fact, at some point down the road a bridge
21 needs to be built across some little area or
22 something needed to be filled, that would
23 require a permit from OCRM, would it not?

24 A Yes

25 Q In your experience with KDP, you've never known

1 them to go out and start doing work in the
2 critical area without a permit, have you?

3 A No

4 Q They've abided by the permitting process in all
5 instances, haven't they?

6 A Yes

7 Q Would you agree with Mr Long that they've
8 worked with the Agency on hundreds of permits?

9 A Yes

10 Q In this instance, you would expect them to come
11 and get a permit before doing it, wouldn't you?

12 A Yes

13 Q In this instance if they happen to find out
14 that they needed to do something with saltwater
15 or freshwater or wetlands, if you were doing
16 your job, there would be no negative impacts,
17 correct? Either it would be denied or there
18 would be sufficient mitigation It would be
19 handled appropriately, correct?

20 A Correct

21 Q And, in fact, on the last page -- I keep
22 jumping to pages and I'm not quite sure, but it
23 is true, is it not, that if those permits are
24 needed, they'll undergo a separate permitting
25 process with appeals?

1 A Correct

2 Q And that, I guess, is on the last page It
3 says, "Therefore" -- and I'm reading from about
4 halfway down -- "SCDHEC-OCRM will have an
5 active role in reviewing any proposed upland
6 development activities on this site "

7 A Yeah, I -- are you on the very last page?

8 Q I'm --

9 A I didn't see it, just then I'm sorry

10 Q That's okay It's the page that looks like
11 this (indicating) Maybe I stopped before the
12 end There you go

13 A Okay I'm sorry

14 Q It's the last sentence on the big paragraph in
15 the middle

16 A Yes, I'm with you now

17 Q So at the time OCRM made its permit decision,
18 it recognized they would have another bite at
19 the apple through the proper permitting process
20 if any of these permits were sought, correct?

21 A Yes

22 Q There was some discussion yesterday about the
23 Coastal Zone Management Act -- I'm going to
24 change that There was discussion yesterday
25 about the Coastal Zone Management Program

1 document

2 A Yes

3 Q When you wrote up your Technical Summary of

4 Review, you referred to certain policies in

5 that document, correct?

6 A Yes

7 Q Rather than go through that whole document,

8 chapter and verse, I'd like to speak in terms

9 of what it allows and doesn't allow or what it

10 prohibits and does not prohibit The Coastal

11 Zone Management Program document does not

12 prohibit the development of barrier islands,

13 does it?

14 A No, it does not

15 Q The Coastal Zone Management Program document

16 does not prohibit the residential development

17 of barrier islands, does it?

18 A Correct

19 Q The Coastal Zone Management Program document,

20 in fact, allows residential development on

21 barrier islands, provided certain things occur,

22 correct?

23 A Yes

24 Q Those things would include such things as

25 reasonable precautions, public water and sewer,

1 **building away from the primary dune, and the**
2 **like, correct?**

3 MS ARMSTRONG Objection, Your Honor I think he's
4 asking questions about the management program
5 I mean, what it says is in the document itself
6 and Mr Walker's recharacterization of what
7 considerations the management program has, I
8 just -- I mean, it says what it says I mean,
9 he's trying to put words into this witness'
10 mouth about policies that the Agency has to
11 implement If you want to look at the specific
12 policies, I'm okay with that, but I've not seen
13 any of those words referred to in the policies

14 THE COURT Any response?

15 MR WALKER The witness yesterday indicated that he
16 considered the Coastal Zone Management Program
17 document His Technical Summary of Review
18 refers to the Coastal Zone Management Program
19 document

20 THE COURT You can ask about that I overrule the
21 objection

22 Q **The Coastal Zone Management Program document**
23 **allows residential development, provided**
24 **certain precautions and steps are taken,**
25 **correct?**

1 A Yes

2 Q And that would include such things ~~as~~ public
3 water and sewer, correct? You don't want
4 septic tanks on the beach, right?

5 A There are septic tanks on the beach I don't
6 know if that would be something that I'm
7 specifically required to require as part of the
8 program document I think it might be best if
9 we could just read the policies out of the
10 program document, instead of me trying to
11 speculate on what could or could not be
12 allowed

13 Q I'm not asking you to speculate You apply it
14 I assume you weren't speculating when you
15 applied it in this case

16 A Correct

17 Q Do you have the program document in front of
18 you?

19 A Yes

20 Q Would you turn to page III-71?

21 A Yes

22 THE COURT Are you under Chapter III?

23 MR WALKER Yes, sir

24 THE COURT What section?

25 MR WALKER That would be section B Let me see if

1 I can find the specific section
2 THE COURT Areas other than critical areas?
3 MR WALKER That's correct
4 THE COURT You're going into the findings
5 MR WALKER I was going to go down to the policy
6 THE COURT Okay
7 Q Policy one, at the bottom of the page,
8 indicates, "Because of their proximity to and
9 strong physical and ecological relationship
10 with the beach and primary sand dune critical
11 areas of the coastal zone, project proposals in
12 secondary sand dunes must demonstrate
13 reasonable precautions to prevent or limit any
14 direct negative impacts on the adjacent
15 critical areas "
16 Did I read that correctly?
17 A Yes
18 Q Also, below that, where it says "Recommended
19 Policies" at the top of page III-72, do you see
20 that?
21 A Yes
22 Q Number one says, "Local governments with
23 coastal shorefronts are encouraged to develop
24 and implement strong local zoning and building
25 ordinances for beach and sand dune areas "

1 A Correct

2 Q The Town of Kiawah Island has implemented a
3 series of ordinances dealing with the
4 beachfront, has it not?

5 A Yes

6 Q In this case, the Town of Kiawah, which is the
7 local government in question, has authorized a
8 certain amount of development behind the
9 setback line under its local laws, correct?

10 A Yes

11 Q The number two recommended policy is, "Property
12 owners, development interests and local
13 governments are encouraged to institute and
14 observe setbacks or buffer zones for
15 construction in beach and dune areas "

16 In this instance, the construction would occur
17 behind the setback line, correct, presumably?

18 A If you're talking about like the residential
19 development --

20 Q Aside from any boardwalks that were later
21 permitted

22 A I would assume so, but I don't know for sure

23 Q Can we also agree that this program document
24 was drafted before the Beachfront Management
25 Act?

1 A Yes

2 Q In your mind, if the Beachfront Management says - --- ---

3 one thing and this document says something

4 else, which one do you go with?

5 A If they directly contradict each other, I would

6 go with the statute, the Beachfront Management

7 Act

8 Q All right Let's go to next page, which is

9 XI-73 That discusses public open spaces,

10 correct?

11 A Yes

12 Q The open spaces that are described in this

13 program document are public, not private,

14 correct?

15 A Are you talking about ownership or usage?

16 Q I'm talking about both

17 A Okay I think they are definitely publicly-

18 owned spaces and they can also include

19 publicly-used open spaces

20 Q Publicly-used open spaces

21 A Yes

22 Q So it either has to be a publicly-owned or a

23 publicly-used open space, correct?

24 A Yes

25 Q The Coastal Zone Management Program document

1 also has a chapter dealing with erosion
2 - - control, - doesn't it?
3 A Yes
4 Q And that is Chapter C of part IV, appearing at
5 page IV-51?
6 A Yes
7 Q There's nothing in that provision of the
8 program document that prohibits erosion control
9 structures on a tidal river, is there?
10 A No
11 Q I'm going to move to something else right now,
12 Mr Eiser, so we can close this one
13 THE COURT Did he answer that question or not?
14 MR WALKER He said "no "
15 THE WITNESS I said "no "
16 THE COURT Oh, okay
17 Q Yesterday, you referred to the portion of
18 regulation 30-11(C) that dealt with piecemeal
19 application, do you remember that?
20 A Yes
21 Q Do you remember saying that you thought it
22 applied here?
23 A Yes
24 Q Now, if somebody comes in with a vacant lot to
25 build a dock and they give you a drawing for

1 that dock, do you consider that a piecemeal
2 application if everything else dealing with the -
3 dock is in your file?

4 A If it's residential and there are no other
5 permits required from my office, then, no,
6 that's not piecemeal That's our only bite at
7 the apple

8 Q But you don't ask them to give you a
9 plan of the house so that you can take into
10 account the cumulative effects of the dock in
11 light of the other development on the lot, do
12 you?

13 A That's correct

14 Q And in this case because the predominant impact
15 was from the residential development and
16 because you didn't need to know the specifics,
17 even if you had been provided a full
18 development plan, that would not have changed
19 your decision, would it?

20 A It --

21 MR WHITFIELD-CARGILE Object, Your Honor,
22 speculative

23 MR WALKER I'll back up and rephrase it

24 THE COURT All right

25 Q We've already established that the foremost

1 cumulative impact was residential development
2 -- that's ultimately going to occur on Captain
3 Sam's
4 A Yes
5 Q We've also established that in the Agency's
6 eyes that was a significant negative impact,
7 correct?
8 A Yes
9 Q And it was what I might describe as the driving
10 impact, correct?
11 A Yes
12 Q Giving you further plans wasn't going to change
13 the predominance of that impact, was it?
14 A It would depend on the development plans
15 Q If the development plan showed, say, 50 houses,
16 that was not going to change the effect of that
17 impact in your eyes, was it?
18 A If the plan showed 50 houses, then, you know,
19 that's the level of impact that we considered
20 when we made our decision
21 Q Well, how many houses would you consider would
22 be okay, then? How many does OCRM consider is
23 okay on Captain Sam's?
24 A Well, fewer houses will have less impact I
25 can't tell you right now how many houses are

1 okay

2 I can also tell you -- and we haven't talked
3 about piping plovers, but --

4 Q We're going to get there

5 A Okay Okay Well, the comments that we got
6 from US Fish & Wildlife on any definite plans
7 would be relevant to our consideration I
8 cannot tell you two houses is okay or 20 houses
9 is okay

10 Q Can we just put piping plovers here for a
11 minute?

12 A Okay

13 Q We're going to have a great discussion on that
14 I'm really excited about that
15 I want to talk to you only right now about the
16 houses and the Agency's determination that
17 residential development was adverse to the
18 public interest

19 A Uh-huh (affirmatively responds)

20 Q How many houses would be okay? How many houses
21 would be tolerable in not, in your eyes, hit
22 that tipping point of too much?

23 A I can't speculate as to the answer to that
24 question right now I would have to see your
25 final development plans before I could answer

1 that question

2 Q Is it five, ten?

3 A I can't speculate on that

4 Q Well, the way to find out would have been to

5 get back to my client to ask them how many

6 houses and, "Can you give us the layout,"

7 right?

8 MR WHITFIELD-CARGILE Your Honor, he's just

9 arguing with the witness

10 Q No, I'm asking, if that's a concern, you could

11 have gotten back to them and asked them

12 THE COURT He rephrased the question

13 A That's correct

14 Q And you didn't do that

15 A No, our assumption was that there were to be 50

16 houses on 20 acres

17 Q You assumed?

18 A Based on the information that your applicant

19 provided us, yes

20 Q The information was that the zoning allowed up

21 to 50, right?

22 A Correct

23 Q And if you wanted to find out what the plan

24 was, you could have asked them

25 A That's correct

1 Q Didn't do that

2 A Correct

3 Q This is the first permit for a revetment that

4 OCRM has ever denied, to your knowledge, for

5 adverse cumulative impact, correct?

6 A Correct

7 Q And if we look at the statute and regulation,

8 it says that cumulative impacts is just

9 supposed to be part of your consideration,

10 doesn't it?

11 A Yes

12 Q It says, "In making the decision, the

13 Department shall take into account and consider

14 in part," correct?

15 A Yes

16 Q One of those things that you said you

17 considered was plovers

18 A Yes

19 Q You're not a wildlife person, are you?

20 A Correct

21 Q We heard you aren't a biologist, right?

22 A Correct

23 Q Certainly not an ornithologist

24 A Correct

25 Q So if you want to make a decision about plovers

1 and you want to know the impacts on plovers,
2 you've got to get a plover person, right? -- -- --

3 A I mean, I would expect that US Fish & Wildlife
4 and perhaps the South Carolina Department of
5 Natural Resources would be the experts
6 providing the information, yes

7 Q Well, two ways to go

8 THE COURT Hold on a second

9 MS ARMSTRONG I need to take a break

10 MR WALKER I don't mind breaking for a second,

11 Your Honor

12 THE COURT Okay Well, we're moving into the
13 piping plovers, so we can --

14 MR WALKER We can migrate for a minute

15 MS ARMSTRONG It sounds like it might be long

16 THE COURT Okay

17 MS ARMSTRONG Thank you, Your Honor

18 (Off the record from 10 38 til 10 48 a m)

19 THE COURT All right Ready when you are

20 Q Mr Eiser, yesterday at several places in your
21 testimony you refer to "we" decided or "we" did
22 this Who else was involved in this decision?
23 You mentioned Ms Neale Who else?

24 A Well, I may have been meaning "we" the Agency,
25 meaning in a generic sense OCRM, and I'm here

1 representing OCRM

2 Other people that were directly involved with
3 our decision were Ms Neale and I think she
4 actually conferred with some of our staff
5 attorneys and perhaps her supervisors, as well

6 Q Do you know whether or not Ms Bolton was
7 involved, the department head of OCRM?

8 A She was aware that we were processing this
9 permit and formulating a decision I don't
10 know how hands-on involved she was

11 Q Did she review the Technical Summary of Review,
12 to your knowledge?

13 A I don't know for sure

14 Q All right You have worked with Mark Permar
15 and Mitchell Bohannon before, have you not?

16 A Yes

17 Q Would you agree that you have a good working
18 relationship with both of them?

19 A Yes

20 Q Plovers appear on many beaches in Coastal South
21 Carolina, do they not?

22 A I'm not a plover expert

23 Q Is your working understanding of plovers that
24 they go up and down -- wintering plovers appear
25 in many locations along the South Carolina

1 coast?

2 A I think that may be true I've never seen a
3 map that shows me all the plover sightings for
4 the entire state

5 Q Mr Eiser, this was the first permit that OCRM
6 has ever denied in part because of plover
7 concerns, correct?

8 A I believe that's correct, yes

9 Q Before you take the very severe action of
10 considering impacts on plovers to be a negative
11 effect sufficient to fold into your analysis,
12 you would want to make sure that you have the
13 information on plovers correct, wouldn't you?

14 MR WHITFIELD-CARGILE Your Honor, I object to the
15 first part of his question It sounds like
16 he's testifying that considering impacts to
17 plovers is a very severe action There's
18 nothing in the record that establishes that and
19 I don't know if he's drawing that from -- I
20 realize he can ask questions on cross, but I
21 think at some point it's adding snippets of
22 stuff that's not in the record

23 THE COURT Maybe I misunderstood the question I
24 thought the severe action was denying the
25 permit because of the plovers

1 MR WALKER The severe action was just taking the

2 ----- final action on the permit

3 MR WHITFIELD-CARGILE That's not how I heard the
4 question phrased, Your Honor, but --

5 THE COURT That's how I heard it

6 MR WHITFIELD-CARGILE -- I could be wrong

7 THE COURT Well, we'll just get him to rephrase it
8 again and make sure

9 Q Before taking final action on a permit that's
10 based in part on perceived negative effects to
11 plovers, you, as the determining official,
12 would want to make sure you had your facts
13 straight on plovers first, would you not?

14 A Yes

15 Q And there's several ways to do that, I would
16 think One would be you could obtain your own
17 plover specialist, for lack of a better word,
18 right?

19 A We could, yes

20 Q Another would be you could rely on things that
21 were in the permitting file that you thought
22 were authoritative, correct?

23 A Yes

24 Q In this file you had a letter from a biologist
25 named Folk that had been submitted by KDP,

1 correct?

2 A Yes

3 Q In addition, you had a report from Dr Oertel
4 where he talked about plover habitat and he
5 said it would not be affected, correct?

6 A They were in the file yes

7 Q But, instead, you decided to rely completely on
8 the comment letters of the United States Fish
9 & Wildlife, correct?

10 A Yes

11 Q The United States Fish & Wildlife had two or
12 three comment letters?

13 A I believe it was three letters, total

14 Q Three letters The final United States Fish &
15 Wildlife letter was dated August 14th, was it
16 not?

17 A It was in August, yes

18 Q In that comment letter, United States Fish &
19 Wildlife said that they did not -- they
20 determined that there was probably -- I think
21 the words were that no adverse effect on
22 plovers or plover habitat was likely

23 MS ARMSTRONG Objection, Your Honor I understand
24 your previous ruling, but I just want to make
25 sure that we've preserved our objection about

1 this coming in for the truth of the matter I
2 understand your previous rulings were what the
3 Department knew at the time, but not that this
4 testimony would be coming in as proof

5 THE COURT That's right

6 MR WALKER Let me rephrase it since --

7 THE COURT Sustained in that regard

8 MS ARMSTRONG Thank you

9 MR WALKER Let me rephrase it since I did such a
10 bad job of paraphrasing

11 Q In the letter of August 14 that you received a
12 copy of, the United States Fish & Wildlife
13 said, "After further review of SC 10 boundary,
14 as well as the engineering plans for the
15 project, it is our opinion that this action is
16 not likely to adversely affect federally
17 protected species and/or designated or proposed
18 critical habitat " Correct?

19 A Is that letter one of your exhibits that I
20 could actually refer to?

21 Q Yeah, the exhibit is Twenty-three We have it
22 at Twenty-two, which was the copy produced by
23 OCRM that had the second page missing, and we
24 have Twenty-three, the complete letter And
25 the comment appears at the top of page two

1 **A** Yes, sir, that's what it says

2 **Q** All right -----

3 THE COURT Read the last part of that so I can I
4 understand the question "It is our opinion
5 that this "

6 MR WALKER "It is our opinion that this action is
7 not likely to adversely affect federally
8 protected species and/or designated or proposed
9 critical habitat "

10 **Q** The federally protected species they were ,
11 talking about was piping plovers, correct?

12 **A** Correct And the action would be the issuance
13 of the permit by the Army Corps of Engineers
14 for the bulkhead

15 **Q** Did you do any work on your own to determine
16 how many piping plovers were on the west end of
17 Kiawah Island?

18 **A** No

19 **Q** Did you do any effort to research anything
20 about piping plovers?

21 **A** No

22 **Q** Did you look in the Federal Register to
23 determine what the true boundaries of SC Unit
24 10 were?

25 **A** No

1 Q Are you aware from sitting in the courtroom
2 that the Federal Register establishes the
3 eastern end of SC Unit 10 as one-tenth of a
4 mile north of Captain Sam's Inlet?

5 A I heard you read that, yes

6 Q Assuming that the Federal Register establishes
7 that as the boundary of SC Unit 10, that is not
8 adjacent to the revetment itself, correct?
9 I'll just show my figure here If the inlet is
10 at this location on KDP Exhibit Forty-eight-C,
11 and the revetment ends opposite this creek, as
12 many people have said, and it's 3,000 feet to
13 the inlet, then SC Unit 10 is not adjacent to
14 the revetment, correct?

15 A I have two thoughts on that First of all --

16 Q Yeah, first, yes or no, and you can explain
17 your answer

18 A Perhaps not In other words, if you're asking
19 me is the revetment out, my answer is perhaps
20 not, based on what you read from the Federal
21 Register

22 Q Okay Go ahead and explain your answer

23 A Okay Two points First of all, we know that
24 Captain Sam's Inlet moves It moves perhaps
25 200 feet per year, so I don't know if when they

1 wrote the Federal Register they meant the
2 location of Captain Sam's Inlet at the time
3 that they wrote it or if they meant that to be
4 a moving target that moves 200 feet every year
5 My second point would be if they say north, not
6 northeast, and you keep in mind that the
7 orientation of the island is more east-west
8 than north-south, then if you look at Captain
9 Sam's Inlet and look at the location of the
10 revetment, it may be within a tenth of a mile
11 to the north The revetment may be within a
12 tenth of a mile to the north of the inlet
13 location, because north is going up, not going
14 that way (indicating) I'd have to measure it

15 Q Let me ask you this It's been a while since
16 I had a compass, but it's 3,000 feet from --
17 more than 3,000 from the inlet to the end of
18 the revetment and it only goes a tenth of a
19 mile from the inlet, no matter which direction
20 we go in, a tenth of a mile is 520 -- let me
21 just round it off -- 530 feet -- before I
22 embarrass myself It's not going to hit the
23 end of the revetment, is it?

24 A It's doesn't say a tenth of a mile in any
25 direction It says a tenth of a mile to the

1 north

2 Q What I'm saying is whether north-is-this way,
3 that way or this way (indicating), if you're
4 only going a range of a little over 500 feet,
5 that's considerably less than 3,000 feet,
6 right?

7 A That number is less than 3,000 feet, but my
8 point still remains that they're not saying
9 within a tenth of a mile radius They're
10 saying a tenth of a mile to the north, and
11 there's no limit on how far to the east you go

12 Q Whoa, whoa, whoa So you think if they say a
13 tenth of the mile to the north, it goes in an
14 unlimited direction to the east, south and the
15 west?

16 A They don't specify any other directions from
17 what you read to me

18 Q That's your interpretation of the federal
19 regulation?

20 A I'm not here to interpret the regulation I'm
21 here to say that potentially you could
22 interpret it that way

23 Q Uh-huh (affirmatively responds) I'll end on
24 that one with respect to that

25 Were you here for Lee Walton's testimony and

1 also Ms Hughes' testimony where they talked
2 about habitat being the tidal mud flats in the
3 inlet?

4 A I was here for --

5 MR WHITFIELD-CARGILE Mischaracterization or
6 limitation of that testimony, Your Honor

7 MR WALKER Never mind, Your Honor

8 MR WHITFIELD-CARGILE That wasn't --

9 THE COURT He withdrew it

10 Q You were really worried about the plovers here,
11 weren't you?

12 A Because the Captain Sam's Spit area is
13 partially habitat for the threatened species,
14 the plover, that makes it a geographic area of
15 particular concern under our program document,
16 which means this area should get the highest
17 level of protection that we can provide it

18 Q The geographic area of particular concern is
19 conferred if it's critical habitat, correct?

20 A I'd have to go back and reread the definition,
21 but, yes I believe that's correct

22 Q So the geographic area of particular concern is
23 coterminous with the critical habitat

24 A That sounds correct, yes

25 Q All right Do you try to treat all applicants

1 with equal objectivity?

2 A Yes

3 Q And by that I mean, if the same or similar
4 circumstances apply, you would want to handle
5 the application in a same or similar way,
6 correct?

7 A Yes

8 Q Wouldn't be fair to slam the door on one person
9 for something that you opened it on another
10 person, right?

11 A Correct

12 Q Let's talk some more about plovers You were
13 the permitting official who made the final
14 permitting decision with respect to the beach
15 scraping and nourishment project in front of
16 the Ocean Course, correct?

17 A Yes

18 Q That permit application was submitted in 2005?

19 A That sounds about right, within a year, yes

20 Q And part of that permit application involved
21 activity inside SC Unit 9 critical habitat,
22 correct?

23 A That's correct, yes

24 Q How many feet -- well, let me ask you, how many
25 acres of designated critical habitat for piping

1 plovers did you allow to be excavated in that
2 permit?

3 A I'd have to go back and reread the file to be
4 able to give you a definite answer to that I
5 know the project was in the vicinity of the
6 plover habitat

7 Q I brought it today, tab 51

8 A All right

9 Q Oops, I jumped the gun It's actually tab 50
10 is the permit and 51 is the Fish & Wildlife
11 assessment that we'll get to Take all the
12 time you need to review it

13 A All right So we're looking at tab 51, which
14 is the -- which one --

15 Q Tab 50 is the permit

16 A Okay

17 Q And tab 51 was the Fish & Wildlife assessment

18 A All right

19 Q And I'm going to ask you, did Fish &
20 Wildlife --

21 MR WHITFIELD-CARGILE Your Honor, I'm going to
22 object on relevance We're looking at the
23 merits of this permit application, not the
24 merits of the 2006 permit application
25 I also think that -- my understanding is that

1 that permit was challenged in court and that
2 - issue has been addressed in court But it's
3 irrelevant to this proceeding, Your Honor
4 MS ARMSTRONG Your Honor --
5 THE COURT Well, he said to treat all applicants
6 with equal opportunity and Weaver versus
7 Coastal Council requires equal protection, so -
8 -
9 I'll get to you
10 So why would it not be relevant in that regard?
11 MR WHITFIELD-CARGILE Well, they're two -- they're
12 entirely different permit applications and I
13 think Dorman says that -- Dorman vs DHEC, on
14 that cite said you look at each permit on its
15 own merits Weaver involved three docks that
16 were right next to each in exact same --
17 THE COURT They were very similar
18 MR WHITFIELD-CARGILE -- the exact same vicinity
19 of each other and -- I mean, this is -- these
20 are two entirely different projects, Your
21 Honor
22 THE COURT All right I'll hear from you
23 MS ARMSTRONG Thank you, Your Honor
24 Mr Walker hasn't laid a foundation that the
25 project he's talking about is similar to the

1 one that we're in court about today, so he's
2 got to first lay that foundation I mean, -- --
3 we're talking about apples and oranges here
4 The project he's asking about was a -- there
5 was no permanent structure involved at all It
6 was moving sand around And so I don't think
7 he's going to be able to establish that, but he
8 still hasn't laid that foundation under Weaver
9 and he needs to do that first

10 THE COURT All right You wish to respond?

11 MR WALKER I do, several areas here He's already
12 said that he treats applicants the same in
13 his -- we're also offering it to show bias and
14 lack of objectivity
15 Also, the Technical Summary of Review that we
16 presented into evidence indicated under
17 mitigation that there couldn't be any
18 mitigation for the plovers and he said in his
19 deposition -- I'll ask him this -- that in his
20 estimation there could be no mitigation that
21 would solve the plover issue
22 What I'm about to show is that he handled and
23 approved a permit to allow the Town of Kiawah
24 Island in front of the Ocean Course to excavate
25 150 acres of critical habitat and, in that

1 instance, he implemented a mitigation plan that
2 -- -- was recommended by Fish & Wildlife that
3 included a take of habitat and a take of piping
4 plovers

5 THE COURT A what of?

6 MR WALKER They call it a "take " It's their
7 parlance under endangered species where it's
8 like "what's the effect going to be?" They
9 consider it a "take "
10 Now, when they gauged the impact and there was
11 a clear determination by Fish & Wildlife of
12 what the take was, and they still allowed them
13 to proceed with the project inside the critical
14 area

15 THE COURT All right Lay that foundation and
16 we're going to deal with the objections then

17 Q Mr Elser, in your deposition did you not state
18 that you did not consider that there was any
19 mitigation that could deal with the plover
20 issue?

21 A Correct At the Kiawah Spit, you're talking
22 about permanent development and I don't know
23 that there's any way that you can completely
24 mitigate away the effects of permanent
25 development

1 Q But that -- all right So you said there was
2 no mitigation available ---

3 A I didn't -- I said that I didn't think you
4 could completely mitigate away the concerns of
5 the effects of development there I mean, you
6 can minimize the effects I don't think you
7 can completely eliminate it

8 Q Well, in the application by the Town of Kiawah
9 Island dealing with the excavation of sand and
10 the cutting of a new inlet in front of the
11 Ocean Course, a big portion of that activity
12 took place in the designated critical unit
13 habitat, did it not?

14 MS ARMSTRONG Objection, Your Honor Mr Walker
15 is mischaracterizing a permit application

16 MR WALKER Well --

17 MS ARMSTRONG It wasn't a --

18 THE COURT He's asking the question, "did it not "

19 MR WHITFIELD-CARGILE Your Honor, I still don't
20 think it's relevant I still don't think he's
21 laid a foundation of any similarity I mean,
22 you have a situation where --

23 THE COURT He hasn't offered -- he's attempting to
24 lay a foundation to ask this question I
25 overrule your objection

1 A Can you repeat the question?

2 Q I want to move on to my next question

3 A All right

4 Q But I can't remember the one I just asked, so
5 if you would please on Exhibit Fifty-one --

6 A Yes

7 Q -- turn to page 41 of the Fish & Wildlife
8 assessment dealing with piping plovers It's
9 marked at the bottom KDP1253

10 A Yes

11 Q Do you see up at the top, under table nine,
12 where Fish & Wildlife indicated that the number
13 of individuals that would -- of piping plovers
14 that would be harassed or harmed was 20?

15 A Yes

16 Q Do you also see that the habitat affected was
17 150 acres of wintering habitat?

18 A Yes

19 Q Nonetheless, you granted that permit subject to
20 certain mitigation by the town, did you not?

21 A Yeah, the mitigation as required by the Fish &
22 Wildlife Service and then performed by the
23 town

24 Q You adopted the recommendation of Fish &
25 Wildlife for mitigation, correct?

1 A Yes

2 Q And that included a-monitoring program, right?

3 A Correct

4 Q In this instance you didn't go to Fish &

5 Wildlife and ask them -- when I'm talking about

6 my client, you didn't go to them and ask them

7 whether or not there was a mitigation plan that

8 might work, did you?

9 A No, and I didn't go to Fish & Wildlife on the

10 sand scraping permit, either They approached

11 us with this information

12 Q And that was because with respect to this

13 permit application, they determined that there

14 would be -- there would likely be no adverse

15 effect, but on the Ocean Course application,

16 there was a determination not just of likely

17 effect, but actual effect, correct?

18 A I'm not going to agree with you as far as the

19 first permit about the -- when you said "no

20 adverse effect " If you're talking about just

21 from the revetment construction, yes, but Fish

22 & Wildlife did express concerns about adverse

23 impacts to the plover habitat from the overall

24 project at the Captain Sam's Spit, to include

25 development

- 1 Q It made no -- there was no determination,
2 though, as there was in the Ocean Course, that ---
3 there would be a direct adverse effect from the
4 project under permitting considerations
- 5 A That's correct, yes
- 6 Q Did you happen to check with the Town of Kiawah
7 Island's biologist to ascertain what had been
8 the effect, if any, of the work that was done
9 in front of the Ocean Course on plovers?
- 10 A I don't recall talking to Jim Jordan, their
11 biologist, about that anytime recently, no
- 12 Q Your monitoring plan -- or your permit requires
13 that the town monitor, correct?
- 14 A Correct
- 15 Q Every two weeks during season, correct
- 16 A I'd have to look at what the monitoring
17 conditions require before I could confirm that,
18 yeah
- 19 Q You know, though, that they're required to go
20 out, you're just unsure about how often they
21 required to go out
- 22 A Correct
- 23 Q And you know, too, that that monitoring plan
24 includes the entirety of the island, correct?
- 25 A Again, I'd have to refer to the permit to be

1 able to confirm that

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

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

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

12 A It's the activity, yes

13 Q It's the project, correct?

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

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

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

24 Q You said "yes "

25 A Okay

1 Q Are you refuting that answer now?

2 A Ask me the question again

3 Q I'm going to ask you, isn't it true when I took
4 your deposition I asked you, when we talk about
5 the "project," the "project" for purposes of
6 the application is the revetment itself,
7 correct?

8 A For purposes of the application, yes

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

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

16 MR WALKER Addressed and offered earlier

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

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

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

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

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001502

1 a letter from my client -- Eighteen These are
2 -- from the permitting file KDP Exhibit
3 Nineteen, KDP Exhibit Twenty, KDP Exhibit
4 Twenty-one, KDP Exhibit Twenty-two, KDP Exhibit
5 Twenty-three, KDP Exhibit Twenty-four, KDP
6 Exhibit Twenty-five, KDP Twenty-six All of
7 these are from the permitting file and stamped
8 received by OCRM KDP Exhibit Twenty-seven,
9 KDP Exhibit Twenty-eight, which is an enclosure
10 and a letter dated September 2 from Mitchell
11 Bohannon, which is KDP Exhibit Twenty-nine, KDP
12 Exhibit Thirty, KDP Exhibit Thirty-one, KDP
13 Exhibit Thirty-two, KDP Exhibit Thirty-four,
14 KDP Exhibit Thirty-five, KDP Exhibit
15 Thirty-seven, which is the one that I was
16 looking for the other day, which is the
17 reinstatement of the nationwide permit by the
18 Army Corps of Engineers KDP Exhibit
19 Thirty-nine
20 I believe that does it, Your Honor, and those
21 would be offered as materials in the file that
22 he relied upon --

23 THE COURT All right

24 MR WALKER -- and are pertinent to the issues that
25 we described earlier I just want to make sure

1 the record is complete I'm not, unless you
2 would like, offering-them all- for the truth of
3 the matter asserted I'm not I'm offering
4 them on the other -- for other purposes

5 THE COURT Notice

6 MR WALKER Yeah, notice, bias

7 THE COURT Okay All right So it's KDP Eleven,
8 Fourteen, Sixteen through Thirty-two,
9 Thirty-four, Thirty-five, Thirty-seven, and
10 Thirty-nine

11 MR WHITFIELD-CARGILE If I could just have a
12 moment, Your Honor That's a lot of exhibits
13 at once Some of these have been admitted for
14 notice already

15 THE COURT Well, just for sake of --

16 MR WHITFIELD-CARGILE Yeah

17 THE COURT -- ease, let's just --

18 MR WHITFIELD-CARGILE Sure

19 THE COURT If they're already in, let's not argue
20 about --

21 MR WHITFIELD-CARGILE Sure

22 (Off the record)

23 MR WHITFIELD-CARGILE Your Honor, I don't have an
24 objection to those coming in for the limited
25 purpose of showing what was in the file and I

1 think that's sounds like what he's doing, as
2 long as it's clear that they're not coming --
3 THE COURT Notice, inquiry --
4 MR WHITFIELD-CARGILE -- in for the truth of the
5 matter Yeah
6 THE COURT -- and two other things along the same
7 lines
8 MR WALKER Right
9 MR WHITFIELD-CARGILE I think we should also add
10 Fifteen, though, in that regard, if we're going
11 to add these
12 MR WALKER That's fine
13 Also, Your Honor, they would be offered to
14 show -- I think we said this -- bias, and also
15 whether or not the decision was arbitrary and
16 capricious
17 THE COURT Okay That's not --
18 MR WHITFIELD-CARGILE That sounds like you're
19 getting into truth -- if you're going to use
20 those to show bias or arbitrary and capricious,
21 then you would have to say that stuff was true
22 I mean, you have to get into the truth of the
23 matter asserted
24 THE COURT Well, it he's --
25 MR WHITFIELD-CARGILE That's an entirely different

1 ball game

2 THE COURT -- he's offering those for inquiry and
3 that if he had notice and inquiry and he -- and
4 I presume this is going to be his argument --
5 that he failed to act upon having received the
6 notice and inquiry, that it would only be
7 because of bias or ultimately arbitrary and
8 capricious

9 MR WALKER That's correct

10 THE COURT The bottom line is, I'm considering it
11 for notice and inquiry and whatever any
12 inference occurs thereafter is something that
13 y'all can argue about

14 MR WHITFIELD-CARGILE I think there's a fine line
15 between --

16 THE COURT I'm sticking with notice and inquiry

17 MR WHITFIELD-CARGILE Very good Thank you, Your
18 Honor

19 MS ARMSTRONG Your Honor, I haven't looked at
20 every single one of those I would agree that
21 if we're limited to notice and inquiry on the
22 majority of these -- I haven't looked through
23 Fish & Wildlife Service, the Corps, whether
24 they actually sent letters I guess I can't
25 really object on inquiry on those, but

1 Twenty-four, Twenty-five, Twenty-six,
2 Twenty-seven, those all contain expert - - - - -
3 opinions They're reports from their experts
4 that were in the courtroom for a couple of
5 days I think they're extremely -- it's
6 extremely prejudicial to allow them in because
7 I think -- Mr Eiser's already testified that
8 he received the reports of Oertel and Basco
9 These, Twenty-four through Twenty-seven, all
10 contain -- are all reports of expert witnesses,
11 experts that KDP has hired He already
12 testified that he had notice of those
13 decisions And Mr Walker even got in some of
14 what those decisions said I just think it's
15 extremely prejudicial to let in all these
16 reports and us try to have to argue about
17 whether there was bias or not bias and
18 whether -- I mean, we already know he had
19 notice and inquiry That's already
20 established

21 THE COURT This establishes exactly what he had
22 notice and inquiry of, the reports by Oertel --

23 MS ARMSTRONG Drs Oertel and Basco

24 THE COURT -- and Basco If it's not offered for
25 the truth of the matter asserted, and I'm not

1 allowing it in for that regard It certainly
2 -- is relevant as to what information he had and
3 why he acted the way he did So I would have
4 to disagree with you on this one and I'll let
5 it in for the limited purpose
6 I can't remember -- you were not -- so I
7 overrule her objection, but I don't think
8 you -- your objection was you just wanted it in
9 only for notice and inquiry and that's what I'm
10 doing

11 MR WHITFIELD-CARGILE Right, Your Honor But if
12 it's admissible to show bias and arbitrary and
13 capricious, I mean, you're -- that assumes the
14 truth of the matter asserted I think that --

15 THE COURT I think --

16 MR WHITFIELD-CARGILE I understand what your
17 ruling is, but I think effectively -- I'm sorry
18 I interrupted you, Your Honor

19 THE COURT That's okay I interrupted you On
20 this one, we're equal
21 I disagree with you on that Let's save us
22 time, because I think evidence comes in of
23 which every party can make their inferential
24 arguments And the purpose for which he's
25 offering the notice is actually -- matter of

1 fact, the purpose for which he is seeking to
2 have the evidence offered, for-notice and
3 inquiry, is a legitimate issue under the Rules
4 of Evidence, because the Rules of Evidence
5 specifically say that you can properly
6 cross-examine a witness concerning bias
7 But now you're apparently not wanting me to
8 follow the Rules of Evidence in that regard

9 MR WHITFIELD-CARGILE Your Honor, I certainly want
10 you to follow the Rules of Evidence I think
11 it's such a fine line between the truth of the
12 matter asserted and this

13 THE COURT Well, I think it's one that I can hold,
14 so

15 MS ARMSTRONG Your Honor, I don't think the fact
16 that he received these documents doesn't have
17 anything to do with bias I mean, if that's
18 the Court's ruling, then every single document
19 that comes into the Agency permitting file
20 would be admissible despite the hearsay rule

21 THE COURT I'm not letting it in for the truth of
22 the matter asserted, so the hearsay rule is not
23 implicated But thank y'all very much
24 All right Now, it's Exhibits Eleven, Fourteen
25 through Thirty-two, Thirty-four, Thirty-five,

1 Thirty-seven and Thirty-nine are admitted

-2-- MR WALKER Thank you, Your Honor -- -- --

3 (KDP's Exhibit Numbers Eleven, Fourteen through

4 Thirty-two, Thirty-four and Thirty-five were

5 admitted into evidence)

6 Q Mr Eiser, you may not know this, but Leonard

7 Long actually knows a little bit of shorthand

8 I didn't know that He took some notes

9 yesterday during your testimony and I want to

10 see if this is an accurate rendition of what

11 you said

12 A Uh-huh (affirmatively responds)

13 Q Based on your testimony yesterday or in your

14 testimony yesterday, did you say that, "Captain

15 Sam's is a valuable resource for the state and

16 it deserves our highest effort to keep it for

17 the people"?

18 A Yes

19 Q If, in fact, as you said, it deserved your

20 highest effort to keep it for the people, then

21 nothing that we could have done for this

22 application would have made any difference,

23 would it?

24 A I disagree with that statement

25 MR WALKER Thank you That's all I have at this

1 time

2 THE COURT - Hold on one moment

3 (Off the record)

4 THE COURT Okay Go ahead Redirect on new
5 issues

6 MR WHITFIELD-CARGILE Yes, Your Honor

7 MR EISER - REDIRECT EXAMINATION BY MR
8 WHITFIELD-CARGILE

9 Q Mr Eiser --

10 MR WHITFIELD-CARGILE Begging the Court's
11 indulgence one moment, Your Honor

12 Q Let me show you what's been marked as DHEC
13 Exhibit Eight Is this a series of comment
14 letters?

15 A (Reading) Yes, these are comment letters that
16 we received from, let's say, the general
17 public

18 Q Okay Were those received in the file?

19 A Yes

20 MR WHITFIELD-CARGILE Okay Your Honor, at this
21 time I'd move for the admission of those for
22 the same purposes that the KDP's Exhibit
23 Eleven, Fourteen through Thirty-two --

24 THE COURT That's fine

25 MR WALKER I have no objection if they're not

1 offered for the truth of the matter If/
2 they're offered to show bias and notice, I like-- -- --
3 them, so I agree to them What's our number?
4 MR WHITFIELD-CARGILE Eight
5 THE COURT I assume they're offered to --
6 MR WHITFIELD-CARGILE They're not offered to show
7 bias, Your Honor
8 MR WALKER But they're not offered to show the
9 truth of the matter
10 MR WHITFIELD-CARGILE No
11 MR WALKER That's all I care about
12 THE COURT Ms Armstrong?
13 MS ARMSTRONG No objection, Your Honor
14 THE COURT They're admitted
15 (DHEC's Exhibit Number Eight was admitted into
16 evidence)
17 Q I want to talk about the 2006 sand scraping or
18 the nourishment up on the east end that
19 Mr Walker was asking you about
20 A Yes
21 Q You said that was temporary, I think What
22 does that mean?
23 A It was basically a sand scraping project
24 They went out on the beach and scraped up sand
25 from one area and moved it to another area

1 Q When was it authorized to occur?

2 A I'd have to look at the permit again I
3 believe it was --

4 Q You said that was Fifty-one?

5 A I think it was Fifty or Fifty-one

6 MR WALKER Yeah, I think the permit was Fifty,
7 Davis, and I think the wildlife assessment
8 report was Fifty-one

9 MR WHITFIELD-CARGILE Okay, Fifty-one

10 THE WITNESS I'm going to refer to Fifty, which is
11 the permit

12 Q Perfect

13 A I'm sorry, could you repeat the question?

14 Q Do you know when the sand scraping was
15 authorized to occur?

16 A Well, I'm looking to see what conditions we put
17 in here I know that there were some competing
18 interests, because they didn't want the work to
19 be done during turtle nesting season, but yet
20 they also didn't want the work to be done
21 during the piping plovers season, but they're
22 kind of mutually exclusive

23 Q Okay

24 A So we did say that all work must be conducted
25 outside of turtle nesting season, which runs

1 May 15th through October 31st, meaning that
2 they could do the work from November 1st
3 through May 14th
4 Q Okay Do you know the period of time over
5 which the work was to be done?
6 A You mean how long would it take to do the work?
7 Q Yes
8 A Is that what you're saying?
9 Q How long would it take?
10 A I don't know that if we -- we specifically got
11 in here It's my recollection that it took
12 them perhaps four to six weeks
13 Q They're not still out there scraping today?
14 A Oh, no, no I mean, this work was done, I
15 believe, immediately once the permit was
16 issued The permit was issued March 21st and
17 their intention was to get the work done --
18 okay, March 21st, 2006, and they wanted to get
19 the work done before May 15th, 2006
20 Q Okay How else does that permit differ from
21 the proposed KDP permit?
22 A Well, as I've just said, there was no permanent
23 construction -- really was no construction of
24 any kind This was a sand moving project on
25 the beach And, you know, when they were

1 finished, you really couldn't tell that any
2 -- -- work had been done It looked different, but
3 it only looked different if you'd seen what it
4 looked like beforehand
5 The other thing is that US Fish & Wildlife was
6 extremely concerned about piping plover impacts
7 and we had several meetings with the Fish &
8 Wildlife staff and we eventually came up with
9 a plan that they found acceptable, provided
10 that certain prudent measures were taken, and
11 so they ultimately approved the plan And one
12 of the components of the process by which we
13 eventually worked to a satisfactory permit was
14 the sand scraping project was specifically
15 modified to create suitable plover habitat as
16 a result of the sand moving

17 Q Okay I want to talk about Oertel and Basco
18 for a minute Did you disagree with Oertel and
19 Basco's conclusion that the revetment would not
20 alter hydrology at the inlet?

21 A Well, first of all, Oertel is a geologist and
22 Basco is an engineer, so I think they have good
23 expertise to draw those sorts of conclusions
24 and I did agree with that conclusion, yes

25 Q Okay So that wasn't an issue

- 1 A I didn't think it was an issue, no
- 2 Q So you didn't disregard that -- well, did you
- 3 disregard his report?
- 4 A No, not at all
- 5 Q Okay It just wasn't an issue?
- 6 A I mean, I agreed with some of the things that
- 7 they said in the report and for other things,
- 8 I felt that they were not really experts and,
- 9 particularly for birds, that they were not the
- 10 experts and the opinion of the US Fish &
- 11 Wildlife Service would be more important
- 12 Q Okay What about the conclusion that the
- 13 revetment itself wouldn't alter sand supply,
- 14 sediment supply to Seabrook Island, did you
- 15 disagree with Kana's assessment?
- 16 A I think if there was any decrease in sand
- 17 supply to Seabrook Island as a result of
- 18 construction of this revetment, it would be
- 19 miniscule, it would be undetectable
- 20 Q So that wasn't a basis for your decision
- 21 A No
- 22 Q That wasn't even -- that wasn't -- well, okay
- 23 A Correct I agreed with what Kana and Oertel
- 24 and Basco had to say on that
- 25 Q Okay What about the conclusion that the

revetment would not have an adverse effect on
the accretion on the front beach? - - -

A I agree with that conclusion

Q Okay So that wasn't a concern

A Correct

Q Okay So you didn't disregard the reports, did you?

A No

Q Okay I want to talk about, you said -- go back to your general knowledge and understanding of coastal processes Can you kind of tell me about the processes involved in Kiawah River?

A Well, I mean, the Kiawah River section that we're talking about is not a beachfront environment, it's a riverine system But it's approaching an inlet out to the ocean, so as you progress towards the southwest, toward Seabrook, the Kiawah River becomes Captain Sam's Inlet

Q Okay

A But the processes that you would expect to see
in this section of the Kiawah River are no
different from what you would expect to see on
any other tidal river And I think it is

1 important to remember that, you know, this is
2 two-way flow -It's not like the Mississippi
3 River, where the water just goes in one
4 direction

5 Q What does that mean?

6 A It just means that you can, you know,
7 experience sand formation, you know, sand bars
8 and whatnot in response to that bidirectional
9 flow, not just the one directional flow

10 Q Is there wave action on the area where the
11 revetment's supposed to go?

12 A Yes I don't believe that wave action is in
13 any way related to waves in the Atlantic Ocean,
14 but it's a fairly wide, fairly long section of
15 river, and the size of waves that are generated
16 on any water body are determined by what they
17 call the "fetch," which is the length of water
18 that the wind can blow across and also by the
19 wind speed itself and then the duration that
20 the wind blows

21 Q Okay Are the processes at the -- you said
22 that this is close to the inlet Are the
23 processes in the area that's closer to the
24 inlet different than the processes that are
25 further on upstream at all?

1 A I think by the time you get to the location of
2 the revetment, it's almost exclusively riverine -
3 processes

4 Q Okay

5 A And you would just see more of the same if you
6 went further up the river and then, as you go
7 downstream towards Captain Sam's Inlet, you get
8 to a point where the ocean processes begin to
9 dominate and not the riverine processes

10 Q What exactly are the dynamics where the
11 revetment is proposed to go?

12 A Well, it is on the outside curve of the river
13 and typically that is the area that experiences
14 erosion, so I'm not at all surprised to see
15 that there is some indication of erosion on the
16 outside curb there And, beyond that, I don't
17 know that I've got any compelling conclusions
18 I can share with you

19 Q Okay Have you assessed -- well, have you
20 ever -- let me talk about something else for a
21 minute Would there be a need for a revetment
22 if there's no structures on that spit?

23 A Well, I'm sure the applicants think that there
24 is, but I think, putting aside the issue of
25 development, this is a very unstable, dynamic

1 area I think that the property owners need to
2 expect that this sort of thing is always going
3 to be happening The shoreline on all three
4 sides of the Kiawah Spit is very dynamic and is
5 always going to be changing

6 Q Why is it very dynamic and unstable?

7 A Well, I mean, it's -- on the ocean side,
8 because we classified it as an unstabilized
9 inlet zone, which are very dynamic beachfront
10 environments, and on the back side you're
11 bordered by a curve section -- actually,
12 several curve sections of the Kiawah River and
13 those river bends are typically unstable, as
14 well

15 Q What do you mean, "curve sections"?

16 A Well, the section where the revetment is
17 proposed to be built is obviously a curve
18 section of the river and then as you go
19 downstream towards Captain Sam's Inlet, it
20 curves back in the opposite direction

21 Q Okay Some of the regulations require you to
22 look at the benefits that the revetment will
23 bring, compared with the benefits of leaving in
24 its unaltered -- without the revetment,
25 basically

1 A Yes

2 Q How does that come into play here?— ---

3 A Well, I think that does come into play and,
4 again, as I've said, this -- you know, this
5 entire area is in constant fluctuation The
6 revetment permit is not like a typical
7 revetment permit where somebody has a piece of
8 high ground property that's not growing on the
9 other three sides, but they are experiencing
10 erosion on the water side

11 Q What do you mean by that?

12 A This is not a typical revetment permit Most
13 of the revetment permits that we see, it's a
14 piece of high ground that is bordered on the
15 other three sides by high ground and so the
16 erosion on the water side is causing a net
17 decrease in the size of the high ground
18 property
19 My point here is that in spite of the fact that
20 they're experiencing erosion in the proposed
21 revetment site, they're still experiencing
22 accretion in other sections of that property,
23 so that makes it a rather unusual revetment
24 permit

25 Q Okay

1 A And I think we need to take that into

2 -- -- consideration when we're reviewing this - - - - -

3 request

4 Q Okay And did the reports of their own experts
5 support that this area is widening?

6 A Yes

7 Q And is that something you took into
8 consideration?

9 A Yes

10 Q Okay Is the area where you authorized the
11 revetment, is that different in the aspect of
12 whether or not there's -- is the area where you
13 authorized the revetment more similar to other
14 revetment projects?

15 A I guess I would say yes, that it is

16 Q Why?

17 A Because if you're just looking at the developed
18 park, the erosion on the water side or on the
19 river side is not really being counteracted by
20 accretion on the beach side because they've got
21 existing infrastructure there that's threatened
22 by that erosion

23 Q Okay When you write your permit decisions are
24 you writing a legal brief?

25 A No, I'm not a lawyer, so I guess it's not a

1 legal brief

2 Q Okay But you try to put down all the reasons
3 for your decision, right?

4 A Yes

5 Q Okay How many permits do you review at one
6 time?

7 A I mean, typically, if you counted all the
8 permits that I have in some stage of the
9 process, that number can vary anywhere from ten
10 to 40

11 Q Ten to 40? Let's talk about your workload at
12 the Department Do you remember what it was
13 between May and December of 2008?

14 A If you're asking me how many permits did I
15 process during that time period --

16 Q How many permits were you reviewing?

17 A Oh, I couldn't tell you right off It was
18 probably somewhere on -- I mean, typically,
19 say, 20 to 30 --

20 Q Okay

21 A -- is what my activity workload is

22 Q Were you doing anything besides just reviewing
23 permits?

24 A Yes

25 Q Like what?

1 A I mean, I had other job duties, as well
2 Well, we were doing our beach baseline and
3 setback line revision process, so that was also
4 taking a significant amount of my time, as
5 well

6 Q What all does that entail?

7 A Well, that's the process whereby every eight to
8 ten years we revise the baseline and setback
9 line positions statewide So as part of that,
10 I was looking at any new beach data that we
11 could collect, beach survey data, any newer
12 photographs that had become available, that
13 LIDAR data, that like topographic survey data
14 that you can obtain from airplanes Also
15 looking at any older data that might have
16 recently become available that we weren't aware
17 of or was not available to us ten years ago

18 Q Okay Do you do that for all the beaches in
19 South Carolina?

20 A Yes

21 Q Okay Have you ever canceled a permit before?

22 A Yes

23 Q Or a permit application, rather

24 A Yes

25 Q In what kind of context?

1 A For lack of information that we requested being ~
2 provided by the applicant

3 Q Okay Have you ever requested -- or have you
4 ever cancelled a permit for failure to
5 provide -- well, let's look at 30-2(B) real
6 quick

7 A All right Regulation 30-2(B)?

8 Q Yeah Is that the regulation that sets forth
9 what's required for a permit to be complete?

10 A Yes

11 Q Okay And so if you don't have something that
12 you requested and you don't receive it, is that
13 why you cancel permits?

14 A Yes

15 Q Okay Is that a particularly rare event?

16 A I probably -- personally, I probably cancel a
17 couple a year --

18 Q Okay

19 A -- because we don't get the information that's
20 required

21 Q Okay We talked about alternatives and
22 Mr Walker asked you if it would be better just
23 to avoid having to deal with special permit
24 issues down the road Do we know whether the
25 river will actually continue to migrate at the

1 rate it has been for the last few years?

2 A No

3 Q Okay Do we know if that spit's going to be
4 developed?

5 A We don't know

6 Q Okay So it possible that they can -- that
7 down the road when they seek access, there will
8 still be an accessway between the setback line
9 and the critical line?

10 A I think it's quite possible that there could be
11 an accessway that's not in our critical area
12 jurisdiction, yes

13 Q Okay And so it would be possible even down
14 road -- it would be possible that in the future
15 they could get access without having to get a
16 special permit?

17 A I think it's possible, yes

18 Q Is it possible that down the road they can get
19 access without having to get a revetment?

20 A Yes

21 Q Okay Why do you say that?

22 A Well, we're trying to speculate on what the
23 river is going to do, I guess, is part of the
24 answer to my question You know, roads can be
25 moved, too Just because they put the road in

1 one location, 20 years later if they have a
2 - - - problem, they can relocate the road, if
3 necessary

4 Q Okay Are you also speculating if there would
5 even be a road there?

6 A Well, I mean, if the property's going to
7 developed for residential purposes, you're
8 going to have to have some sort of road, you
9 know, just for fire and rescue access

10 Q But did you hear Mark Permar and Mr Long
11 testify that they don't even know if they're
12 actually going to build residential houses out
13 there?

14 A Yes

15 Q Okay Let me ask you this From a coastal
16 zone management perspective, would you rather
17 have a road and a revetment or just a road?

18 A Just a road

19 Q If you're not going to have a road, from a
20 coastal zone management perspective, would you
21 rather have a natural shoreline or a concrete
22 block shoreline?

23 A A natural shoreline

24 Q Okay Do docks facilitate residential
25 development?

1 A I don't know that they actually facilitate the
2 development I'm sure they facilitate the
3 marketability of residential lots, yes

4 Q But, I mean, Mr Walker was asking you about
5 docks and cumulative impacts and whether or not
6 you ask for development plans whenever you get
7 a dock permit for an undeveloped lot

8 A Okay

9 Q Why don't you ask for --

10 A Well, on a case-by-case basis, you know, a dock
11 here, a dock there, we don't But we actually
12 do have what we call a "dock master planning
13 process" where a developer with a fairly large
14 piece of property, as part of his overall
15 development plans, can tell us where he's
16 proposing to put the roads and the lots and
17 which lots he'd like to be able to get docks
18 for And we can review that dock master plan
19 And we don't guarantee the issuance of dock
20 permits, but we can identify the lots that we
21 think would certainly qualify for docks

22 Q Okay Is that a process that allows for the
23 Department to look at cumulative effects and
24 kind of assess an area in a nonpiecemeal
25 fashion?

1 A Yes

2 Q Okay How else is this particular KDP's
3 application here different from a standard dock
4 application?

5 A Well, in this one, we're -- well, first of all,
6 it's one of the largest revetment permits that
7 I've ever dealt with and I think one of the
8 largest ones that the Agency has ever dealt
9 with But in this one, also, as we discussed,
10 you know, we're looking at the potential
11 impacts from the proposed development or the
12 possibility of development

13 Q Okay Are there any other differences?

14 A Between this revetment and a dock permit --

15 Q Yes

16 A -- is that your question? Not really, no

17 Q Okay When the statute says you have to look
18 at possible future -- or the Regulation
19 30-11(C)(1), I believe it reads you have to
20 look at the extent to which long-range
21 cumulative effects of the project may result
22 within the context of other possible
23 development What does that mean to you?

24 A Well, it says, "the extent to which long-range
25 cumulative effects of the project may result

1 within the context of other possible
2 development and the general character of the
3 area "

4 To me, that means that when I'm making a
5 decision on an activity in the critical area,
6 that I should consider the cumulative effects
7 of other possible development out of the
8 critical area that may result

9 Q Does it require you to know for certain if some
10 development will occur?

11 A It says "possible development "

12 Q Okay Does it require --

13 THE COURT Mr' Whitfield-Cargile, I just want to
14 keep your case moving, wasn't this asked in
15 your direct?

16 MR WHITFIELD-CARGILE Your Honor, it may have
17 been I'm senile I'll be happy to move on
18 If you think I've covered it, then I'm happy to
19 move on

20 THE COURT I thought you did, but that's why I'm
21 asking I'm not positive

22 MR WHITFIELD-CARGILE I may have

23 THE COURT Okay

24 MR WHITFIELD-CARGILE I'll move on And, Your
25 Honor, I might really move on I might be

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1 done Can I have just one moment, Your Honor?

2 THE COURT Yeah

3 (Off the record)

4 MR WHITFIELD-CARGILE I have no further questions,
5 Your Honor

6 MS ARMSTRONG Thank you, Your Honor

7 MR EISER - RECROSS-EXAMINATION BY MS ARMSTRONG

8 Q When you were discussing consideration of the
9 character of Captain Sam's Spit, is part of the
10 character of Captain Sam's Spit is that it
11 historically migrates, isn't that right?

12 A Yes

13 Q Okay So this revetment would prevent the
14 river side migration, wouldn't it?

15 A When I said the migration, I'm talking at the
16 position of Captain Sam's Inlet I don't know
17 that the revetment would prevent the migration
18 of the inlet It would retard the erosion of
19 the river

20 Q So it would prevent the natural migration of
21 the river side, is that right?

22 A Yes

23 Q And the river side movement is part of the
24 whole river's migrational -- the whole spit's
25 migrational pattern --

1 A It's part of the overall character of the area,
2 yes - - -

3 Q Mr Walker was asking you about Fish & Wildlife
4 Service responses and opinions Do you
5 remember that?

6 A Yes

7 Q Now, we admitted earlier an exhibit related to
8 Kiawah Development Partner's application for a
9 stormwater permit to construct a bulkhead
10 outside of the critical area lines Do you
11 remember talking --

12 A Yes

13 Q -- about that?

14 A Yes

15 Q And you received a letter from the Fish &
16 Wildlife Service regarding that permit
17 application, didn't you?

18 A For the storm --

19 Q The stormwater permit

20 A -- water permit? I'm not project manager on
21 the stormwater permit I've had little to any
22 involvement with that

23 Q Okay

24 A So we may have received a comment letter from
25 US Fish & Wildlife in regards to that, but it

1 would not have been addressed to me

2 Q Okay And is your understanding of the-
3 stormwater permit that the project that's being
4 proposed is for erosion control?

5 A Yes

6 Q Okay And that structure is actually
7 significantly smaller than the project that's
8 being proposed today?

9 A Right, but the stormwater permit is for a
10 340-foot-long sheet-pile wall and a
11 construction access road

12 Q And I handed you what is marked as CCL Exhibit
13 Thirty-one?

14 A Yes

15 Q Okay Would you look on that exhibit and read
16 for me that first --

17 MR WALKER Objection, Your Honor

18 MS ARMSTRONG -- paragraph, please

19 THE COURT On what grounds?

20 MR WALKER This is a Fish & Wildlife letter
21 commenting on a separate project that he does
22 not oversee, that he said that has not been
23 taken into consideration by him in any way It
24 occurred after the permit decision in this
25 case

1 Mr Eiser is aware of the general nature of
-2 -- what's going on with the stormwater permit
3 application, but he's just said he's not the
4 project manager and this is not his file, so
5 the letter is not anything that he has relied
6 upon or taken into consideration
7 That is in sharp contrast to the letters that
8 were in his file that he said he relied on in
9 making the determination in this case

10 MS ARMSTRONG I'll withdraw that question, Your
11 Honor

12 Q Mr Eiser, I want you to look with me -- you've
13 got the coastal management program in front of
14 you, don't you?

15 A Yes

16 Q Would you turn to Chapter III-73, please?

17 A (Witness complies) Yes

18 Q Okay And Mr Walker was asking you about
19 public open spaces Under that section D,
20 Public Open Spaces, would you read the first
21 paragraph -- well, the second paragraph under
22 the parenthetical, starting with "the values "

23 A Sure It says, "The values of public
24 recreational and open space areas throughout
25 the coastal zone cannot be overemphasized

1 They provide recreational and aesthetic
2 opportunities and amenities which are both
3 desired and needed by the people With
4 increasing populations and continued growth and
5 development, these limited resources become
6 even more precious as increasing numbers of
7 people seek to find recreational opportunities
8 within more urbanized areas and from fewer
9 available open spaces "

10 Q And do you consider the area between the mean
11 high watermark down to the river as a public
12 open space used by public?

13 A Yes

14 Q Okay And, in fact, the policies that apply to
15 that public open spaces, could you actually
16 read that first policy that applies to public
17 open spaces?

18 A Sure Policy number one, "Project proposals
19 which would restrict or limit the continued use
20 of a recreational open area or disrupt the
21 character of such a natural area aesthetically
22 or environmentally will not be certified where
23 other alternatives exist "

24 Q If you'll look at IV-57 now, the erosion
25 control policies

1 A (Witness complies) Yes

2 Q Okay Now, these are policies that apply
3 specifically to structures like bulkheads and
4 revetments, is that right?

5 A Yes

6 Q Okay And that policy number three actually
7 requires the Agency to consider whether a
8 revetment or bulkhead structure would impede
9 the public use of beaches below the mean high
10 water line, isn't that right?

11 A Yes

12 Q And the area where the proposed revetment would
13 be, you consider that a beach below the mean
14 high water line, don't you?

15 A It's certainly below the mean high -- well, the
16 majority of the structure will be below the
17 mean high water line It's either a beach or
18 a tideland critical area It's a sandy area
19 that most people would call the beach, yes

20 Q Okay And I want to make sure I understand
21 your earlier testimony because it wasn't asked
22 in quite this way, but this proposed revetment
23 would impede the public's use of that beach
24 area, wouldn't it?

25 A I think that's true I think the question

1 comes up, it's reasonable to look at how much
2 public use there is and how much public use is
3 being impeded You could argue that the
4 general public at some point may walk on
5 virtually every square inch of critical area in
6 the State of South Carolina I don't know that
7 it's heavily used by public, but there is some
8 public use, yes

9 Q Okay And we were talking about this project
10 being a minor project The term designation of
11 the permit as "minor," that's due to the
12 technical wording of the regulation, isn't that
13 right?

14 A I would agree, yes

15 Q Okay But if you compare this permit to the
16 other permits that have been reviewed by you
17 and your Agency, wouldn't you personally
18 consider this a major project?

19 A It's about ten times larger than most revetment
20 permits we process, yes, so I would informally
21 think of this as a major activity

22 Q And we were looking at KDP Exhibit Forty-eight,
23 which is that plat of Southeastern Surveying
24 earlier, and you indicated that the spit
25 actually overall is increasing in width, isn't

1 that right?

2 A Yes, it's growing in two directions It's --
3 growing out into the Atlantic Ocean and it's
4 growing down toward Seabrook Island

5 Q So if there was not going to be any development
6 on the spit, would there really be any need for
7 this revetment, since the spit's growing?

8 A Considering the overall dynamic area or dynamic
9 nature of the area and the fact that I think
10 the property owner should reasonably expect
11 that their property boundaries are going to
12 change with time because of the nature of the
13 area, I would agree with what you said, yes

14 Q And so if this revetment application was in
15 front of your Agency with no possibility of
16 development and there was strong evidence of a
17 public use and enjoyment of the beach where the
18 revetment is proposed, there's evidence that
19 the revetment would harm marine life, there's
20 evidence that the revetment would eliminate
21 public access and public use of this area and
22 evidence that the public area is unique, isn't
23 it true that there's a very good chance and
24 perhaps even a strong likelihood that the
25 Agency would deny this permit?

1 A I think there's a good chance I don't know
2 that I would go as far as saying strong
3 likelihood

4 Q Mr Walker was asking you about your
5 relationship with Mr Permar and Mr Bohannon
6 Did I hear you correctly that that relationship
7 with Permar and Bohannon is a cordial
8 relationship?

9 A It's a good professional relationship You
10 know, I don't really know either one of them
11 personally

12 Q Okay You don't know either of them
13 personally?

14 A I mean, we don't socialize outside of work, you
15 know, if that's what you're getting at

16 Q Do you have any personal bias against either
17 Mr Premar or --

18 A No, not at all

19 Q -- Mr Bohannon? Do you have any bias against
20 Kiawah Development Partners or Mr Long?

21 A No

22 Q Was your decision based on anything other than
23 the application and supporting documents, the
24 comments received and your experience and
25 expertise?

1 **A No**

2 MS ARMSTRONG I don't have any other questions

3 MR WALKER I neglected to introduce Exhibit

4 Fifty-three, which are the excerpts from the
5 2008/2009 State of the Beaches report that were
6 offered by this gentleman At this time I
7 would like to offer that exhibit into evidence

8 MR WHITFIELD-CARGILE No objection, Your Honor

9 MS ARMSTRONG I guess the only objection is as
10 long as it's just notice and inquiry, because,
11 again, we're back at the hearsay

12 THE COURT Beach report is -- I'm sorry, I thought
13 the beach report was a document published by
14 OCRM pursuant to statutory duties or something,
15 so I don't know what it is, apparently

16 MR WALKER It's a public document that they do --
17 I think they do have a duty to report and they
18 do it on an annual basis, Mr Elser said, and
19 he's an author of it

20 MS ARMSTRONG I'll withdraw the objection, Your
21 Honor

22 THE COURT It's admitted
23 (KDP's Exhibit Number Fifty-Three was admitted into
24 evidence)

25 MR WALKER The last exhibit deals with your --

1 THE COURT The last exhibit deals with what?

2 MR WALKER The potential exhibit deals with the
3 CZMP document, even though we don't think it's
4 legally enforceable, it was part of the
5 decision Does the court have a copy of it?
6 Do we need to introduce it? What is your
7 preference on that, Your Honor?

8 THE COURT I don't have a copy of it

9 MR WALKER At this time, then, we would introduce
10 Exhibit Seventy-one, which is a copy of the
11 text of the Coastal Zone Management Program
12 document that includes all the provisions that
13 were referred to by the witness

14 MS ARMSTRONG Your Honor, our position is that you
15 can take judicial notice of the Coastal
16 Management Program It was passed pursuant to
17 the Coastal Zone Management Act, approved by
18 joint resolution of the General Assembly and by
19 the Governor, and so we think you can take
20 judicial notice of it
21 It's a pretty hearty document We'd be glad to
22 get you a copy for the Administrative Law
23 Court, but we just don't want to clutter up the
24 record with -- I mean, we don't really need
25 this in the record, I don't believe

1 MR WALKER I'll withdrawal it if there's other
2 access to it I didn't know how that's
3 handled If nobody introduces it -- I don't
4 want to clutter up the record, either
5 THE COURT Well, we don't keep it here Like I
6 said, I'm not sure I don't know the law that
7 brought it into existence I haven't
8 researched it yet So I'm only aware of one
9 decision that I've heard about and I haven't
10 even read it, that says that it's not a binding
11 document, so that's the only reason I -- we
12 don't have it around here, though
13 MR WALKER Well, I withdraw the proffer, Your
14 Honor I think we had sufficient examination
15 for you to understand it and I withdraw offer
16 of the exhibit
17 I have no further questions of Mr Elser
18 MR WHITFIELD-CARGILE I do think it would be
19 technically proper to ask -- and I would ask
20 the Court to take judicial notice of the
21 document
22 THE COURT To take judicial notice of something,
23 I'm --
24 MR WHITFIELD-CARGILE You've got to have it
25 THE COURT -- I'm sure that I --

1 MR WHITFIELD-CARGILE Well, there's several

2 Supreme Court cases --

3 THE COURT I mean, is it in statute?

4 MR WHITFIELD-CARGILE Pardon me?

5 THE COURT Is it a statute or a regulation? Where
6 does it exist?

7 MS ARMSTRONG It was published --

8 MR WHITFIELD-CARGILE It was published in the
9 State Register, Your Honor

10 THE COURT All right Well, I'm not going to take
11 judicial notice of it because I -- I may down
12 the road, because I have a right to take
13 judicial notice later, but I've got to
14 determine first the -- just give me the law on
15 how it came into existence I'm not sure So
16 until I understand that, I'm not taking
17 judicial notice of it, until I read the case
18 that -- also, I'm going to wait and read the
19 case There's apparently a case out there and
20 I'd like to read the law on that case It may
21 be wrong, I don't know, but I want to read it,
22 if I can find it

23 MR CHANDLER Your Honor, if I might address that

24 THE COURT Yeah

25 MR CHANDLER There are two Administrative Law

1 Court decisions --

2 THE COURT Okay

3 MR CHANDLER -- concerning this document There
4 was one opinion issued by Judge McLeod in which
5 he concluded that he doesn't think this
6 document is valid There's another --

7 THE COURT Valid or not binding as a guideline?

8 MR CHANDLER Well, he basically said it wasn't
9 published, it wasn't promulgated as a
10 regulation under the Administrative Procedures
11 Act, notwithstanding the fact that it had been
12 adopted under an alternate procedure set forth
13 in Section 90 of the Coastal Zone Management
14 Act

15 THE COURT What's the name of that case?

16 MR CHANDLER The name of that case is Spectre,
17 S-P-E-C-T-R-E, vs DHEC

18 THE COURT That's the one

19 MR CHANDLER There's another decision that I'll
20 have to go back and look up a copy of it It
21 was a decision by Judge Geathers when he was an
22 Administrative Law Judge, in which his
23 conclusion was that the Administrative Law
24 Court didn't have authority to declare that it
25 was not binding law and he declined to do so

1 and he ruled that it had to be applied It has
2 been applied by the Court of Appeals, by the
3 Supreme Court in at least three or four
4 cases --

5 THE COURT Okay

6 MR CHANDLER -- and I can provide you copies of
7 all of those cases

8 THE COURT Once y'all do that, then I think I'll
9 feel a lot more comfortable, but I want to
10 read -- I just want to be sure on the decision
11 I'm making

12 MR CHANDLER Okay I would propose that we --
13 this is my own personal copy and I've got it
14 marked up We can make another copy of this
15 and have it bound just like this and submit it
16 with those references in the law at an
17 appropriate time, if that would be acceptable
18 to the Court

19 THE COURT Is it online?

20 MR CHANDLER It is online It is, in fact There
21 is a PDF version of this online on the --

22 THE COURT Any objection to me going online and
23 looking at it?

24 MR CHANDLER Not at all

25 MS ARMSTRONG Not at all

1 MR WHITFIELD-CARGILE No objection
2 MR WALKER That's how we got ours - - - - -
3 MR CHANDLER I would just say as a personal
4 matter, Your Honor, back in 1988 I argued one
5 of the first -- I think the first case
6 involving this document in the Supreme Court
7 and before I went to argue that case to the
8 Supreme Court, I went to the Supreme Court
9 library and I asked them if they had a copy of
10 it And they didn't have a copy of it, so I
11 walked down the street
12 OCRM, Coastal Council, had an office right down
13 the street from the Supreme Court at the time
14 I got a copy of this, took it back, donated it
15 to the Supreme Court library, so at least they
16 have it in their library
17 THE COURT Has it been amended since then?
18 MR CHANDLER It has been amended --
19 THE COURT Then you need to donate a new one
20 MR CHANDLER There has been a subsequent document
21 which has been described as the 1993
22 refinements to this document, which, in fact,
23 the refinements were adopted pursuant to the
24 Administrative Procedures Act
25 THE COURT Well, that's interesting

1 MR CHANDLER We'll outline all of those things --

2 THE COURT Okay

3 MR CHANDLER -- in our submittal

4 THE COURT All right Okiedoke So you're thro
5 ugh?

6 MR WALKER (Nods head affirmatively)

7 THE COURT All right I've got a couple of
8 questions, I think

9 MS ARMSTRONG Questions for you

10 MR WHITFIELD-CARGILE He's got questions --

11 THE WITNESS Oh, for me, I'm sorry I thought I
12 was done

13 THE COURT But I had asked as you walked through
14 this, you said that you --

15 Mr Whitfield-Cargile asked you several
16 components of the Oertel-Basco reports that you
17 agreed with

18 THE WITNESS Yes

19 THE COURT For me, I think it would be just simpler
20 to ask what did you disagree with on those
21 reports?

22 THE WITNESS I would have to go back and reread
23 what they said about piping plovers because I
24 think they drew some conclusions in there And
25 if they drew any conclusions that were contrary

1 to what US Fish & Wildlife said, then I would

2 agree with the Fish & Wildlife comments

3 THE COURT So the main disagreement was the piping
4 plovers

5 THE WITNESS Yeah

6 THE COURT Okay

7 THE WITNESS And that would be it, I believe, yes

8 THE COURT Okay You said property owners should
9 expect the shoreline should be changing

10 THE WITNESS Yes, sir, particularly these property
11 owners

12 THE COURT If the theory is that property owners
13 should expect that the shoreline would be
14 changing, why would you grant any revetments if
15 that's what the property owner should be
16 expecting, because the whole purpose of the
17 revetment is to --

18 THE WITNESS Sure

19 THE COURT -- prevent that from changing

20 THE WITNESS Yes, sir Well, keep in mind that the
21 State does not allow revetments on true
22 beachfront property

23 THE COURT I understand and that's where I came up

24 THE WITNESS And this is a beachfront parcel that
25 is bounded on the back side by the Kiawah River

1 and because the river curves or bends, that
2 adds a certain degree of instability on the
3 back side of the property, as well
4 So I guess my point is that it's unstable on
5 all three sides and you don't -- there are not
6 many pieces of property in the state that are
7 similar in situation to that, where you've got
8 the beach instability on one side, you've got
9 the inlet instability on the other side and
10 you've got the river instability on the third
11 / side

12 THE COURT Well, what I'm trying to figure out, your
13 statement was more of a general blanket
14 statement that property owners should expect
15 that the shoreline should be changing

16 THE WITNESS Well, I think I meant these property
17 owners --

18 THE COURT Okay

19 THE WITNESS -- Your Honor

20 THE COURT You were asked about dock master plans
21 Have you ever denied a dock master plan because
22 of cumulative impacts?

23 THE WITNESS When we're -- I think the short answer
24 is "no " When we're reviewing dock master
25 plans, we're typically just looking at which

1 lots we think might be suitable to have docks
2 THE COURT Any follow-up questions on what I have
3 asked?

4 MR WHITFIELD-CARGILE Yes

5 MR EISER - FURTHER REDIRECT EXAMINATION BY MR
6 WHITFIELD-CARGILE

7 Q Mr Eiser, when you review dock master plans,
8 you said you don't deny dock master plans
9 because of cumulative impacts But when you
10 review dock master plans, are cumulative
11 impacts something that you take into account
12 when y'all review those?

13 A The dock master planning process typically
14 involves staff looking at the docks that
15 they're talking and then staff also looking at
16 the high ground developments that the developer
17 is proposing
18 My review is typically limited just to the dock
19 portion of it and I'm looking to see whether or
20 not the lots they've identified as potentially
21 qualifying for -- the lots that would qualify
22 for docks really do meet our regulations
23 There may be other staff who are reviewing the
24 overall development through our land
25 disturbance program process, that would

1 certainly be looking at the cumulative impacts
2 from the high ground development being
3 proposed

4 So I think the short answer is I don't think we
5 would ever deny a dock master plan because of
6 cumulative effects on the high ground, but the
7 dock master plan is being reviewed and approved
8 in conjunction with a permit for the high
9 ground impacts, the land disturbance program
10 process, and those folks might be looking very
11 closely at cumulative impacts

12 MR WHITFIELD-CARGILE Okay I don't have any
13 further questions, Your Honor

14 MS ARMSTRONG Nothing, Your Honor

15 MR WALKER Nothing further, Your Honor

16 THE COURT You may step down

17 THE WITNESS Okay Thank you

18 (Witness excused)

19 MR WHITFIELD-CARGILE Begging the Court's
20 indulgence I think we're done with that
21 discussion

22 At this time, Your Honor --

23 You want to take him out of turn?

24 MS ARMSTRONG Yes Well, I would like to

25 MR WHITFIELD-CARGILE Your Honor, the League still

1 has an additional witness and I think we agreed
2 that we would take him out of turn I think
3 that would allow me -- that would probably be
4 a better use of time than me looking through my
5 notes to see if I'm done

6 THE COURT Okay

7 MR WHITFIELD-CARGILE Thank you, Your Honor

8 MS ARMSTRONG The Coastal Conservation League

9 calls Dr Michael Dorcas to the witness stand

10 DR MICHAEL DORCAS, having been duly sworn,

11 testifies and examines as follows

12 DR DORCAS - DIRECT EXAMINATION BY MS ARMSTRONG

13 Q Afternoon, Dr Dorcas Can you tell me -- I
14 want you to start by giving me your educational
15 background, starting with undergraduate degree,
16 year and what your degree was in and
17 institution

18 A Okay My undergraduate degree was at the
19 University of Texas at Arlington in biology,
20 graduated in 1986 In 1990, I graduated from
21 the same institution with a Master's degree in
22 biology and then I got a Ph D from Idaho State
23 in 1995 in biology, as well

24 Q Okay And what was your area of research for
25 your Master's thesis?

1 A For my Master's thesis, I worked on the
2 systematics of Mexican Montane rattlesnakes

3 Q And tell me about the research for your
4 dissertation

5 A My dissertation was studying the ecology of a
6 small snake that lives in Idaho and the Pacific
7 Northwest, called rubber boas

8 Q And within the Ph D and biology is kind of
9 generally is there an area that you kind of
10 specifically focused on?

11 A In the Ph D ? Yes, I focused on their ecology
12 and natural history, temperature biology,
13 physiological ecology, those kind of things

14 Q Of any particular species or --

15 A For my Ph D I focused on rubber boa, although,
16 I got involved in other projects, as well,
17 dealing with herpetology, in general, such as
18 I got involved in some research on frogs and
19 things like that

20 Q And after you have finished your Ph D , what
21 did you do next?

22 A I began a postdoctoral fellowship at University
23 of Georgia at the Savannah River Ecology Lab,
24 which is on the Savannah River site near Aiken,
25 South Carolina And I worked there as a

1 postdoc until 1998, when I got the job at
2 Davidson College, where I'm now an associate
3 professor

4 Q And what was the research that you did at the
5 Savannah River Ecology Lab?

6 A Well, it varied all over the map All of it
7 dealt with amphibians and reptiles Much of it
8 dealt with ecology and conservation of
9 amphibians and reptiles, so everything from
10 turtles to frogs to snakes to

11 Q At that time were you conducting research on
12 reptiles and amphibians? Would that be
13 considered research?

14 A Oh, yeah Yeah, that's essentially all I did
15 as a postdoc I taught a couple of nonmajor
16 lecture classes at USC Aiken one year, but,
17 other than that, I was strictly a researcher

18 Q And were there any publications that came out
19 of your work at Savannah River Ecology Lab?

20 A Yes

21 Q And what did those relate to?

22 A Oh, various things, anywhere from, you know,
23 summarizing the herpetofaunal
24 diversity -- herpetofaunals are amphibians and
25 reptiles -- herpetofaunal diversity of

1 particular areas, to a paper that I did on the
2 defensive behavior of cottonmouths towards
3 humans So any number of different research
4 areas, but all of it dealing with amphibian and
5 reptile ecology and/or conservation

6 Q And then you started at Davidson and is that
7 where you are currently?

8 A Uh-huh (affirmatively responds)

9 Q When did you start at Davidson?

10 A 1998

11 Q And what's your currently position at Davidson?

12 A Associate professor

13 Q And what courses do you teach at Davidson?

14 A I teach the organismal half of our intro
15 biology sequence, which is -- we cover ecology,
16 evolution, physiology, conservation, those
17 kinds of things And I teach an advanced
18 course on animal physiology and, periodically,
19 I teach a course in amphibian and reptile
20 conservation And then technically I teach
21 courses in independent research in amphibian
22 and reptile, you know, investigations, but
23 those are not a typical, you know, discussion
24 or lecture course It's actually me mentoring
25 students in research methods and them

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1 conducting their own projects

2 Q What are your research interests as a professor
3 at Davidson?

4 A In general, amphibian and reptile ecology and
5 conservation, primarily

6 Q Are you involved in any research projects
7 ongoing at Kiawah Island?

8 A Yes When I was a postdoctoral fellow, I
9 became involved in a long-term research project
10 on Kiawah Island that a colleague of mine, Whit
11 Gibbons, Dr J Whitfield Gibbons, began in
12 1983 and we've continued to this day
13 So when I arrived at SREL where Dr Gibbons
14 was, where Whit was, I became involved in the
15 project at that time in 1995 and have been
16 involved in it ever since And over the last
17 several years, have taken over management of
18 that project, as Whit has retired and become
19 less involved in it

20 Q And what is that project looking at,
21 specifically?

22 A The project is a long-term study of diamondback
23 terrapins on the west end of Kiawah Island that
24 inhabit the various tidal creeks there And
25 it's a mark-recapture study So we capture

1 turtles, individually mark them by filing
2 little notches in their scutes and release
3 them And using those data we can address all
4 kinds of questions relating to where the
5 turtles live, their survivorship, factors that
6 affect their survivorship, their movement
7 patterns, growth, you know, all of those kinds
8 of things, changes in population structure, all
9 that kind of structure

10 Q And how many years have you been participating
11 in and conducting research on the diamondback
12 terrapins?

13 A This would be the -- well, since 1995, so I
14 guess this would be the 16th year

15 Q All right

16 A Fifteenth year

17 Q Yeah, I was going to say, your math is a little
18 bit different than mine, but that's --

19 A Yeah, that's okay

20 Q We're pretty close

21 MS ARMSTRONG Your Honor, at this point, I'd like
22 to offer Dr Dorcas as an expert in
23 herpetology, with special expertise in
24 diamondback terrapins

25 MR HOWE No objection

1 MR WHITFIELD-CARGILE No objection, Your Honor

2 THE COURT He's so qualified - - - -

3 Q Dr Dorcas, could you tell me a little bit
4 about the life history of diamondback
5 terrapins?

6 A Uh-huh (affirmatively responds) As is the
7 case with most turtles, terrapins are
8 long-lived animals We still capture animals
9 that were first captured as adults in the
10 1980's and as adults in the 1980's, they could
11 very well have been 20 or 30 years old then, so
12 they're long-lived animals
13 And long-lived animals like that rely on
14 certain what we call "life history"
15 characteristics that are critical to the
16 persistence of their populations over the long
17 term And, in general, those are high
18 survivorship, especially of adults, a certain
19 level of recruitment, in other words, a certain
20 level of, you know, successful reproduction and
21 incorporation of those juveniles into the
22 breeding population And anything that alters
23 those things in a negative way can
24 detrimentally impact terrapin -- you know,
25 turtle populations in general and terrapins, as

1 well

2 Q And how long -- what is their life span,
3 approximately?

4 A We don't know for sure because most people --
5 this is the longest ongoing study of terrapins
6 in the world and, unless we stop, it will
7 continue to be so, but -- so we don't have any
8 study anywhere, you know, in the Eastern US
9 that -- where we know exactly how long these
10 animals are going to live, because they just
11 haven't been studied that long in a way that
12 allows that to be determined Certainly, in
13 the range of 40 to 50 years is not at all
14 unreasonable and they may very well live longer
15 than that There are some turtles that are
16 similar in size and within the same family that
17 live well over 100 years

18 Q And where do these turtles live? What do they
19 do every day?

20 A These turtles live in salt marsh habitats, at
21 least in the Carolinas, and other areas, like
22 South Florida, they live in mangrove habitats
23 But in the Carolinas they live in salt marsh
24 habitat and, in fact, they're unique in that
25 they're the only species of turtle in the

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1 United States that has the salt marsh habitat
2 as its primary place where it lives Most
3 other turtles -- basically you can classify
4 them as terrestrial, freshwater turtles or sea
5 turtles

6 Q And is there anything that's different or
7 unique about these terrapins, compared to other
8 turtle species?

9 A Yeah, again, the area they live, there are no
10 other turtles that inhabit those area Every
11 now and then you'll get a sea turtle that goes
12 up the Kiawah River into some of the tidal
13 creeks where these terrapins live, but that's
14 not their primary habitat Their primary
15 habitat is the open ocean

16 Q And what is the primary goal of the research
17 that you've been conducting on Kiawah Island
18 relating to terrapins?

19 A The primary goal has been to monitor the adult
20 terrapin populations over the years, but
21 there's been numerous projects, you know, you
22 might want to call subprojects within that,
23 that focus on various other aspects But the
24 primary goal is to monitor the terrapin
25 populations long term, because to determine

1 what's going on with long-lived organisms, you
-2 have to study them for a long time

3 Q And what have you concluded thus far from your
4 research on terrapins at Kiawah?

5 A Yeah We've concluded that the terrapin
6 population on the west end of Kiawah Island has
7 declined There are fewer terrapins now than
8 there used to be and there are numerous
9 possible reasons for that, such as, obviously,
10 development, you know, road mortality But one
11 of the primary reasons is mortality due to --
12 mortality in crab pots, crab trapping So the
13 turtles go into crab pots and drown and it --
14 like I said before, if you take out a lot of
15 the adult population, or some of the adult
16 population, the populations will tend to
17 decline

18 Q So in Kiawah, if I understand you correctly,
19 they're becoming more -- you're not seeing them
20 as much, they're declining?

21 A Right, we don't see as many

22 Q What about in other areas that they inhabit?

23 A Yeah, the -- in other areas we -- based on
24 evidence that we have, there are declines in
25 other areas, as well, such as other places like

1 Maryland and New Jersey where colleagues of
2 mine study terrapins But they don't use the
3 same techniques that we use and, consequently,
4 they're not able to necessarily calculate
5 population declines
6 Our techniques rely on some pretty intensive
7 fieldwork where we actually go out into the
8 tidal creeks and the mud and drag big, you
9 know, 35-foot seines through the tidal creeks
10 and it's, frankly, a lot of hard work and
11 difficulty and so usually people don't do that
12 and instead use other techniques to try and
13 sample them, but they're really not as
14 effective in sampling the adult populations
15 But anecdotally there are numerous places
16 where, you know, people say, you know, "There
17 used to be a lot of terrapins here, and now
18 there are none or very few I rarely see one "
19 So range-wide, there likely have been
20 significant declines of the species

21 Q Are you aware of any research being conducted
22 in South Carolina that's as extensive as what
23 you're doing right now?

24 A Any research conducted on terrapins --

25 Q Yes, on terrapins

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1 A -- in South Carolina? No, there's -- I'm
2 pretty confident there's not -- - - -

3 Q And I want to talk a little bit about the
4 nesting and productivity of terrapins Where
5 do terrapins, where do they nest?

6 A Terrapins nest in open sandy habitats above
7 high tide level so that their eggs don't drown
8 And they need open habitats because the thermal
9 characteristics are better so when they bury
10 their eggs in the sand, the sand stays warm and
11 incubates the eggs properly

12 Q And do you know whether they nest in the same
13 place over and over again or

14 A All evidence that we have is that not only do
15 they reside in the same place -- for example,
16 we sample these little tidal creeks that branch
17 off of the Kiawah River on the west end and if
18 we caught a turtle in 1990 in that tidal creek,
19 chances are it's going to be in the same tidal
20 creek in 2009 So not only do they have
21 extreme site fidelity in terms of where they
22 spend their nonreproductive part of the season,
23 but, based on what we know about nesting at
24 Kiawah and based on what we know about nesting
25 at other places where extensive reproductive

1 studies have been done, they tend to use the
2 - - - same nesting area time and again

3 Q And how do they get from the water up into the
4 areas above the dunes, above mean high
5 watermark?

6 A They crawl

7 Q Okay Is there something about them
8 biologically that helps them to crawl up?

9 A Sure, they have legs and feet and claws that
10 dig into the sand and they walk up into the
11 sand above the high watermark

12 Q And so do they have difficulty climbing up --
13 they're able to climb up sandy banks, then?

14 A Yeah, as long as they're not too steep

15 Q Have there been any studies looking at where
16 terrapins on Kiawah Island nest, where they
17 nest and produce?

18 A Yeah, yeah, although our sampling that we
19 conduct at Kiawah doesn't focus every year on
20 the nesting There was a study done in the
21 early nineties by a Master's student at College
22 of Charleston that focused on nesting and --
23 yes, so there have been studies

24 Q Okay And what did that Zimmerman Master's
25 degree thesis -- is that something that you

1 rely on in doing your research?

2 A We rely on it in terms of understanding more
3 about the overall ecology of these animals,
4 yes

5 Q And what did he determine about the areas where
6 terrapins nest on --

7 MR HOWE Excuse me, that would be hearsay,
8 wouldn't it?

9 THE COURT She's laid the foundation that he relied
10 upon it, although maybe not in giving his
11 opinion, but he said he relied upon it in
12 research She got close

13 Q When you're formulating your opinions on
14 diamondback terrapins on areas that they
15 nest, where they reproduce, would the
16 Zimmerman thesis, is that something that you
17 rely on?

18 A Yes

19 Q And what has that thesis indicated about where
20 terrapins nest on Kiawah Island?

21 A That the majority of the nesting occurs in the
22 dune area on the river side of Captain Sam's
23 Spit

24 Q And are you referring to the area where the
25 proposed revetment would be constructed?

1 A Yes

2 - Q Have you seen evidence of terrapins nesting on
3 other areas of Kiawah Island?

4 A I have not seen evidence of that

5 Q Have you seen evidence of them nesting along
6 this riverbank where the proposed revetment
7 would go?

8 A Yeah, although, like I said before, our
9 research doesn't focus on the nesting, but the
10 times we have been there, we have seen either
11 hatched or depredated nests A depredated nest
12 are kind of the easiest ones to find They're
13 the ones that get torn up by raccoons, so you
14 find eggshells laying beside the nest

15 Q There are some photographs that are in evidence
16 I'd like you to look at They're probably
17 Exhibit --

18 MS ARMSTRONG They're Nine-A They're not those
19 They're with the kind of concrete wall Yes,
20 I think you found them You know, I may just go
21 ahead and introduce these They are
22 repetitive, but I keep referring to KDP's
23 Exhibit --

24 MR WHITFIELD-CARGILE KDP Six

25 MS ARMSTRONG KDP Six, okay

1 Q These are marked as CCL Exhibit Nine, but
2 they're the same images that have been admitted
3 already as KDP Six If you don't mind looking
4 at those images

5 A (Reading)

6 Q What do you see in those three photographs?

7 A I see what appears to be a revetment I'm not
8 an expert on revetments, but what appears to be
9 a revetment In two photographs it appears to
10 be constructed of cinder blocks laid so that
11 the open holes are up, or something similar to
12 cinder blocks, all laid in rows with gaps in
13 between them

14 And in the third one, it appears to be
15 primarily just riprap or large boulders,
16 probably football-size boulders, piled up on
17 the bank to, you know, apparently prevent
18 erosion

19 Q With respect to the two images that show what
20 you described as cinder block, concrete cinder
21 blocks, do you have any opinions about whether
22 terrapins would be able to scale over that kind
23 of structure to get to the nesting grounds
24 above mean high water?

25 A They might be able to It might be difficult

1 because they rely on digging their claws into
2 whatever substrate they're climbing up,
3 whatever slope it is, to gain access to the
4 above-tide areas where they can nest So it
5 might be difficult for them to do that
6 It might also be difficult in the sense that
7 they may become trapped within some of the
8 openings In other words, turtles, you know,
9 if they are climbing up that, it would be
10 difficult for them to not, you know, get tilted
11 up and stuck in an opening, depending on the
12 size of the openings, of course, and the size
13 of the terrapins

14 Q And how does the fact that it's a manmade
15 structure, would that, in your opinion, have
16 any effect on terrapins' ability to get to
17 their nesting grounds above mean high
18 watermark?

19 A I think it certainly could prevent them from
20 getting there if they wanted to I think the
21 important thing is how would it affect their
22 propensity to nest there and I doubt that they
23 would -- in other words, if a turtle had nested
24 over a series of decades, potentially, at the
25 same site and encountered the same typical sand

1 habitat on the slope where it climbs up into
2 the dune area to nest and one year it shows up
3 and that site is constructed like this
4 (indicating), I doubt that the terrapins would
5 nest

6 Q Let's assume, just a for moment, that they
7 somehow manage to get over that structure and
8 nest When the infants, when the baby
9 turtle -- terrapins are hatched, what is your
10 opinion about whether they would be able to
11 successfully make it back into the river?

12 A Yeah My opinion would be that this would be
13 much more treacherous for baby turtles than for
14 the females The baby turtles certainly would
15 become trapped within -- well, not certainly,
16 but it's likely that many of them would become
17 trapped within the openings of this

18 Q I'd like you to look at drawings that are part
19 of the permit application

20 MS ARMSTRONG Is that Eleven?

21 MR WHITFIELD-CARGILE I don't remember, exactly

22 MS ARMSTRONG The permit application

23 MR WALKER KDP Ten

24 MS ARMSTRONG Ten, I was close

25 Q Dr Dorcas, I'm going to show you what's

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1 identified as sheet seven of seven on KDP
2 Exhibit Number Ten Tell me, have you seen--
3 that image before?
4 A I have
5 Q Okay And what is it an image of?
6 A Well, it appears to be a profile of a revetment
7 with this -- it says "articulated concrete
8 block," between mean high tide and below the
9 mean low tide level that slopes up and then, at
10 the top of it, there is a retaining wall
11 Q And is that retaining wall vertical?
12 A It is vertical
13 Q And that's at the top of the revetment
14 structure?
15 A Yes
16 Q Do you have any opinions about whether a
17 terrapin would be able to scale that
18 retaining -- that vertical wall to get to its
19 nesting grounds?
20 A Yeah, this is -- there's no measurements on
21 this retaining wall, but if the retaining wall
22 was greater than approximately 12 to 15 inches,
23 it would certainly essentially eliminate the
24 possibility of terrapins gaining access to the
25 nesting area

1 Q Now, if the terrapins were not able to gain
2 -- -- access to their nesting areas and able
3 reproduce, do you have any opinions about what
4 could happen to this Kiawah Island population
5 of diamondback terrapins?

6 A Yeah, I think it could effect -- based on what
7 we know, it could eventually go extinct . It
8 would take a while because you've got
9 long-lived animals that are going to hang
10 around for a long time But if there's no
11 reproduction/to replace them, eventually
12 they're going to die and the population would
13 disappear

14 Q All right Dr Dorcas, I want to go back, talk
15 about the baby turtles If they -- after they
16 hatch and if they're heading towards the river,
17 if they encounter a hard structure, what are
18 they likely to do?

19 A I don't have -- I don't know It may be
20 similar to what I suspect would happen with
21 females in that they determine that this is not
22 where they need to go and they may turn around
23 and go the opposite direction I really don't
24 know

25 MS ARMSTRONG I don't have any other questions,

1 Your Honor

2 THE COURT Ms Whitfield-Cargile? - -

3 MR WHITFIELD-CARGILE No questions, Your Honor

4 MS ARMSTRONG I have one more follow-up, Your
5 Honor, if you don't mind

6 Q What would happen if those turtles go in the
7 opposite direction?

8 A Well, they would end up in the ocean and
9 probably be eaten by fish pretty rapidly I
10 mean, they may get eaten by fish in the Kiawah
11 River, as well, but they have to traverse a
12 much smaller distance across the Kiawah River
13 before they could get into marsh, and so their
14 probability of survival would be substantially
15 higher And whether they would be able to ever
16 find their way from the open ocean into the
17 salt marsh habitat, you know, would be pretty
18 remarkable

19 MS ARMSTRONG Okay Thank you

20 DR DORCAS - CROSS-EXAMINATION BY MR HOWE

21 Q How you doing?

22 A Good

23 Q I took your deposition, do you remember?

24 A I do

25 Q Great What is the range -- you mentioned all

1 the way down in the mangroves, turtles are down
 2 that far south, and you talked about people up
 3 in Maryland --

4 A Uh-huh (affirmatively responds)

5 Q -- so how far north do they go?

6 A Basically, up to Chesapeake Bay and all the way
 7 around to Corpus Christi

8 Q Okay So they got 1500 miles worth of --

9 A I'm not sure what the miles is

10 Q When you say Corpus Christi, you mean all the
 11 way down and around Florida, back up along the
 12 Gulf Coast and all the way over to Texas?

13 A Now, the range is not necessarily continuous
 14 It depends on the available habitat
 15 Certainly, there are large areas where there
 16 are no salt marsh, no mangrove and nothing like
 17 that, where they would not occur

18 Q But along the eastern coast from Maryland down
 19 to Florida wherever there's salt marsh or
 20 saltwater, there would be habitat all the way
 21 around Florida up and around the coast to
 22 Alabama, Mississippi and Louisiana, right?

23 A That's their geographic range That doesn't
 24 mean they occur everywhere, though

25 Q And you're studying just Kiawah

1 A Right

2 Q You're studying four creeks on Kiawah

3 A Five -- six -- five creeks

4 Q Okay So you're not studying all that area

5 behind Kiawah, you're studying five creeks

6 A Right, we've got -- there's a couple of

7 creeks --

8 Q What are the --

9 A Let me finish --

10 Q Sure, that's fine

11 A Okay There's a couple of creeks that we've

12 recently, in the last few years, started

13 studying on the back side of Kiawah, that's

14 more toward the eastern end

15 Q How long has the study been going on?

16 A This study was initiated in 1983

17 Q Okay So from 1983 until, say, two years ago

18 and how many creeks were you studying?

19 A Five

20 Q Okay Now, one of the things you weren't

21 studying and aren't studying is reproduction

22 A That's not a question

23 Q That's not part of your study, is it?

24 A That's not part of my study --

25 Q Okay

1 A -- but it's part of the overall project that

2 was conducted in the early nineties - - -

3 Q Did you work with Mr Gibbons?

4 A Yeah

5 Q Did he discuss with you or did you -- were you

6 working with him when y'all asked for and got

7 the complete cooperation of Kiawah Island?

8 A I don't know I wasn't working with him at

9 that time

10 Q Have you seen that his work has been published

11 in their newsletters?

12 A The newsletters?

13 Q Kiawah Island's newsletter

14 A I don't know

15 Q Don't know about that

16 A But his work has been published in scientific

17 journals

18 Q You're a part of a scientific group in North

19 Carolina?

20 A Yeah, I'm part of several

21 Q You mentioned one in your deposition that you

22 were recently the president of

23 A I'm not the president of any There's a group

24 that's working with the Wildlife Resources

25 Commission called the Scientific Council on

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001575

1 Amphibians and Reptiles

2 Q Right - -

3 A I'm the chair of that

4 Q Okay I promoted you to president, I'm sorry

5 You're the chairman

6 A Yeah, I'm the chair, yes

7 Q All right Is it correct that these turtles

8 are not listed as threatened or endangered?

9 A That's correct

10 Q Neither one

11 A Neither threatened nor endangered, no

12 Q Have you made any effort in your position as

13 chairman of that committee to get them listed

14 as threatened or endangered?

15 A Yes Yeah, in North Carolina they are

16 currently listed as a species of special

17 concern

18 Q Have you made any efforts?

19 A Yes

20 Q Are there any studies done on the angles that

21 the turtles can climb?

22 A No

23 Q Are there any studies done on the surfaces that

24 turtles can climb?

25 A Not of which I'm aware

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001576

1 Q Are there any studies showing reproduction,
2 reproduction studies? - - - -

3 A There are many reproduction studies on
4 terrapins

5 Q Okay Now, did you write an article titled
6 "Crab Traps Causing the Population Decline of
7 Diamondback Terrapins"?

8 A I don't think that's the actual title

9 Q I left out a word, "Over Two Decades " You can
10 read it

11 A Yeah "Crab Trapping Causeing Population
12 Decline and Demographic Changes in Diamondback
13 Terrapins Over Two Decades "

14 Q Okay And as one of the great --

15 A Pardon?

16 Q I'm not going to ask you anything else about
17 it

18 A Okay

19 Q Is one of the primary causes of mortality for
20 turtles crab trabs?

21 A It certainly appears to be at Kiawah Island and
22 there's certainly evidence in other areas, as
23 well

24 Q Now, are you aware of the fact that people
25 still eat these turtles?

1 A I'm not aware of that fact
2 - Well, no, I take that back I am aware of the
3 fact that in places where they can be
4 harvested, they're often sold, especially to
5 Asian markets, for eating
6 Q Do you know that the law in South Carolina is
7 you can possess two of these turtles and
8 consume these turtles, and that people do that?
9 A Uh-huh (affirmatively responds) I did know
10 that people do that
11 Q Okay
12 A But the law is that you can possess a certain
13 number -- a small number of these Up until
14 just a few years, they were still listed as a
15 commercial species
16 Q What does it mean to be listed as a commercial
17 species?
18 A I'm not an expert on that listing, but I assume
19 that that means they're at least potentially
20 available for commercial harvest
21 MR HOWE That's all Thank you, Judge
22 THE COURT Redirect on new issues raised
23 MS ARMSTRONG I don't have anything else, Your
24 Honor
25 MR WHITFIELD-CARGILE Nothing, Your Honor

1 THE COURT I'm trying to decide You say you trap
2 or seine them - -

3 THE WITNESS Yeah, we actually -- we use two
4 techniques The primary technique is seining
5 We also use something called "trammel nets"
6 that we set across the creeks that are
7 essentially tangle nets

8 THE COURT I'm just curious Could the reason be
9 that you're not finding as many is maybe they
10 get tired of being trapped and find somewhere
11 else to go?

12 THE WITNESS That's certainly a possibility, except
13 for the fact that because we individually mark
14 these animals, it allows us to document the,
15 you know, repeated capture of these animals
16 And some of them, you know, literally have been
17 captured 15 times over the course of a couple
18 of decades

19 THE COURT And how many are there now, according to
20 your study?

21 THE WITNESS We haven't done recent population
22 estimates In 2004, at the ending of the study
23 that he showed, the populations varied in the
24 tidal creeks from apparently one that appears
25 to be close to zero now, that was actually

1 named Terrapin Creek because of the number of
2 terrapins that were there back in the-1980's,-- - -
3 and then in some of the other creeks we've seen
4 reductions of approximately, you know, half to
5 two-thirds of the terrapin population

6 THE COURT Yeah, how many are you finding?

7 THE WITNESS Typically, like in May, when we were
8 there, we captured, in all five creeks, a total
9 of -- I think we got 47 terrapins, total, in
10 all the creeks And, back in the mid nineties,
11 and even before that, it wouldn't have been
12 uncommon to catch twice that many

13 THE COURT When you say "in the creeks," do you
14 catch them in Kiawah River right where this
15 revetment is proposed?

16 THE WITNESS The way the habitat of these -- these
17 guys spend most of their time in the small
18 tidal creeks that branch off the Kiawah River
19 and up in the mud, you know, salt marsh,
20 Spartina marsh And the place that we sample
21 them is within the small tidal creeks
22 When it comes time for them to lay eggs, they
23 swim out of the tidal creeks up the Kiawah
24 River to their nesting habitat And then they
25 go back

1 THE COURT If a revetment was put in an area along
2 the Kiawah River, would they just not ever nest
3 or would they go elsewhere?

4 THE WITNESS That's a very good question We don't
5 know We don't know if there is anywhere else
6 that's suitable for nesting There's certainly
7 nothing like the area on Captain Sam's Spit
8 where we know they nest

9 THE COURT Any follow up on what I have asked?

10 MS ARMSTRONG Just one, Your Honor

11 DR DORCAS - REDIRECT EXAMINATION BY MS ARMSTRONG

12 Q If the terrapins don't have a nesting site, is
13 there any way to prevent a decline of the
14 species?

15 A Well, I suppose you could, you know,
16 perpetually raise terrapins and keep dumping
17 them in the creeks, but I don't think that's a
18 viable alternative in reality

19 MS ARMSTRONG Thank you, Your Honor I don't have
20 any other questions

21 MR WHITFIELD-CARGILE No questions, Your Honor

22 MR HOWE Nothing further

23 THE COURT You may step down

24 THE WITNESS Thanks

25 (Witness excused)

1 THE COURT All right We're going to break for
2 lunch If we could be back at two o'clock - -
3 How many more witnesses do we have?
4 MR WHITFIELD-CARGILE Your Honor, I think I'm
5 done
6 THE COURT Okay
7 MR WHITFIELD-CARGILE A couple of evidentiary
8 matters that we'll handle when we get back
9 THE COURT Y'all were through except for one
10 witness?
11 MS ARMSTRONG Your Honor, we just have Jeff
12 Mullinhower who, as I indicated yesterday, he
13 is available Monday and Tuesday for a de bene
14 esse deposition So we don't have any more
15 witnesses to present today
16 THE COURT Are y'all going to do the deposition in
17 Charleston?
18 MS ARMSTRONG Yes, Your Honor
19 THE COURT Okay
20 MR WHITFIELD-CARGILE I hope so
21 THE COURT We could do it up here as far as that
22 goes
23 MS ARMSTRONG Well, yeah, I mean, the witness --
24 THE COURT No, that's fine I want to do what's
25 convenient for y'all ,

1 MS ARMSTRONG All right

2 MR WALKER We may have some reply If it is, it's
3 not going to be lengthy

4 THE COURT Okay Well, then we're going to finish
5 today, I think

6 MR WALKER I hope so It's our goal

7 THE COURT All right

8 (Lunch break from 1 00 p m till 2 00 p m)

9 THE COURT You rest?

10 MR WHITFIELD-CARGILE No, a couple of housekeeping
11 matters, Your Honor I thought that I had
12 moved for the admission of Seventy-seven
13 yesterday It's come to my attention I don't
14 think I did, so I'd move at this time for
15 Seventy-seven which was Melissa Hughes'
16 reference list

17 THE COURT Any position?

18 MR WALKER No objection, I'm sorry

19 THE COURT All right

20 MS ARMSTRONG No objection

21 THE COURT It's admitted

22 (DHEC's Exhibit Number Seventy-seven was admitted
23 into evidence)

24 MR WHITFIELD-CARGILE Okay And the other matter,
25 Your Honor, the Department filed a Touhy

1 request and a subpoena for the testimony of
2 Melissa Bimby with the US Fish & Wildlife
3 Service

4 THE COURT You're going to let that go now that
5 you've already gotten your own?

6 MR WHITFIELD-CARGILE What's that?

7 THE COURT I said you're going to let it go
8 finally, now that you've already done your own?
9 Didn't you just present --

10 MR WHITFIELD-CARGILE Oh Well, what I'd like to
11 do, Your Honor, is admit -- I'll move for the
12 admission of the letter from Fish & Wildlife
13 explaining their decision to not allow her
14 testimony They did agree to provide an
15 affidavit I know the affidavit's
16 inadmissible, but I would like the letter in
17 the record

18 THE COURT Okay So you want the letter

19 MR WHITFIELD-CARGILE Yes

20 THE COURT Do you want the letter --

21 MS ARMSTRONG Yeah, yeah -- no

22 THE COURT -- for the truth of the matter asserted?

23 MS ARMSTRONG Yes, Your Honor

24 THE COURT Okay

25 MR WALKER I understood that the letter was going

1 in just to show he tried to get the witness
2 -- Is the letter you're talking about the letter
3 where Fish & Wildlife said they aren't going to
4 allow her but they'll produce an affidavit?

5 MR WHITFIELD-CARGILE Yes

6 MR WALKER I don't think it's relevant, but we
7 don't have an objection, because it doesn't say
8 anything about the case It just says they
9 aren't producing the witness

10 THE COURT Well, it's not the letter dealing with
11 the finding that there was -- that was used to
12 cross-examine --

13 MR WALKER This is purely on the availability of
14 Melissa Bimby --

15 THE COURT Okay

16 MR WALKER -- as a witness in the proceeding

17 MR WHITFIELD-CARGILE I think it is relevant, Your
18 Honor

19 THE COURT Well, whether it is or is not, it's in
20 I'll admit it

21 (DHEC's Exhibit Number Seventy-nine was admitted
22 into evidence)

23 MR WHITFIELD-CARGILE I would also move for the
24 admission of DHEC Seventy-eight, which I don't
25 think I did yesterday

1 MS ARMSTRONG Is that Seventy-seven and

2 Seventy-eight? - --

3 MR WHITFIELD-CARGILE Seventy-eight

4 MS ARMSTRONG And the other one in your hand?

5 MR WHITFIELD-CARGILE Oh, this is going to be --

6 THE COURT That's another one

7 MR WHITFIELD-CARGILE This is going to be

8 Seventy-nine or Eighty, I believe

9 (Off the record)

10 MR WHITFIELD-CARGILE And then Exhibit

11 Seventy-eight, I would move for the

12 admission of that And I think I

13 understand that the other parties don't have an

14 objection

15 MS ARMSTRONG No objection, Your Honor

16 THE COURT It's admitted

17 (DHEC's Exhibit Number Seventy-eight was admitted

18 into evidence)

19 MR WHITFIELD-CARGILE And on that, Your Honor, the

20 Department rests

21 THE COURT All right And we still have

22 your one witness that's pending,

23 correct?

24 MS ARMSTRONG We do, Your Honor

25 THE COURT Okay All right

1 MR WALKER We have a little bit of reply that's
2 been greatly facilitated by the other parties - -

3 THE COURT All right

4 MR WALKER We have two exhibits Mark, why don't
5 you come around

6 MARK PERMAR, having been previously sworn, was
7 recalled and testifies as follows

8 MR PERMAR - DIRECT EXAMINATION BY MR WALKER

9 Q Mr Permar, after --

10 THE COURT Well, I need to remind you that, even
11 though it's been a while, you're still under
12 oath

13 THE WITNESS Yes, Your Honor

14 THE COURT Okay

15 Q After your testimony the other day, did you go
16 back to Kiawah Island?

17 A Yes

18 Q Did you take some photographs?

19 A Yes

20 Q Did you walk the length of the shoreline of the
21 Kiawah River?

22 A In Captain Sam's

23 Q All right From where to where?

24 A From generally Beachwalker Park to the tip
25 where the sandy shoreline sort of feathers out

)

1 Q Did you, as part of that process, take
2 pictures?

3 A Yes

4 Q Did you try to or did you use a system so that
5 the pictures could be located?

6 A Yes

7 Q Would you explain what you did?

8 A Well, Doug DeWolff of Southeastern had, I think
9 about a week or so ago, placed some stakes in
10 250-foot increments, starting roughly where the
11 parking lot of the Beachwalker Park lease area
12 ends, but down along the shoreline, starting
13 there in 250-foot increments, to a point where
14 it just then reached the marsh

15 Q Okay

16 A The extreme western end

17 Q Did you --

18 A And I used those as reference points to
19 photograph the shoreline

20 Q Then did you put those photographs in sequence
21 in this binder?

22 A Yes

23 Q And do you have them in such an order that for
24 each lettered station, right afterwards there's
25 a picture of what it looks like at that spot?

1 A Yes, I had a rhythm of, a sequence of how I
2 shot at each one of the stakes - - -

3 Q Why don't you just tell us -- just use one
4 example, don't show the whole thing, but just
5 hold it up and show one example of what you
6 meant, so we know what your system was You
7 don't need your watch, just the other ones

8 A Right

9 THE COURT Step around here where I can see

10 MR WALKER Yeah, Mark, if you would come around
11 here

12 THE WITNESS Step over here?

13 MR WALKER Yes

14 THE WITNESS Okay

15 THE COURT If y'all need to

16 A For example, I would shoot a wide-angle shot
17 showing a stake within the -- this way
18 (indicating), all right, I'm sorry -- within
19 the photo to show a general contextual
20 relationship Then I would photograph the
21 stake close enough so I could identify the
22 stake And they were lettered A through -- I
23 think the last stake was P Then at that point
24 of the stake, I -- it was early in the morning,
25 because I tried to get there right at low tide

1 which was 7 58 or something like that And I
2 - - didn't know whether I could get ahold of Doug
3 DeWolff to follow me and be more accurate with
4 it

5 Q Tell us what it is

6 A So I would walk out My foot is a foot, so I
7 would pace off of the stake out to the low
8 watermark and then I would go back and again
9 photograph the stake looking westward, to
10 complete the cycle That would be a cycle at
11 each stake

12 So, for example, I'd go to the next stake, show
13 the context again, photograph the stake,
14 identifying it, pace it off to the low
15 watermark, reshoot the stake in its context,
16 and then I'd move on So that was an example
17 of two -- the A stake and the B stake

18 Q Then did you have Southeastern shoot the
19 locations of the stakes along the riverbank --

20 A Right, this --

21 Q -- and identify them?

22 A This exhibit points out where A, B, C, and on
23 is And then fortunately I was able -- while
24 I was doing this, I was able to get Doug and
25 one of his associates out there that would

1 follow me and more accurately, put key
2 dimensions between the stake and the low
3 watermark, and then they put the time of day at
4 each one of those points So the two pieces
5 together, this piece (indicating), which is
6 photographic images sort of showing the
7 contextual relationship, and this are sort of
8 related to each other in terms of where you're
9 at

10 Q And did you have Southeastern do the dimensions
11 from the stake to the low water line?

12 A Right, they were at the end of both -- you
13 know, each was at the end of the tape and they
14 would pace it off from their survey stakes to
15 the low water at that point in time And so,
16 as I said, what you see here are the specific
17 times of day, which is important as it relates
18 to how does it relate to the timing of low
19 tide

20 Q And the lettered stations went all the way down
21 P?

22 A To P, right

23 Q So if His Honor wanted to get a good idea of
24 what the bank and riverbank looks like at any
25 of these locations, your book would have it

1 right there

- - - 2 A You would go -- yeah, the easiest way ~~is~~ to
3 find the tight image of the stake -- I'm just
4 picking it randomly, now -- G, that's stake G,
5 so you go to -- where's G -- there (indicating)
6 and then you can go -- well, what I would be
7 doing ~~is~~ going back and forth to understand not
8 only the dimension, but what -- what's it look
9 like

10 THE COURT That shot, you'd back up to the wide
11 shot

12 MR WALKER Exactly

13 THE WITNESS Yeah, I picked that so I could locate
14 one for you That's the very first shot I took
15 of the context, then the stake and then I
16 reshot

17 THE COURT Yeah

18 THE WITNESS So you could see what the condition
19 was like at that point in time

20 MR WALKER Very good

21 MS ARMSTRONG Would we be able to get some sort of
22 a copy of this?

23 MR WALKER Yeah, we'll give you a copy

24 THE WITNESS Well, it's a --

25 MR WALKER If you want an extra copy of that,

1 we'll be happy to give it to you

2 MR WHITFIELD-CARGILE -You gave me one

3 Q Was the dimension -- you mentioned that this
4 went all the way down to where the sand
5 riverbank went into the marsh?

6 A At the western end

7 Q At the western end?

8 A Right

9 Q And did you have them take the distance from
10 the end of the proposed revetment to where the
11 sand goes into the marsh?

12 A On the document, there's an indicator with a
13 note on it of where the western terminus is of
14 the proposed revetment, but -- I mean, we
15 didn't do a specific dimension from that point
16 on, but I remember --

17 Q Did you --

18 A -- scaling it off at a little bit more than
19 1600 feet

20 Q Okay

21 MR WALKER Your Honor, we would move for the
22 admission of the book of photographs and the
23 reference map

24 THE COURT Any objection?

25 MS ARMSTRONG No objection, Your Honor

1 MR WHITFIELD-CARGILE No objection I'm assuming
2 that's the one, that you pulled the other-ones --
3 out?

4 THE COURT Yeah

5 MR WHITFIELD-CARGILE Okay No objection

6 THE WITNESS Same one

7 THE COURT So 1600 feet from the terminus of the
8 proposed revetment to the basically terminus of
9 the sand beach

10 THE WITNESS Right, as of that -- at that time of
11 day on that date

12 MR WALKER Mark, you want to show what you're
13 talking about, the dimension?

14 THE WITNESS It's upside down, but they're on --
15 Davis, let me show you where it is, on this
16 document, on this exhibit, there is an
17 indicator between I and J as the approximate
18 end of the proposed revetment When we were
19 out there, I didn't know the exact location,
20 but I approximated it and we used that -- I'm
21 sorry -- right there, that line (indicating)

22 Q To where it was approximately 1600 feet

23 A To that point just beyond P

24 Q Was it a continuous run of sandy shore?

25 A Yes

1 MS ARMSTRONG Your Honor, can we make clear for
2 the record that it's only through 609? They're
3 identified on the images as DSCO 532 and my
4 understanding is that it goes through 0609

5 MR WALKER That's correct

6 MS ARMSTRONG Okay And those are the only ones
7 that are being admitted

8 MR WALKER Yeah, there are no other photos
9 (KDP's Exhibit Numbers Seventy-seven and
10 Seventy-eight were admitted into evidence)

11 MR WALKER That's all we have

12 THE COURT Any questions?

13 MS ARMSTRONG No, Your Honor

14 MR WHITFIELD-CARGILE Can I have just a moment,
15 Your Honor? We just got these a minute ago,
16 earlier before lunch

17 MR PERMAR - CROSS-EXAMINATION BY MR
18 WHITFIELD-CARGILE

19 Q Mr Permar, do you have a copy of this --

20 A No

21 Q -- exhibit with you?

22 A Oh, yeah, I'm sorry Yes

23 Q The proposed exhibit ends between I and J, is
24 that right?

25 A No

1 Q On Exhibit Seventy-seven, the long map?

2 A The proposed revetment ends between I and J

3 Q Okay What did I say?

4 A I thought you said proposed exhibit?

5 THE COURT That's what he said

6 Q Oh You're right, I was wrong

7 The proposed revetment ends between I and J?

8 A Best of my memory, right, yes

9 Q Okay And you said that from that point on

10 there's continuous sandy shoreline to the end

11 of what you've marked on there?

12 A To beyond the point P,

13 Q Yeah So between the -- halfway between I and

14 J, the point that's on Exhibit Seventy-seven

15 that's marked the location of the end of the

16 revetment, between there and the end of the

17 area just beyond point P, you describe as

18 continuous sandy shoreline?

19 A Yes

20 Q Okay Let's look at -- turn to page 588

21 A (Witness complies)

22 MR WHITFIELD-CARGILE Maybe we should show the

23 Judge

24 THE COURT Yeah, I need you to step around for

25 this

1 Q Where was that taken? Can you use your
2-- ---- analysis to determine where that was taken?

3 THE COURT The chart

4 A It's -- I'm sorry, bear with me My system is
5 supposed to work here It's where this stake
6 is taken, which is --

7 Q What is that, M?

8 A M

9 Q Okay And turn back to page 588

10 A (Witness complies)

11 Q And that's between J and P, right?

12 A It's between J and P, yes

13 Q Okay So that's part of that long, continuous
14 sandy shoreline we're talking about?

15 A Yes, uh-huh (affirmatively responds)

16 Q Okay How would you compare that shore right
17 there with, say, the beach at 560? Let's make
18 sure we're going back far enough 549

19 A Well, 549 is --

20 Q Will you hold up 549?

21 A This is --

22 Q I'll hold up 588

23 A This is 549

24 Q Okay

25 A And this is (indicating), you know,

1 unobstructed sandy shoreline from the stake
2 area to the edge of water At this point, this
3 had a combination of the marsh grasses and
4 sandy shoreline (indicating)

5 Q That's mud 'right there

6 A No, that's sand That is sand

7 Q Doesn't look like pluff mud to you?

8 A I walked on it It's sand

9 Q Okay How would you compare the width down
10 here with the one -- I've got 588 You've got
11 549 Where's 549 Is that around B? E?

12 A E

13 Q Okay How would you compare the width of this
14 little shore --

15 A Well, 549 is much wider --

16 Q Much wider

17 A -- in terms of the sand area than --

18 Q Uh-huh (affirmatively responds) Looks dryer,
19 too, doesn't it?

20 A Well, it's higher topo

21 Q Okay But it's dryer

22 A It's dryer, yeah, because it's higher topo

23 Q Turn to page 590

24 A (Witness complies)

25 Q Where is that taken? Is that at N?

1 A Stake N

2 Q Okay I guess --

3 A Stake N is in the immediate left here

4 Q Okay

5 A And then --

6 Q You keep that page right there

7 A 590?

8 Q Yeah I'll go back to page 549

9 Now, the beach at 549 is much wider than it is

10 at 590, wouldn't you agree?

11 A The sandy area is, yes

12 Q Uh-huh (affirmatively responds) And this is

13 a lot wetter up in here, too, right, on 590?

14 A There's a low depression that's feeding in from

15 the marshland area that shows up in the

16 foreground here

17 Q The bottom line is beyond the end of where the

18 revetment's proposed to go, it's different,

19 totally different

20 A The closer you get to P, the beginnings of the

21 marsh grasses penetrating --

22 Q Uh-huh (affirmatively responds)

23 A -- are evident

24 Q Okay And it's also not as dry because of its

25 low topography?

1 A No, it's just a lower profile, it's not as
2 steep
3 Q Okay But it's wetter down there
4 A No, it's not any wetter than other locations
5 Q That's water right there, isn't it?
6 A Well, no, in 590, as I said, there's a
7 depression feeding in --
8 Q Oh, okay
9 A -- that shows itself as it comes closer to the
10 water area So, for -- what happens as an
11 example of this rhythm, it goes from a
12 relationship of all sand to the beginnings of
13 every once in a while these marsh areas So,
14 for example, if you keep proceeding --
15 Q Is 601 the end of it?
16 A Right 601 is P
17 Q Uh-huh (affirmatively responds)
18 A Stake P in the left
19 Q Okay
20 A And then the shot of the stake
21 Q Uh-huh (affirmatively responds)
22 A Then the shot again And that area that I'm
23 pointing to right now is where the marsh grass
24 overtakes the sand and there's no more sand
25 exposure beyond that point That's the western

1 end

2 Q The surface down at 549 is a lot smoother down
3 there, isn't it? You keep there to compare the
4 two, so we don't have to flip back and forth

5 A Sure

6 Q Compare the surface at 549 with 601 What are
7 all these little pebbles and stuff? Is that
8 where crabs are? Is that what that shows?

9 A It's just the texture of -- I don't know what
10 the --

11 Q What causes that texture?

12 A Critters

13 Q Is it muddy?

14 A No, it's not muddy

15 Q Critters like the muddy areas, don't they?

16 A I have no idea It's just the sand -- I'm
17 trying to confirm this

18 Q If you pull up into Beachwalker Park, the
19 parking lot, can you climb down and be right
20 here at 601?

21 A Climb down?

22 Q I mean, can you just jump from Beachwalker Park
23 parking lot down over that --

24 A No, this is --

25 Q -- little cliff and land right here

1 (indicating)?

2 A -- No, it's several thousand feet away

3 THE COURT That would be a big jump

4 MR WHITFIELD-CARGILE Yeah, it would You should
5 be playing basketball if you can do that

6 THE WITNESS I wish

7 MR WHITFIELD-CARGILE I don't have any further
8 questions, Your Honor

9 THE COURT All right

10 MR WALKER No questions

11 THE COURT All right You may step down

12 (Witness excused)

13 MR WALKER Leonard Long --

14 MS ARMSTRONG One --

15 MR WALKER Oh, I'm sorry, go ahead

16 MR PERMAR - CROSS-EXAMINATION BY MS ARMSTRONG

17 Q Mr Permar, you said that the revetment
18 structure would end at J, is that right?

19 A No, I said it was in between two station
20 points I think it was I and J, if I'm not
21 mistaken

22 Q So there's no revetment structure past J, if
23 we're going out towards the inlet?

24 A That's correct

25 Q Okay Would you look at 577 with me

1 THE WITNESS Go up?

2 MR WALKER Sure

3 Q And the area that's towards the inlet, away
4 from the park of that stake, in that image

5 A This right here (indicating)?

6 Q Yeah All the area -- I guess it would be
7 west --

8 A West, right

9 Q -- of the stake There aren't any sand dunes
10 in that area, are there?

11 A Not immediate to the shoreline

12 Q So there wouldn't be any areas for the turtles
13 to nest in if they use the sand dunes, is
14 that --

15 A I don't know that

16 MR WALKER Objection

17 MS ARMSTRONG Withdraw the question

18 MR WALKER Objection, because he's not a turtle
19 expert and we actually have a map that shows
20 they go up in the marsh beyond that

21 MS ARMSTRONG I withdrew the question

22 MR WALKER Okay I'm sorry

23 THE COURT Okay Next?

24 MR WALKER I have no more questions

25 THE COURT You can step down

1 (Witness excused)

2 MR WALKER Leonard

3 THE COURT You are still under oath

4 THE WITNESS Yes, sir

5 LEONARD LONG, having been previously sworn, was

6 recalled and testifies as follows

7 MR LONG - DIRECT EXAMINATION BY MR WALKER

8 Q There has been mention of an application for a
9 stormwater permit for some sheet-pile Are you
10 familiar with that?

11 A Yes

12 Q Do you consider that to be a feasible
13 alternative to the revetment?

14 MR WHITFIELD-CARGILE Objection, Your Honor He
15 has not been qualified as an expert in
16 engineering, in geology -- what's the big
17 objection -- geomorphology or any of that, Your
18 Honor

19 MS ARMSTRONG The League joins in that objection

20 MR WALKER I'll rephrase it

21 Q Do you consider that to be an adequate
22 substitute for the revetment?

23 MR WHITFIELD-CARGILE Object, Your Honor He's
24 not been qualified as an expert That's the
25 same question

1 MR WALKER I'm not asking for his expert opinion

2 MR WHITFIELD-CARGILE -- He can ask if he wants it

3 THE COURT I think he could ask it from that

4 perspective, because the question doesn't

5 appear to me to be one of expertise So I

6 overrule that objection

7 A No, I don't consider it to be an alternative or

8 in any sense a substitute for the current

9 request

10 Q Why?

11 A Well, we're 20 or 21 months into a permit that

12 we asked for that we thought was reasonable,

13 but essentially had been turned down so far

14 with no discussion

15 Some months ago we started contemplating what

16 do we do, because, as you know, under the case

17 law we were required to exhaust every

18 possibility that could avail or be a substitute

19 or at least a holding action substitute

20 And that's what that request for a sheet-pile

21 is It's 370 feet, not 2800 feet It's only

22 at the bend where the most -- you know, where

23 the closest point, the neck, et cetera, is

24 And the thought was that it's on our highland

25 We would have the sheet pile -- not

1 jackhammered, but knocked into the ground as
2 you would a piling on a bulkhead I think-----
3 they're 30- or 40-foot long pilings, steel, and
4 they would be sort of interlocked or side by
5 side and interlocked for 370 feet And it was,
6 you know, kind of like a last-gasp alternative
7 if this lawsuit, which has taken so long to get
8 to a decision, kept on going and the corridor
9 that we've talked about had been compromised or
10 foreclosed from use So it was recommended by
11 counsel and others to try that

12 Q If there is a permit issued for a revetment and
13 it's constructed, would you proceed with the
14 sheet-pile?

15 A No, of course, not It's very expensive It's
16 almost a million dollars to do just the 370
17 feet

18 Q Do you, as the owner, consider that you have
19 reasonable access to the spit at the current
20 time?

21 A No, we definitely do not have reasonable access
22 or use We have asked for a dirt road and a
23 sheet-pile access to get to our 150 acres of
24 land and have been stymied for five months now,
25 almost six, since we applied -- maybe it's

1 five, I'm not sure -- since we applied for the
2 sheet piling
3 And it's kind of like the same story with one
4 little addition Now, they've complained about
5 not getting any requests for information --

6 MR WHITFIELD-CARGILE I'm going to object, Your
7 Honor I don't think any of this is relevant

8 THE WITNESS We've had a number of requests for the
9 most inane things possible --

10 MR WHITFIELD-CARGILE Your Honor --

11 Q Leonard, let me go back to a question

12 A All right

13 THE COURT Yeah, let's get back to the Q and A

14 Q We heard from some active kayakers

15 A Yeah

16 Q Do you, as developer, promote kayaking on the
17 island?

18 A I've kayaked, my family has, and I wanted to
19 make sure that kayakers were treated as well as
20 we could at Kiawah And so we've provided any
21 number of places and outlets and little
22 landings around the island Boathouses for
23 kayaks have been built, admittedly at the other
24 end, but on the creeks that are the most
25 susceptible to great kayaking, in our view

1 Q Is there a landing at --

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

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

17 Q County park?

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

20 Q What is that landing made of?

21 A It's made of concrete

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

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

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

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

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

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

22 MR CHANDLER Cross examination?

23 MR LONG - CROSS-EXAMINATION BY MR CHANDLER

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

1 designated for any development at all, was it?

2 A It wasn't - - - - -

3 Q And was that taken into account in determining
4 how much you were willing to pay for this land?

5 A You know what, it wasn't The price was set by
6 the Kuwaitis and we paid exactly what they
7 asked

8 Q And you paid that with the understanding that
9 this was not a developable part of the island
10 that you were buying

11 A We thought it would be developable one day It
12 was beautiful, it was growing Frank Brumley,
13 our partner, who had been the Kuwaitis' general
14 manager for so many years, and his sales
15 director, who was also our partner, Pat
16 McKinney, both of them thought that a lot of
17 the areas that had been marked undeveloped by
18 Hayes would be developed easily one day And
19 that's been proven

20 Our highest-end subdivisions on the front beach
21 are parts of those areas that Hayes marked as
22 unstable and not developable The reason is
23 because there's been growth and accretion just
24 enormously over -- as Kana said, Dr Kana, for
25 150 years

1 Q Now, over the time that KRA and KDP have owned
2 this property, you've promoted this and
3 marketed this entire island as I -- couple of
4 the things that I wrote down, I'm not sure
5 whether you said them or Mark said them, but
6 "man exists with nature "

7 A Right

8 Q Or "designing with nature " Do those things
9 ring a bell?

10 A "Designing with Nature" is the name of the
11 booklet that we give out to new homeowners to
12 go through the process of learning how to
13 design and build at Kiawah and to landscape at
14 Kiawah It's been around by a predecessor and,
15 of course, we revised it and have revised it
16 several times since we came

17 Q Okay And a lot of the attraction of the
18 island and the reason that people come there to
19 take their vacations and buy their vacation
20 homes and retire there or come to live there is
21 because it's a place for them to get close to
22 nature and actually get out in the water and
23 recreate, isn't that true?

24 A That's true Nature is the biggest attraction
25 in every poll we have and whether that's the

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

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

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

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

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

1 we went out and spent a good deal of extra time
2 and funds to poll a lot of experts to come up
3 with something that was, in fact, green, that
4 would have grasses growing out of it, that
5 wouldn't be unattractive, as you mentioned,
6 that wouldn't interject itself unnecessarily
7 But sometimes you come across not just lots
8 where you need erosion control, but a length
9 I was interested to have the gentleman say that
10 with the kayaking, that he'd have no place else
11 to go, and we've just shown there's another
12 1600 feet right next to -- with no escarpment
13 backing it up, right next to the revetment
14 area

15 So we have tried to come up with a solution
16 If you've got a better solution that works,
17 we're all ears, Jimmy We didn't get a single
18 suggestion from Davis' client as to how we
19 might improve or, you know, alter or amend or
20 change our permit and we have tried, tried hard
21 to gather that sort of assistance and help from
22 the Agency charged with this area
23 No, I don't like having something that you or
24 anybody else considers to be objectionable I
25 hope we can improve it still

1 Q So is your new motto going to be there's still
2 ----going to be a little bit of nature left?

3 A Yeah, Jimmy, that would be about it

4 Q Okay There's all kinds of green, isn't there?

5 A There's all kinds of green?

6 Q Yeah, yeah There's building green and
7 something there's going for the long green

8 A Is that a question?

9 MR CHANDLER That's all I've got, Your Honor

10 MR LONG - CROSS-EXAMINATION BY MR

11 WHITFIELD-CARGILE

12 Q Mr Long, those houses out at Kiawah that
13 people have as second homes, you say they're
14 only there six to eight weeks per year?

15 A That's what our polling has said over 22 years

16 Q Anybody rent their houses out out there?

17 A They do, and what I'm telling you is that 89
18 percent of the people are second homeowners
19 I'm not talking about investors

20 Q Okay

21 A I'm talking about second homeowners Investors
22 fit in the rest of the category We have
23 almost --

24 Q Second --

25 A Yeah, we have almost no retirees We have

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1 something like 300 families -- 300 families,
2 maybe, out of all those owners who--are--
3 retirees

4 Q But second homeowners, they can rent out their
5 place, too, can't they?

6 A Some of them do, a little bit But let me tell
7 you, when you have an expensive house, you're
8 rarely in that category Mostly it's the
9 condos the Kuwaitis built that are leased out
10 on a regular basis and --

11 Q When you got --

12 THE COURT Let him finish

13 MR WHITFIELD-CARGILE Yeah, I'm sorry

14 A And there are those people particularly who
15 rent, but the homes are much less rented, I
16 would say

17 Q Well, you got an expensive house, you got to
18 pay for it, don't you?

19 A I think that's probably self-evident, yes

20 Q Okay Do you remember saying in your
21 deposition that that spit has value as open
22 space?

23 A You asked me did the spit have value as open
24 space and, of course, I think it does If we,
25 you know, have just a piece of land that has

1 trees and dunes on it, I certainly don't think

-- 2- it's valueless

3 And I told you later on in the deposition that

4 an MAI or somebody would have to evaluate if

5 that's all you could do with it, what it would

6 be worth It would be hard for me to say

7 It's not the business I'm in to know what kind

8 of value But it has value, it's beautiful

9 Q That was all you could do with it until 2005,

10 right? That's what you testified to earlier

11 A 2005 is when we got the right pursuant to

12 current zoning ordinance

13 Q So before 2005 all you could do with it was

14 open space and park space

15 A Well, we could do what the zoning ordinance

16 would allow after the 1999 setback change

17 Q Up until 2005 the only thing that was allowed

18 under your zoning scheme, under your

19 development agreement was open space --

20 A I think we began negotiating --

21 Q And park

22 A -- in 2003 or '4, but you're right

23 Q Okay

24 A The document was signed in '05

25 Q Is there a gate when you go onto Kiawah?

1 A There is

2 Q When you go to Beachwalker Park, you take a

3 right just before you go into the gate, right?

4 A Exactly We didn't want to have a gate be

5 either a psychological or an actual impediment

6 to the public's enjoyment of the park

7 Q Okay But there's a gate there, right?

8 A The gate comes after you make a turn to go to

9 Beachwalker

10 Q Right How do you get through that gate?

11 A Well, if you have -- just about -- I hate to

12 ~ say this, but if you have a pulse at all, you

13 almost can get through, because you can say,

14 "I'm going to the hotel, I'm going to the

15 little shopping center," where the inn was or,

16 "I'm going to visit a friend," and they'll

17 probably let you through

18 Q But either you've got to tell -- if you're not

19 going to see a friend and you're not going to

20 either the hotel or the --

21 A You probably won't get in unless you've got a

22 really good excuse

23 Q Or unless you just lie to them --

24 A I guess a lot of people do

25 Q -- and say you're going --

1 A I guess a lot of people do

2 Q Okay

3 A It's more of a checkpoint than a gate, Davis

4 It's a way particularly if people know there's

5 one way on and one way off of Kiawah and

6 they're going there for criminal activity, they

7 know the car can be noticed going out, just as

8 it came in, and that retards it

9 Q Does Dewees Island have road access?

10 A No

11 Q Does Daufuskie Island have road access?

12 A No

13 Q Okay You talked yesterday about -- you said

14 about the mortgage -- not yesterday, seems like

15 yesterday -- Tuesday, about the mortgage that

16 you have on the property

17 A Yes

18 Q And you said you're using that \$50 million for

19 development in St Kitts?

20 A Yes

21 Q What's the project down in St Kitts that

22 you're using that money on?

23 A St Kitts is a project that's just beginning

24 It's going to be, hopefully, one day a resort,

25 if we ever get financing for the hotel, which

1 seems very problematical

2 Q Why is it problematical?

3 A You probably have noticed that the financing
4 arrangements for both equity and debt are
5 almost moribund right now They're just not
6 available to investments, particularly hotels,
7 which have suffered a lot during this
8 recession

9 Q Will the revetment help you get some more
10 financing for St Kitts?

11 A I doubt if we'd be borrowing too much more out
12 there for any other purposes than, you know,
13 the development of that property

14 Q Would the revetment help you get more
15 financing --

16 A The disposition of the Bank of America to loan
17 the money two years before the recession was
18 fortuitous I don't think they'd do it again
19 today if they were given a chance, if that's
20 what you mean

21 Q I'm just asking if the revetment would help you
22 get more financing

23 A The revetment makes the property feasible
24 Anybody who would build a road, as I've heard
25 described, out there of any consequence or try

1 to sell property to any significant degree,
2 without the revetment would be very foolish

3 Q If the revetment makes it -- you said the
4 revetment will make it more feasible?

5 A It makes it practical and feasible You can't
6 have 2800 feet of erosion continuing and have
7 people feel comfortable that their road and
8 their access, as well as their property that
9 they buy along the river, for example, is
10 secure

11 Q Okay But the revetment will make the property
12 more feasible, is that right?

13 A Makes the development more feasible

14 Q Okay And then --

15 A In fact, it's probably, you know, the essential
16 ingredient, without which you probably would
17 have what seems to be your client's goal, which
18 is to leave it for the people and have it just
19 lie fallow

20 Q If that property's more feasible for
21 development because of the revetment, that's
22 going to make it easier for you to get more
23 money for your St Kitts' development, right?

24 A With the revetment, the property begins to
25 become valuable again It's in very much of a

1 limbo right now, to say the least

2 Q And if it's valuable, you can take more money

3 out on it?

4 A Yeah

5 Q And you can use that money --

6 A Probably would have some value

7 Q -- on St Kitts

8 A Yeah, we could use it any number of ways

9 Q Okay And you said if the revetment's there,

10 there's still 1600 feet of shoreline on down

11 that people can use if they want to?

12 A There's 1600 feet before you get to the marsh

13 that's shown on that drawing Then there's

14 another -- if you go all the way around,

15 there's a mile and a third to the tip, so

16 you've got a mile and a third of beach and

17 inlet area

18 Q That's on the ocean side?

19 A And inlet area, inlet area that's not -- it's

20 kind of halfway between the river and ocean

21 waters

22 Q Currents are a lot stronger in inlet areas,

23 aren't they?

24 A They can be, particularly as you get towards

25 the ocean You wouldn't want to take a boat

1 out there I've had some bad experiences

2 myself - - - - -

3 MR WHITFIELD-CARGILE Okay I don't have any

4 further questions

5 MR WALKER Nothing, Your Honor

6 THE COURT Follow-up on his question? No?

7 MR CHANDLER I've got nothing

8 THE COURT Okay You may step down

9 (Witness excused)

10 MR WALKER That's the end of our reply case, Your

11 Honor

12 THE COURT All right A lot of times I don't ask
13 for closing arguments, but I think I might like
14 brief ones on this

15 MR WALKER All right

16 THE COURT Do y'all want to -- or do y'all not want
17 to do that?

18 MR WALKER No, we would like to and I would like
19 a short break before we start, if that's okay

20 THE COURT Okay

21 MR CHANDLER Can we set some kind of guidelines as
22 to how much time we're talking about, maybe ten
23 minutes each, or something like that?

24 THE COURT Do you want -- I don't need -- if it
25 went more than ten minutes, it wouldn't bother

1 a ten-minute break

2 (Off the record from 2 51 p m to 3 07 p m)

3 THE COURT You want to go first, last or both? If

4 you go first, you have to open --

5 MR WALKER That's fine

6 THE COURT Okay

7 MR WALKER Thank you, Your Honor

8 CLOSING STATEMENT BY MR WALKER

9 MR WALKER The first thing I want to do, has

10 nothing to do about the facts of the case, is

11 to express our appreciation for your taking

12 this case We were left in the lurch ten days

13 ago when through unexpected circumstances Judge

14 McLeod recused himself We were hoping for a

15 trial, but at that point thought it highly

16 unlikely We appreciate your rearranging your

17 schedule and your giving us so much time,

18 giving us the long trial days and being such an

19 astute judge throughout this case and listening

20 to us Thank you

21 Your Honor, we would submit that the

22 overwhelming evidence, not just a preponderance

23 of the evidence, supports the issuance of the

24 permit in this case for not just 270 feet, but

25 for the full length of the revetment requested

1 I'm not going to summarize the testimony and
2 say who said what-because you got it, it stuck,
3 so I'm not going to go through it
4 I am going to make a couple of comments The
5 first comment I'll make deals with
6 geomorphology Tim Kana is the witness on
7 geomorphology He testified for, I think, five
8 hours What he had to say was not really
9 contradicted at all
10 What we know is that the spit now is in its
11 healthiest state, healthiest in historical
12 times, and a big reason for that is that
13 Mr Kana has -- or Dr Kana has engineered
14 these inlet relocations which have allowed the
15 inlet to keep moving back to the east and
16 thereby allowing the sand to continue to
17 accumulate, plus we have a seemingly endless
18 source of sand at Stono Inlet that he described
19 as so many million cubic yards of sand that's
20 going to continue to come down I don't really
21 think that's in dispute
22 On the environmental compatibility and the
23 development methods that would be used, we
24 submit that Mark Permar was convincing in what
25 he had to say, established not only a record of

1 environmental sensitivity, but a commitment to
2 it

3 On plovers, we submit that Lee Walton testified
4 that there would be no material adverse impact
5 and he gave good reasons for it, and I'm not
6 going to go over that It's purely speculative
7 to think that there would be any adverse impact
8 on plovers

9 Even the Fish & Wildlife Service acknowledges
10 that wintering piping plovers are not in any
11 significant risk because of people walking on
12 the beach And Ms Hughes acknowledged that if
13 we have responsible people on the beach, then
14 even she agrees that's okay

15 With respect to terrapins, on our last witness,
16 terrapins aren't protected The bulkhead on
17 the revetment is going to be placed at the
18 contour where the escarpment is, so aren't
19 increasing that vertical face

20 He didn't say that it would definitely impair
21 terrapins The question was not asked with
22 reasonable degree of certainty He said it
23 possibly could affect terrapins

24 As Your Honor pointed out, they may go to other
25 places and there's shoreline on either side of

1 this revetment where they can go and shoreline
2 -- -- on Captain Sam's where they can still burrow -
3 We don't think that's a negative impact
4 sufficient to deny this permit
5 The purpose of this permit would be to build a
6 revetment to stabilize the bank to allow
7 assured access to Captain Sam's Spit It was
8 never the intent that this revetment would be
9 to stop a hurricane There's been much made
10 of, well, it won't stop a hurricane We
11 acknowledge that if there's a hurricane, not
12 only -- of a magnitude that would damage
13 Captain Sam's Spit sufficiently, given what
14 Dr Kana said, that it's going to damage
15 everything else And I think Rob Young said
16 that, as well
17 In the last four years, the distance between
18 the critical line and the setback line, which
19 is the only area we can put a road in at the
20 narrowest part, has gone from 90 feet to 66
21 feet As Mitchell Bohannon said, the desirable
22 right-of-way would be 60 feet We can go
23 narrower than that, maybe to 50 feet, but at
24 the rate it's gone over the last five years,
25 it's going to be gone unless we're able to

1 secure and stabilize that bank
2 They have said, "Well, you can-build-a-road,
3 you can go out there " They have been
4 unwilling to grant any type of stormwater
5 permit and you heard that they are committed to
6 seeing that there's no development out there,
7 because they believe it's in the public
8 interest to preserve Captain Sam's
9 Let me turn now to OCRM's case There were
10 many interesting facets of it The primary one
11 that I'm here to communicate is the abundance
12 of inconsistencies that we see in their case
13 and certain weaknesses we see in their case and
14 certain misdirection plays
15 The first I want to talk about is their
16 argument that Captain Sam's Spit is gaining on
17 the ocean, therefore, you have a net gain of
18 land and you don't need a revetment Well, the
19 revetment is needed to secure the access
20 corridor
21 And that's related to the next misdirection
22 play, which is the setback line will be set
23 again in ten years and it will be moved We
24 just heard today from Mr Eiser, ten years has
25 gone by and they aren't moving the setback

1 line, and it will be another ten years And in
-- 2-- that ten years, at the current rate of growth,
3 even if the beach is growing at ten or 15 feet
4 a year, the access corridor is going to be
5 lost

6 We also heard, well, all KDP needs to do is to
7 try to get an exception You can apply to
8 construct something on the other side of the
9 setback line But it isn't going to work,
10 either, because they've already said that the
11 purpose is not to see any substantial
12 development on the spit They aren't going to
13 grant that and we'll be up here again on that
14 one and we'll have even a worse case We have
15 a good case now We'll have a terrible case
16 there, because that's entirely discretionary
17 Here, in this instance, we have a right to the
18 bulkhead and there we don't start with
19 anything

20 Another facet of their case is they've changed
21 their reasons for denial At the time of the
22 permit decision, the big issue was they said
23 that the revetment would interfere with natural
24 inlet migration Well, they've tossed that
25 one And good reason that they tossed it

1 because they've issued permits to Seabrook to
2 move the inlet through manmade means and
3 they've heard the testimony, including from
4 their own expert, Rob Young -- excuse me, Rob
5 Young was for the League -- but through the two
6 geomorphologists, that it's highly unlikely
7 that the spit is going to breach at the neck
8 They also talked about wetland impacts in their
9 denial originally and we didn't hear much at
10 all about that They acknowledged that if we
11 do any work in wetlands, we have to get a
12 permit No impact
13 And the other reason that they gave at the
14 administrative level was plovers, and there is
15 no impact to plovers And what they had in
16 their file at the time of denial was the letter
17 from Fish & Wildlife saying no negative impact
18 to plovers We had zero impact here, zero
19 impact here, and zero impact here, so obviously
20 they had to come up with other reasons and the
21 reason they told you is what they feel to be
22 the commanding mandate under the policies of
23 the State, to protect this land for the people
24 And it's interesting because they're talking
25 about alleged impact that's not even in the

1 critical area That's not their jurisdiction
2 because the impact that they're concerned about-----
3 is high ground development
4 We've talked about the plover impacts They
5 said that there were plover impacts They
6 didn't have anything in the file to show that
7 there were plover impacts And they only a
8 week ago got an expert on plovers, and we've
9 already talked about her, who was not
10 convincing at all and ultimately said you can
11 go on the beach and there's no problem
12 They also keep coming back to -- at least the
13 League does -- what happened out there in 1660,
14 in 1850 and 1922, coming forward Why do they
15 do that? They do that because they know that
16 if they stick to the law, which is a 40-year
17 look-back policy, they don't have anything
18 When the Beachfront Management Act was passed,
19 the General Assembly said when it comes to
20 looking at development on a barrier island,
21 here's the rule You look back 40 years We
22 satisfied the 40-year rule They won't abide
23 by that
24 They say -- but this is really just, we think,
25 pretextual, that, "We have to look back beyond

1 that and it's an unsafe place and we wouldn't
2 want-people to have a false sense of security "
3 By the way, that was never in the Technical
4 Summary of Review, as you will see
5 Then we have this other argument about
6 piecemeal presentation It wouldn't have made
7 any difference if we gave them ten development
8 plans They'd already decided they were going
9 to deny it for the reason that they want to
10 protect the high ground Our plan wasn't
11 important to them If it was, they would have
12 asked for it
13 In the same light, they're now coming up with
14 the argument that the revetment is going to
15 fail There's nothing in the file to suggest
16 that they had any notion the revetment would
17 fail This is one of those after the fact grab
18 an idea and see if we can use it as a
19 justification after the fact for denying the
20 permit
21 Our engineer, who's going to stand by this,
22 says he thinks it will work and we'll monitor
23 it and if it shows any type of need for
24 adjustment, it can be adjusted
25 Their own State of the Beaches report, Your

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1 Honor -- and this gets back to the stability of
2 the spit -- states that it is one of the most -
3 stable areas -- the west end is one of the most
4 stable beach areas and barrier islands in the
5 State of South Carolina Yet they talk all
6 around that, didn't acknowledge it once We
7 had to bring it up

8 As to the League, their position's the same
9 spit shouldn't be developed When we talk
10 about development of the spit, that really is
11 a question of the Beachfront Management Act and
12 local zoning, and they both would allow
13 development, subject to proper permitting

14 The League, again, goes back to year after year
15 after year, 300 years ago, 200 years ago, 100
16 years ago They didn't bring in any
17 geomorphologist to say that anything was
18 different in the last 40 years In fact, the
19 one they did bring live refuted their other
20 case, their other argument The argument in
21 the report that you let in is that the spit's
22 so unstable, it's going to breach at the neck,
23 so we can't develop out there And their own
24 expert, Rob Young, said he thinks it would take
25 a huge storm, a Category V, to breach And if

1 a Category V hit, he said everything would be
2 - - - - wiped out, Isle of Palms, everything on Kiawah - -
3 So their theories, I think as you have
4 perceived, are entirely inconsistent
5 There also seems to be the League's argument
6 that there's no erosion on the riverbank
7 There's erosion on the riverbank The
8 riverbank's moving We have proof positive
9 that it's moved from a location where this
10 green line is to where this orange and red line
11 is over the course of the last 35 years
12 There's significant movement All the
13 witnesses have said that this bend is migrating
14 down Yes, the beach is migrating, and
15 migrating at a good clip, but the river's
16 migrating, too, and that is the problem
17 All the witnesses said there's erosion, but Rob
18 Young, for some inexplicable reason, seemed to
19 say he didn't see much in the way of erosion
20 As to Rob Young, he's such an advocate, I'd ask
21 the Court to consider his credibility based on
22 a particular response he made that floored me
23 He said that the revetment would stop the
24 release of sand on the river bend that's
25 building the dunes on the front beach We can

1 go back and look at the transcript But that
2 answer, to me, was so contrary to common sense
3 and what Dr Kana had said, it was off the
4 wall I don't know why he felt like he had to
5 go that far, but he did Testimony about no
6 erosion is not believable
7 They also have the argument, the League, that
8 there should be no development there Their
9 witness was Josh Martin on that, from a
10 planning standpoint I'll let you judge the
11 weight of that His standard was himself, his
12 own personal opinion, even if all the laws
13 allow it That's not sufficient reason not to
14 allow it
15 They are going to depend heavily on public
16 access But it's important to know that Bill
17 Eiser said that he saw some access, but not
18 considerable access and that he said, Bill
19 Eiser, that he did not see a significant
20 impairment of the public access
21 The public can still use this area
22 Navigation's not impeded They can still pull
23 their boat up If they don't want to pull
24 their boat up right there, they can go down the
25 river a little bit and pull up somewhere else

1 There is still a recreational opportunity
2 there And the law says, both in the statute --
3 and under the Sierra Club case that
4 Mr Chandler mentioned, the impairment of the
5 public tidelands needs to be substantial And
6 here, there's no substantial impairment
7 Where we started this was looking at the
8 regulations The project specific regulation
9 30-12(C) for bulkheads and revetments is met
10 here Bill Eiser acknowledged that we have met
11 the criteria The reason OCRM denied it was
12 cumulative impacts
13 He also acknowledged that he probably would
14 have granted the permit if there was going to
15 be no high ground development So the impact
16 that we're talking about is the high ground
17 development
18 We have argued all along, and will continue to
19 argue, that that application of the statute by
20 OCRM is incorrect 30-11(C)(1) says that one
21 of the considerations is "the cumulative
22 long-range impacts of the project" -- and they
23 acknowledge the project is the revetment -- "in
24 the context of other foreseeable
25 development" -- and I think it's the character

1 of the area The development is to be
2 considered solely to determine the impacts of
3 the revetment, it's not the impacts of the
4 development Otherwise, the statute would be
5 written --

6 THE COURT Say that again

7 MR WALKER It's the impacts of the revetment, not
8 the impacts of the development If it was the
9 impact of the development that we were to be
10 thinking about that the statute referred to
11 would say the cumulative impacts of both the {
12 project and other development It doesn't say
13 that It says the project in the context of
14 other development, meaning that if you are
15 building, say, a dock or a pier, but -- and you
16 have to look at the surrounding area, but you
17 also have to anticipate whether there's
18 foreseeable development that somehow is going
19 to play into that where your pier is going to
20 interfere with that development You can't do
21 something through a coastal zone activity
22 that's going to interfere with another project
23 potentially or other development That's
24 poorly said, but what I mean is you have to
25 consider the impacts of the project in light of

1 what's going to come on, not the impacts of

2 what's going to come off -----

3 As far as the Coastal Zone Management Program

4 document, it was never adopted and, if you

5 consider it, it allows residential development

6 on barrier islands

7 the whole issue of what's appropriate on

8 barrier islands from the standpoint of

9 development was determined in 1989 under the

10 Beachfront Management Act, which, in our mind,

11 in essence superseded the program document,

12 even though it's not effective

13 It seems to me that they're relying

14 considerably on the policies that are stated at

15 the beginning of the Beachfront Management Act,

16 particularly 48-39-30 And those policies, if

17 you read them together, rather than isolating

18 and cherry-picking them, dictate that the

19 determination of permits needs to be a balance,

20 needs to be a balance between the promotion of

21 economic activity and the protection of coastal

22 resources It's neither one nor the other

23 I'd also point out that the specific statute

24 that was referred to yesterday, 48-39-120, in

25 part F specifically authorizes the Department

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1 to issue erosion control structures to protect
2- private property
3 Your Honor, considering all the evidence and
4 where we are, we submit that we have
5 demonstrated overwhelmingly that we have
6 satisfied the criteria for issuance of the
7 permit for the revetment, that there will be no
8 substantial harm to the public access and that
9 what's really going on here is that this
10 permitting process is being used in an effort
11 to usurp zoning

12 Thank you

13 THE COURT All right I just thought, I had him
14 going first and going last I got two people
15 with burdens of proof, but I'll just let y'all
16 go and I'll figure this out as we go down the
17 path, so

18 MR CHANDLER Is that all -- I thought y'all had
19 two of y'all that were going to speak

20 THE COURT Well, they can go first and last

21 MR HOWE No, I was just -- I'll do a reply

22 THE COURT Okay

23 CLOSING STATEMENT BY MR CHANDLER

24 MR CHANDLER Your Honor, we argued about not
25 having this hearing this week, but it has

1 certainly run smoothly and --

2 THE COURT Smoother than-I thought-it-would -

3 MR CHANDLER We, despite our arguments against it,
4 at this point in time, I am glad it's over
5 And so we appreciate the way this hearing has
6 been run, as well

7 Now, the Coastal Conservation League is a
8 nonprofit organization that was set up about 20
9 years ago to protect the natural resources of
10 the coastal zone of South Carolina And the
11 members of the League are some of the people
12 who use and enjoy these natural resources
13 The League likes to advocate -- you heard --
14 for protection of these resources You heard
15 from some of the members of the League and I'll
16 talk about that in just a minute

17 Before I review the facts, I want to just give
18 a quick overview of the law Before we had the
19 Coastal Zone Management Act that was passed in
20 1977, we had the Public Trust Doctrine and the
21 Public Trust Doctrine has been the law of the
22 land in the United States of America since this
23 country was formed It's a law that was
24 brought over, here from England There are some
25 historical documents that indicate that it

1 became the law in England because it had been
- 2 -- -- the law of the Roman Empire back in Roman
3 times It's one of the most ancient laws that
4 we have on the plant Earth
5 And the Public Trust Doctrine stands for the
6 principle that the areas below the mean high
7 ~ watermark in the tidal areas of the waters of
8 the nation are owned by the United States -- in
9 England it was that the King owned those areas,
10 but the King didn't have absolute dominion He
11 held them in trust for all of the people
12 In the United States and in the State of South
13 Carolina the case law says that the State owns
14 those areas below mean high --

15 THE COURT The King used to own it, but now the
16 State owns it

17 MR CHANDLER Well, now the State owns it

18 THE COURT At one time the King --

19 MR CHANDLER We sort of took it away from the ,
20 King But there's still that trust obligation
21 They're held in trust for the benefit of all of
22 the people The League's in this case because
23 its members are some of the beneficiaries of
24 that trust relationship that the State has
25 Now, the Coastal Zone Management Act when it

1 was passed in 1977, it brought another layer of
2 law to bear on these areas It expanded some
3 of the things that were covered by the Public
4 Trust Doctrine The Public Trust Doctrine
5 didn't extend into primary oceanfront sand
6 dunes, like we have under the -- what we had up
7 to the crest of the primary -- I can't
8 remember -- even under '77, we included some
9 sand dunes Now we include in the critical
10 areas sand dunes and a setback area --

11 THE COURT Secondary dunes

12 MR CHANDLER -- that may go a little further in

13 We also include some tidelands that go beyond
14 the mean high watermark, in a lot of instances
15 where there is regular inundation of the tide
16 and there is vegetation that can tolerate the
17 saltwater coming in on a regular basis
18 All of these -- both these rules, the Public
19 Trust Doctrine and the Coastal Zone Management
20 Act, they've got one thing in common And what
21 is in common between those things is the
22 protection of these public trust areas and
23 these critical areas for the benefit of all of
24 the people And that is an overriding
25 principle that is found -- it is mentioned in

1 Sections 20 and 30 of the act It's mentioned
2 in Section 150 of the act It's mentioned in
3 countless areas of the regulations that have
4 been promulgated by, first, the Coastal
5 Council, now the Department of Health and
6 Environmental Control It's mentioned so many
7 times in Coastal Management Program that I just
8 about ran out of sticky notes to mark all of
9 these things about making sure that the
10 decision-making kept foremost the idea of what
11 is the best for all of the people
12 Now, taking a look at the facts of this case,
13 the owner of this property bought this property
14 with the understanding that this spit down at
15 the southern or western edge of this
16 property --

17 THE COURT Can I stop you? I wasn't going to
18 interrupt y'all I want to understand your
19 argument, and when you say "best for all the
20 people," I always take things to the logical
21 extension and bring them back Well, not
22 always, but frequently
23 But if you want to say it's best for all the
24 people, it would be best for all the people to
25 not have any docks So where does that fit

1 into your theory?

2 MR CHANDLER --Well, docks are a fairly unique

3 thing Docks --

4 THE COURT I'm giving that as an example

5 MR CHANDLER Okay

6 THE COURT You can take "best for all the people"

7 and you'll just shut down everything in the

8 coastal zone, because, you know, since the --

9 whoever is seeking to get the activity, there's

10 more people out there than that one person that

11 doesn't want the activity or project, so

12 MR CHANDLER Here's the answer that I would give

13 to this, and it's backed up in some of the case

14 law Even though I say we protect it for all

15 of the people, that's not an absolute If we

16 did, we wouldn't allow anything in these areas

17 and that's not what I'm saying at all I'm

18 just saying that that is a consideration that

19 has to be kept in mind in every one of those

20 decisions

21 Now, things like docks, docks allow people

22 access to the water Docks also go back to

23 ancient doctrines of riparian rights Docks

24 also -- if you had 300 people lining the

25 shoreline, like there are maybe at the north

1 end of Pawley's Island or the south end of
2 Pawley's Island, and you didn't give them docks
3 and they had to get access to the water
4 tromping through the marsh, they're going to do
5 just as much, if not more damage to the public
6 trust tidelands than by putting a few pilings
7 in and going over those areas And so that's
8 one reason under the regulations docks now have
9 to be three feet above -- what is it -- the
10 high tide mark or the marsh or something, so
11 that we don't shade the marsh We have
12 restrictions on those docks We have
13 restrictions on the size of them, related to
14 the creeks, so that they're not out of
15 proportion to the creeks
16 There was a case recently in the -- either
17 Court of Appeals or Supreme Court, that a dock
18 was going to impede public access to a stream,
19 and the court ruled that that wasn't allowed,
20 and so --

21 THE COURT Yeah, I know about that case

22 MR CHANDLER The public access is something that
23 has great emphasis here So, I mean, it's
24 something that you can never shut out of the
25 decision-making process It has to always be

1 there It's a balancing test and so it's a
2 - - - - - matter of taking into account all of the facts
3 and circumstances
4 Now, as I started to say, KDP, and before it
5 KRA, and I guess still KRA, bought this island
6 with an understanding that this southern tip
7 was unstable, wasn't slated for development,
8 may not ever be developed They knew that
9 going in
10 In the meantime, they have sold off an awful
11 lot of property out there They've created
12 quite -- I mean, I'd say to a certain extent
13 well-deserved aura of environmental sensitivity
14 on this island They've said to the world,
15 "We're not like all those other developers We
16 do it right " They won awards for this, awards
17 for excellence in their development, for
18 stewardship of the natural resources These
19 phrases, "Man exists with nature," "designing
20 with nature," it worked They've made a lot of
21 money drawing in people because nature does
22 sell, going green really does sell when you do
23 it right They've brought in people who love
24 to go kayaking, who love nature, who love to
25 take their grandchildren out to see the

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1 dolphins come rolling up And I've seen those
2 before and that is one of the-most-amazing
3 things that you can ever see in life is to see
4 a whole school of dolphins run fish up on a
5 bank in a saltwater creek It is just a
6 stunning sight to see
7 So one of the problems that I think the
8 Conservation League has with this case is that
9 if we're to take KDP and KRA at their word, if
10 they really are environmentally sensitive
11 developers, this wouldn't be the way to go
12 You don't go out there and put down concrete
13 blocks over an area that people take their
14 kayaks out on You don't take concrete blocks
15 out there and block the turtles off from their
16 nesting sites and go, "Gee whiz, you still got
17 turtles in New Jersey You still got turtles
18 in Florida So what if we don't have them in
19 Kiawah anymore "
20 I feel it's sort of a sense of loss, I think,
21 to a group like the League and other people
22 that they thought there was one place in the
23 world that was going to be done right and now
24 there's a feeling that this company has somehow
25 lost its way

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1 This revetment is going to take away a natural
2 feature that's enjoyed by people, it's used by
3 wildlife, and it's just going to turn it into
4 a rocky, dangerous place that you might be able
5 to walk on if you are very, very, careful, but
6 you also might even get hurt just trying to
7 walk on it This is not what we would call
8 "designing with nature "

9 The evidence in this case shows that KDP every
10 year gains more land than it is losing at this
11 river There's no question about that
12 Everybody agreed they're gaining more land than
13 they are losing

14 The evidence shows their own survey -- this
15 isn't just Rob Young's opinion, but their own
16 survey shows that over the last ten months the
17 erosion has been practically zero

18 The evidence shows that the spit is used by a
19 lot of members of the public for recreation and
20 enjoying nature People have purchased houses
21 at Kiawah They go to Kiawah for vacation
22 They use this area This area is used by
23 wildlife, including those porpoises, as places
24 to live, to eat, for the turtles to nest It
25 all fits together in this web that's the

1 natural system on this earth
2 Now, we keep calling this a "beach" and we get
3 it confused with the beach that's over on the
4 ocean, but it's a beach, it's a sandy beach
5 It's a very unique beach because you don't have
6 many places as -- I think it was Greg
7 VanDewerker who said that if you want to get to
8 the beach and get away from the crowds, get out
9 of the wind -- you know, sometimes you get out
10 there on beach, and I know the day I went out
11 there back in May -- you get some wind blowing
12 and the sand comes along and it's whipping you
13 and you feel like you're being sandblasted
14 Then you get back on this side and get up
15 against that -- you're out of the wind
16 Everything is just kind of at peace
17 Everything is in harmony You see these
18 amazing things like dolphins and other things
19 coming around over there This is a precious
20 public resource
21 Now, if this revetment is built, it will cover
22 three acres of public land, land that's owned
23 by the State, which is me, Ms Armstrong, -- I
24 guess Mr Whitfield-Cargile even is one of the
25 owners of this property We all are It's

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1 going to cover three acres of our property
2 The most that they say they've lost is one - — -
3 acre Because they lost one acre -- they've
4 gained 64 somewhere else, but because one acre
5 of land, they want to take three acres of our
6 land
7 It would eliminate an important public
8 recreation area And in place of this
9 beautiful little area, that's such an important
10 public recreation area, we're going to have
11 this ugly, unproductive eyesore We're going
12 to turn this sandy beach into a dangerous place
13 for human beings and animals
14 So what does the law say? You know it's
15 interesting Section 48-39-150 says, "In
16 determining whether a permit should be granted
17 or not, the Department shall base its
18 determination on the individual merits of each
19 application " We're focused on this particular
20 application
21 Now, there's been a lot of pointing at the
22 League "The League doesn't want them to
23 develop this land OCRM doesn't want them to
24 develop this land " This case is about we
25 don't want them to put a bunch of rocks or

1 concrete blocks on our land That's what this
2 - case is about
3 We're to take into account the policies
4 specified in Sections 48-39-20 and -30 Well,
5 we've read some of those and I'm not going to
6 read them all right now, but they talk about
7 how valuable the coast is to this state
8 The coast of this state and in keeping it in
9 good condition is one of the most valuable
10 financial economic engines this state has
11 Tourism and nature-based tourism is a real
12 driver of the coastal economy If we keep
13 nibbling away and taking away pieces, we're
14 going to kill the golden goose and people are
15 going to have to start flying off to St Kitts,
16 maybe, to find a place where they can have some
17 fun and really enjoy nature
18 And what does it say in Section D of 48-39-30
19 "Critical areas shall be used to provide the
20 combination of uses which will ensure the
21 maximum benefit to the people "
22 150 also gives us ten general considerations
23 We look at how it's going to affect production
24 of fish, shrimp, oysters, crabs, clams or any
25 marine life, including those doggone turtles

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1 We have to look at that
2 We have to look at "the extent to which the
3 development could affect existing public access
4 to tidal and submerged lands," and we've heard
5 a lot about that
6 "The extent to which the development could
7 affect the habitats for rare and endangered
8 species " There's been a lot about piping
9 plovers
10 Even if you find there's not going to be any
11 effect on piping plovers, there's still plenty
12 of other evidence that this is going to have
13 negative impacts on the public and on wildlife,
14 that this permit ought to be denied
15 "The extent of the economic benefits as
16 compared with the benefits from the
17 preservation of an area in its unaltered
18 state "
19 Now, you know, it's an interesting provision in
20 the regulations that talks about "public
21 interest " And that section says that --

22 THE COURT Give me the section when you give it to
23 me or the number

24 MR CHANDLER It is under regulation 30-1(D),
25 subsection 44, under (1)(D), the "public

1 interest " The public interest refers to "the
2 - - - - - beneficial and adverse impacts and effects of
3 a project upon members of the general public,
4 especially residents of South Carolina who are
5 not the owners and/or the developers of the
6 project " So when we're looking at the public
7 interest and the economic benefits, this
8 definition of "public interest" says we look at
9 how it affects the other people besides the
10 developer

11 Number eight, "the extent of any adverse
12 impacts which cannot be avoided by reasonable
13 safeguards " Well, even Mitchell Bohannon
14 admitted that there might be other ways to deal
15 with this erosion than putting these ugly
16 concrete blocks out there

17 Number nine is very similar, "the extent to
18 which all feasible safeguards are taken to
19 avoid adverse environmental impact resulting
20 from a project " If nothing else, KRA
21 certainly has not met any burden of proof on
22 that item

23 "The extent to which the proposed use could
24 affect the value and enjoyment of adjacent
25 owners " That's back to us again, the public,

1 this is our land
2 They're not asking for permission to build a
3 structure on their land, they're asking to
4 build a structure on our land
5 Go back to the Regulation 30-1(A)(3) There's
6 a statement -- let me see I've written that
7 one down wrong I'll come back to that in my
8 brief, Your Honor Let me see
9 Let's turn -- you know, one of the sections
10 that was cited by Mr Walker was Section
11 48-39-120(C), talking about how it
12 authorized -- erosion control structures can be
13 permitted That same section says that in
14 making a determination about issuing those
15 permits, it talks about it "may issue permits
16 for erosion control structures following the
17 provisions of this section " And Sections
18 48-39-140 and -150, "on or upon the tidals and
19 coastal waters of this state as it may deem
20 most advantageous "
21 Well, advantageous to who? And we're really
22 talking about the public, because the very next
23 section of that says, "The Department shall
24 have the authority to remove all erosion
25 control structures which have an adverse impact

1 on the public interest "

2 Been a lot of talk about how this project

3 absolutely slam dunk meets the bulkhead

4 policies, but, again, that's really simply not

5 the case Bulkheads and revetments, the

6 section says in Section 30-12(C)(1)(D),

7 "Bulkheads and revetments will be prohibited

8 where public access is adversely affected,

9 unless no feasible alternative exists "

10 OCRM looked at cumulative impacts I've

11 listened to Mr Walker's argument about

12 cumulative impacts and I cannot find the

13 coherence in it "The context of other

14 potential development " He said if you're

15 permitting a dock, you have to look at the

16 development on the hill Same thing with this

17 If you're talking about a revetment which is

18 specifically asked for so that they can develop

19 the upland, than you've got to look at it all

20 But even if you ignore that, even if you ignore

21 whatever development might take place, there is

22 still no justification for taking three acres

23 of public trust tidelands that are used for

24 public recreation and turning it into a

25 concrete wasteland

1 THE COURT Before you sit down, what's your
2 position concerning the park, the 270 feet that
3 OCRM granted?

4 MR CHANDLER We think that will have adverse
5 impacts -- and I'm glad you mentioned that We
6 think it will have adverse impacts on public
7 access, as well, because the nature of this
8 revetment is that -- I mean, everybody admitted
9 you just can't walk on this thing, you cannot
10 deal with it We've heard a lot about people
11 fishing and crabbing right out in front of that
12 park

13 There are other ways of doing it We've got
14 marsh grass growing up there It seems to have
15 stabilized somewhat There is --

16 THE COURT Isn't one of your own witnesses even --
17 I don't remember the names very well, but it's
18 the lady that does a lot of the kayaking She
19 said that the erosion seems to be centered
20 around storm events and there hasn't been a
21 storm event as of recent, and that she thinks
22 if there is another storm event, the erosion
23 will start back up again, so

24 MR CHANDLER Well, it might and I would candidly
25 say that the evidence didn't come out quite

1 like we thought it would in terms of the
2 permanence of that park there There-still - ---
3 seems to be some concern about whether the park
4 may move to another location The evidence,
5 though, didn't bear out what we thought it
6 would I'll acknowledge that our case is
7 weaker on the park part of this than it is on
8 the rest of this, but still the evidence does
9 show that there is marsh out there, it's
10 reaching some kind of stability There has to
11 be some other ways that that can be controlled
12 at that site than putting something out there
13 that's really going to deny public access

14 CLOSING STATEMENT BY MR WHITFIELD-CARGILE

15 MR WHITFIELD-CARGILE Thank you, Your Honor I
16 also want to thank the Court for hearing this
17 case so quickly I filed --

18 THE COURT You don't have to do that,

19 Mr Whitfield-Cargile

20 MR WHITFIELD-CARGILE I filed a couple of motions
21 for continuance last week, but somehow we've
22 gotten through it

23 THE COURT Yeah

24 MR WHITFIELD-CARGILE Getting to the merits of the
25 case, Your Honor, the question before this --

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1 we've talked a lot about the development in the
2 upland property and the question before this
3 Court isn't whether or not -- and what they can
4 do with their upland property The question
5 for the Court is whether or not KDP can use
6 2800 feet of critical area, three acres of
7 critical area, as their expert testified, to
8 facilitate that development

9 And not only to facilitate the development, the
10 first question is whether or not they've
11 presented a need for the 2800 feet of revetment
12 on that critical area and whether or not, in
13 and of itself, there's a compelling basis for
14 the Department to authorize that permit But
15 then you have to look at it in the context of
16 what it's facilitating'

17 I want to go through the laws briefly, Your
18 Honor And I think Mr Chandler did a pretty
19 thorough job of it, so I'm going to try not to
20 be too repetitive of his summary of some of the
21 law, Your Honor

22 But there's several policies that speak to the
23 Department's obligation to look at each permit
24 application and look at it in the context of
25 the policies set forth in 48-39-20 and -30, as

1 well as the ten general considerations and then
2 the further guidelines in Regulation 30-11(C)
3 And those policies in 48-39-20, specifically in
4 20, policies C, D and E, talk about the
5 Department's obligation to protect ecologically
6 fragile resources, natural, geological and
7 scenic characteristics, cultural
8 characteristics, historical values in the
9 coastal zone, and it talks about how those
10 resources are being irretrievably damaged or
11 lost by ill-planned development that destroys
12 those values It talks about encourage the
13 Department to exercise its full authority over
14 the lands and waters in the coastal zone, the
15 entire coastal zone, not just the critical area
16 over which the Department has direct permitting
17 jurisdiction, but the statute gives the
18 Department authority to and requires the
19 Department to look at the potential impacts of
20 a project in the context of the entire
21 character of the area
22 Well, in 48-39-30, while we're talking about
23 those policies, policies (A) and then (B) (1)
24 and (2) and D, all of these policies speak to
25 insuring the maximum benefit to the people of

1 the State, of which Mr Chandler did a good job
2 of kind of summarizing all of that, and it puts --
3 the burden -- it authorizes the Department to
4 let someone use critical area, a portion of the
5 critical area, to the alienation of others, but
6 there's statutes and regulations that must be
7 complied with And it puts the burden on the
8 applicant, the person seeking to use that
9 critical area to establish that it's entitled
10 to use that critical area to the elimination --
11 to the exclusion of others

12 Mr Walker talked about 30-11(C)(1) and whether
13 or not -- A, whether or not the Department can
14 use that as a basis for its decision and then,
15 B, what it means The first one talked about
16 what he says it means, his interpretation of
17 it He said that it requires the Court and the
18 Department to look and see what the impacts of
19 the project are going to be on other future
20 development

21 But that's not what it says It says the
22 extent to which the long-range cumulative
23 effects of the project may result within the
24 context of other possible development and the
25 general character of the area It doesn't say

1 the extent to which long-range cumulative
2 effects of the project may result on possible
3 future development It says in the context of
4 that development So it requires the
5 Department to look at the impacts of this
6 project, this 2800 feet of revetment in
7 critical area, in the context of what it's
8 facilitating

9 And it's interesting what it says It says
10 "other possible development " It doesn't say
11 "other foreseeable development," which is what
12 Mr Walker says it says, it says "other
13 possible development "

14 And we know that here there's a possibility
15 that there could be other development in the
16 area, just on the spit, right on the other side
17 and just down from the revetment

18 THE COURT You don't think that the language
19 concerning that development means the
20 development within the critical area?

21 MR WHITFIELD-CARGILE No, Your Honor, it says "the
22 extent to which long-range cumulative effects
23 of the project may result within the context of
24 other possible development and the general
25 character of the area "

1 The Department's -- there's numerous
2 statutes -- and I think the statute that -----
3 requires the Department to promulgate the
4 program document, but even the policies in
5 48-39-20 and -30 require the Department to look
6 at a comprehensive management of all the -- all
7 the resources in the coastal zone, the coastal
8 zone being the eight coastal counties
9 Mr Walker made a lot of deal about whether or
10 not the Department's ever denied a revetment
11 based on cumulative impacts And there's three
12 cases that come out of the Court of Appeals
13 recently, Your Honor, that have addressed
14 Regulation 30-11(C)(1) specifically
15 This summer a case called Rutledge Young vs,
16 DHEC, Mr Young was arguing in that case that
17 there was a requirement that -- that that
18 regulation required the Department to deny a
19 boatlift to a neighbor and he said because that
20 boatlift is going to facilitate other boatlifts
21 and that's going to change the character of the
22 area The Court of Appeals affirmed the lower
23 court, who had found that that wasn't
24 sufficient cumulative effects to deny a
25 project But the Court of Appeals did affirm

1 the Department has an obligation to look at --
2 -- in reviewing each permit application, the
3 Department's required to consider the
4 long-range cumulative effects of the project
5 and the Court of Appeals noted in that case
6 that the area in that question wasn't a
7 pristine wilderness, unmarked by docks and
8 piers, but was familiar with development
9 Here we've got a case where you've got an area
10 that is undisputed it's pristine, it's
11 unfamiliar with human development And this is
12 one of the cases that the Court of Appeals this
13 summer intimated is where this regulation
14 really has a lot of meaning
15 In two other cases, Olsen vs DHEC, which came
16 out in 2008 It's 663 Southeast 2nd 497 It
17 affirmed the ALJ's decision which had denied a
18 permit and it -- I believe it affirmed the
19 Department -- it denied a permit based, in
20 part, one of the two reasons it provided was
21 the 30-11(C)(1) and the long-range and
22 cumulative effects of the project, that
23 warranted a denial
24 Another case that came out in 2008, Terry vs
25 DHEC -- that's 660 Southeast 2nd 291 -- also

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1 affirmed another ALJ decision, affirming the
2 Department's denial of the permit-based-in-part
3 on the long-range cumulative effects of the
4 project I think those are dock cases I know
5 one of them was

6 In this case, Your Honor, it's much bigger than
7 a dock The potential impacts of the revetment
8 and even the revetment itself clearly are going
9 to alter the character of the area You heard
10 testimony that it's going to be three acres of
11 concrete block sitting in the river In the
12 context of future development, the impacts will
13 likely be even more significant

14 I want to talk about a few of the other
15 statutes and really what the policies --

16 Mr Walker said something that I agree with
17 the policies require the Department to balance
18 things and in order for someone to be entitled
19 to use critical area to the exclusion of the
20 public, they have to show that the factors tip
21 in their favor

22 And some of the regulations that -- the
23 provisions in the statute and regulations,
24 30-11(B)(7) specifically says the Department's
25 required to consider the extent of the economic

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1 benefits of the project as compared with the
2 -- ----- benefits of preservation of an area in its
3 unaltered state
4 Well, Mr Long testified that he doesn't even
5 know what the extent of the benefit is going to
6 be to his client They don't even know if the
7 Department's ever -- if the upland -- if the
8 spit itself will ever even be developed That
9 decision hasn't been made, but yet they're in
10 a hurry to come in here and get this revetment
11 The only other benefit, if they're not going to
12 use -- if they're not going develop that
13 property, is it allows them to get mortgages on
14 other properties that aren't even in South
15 Carolina And if you talk about the economic
16 benefits, as compared with the benefits of
17 preservation of the area in its unaltered
18 state, they haven't done anything to show that
19 the benefits to the developer outweigh the
20 benefits to the State Nothing
21 They talked about the big problem of erosion
22 They put up Mr DeWolff, Doug DeWolff He was
23 their erosion rate expert He said -- he
24 calculated erosion rates and over a long period
25 of time -- I think he said over seven years --

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1 shore had migrated some 35 feet in a few
2 places You divide the math, that's an average
3 of five feet per year
4 But what was really telling about his
5 calculation was this map where he highlighted
6 the lines and showed you that the 2009 line he
7 calculated is riverward -- if that's a word --
8 is riverward of the 2008 line
9 They had some bad erosion, but right now, in
10 the last ten months, it's been accreting in a
11 lot of places So they haven't showed some
12 compelling need -- they haven't shown any need
13 to put this revetment in
14 The revetment, if it was authorized, would be
15 protecting a spit of land and allowing it to
16 grow, but that's not a compelling reason for
17 them to be entitled to a permit, Your Honor
18 Some of the other regulations that are
19 applicable are the requirements to protect
20 public access And I'm going to just fall back
21 on Mr Chandler's arguments there, because I
22 think that they really follow what the
23 Department's argument is I think it's clear
24 that the revetment will affect public access
25 and by saying that -- well, we take --

1 THE COURT Mr Eiser testified that there wasn't

2 much public access in that area

3 MR WHITFIELD-CARGILE Mr Eiser --

4 THE COURT He said there is public in there, but he

5 specifically said there wasn't a significant

6 amount of public --

7 MR WHITFIELD-CARGILE You're right, Your Honor

8 Mr Eiser said that public access, in and of

9 itself, wasn't the main basis of the

10 Department's decision He said yes, it will be

11 affected He said maybe not too severely I

12 think he said it's not too significant, was

13 what he said, but it would be impacted

14 And I think the evidence has come out today or

15 this week that wasn't -- some of which wasn't

16 before the Department, was that there's a lot

17 of public access down there

18 But you weigh all these factors together and

19 they all weigh towards no revetment for the

20 area below the county park

21 Now, the Department issued the permit for the

22 county park, because there's infrastructure

23 that's being threatened and, you know, you have

24 two entirely separate pieces of property --

25 well, before I get to that, the other -- when

1 we're talking about -- when the regulations are
2 talking about---- Your Honor, 48-39(B)(1) talks
3 about the need to protect sensitive and fragile
4 areas from inappropriate development And
5 Mr Eiser testified and Mr Young testified and
6 even Mr Kana testified that, you know, this is
7 a unique area that's subject -- it's very
8 dynamic on all three sides You know, it might
9 not be that likely that there's going to be a
10 breach, but there's evidence that there's been
11 a breach in the last 60 years, 60 years ago
12 That spit wasn't even there for a large portion
13 of where they're planning on putting the
14 development, if there is development
15 But when you read that regulation or that
16 policy, it says "protect these fragile and
17 sensitive areas from inappropriate
18 development," and you read that in conjunction
19 with 48-39-30(D) and the requirement that "the
20 critical area shall be used for the maximum
21 benefit of the people," it weighs heavily in
22 favor of saying no permit on that area where
23 it's not providing -- there's no evidence that
24 it's going to provide a benefit to the
25 developer

1 We've talked about piping plovers We've
2 talked about terrapins Those are other areas---
3 which I think the evidence is that there is a
4 possibility of potential impacts to the plovers
5 in the context of the future development as a
6 result of the revetment

7 And we've also heard evidence about the
8 terrapins The terrapins wasn't really a basis
9 for the Department's decision, but that's
10 another factor the Department's required to
11 consider They're another factor that tips
12 towards saying, "We're not going to allow this
13 2800 feet of critical area to be used just by
14 KDP to the exclusion of others," Your Honor
15 The Department did think that there was
16 sufficient basis to issue a permit for the 270
17 feet at the park There's evidence that
18 there's structures being threatened and the
19 park is much more typical of property that
20 people get revetments to protect

21 You have a spit which is separated on all three
22 sides by some type of dynamic water body, but
23 the public park is on the river It's not
24 hanging out there It's not exposed to the
25 hazards as much as the spit is The park, in

1 other words, isn't one of these fragile and
2 -- sensitive areas, as much as the spit is
3 You mentioned the case came out of the Supreme
4 Court this week, the Neal v Brown decision,
5 and in that case, I remember you mentioning
6 that it said that the courts give deference to
7 the DHEC board or to the Council Zone
8 Management Appellate Panel, and not to staff
9 But, Your Honor, I think that this is something
10 that bears mentioning in here today, and I'll
11 address it more in the brief, but I think that
12 statute does require the deference and the law
13 requires deference be given to the Department
14 in its decision
15 Neal v Brown started long before Act 387 came
16 out in 2006 and that was one of those that went
17 up through the Coastal Zone Management
18 Appellate Panel and in the text of that opinion
19 they say where the board or where the panel has
20 spoken, they get deference, if they're
21 inconsistent with staff
22 But here the staff decision is the final Agency
23 action and it is entitled to deference, Your
24 Honor, and I think that the evidence strongly
25 supports the Department's decision that these

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1 factors and that these policies and these
2 statutes and regulations -- - - - -

3 THE COURT The decision gets deference or the
4 staff's -- I mean, that's even going further
5 than any decision I've ever seen -- or the
6 staff's interpretation of the regs gets
7 deference?

8 MR WHITFIELD-CARGILE The Department's
9 interpretation of the regs gets deference and
10 I think the Department's --

11 THE COURT Or laws

12 MR WHITFIELD-CARGILE -- application of the regs
13 gets deference, Your Honor

14 THE COURT Well, I don't see that in the law at
15 all, Mr Whitfield-Cargile

16 MR WHITFIELD-CARGILE 123 380

17 THE COURT I'll just wait to see your argument

18 MR WHITFIELD-CARGILE Yeah, I'll brief that --
19 I'll address that in the brief, Your Honor

20 THE COURT I can say I don't see that in the law at
21 all

22 MR WHITFIELD-CARGILE Well, I don't think it
23 matters that much, Your Honor, because I think
24 that the -- with all with respect --

25 THE COURT I can take that two ways

1 MR WHITFIELD-CARGILE I did not mean that the rude

2 way

3 THE COURT I'll take it in a positive way

4 MR WHITFIELD-CARGILE I won't say it like that

5 again

6 THE COURT That's fine I understand what you

7 mean

8 MR WHITFIELD-CARGILE You apply the policies as

9 they're written, the plain language of all

10 these statutes and the regulations and it's

11 clear This isn't a case where KDP has shown

12 that they're entitled to use that 2,513 feet --

13 which is less than three acres, because 2,783

14 was three acres -- that length of shoreline to

15 protect essentially nothing, because we don't

16 know what they're going to do, and they haven't

17 calculated what the benefit's going to be to

18 them

19 THE COURT Well, let me ask you about one other

20 thing --

21 MR WHITFIELD-CARGILE Yes, sir

22 THE COURT -- and that is while ago you said that

23 the -- in the context of development --

24 MR WHITFIELD-CARGILE Yes, Your Honor

25 THE COURT -- that OCRM is charged with protecting

1 the eight coastal counties Under that theory,
2 then, in developing-whatever you want in the
3 critical area, you can take into account
4 anything within those -- in the development of
5 those coastal counties So obviously that's
6 not true I don't think you're going to take
7 that position, because you're not going to say
8 that in deciding whether to do dock permits in
9 the Myrtle Beach area, we're going to decide
10 whether they're developing Myrtle Beach too
11 much so that there's too many houses being
12 built

13 So where do we go on that continuum under your
14 theory?

15 MR WHITFIELD-CARGILE Sure Your Honor, you're
16 entirely correct I am not at all suggesting
17 that in processing this revetment we have to
18 see what the effect's going to be in Myrtle
19 Beach or Horry County or Beaufort But
20 Regulation 30-11 speaks -- I think it speaks
21 pretty clearly It says "the extent" -- well,
22 let me back up
23 I mean, I think that the statute gives --
24 wherever you are, the statute requires the
25 Department to consider effects outside of the

1 narrow critical area itself It requires it to
2 consider the effects in the entire coastal
3 zone, but I'm not saying that -- and the
4 argument isn't that when you're in Beaufort
5 County, you consider the effects in Horry
6 County

7 THE COURT Well, I'm not even saying that You
8 wouldn't even consider the effects in Kiawah
9 proper You wouldn't go that far, I don't --

10 MR WHITFIELD-CARGILE No You know, it says --

11 THE COURT But you could argue that if Kiawah
12 wasn't developing, that this area wouldn't
13 develop, either, so stop the development of
14 Kiawah and that would keep this area from
15 developing

16 MR WHITFIELD-CARGILE No, Your Honor The
17 regulation says "the extent to which long-range
18 cumulative effects of the project may result
19 within the context of other possible
20 development and the general character of the
21 area " And I think the area here is the area
22 that you see, the area in the vicinity of the
23 project

24 THE COURT Including the high ground?

25 MR WHITFIELD-CARGILE Absolutely, Your Honor

1 THE COURT All right

2 REPLY BY MR HOWE - -

3 MR HOWE Thank you, Judge The first thing I want
4 to do is sort of tell everybody -- not just you
5 "thanks," but tell everybody "thanks " This is
6 an usual adversarial proceeding where I think
7 you come away with it's the good guys against
8 the good guys Everybody here is trying hard,
9 means well, and we certainly don't have any
10 hard feelings towards anybody, particularly to
11 the DHEC folks, who do a good job I might
12 have to say otherwise do a good job
13 Secondly is, I'd like to start with a little
14 something one of the experts said He was
15 talking about Fripp Island, he talked about buy
16 it, build it, something, bankrupt it, you know,
17 the four B's, the transient feel of real estate
18 development
19 Now, that's decidedly what we aren't They
20 bought this island 22 years ago The two
21 families bought it, the Longs and the Darbys,
22 and they've committed their life to it I
23 mean, Leonard gave up his law practice and went
24 out there, and his cousins and uncles and
25 everybody lives there and everybody works there

1 and they are an integral part of that
2 community
3 Nobody -- my daddy had a great line that
4 "there's no interest like self-interest" --
5 nobody's got the self-interest of the overall
6 good of Kiawah any higher than the Long family
7 Now, the second thing that I like to dissuade
8 people of is this is some -- it's sort of like
9 there's an easter egg hunt and they found the
10 golden egg, you know, and maybe they shouldn't
11 have the golden egg and are they entitled to
12 the golden egg and why did they get the golden
13 egg That's just not what happened
14 The Legislature passed a law that these folks
15 are supposed to enforce Mr Eiser drew the
16 line himself based on the law that they readily
17 concede, you look back 40 years All right
18 Then based on that, because of accretion,
19 because of the good fortune of Mother Nature,
20 things sort of broke our way But that didn't
21 end it, because it was not zoned for
22 residential use
23 We gave up the right -- Mr Long testified that
24 in the development agreement they had the right
25 to build a hotel A hotel site on the east

1 coast on Kiawah Island's a pretty valuable
2 -- -- thing to have and in the course of rezoning
3 they gave that up And it was a very valuable
4 thing for them to give up And they did it in
5 the context of, you know, what's in their best
6 interest, what's in the best interests of the
7 island, what does the market hold, and they
8 made a business decision But it was certainly
9 not a gift from anybody They've paid
10 handsomely for the right -- not for this
11 property, because it's their property and it's
12 always been their property -- but for the right
13 to do certain things with it which were
14 controlled by zoning They've paid handsomely
15 for that
16 Now, I like to look at motive It doesn't have
17 to be just a criminal case that you look at
18 motive What is Mr Long's motive? What is
19 KRA's motive?
20 It certainly isn't to build the biggest,
21 ugliest, most expensive structure somebody can
22 figure out Why would they do that? I mean,
23 that just doesn't make any sense at all
24 **30 21 says it's ugly and it's big and it's
25 way too long But then they say Leonard wants

1 to do that Why would he want to do that?
2 They get -- when it comes time to do a permit,
3 they've got a track record They've got how
4 many miles of coastline?
5 MR LONG Sixty-seven
6 MR HOWE If you go all the way around the island,
7 they've got 60-something miles of coastline
8 They've been getting along with these folks for
9 years and years and years They've had
10 hundreds of permits together Never had a
11 problem, any problem
12 So they go back and go to their engineer, who
13 they've had for years and who's done many, many
14 permits for them, and they say, you know, "What
15 do you think we need to do?" And he said, "We
16 need to hire some particular experts in this
17 field "
18 "That's fine, go ahead " And so they hire them
19 and then this information comes in From our
20 traditional engineer through the experts he
21 hires and they come up with a design And I
22 hope Mr Long didn't comment too much on the
23 design, because he doesn't know a thing in the
24 world about it And they packaged this
25 together in a pretty sophisticated application

1 and they submitted it to DHEC Thirty days
2 pass, 60 days pass, 90 days pass
3 We've got a track record with these people
4 Not only do we have a track record in terms of
5 communication and participation, we've got a
6 well-trodden path to their door and back to our
7 door Never hear a word
8 And this is about the time I got involved
9 There was a sense of, you know, what's wrong?
10 Well, write them a letter, participate with
11 them, engage them All right? And this is
12 where the motive swings a little bit Our
13 motive can only be one motive We want to have
14 access, but we want -- what kind of access do
15 we want? We want it to be effective We want
16 it to be effective We want it to be
17 attractive All right? We've got hundreds of
18 examples on the island and we wanted to have an
19 acceptable course That's our motive It's
20 not making it long, it's not making it thick,
21 it's not making it hard to get to
22 You know, they talk about in the regulations
23 the adjacent property owner, the interests of
24 the adjacent property owner Who is the
25 adjacent property owner? Us Whose land is it

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1 going to affect more than anybody else's?

2 Ours - I mean, so why would we do anything that
3 was consciously or purposefully destructive?

4 And the answer is we wouldn't because

5 self-interest takes care of that We're going
6 to do what's good for us And what's good for
7 us is the same thing as what's good for them

8 Successful, good, solid engineering in a
9 minimalistic way

10 But we get no feedback and we have punched each
11 other and fought this out and if we could send
12 them a bill for the hours we've spent trying to
13 figure out why DHEC wasn't talking to us, all
14 right? And we found out yesterday

15 "Captain Sam's is a valuable resource for the
16 State and it deserves our highest effort to
17 keep it for the people "

18 Well, I mean, this in a nice way, but it ain't
19 ever been the people's The water around the
20 outside is, but even when it was zoned for
21 recreation or whatever, it belonged to the
22 Longs It belonged to KRA And obviously the
23 motive of DHEC is not to cooperate with us in
24 the exercise of figuring out what's the best
25 revetment, what's the most minimal revetment,

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1 how can we attractively and effectively
2 stabilize this bank so that we can develop our-----
3 land That's just not their motive
4 Their motive is to not cooperate with us, to
5 thwart us at every turn, to do everything they
6 can to gut us, to keep us from exercising our
7 lawful rights And I'm not really mad, but I
8 am a little disappointed
9 I'm reminded I was doing a very difficult
10 personal injury case against the federal
11 government one time and it was a tough case of
12 liability and a witness came on who was very
13 helpful to us And when it was over, the
14 lawyer for -- his name was Klinger, lawyer from
15 the government, from big justice out of DC He
16 said, "Well, let's sit down and work this out,"
17 and he made a very generous offer
18 And I said, "You know, that's really nice,
19 that's a pretty fair offer to be starting
20 with "
21 He said, "Let's get something straight,
22 Mr Howe Your client is our citizen We're
23 not adverse to him If we owe it -- if we
24 don't owe it, we aren't going to pay it But
25 if we owe it, we're glad to pay it Your

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1 client is our citizen "

2 Leonard-Long is part of the public, too, and
3 we've been left out of that process We
4 haven't gotten a fair shake

5 Thank you, sir

6 THE COURT All right Thank y'all for doing an
7 excellent -- I want to go -- well, that's going
8 to be interesting
9 Y'all want to go again?

10 MR CHANDLER We're going to submit proposed orders
11 in this case, Your Honor

12 THE COURT Okay

13 MR CHANDLER We can deal with it then

14 THE COURT Okay All right Well, then, with that
15 said, I normally say that, you know, 30 days
16 from the date of the hearing or 30 days from
17 the day that the transcript's made available to
18 you I'm pretty confident that y'all are
19 probably going to get transcripts, so 30 days
20 from the day the transcript is placed in your
21 hand is when I'd like the proposed orders,
22 which has been my recent approach
23 I know there's going to be the de bene esse of
24 the bird expert If you want to put additional
25 argument in the discussion section, that's fine